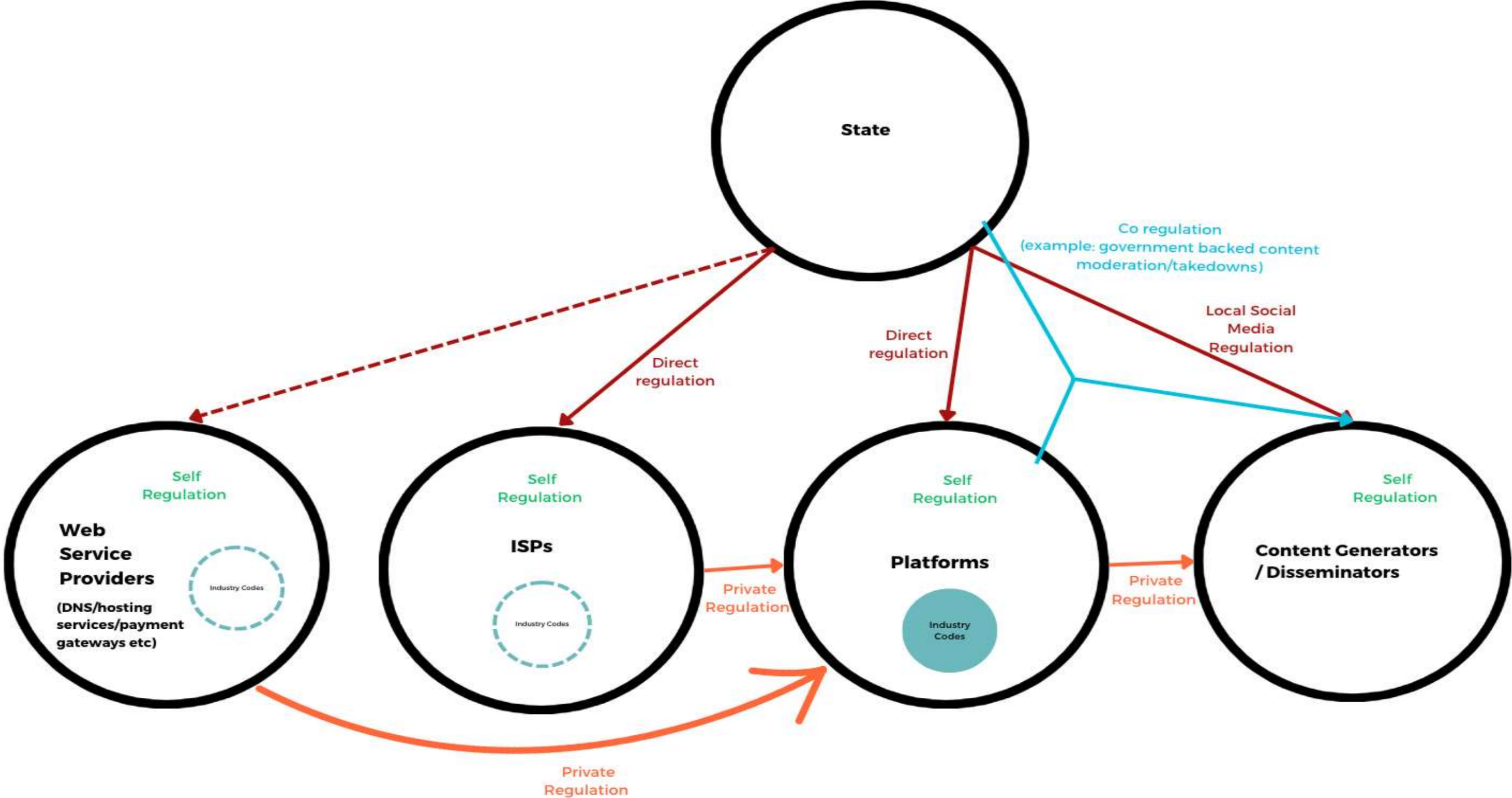


Lessons from Sri Lanka's ongoing effort to criminalize online expression

Rohan Samarajiva

19 October 2023

Modalities of online content regulation



What is different about social media?

- Millions of potential publishers, though few will reach millions. The usual power law dynamics apply
 - Chokepoints/gatekeepers absent
- Viral dissemination: what one publishers can keep going even if original publisher deletes
- The major cause of harm from false, etc content is rapidity of viral dissemination → quick takedown is the appropriate response

From MSM cartoonist who has gone to court; not limited to online content



How the law will work

How the Commission is activated

26. (1) A person aggrieved by the communication of a prohibited statement which is seen, heard or otherwise perceived by the users of internet based communication services (in this Act referred to as the “end users”) in Sri Lanka, by any other person, may either orally, in writing or in electronic form, make a complaint providing information pertaining to such communication to the Commission.

(2) The Commission shall designate such number of information officers from among the staff of the Commission as the Commission may deem necessary, from time to time, to receive information in relation to communication of a prohibited statement for the purpose of subsection (1).

(3)(a) Every complaint shall set out all available details of the person or persons responsible for the making or communicating the prohibited statement, including, where available, details pertaining to the Universal Resource Locator (hereinafter referred to as the “URL”) or other identifying features of the location or number from which the prohibited statement was communicated or published, and such other details as may be prescribed.

- Any user of internet-based communication that is **seen, heard or otherwise perceived**. can complain
 - E.g., not a reader of a newspaper, **but one who read the newspaper online**
- **Orally**, in writing or in electronic form
- With URL. Details of persons responsible for statement, if available

New offences. Each requiring determination of false statement

- Among many ways the bill recognizes for a person to become aggrieved are:
 - Posing a threat to national security, public health or public order or **promoting feelings of ill-will and hostility between different classes** of people, by communicating a false statement (s. 12);
 - Communicating a false statement which gives **provocation** to any person intending or knowing it to be likely that such provocation, will cause the offence of rioting to be committed (s.14);
 - Communicating a false statement, which **voluntarily causes disturbance to any assembly lawfully engaged in the performance of religious worship** or religious ceremonies (s. 15);
 - **Wounding the religious feelings of a person** by communicating a false statement (s. 16).
 - **Outraging the religious feelings of any class of persons**, insulting or attempting to insult the religion or the religious beliefs of that class by communicating a false statement (s. 17);
 - By communicating a false statement, **insulting or provoking a person that would cause that person to break the public peace**, or to commit any other offence (s. 20).

Commission actions in relation to person held responsible for content

5) Where the Commission is of the opinion that sufficient material exists that a prohibited statement has been communicated, the Commission shall carry out investigations through the officers of the Commission.

(6)(a) If the Commission is satisfied, that sufficient material exists that a prohibited statement has been communicated, it may, taking into consideration the seriousness of the matter and the likelihood of damage or prejudice caused by such prohibited statement, issue notice to the person who communicated such prohibited statement, to take measures to prevent the circulation of such prohibited statement.

(b) A person to whom a notice has been issued under paragraph (a) shall comply with such notice immediately but not later than twenty four hours from such notice.

(c) Notice referred to in paragraph (a), shall be deemed to be served, where it is served by personal service, sent by post to the last known address of the person who communicated such prohibited statement, or served by electronic means to such person, or served by such other appropriate method adopted by the Commission depending on the nature of the case.

- Forms opinion re sufficient material exists re statement
- Investigates (no hearing)
- Issues notice to prevent circulation of prohibited statement
 - Deemed served when served by personal service/sent by post/served by electronic means/by other means
 - Silent on viral disseminators
- Person to whom notice issued shall comply immediately/no later than 24 hours.

Commission actions in relation to ISP/internet intermediary

(7) Where any person fails to comply with a notice issued under subsection (6) within twenty four hours of such notice, the Commission shall issue a notice to the internet access service provider or internet intermediary on whose online location such prohibited statement has been communicated-

(a) to disable access by the end users in Sri Lanka to such prohibited statement; or

(b) to remove such prohibited statement from such online location, as the case may be, for the period specified in such notice.

(8) The internet access service provider or internet intermediary to whom a notice has been issued under subsection (7) shall comply with such notice within twenty four hours from the issuance of such notice.

- If no action by person served notice under s. 26(6)(a), notice is served on ISP/internet intermediary to disable access by end users in LK OR remove the statement
 - Shall comply within 24 hrs

ISP/Internet intermediary definitions

- “internet access service provider” means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received;
- “internet intermediary” means a person who provides any internet intermediary service;
- “internet intermediary service” means-
 - (a) a service that allows end users to access materials originating from third parties on or through the internet;
 - (b) a service of transmitting such materials to end users on or through the internet; or
 - (c) a service of displaying, to an end user who uses the service to make an online search, an index of search results, each of which links that end user to content hosted or stored at a location which is separate from the location of the index of search results, but excludes any act done for the purpose of, or that is incidental to, the provision of a service of giving the public access to the internet or a computing resource service;

How enforced? S. 25. Imprisonment < 5 years; fine < LKR 1 million

- 25. Any person who fails to comply with any directive issued in respect of such person by the Commission under paragraph (c) of section 11 within twenty four hours of its receipt commits an offence and shall on conviction be liable to imprisonment for a term not exceeding five years or to a fine not exceeding one million rupees and in the event of a second or subsequent conviction, such term of imprisonment or fine or both such imprisonment and fine may be doubled.
- 11. The Commission shall have the following powers and functions: -
 - (c) to issue directives to persons who communicate prohibited statements under this Act, to stop the communication of any such statements;

Section 26 and section 27 routes

Section 26: Judiciary only at end

- The stop orders are issued based on Commission's opinions that do not require adherence to rules of natural justice, applicable to courts as well as to decision makers exercising public functions
- Section 25 offence is defined in terms of failure to comply; does not go into merits of original decision by Commission

Section 27: Judiciary throughout, but expedited procedure

- Magistrate involved from start
 - Presumption re serving notice
 - conditional order to such person or the internet access service provider or internet intermediary on whose online location such prohibited statement has been communicated
 - If person served order does not appear within 7 days, order will be made absolute
 - Hearing to be completed within 2 weeks

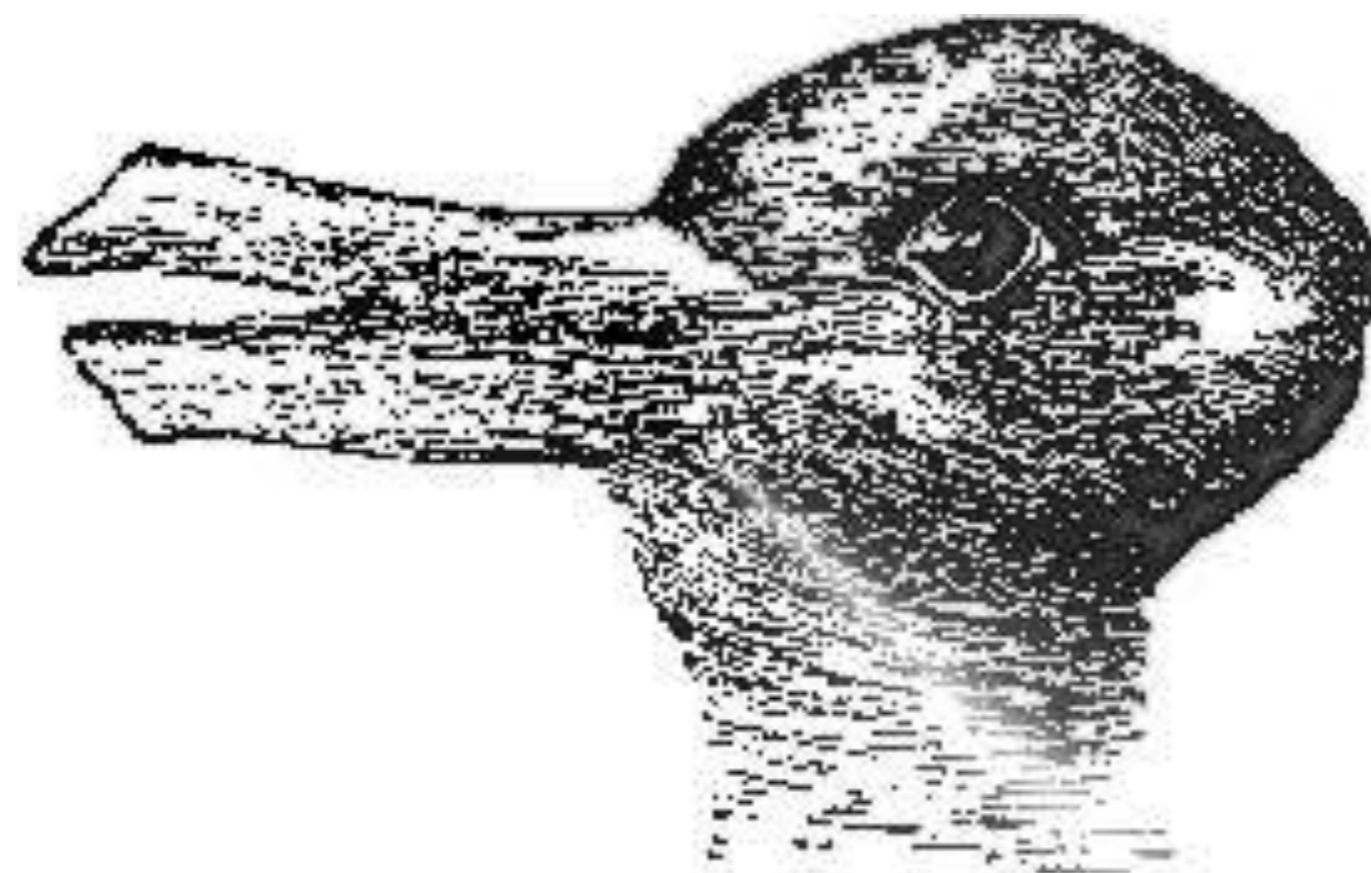
No remedy for viral dissemination by taking either route

- S. 27 is slower than s. 26
- But s. 26 not much faster; under optimum conditions it should take 3-4 days for a stop order to be effective
- In Singapore
 - POFMA office is located within IMDA, and its staff enjoy high compensation packages
 - Not anyone can complain in Singapore. Ministerial screen
- If many complaints are made in Sri Lanka, non-optimal conditions are likely to prevail → more time to takedown

Imprecise drafting throughout

Leaving room for arbitrary
applications

Truth/falsehood cannot be defined



But many more undefined, or vague

- False statement is defined as
 - “A statement that is known or believed by its maker to be incorrect or untrue and is made especially with intent to deceive or mislead but does not include a caution, an opinion or imputation made in good faith.” [Sri Lanka]
 - ‘Known or believed by its maker to be incorrect,’ is a subjective criterion. Unclear how this will be interpreted.
 - “False or misleading, wholly or in part, and which a reasonable person would consider to be a representation of fact.” [Singapore]
- “Wounding religious emotions” (Section 16)
- Making a false statement with the “objective of violating the peace,” (Section 20)

Example of offence of “revenge porn” (not involving det. of falsehood; generally seen as filling a gap)

Sri Lanka provision

- 22. (1) Any person, whether in or outside Sri Lanka who wilfully makes or communicates a statement of fact, with intention to cause harassment to another person (in this section referred to as the “target person”), by publishing any “private information” of the target person or a related person of the target person, and as a result causes the target person or any other person harassment, commits an offence and shall on conviction be liable to imprisonment for a term not exceeding five years or to a fine not exceeding five hundred thousand rupees and in the event of a second or subsequent conviction, such term of imprisonment or fine or both such imprisonment and fine may be doubled.

California provision

- • “anyone who intentionally distributes an image of the intimate body part or depicting them in sexual intercourse, oral copulation, sodomy, sexual penetration, or masturbation, under circumstances in which they understand that the image shall remain private, the person distributing the image knows or should know distribution of the image will cause serious emotional distress, and the person depicted suffers that distress.”

CA & UK are limited to “revenge porn.” Sri Lanka wording ambiguous; may be applied for other acts



Sri Lanka provision (contd)

- (2) For the purpose of this section-
- (a) “private information” means personal information, including any image, audio or video details, that any person may reasonably expect to remain private, but does not include any information that may be evidence of the commission of any other offence; and
- (b) “harassment” means an act or behaviour which has the effect of threatening, alarming or distressing a person or violating a person’s dignity or creating an intimidating, degrading, hostile, humiliating or offensive environment or, which has all such effects.

UK provision

- Disclosing or threatening to disclose,]private sexual photographs and films with intent to cause distress
- 1)A person commits an offence if—
 - (a)the person discloses, or threatens to disclose, a private sexual photograph or film in which another individual (“the relevant individual”) appears,
 - (b)by so doing, the person intends to cause distress to that individual, and
 - (c)the disclosure is, or would be, made without the consent of that individual.]
- (2)But it is not an offence under this section for the person to disclose or threaten to disclose,] the photograph or film to the relevant individual].

Two possible explanations

If minimization of harm through rapid takedown is the objective . . .

- Unrealistic to expect results from s. 26 or s. 27 routes which take multiple days
- Working with platforms to implement technological means of quick takedowns is the solution
- Explanation could be ignorance/lack of consultation/belief that the solution must be a law
 - Viral dissemination after complaint made has been missed
- Imprecise drafting may be attributed to incompetence

If minimization of harm through self-censorship is the objective . . .

- The imprecise drafting **is not a bug, it's a feature**
- Because no one can be sure what is allowed and what is prohibited, content generators, those who share the content, platforms, ISPs will be ultra cautious and engage in excessively strict self-censorship
 - Dissemination of potentially harmful content will decline
 - But there will also be considerable damage to healthy discourse necessary in a democratic society
 - The ambiguities in the law and the broad discretion given to the Commission will also allow arbitrary actions against persons/organizations
 - Because anyone can initiate action under s. 26 or s. 27, a high level of uncertainty will be created, as with ICCPR Act misapplications

Draconian laws like NETXDG leads to excessively strict moderating practices

The Sunday Guardian

WORLD EDITOR'S CHOICE BUSINESS OPINION LEGALLY SPEAKING LIFESTYLE SPORTS E-PA

Jörg Rupp, 53, a social worker and political activist in the eastern German town of Malsch, said he was swept up in Europe's new laws. In January 2018, he posted a tweet with altered lyrics to a German song called "The Anarchist Pig," adding derisive words about asylum-seekers and Chancellor Angela Merkel.

Within three hours, his Twitter account was banned. Germany has one of the world's strictest hate-speech laws, the Network Enforcement Act, which had recently taken effect when Rupp tweeted. The law mandates that Internet companies remove offensive material within 24 hours or face fines of up to 50 million euros, or about \$56 million.

Rupp said the tweet was satire, an attempt to use the language of right-wing groups to show their cruelty. "It's

"According to Article 1, Section 3 of the NetzDG, platforms must remove or block access to content that is "manifestly unlawful" within 24 hours of receiving the complaint, and furthermore, to "all unlawful content" within a 7-day period." (Gollatz et al, 2018)

Platform	Total reported	Removals	Removal rate within (as a % of total removals)	
(Time frame: January -June 2023)			24 hours	>7 days
Facebook	124,597	61149	25%	0.10%
Youtube	193,131	30,870	20%	0.11%
Instagram	99,825	10,474	81%	0.11%

Sources: meta and google NETZDG transparency reports (2023) – appeals are not reported

Not regulation in conventional sense; but creation of uncertainty → excessive self-censorship on the part of content generators & excessive “private regulation” by platforms

