

FEBRUARY 2020

CITIZENS PROTECTION (AGAINST ONLINE HARM) RULES, 2020

KEY CONCERNS, OBJECTIONS AND
RECOMMENDATIONS

SUBMISSION TO THE PARLIAMENTARIANS

Executive Summary

MMfD views the recently notified **Rules on Citizens Protection (Against Online Harm) 2020 as a direct threat to Pakistan's digital economy and the citizens' rights to freedom of expression and privacy.** We are deeply concerned that these Rules appear to be a blatant attempt to exert unchecked control over content not just being shared on public digital platforms but also through private messaging applications. The scope and scale of action defined in the Rules appear to go beyond the mandate given to the Pakistan Telecommunication Authority (PTA) under Pakistan Telecommunication (Re-organization) Act, 1996 (XVII of 1996) and the Prevention of Electronic Crimes Act, 2016 (XL of 2016). Our key concerns are as follows:

1. The establishment of the office of **National Coordinator (NC)**, along with the powers vested in the NC and his/her arbitrary selection by a Federal Minister, all point towards the **centralisation of power to exercise strict controls over digital and online narratives.** The creation of this post is undemocratic because it gives unchecked power to a sole arbiter, thereby threatening the political progress of the country.
2. The obligations that Social Media Companies are expected to adhere to as per the Rules are invasive, impractical and ignorant of the realities of the global digital media market. Many of the **requirements outlined in these Rules contradict the legal liabilities and responsibilities incumbent upon these companies in their original countries of incorporation.**
3. The fact that the government has asked Social Media Companies to provide all and any kind of user information or data in decrypted, readable and comprehensible format, including private data shared through messaging applications like WhatsApp, demonstrate that **the government is sidestepping the due procedure of the law that defines mechanisms for gaining access to the data of anyone being investigated for a charge under PECA 2016, thereby violating a Pakistani citizen's right to privacy.**
4. Threatening Social Media Companies with potential blocking of online systems demonstrates the extent of harm that these Rules can perpetuate. Blocking platforms like Facebook and services like WhatsApp would **also have a direct and significant impact on the growth of the digital economy in Pakistan.**

By creating Rules that go beyond the jurisdiction provided in the parent laws, the government has also violated the supremacy of the parliament and stepped into the domain of legislation, which is the sole prerogative of the parliament itself.

Due to these key concerns and specific legal concerns (highlighted below), the Rules should be immediately denotified. Any future attempts to form Rules for the implementation of Section 37, should be done in consultation with all the relevant stakeholders and in consideration of human rights principles.

Background

On 12th February 2020, Citizens Protection (Against Online Harm) Rules, 2020, started being circulated online and reported on media. The document, signalling the approval of the Rules by the Cabinet and including the notification, was dated 21st January 2020. Before the Rules started circulating, there had been no official intimation. In fact, as Dawn reported on 14th February, even Pakistan Telecommunication Authority (PTA), one of the implementing bodies under the Rules, had not been officially notified. Later, GEO reported that a government representative had said that the government had deliberately kept the Rules under wraps to avoid any hue and cry over them.

The actual text of the Rules makes it obvious that the government's fear of an overwhelmingly negative reaction was justified. The Rules, created for the implementation of certain sections of the Pakistan Telecommunication Authority (Reorganisation) Act, 1996 (PTA Act), and Prevention of Electronic Crimes Act, 2016 (PECA), are focused on two key factors:

1. The establishment of the office of National Coordinator, who will be designated by the IT Ministry and has been given excessive, unilateral power to regulate digital content and facilitate access to citizens' data;
2. The localisation of Social Media Companies, mandating compliance with broad censorship and data provision requirements, and imposing legal liabilities and fines on them in the event of non-compliance.

Neither of the two areas of focus are in line with the powers that were granted for rule-making under the cited Acts.

The public reaction to the Rules has been extremely negative so far. In addition, the Asia Internet Coalition (AIC), which is a representative body of 13 global technology giants, including Google, Facebook, Twitter and LinkedIn, issued a statement and made a submission to the Prime Minister, in which it clearly stated that if the Rules were implemented it would be extremely difficult for them to continue providing services in Pakistan. The statement also warned of the crippling impact on Pakistan's ambition of a digital economy.

Following the feedback, news reports regarding a high level meeting at the Prime Minister House quoted that the PM had issued orders to take all stakeholders on board before the implementation of the Rules and also issued instructions to incorporate feedback. However, all the news reports came through unnamed sources and **the government has not officially released a statement to clarify the official status of the Rules, that have already been approved by the Cabinet and notified.**

Legal Concerns

A legal analysis of the Citizens Protection (Against Online Harm) Rules 2020 demonstrates that these Rules are:

- a. Excessive and often in direct contradiction of the scope defined in the Parent Acts including the PT (Reorganisation) Act and PECA;
- b. Representative of government overreach that undermines the parliament's legislative mandate; and

- c. In contradiction of Pakistani citizens’ constitutional rights of freedom of expression, privacy and fair trial.

Our detailed analysis is as follows:-

1. CONCERNS WITH THE SCOPE OF THE RULES

This section demonstrates how the Rules exceed the purview and the scope of the parent laws and how they represent an overreach of the government’s powers to make rules.

Quoted Sections of the Parent Acts	Contradictions in the Prescribed Rules
Section 8(2)(c) of the PTA (Reorganisation) Act	No specific articulation of the fact that the implementation of the Rules will be limited to matters of national security and / or relations with foreign states.
Section 54(1) of the PTA (Reorganisation) Act: National Security	The due process of interception of calls, monitoring and surveillance has been defined through different sections of the Fair Trial Act and PECA. The Rules make no reference to the defined legal procedure that gives a National Coordinator and the FIA the authority to directly ask Social Media Companies for consumer data.
Section 57(2)(ag) of the PTA (Reorganisation) Act	The Rules deal singularly with Social Media Companies, primarily of foreign origin. This is beyond the definition of ‘telecommunication sector’ as defined in the PTA (Reorganisation) Act.
Section 35 of the PECA	<ul style="list-style-type: none"> * Rules for the implementation of Section 35 have already been defined by the FIA. * These Rules also give similar powers to National Coordinator, whose office has not been defined in either PECA or PTA (Reorganisation) Act, * The Rules do not mention anything with regards to 35 (2), especially sub section 2a, related to proportionality - in fact the Rules enable acquisition of a broad range of data and information, including “subscriber information, traffic data, content data and any other information or data.”
Section 37 of the PECA	* Not a single section of the Rules deals with safeguards, transparent process and oversight mechanism as required under Section 37(2) of PECA. This is in clear violation of the order passed by the Islamabad High Court in the case of Awami Workers Party (W.P 634/2019) in which PTA was directed to ensure protection of the fundamental rights

<p>Section 48 of the PECA</p>	<p>of citizens during exercise of powers under Section 37 of the PECA 2016.</p> <p>* Section 11 (1) of the Rules simply reproduced Section 37 (4) & Section 12 of PECA without defining the actual procedure that these sections should entail. In fact, Section 11 (4) of the Rules further directs the Authority to prescribe the procedure for review, something that the Rules under the law should define themselves. This demonstrates that the focus on safeguards, transparency and oversight has not been given any focus in the rule making exercise.</p> <p>* Social Media Companies are non licensees and Section 48 of PECA limits the fine to ten million rupees for non-licensees. However, the Rules create a liability of upto 500 million rupees, which is not just going beyond the provisions of the parent Act (PECA) but is also linked to non compliance of actions that are not originally defined in PECA at all. Moreover, this is done without reference to Section 38 of PECA, that pertains to the limitation of intermediary liability.</p>
<p>Section 51 of the PECA 2016</p>	<p>None of the sub sections under Section 51 allow the government to make Rules that are to be implemented on foreign entities.</p>

2. LEGAL ANALYSIS OF THE RULES

This section deals with specific sections defined within the Rules and mentions the legal contradictions contained therein.

Section of the Rules	Legal Contradictions
<p>Section 3: Establishment of the Office of National Coordinator</p>	<p>Neither PECA nor PT (Re-organisation) Act have the provision to create the National Coordinator's office. The NC has also been given wide discretionary powers. Creation of any such office can only be done through the proper legislative mechanism.</p> <p>The Rules allow NC to unilaterally demand access to citizens' data, which is a violation of the constitutional right to privacy and is also in contradiction of the due processes defined for the search and seizure of data within PECA and other Acts.</p>

Section 4: Obligations on Social Media Company with respect to blocking and removal of unlawful online content

Section 5: Other Obligations of Social Media Companies

* Sub Section 4 (2) gives full authority to the NC or PTA to interpret the law regarding illegal online content. Without a defined framework that deconstructs the qualifiers used in PECA and the Rules, this section threatens the rights granted under Article 19 of the Constitution of Pakistan.

Section 5 (a) requires social media companies to register with PTA. However, under the PTA Act, the Authority does not have any mandate to register these companies and its mandate is limited to telecommunication operators providing telecommunication services in Pakistan.

Section 5(d) requires Social Media Companies to establish data servers in Pakistan. This requirement has significant implications for data privacy and digital economy in Pakistan, as:

I. Pakistan has no data protection legislation. The lack of a protective regime for the safeguard of citizens' data means that citizens have no way of redressal if their data is misused or abused.

II. The General Data Protection Regulations (GDPR) that govern data privacy across Europe, require companies with European origins or presence to ensure that they limit activity in regions where there is no parallel data protection regime. This means that the Rules will be effectively pushing out a number of technology companies, thereby causing irreparable harm to Pakistan's digital economy.

Section 5 (e) requires social media companies to remove content from overseas Pakistanis, with no regard to the fact that immigrants enjoy the protection of laws that are in place in their resident countries.

Section 5 (f) requires social media companies to tag content as 'false' if the government decides that it is false. This has serious implications for the right to freedom of speech as it gives the government the power to deny any stories, opinions or investigations that are critical in nature. The section simply directs Social Media Companies to label content as false on receiving directives, without providing any framework for the identification, verification and designation of 'false' content. In addition, no exemptions for opinion, satire and artistic content has been provided.

<p>Section 6: Provision of information by Social Media Company</p>	<p>* This is a dangerous section as it allows the National Coordinator to have access to both traffic and content data (among other kinds of data), without evoking any legal procedures. The fact that this includes provision of decrypted, readable content data being shared through communication and messaging applications demonstrates the severity of this threat.</p> <p>* Section 33 and 34 of PECA define a detailed legal procedure for search and seizure of devices and access to content data. The Rules sidestep the legal requirements of obtaining a warrant and make no reference to other considerations defined in the Act. Thus, this section is in direct contradiction with the parent Act.</p>
<p>Section 7: Blocking of Online System</p>	<p>*Through the Rules, the authority to block online systems, that include social media giants like Facebook and other services like Google has been given to a single person, the National Coordinator, who, as mentioned above, has been designated without any provision in the parent laws. This is centralisation of power within a sole authority and poses a grave risk to both freedom of expression and to the digital ecosystem in Pakistan.</p>

ENDNOTE AND RECOMMENDATIONS

In addition to these concerns, it should also be noted that the response from global technology companies has been extremely alarming. The Asian Internet Coalition [AIC] has called these Rules ‘sweeping’ and has held that Pakistan will be isolating itself if these Rules are put in place. In addition, and most alarmingly, the companies have indicated that if the Rules are implemented, they will not be able to continue providing services in Pakistan.

This can be a fatal threat to Pakistan’s ambition of creating its place in the global digital economy.

Keeping in mind, the procedural, legal, rights-based and economic concerns, MMfD recommends that:

1. The government should immediately and urgently denotify the Rules through a written order.
2. The government should share an effective strategy for seeking stakeholder input before formulating any new set of Rules concerning online content regulation.
3. The parliament and parliamentary bodies should hold the government and its subsidiaries accountable with regards to their attempt to exercise powers that are beyond their mandate and jurisdiction.

4. When preparing any law, rules or regulations dealing with the regulation of online content, the government and the parliament should keep international human rights standards in consideration, especially while noting the principle guidelines from the recommendations of David Kaye, Special Rapporteur on Freedom of Expression. In particular, state limitations on the right to freedom of expression must be provided by law, demonstrate necessity and proportionality in regards to the state interest in question, and prove legitimacy in line with Article 19 of the Constitution of Pakistan.
5. The government and its regulatory institutions should engage in rigorous market research and look at both the economic and rights-based impact of any legislation before they draft another set of Rules and regulations.

