Analysis:

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

On November 18, 2020, Removal and Blocking of Unlawful Online Content (Protection, Oversight and Safeguards) Rules, 2020, as published in the Extraordinary Gazette, were uploaded to the Ministry of Information Technology and Telecom's (MOITT) website, approved and in effect since October 20, 2020. Below is a comparison with the earlier version of the Rules that surfaced in February 2020, titled the Citizens' Protection (Against Online Harms) Rules, 2020, as well as an analysis of additions made to the Rules which are now in effect.

Before definitions, "2. Purpose and scope of the rules," has been added which says "the rules provide for safeguards, process and mechanism for exercise of powers by the Authority under the Act for removal of or blocking access to unlawful Online Content through any information system." While that certainly is what is required as per Section 37(2) of the Prevention of Electronic Crimes Act, 2016, under which these Rules have been notified; instead, the Rules expand Pakistan Telecommunication Authority's (PTA) powers beyond the remit of the PECA itself in a glaringly unconstitutional and illegal manner, as discussed below.

3. Definitions

In the previous version of the Rules, the definitions of "extremism" and "terrorism" were the subject of much criticism. Those have been omitted, however several others have been added, some modified.

Added	**Modified**
ii) community guidelines iv) contempt of court vii) incitement xi) person xiv) URL xv) user	iii) complainant has replaced earlier definition of "complainant organization" which was defined as follows in Rule 8(1) "(a) any person, natural or juristic, or his guardian, where such person is a minor, aggrieved by unlawful content; or (b) 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 owned or controlled by the Government." Complainant is now defined as "any person or his/her guardian, where such person is a minor, aggrieved by unlawful Online Content and includes an entity or a person authorized under these rules to lodge a complaint." However the definition of complainant organization from the earlier version has been incorporated in Chapter III - Filing, Processing and Disposal of Complaints, in Rule 5(1)(ii), which pertains to who may file a complaint. xiii) social media company now means "person" that owns or manages Online Systems for provision of social media. Rule 3(ix) defines "Person" as "any individual, servant of the state of public servant, company, body politic or corporate, or association or body of individuals whether incorporated or not."

Of particular concern is the definition of "social media company," which also includes an "individual." Read with other provisions of the Rules that ascribe responsibility and impose liability, it is important to distinguish between an individual as well as small, medium and large companies, both in terms of size but also the nature of company and the functions they perform.

Chapter II – Safeguarding the Freedom of Speech and Expression
Rule 4: Freedom of speech and expression

Earlier Chapter II was titled "National Coordinator" and gave the charge to MOITT to delegate a national coordinator who was empowered to issue notices to social media companies regarding the blocking of content and acquisition of data. Separately, the national coordinator was empowered to block a social media company for non-compliance and impose a fine. Only the national coordinator's office has been removed and the power to block a service and impose a fine now rests with the PTA under other provisions of the Rules.

Section 37 of PECA delegates certain powers to the PTA. It does not create an offence or criminalise speech. Nor does it contain any provision for acquisition of data. Though overbroad in its framing, Section 37 specifically pertains to PTA's powers "to remove or block or issue directions for removal or blocking of access to an information through any information system."

Rules, which are subsidiary or delegated legislation, cannot exceed the scope of the parent law. However, these Rules create categories of prohibited speech and ascribe meaning to existing terms which the Act itself does not do. They create new offences and grant additional powers to the PTA not already covered under the scheme of the law. Content categories in **Rule 4** exceed those listed in Section 37 of PECA and Article 19 of the Constitution. They are expanded in Rule 4 by attributing definitions to them by referencing various Sections of the Code of Criminal Procedure (CrPC), Pakistan Penal Code (PPC) and Articles of the Constitution of Pakistan, going well beyond the scope of Section 37.

i) "glory of Islam"	Chapter XV of the PPC which pertains to 'Offences Relating to Religion' and includes Sections 295-298-C.
ii) "integrity, security and defence of Pakistan"	to have the same meaning as under Article 260 of the Constitution, which defines 'Security of Pakistan' as "safety, welfare, stability, and integrity of Pakistan and of each part of Pakistan, but shall not include public safety as such."

	Integrity and defence are not defined under Article 260 or in the Rules themselves. However, "dissemination of information which intimidates or harms the reputation of Federal and Provincial Government or any person holding public office...or otherwise brings or attempts to bring into hatred or contempt or excites or attempts to excite disaffection towards Federal or Provincial government" has been added to the 4(ii) of the Rules.
iii) "public order"	covers offences under Chapter XIV which pertains to offences affecting the public health, safety, convenience, decency and morals. The definitions in the Rules also creates new categories such as "fake or false information that threatens the public order, public health and public safety." It also includes content that "constitutes any act which could lead to the occasions as described under Chapter XI of the CrPC, which includes Section 144.
iv) "decency and morality"	Pertains to content which is an offence under the following sections of the PPC: 292 - Sale etc of obscene books 293 - Sale etc of obscene objects to young person 294 - obscene acts and songs 509 - word, gesture or act intended to insult the modesty of a woman

While the overbroad framing of Section 37 places legislative and judicial functions into the hands of a telecom regulator, the Rules go even further in appropriating these powers. Interpreting how an Article of the Constitution is to be applied is a judicial function. Whether something constitutes an offence under the PPC requires a complaint to the relevant law-enforcement agency, typically the police, and a trial and decision by the court determines whether such offence was made out or not. Instead, here, PTA has been empowered to make the determination on its own, circumventing judicial process.

Rule 4(2) holds "directions issued by the Authority under these rules shall prevail and take precedence over any contrary Community Guidelines," also declaring such guidelines as "null and void." The PTA is not a High Court or the Supreme Court to declare anything "null and void." The purpose of the Rules is to curtail PTA's discretion and lay out a procedure for the exercise of its own powers, not to instruct and compel private sector entities - many of whom have no legal and physical presence in Pakistan and on whom Pakistani law is not binding - not only how to amend their policies and enforce them, but dictate what to include in them, as will be discussed later with reference to Rule 9.

Chapter III – Filing, Processing and Disposal of Complaints

While the definition of a complainant in **Rule 2** is limited to "any person or his/her guardian, where such person is a minor, aggrieved by unlawful Online Content and includes an entity or a person authorised under these rules to lodge a complaint," two categories of complainants are created under **Rule 5(1)**:

(a) any person, natural or juristic, or his guardian, where such person is a minor, aggrieved by unlawful content; or

(b) 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 owned or controlled by the Government."

The omission of **Rule 5(1)(b)** from the definition of complainant in Rule 2 is inconsequential as it is retained here. Hence, there is essentially no change to the definition as it existed in the February version of the Rules. The problem with this addition is the scope of content that those categorised under Rule 5(1)(b) can report. So long as it pertains strictly to the concerned ministry or office in relation to its official mandate and communications, it would still make sense. But if they undertake the role of guardians of the Internet and custodians of society to report content in the categories as defined under Rule 4, this raises issues of mandate, authorisation and overreach. **Rule 5(3)** suggests they are permitted to report "unlawful Online Content" not just pertaining to their official duties, but in a wide ranging manner, albeit through an "authorised representative." Relevant here is the May 2018 order of the Islamabad High Court in W.P. 4994/2014:

*4. "…**The Federal Government like any other person can lay an information before the Pakistan Telecommunication Authority but the same cannot be treated as binding in the context of subsection (1) of Section 37.** The Authority is exclusively empowered under subsection (a) of the Act of 2016 to consider any information laid before it and then to decide whether or not to take action in the manner prescribed therein. In matters which fall within the exclusive domain of the Pakistan Telecommunication Authority under subsection (1) of Section 37 of the Act of 2016, **the powers and discretion is required to be exercised independently and without being influenced by any direction or information laid before it by the Federal Government**.*

*6. The august Supreme Court observed and held in the case of M.A. Supra that a discretion must be exercised only by the authority to which it is committed, and that in exercising the same the authority must genuinely address itself of the matter before it and must act in good faith and have regard to all relevant considerations. **It was further held that in exercising discretion, the authority must not be swayed by irrelevant considerations, nor must it seek to promote purposes alien to the letter and or spirit of the legislation that gives it the power to act and, therefore, must not act arbitrarily or capriciously.**"*

A more detailed explanation of the case against the Federation of Pakistan and PTA's powers, and the court's ruling, can be read in Bolo Bhi's policy brief published in July 2020, Pakistan's Online Censorship Regime.

Rule 5(5) states "the Authority shall ensure that the Online Content and the identity of the Complainant is kept confidential". While maintaining confidentiality is a statutory requirement for service providers and an authorised officer who obtains "access to any material or data containing person information" under Section 41 of PECA – a necessary obligation with respect to aggrieved parties – however, given that public institutions have been included in the definition of a complainant and Rule 5(5), in a blanket manner, imposes a restriction on disclosure about requests made to the Authority, it poses a challenge to transparency. It also runs contrary to the Right to Information (RTI) as enshrined under Article 19-A of the Constitution, under which federal and provincial laws have been enacted. It is in public interest to know the kind of requests public sector institutions make to the PTA and those that PTA makes to ISPs and social media companies, with respect to online content, as they have a direct bearing on Article 19 and 19-A rights.

Social media companies in their transparency reports categorise government requests separately and to date, this has been the only way to find out about the volume and nature of requests made by the PTA, since both the PTA and the Federal Investigation Agency (FIA) have a poor compliance record under RTI laws and transparency in general, a tendency well documented by now. They regularly flout statutory obligations, an example of which is the requirement to file bi-annual reports to Parliament under Section 53 of PECA. Only one has been filed since the enactment of the law in August 2016.

Rule 5(6) permits the PTA to, "on its own motion take cognisance of any unlawful Online Content" and "pass appropriate directions." This is an overarching, unregulated power akin to suo motu. The objective of Section 37(2) of PECA is to "prescribe rules...for the exercise of powers" of the PTA. The purpose is to curtail PTA's discretion by codifying a process that binds PTA to a process and subjects its powers to checks and balances. The purpose of the Rules is not for the Federal government and PTA to impose restrictions not envisaged in the law itself, on internet users and social media companies, which is what the Rules actually do without any authorisation by the parent law.

Rule 6 outlines a procedure for disposal of complaints. **Rule 6(2)** states "the Authority while deciding any complaint filed under Rule 5(1) or taking action under Rule 5(6) may pass any order in writing and reasons for its decision." The word "may" leaves it up to the PTA's discretion to decide whether to pass an order or record reasons, whereas multiple IHC judgments require the PTA to adhere to mandatory requirements of the law and provide notice, opportunity of hearing and pass a reasoned order. This is not optional or up to the PTA to decide on its own motion. Typically, PTA notices reference Section 37 and various other sections of the law, contain links and deem the said content in "violation of local law" without justifying or providing reasons for why it is a violation.

The proviso under Rule 6(2) states that prior to the passing of an order, the Authority "shall issue notice or provide an opportunity of hearing". This is not supposed to be an either/or situation. Typically, a notice is sent and then an opportunity of hearing provided after. Under the RTI laws, this takes the form of a hearing between the applicant seeking information and the party that is supposed to supply the information. If a response or information is not provided within the stipulated time as laid down in the federal law for instance, the applicant can file an appeal before the information commission. The commission then calls a hearing between both parties if a written

direction to provide the information is not met with a satisfactory response. While Rule 11(3) states the Authority shall decide a review application "after conducting hearing and pass its decision in writing," this has not been PTA's track record and should be stated with utmost specificity, leaving no room for discretion. Moreover, unlike appeals under the RTI law which go before an independent commission, here the PTA sits in judgment over a challenge to its own order. Who within the PTA makes the decision and who presides over the review process is not stated.

It is also unclear who a notice or opportunity of hearing will be provided to. The proviso states "as the case may be, the Complainant and any other Person who in the opinion of the Authority, is likely to be adversely affected by such order." What this fails to take into account is when such decisions concern social media platforms, the restriction or blocking also adversely impacts them. The affectee or the "Person" likely to be adversely impacted can be a company, someone who owns and manages a page or website, and users who access and interact on these platforms.

In terms of time frames specified within which "a service provider, Social Media Company, owner of Information System, owner of an internet website or web server and User" must comply, only 24 hours time is given to accede to the request and, in "emergency situations," 6 hours. This certainly does not fulfil the criteria of providing prior notice before taking adverse action. It is also not specified how the PTA will send the notice to the parties listed. Will it be via post, email or some other channel? **Rule 7** only states "upon receiving any directions under Rule 6 by the Authority, in writing or through email signed with electronic signature," the recipient is required to act within 24 or 6 hours. What happens if the email or post is not received or seen in time? Summons sent by the FIA, requiring attendance at their office, more often than not, have been received by individuals once the date of attendance has passed. While the summons are supposed to be sent via post, there have been instances in which they have been sent via Whatsapp or Facebook Messenger, and the person summoned has seen them much later. These are also not official channels. Is the expectation then that users and companies must sit by their doors or gates and wait for the post to arrive, or then hit refresh on their emails, check spam, look at Whatsapp and any other communication channels continuously, for a PTA notice they may get, in order to respond in a timely manner to avoid adverse action?

Then there is the question of when the 24-hour period begins. From the time the notice is dispatched? Received? How is receipt of notice tracked? A post may be received at the address but not by the individual it is addressed to. Or in the case of a

company, whether by post or email, the decision may rest with another individual or several individuals, for instance a committee or board, and without requisite approval the decision cannot be executed. What happens then?

If upon receiving the notice, the decision is to contest and not comply, preparing and dispatching the response can take well over 24 hours. Some may wish to consult legal counsel. While Rule 11 outlines a process for review of any order or direction by the PTA and stipulates a 30-day period within which this must be done – though it can be extended by the PTA with reasons – does the 30-day period for redressal of complaint and review run concurrently? Meanwhile, if a direction is not complied with, within the stipulated time frame, there is a looming threat under **Rule 6(5)** under which the PTA can go ahead and "initiate action," which under **Rule 8** can result in a blanket ban of the platform. What such action otherwise means has not been specified.

Additionally, the indiscriminate lumping together of various entities – a service provider, Social Media Company, owner of Information System, owner of an internet website or web server and User – does not take into account the difference in capacity between, for instance, an individual user and a large social media company or service provider. An average citizen or user will find it much difficult to navigate the bureaucracy of this process. It is unlikely that they will be able to obtain legal services if so required, in a timely manner or at a nominal cost. Even with resources available to social media companies and service providers, to earmark funds and staff simply to deal with such notices is cumbersome. And it is likely the volume of notices will be directly proportionate to the size and popularity of the platform. How much staff can be dedicated for this process? For smaller companies this cost can be prohibitive. Time and money invested into this process can be utilised better for more constructive ends.

While Section 32 of PECA authorises the PTA to require a "service provider" to retain "specified traffic data," this obligation extends only to a "service provider" as defined by Section 2(xxviii) of PECA. While the definition is somewhat broad, it is not applicable to a user. However, **Rule 6(6)**, extends this obligation to a user as well. It is also not clear why reference to this is made under the scheme of these Rules since Section 37 pertains only to "removal or blocking of access," not data.

Rule 8 permits the PTA to block "the entire Online system" or "services provided by such Service Providers owned or managed by the said Service Providers or Social Media Company." This is extremely disproportionate, excessive, and overbroad. Firstly, blanket bans are an unreasonable restriction. Suspension of services is also an

unreasonable restriction. Rule 8 also seems to suggest that if a particular piece of content exists on YouTube which is owned by Google, non-compliance could lead to not just a ban on YouTube but also disruption of other Google services? Within the context of Section 37 and Articles 19 and especially 19-A of the Constitution, this is illegal and unconstitutional. Section 37 allows the PTA to block, restrict or pass directions to block and restrict “an information,” not information system or services.

Rule 9 merges what is typically a content moderation function that platforms perform, with a content regulation function carried out by some governments. Each company, as a private entity, devises and publishes its own community guidelines or rules, which vary also due to the nature of the platform. **Rule 9(2)** issues a standardised decree requiring all platforms to incorporate and publish the listed categories as part of their community guidelines. Guidelines, standards, and rules are global, and their enforcement in relation to user requests and government requests takes on a local dimension. Factors that guide this process include whether i) the company is legally incorporated in a country and the local laws are binding ii) it has rolled out a local service or domain iii) the request falls within its own global standards, guidelines, or rules, and iv) if such a request is recognised by the company as valid as part of its legal enforcement regime based on the laws of the country of its origin. Different companies have varying thresholds and market interests also determine the level of compliance with regulators in any jurisdiction even if local law is not legally applicable or binding.

The other problem with the categories specified in Rule 9(2) is that they are extremely vague. They include:

i. belongs to another person or to which User does not have any right; or

ii. is blasphemous, defamatory, obscene, pornographic, pedophilic, invasive of another’s privacy; or

iii. Violates or affects religious, cultural, ethnical sensitivities, of Pakistan; or

iv. harms minor in any way; or

v. impersonates another person; or

vi. Threatens the integrity, security or defence of Pakistan, or public order, or causes incitement to any offence under the Act.

Rule 9(3) requires service providers and social media companies to put "appropriate mechanisms to identify content which falls in the categories listed in Rule 9(2)". How is a service provider or social media company expected to determine what online content falls under these categories when Parliament has been unable to do so in all these years. These definitions, as and when taken to court, keep evolving, and there is no consensus on what some of these terms normatively mean either, the ones pertaining to society or the State.

Some categories are already covered by platform guidelines and Rules, but the enforcement is through the complaint mechanism they provide, when users file complaints under various categories, with the option of an appeal. And while Artifical Intelligence (AI) is deployed to detect and remove child pornography for instance, the same is not possible for other content categories due to various considerations. The categories, as they exist in Rule 9(2) are vague and to expect their enforcement is not only impractical but also unreasonable, given how subjective these terms are. This is certainly a function that cannot and should not be performed through active monitoring.

Rule 9(5) requires social media companies with "more than half million users" or falls within the list of companies notified by the PTA to i) register with the PTA ii) establish a permanent registered office iii) appoint a focal person for coordination and compliance and iv) subject to the promulgation of the Data Protection law, establish one or more database servers in Pakistan.

All this is well beyond the scope of Section 37 which does not pertain to data at all. PECA also does not require this. Rule 9(5) is a data localisation provision that exceeds authorisation under Section 37 and PECA. Further, under **Rule 9(7)**, a service provider and social media company are required to provide the investigation agency with "any information or data or content or sub-content contained in any information system...in decrypted, readable and comprehensible format." This is technically impossible where end-to-end encryption exists and even where technically possible, violates privacy. Legally, under PECA's regime, the investigation agency has to apply for a warrant before the competent court and fulfill the requirements listed under Section 33 (search and seizure) and Section 34 (disclosure of content data), to obtain data. Data obtained in breach of this process would be illegal. And while this procedural protection exists on paper, in practice the FIA is known to seize devices and obtain access to data without obtaining warrants or fulfilling the requirements under the law.

Rule 9(9) requires service providers and social media companies to put in place something similar to a delay mechanism the electronic media was instructed to deploy by the Pakistan Electronic Media Regulatory Authority (PEMRA). This is apparently to prevent content from being uploaded or streamed live if it falls in the following categories: "terrorism, extremism, hate speech, pornography, incitement to violence and detrimental to national security." Other than these categories being vague and overbroad, the Internet and electronic media are two very different mediums. The only way to do this for the Internet would be large-scale, invasive filtering systems that breach secure protocols, and monitor and check every piece of information flowing through their networks. Other than the privacy rights at stake, this is also an impossible task practically – even with automation and artificial intelligence. It requires a huge undertaking in terms of technical equipment and human resources, which have costs attached. The volume of content, language and context is precisely what is already posing a challenge to companies in carrying out their content moderation functions. Filtering of this scale, and the capacity to breach encrypted protocols, also slows down the Internet. Subjecting all communication to prior, arbitrary checks, violates both speech and privacy rights locally and globally.

Rule 9(10) imposes a penalty of up to 500 million rupees if a service provider or social media company fails to comply with a directive of the PTA. This negates and withdraws the liability protection extended through Section 38 of PECA which states that "no service provider shall be subject to any civil or criminal liability, unless it is established the service provider had specific actual knowledge and wilful intent to proactively and positively participate, and not merely through omission or failure to act." Section 38 also states "the burden to prove that a service provider had specific actual knowledge, and wilful intent to proactively and positively participate shall be upon the person alleging such facts and no interim 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." Rule 9(9) clearly violates Section 38. It also exceeds the scope of Section 37 and PECA, which does not authorise the PTA to impose fines. Also, there is no stipulation for where the money collected through these fines will go.

Rule 10 pertains to "circumstances not to entertain complaints/applicants." What this does not specify is if the PTA determines the complaint cannot be entertained based on the circumstances listed, will the PTA respond to the complainant in writing, informing them why the complaint was not entertained and allowing them to either

amend their complaint or file a fresh one? No obligation is placed upon the PTA in this regard.

Chapter IV - Review Application

Rule 11 lays out the review process whereby any person aggrieved by an order or direction of the PTA may file an application within 30 days. The PTA can “condone a delay” in writing, again on its own motion. The Rules do not specify which officers or departments are responsible for making issuing notices, reviewing applications and conducting hearings. Beyond vague guidelines, their obligations and how to hold them accountable for any excesses or breach of process - which would need to be detailed - is not part of the Rules.

Given the discretionary nature of powers, users and companies in all likelihood will be buried in the bureaucracy of the process, unable to avail the remedy under **Rule 12**, an appeal to the High Court “within thirty days of the order” passed by the PTA. Which order? An initial notice or order? An order after the review process has taken its course? Even though RTI laws specify timeframes, they are not met. Often parties - especially state authorities - are given additional time to respond. Despite repeated notices in writing by commissions, they fail to respond. Courts expect the process under the law is first exhausted before a party approaches it for relief. For someone who is adversely affected by a decision of the PTA, thirty days or more is not a feasible time frame at all. During this time, they will likely suffer monetary losses, the platform will lose relevance and not everyone will have the ability to follow through with procedural delays.

The Bottom Line

- The Rules exceed the scope of PECA, specifically Section 37, they run contrary to various sections of PECA 2016, most notably Section 38 which extends liability protection to service providers, are therefore illegal and unconstitutional, and should be withdrawn by the Federal Cabinet by de-notifying them

- If the Federal Cabinet fails to denotify these Rules, the only remedy available to citizens and the local industry will be to invoke the writ jurisdiction of the High Courts under Article 199 and file challenges their vires

- Parliamentary committees should extend oversight with respect to these Rules and initiate the process for the repeal of Section 37**,** since both the Rules and Section 37 appropropriate legislative functions, infringe on fundamental rights, and violate the principle of the separation of powers

Section 37 is an overbroad and unreasonable restriction, it impacts rights under Article 19 and 19-A rights in particular. In violation of due process as enshrined under Article 10-A, powers under Section 37 have been abused and the Rules clearly demonstrate that the intent is to further exceed the scope of the law which will lead to further infringement of fundamental rights and abuse. Instead of allowing the PTA to retain this power and function under Section 37, it should be held accountable for its excesses and flagrant violations of the law. Section 37 should be repealed by Parliament or struck down by court. Remedies for citizens under other sections of PECA already exist, the omission of Section 37 will have no bearing on remedies available to them, as Section 37 serves no utility other than a censorship enabling provision for the State. Only once these Rules are denotified and Section 37 repealed, can an honest and informed conversation begin on the problems vis a vis online content and appropriate remedies which respect rights and offer actual recourse to aggrieved citizens.

For more on PECA, see our Archive.