



The Prevention of Electronic Crimes Act 2016 And Shrinking Space for Online Expression in Pakistan

Yasir Aleem, Lecturer College of Law, University of Sargodha, Pakistan. yasir.aleem@hotmail.com

Muhammad Asif, Ph.D. Scholar (Sociology) School of Government, Universiti Utara Malaysia. asifnsf@gmail.com,

Mohid Khaliq, Ph.D Scholar (Public Administration) School of Government, Universiti Utara Malaysia mohidkhaliq50@gmail.com.

Iqra Intiaz, Lecturer, Government. Degree College for women BastiMalook, Multan. Iqraintiaz25@gmail.com.

Muhammad Umair Ashraf, Ph.D. Scholar (Sociology) School of Government, Universiti Utara Malaysia. umairgujar359@gmail.com

Abstract- Freedom of expression is one of the most cherished fundamental rights. It also imperative in all fields including cyber or digital space. The Prevention of Electronic Crime Act (PECA-2016) was enacted in 2016 to regulate cyber or digital space in the country. This study critically comprehends PECA-2016 with regard to online expression in Pakistan. Doctrinal as well as non-doctrinal(socio-legal) research method are adopted in present study. Under non-doctrinal(socio-legal) methods, unstructured interviews with three legal experts were conducted. This study finds out that there are several provisions in the PECA-2016 which adversely affect online freedom of expression in the country. It is concluded that some of the provisions of the PECA-2016 should be improved or repealed to bring it in conformity with freedom of expression principles.

Keywords: Electronic Crimes, Freedom of Expression, Online Expression, CyberSpace

I. INTRODUCTION

Freedom of expression is one of the basic essentials of democracy (Blasi, 1995). During this digital age and almost all of political activities takes place online, ranging from political leaders involving with their voters or research by voters about their prospective leaders. For such political activities a vibrant and free digital space is essential (Hutt, 2019). Free digital space allows all speakers to reach out to all potential global audience and allows people to access information from diverse perspectives. However, in autocratic countries of the world, availability to information is considered dangerous. People who are in power in those autocratic countries do not prefer to face inconvenient queries from the public or journalists (Karanicolas, 2020). The beginning of the digital time has also paved a need for a vigorous cyber space or digital space legislation in nation-states (Baloch, 2016). Nevertheless, many states around the globe are finding difficulties regarding promulgations of comprehensive laws for online content. Technological advances are outdoing the solutions planned by state departments (Dad, 2017). Those were aimed to counter new challenges rising out of the growing usage of digital media. State governments in the world are also finding it difficult “to change present laws that seek to ensure the regulation of cybersecurity (Hassine, 2016).”

In 2016 Pakistan promulgated famous “The Prevention of Electronic Crimes Act (PECA)” for regulation of cyberspace in the country (Raza, 2017). Prior to its creation of PECA in 2016, “the Electronic Transactions Ordinance (2002)(ETO)” criminalized illicit and unauthorized access to material. While before the passage of a direct and detailed data protection law, the ETO laws tentatively regulated data protection and privacy. ETO however in ETO there was no direct regulation of data protection but instead criminalized illegal or unauthorized access to information. The questions that have recently appeared due to the growing use of digital media called for the formation and execution of an appropriate and separate legal framework that endeavors to guard the “digital rights” of individuals (Mohammed, 2016).

It must always be remembered that all such laws and regulations are eventually passed for the protection and promotion of rights of the citizens in that specific country. Any draconian laws that restrains the citizen’s constitutional rights and strengthen suppressive state governmental powers would defeat the letter and spirit of the law. However, the PECA became controversial even before its promulgation in 2016. even than it was enacted in August 2016. The promulgation of this contentious law concluded a lengthy and tense clash

between the federal government and the several stakeholders who criticized it as “an incoherent mix of anti-speech, anti-privacy and anti-Internet provisions”. In a state like our Pakistan, where there is comparatively little literacy regarding digital content, an effective and comprehensive law for curbing cyber offences must have been drafted earlier and implemented, with the necessary acumen and vision to confirm that it continues to remain within the national constitutional framework(Baig, 2016).

This study analyzes the PECA by discussing it within the constitutional framework of the country and evaluating its different provisions, which are expected to violate some of the fundamental rights granted by the Constitution of Pakistan. Although there are numerous sections in the PECA that have serious influence on some of the fundamental rights of the citizens like right of due process, right of privacy and freedom of speech. However, in this study the focus is on implications of PECA for online freedom of expression. This article argues that although PECA has regulated the previously unregulated internet in the country but some of its provisions have serious implications for online speech in the country. This article is divided into five parts. First parts present the introduction of the study. Second part presented the methodology of the study. Third part comprehended the principle of freedom of expression as envisioned under the constitution of Pakistan. Fourth part presents critical analysis of PECA and the issues it poses for online speech online in the country. Fifth and last part presented conclusion of the study.

II. METHODOLOGY

Legal research method is separated into doctrinal and non-doctrinal (Socio Legal). Present study combined both doctrinal as well as non-doctrinal legal research method. Yaqin (2008) in his book has stated that typically legal research contains four varied methods, namely analytical, descriptive, comparative and historical. Under this study analytical legal research method is applied(Yaqin, 2008). This method is adopted to ascertain, describe and analyze the attitude of Pakistan towards regulation of online expression.

As this study attempts to gain an in-depth analytical perspective about regulatory framework of online expression in Pakistan, therefore, only analytical legal research method is not adequate to address the subject (ONeill, 2017). Non-doctrinal research method is adopted to supported doctrinal method (Dobinson&Johns, 2007). Under non-doctrinal or socio legal research methods, the qualitative methods of in-depth interviews are adopted (Krauss, 2005). Three legal experts were selected for the purposes of in-depth interviews (Kee, 2015). Socio legal method of interview was adopted to acquire detailed understandings of problems annexed with PECA (2016).

Freedom of expression in Pakistan

The Pakistani Constitution of 1973 maintains the essentials for a vivacious democracy and pledges freedom of expression (Khalid Aziz vs Pakistan Television Through Managing Director, 2017). Emphasizes is always made on state’s commitment to Islam and at the same time the Constitution features the vital civil rights intrinsic in a democracy(Chaudhry, 2011). Constitution of Pakistan presents that citizens (Mahmood, 2015):

“Shall be guaranteed fundamental rights, including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality”.

Fundamental rights are the heart and soul of a living Constitution and must always be ready to embrace and protect the sensibilities of the people. They must be progressively construed to advance the ideas and notions of freedom, free choice and individual autonomy. Such vitality and vibrancy are the hallmark and eminence of a living Constitution in a democracy(Sheikh, 2007).Freedom of expression is key cornerstones of fundamental rights and also of democratic institutions. Freedom of expression extends from all subjects to all themes. It also affects all parts of life without imitating to any fact of human interest (Ali Raza vs Federation of Pakistan, 2017). “*Article 19 of the Constitution of 1973*” presents the notion of freedom of speech, expression and freedom of press in Pakistan in the following words (Ali Raza vs. Federation of Pakistan, 2017);

“Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defense of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, [commission of] or incitement to an offence”

Constitution of the Pakistan pledges freedom of speech and expression only to citizens. Foreigners and non-citizen residents do not enjoy this right (Suo Motu Case No 07 of 2017, 2019). In Pakistan the notion of freedom of speech and expression does not take the shape of a positive or enforceable right (Salman Shahid vs Federation of Pakistan, 2017). It falls under the umbrella of negative liberties to communicate with others or immunity from interference by others. This means that an individual may say or write as long as it does not infringe the right of others or violates any law. The freedom unlike an infringed right is subject to statutory curtailment and may be restricted by judicial development of law (DG cement vs Federation of Pakistan, 2013).

Freedom of speech was defined by the Lahore High Court as “an expression or communication of thoughts or opinions in spoken words. An expression of or the ability to express thoughts and feelings by articulating sounds or a sequence of lines written for one character in a play”. Whereas freedom of expression means “the action of making known one’s thought or feelings; the conveying of feelings in a work of art or in performance of a piece of music; writings, speech, or action that show a person’s ideas, thoughts, emotions or opinions. Expression include speech. Any dramatic work is therefore a symbol of speech and expression. The right to communicate and receive ideas, knowledge, information, beliefs, theories, creative and emotive impulses by speech or by written words, theatre, dance, music film, through a newspaper, magazine drama or book is an essential component or the protected right of freedom of expression (Leo communications Limited vs. Federation of Pakistan, 2017)”. The broadcast of ideas, culture, history, literature, opinions, thoughts, emotions and art through the medium of plays and dramas signifies freedom of expression in a country (Suo Motu Case No 28 of 2018, 2019). The right to freedom of expression covers the right to receive and circulate literature to public (Muhammad Ayoub vs. Federation of Pakistan through Secretary, Ministry of Interior, 2018). Freedom of expression also infers freedom of communication including freedom to receive communication. It may be done by all lawful means, e.g. loudspeakers (Province of Punjab vs Qaiser Iqbal, 2018). More ever the right to expression brings with it the basic right to circulate one’s philosophies and publish his sentiments with full freedom. We can also resort to any existing means of publications and subject to such restrains as could be lawfully levied under the abovementioned clause (Sakal Papers (P) Ltd., And Others vs The Union of India, 1962).

The fundamental right of expression includes the right to the public to know as to what the government is doing in a democracy. An elected government attributes great value to this freedom. This freedom paves ways for good governance in a democratic country (Cafferty, 2009). The nature and extent of this freedom and fundamental right determines the quality and maturity of democracy in a country (Awais, 2008). The right to freedom of expression applies to all subjects that are related with all ways of life without limitation of any fact of human interest. Furthermore, the right of freedom of speech and expression carries with it the right to publish and circulate one’s ideas, opinions, and views with complete freedom (Masud, 2017).

Freedoms of expression as all other freedoms are closely connected with the notion of rights. Those rights are further strengthened in shape of fundamental rights, mostly provided under the Constitution. Freedom of expression is one of those cherished fundamental rights. Rights of citizens are tied with or counterbalanced by responsibilities in a society. Absolute and uncontrolled individual freedom do not find place in present time in any state (Minnesota Voters Alliance, Et Al v. Joe Mansky, 2018). In any organized society the collective interests, security and peace are of vital importance. If the country itself is in chaotic and dangerous situation than the applicability of fundamental rights is irrelevant at that time in that country. It is therefore required that an equilibrium should be managed between the fundamental rights and its restrictions (Nawabzada Nasrullah Khan v. Government of West Pakistan, 1965). The freedom of expression under the Constitution has maintained that equilibrium. Article 19 of the current Constitution of Pakistan has expressly protected freedom of speech, expression and freedom of press (Independent Media Corporation (Pvt.) Limited vs.

Pakistan Electronic Media Regulatory Authority, 2019) and Constitution has expressly provided restrictions under the same Article 19.

Although the right of expression is expressly granted to the citizens of the country and no companies or organizations are offered freedom of expression. An exception was made where press was specifically promised freedom of expression in the same Article 19 of Pakistani Constitution and is subjected to the same restrictions (Khalid Aziz vs Pakistan Television through Managing Director, 2017). Bare examination of Article 19 of Constitution presents it clearly that this right of freedom of expression is not unqualified but a limited right. Limitations on freedom of expression may be levied if it meets the necessities of "reasonableness". Nevertheless, the word "reasonableness" is not well-defined in the Constitution. It is neither conceivable nor advisable to present any theoretic standard of general application of reasonableness (Fazeel, 2002). Than "what exactly is the test and method of defining Reasonableness of restriction within the ambit of freedom of expression?" This is a vital and most relevant question prior to proceeding to the different kinds of restrictions. The superior Courts has defined this reasonableness and prescribes that "when state wishes to deny to its citizens the enjoyment of fundamental rights enshrined under the constitution; three significant features must be accomplished" (Srivastava, 2017).

- a) The restrictions on expression under article 19 can only be levied by the authority of law, no restriction can be levied by the authority of executive of the country.
- b) Each restriction must fulfill the condition of reasonable restriction.
- c) Restriction should be allied to the objects declared in Article 19.

Article 19 of the constitution grants the authority and power to the parliament to enforce reasonable restraints on freedom of expression "in the interests of" or "in relation to Glory of Islam, Integrity and Security of Pakistan, Friendly relations of states with foreign states, Public order, Decency or morality, Contempt of court and Defamation". It is the authority and power of the courts to interpret and decide about the reasonability of the restrictions imposed upon freedom of speech and expression in Pakistan.

PECA-2016 and Online Expression in Pakistan

"The Prevention of Electronic Crimes Act 2016" was promulgated on 16th of August for regulation of cyber content in the country. This law presented both substantive as well procedural aspects. PECA law, which regulated online content was created in the wake of "the National Action Plan (NAP). The National Action Plan (NAP)" was created after the deadliest attack on "Army Public School in December 2019". The government stressed that it needed "unfettered ability to monitor, locate and prosecute alleged militant activity (Daudpota, 2016)." It is this precisewish that also pervaded into all other laws promulgated in the aftermath of APS tragedy. For instance, the other responses of the government of Pakistan included lifting of unofficial moratorium on the death penalty in the country. At that time the situation of the country was compared with that of post- 9/11 of USA. In USA after 9/11 "Patriot Act 2001 (Foundation, 2018)" was passed and in UK "the Anti-Terrorism, Crime and Security Act 2001" was passed (SEPT. n.d.). However, both of these pieces of laws were severely criticized for threatening and violating the basic civil liberties of the citizens of the respective countries. the same is the case with Pakistan. "The Prevention of Electronic Crimes Act 2016" is also severely criticized for violating and threatening several of important rights of the citizens of the country. While there are numerous provisions in the PECA that have serious influence on some of the fundamental rights of the citizens like right of due process, right of privacy and freedom of speech. However, in this study the focus is on implications of PECA for online freedom of expression.

PECA-2016 has faced a severe criticism have been made on PECA-2016 for threatening the fundamental right of freedom of speech under "Article 19 of the Constitution of Pakistan". Freedom of expression and speech is always liable to several limitations under the constitution. However, those restrictions should always fulfill the condition of reasonability (Sadaf Liaquat n.d.). While there is no such absolute test for reasonableness of restrictions in country, as a general rule, it is for the state courts to resolve whether, under the provided situations, a restriction meets the criteria of reasonableness or not. One of the utmost pressing apprehensions relates to whether the powers granted to authorities under PECA should be lied with them in the first place.

There are several provisions in the PECA 2016 which adversely affect online freedom of expression in the country (Hassine, 2016). Section 9 of the PECA-2016 deliberates the adoration of an offence and also stipulates the kinds of offences in the same section. However, legal scholars believe that this part of the PECA is drafted in very broad terms. this part is also against the international standards related with on freedom of speech. Some of the legal scholars presents this part as a classic illustration of a provision that has a “chilling effect” on freedom of expression(1,Interview with Legal expert no, 2020). A chilling impact is the dissuasion of the valid exercise of lawful rights by the threat of permissible sanctions. Generally, this terminology of chilling effect is thoroughly deliberated in the USA under the umbrella of the USA First Amendment. “In the US Supreme Court case of *Reno v ACLU*, the constitutionality of two provisions of a statute was challenged. The Supreme Court held that the statute violated its First Amendment because the regulations amounted to a content-based blanket restriction of free speech. Justice John Paul Stevens wrote that the vagueness of the statute was a matter of special concern because it related to a content-based regulation of speech. The vagueness of such a regulation raised special First Amendment concerns because of its chilling effect on free speech. Herein, the ‘chilling effect’ would have been the discouragement of the exercise of an individual’s right to free speech”(Baig, Prevention of Electronic Crimes Bill 2016 – Implications for Investigative and Public Interest Journalism, 2016).

Likewise, Section 9 of PECA-2016 also have the tendency to stifle any kind of deliberation on matters related with terrorism, national security, or public interest (3, Interview with Legal expert no, 2020). Specifically, this section relays to “crimes related to terrorism and activities of proscribed organizations does not resolve the threat it poses to the freedom of speech and press”(3 2020). criticism on public officials and public figures is one of the established objectives of the freedom of expression. However, this principle was also stifled in the section 18 of the PECA 2016. “US Supreme Court case of *New York Times v. Sullivan*(New York Times v. Sullivan n.d.)” provides that public figure cases for damages to reputation have very limited space and limited in nature. Section 18 of the PECA 2016 makes no difference between public and private office holders regarding criticism on them. it puts both public and private officials in the same bracket and safeguard them from criticism (2, Interview with legal expert no. 2020).Public whistleblowing is also considered as one the basic principle of freedom of expression in a settled democracy. Public whistleblowing allows individuals to bring into light the misdeeds, scandals and other illegitimate actions of the public figures. However, section 21 makes it illegal “for someone to take a photograph or video of any person and display it without his/her consent in a manner that might harm that person”. Again, there is no division between private and public individuals under this section and neither this section has defined “harm”. The intrinsic vagueness of the provision makes it almost impossible to criticize the sitting government of the country. any constitution of the world would not allow such provisions in any form in the country.

Overbreadth and vagueness permeate numerous parts of the Act. In general, free speech jurisprudence of the civilized world the overbreadth and vagueness of the sections are sufficient to strike down those legislations. Vagueness of the laws force people to think twice before speaking or writing anything in countries like Pakistan. Whereas overbreadth results in outlawing not just genuinely harmful speech but also benign and valuable speech. This piece of legislation does not recognize these basic principles. this does not even comprehend the basic and simple concepts of free speech. Furthermore, several sections indulge in blatant “viewpoint or content discrimination”, which are some of the greatest forms of unlawful speech legislation (Interview with Legal expert no. 3, 2020).

The other instances which hamper freedom of online speech includes Section 37 of PECA-2016 which debates illegitimate online content in the country. Under Section 37 of the PECA, huge powers are grated to PTA regarding block and removal of online content (2, Interview with Legal Expert No, 2020). These powers allow PTA to restrict expression in the country. Historically PTA is famous for its casual but frequent romances with state censorship, arbitrary blocking and removal of content. tis reliability on PTA has two-fold problems. Firstly, the cases related with online speech in the country are left at the sole discretion of the PTA. In this regard PTA has the sole and absolute executive authority and power to decide as to in what way Article 19 of the Constitution is to apply and interpreted regarding online content in the country (1, Interview with Legal expert no, 2020). Representatives or the authorized persons of the PTA have the complete power and authority to remove any content which they consider as anti-state, immoral, politically unacceptable or any other reason. This clearly indicates that both the executive and judicial functions are vested with the

executive authority of the PTA. One must also understand that section 37 of the PECA merely restates the limitations concerning to freedom of speech, which have been provided in Article 19 of Pakistan Constitution (Vagueness in Cybercrime Law, 2019). Instead of “providing a more comprehensive approach regarding cybercrimes and providing laws that secure the interest of citizens and safeguard fundamental rights, the legislature has focused on providing a law that prioritizes national security and limit online freedom of expression (1, Interview with Legal expert no, 2020)”.

Secondly, Section 37 of the PECA also permits complainants to file petitions with the PTA to block any content in question. PTA has the authority to act unilaterally against such content solely on the basis of such compliant and there is no such requirement of court order for such removal (2, Interview with Legal Expert No, 2020). These unfettered powers provide state an apparatus to block and deal with content that it believes as unacceptable. For instance, the government can block access to any online political content beneath the umbrella of preventing online harm in the country. According to a report presented by Transparency International, only on Facebook, more than 177 online posts have already been constrained from viewership. This was done on appeals advanced by the PTA for “violating local laws prohibiting blasphemy and condemnation of the country’s independence (Pakistan’s Cybercrime Law: Boon or Bane? n.d.)”.

There are numerous other provisions in PECA2016 which seriously affect other fundament right of the citizens of the country. There is dire need to change this mindset of controlling speech in the country. Democracies does not flourish when speech is controlled in the country. Another attempt to control the remaining space for online speech was made on the beginning of this year “***the Citizens Protection (Against Online Harm) Rules, 2020***” were passed by the Federal cabinet of the country. These rules were passed under the

“clause (c) of sub-section (2A) of section 8, sub-section (1) of section 54 and clause (ag) of sub-section (2) of section 57 of the Pakistan Telecommunication (Re-organization) Act, 1996 (XVII of 1996) and the sections 35, 37, 48 and 51 of the Prevention of Electronic Crimes Act, 2016, (XL of 2016)(The Citizens Protection (Against Online Harm) Rules, 2020)”

These rule if implemented would have posed a grave danger for online free speech in Pakistan. Apparently, the *Rules* were aimed at restricting harmful online content, such as hate speech, misinformation and harassment. However, the breadth and vagueness of these *Rules*’ restrictions, and the invasive requirements that they placed on social media platforms, would have severely threatened online freedom of expression (2, Interview with Legal Expert No, 2020). The *Rules* would have granted unprecedented and extraordinary censorship powers to a newly appointed National Coordinator, and they would have made it almost impossible for international online media platforms to present services to end-users in Pakistan. however due to severe criticism and allegedly noncooperation of international online media platforms the federal government was forced to withdraw and suspend operation of those rules. those rules if implemented would have adversely affected online freedom of expression in the country.

III. CONCLUSION

Regulating cyberspace is a challenging task for every nation. In Pakistan, the enactment of the Prevention of Electronics Crime Act (PECA), (2016), despite many reservations, was a step in the right direction due to the emerging cyber threats and the need to provide protection to citizens’ rights. However, the threats posed by some of the provisions of the Act has grave implications for freedom of expression and some of the other fundamental rights of the citizens. This article analyzed freedom of expression principle as protected under the constitution of the country. Secondly this article investigated the threat posed by the PECA for freedom of online expression in the country. However, problems of PECA 2016 which are related with fundamental rights other than freedom online expression and its enforcement problems were not discussed in this article. This Act in current shape and form has the tendency to pose blatant attacks on constitutional right to freedom of speech and it needs to be revised. Newly emerged forms of online journalism, literature, values and people discourse are at stake. It is the need of the time to speak and raise voices against the threats raised by this piece of legislation in Pakistan.

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