



Impact of PECA-2016 Provisions on Freedom of Speech: A Case of Pakistan

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Abstract

Prevention of Electronic Crime Act, PECA-2016 is a procedural and penal law in Pakistan deals with the cyber or digital space. This research is to explore about the freedom of speech regime in Pakistan. It also provides the in-depth overview of PECA-2016 and analyses the effect of certain provisions of PECA-2016 on the practice of freedom of speech in cyberspace e.g. internet and whether these provisions promote or hinder the right to freedom of speech. The research is purely qualitative based on thorough document analysis. Results demonstrates that certain provisions of PECA do not have enough safeguards to secure access to quality research and quality knowledge- including freedom of human rights , specially right to freedom of speech, both, online and offline. Hence, it is suggested to policy makers to improve or repeal the current status of PECA-2016 on priority basis.

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INTRODUCTION

With advent of information and communication technology, most of offline human activities have been changed to online activities. There is an abrupt increase in the users of internet every day which also holds true for Pakistan (Kundi et al., 2014). It is obvious that the internet has shown greater impact on the scope, type and designs/pattern of human communications. Very quick and unlimited access to massive amounts of information through several communication devices such as smart phones, laptops, tablets or others has reformed modern societies globally (Mailland, 2000). It is no more surprising, Strasbourg Court has apprehended that 'expressive activity generated by the user on the internet offers an unprecedented platform to exercise freedom of expression. However, on one side this technological development has multiplied the easiness of livelihoods, but on the flip side of coin it is also used for nefarious activities. To rein the nefarious activities committed via internet, most of the nations of the world have enacted stringent cyber laws which has devastating effect on freedom of speech including others (Eboibi, 2017).

Likewise Pakistan in 2016, enacted a law to reduce the nefarious activities via internet, called as Prevention of Electronic Crimes Act-2016 (Daudpota, 2016). If the law is compared to similar cybercrime Acts worldwide, there are more harsher and severe penalties in PECA for offenses, and goes one step further to criminalize acts that are not found to be unlawful in comparable nation-states. Some clauses restricts internet freedoms, limit the freedom of speech, access to the information as well as the right to privacy. Kamal (2017) argued that it always remained the basic concern to have a balanced legislation on cybercrime while granting freedom of speech, and wants to impact the more restricted space for public speech.

Nevertheless, this study at outset give an overview of PECA-2016 which is a procedural as well as penal law in Pakistan dealing with

cyber space. In addition, it analyses the impact of certain PECA provisions on the practice of freedom of speech on internet. To put it more simply and openly, it evaluates and assess legal framework under section 3, 4, 11 and 37 of PECA in reference to practice of freedom of speech online with the aim to analyse that whether these relevant provisions promote or hinder the right to free speech.

An Overview of PECA-2016

PECA is a cyber legislation and new addition to penal laws of Pakistan including both procedural and substantive aspect. It has promulgated on 16 August, 2016 and is considered one of the worst and most controversial legislation with respect to freedom of speech among other concerns (Baloch, 2016). According to Shepherd (2017), PECA-2016 has got overwhelming criticism from civil societies, opposition political parties and international human rights organizations as they termed the act as the most controversial, problematic, draconian and defective in its nature. Among other concerns, PECA-2016 is considered one of the question mark on online freedom of speech in Pakistan .

Although there was a universal condemnation from Pakistan's tech experts, in spite of this and the efforts being made by the determined coalition of activists, as well as several attempts by alarmed politicians in order to patch its various flaws, Pakistan's Prevention of Electronic Crimes Act on 16 August passed into law. Its passage completed an 18 month long fight between government of Pakistan, who considered the act as a flagship element of their agenda of anti-terrorism, and the groups of civil liberties and technologists who smashed the act as an incoherent mix of anti-privacy, anti-speech and anti-Internet provisions. But the PECA not at all a tragedy for freedom of expression and freedom of privacy within Pakistan. Its wider reach has extensive consequences for Pakistan nationals who



lives in abroad, and international criminal law as it applies to the net (O'Brien, 2016).

Plethora of issues are accompanied with PECA-2016 where among all, it badly affects freedom of speech guaranteed under article 19 of Pakistan's constitution and ICCPR and article 10 of ECHR. Shahid (2016) explained, vague and over-broad language of the PECA-2016 leaves it open to selective and arbitrary enforcement which has direct impact on freedom of speech and others rights.

PECA is applicable to the whole of Pakistan and also those activities irrespective of their place of occurrence but which have an effect inside Pakistan. This implies that PECA applies to every citizen of Pakistan where ever he may be and also to every other person for the time being in Pakistan, to any act committed outside Pakistan by any person if the act constitutes an offence under this Act and affects a person, property, information system or data located in Pakistan (National Assembly of Pakistan, 2016). It includes total of 55 provisions dealing with different dynamics of cyber space and total of seven chapters, each having its own objective and aim of defined objectives. It encompasses various cybercrimes including hacking, spoofing, spamming, hate speech, child pornography, cyber terrorism, Electronic forgery, Electronic fraud etc. (National Assembly of Pakistan, 2016).

SECTION 3 AND 4 OF PECA-2016 AND FREE SPEECH

According to section 3: Anyone with deceitful intention gains authorized access to any data or the information system shall be granted with the punishment of imprisonment for three months approximately or with fine which may be extended to fifty thousand rupees or with both the both punishments.

According to section 4: Unauthorized copying or transmission of data.-Anyone with dishonest/deceitful intention and without authorization copies or otherwise convey or causes to be convey any data shall be granted with the punishment of imprisonment (may extend to six months), or with fine which may be extended to one hundred thousand rupees or with the both of punishments.

The first issue associated with section 3 and 4 is that it embodies vague words like dishonest, information system, unauthorized access, transmission of information (Dad, 2017). There is no yard stick to measure the degree of dishonesty. Likewise the ambit of information system is too wide. According to Alavi (2017), this is also an enigma that by unauthorized access and transmission of information, what the legislator means? If a law defines a crime in unclear terminologies, it is probably raising due-process issues. In the United States, courts give specific scrutiny to unclear laws related to First Amendment issues because of their likely chilling effect on protected rights (Hessick, 2016). According to the U.S. Supreme Court in *Connally v. General Construction Co.*, a law is unconstitutionally vague when people "of common intelligence must necessarily guess at its meaning." If the law regulates or not the free speech, if it is excessively vivid or unclear, it may cause severe problems under the due process guarantee (Legal Information Institute, 2000).

There is another doctrine regarding the law carrying vague words called as "the void-for-vagueness doctrine. According to "void to vagueness doctrine" it is needed that a penal statute must define the criminal offense with enough definiteness which a common people can easily understand and can have a knowledge about prohibited conduct and in a manner that not encourages discriminatory and arbitrary treatment (Hessick, 2016). Vagueness doctrine refers to a constitutional rule that requires criminal laws to state explicitly and definitely what conduct is punishable. Criminal laws that violate this requirement are said to be void for vagueness. AGA (2016) revealed that by having a clear notice of what acts are punishable and what not, it may help eliminate arbitrary enforcement of laws. Under the doctrine of vagueness, a statute is also considered to be void for vagueness if a delegation of legislature of authority to administrators or judges is very extensive that it may lead towards arbitrary prosecutions.

Hence, keeping the legal status of section 3 and 4 in reference to void to vagueness doctrine, it fails to obey the necessary requirements of law. In turn which has drastic impact on freedom of speech. Moreover, such provisions or sections are tools in the hand of authorities to misuse it for personal benefits and personal grudges (Dad, 2017). Beside it section 3 and 4 is also far below the standards which is required by due process. According to the first amendment of US constitution, due process needs that a law should be clear, understandable and accessible to common masses where in terms of Pakistan, the average literacy rate is 40% and it can be said with absolute confidence that sections carries vague words and does not qualify for requirement of due process as well which is an essential pre requirement for the governance of freedom of speech (Liaquat et al., 2016).

Nonetheless, as far as void to vagueness doctrine is concerned, Supreme Court of US has reliably told that the void-for-vagueness doctrine would be applied surely on strict basis with the concern of First Amendment freedoms counting free speech. In *NAACP v. Button*, the Court described that terms of free expression, permissible statutory vagueness standards are quite strict. The quality of vagueness and over breadth which is objectionable, not reliant on the absence of fair notice to a criminal suspect or an unhandled delegation of legislative powers, while it only depends upon the danger of tolerating, in the field of First Amendment freedoms, the penal statute existence which is susceptible of sweeping and indecorous application (Hessick, 2016).

Baloch (2016) argued that Section 3 and 4 of PECA is one of the provision of penal law and especially serious penal laws, "ought to be perspicuously and plainly penned. While the fact is quite different which has contrary effect on the practice of freedom of speech in Pakistan. Blackstone narrates that a person stoles one horse was not penalized under a statute which forbade "stealing horses". In same tone, if a criminal argue that he/she has accessed the information system with honest intention then what will the court reply, hence it is one of the fact that section is too open ended and leaves too much room for the regulators of information system (Stanley, 2017). This not only defeats the essence of justice but also creates self-censorship among journalists and social media users. As by Hashim (2017), the presence of this section is like a hanging sword on the principle of freedom of speech which is not only violates the Pakistan's constitution but also in clear contradiction to legal norms of ICCPR.

In the case of *Unar Sattar v The State* the Court has suggested three basic reasons of why excessively vague statutes are unconstitutional. First, there is a requirement of due process that law must provide fair warning and also offers a "persons of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly" (Hessick, 2016). Second, the law must provide "explicit standards" to law enforcement officials, judges, and juries so as to avoid "arbitrary and discriminatory application." Third, a vague statute can "hinder the exercise" of fundamental rights of speech and expression and may cause speakers to "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." The epitome of the judgment is analogous to section 3 and 4 of PECA as it carries open ended words, appeals towards its unconstitutionality. Further, it does not offers an explicit standards to the officials who enforces law and hence paves path towards arbitrary and discriminatory applications. After all, it has devastating impact upon the all basic human rights (Stanley, 2017).

In Pakistan, Freedom of expression and assembly are presently under attack, assisted by the presence of vaguely worded and too broad laws that can wield to arrest by the government for investigation and may imprison its critics. The live example of this is the enactment of PECA-2016. The recent increase in use of laws that criminalize peaceful expression is a step backward for a country that had seemed to be making progress on the protection of rights (Muhammad, 2016). By the legal examination of section 3 and 4 it is crystal clear that how the government of Pakistan is using and abusing such sections of PECA-2016 and the ways in which the whole law of PECA themselves fall short of international standards.



Both sections of PECA have used a variety of too broad laws which were vaguely worded too and the political elite can use for the harassment of political opponents and critics and to make them silent. According to Hashim (2017), the Pakistan's constitution pledging to "uphold civil liberties" and exhibit "regard for the fundamental rights of the people," but there is an increase in the use of broadly worded criminal laws in order to make critics and civil society activists silent, after the enactment of PECA-2016. Since enactment Federal investigating agency has been arrested more than 200 people and were questioned by the police for offering peaceful criticism of the authorities/judiciary or for exercising their right to freedom of assembly peacefully (Dad, 2016).

Nevertheless, section 3 and 4 has been exercised against civil society activists, opposition politicians, academics, journalists, and common citizens who are using social media. The government has also twisted to broadly worded provisions of the PECA in terms of efforts to silence critics, which criminalizes speech and leads to a breach of "public tranquillity," and criminalize speech might be injuring the reputation of another person, who is alive or dead (Ahmad, 2017). The FIA were been used to block those websites which were reporting on the higher judiciary decisions and corruption regarding military elites and higher political parties, penalize those using electronic media for discussions of staples of public interest, and arrest and prosecute social media users.

Section 3 and 4 of PECA impose criminal penalties for peaceful expression done with dishonest intention are under particular consideration as they are having alarming effects on freedom of speech. On the basis of UN special research about the protection and promotion of the right of free speech, free opinion and free expression, it is reported that, with the implementation of such laws in which a person faces continuous threat of being detained or arrested, which may held in pre-trial arrest, related to expensive criminal trials, imprisonment and fine, also the social stigma allied to having a criminal history/record. Zafar (2016) revealed that most the individual human right activists refers to the "culture" or "climate" of fear in Pakistan in their interviews. This fear ultimately leads to self-censorship, and self-censorship is positively related to the stifling of the political debate which is quite essential for democratic society.

According to section 11: Anyone who prepares and spreads information, by way of any information system or any device which shows or likely to show sectarian, inter faith or hatred on the basis of race, shall be imprisoned on the terms and conditions which may prolong to 7 years or may along with fine or with both.

According to section 37: (1) The Authority shall be empowered to block or remove or issue notice for removing or blocking of access to the information by way of any information system or device if found to be important and if it is necessary for the glory of Islam or for the security, integrity or defence of Pakistan or any of its part, public order, morality or decency, or if related to the contempt of court or commission or provocation to an offence under this Act.

(2) The Authority shall, after getting approval from the Federal Government, propose rules providing for, including other matters, transparency process, safeguards and active oversight mechanism in order to exercise power under subsection (1).

(3) Until and unless such rules are prescribed under sub-section (2), under this Act or any other act, the Authority shall exercise its power at the time being in force according to the directions that are issued by the Federal Government and must be consistent with the provisions of this Act.

(4) Any individual distressed by any order under sub-section (1), passed by the Authority has a right to file the application with the Authority for re-examination of the order within 30 days period after passing of the order.

(5) An individual may appeal against the Authority's decision regarding re-examination or review Of the order, shall lie before the High Court within 30 days period from the date of the application of review order.

Section 11 and 37 provide the legal framework for hate speech and removal of online content under PECA-2016. Like section 3 and

4, these provisions also embodies broad terms and lacks clarity. For instance, dissemination of information, hatred, blocking of content if the authority considers etc. All these are devoid of clarification and are too open ended which has brutal impact on all basic human rights. Nor the sections embed any safe guards for the better regulations of freedom of speech. Hence analysing through the lens of famous void to vagueness doctrine, both sections have devastating impact on the free speech. As both section carry dubious loaded words, hence serve as tools in the hands of administrators and regulators.

PECA under section 37 has granted power to Pakistan Telecommunication Authority (PTA) without judicial lapse. Report of Tribune claims, an absence of judicial oversight is equivalent to avoiding or abrogation of due care of human rights which includes free speech as well . Also the UN special rapporteur on free speech evidently indicated that word hate does not qualify the international standards for the limitation of free speech. Another issues with these sections is that these section are replicated in other laws of Pakistan. Hence it can be said that these are clauses specifying offenses which has duplicating nature with the previous laws like defamation act and Pakistan penal code. In addition, it creates confusion and defeats the true spirit of Pakistan's constitution.

According to Latif that clause 37 of the act grants new sweeping powers to the Pakistan Telecommunications Authority ('PTA') to order the removal or blocking of access to "any" information if it considers it is necessary for the glory of Islam or the security, integrity as well as in the interest of the defence of Pakistan or on the grounds of 'public order', morality or decency or is related to the contempt of court or provocation to an offense. In other words, this section grants carte Blanche to the government to limit the access to any kind of information over the Internet and this clause may effect media house and opposition parties negatively as they may not directly criticise the government acts (Dad, 2016). Though under PECA even little criticism against government is quite enough for activating provisions 37 of PECA-2016, as the case of disappearance of bloggers also evidenced this. The case of Achakzai (2016) arrest and blocking of ARTICLE 19.org website under section 37 of PECA-2016 depicts the same. All these events and occurrence depict that under the existence of section 11 and section 37 the freedom of speech is like day dreaming in Pakistan.

Hassine elaborates that human Rights Watch went further, saying that section 37 of PECA constitutes "clear and present danger to human rights". While Zahid Jamil, the foremost voice in cyber jurisprudence took stand on section 37 of PECA which was quite alarming and is considered to be a poorest piece of cybercrime legislation globally (Zafar, 2016). These sections are an attempt to curb citizens' freedom of speech rather than protect them. Yet, no yardstick has established with the acts which would be considered against the army of the country or the whole nationality. And further argued that these two section that is section 11 and 37 of PECA are endeavouring to restrict freedom on internet such as freedom of speech, rights to privacy, access to information, peaceful assemblies online and of association (Guramani, 2017).

According to O' Brien ICCPR, an international human right treaty sets criteria for both regulation and restrictions of freedom of speech under article 19. Brien (2016) argued, it has been ratified by Pakistan so bind by law to obey it. But the section 37 of PECA-2016 in Pakistan is in contradiction to ICCPR and is deemed a tool of exploitation for internet users. Among the key concerns are capacity issues of determination of standards for freedom of speech observed at international level in ICCPR while the inconsistency of section 11 and 37 of PECA with the provisions of ICCPR is considered another dilemma in Pakistan (Raza, 2017). Likewise it can be depicted that in the current digital age, human rights are increasingly being either fulfilled or violated in the online environment. By (Mathiesen, 2014), the violation cannot be tolerated in terms of the standard established under ICCPR.

According to (Sheperd, 2017) there are three requirements for a domestic legislation; First the restricted and over broad provisions of any law should be in compliance with principle of legality. There



should be a legitimate purpose for restricting any provisions and finally the law restricted should follow the strict test of necessity. Likewise section 11 and 37 of PECA has been restricted without providing any safe guards for the prevention of freedom of speech. Ironically, an international human rights organization, called Article19.org has been shut down under section 37 in Pakistan on a certain ISP. PTA has done this under section 37 of PECA without justifications, and took a strict notice on the misuse of act (Latif, 2015). While the basic purpose of the Act is to counter digital crimes in the country related to ICT, but unfortunately most of the provisions have the objective to block the free exchange of expression or free opinion over the Internet. The act must be altered in terms of addressing crimes and do not criminalise expression and related fundamental rights. One of the senate member took a hard stance regarding section 11 and 37 of PECA in regard to ICCPR that "A toothcomb review of the act is imperative to eliminate and amend provisions which are in grave violations of Article 19 of the ICCPR, of which Pakistan is a party.

Hence, it can be argued that section 37 of PECA serves three purposes and by serving those purposes, it has negative impact on freedom of speech. At first place, section 37 of PECA, empowers the authority (PTA, Pakistan Telecommunication Authority) with arbitrary and unbridled power. Due to this section, Political dissent in Pakistan under threat, government censors online content (Stanley, 2017). A study conducted by Digital rights foundation confirmed that the detection of 210 blocked URLs in Pakistan under section 37 of PECA. Explicit block pages were observed for many of these URLs, while others were blocked by means of DNS tampering.

Pakistani ISPs are now trying to apply "smart filters", started to block access to selective web pages and hosted on the unencrypted HTTP site's version instead of blocking the entire domains accessibility. Overall, it is depicted that blocking of HTTP version of sites by ISPs is actually allowing censorship circumvention over the HTTPS (for those sites which support encrypted connections of HTTPS).

Secondly, under section 37 of PECA, censorship become the game of the town. It created self-censorship and that self-censorship is paramount to handicapping of free speech on social media, electronic media and print media. Most of the journalists quieted their jobs and others went to developed countries. This happened as every week and every month, journalists become disappeared (Latif, 2015). The recent case of bloggers disappearance is the prime evidence of misuse of section 37 of PECA. In May 2017 Human Rights Watch raised concerns that the Pakistani government was "clamping down on internet dissent at the expense of fundamental rights".

Thirdly, combining the censorship nature of section 37 and the empowering nature of this section has bad impact on the practice of speech both online and offline. As censorship and arbitrary exercise of power are fatal for the existence of democratic society and without democratic society freedom of speech and other human rights is just like day dreaming (Stanley, 2017). Nevertheless, during the last two years that is from January 2017 to January 2019, Telecommunication Authority of Pakistan (PTA) has blocked around 800,000 those web pages and websites which contained unsuitable, and inappropriate content. According to Rizvi (2019), this statistics is released on 30th January 2019 by PTA officials who were informing the Senate Standing Committee about Information Technology (IT) and Telecom. These all events become possible due to the enactment of PECA and then section 37 added more by adding limitless power in the hands of officials (Muhammad, 2016).

The effect of PECA provisions have been identified which depicts that PECA enactment has threatened the organisation who deals with the human rights as well as the civil society from expressing against acts of government. From holistic perspective, PECA may be serving some good purposes but due to the presence some sections like section 37 and 11 etc., it will not achieve its objectives. But rather to combat the cybercrimes it will worsen the condition of basic fundamental human rights (Muhammad, 2016). The Human rights organizations and civil society of Pakistan named the PECA provision

a "black law" for the country as it is under full control of the government to use this law according to their wish. The observation showed that the content which criticizes the political elites and the army in treasury benches remains block after publication. Due to the presence of section 37, most of the scholars feel fear to access websites and databases belonging to a bit sensitive domain. For instance, the student researching on the expenditure of army and military industrial complex in Pakistan will be probably a complex and difficult job (Raza, 2017).

CONCLUSION

This study investigates the effect of certain provision of PECA which include section 3, 4, 11 and 37 on free speech both offline and online in Pakistan. In order to achieve the objectives of the study a thorough legal analysis was carried out by analysing the Pakistan's constitution, PECA-2016 and other legal literature from developed countries to get insight and an effort was made to bring the standards for freedom of speech at with the developed nations. Moreover, it was tended that how misuse of internet can be avoided in country like Pakistan.

The presence of certain provisions of PECA plague the emergence of democratic norms including access to quality research and quality knowledge, including freedom of human rights, specially right to freedom of speech, both, online and offline. To put it simple, all section like section 3,4,11 and section 37 of PECA are bad tools in the hands of politicians and high up officials to misuse it for their personal objectives and personal grudges. For instance, it is by the dint of section 37 that government can block any content, whether legal or illegal, whether beneficial for the masses of Pakistan or not but it is the discretion of high ups by the dint of section 37 that what they considers illegal is illegal and what they consider illegal will be illegal.

Keeping the whole scenario in mind, it raises to couple of questions. At outset, certain provisions are enacted to deal with the cybercrimes with iron hand but pressing too much on the combating of cybercrimes, these provisions added loads of power in high ups hands. As it is said that power corrupts and absolute power corrupts absolutely. The same happens in case of PECA provisions, as empowerment of officials by the dint of section 37, other fundamental rights became at stake. At the cost of basic and fundamental rights which includes to receive, access, impart and deliver information, censorship and self-censorship of media and social media occurred. A strong policy suggestions are made to policy makers either to improve or repeal the current status of PECA-2016.

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