

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and the Special Rapporteur on the situation of human rights defenders

REFERENCE:
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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and Special Rapporteur on the situation of human rights defenders, pursuant to Human Rights Council resolutions 34/18 and 34/5.

1. Introduction

With this letter we would like to bring to the attention of your Excellency's Government our preliminary reactions to the Citizens Protection (Against Online Harm) Rules, 2020 (hereinafter "Draft Rules"), dated 21 January 2020. This communication examines the compatibility of the Draft Rules with the obligations of Pakistan to respect, protect and fulfil the right to freedom opinion and expression and of privacy under international human rights law, particularly under the International Covenant on Civil and Political Rights, which Pakistan ratified 23 June 2010.

According to the information we have received, the Draft Rules would involve an implementation of powers under two laws, the Pakistan Telecommunication (Re-Organization) Act and the Prevention of Electronic Crimes Act (2016) ("the Act"). Among the rules that would be adopted:

- The establishment of the office of national coordinator (Paragraph 3) to (1) coordinate the regulation of online platforms, (2) advise public authorities in relation to management, regulation or functioning of social media companies "in accordance with requirements of National Security", and (3) engage with social media companies, including directing their representatives to appear before the national coordinator.
- The imposition of specific obligations on social media companies. Paragraph 4, for instance, would require that social media companies block and remove certain categories of online content, such as "extremism" and "fake news". The Draft Rules, in keeping with the Prevention of Electronic Crimes Act, define "extremism", in part, as "the violent, vocal or active opposition to fundamental values of the state of Pakistan . . ." (Paragraph 1.c) The Draft Rules do not, however, define "fake news".

- The establishment of a deadline for content action. Paragraph 4 also requires social media companies, “upon being intimated about any online content” in contravention of the Act or any other law, rule, regulation for the time being in force or instruction of the National Coordinator, to ensure the removal, suspension or disabling of access to the content within twenty-four hours or, in the case of emergency, within six hours. In this connection, the Draft Rules provide that “the National Coordinator shall be the sole authority in determining the situation of emergency.”
- The imposition of other obligations on social media companies. These obligations include registration with the governing authority, establishment of local offices and “a focal person” in Pakistan, the localization of data on servers in Pakistan, and an obligation to take actions against content of or accounts held by Pakistani nationals residing abroad where engaged in “spreading of fake news or defamation and violates or affects the religious, cultural, ethnic, or national security sensitivities of Pakistan”.
- An obligation to “provide to the Investigation Agency” under the Act “any information or data...in decrypted, readable and comprehensible format...”
- Significant penalties for failure to meet the obligations imposed under the Draft Rules. The national coordinator may fine social media companies up to 500 000 000 Pakistani rupees (approx. 3.2 million USD) for failure to comply with any provision of the Draft Rules. The national coordinator may also order the “blocking of the entire Online System, Social Media Application or [Over the Top Application]”.
- The establishment of procedures for submitting complaints and requests for removal of online content, along with review and appeals (Paragraphs 8 – 14).

Before identifying our specific concerns with the Draft Rules, we begin by noting that Article 19 (2) of the ICCPR guarantees everyone’s right to seek, receive and impart information and ideas of all kinds, regardless of frontiers and through any media. As the Human Rights Committee emphasized, Article 19 protects “the expression and receipt of communications of every form of idea and opinion capable of transmission to others” (CCPR/C/GC/34 para. 11). It embraces “even expression that may be regarded as deeply offensive” (id). The scope of Article 19 (2) includes “all forms of expression and the means of their dissemination” (id. para. 12). The UN Human Rights Council and the United Nations General Assembly and our mandates have consistently affirmed that freedom of expression applies equally online and offline (see A/HRC/RES/20/8 (2012)).

Any restriction of the right to freedom of expression, online or offline, must be justified under the requirements under Article 19 (3) of the ICCPR. That is, the State must demonstrate that the restrictions meets three conditions:

- It must be “provided by law.” This entails that it is “formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution” (CCPR/C/GC/34 para. 25);
- It must aim to protect one of the legitimate aims described in Article 19 (3) , that is, (a) the rights or reputations of others; or (b) national security or of public order, or public health or morals.
- It must be necessary and proportionate. This means that it must be necessary to achieve its legitimate purpose (CCPR/C/GC/34 para. 33) and the measure must be “appropriate to achieve [its] protective function; [it] must be the least intrusive instrument amongst those which might achieve their protective function; [it] must be proportionate to the interest to be protected”. (*id.* para. 34)

Under Article 20 of the ICCPR, the State also has an obligation to prohibit propaganda for war and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, violence or hostility. The Human Rights Committee has noted that any implementation of Article 20 obligations must also comply with the requirements in Article 19 (3) (*id.* para. 50).

In addition to the protections of opinion and expression under Article 19, Article 17 ensures the right to privacy. The scope of this right is broad. As indicated by the Human Rights Committee, “the notion of privacy refers to the sphere of a person’s life in which he or she can freely express his or her identity, be it by entering into relationships with others, or alone.” (Human Rights Committee, *Raihman v Latvia*, communication no. 1621/07, para. 8.2) The UN Human Rights Council affirmed that the right to privacy applies equally online and offline (see *A/HRC/RES/34/7*, see also *A/HRC/27/37* para. 20). Any restriction on the privacy of individuals online will constitute a restriction of the Article 17 of the ICCPR, including through such measures as surveillance (targeted or mass surveillance) or the collection of personal data (see *A/HRC/RES/34/7*). Article 17 of the ICCPR provides that the right to privacy may not be subject to “unlawful or arbitrary interference”. As indicated by the Human Rights Committee, “[t]he introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances” (CCPR General Comment No. 16: Article 17 (Right to Privacy), adopted 8 April 1988, para. 4). This entails that restrictions should be “proportional to the end sought and be necessary in the circumstances of any given case” (Human Rights Committee, *Toonen v. Australia*, communication no. 488/92, para 8.3).

The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, also known as the Declaration on Human Rights Defenders,

specifically protects all those who share information on human rights, as well as their personal views and observations on those rights. Article 6 (c) of the Declaration provides that everyone has the right to “study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters.”

2. Application of international standards to the Citizens Protection (Against Online Harm) Rules

a) Introduction

The Draft Rules raise very serious concerns related to your Excellency’s Government’s obligations to promote and protect freedom of expression. We previously addressed our concerns about the Act in 2016 (OL PAK 8/2016, 8 July 2016; OL PAK 13/2015, 14 December 2015), and we are grateful for your Excellency’s Government’s engagement with our communications. Nonetheless, we believe that those concerns remain pertinent to the Draft Rules. In keeping with our previous comments, we would like to highlight our concerns according to the limitations on restrictions found in Article 19(3) and Article 17, among other provisions of human rights law binding on Pakistan.

b) Concerns

Paragraph 4 (1) provides that any content “in contravention of any provision of the Act, or any other law, rule, regulation for the time being in force or instruction of the National Coordinator”, is subject to removal. This provision is fraught with serious deficiencies. First, the wording of the Draft Rules provide a blanket competence to the National Coordinator to instruct social media companies to remove content, be it lawful or unlawful. These decisions made by the National Coordinator appear not to be subject to institutional, let alone judicial, control. It is useful here to recall that a law providing “unfettered discretion for the restriction of freedom of expression on those charged with its execution”, fails to meet the “provided by law” standard set out in Article 19 (3). Second, the general reference to any rule currently in force will not enable permit individuals affected, or the social media companies that are required to comply with the law, to predict with confidence what types of expression would be subject to removal. This is even more so because of the individual duties imposed on social media companies in their enforcement of the law under Article 4 paragraphs (3) and (4).

Paragraph 4 (3) provides that social media companies are under the obligation to take “due cognizance of the religious, cultural, ethnic and national security sensitivities of Pakistan”. This provision fails to clarify with sufficient specificity the “sensitivities” at issue. Given that the National Coordinator would enjoy significant control over implementation, it is imperative that provisions such as these be exceedingly clear and subject to rigorous oversight, given the likely impact on expression of users. The language is so broad as to incentivise companies to err on the side of removal of legitimate content.

Paragraph 4 (4) provides that social media companies shall “deploy proactive mechanisms to ensure prevention of live-streaming through Online Systems in Pakistan” of any content that might qualify for removal under the act. We are concerned that the provision does not distinguish permissible from impermissible measures of prevention. Thus, it would seem to encourage the measures permitting the monitoring of live-streams and would potentially legitimize the prior censorship of content by social media companies. Furthermore, the assessment of whether the content of a live-stream should be subject to measures of prevention requires nuanced assessments of content and context that would be difficult, if not impossible, to implement without potentially undermining live streaming services altogether (compare, for example, with the assessment in OL AUS 5/2019).

Paragraph 5 (e) imposes a duty upon social media companies to “remove, suspend or disable access” to accounts of Pakistani nationals residing outside Pakistan, should they publish content that is “involved in spreading [...] fake news or defamation and violates or affects the religious, cultural, ethnic, or national security sensitivities of Pakistan citizens of Pakistan residing outside its territorial boundaries”. The provision contains two conditions for account actions related to nationals residing abroad. First, the account must be involved in spreading fake news or defamation. It is unclear what the standard of “involvement” entails, or how “fake news” is defined. The second requirement is that it violates or affects certain categories of sensitivities of Pakistani citizens. However, it is not at all clear what the requisite standard of violation or affectation of sensitivities of Pakistani citizens entails, or how it should be interpreted or applied. In sum, the provision entails a risk of arbitrary decision-making and makes it difficult to predict in advance what types of content would make an account eligible for removal or suspension.

The vague terms with which the provisions in the Draft Rules are framed raise specific questions as to whether they are necessary for the protection of a legitimate aim specified in the Covenant. The broader the competence to restrict rights, the more likely it is to constitute a disproportionate restriction.

For instance, we are concerned that the general reference to “rules in force” in the Draft Rules would reinforce existing law that fails to satisfy the requirements under Art. 19 (3) of the ICCPR. For instance, the prohibition of blasphemy under Pakistani law, as I have indicated previously, does not pursue a legitimate aim recognised in the Covenant, and has for this reason been declared incompatible with the ICCPR (A/74/486 para. 21, CCPR/C/GC/34, para. 48). The removal of content with reference to a violation of the prohibition of blasphemy would consequently also constitute a violation of the ICCPR.

In addition, the Draft Rules refer to ethnic, religious, cultural, and national security sensitivities in Pakistan. General references alone to the legitimate aims under the Covenant do not satisfy the requirement that the State demonstrate that any measure of restriction is necessary within the meaning of the Covenant. In a context like the present one, where the State in part delegates responsibility to moderate content to a non-

State actor, these broad categories of almost inevitably lead to overreach and arbitrary decision-making.

Finally, regulation of “fake news” or “false” information creates particular challenges. Restrictions on false information are inherently problematic. The 3 March 2017 Joint Declaration on freedom of expression and “fake news”, disinformation and propaganda¹ is relevant in this regard. The declaration is a restatement of human rights principles applicable to the regulation of “fake news” and disinformation, and should thus be considered best practices in the implementation of such measures of regulation. As indicated in section 2 a of the declaration, “general prohibitions on the dissemination of information based on vague and ambiguous ideas, including “false news” or “non-objective information”, are incompatible with international standards for restrictions on freedom of expression, [...] and should be abolished”. The Special Rapporteur on the freedom of opinion and expression has provided analysis on the compatibility of “fake news” legislation with international human rights law on several occasions (see OL SGP 3/2019 (24 April 2019), OL ITA 1/2018 (20 March 2018), OL MYS 6/2018 (28 December 2018)). In the most recent of these letters, he expressed that the restriction of information based on vague notions of “falseness” entails significant risk of abuse. It may permit the “suppression of a wide range of expressive conduct, including criticism of the government, and the expression of unpopular, controversial or minority opinions” (OL SGP 3/2019 p. 5). Lastly, the restrictions on expressions that are false result in complicated delimitations in individual cases and entails significant risks of misapplication. The extent to which this is incompatible with the ICCPR is intimately related with the extent to which there are safeguards against abuse, see further below.

As previously mentioned, the Draft Rules would also impose a series of penalties on social media companies. The severity of these penalties incentivizes the restriction of expression, and should be understood in conjunction with broad scope of the obligations of these private actors to enforce content moderation online. The risk of such penalties increases the likelihood of arbitrary restrictions on the freedom of expression.

Recalling that the proportionality assessment entails a duty to implement the least restrictive means, one must consider the extent to which the Draft Rules include safeguards against potential abuse, and whether there are mechanisms that would prevent that than what is strictly necessary to achieve the legitimate aim concerned.

As a basic starting point, “States should refrain from adopting models of regulation where government agencies, rather than judicial authorities, become the arbiters of lawful expression. They should avoid delegating responsibility to companies as adjudicators of content, which empowers corporate judgment over human rights values to the detriment of users.” (A/HRC/38/35, para. 68)

¹ Issued jointly by the UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights Special Rapporteur on Freedom of Expression and Access to Information.

It is striking to note that despite providing for severe restrictions on the exercise of the right to freedom of expression, and broad powers to government agencies and private companies, the Draft Rules do not contain any procedural safeguards against abuse. Instead, the rules of procedure contained in the draft concern avenues to complain about expression that allegedly contravenes the Draft Rules.

Likewise, no procedures exist to ensure that measures of blocking social media systems are in compliance with Article 19. This is problematic not only because it entails a strong incentive to prevent certain expressions on their platforms, but because the blocking of a social media system would prevent individuals from accessing certain forums for expressing themselves online.

c) Surveillance of online communications in Pakistan

Paragraph 6 provides that social media companies “shall provide to the Investigation Agency designated or established under section 26 of the [Prevention of Electronic Crimes Act], any information or data or content or sub-content contained in any information system owned or managed or run by the respective Social Media Company, in decrypted, readable and comprehensible format or plain version in accordance with the provision of the aforesaid Act.”

Our concerns in relation to this paragraph in the Draft Rules should be understood in conjunction with concerns previously raised in OL PAK 8/2016 and AL PAK 13/2015. The concerns raised dealt with the excessively harsh penalties for offences that did not meet the requirement of legality under Article 19 (3), the granting of broad powers to the authorities to regulate content online, and the powers to require the retention by service providers of data. Beyond these concerns, the Act was likely to have a chilling effect on the freedom of expression, particularly the work of investigative journalists and human rights defenders.

The paragraph also imposes a duty to provide information to the authorities in decrypted format. This would involve an interference with the right of individuals to maintain the privacy and security of their communications. As indicated in the report of the UN Special Rapporteur on the freedom of opinion and expression to the UN Human Rights Council (A/HRC/29/32), such measures, as restrictions under Article 19, must satisfy the requirements of legality, necessity and proportionality (*id.* para. 52). The Draft Rules do not provide indications that this standard is met, particularly when viewed together with the problems which we have previously identified with the Act.

Lastly, the blanket competence granted to the Investigation Authority to demand information from social media companies is particularly problematic when read in relation to the proposed obligation of Social Media Companies to establish servers within the territory of Pakistan. As the Special Rapporteur on the freedom of opinion and expression indicated in his report to the UN Human Rights Council, laws requiring the

localization of data may encourage surveillance measures (see A/HRC/32/38, paras 61 and 80).

3. Conclusions

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information that may be relevant.
2. Please provide information on the status of the present Draft Rules and the measures taken to reject the proposal or amend it in accordance with State obligations under the ICCPR.
3. Please provide information on the extent to which the authorities have and taken into account the views of affected stakeholders in the preparation and development of the Draft Rules.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting website within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration.

David Kaye

Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

Michel Forst

Special Rapporteur on the situation of human rights defenders