



B A R R I S T E R S - A T - L A W

Advocates of the High Courts & Supreme Court of Pakistan  
and Legal & Policy Consultants

# Cyberlaw

## Towards a New Philosophy of Regulation

By

ZAHID U. JAMIL

Barrister-at-law

[www.jamilandjamil.com](http://www.jamilandjamil.com)

**Electronic Commerce Act (Ireland)**

**Electronic Transactions Act (UK,  
USA, Australia, New Zealand, Singapore)**

**Electronic Transactions Ordinance  
(Hong Kong, Pakistan)**

**Information Technology Act (India)**

**Information Communication  
Technology Act Draft (Bangladesh)**

## Pre- ETO 2002:

- **No recognition of electronic documentation**
- **No recognition of electronic records**
- **No recognition of evidential basis of documents/records**
- **Requirement of signature, in writing, two witnesses, stamp duty, attestation, notarisatation**
- **Failure to authenticate or identify digital or electronic signatures or forms of authentication**
- **No online transaction could be legally binding**
- **Risk of default or denial of transactions/liability e.g. Credit Card**
  - Registration Act 1908 ,Stamp Act 1899, Evidence Act 1882
- **Electronic Data & Forensic Evidence not covered. No Rules**

### **Qanun –e Shahdat (EVIDENCE ACT):**

***164. Production of evidence that has become available because of modern devices, etc. --- In such cases as the Court may consider appropriate, the Court may allow to be produced any evidence that may have become available because of modern devices or techniques.***

## Post

# ELECTRONIC TRANSACTIONS ORDINANCE 2002

- Electronic Documentation & Records recognized
- Electronic & Digital forms of authentication & identification given legal sanctity
- Messages through email, fax, mobile phones, Plastic Cards, Online recognized.

# **ETO 2002 takes heavily from Ireland, Hong, Kong, Singapore, UK, US, UNCITRAL, EU, New Zealand and Australia**

## **8 main areas relating to E-Commerce:**

1. Recognition of Electronic Documents
2. Electronic Communications
3. Digital Signature regime and its evidential consequences
4. Providers of Certification of Web Site & Digital Signatures
5. Stamp Duty.
6. Attestation, notarization, certified copies.
7. Jurisdiction.
8. Offences.

**NO MANDATORY LICENSING -ACCREDITATION  
LAW DEFINED RULES**

## **36. Violation of privacy information**

- **gains or attempts to gain access**
- **to any information system with or without intent**
- **to acquire the information**
- **Gain Knowledge**

**Imprisonment**

**7 years**

**Fine**

**Rs. 1 million**

## 37. Damage to information system, etc.

- alter, modify, delete, remove, generate, transmit or store information
- to impair the operation of,
- or prevent or hinder access to, information
- knowingly not authorised

**Imprisonment**

**7 years**

**Fine**

**Rs. 1 million**

**38. Offences to be non-bailable, compoundable and cognizable.—**

All offences under this Ordinance shall be non-bailable, compoundable and cognizable.

**39. Prosecution and trial of offences.—**

No Court inferior to the Court of Sessions shall try any offence under this Ordinance.



# Jurisdiction

- Due to the global nature of e-commerce
- To provide Pakistani consumers with the maximum protection

Pakistani Courts have jurisdiction if transactions

- connected to or
- have effect on
- any person, systems or events within Pakistan.

# **PUBLIC KEY INFRASTRUCTURE**

**Customs**

**Trade Facilitation**

**E-Commerce**

**E-Banking**

**E-Stock Exchange**

**Cyber Crime Coordination**

**Terrorism**

**Gone Global**

“The Law of Cyberspace”:

*"The problem for law is to work out how the norms of the two communities are to apply given that the **subject** to whom they apply may be in **both places at once**"*

*“The Law of Cyberspace”*

Lawrence Lessing

**David R. Johnson and David G. Post**  
**Stanford Law Review:**

*Global computer-based communications cut across territorial borders, creating a new realm of human activity and **undermining the feasibility--and legitimacy--of applying laws based on geographic boundaries** ..... This new boundary defines a distinct Cyberspace that needs and can create **new law and legal institutions of its own.***

*Separated from doctrine tied to territorial jurisdictions, new rules will emerge, in a variety of online spaces, to govern a wide range of new phenomena that have no clear parallel in the nonvirtual world.*

*These new rules will play the role of law by defining legal personhood and property, resolving disputes, and crystallizing a collective conversation about core values.*

# **Territoriality**

## **Conflict of Laws**

## **Applicable Laws**

# **Disharmonious**

# **Regulation**

*The Law Of Cyber-*

*Space, An Invitation To The Table Of Negotiations*

*Ahmad Kamal, UNITAR*

*(United Nations Institute Of Training And Research)*

*“In many ways, this situation is **similar** to the problems faced in dealing with the **high seas**, where the **absence of consensus legislation** was also creating an avoidable and acute **vacuum**. The **international community** finally woke up to the challenge, and started negotiations on the **Law of the Sea**.*



*In the case of cyber-space, the challenge is far greater. The speed of change is phenomenal, the dangers affect all countries without exception, new shoals and icebergs appear every day, and global responses are sporadic or non-existent. There can be no doubt whatsoever that a globally negotiated and comprehensive Law of Cyber-Space is essential.”*

- **International Convention**
  - **Contract**
  - **Standards**

# **New Philosophy of Regulation**

# **A Declaration of the Independence of Cyberspace**

by John Perry Barlow

Davos, Switzerland

February 8, 1996

# HABERMAS PHILOSOPHY OF **LEGITIMACY OF LAW**

*A. Michael Froomkin*

*CYBER LAW*

HARVARD LAW REVIEW

**Procedural & Dialogue**

*Sovereigns must come to see this:*

*That the code of cyberspace is itself a kind of sovereign. It is a competing sovereign. The code is itself a force that imposes its own rules on people who are there, but the people who are there are also the people who are here. The code thus competes with the regulatory power of local sovereigns. It competes with the political choices made by local sovereigns. And in this competition, as the net becomes a dominant place for business and social life, it will displace the regulations of local sovereigns.*

As government takes control or influences the architecture of the code of the net, at a minimum, ***we must assure that government does not get a monopoly on these technologies of control.***

We must ***assure that the sorts of checks that we build into any constitutional democracy get built into regulation by this constitution — the code***

- *Code and Other Laws of Cyberspace, The Future of Ideas, and Free Culture*

*by Lawrence Lessig*

# PAKISTANI CASES

**Justice Tassaduq Hussain Jillani and Mr.  
Justice Abdul Shakoor Paracha, JJ (P L  
D 2003 Lahore 213)**

**Mr. Justice Khilji Arif Hussain, (2004 C L D  
1131) ACER, INC. Versus ACER  
COMPUTERS**

**Mr. Justice Maqbool Baqar, (2006 C L D 580)  
TELEBRANDS CORPORATION Vs.  
TELEBRANDS PAKISTAN (PVT.) LIMITED**



***“NEW WORLD”:***

***Electronic Transactions Ordinance, 2002***

***“OLD WORLD”:***

**Cybercrimes Act**

**Data Protection Act**

**E-payment systems and EFT Act**

**Copyright, Patent, Trade Mark- Domain Names**

**Customs – Digital Signatures, UNCITRAL  
compliant**

**Bad Code**

**Bad Law**

**Operating  
System  
Conflict**

**Unconstitutional**

**Reboot**

**Emergency**

**Programmer**

**Draftsman/Policy**

# **CYBER CRIMES LAW**

**Draft Electronic Crimes Act 2003**

**Council of Europe  
Convention on Cyber  
Crimes  
Budapest Convention  
23.11.2001**

**Chapter II sets out the following procedural powers:**

**expedited preservation of stored data;**

**expedited preservation and partial**

**disclosure of traffic data;**

**production order;**

**search & seizure of computer data;**

**real-time collection of traffic data;**

**interception of content data.**

# INTERNATIONAL CO-OPERATION

**With whom has reciprocal arrangements**

***But what if no reciprocal  
arrangement?***

**Cyber criminal can forum shop!**

# WHAT IS REQUIRED?

- **A Global Coordination Center**
- **International Time Zone Coordination Centers**
- **National Coordination Centers**

# **ANTI-TERRORISM ACT 1997 (2001)**

**WHAT IS TERRORISM:**

*religious, sectarian or ethnic*

**E-CRIMES BILL**

**WHAT IS CYBER-TERRORISM:**

*political or social objectives*



- **Criminal access 3 3 lacs**
- **Criminal data access 3 3 lacs**
- **Data damage 3 3 lacs**
- **System damage 3 3 lacs**
- **Electronic fraud 7 7 lacs**
- **Electronic forgery 7 7 lacs**
- **Misuse of devices 3 3 lacs**
- **Unauthorized access to code “**
- **Misuse of encryption 5 5 lacs**
- **Malicious code 5 5 lacs**
- **Defamation 3 3 lacs**

- **Cyber stalking** 3 3 lacs
- **Spamming** 6 months 50k
- **Spoofing** 3 3 lacs
- **Pornography  
& Child Pornography** 10
- **Unauthorized interception** 5 5 lacs
- **Cyber Terrorism –** 10
- **Waging cyber war** LIFE
- **Enhanced punishment for offences  
involving sensitive electronic systems** 10 10 lacs
- **Attempt and aiding or abetting**
- **Other crimes** 2 2 lacs

# **Special agency**

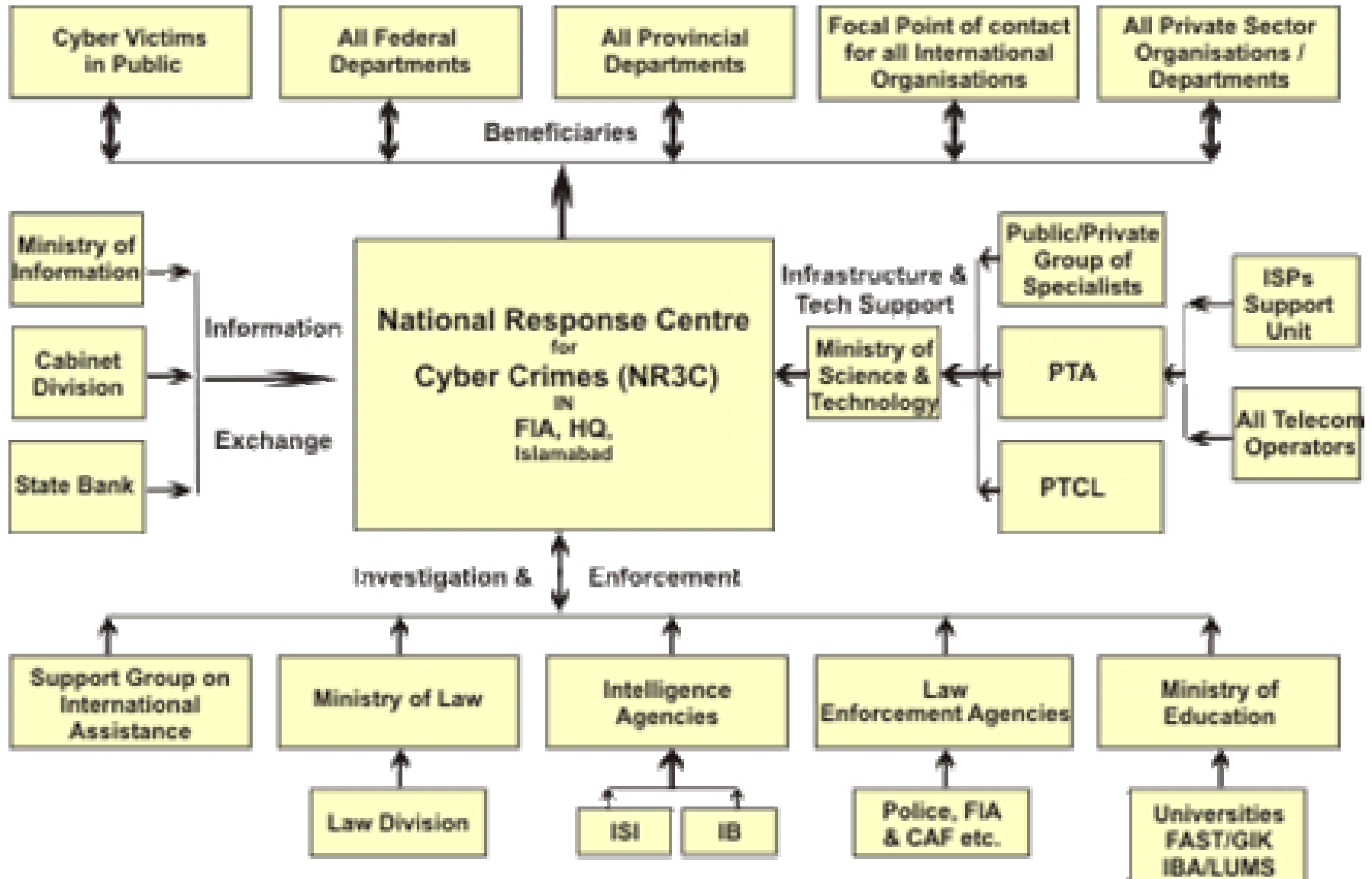
**Federal Intelligence Agency**

**NR3C**

**(National Response Center for  
Cyber Crimes)**

**Sindh Police – Cyber Cop**

**Save Police Powers**



# **Powers**

**After obtaining search warrant :  
[NO GROUNDS]**

- **access inspect ANY Computer**
- **use ANY Computer to search any data**
- **access any Encrypted data**

- **require any person where:**
  - **reasonable technical and other assistance**
  - **require any person to such decrypt information**
- **obstruction**
  - **1 year imprisonment**
  - **1 hundred thousand rupees**

**NO JUDICIAL SAFEGUARD**

- **No Procedural Safeguards for protection of Human Rights and Democratic Values**
- **Disproportionate Sentencing**
- **Ineffective International Cooperation**
- **Defective Definitions**
- **TERRORISM**

**Threat to the Civil Liberties and Fundamental Human Rights**

**Council of Europe  
Convention on Cyber  
Crimes  
Budapest Convention  
23.11.2001**



Article 14 - Each Party shall adopt such legislative and other measures as may be necessary to establish the powers and procedures provided for in this Section for the purpose of specific criminal investigations or proceedings.

### **Article 15 – Conditions and safeguards**

Each Party shall ensure that the establishment, implementation and application of the powers and procedures provided for in this Section are subject to **conditions and safeguards provided for under its domestic law**, which shall provide for the **adequate protection of human rights and liberties**, including rights arising pursuant to obligations it has undertaken under the 1950 **Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms**, the 1966 **United Nations International Covenant on Civil and Political Rights**, and other applicable international human rights instruments, and which shall **incorporate the principle of proportionality**.

## Signatures: 34

<b>Albania</b>	<b>Armenia</b>	<b>Austria</b>
<b>Belgium</b>	<b>Bulgaria</b>	<b>Croatia</b>
<b>Cyprus</b>	<b>Denmark</b>	<b>Estonia</b>
<b>Finland</b>	<b>France</b>	<b>Germany</b>
<b>Greece</b>	<b>Hungary</b>	<b>Iceland</b>
<b>Ireland</b>	<b>Italy</b>	<b>Luxembourg</b>
<b>Malta</b>	<b>Moldova</b>	<b>Netherlands</b>
<b>Norway</b>	<b>Poland</b>	<b>Portugal</b>
<b>Romania</b>	<b>Slovenia</b>	<b>Spain</b>
<b>Sweden</b>	<b>Switzerland</b>	<b>Ukraine</b>
<b>Republic of Macedonia</b>		<b>United Kingdom</b>
<b>Canada</b>	<b>Japan</b>	<b>South Africa</b>
	<b>United States</b>	



# **Data Protection – Privacy Laws**

**Compliant with International Best  
Practice – California Law.**



# Pakistani Data Protection Act 2004

*There are significant ramifications because it could create ownership rights and therefore greatly impact the ability of companies to use data in general. Apart from the ownership issue, it simply does not make sense to extend any data privacy obligations (such as the requirement to process foreign or local data fairly and lawfully and store it for specified, explicit and lawful purposes) to nonpersonal data. **Such requirements serve no purpose and will only discourage companies from engaging in any processing activities in Pakistan.***

*Complaints may be lodged with the Sessions Judge and the Session Judge, may, in turn, direct someone to investigate on his behalf and report back to the court. **Requiring access to data systems by unauthorized personnel poses significant security risks.***

Heather I. Shaw - Director, E-Business, Marketing and Advertising

**U.S. Council for International Business**



- *Unnecessarily interferes with their deployment of global policies on privacy and security*

- *Dictating rules too stringent*

- *This will always be the case when trying to address global needs with one standard.*

*Companies are less likely to choose a location for sourcing*

- *Successful approach in India's amendment of its IT Act*

**Chief Privacy Officer - Oracle**



# Patents Ordinance



"process" ; means any art, process or method or manner **of new manufacture of a product**

"product" means any substance, article, apparatus or machine;

***In Pakistan, computer programmes are excluded from patent protection under the patent laws. Protection under the copyright laws is the only safeguard available for the computer software industry.***

- SMEDA Business Guide Series  
Copyrights Registration Procedure



# Copyright Ordinance 1962:



"literary work" includes works on humanity, religion, social and physical sciences, tables "compilations and **computer programmes,**

that is to say **programmes** recorded on any disc, tape, perforated media or other information storage device, which,

**if fed into or located in a computer or computer-based equipment** is capable of reproducing any information"

**Guidelines to users – SMEDA**

**Need guidelines for Copyright Registrar**



# **E-Payment Systems Act**

**No Stakeholders**

**Only Banks**

**No Other Stakeholders eg. Cellcos, Hello, PSO, SSGC,  
IT Companies etc.**





**1/3 Incorrect US EFT Act**  
**1/3 Incorrect EU Directive**  
**1/3 Pakistani Old Regime / Archaic Indian Law**

## **Definitions**

**Arbitrary & Discretionary**

**Command Control Policy?**

**No Commerce without Payments**  
**No e-Commerce without e-Payments**



**“As I have said many times in the past, to continue to be effective, governments' regulatory role must increasingly ensure that effective risk management systems are in place in the private sector.**

**As financial systems become more complex, detailed rules and standards have become both burdensome and ineffective, if not counterproductive.**

**If we wish to foster financial innovation, we must be careful not to impose rules that inhibit it. I am especially concerned that we not attempt to impede unduly our newest innovation, electronic money, or more generally, our increasingly broad electronic payments system”**

**Alan Greenspan**

# RECOMMENDATIONS

- Technology Non-Specific
- Flexible
- Minimal Regulation
- Accreditation vs. Licensing
- Contractual
- Party Autonomy
- International Best Practice - UNCITRAL
- recognition of extraterritoriality/cross-border jurisdictional requirements
- Dispute Resolution Mechanisms (ADR, NY Convention)



# *QUESTIONS*

**[www.jamilandjamil.com](http://www.jamilandjamil.com)**