MediaMatters forDemocracy
Policy Research & Advocacy Initiative

The Removal and Blocking of Unlawful Online Content (Procedure, Oversight and Safeguards) Rules 2020

A rights focused legal analysis

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A legal analysis

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1. Introduction & Background

1.1 - Context

The Removal and Blocking of Unlawful Online Content (Procedure, Oversight and Safeguards) Rules 2020 (hereinafter referred to as the Rules) have been drafted under Section 37 of Prevention of Electronic Crimes Act 2016 (referred to as PECA from hereafter). The rules were notified in October 2020, and published in the Official Gazette in November. A small amendment was made in the Rules, on 27th November though a corrigendum that was published in the official gazette.

The Rules are the second version of rules under Section 37 - Originally, rules titled Citizen's Protection (Against Online Harms) Rules 2020 (hereinafter referred to the previous Online Rules) was leaked online, weeks after being approved by the Cabinet in January 2020. The previous Online Rules were 'suspended' following severe criticism from local and international human rights and technology bodies. Media Matters for Democracy (MMfD)'s analysis of the previous rules can be found here. The Rules that are now in effect were supposed to be drafted after meaningful consultation with stakeholders.

However, the consultative process that was initiated in July 2020 by Pakistan Telecommunication Authority (PTA) and a consultative committee formed by the Prime Minister, was symbolic and largely boycotted due to the ambiguity in the legal status of suspended rules[1]. Asia Internet Coalition, a technology body of tech giants also criticised the consultative process after the new draft of rules was notified. In effect, the updated Rules are not drastically different from the previous ones. While the position of National Coordinator, one of the most concerning elements of the previous draft, has been removed, the implications for data localization remain far-reaching. Moreover, the Rules have more severe repercussions on the rights to privacy and freedom of expression of the citizens of Pakistan.

Media Matters for Democracy has been critical of the process leading up to these Rules from the start. We have raised concerns about the secrecy and lack of transparency shrouding these Rules, and also urged the Government to repeal Section 37 of PECA, which in itself is an unconstitutional section that gives the PTA unfettered powers to block and remove online content.

1.2. Brief Critique

The Rules appear to be an exercise in legislation rather than delegated legislation. The scope of these rules go beyond the powers and parameters delegated to the rule making body, showing an attempt to

[1] Open Letter to Consultative Committee on Citizen Protection Rules and Chairman PTA - https://mediamatters.pk/media-matters-for-democracys-co-founder-sadaf-khan-writes-an-open-letter-to-consultation-committee-on-cp-rules-and-chairman-pta/

expand the power given by law. By and large, various sections of the rules atre *Ultra Vires* and often in direct contradiction of the safeguards provided in other sections of PECA.

The rules also side step procedures for acquisition of data that has been prescribed in PECA, by allowing PTA to intervene on behalf of law enforcement agencies and ask social media companies to directly provide data to the law enforcement. This shows that the rules are not simply going beyond the prescribed legal limits with regards to expression, they also have a direct impact on the process of fair trial and investigation.

Intermediary liability is a complicated issue, and the Government of Pakistan should therefore tread carefully while demanding accountability for user-generated content on internet platforms. Regulations that force private actors to extensively monitor and control citizen generated content, thus creating challenges both for expression and privacy. The Manila Principles on Intermediary Liability, set a yardstick including safeguards and best practices in relation to content moderation. The rules as such are in direct contradiction of Principle 1d that holds that "intermediaries must never be made strictly liable for hosting unlawful third-party content, nor should they ever be required to monitor content proactively as part of an intermediary liability regime"[2].

The historical purpose of ICT laws has been to supplement international trade and community laws. In contrast, the social media rules have triggered an immensely negative reaction from international technology against who have said that they may be forced to stop providing services in Pakistan. Thus, the social media rules may have a chilling effect on Pakistan's online spaces and hamper the goal of creating a Digital Pakistan

Finally, the manner in which the rules have been drafted and notified leaves questions about the lack of transparency. While the PTA initiated a consultative process, its credibility was questioned from the beginning and the final draft clearly shows that apart from one key change, i.e. the removal of the position of the National Coordinator, an ill conceived part of the Citizen Protection Rules, nothing else has significantly changed. This shows that the concerns highlighted by stakeholders who did take part in the consultative process and concerns highlighted by different civil society groups through legal analysis and feedback were completely discarded and ignored.

[2] Manila Principles on Intermediary Liability - https://www.manilaprinciples.org/#:~:text=Intermediaries%20must%20not%20be%20held,of%20an%20intermediary%20liability%20regime.

2. Key Legal Concerns

2.1 - PECA Section 37: A problematic foundation

Section 37 of PECA, titled **unlawful online content** has been a subject of criticism since PECA's inception. Civil society bodies and digital rights organisations have consistently called upon the government to remove this section from PECA altogether and held that content regulation policies should not be drafted within criminal legislation. A white paper on PECA reforms published in September 2020 by Media Matters for Democracy recommended removal of Section 37[3] and held that "This section gives unfettered powers to the PTA to interpret the reasonable restrictions supplied in Article 19 of the Constitution. Such interpretation should only be done either with adequate legislative guidance or by the higher courts. Furthermore, censorship of content by blocking or removing access to online information is not the same subject as cybercrimes, as also discussed in the policy recommendations section of this paper". The paper also suggests that if removal of the Section is not possible, a news section for the 'formation of an oversight committee' should be inserted in Chapter III of PECA. The paper recommends that this "multi- stakeholder committee will review the content takedown decisions of the authority"[4].

2.2 - Foray from 'delegated' legislation to legislation

According to Section 3 of the General Clauses Act, 1897, a rule has to be "made in exercise of a power conferred by any enactment, and shall include a regulation made as a rule under any enactment." It must be noted that delegated legislation, including amendments, must be vetted by the Law Division under the Rules of Business, 1973. Moreover, delegated legislation cannot confer arbitrary powers, nor can it be inconsistent with, or exceed, the scope of the parent legislation. Provisions like penalties and fines are substantive provisions and cannot be included in the rules unless explicitly authorized by the Act itself. A distinction also needs to be made between rule and regulation making, whereby the former takes precedence over the latter. According to Chairman Regional Transport Authority V Pakistan Mutual Insurance Company [PLD 1994 SC 14], structured discretions should be regularized, organized and geared towards producing order, so that the ensuing decisions ensure justice. Hence, the Rules should have aided the PTA in limiting its own discretion, instead of according itself with more unchecked power. Therefore, the Rules are in violation of the separation of powers doctrine, as they go beyond constitutional limits and allow those who are responsible for upholding the law to also make the law.

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[3] Media Matters for Democracy. (2020). *White Paper on Reforms for Prevention of Electronic Crime Act 2016* [Ebook] (p. 22). Islamabad. Retrieved from https://drive.google.com/file/d/18SFypiALP33wNNhRSlkBmbSLT_jNi7_7/view

[4] The proposed language of the section as prescribed in the white paper is: "A committee shall be created under thisAct, by the Federal Government, and should consist of parliamentarians from the ruling party and the opposition as well as representatives of civil society, industry, lawyers, and media." Additional sections may be added to spell out the formation, composition, and responsibilities of the committee. Furthermore, the restrictions on expression borrowed from Article 19 of the Constitution should be clearly defined along with precise checks of necessity and proportionality to offer guidance to executive officers so that they may interpret and apply these restrictions in a transparent and accountable manner.

2.3 - Violations, Contradictions & Contraventions from the Parent Act

Many of the Rules, that are now in effect, remain in direct contradiction of protections offered in different sections of PECA. First and foremost, the Rules violate the protections provided to intermediaries in Section 38 of PECA[5]. In contrast to the safeguards enacted for intermediaries i.e. service providers and social media companies, face additional responsibilities of proactively monitoring citizen generated content and have to face legal liabilities if they fail to do so.

Other contradictions also exist. Rule 9 (7), requires social media companies to hand over any data requested by PTA and law enforcement. This Rule effectively sidestep the procedure set out for data acquisition in Section 34 of PECA, that mandates the acquisition of a warrant for disclosure of content data and limits the time for which the data may be legally acquired.

[5] **PECA Section 38 - Limitation of liability of service providers.**--{1) No service provider shall be subject lo any civil or criminal liability, unless it is established that the service provider had specific actual knowledge and willful intent to proactively and positively participate, and not merely through omission or failure to act, and thereby facilitated, aided or abetted the use by any p€6on of any information system, service. application. online platform or telecommunication system maintained, controlled or managed by the service provider in connection with a contravention of this Act or rules made thereunder or any other law for the time being in force: provided that the burden to prove that a service provider had specific actual knowledge, and willful intent to proactively and positively participate in any acl that gave rise to any civil or criminal liability shall be upon the person alleging such facts and no interim or final orders, or directions shall be issued with respect to a service provider by any investigation agency or Court unless such facts have so been proved and determined…..(Additional provisos follow)

4. Legal Analysis

3.1 - Analysis of Rules Chapter I: Preliminary

3.1a - Rule 3(1): Definitions

The Rules fail to clearly define some of the most important and frequent terms contained therein. While the the definitions of "extremism", "National Coordinator" and "terrorism" that were contained in the previous rules have been omitted. Some of the definitions remain vague and problematic.

1) The definition of **'Online Content' (vii)** is inadequate as it fails to make a distinction between different types of online content that could be blocked. nor has any scale been determined in regards to the penalties that intermediaries could incur depending on the type of content being flagged. There is also no way to differentiate between content data, traffic data and other metadata. I**nformation** has not been defined in the Rules. If we look to the definition provided in PECA[6] for interpretation, the meaning of online content will expand to include all kinds of traffic and meta data as well, which is a concerning provision.

2) **'Over the Top Application (OTTA)'** has been defined to mean the "service of an application or a content which is provided to user over the public internet with or without the involvement of the network provider." This definition can also bring Web TV and streaming services into their remit. Previous attempts to regulate video on demand services like Netflix was met with criticism[7] due to the inability of proposed policies to recognise the difference between local mainstream media industry and global video streaming operations.

3) **'Person' (xi)** means "any individual, servant of the state or public servant, company, body politic or corporate, or association or body of individuals, whether incorporated or not" - the definition appears to have been drafted to allow public bodies to initiate complaints or to be recognised as aggrieved subjects.

4) **'Social Media Company' (xiii)** has been defined as "**any person** that owns or manages Online Systems for provision of social media." This means that even individual content creators, editors or any other persons associated with digital companies could be held liable as per this definition. This could also allow companies to easily absolve themselves of any responsibility, as the application of these Rules would create an arbitrary hierarchy between powerful tech

[6] PECA defines information as "text, message, data, voice, sound, database, video, signals, soiiware, computer programmes, any forms of intelligence as defined under the Pakistan Telecommunication (Reorganization) Act, 1996 (xv[of 1996) and codes including object code and source code;

[7] Leading digital media outlets, digital and media rights activists, prominent journalists and opinion makers, and lawyers deem PEMRA's proposed OTT and 'web TV' policy 'unacceptable' in its current form. Media Matters for Democracy. (2020). Retrieved 21 January 2021, from https://mediamatters.pk/leading-digital-media-outlets-digital-and-media-rights-activists-prominent-journalists-and-opinion-makers-and-lawyers-deem-pemras-proposed-ott-and-web-tv-policy-unacceptable-in-its-curren/

companies and smaller businesses or individual creators who may be rendered powerless in front of the law and subsequently bound to pay heavy fines. In the previous draft, 'Social Media Company' was defined more aptly as an entity that owns, manages or runs Online Systems.

5) The definition of **'Universal Resource Locator' (xiv)** has been added to the Rules.

3.1b - Missing Definitions

The Rules do not define some key terms like information and information system that are required to understand other definitions.

The Rules do not specify the definition of an 'aggrieved party'. Rule 10 (iv) mentions that PTA will not entertain complaints made by anyone who is not 'an aggrieved party', Thus, it is important to understand who would be considered aggrieved. Specifically, it is important to know if citizens complaining against blocking of a website on the basis that it violates their right to access information will be considered aggrieved by PTA, or does the grievance only extend to citizens who are requesting content take offs or who have directly produced censored content.

3.1c - Scope of the Rules

Rule 3(2) refers to the Pakistan Telecommunication (Re-organization) Act 1996, Pakistan Penal Code (Act XLV of 1860), Code of Criminal Procedure 1898 (Act V of 1898), and Qanoon-e-Shahadat, 1984 (P.O.No.X of 1984), bringing brings criminal law into the remit of the Rules. Since, PECA Section 37, under which these rules have been defined, does not allow the Authority to create a new offence or criminalize online content in any way, extending the interpretation to criminal procedures and legislation extends the scope of the rules beyond its legally mandated limits.

3. 2 - Analysis of Chapter II: Safeguarding the Freedom of Speech and Expression

3.2a - Rule 4: Rule Freedom of speech and expression

Rule 4 creates the foundation for the scope of the Rules and defines the limitations on freedom of expression online. Rule 4 refers to the scope of unlawful content in Section 37 of PECA , but adds a second proviso to extend the scope of 'unlawful' content, by bringing in references from other laws. Given that the Rules have been defined under Section of PECA, all references to other laws and legal instruments are ultra vires the parent act and go beyond the scope of delegated legislation.

The second proviso to Rule 4 creates additional limits and states that "the removal and blocking of access to an Online Content would be necessary in the interest of:

(i) "glory of Islam" if the Online Content constitutes an act which is an offence under chapter XV of Pakistan Penal Code, 1860 (Act XLV of 1860); or

(ii) integrity, security and defence of Pakistan" shall bear the same meaning as given under Article 260 of the Constitution of Islamic Republic of Pakistan 1973; or.

(ïii) "public order" if the Online Content constitutes an act which is an offence under chapter XIV of Pakistan Penal Code, 1860 (Act XLV of 1860), or the Online Content contains any fake or false information that threatens the public order, public health and public safety or the Online Content constitutes an act which could lead to the occasions as described under chapter XI of the Code of Criminal Procedure, 1898 (Act V of 1898); or

(iv) "decency and morality" if the Online Content constitutes an act which is an offence under section 292, 293,294 and 509 of Pakistan Penal Code (PPC), 1860 (Act XLV of 1860)."

No provision in PECA, or Section 37 empowers PTA to create rules for implementation of the laws mentioned in this provision. In addition, Section 37 does not extend to regulation of 'fake or false information' as described in point iii of the proviso. In this shape and without proper safeguards, this provision can lead to censorship of differing opinions and analysis as well.

Imagining the internet as a public space that operates in the same manner and within the same parameters as a physical public space is also problematic. For example, Section 294 of PPC, included in the proviso as one of the sections on which content has to restricted criminalises **Obscene acts and songs** and states that "whoever, to the annoyance of others, --

(a) does any obscene act in any public place, or

(b) sings, recites or utters any obscene songs, ballad or words, in or near any public place,

shall be punished..."

Technically, this would allow PTA to restrict songs and performances put up on citizens' own social media pages and accounts, tiktoks etc. Content that is 'public' through privacy settings but not exactly in 'public space' for whoever wants to access them will have to make a choice and take actions to access the content. Any creative content that any internet user reports as an annoyance could be deemed "obscene" and blocked accordingly. A major casualty of the Rules could also be discussions on gender rights and criticisms of violent cultural practices.

It is also important to highlight that unlike the legislature and judiciary, **PTA does not have the mandate or the capacity to interpret or define these terms of their own accord, nor can it lean on definitions contained in Pakistan's criminal law**, since Section 37, as mentioned before, does not stipulate a criminal offense.

Creating the space for this kind of content control completely goes against the principle of 'proportionality' with regards to online content regulation. By legalizing excessive restrictions on content, Rule 4 also violates the rights protected by Article 19(A) of the constitution by allowing the Authority to curtail citizen's right to information.

As per Article 8 of the constitution, laws inconsistent with or in derogation of Fundamental Rights are to be held void, and due to the reasons listed above Rule 4(1) is unconstitutional.

3.2b - Rule 4(2): Regulating Internationally

Rule 4(2) states that the "rules and any directions issued by the Authority under these rules shall prevail and take precedence over any contrary Community Guidelines and any such Community Guidelines shall be null and void". This rule extends to scope of implementation of global and international technology companies and thus poses a serious question about the thought given to the practicality of implementation.

It is highly unlikely that a global social media company will regulate content based on a Pakistani Authority's decisions, especially since the regulations stipulated by the PTA lack transparency and consistency. The Asia Internet Coalition (AIC), a body of various technological giants, has made it very clear that international tech companies will discontinue platforms and services in Pakistan if the broad regulatory system stipulated in these Rules will be imposed upon them.

3.3 - Analysis of Chapter III: Filing, Processing and Disposal of Complaints

3.3a - Rule 5: Filing of complaints

Rule 5(1) states that a complaint may be filed by:

> i) Any person, or his/her guardian, where such person is a minor, aggrieved by Online Content; or
>
> ii) A Ministry, Division, attached department, subordinate office, provincial or local department or office, a law enforcement agency or intelligence agency of the Government, or a company owner or controlled by the government.

With the government and public bodies empowered to directly complain to the PTA regarding content restrictions under Rule 5 (4) ii, it is essential that transparency of these complaints is ensured. WIthout transparency, government and public representatives would have no accountability and can influence content geared towards their own performance, especially if it is critical. However, rather than ensuring transparency, Rule 5 (5) creates a general confidentiality clause, through which these bodies may be able to get content blocked without any public scrutiny.

It is important to note that a confidentiality clause is important to have for the safety of private citizens, and this confidentially should continue to be the right of private citizens who may fear a backlash if their complaints are made public. It is also equally important to ensure that any content related complaints from government and public bodies are made available to the public to ensure that these powerful bodies can be held accountable if they start complaining against genuine criticism and critique of their performance.

On the whole, Rule 5 demonstrates that PTA has assumed jurisdiction on several matters pertaining to the removal of online content. It must be stressed that the power given to PTA under Section 37 is limited in scope; the authority cannot "on its own motion take cognizance of any unlawful Online Content" and "pass appropriate directions" and stipulated in Rule 5(6). [Rule 5(6)]. Section 37 does not accord the PTA with suo motu powers.

The main objective of the Rules is to lay down a transparent procedure as to how the Authority will be taking cognizance of complaints, which unfortunately has not been done.

3.3b - Rule 6: Disposal of complaints

Various subsections of Rule 6 of the law are ultra vires of the parent act and create new liabilities for service providers and social media companies.

Rule 6(2) states that the Authority ``may pass any order in writing and record reasons for its decision for removal or blocking or issue directions to the Service Provider''. This framing and the use of the word 'may' makes documentation of reasons for PTA's decision optional. Since the enactment of PECA2016, the Authority has been notoriously denying information regarding content blocks, despite multiple organisations and individuals asking for this information through Right to Information requests. The rules should thus ensure that PTA acts with transparency and should make the written documentation of content related decisions mandatory. These written orders must be shared with complainants and made available for public on PTA's website.

Another example of the PTA giving itself discretionary power in Rule 6(2) is as follows: "Provided that the Authority... prior to the passing of any order shall issue notice or provide an opportunity of hearing, as the case may be, to the Complainant and any other Person who is, in the opinion of the Authority, likely to be adversely affected by such order. Over here, the PTA is given power as the sole arbiter to decide between issuing a notice or providing an opportunity of hearing to the Complainant. Both requirements should be obligations that the PTA must follow; the opportunity of hearing should follow the issuing of a notice. Nor should the PTA have the power to include any other party other than the ones affected. Instead, the Rule should have made specific reference to potential affectees in this case: such as users, social media companies, or content page owners and moderators. Moreover, as mentioned before, the PTA cannot endow itself an adjudicatory role in determining questions of fact and law, which can only be done by a competent court.

Second proviso in Rule 6(2) asks social media companies and service providers to take action on PTA's orders within **twenty four hours**. The **third proviso** further brings down the time of action to **six hours** in case of emergency. This timeline is arbitrary, unrealistic and also a violation of the principles of natural justice. Over here, the Federal Government is attempting to implement a private censorship mechanism without any checks and safeguards. Moreover, "cases of emergency" have not been defined in these Rules.

Furthermore, in **Rule 6(3)**, PTA is given the discretion to "defer action" for a month, to aid law enforcement/investigation agencies in the interest of helping criminal investigation of the matter. Again, the working relationship between FIA, the law enforcement agency and the Authority, cannot be defined through delegated legislation, as the prescription of this process goes beyond the mandate of rule making defined under Section 37.

Rule 6(5) states that the PTA in case of non compliance "the Authority may initiate action against Service Provider, Social Media Company, owner of Information System, owner of Internet website or web server and User under the Act. It is to be noted that neither Section 37, nor PECA itself includes any provisions that allow PTA to take any sort of 'action' against social media companies and service providers. Thus, this rule gives PTA powers beyond what is legally mandated in PECA. This is also in violation of Section 38 of PECA that protects intermediaries from "civil and criminal' liabilities unless "it is established that the service provider had specific actual knowledge and willful intent to proactively and positively participate, and not merely through omission or failure to act."

Rule 6(6) is one of most concerning rules as it allowed PTA to direct "the Service Provider, Social Media Company, owner of Information System, owner of Internet website or web server and User to secure such information including traffic data, as the case may be, for such period of time as the Authority may deem appropriate." First, once again, it extends PTA's power beyond the power given to it in Section 37 and secondly poses a direct threat to the privacy of citizens whose data will be retained without any prior knowledge, consent or protection. PTA has also been given completely arbitrary power to determine the kind of data that may be secured, the reasons for securing such data and the time for which such data may be stored. There is also no framework to determine the security protocols of such data.

Rule 6(7) states that the Authority may seek an expert opinion from any person(s) wherever it deems appropriate during processing of the complaint against Online Content. Without determining the criteria on which such experts would be selected this would be a problematic exercise. In addition, PTA should also be mandated to publicly disclose if any externals are being engaged as experts in the decision making process.

3.3c - Rule 7: Obligations with respect to blocking and removal of unlawful Online Content

Rule 7 is a replica of provisos in Rule 6(2) and has been analysed above. To reiterate, the deadlines provided are arbitrary and impractical, and any user or intermediary, based locally or internationally, should not be obligated to follow impractical deadlines.

3.3d - Rule 8: Blocking of Online System

Rule 8 gives PTA the power to block "entire online systems" and "any services provided by Such Service Providers owned or managed by the said Service Providers or Social Media Company". Section 37 of PECA only refers to the blocking of information stating that, the "Authority shall have the power to remove or block or issue directions for removal or blocking of access to an information through any information system if it considers it necessary...". The rules have to be defined within this framework provided by Section 37 and the power granted to the PTA is limited in scope. 'Entire online systems' do not fall in the ambit of 'an information through any information system'. This Rule not only fails the test of proportionality and necessity, but also exceeds the scope of the parent law. This makes Rule 8 *ultra vires* and a and remains a clear overreach of authority by PTA.

Rule 8 is also a violation of Article 19 and Article 19 A of the constitution as it threatens the exercise of right of expression and right to information. Assuming the power to block online systems and sister concerns of owners of the systems, allows PTA to act in a way that would threaten citizen's expression and access to information across platforms. It undermines the right to free speech by promoting censorship through the blocking of an "entire Online System".

For example, let us assume that Google fails to respond to PTA's orders for blocking of a certain piece of content. Rule 8 will allow PTA to block Google, Youtube, Google Classrooms all other related services and the android operating system that is also operated by Google. While one hopes that it will never come to that, PTA and any other Authority should not have the power to legally carry out censorship at such a massive scale at any cost. Therefore, this Rule suggests an excessive and exaggerated response on the part of PTA, and therefore should be removed, as this action is not mandated by Section 37 of PECA, nor did the legislature envision giving the PTA this kind of broad power.

The Rule is also violative of due process obligations and should be removed.

3.3e - Rule 9: Other obligations of the Service Providers and Social Media Companies

As per Rule 9(2), social media companies and service providers are expected to modify their Community Guidelines specifically for the Pakistani context. The text used in the Rule to define the content that should be limited is subjective, vague and arbitrary in nature.

For example social media companies have been asked to restrict users from hosting content that "violates or affects religious, cultural, ethnical (sic) sensitivities of Pakistan'' - The religious, cultural and

ethinic sensitivities differ from community to community and region to region within Pakistan. None of these sensitivities have been (or can be) defined and through this Rule, not only is PTA creating a censorship framework that presupposes a hegemonic, all encompassing sensibility for all Pakistanis, but also privitatises the interpretation of that sensibility to a third party, a private actor (including private actors who are not even Pakistanis), by making it a responsibility of social media companies to enforce the adoption of said (and non existant) sensibilities through its community guidelines. This is both illegal (ultra vires of the parent act) and unconstitutional (in violation of Article 19 of the constitution) and creates a potential for violation of rights protected under Article 20 (a) that protects the rights of minorities to propagate their religions, a form of expression that can easily be tagged as a an offense to majorities' religious sensibilities.

Rule 9(2) also ventures into the area of imposing copyright regulations by asking social media companies to create community standards against sharing content that "belongs to another Person or to which User does not have any right" - this, once again is not authorised under Section 37 of PECA.

Rule 9(3) states, very vaguely, that social media companies and service providers should "deploy appropriate mechanisms" for identifying online content as per the ambiguous and overbroad categories specified in 9(2). This Rule makes it mandatory for social media companies to establish elaborate monitoring mechanisms for user generated content, including content shared over private digital platforms like WhatsApp and Facebook Messenger. In addition to being an act of privatisation of censorship through third parties, this is also a violation of citizen's right to privacy.

Rule 9(4) states that service providers and social media companies "shall not knowingly host, display, upload, publish, transmit, update or share any Online Content, and shall not allow the transmission, select the receiver of transmission, and select or modify the information contained in the transmission as specified in sub rule (2)". While two provisos to this rule have been included, the rule continues to pose a direct threat to rights to expression and privacy.
This entire subsection has been copied from Section 3(3) of the Information Technology (Intermediaries guidelines) Rules, 2011 in India. In their analysis of the Intermediary Rules, 2011, the Centre for Internet and Society (CIS) makes some important observations regarding the principle on which this Rule is based:

"An intermediary can provide multiple services at the same time. Such services can be provided independently of each other or as any combination thereof. Even if such services are provided in combination by the intermediary, it is important to treat each such service independently of the others while determining its applicability to the law. It is for this reason that any service (like hosting) must be broken to the lowest level of granularity as recognised in the definition of intermediary (i.e. receive, store, transmit and provide service) to determine its applicability to law."

This observation is true for Rule 9(4).

Rule 9(5) mandates that social media companies and service providers with over 500,000 users must register with the PTA, establish a permanent registered office in Pakistan "with a physical address preferable (sic) located in Islamabad", and appoint a focal person based in Pakistan, within nine months of these Rules coming into force. However, the PTA does not have the authority to register international companies, and this power exceeds the scope of Section 37 of PECA as well. Additionally, even the Pakistan Telecommunications (Reorganisation) Act, under which PTA is established, does not give PTA tha authority to register social media companies.

Rule 9(5)(b, c & d) requires social media companies and service providers to establish one or more database servers in Pakistan and establish local presence along with focal persons. These hard localisation obligations have been criticised by technology giants and are unlikely to be followed. While the establishment of the database server is provisional to the promulgation of data protection law, concerns of privacy and data protection remain.

Rule 9(7) requires them to provide "any information or data or content or sub-content contained in any information system owned or managed or run by the respective Service Provider or Social Media Company, in decrypted, readable and comprehensible format or plain version". Read with the definitions of information systems, information, data, content etc as provided in the rules and in PECA, it is apparent that the scope of this rule extends to both public data and data shared over private channels, including messaging applications.

The Rule is ultra vires of the parent act and in contravention of protections provided by PECA with regards to access of citizens' data. Section 34 of PECA, Warrant for disclosure of content data, prescribes the legal process that has to be followed by the law enforcement agency if they need to access content data generated by citizens. Rule 9(7) allows FIA to directly go to social media companies and acquire this data without warrant, without a safeguard procedure and without a time limit, all of which are contradictory to the process defined in Section 34.

This rule is thus, also against due process of law, contradictory to different sections of the parent act and ultra vires Section 37. It also poses a direct threat to privacy rights of citizens.

Rule 9 (9) says "A Service Provider and the Social Media Company shall deploy mechanisms to ensure prevention of uploading and live streaming through Online Systems in Pakistan of any Online Content particularly regarding Online Content related to terrorism, extremism, hate speech, pornographic, incitement to violence and detrimental to national security". In essence, social media companies are being asked to deploy a mechanism for live monitoring of citizens who are using their platforms. Even if technically possible, implementation of this rule would require social media companies to actually gain access to cameras and videos that consumers are making *before* they are uploaded and streamed through their platforms. Again, nothing in PECA or Section 37 gives PTA the power to demand this, the Rule is ultra vires, illegal, represents gross overreach of power, directly threatens the privacy of citizens and mandates privatization of censorship.

Rule 9(10) allowed PTA to impose a penalty up to rupees five hundred million ons social media companies for an offense not defined in PECA. This is ultra vires and beyond the ambit of delegated legislation. By creating new offences and defining a fine (that goes way beyond the highest fine actually imposed through PECA).

3.3f - Rule 10: Circumstances Not to Entertain Complaints/Applications

Rule 10 (vi) says that The Authority shall not entertain complaints for removal or blocking of Online Content where "the complaint / application has been made by a Person who is not an aggrieved person". However, the rules do not define who an aggrieved person is or what the scope of grievance can be. It needs to be clarified if complainants, who are aggrieved by the lack of access to certain information and content, can approach PTA as aggrieved parties.

3.4 Analysis of Chapter IV: Review and Application

3.4a - Rule 11: Review

Rule 11 (iv), regarding the procedure of the review process allows only three to 'designated departments' for submission of "rejoinder or report within three working days to show as to why the order of the Authority in question shall not be modified, reversed or recalled". The term 'designated department' is confusing and needs to be clarified and three days may not be enough time to respond to such a request.

Rule 11 (v), says that the "applicant shall be informed of any deficiency in the review who shall remove the deficiency within the given period in writing". There is no specification of what the 'given time period' would be. The time period should not be arbitrarily decided and needs to be specified clearly.

3.5 - Analysis of Chapter V: Miscellaneous

While there is nothing specifically concerning Chapter V, it may be noted that Rule 16 and Rule 18 are both concerned with awareness raising and public education regarding the Rules. Rule 16 actually specifies that PTA shall take awareness raising measures within thirty days of the publication of the Rules. In contrast, PTA did not even share the Rules with digital rights and media organisations when they reached out after notification and did not make them available on their website till a month later. This analysis is being published in January 2021, two months after the publication of the Rules and there still isn't much public communication from PTA regarding the concerns that have been raised or the procedures that it is supposed to set up.

5. Conclusion & Recommendations

4.1 - Conclusion

The analysis makes it clear that the rules, in their current state, are both unconstitutional and illegal. They pose numerous threats to constitutional rights of citizens and contradict various provisions of the parent act. The Rules also go against established principles of natural justice and due process and also contradict principles of proportionality that inform the global standards on online content regulation.

Insofar, the rules also fail to do what Section 37 requires. Section 37 (2) states that "The Authority shall, with the approval of the Federal Government, prescribe rules providing for, among other matters, safeguards, transparent process and effective oversight mechanism for exercise of powers". The Rules, instead of creating any safeguards and oversight mechanisms, empower PTA to extend powers that go much beyond those envisioned and mandated through Section 37. There is a complete lack of transparency regarding the actual framework that PTA will use to define the parameters of illegality for content that it censors - the terms that were subjective in Section 37, remain just as subjective in the Rules. The Rules in fact, increase the scope of censorship and expands it to include fake and false information and ethinic sensibilities (terms not included in Section 37).

It has to be said that some of the issues with the Rules stem directly from Section 37 itself, and thus, the amendment of Section 37 remains essential to ensure that online content regulation regime is human rights friendly and based on global principles for content regulation and intermediary liability.

4.2 - Recommendations

1. **Amendment of Section 37 -** Section 37 of PECA sets a very problematic ground for online content regulation. The section should ideally be repealed. Failing which, it is essential to review and amend the section. We reiterate our recommendation, originally made in a white paper on PECA reforms that, section 37 gives unfettered powers to the PTA to interpret the reasonable restrictions supplied in Article 19 of the Constitution. Such interpretation should only be done either with adequate legislative guidance or by the higher courts. Furthermore, censorship of content by blocking or removing access to online information is not the same subject as cybercrimes, as also discussed in the policy recommendations section of this paper". The paper also suggests that if removal of the Section is not possible, a news section for the 'formation of an oversight committee' should be inserted in Chapter III of PECA. The paper recommends that

this "multi- stakeholder committee will review the content takedown decisions of the authority"[8].

2. **Denotification of the Rules** - Given the threats to constitutional rights and the contradictions with parent law that various rules pose, the 'Removal and Blocking of Unlawful Online Content (Procedure, Oversight and Safeguards), Rules 2020' should be immediately denotified by the Cabinet.

3. **Initiation of meaningful consultative process for formulation of new rules -** To draft new rules, PTA should initiate a meaningful consultative process that ensures representation and inclusion of all different stakeholders. The process should also go beyond hosting meetings where different stakeholders share their concerns and recommendations and then have no inkling about whether the issues raised are actually being considered. The consultative process for the current rules included an online survey, a series of meetings with stakeholder groups and then silence and secrecy about the updating of the draft. The rules demonstrate that all concerns shared by concerned parties simply fell on deaf ears and apart from one significant change, none of the actual concerns were heard and none of the recommendations were incorporated. This process is not credible, inclusive and lacks transparency. The consultations should happen in multiple rounds, with each stakeholder allowed to give inputs on working drafts, multiple times and in realistic timelines.

4. **Ensure adherence to principles -** A basic test about the human rights impact of rules should be their adherence to principles of permissibility, legality, necessity and proportionality. That is the rules should not go beyond the limits outlined in the law and proportionate to protect a legitimate aim. It is also important that the laws are both accessible and foreseeable; i.e. their meaning and interpretation is not subjective and they can be easily (and similarly) understood by the citizens. As a UN member state and a signatory of the International Convention of Civil and Political Rights (ICCPR), the government must also ensure that the Rules (and Section 37) are amended to limit the restrictions on freedom of expression to the justifications laid out in Article 19 (3) of the ICCPR. Finally, the rules must ensure that the Authority responds with proportionality and takes the least onerous restriction to fulfill the ims set forth in Article 19 (3) of the ICCPT.

[8] The proposed language of the section as prescribed in the white paper is: "A committee shall be created under thisAct, by the Federal Government, and should consist of parliamentarians from the ruling party and the opposition as well as representatives of civil society, industry, lawyers, and media." Additional sections may be added to spell out the formation, composition, and responsibilities of the committee. Furthermore, the restrictions on expression borrowed from Article 19 of the Constitution should be clearly defined along with precise checks of necessity and proportionality to offer guidance to executive officers so that they may interpret and apply these restrictions in a transparent and accountable manner.

5. **Uphold other human rights principles**: The government should also uphold other principles for content regulation defined by United Nations Special Rapporteurs on Freedom of expression, who have published various reports with recommendations for regulating harmful online content. On Intermediary Liability, the Manila principles for Limitations on Intermediary Liability present a strong base to ensure protection of human rights while determining the scope of intermediary liabilities.

6. **Put Transparency Measures in Place**: PTA must create mechanisms to ensure transparency with regards to its decisions to take down digital content. At the least, PTA should:
    a. Publish periodic transparency reports outlining details of the content restricted in the reported period along with the rationale for removal or blocking. The transparency report should also include details of requests sent to intermediaries for content restrictions.
    b. Publish the framework it uses to make decisions for removal and blocking
    c. Make public the process followed to identify unlawful content, the matrix used for assessment and procedures for blocking the said content

ABOUT MEDIA MATTERS FOR DEMOCRACY

Media Matters for Democracy is an organisation of journalists geared towards media development, digital democracy and rights, Media and Information Literacy, and Internet governance. We work for the freedom of media, expression, Internet, and communications in Pakistan.Our activities include policy research, movement building and capacity building.

Our core objective is to ensure that rights to free expression, association, access to information, and other media and digital freedoms are protected in Pakistan, in policy and practice.

MMfD also works for innovation in media and journalism through the use of technology, research, and capacity building.

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