

International Human Rights Law and the Right to Privacy under Pakistan's Prevention of Electronic Crimes Act, 2016

1. **Mariam Sherwani**, Ph.D. Law Scholar, International Islamic University, Islamabad
2. **Prof. Dr. Farkhanda Zia**, Professor of Law, International Islamic University, Islamabad

Abstract: *The Prevention of Electronic Crimes Act, 2016 of Pakistan is contemptuous in various aspects, particularly because it brings the right to privacy –which is a fundamental right of an individual endorsed by Public International Law and Human Rights Law –to a compromising position, therefore the law needs a careful assessment to bring it with conformity with international law and human rights law. The right to privacy is an important fundamental right enjoyed by individuals. Public International law contains provisions for the maintenance and protection of the right to privacy. Human rights laws have always emphasized the maintenance of the privacy of data and declared the privacy of an individual to be sanctified. There are, however, certain instances where the right to privacy seemingly comes into conflict with national security. This can be witnessed in countries that face poor law and order situations and to cope with the situation the countries are compelled to make some harsh laws. One such example is the Prevention of Electronic Crimes Act, 2016 is the law that has been made to curb the illegal activities taking place in the online world. In doing so, the law appears to be violating some aspects of the right to privacy. This paper attempts to make a balance between the right to privacy and national security and identify the inconsistencies of the law with human rights law and also suggest ways to remove the inconsistencies.*

Keywords: *Privacy, Data Privacy, Right to Privacy, Electronic Crimes, Human Rights*

Introduction

The right to privacy is of huge importance today especially when the world has become a global village. International law and human rights law both have provisions to protect the right to privacy of individuals so that their data remains in safe hands. Preserving the right to privacy encourages the protection of personal information. The protection of the right to privacy promotes human dignity and integrity and helps in maintaining and elevating the social status of an individual. The right to privacy serves as the cornerstone on which many other human rights are built.¹

The importance of privacy rights can also be realized from the fact that it has been recognized as a right in several international covenants and treaties. Protecting privacy ensures human dignity, safety, and self-determination and helps in the development of the personality of an individual in society.² The rise in the use of the internet has made it complicated to understand privacy law. For this reason, the right to privacy intersects with other human rights and freedoms such as the right to seek, receive and impart information and freedom of association and assembly.³

Right to Privacy

There is no universally accepted philosophical definition of privacy. Privacy is taken as a concept of negative freedom i.e. 'being left alone and not to be interfered with'. Privacy was defined by Louis Brandeis as "the most fundamental of all rights cherished by free people" and the "right to be let alone" in his famous article on the right to privacy in 1890 where plaintiffs can seek legal remedies for the intrusion of private life.⁴ Privacy is an individualistic, instrumental, and liberal value, necessary for securing happiness.

Privacy has a huge impact on an individual's life and interference with privacy may result in damage to reputation, embarrassment or humiliation, emotional distress, identity theft or fraud, financial

loss, physical harm, intimidation, disruption of government services, discrimination, and feeling of disempowerment.⁵

Why Privacy of an Individual is Important?

Privacy helps an individual to maintain his autonomy, integrity, self-esteem, and individuality. Privacy is also important because of its functional benefits. For example, anonymity and pseudonymity help an individual to protect his privacy and maintain his identity.

The right to privacy has gained importance in recent times because of the protection it provides to an individual. If the right to privacy is ensured and guaranteed under the law, it prevents the government from spying on the people without due cause. The government has the responsibility to protect the privacy of its citizens but when it fails to do so it is identified by the reported incidents of surveillance. In 2013, Edward Snowden, a whistleblower, on NSA's spying program and showed major concern on the issue of privacy.⁶

The right to privacy when protected prevents groups and companies to use personal data and information (without the owner's consent) however they wish. In Cambridge Analytica Scandal, the organization used the data taken (without consent) to influence voters through political ads. The privacy right halts the organizations to use the data of the users without permission of the data owners (consent) for their motives. In times when almost all big companies such as Facebook, Google, Amazon, etc. run on technology and retain the data of users, the right to privacy prevents them to use the data of the users without their explicit consent.⁷

Privacy rights are necessary for the protection of the rights of individuals. When privacy is recognized as a fundamental right, there will be consequences for those infringing or violating the right to privacy. Sending targeted ads is an example of personal data use. Privacy rights restrict and prevent corporations and governments from misusing or stealing data and they also make them face the law if they violate the privacy law.⁸

Privacy rights help to maintain social boundaries and provide personal space to individuals on certain information related to them that they might not want to share with anyone. Maintaining social boundaries and protecting personal space is necessary for healthy relationships and a sound professional career.⁹

Moreover, privacy rights help to build trust and ensure secrecy. It also ensures the safe handling of personal data which enhances the confidence of the data owner over the entity (such as a lawyer having information about a client, a bank having financial data of the client, a doctor having health information/record of the patient) possessing data of the individual.¹⁰

Privacy rights enable the individual to have control over his data. Privacy law guarantees that the data of the owner can only be used the way he wants and only for the purpose he has given consent. The data owner has absolute access to his information. Lack of control over personal data and information makes a person vulnerable and helpless in society.¹¹

The right to privacy also protects and promotes freedom of expression and thought which means that certain thoughts and expressions can be tagged as negative or unethical and the person will be identified and judged based on his thoughts and opinions. Lack of privacy can make a person face adverse situations for only exercising his basic freedom of thought and expression which is against the norms of natural law and human rights law. Privacy rights protect the ability of a person to think and say.¹²

The right to privacy lets a person exercise his political rights with complete freedom. He can vote for the candidate of his choice with privacy and secrecy. He is not liable to tell anyone who he voted for. Privacy rights protect an individual against persecution that he might have to face in his professional and personal life based on his political affiliations. The right to privacy lets a person participate freely in his political life.¹³

The right to privacy also protects reputation and integrity. There might be some information related to an individual which is posted online by mistake which he realizes later on and wants to be removed. The right to privacy gives him the power to remove certain information related to him. In this scenario, the right to be forgotten is specially addressed in EU law. This lets a person remove private information from internet searches under some circumstances by filing a request. Revenge porn or the leak of a private video (violation of privacy) are examples of personal data that can destroy a person's reputation and respect in society.¹⁴

Privacy law protects the financial information of an individual. Compromising financial information of data owners by the companies holding the information results in consequences like credit card numbers stolen and money theft. Financial institutions like banks should take all measures to ensure the privacy of their clients and the safety of their data.¹⁵

Right to Privacy under International Instruments

Article 12 of UDHR 1948 asserts the enforcement of privacy rights¹⁶, Article 17 of ICCPR emphasizes declaring meddling with someone's privacy as illegal¹⁷, Article 14 of the United Nations Convention on Migrant Workers¹⁸, Article 16 of the United Nations Convention of the Protection of the Child¹⁹, Article 10 of the African Charter on the Rights and Welfare of the Child²⁰, Article II of the American Convention on Human Rights²¹, Article 4 of the African Union Principles on Freedom of Expression²², Article 5 of the American Declaration of the Rights and Duties of Man²³, Article 16 and 21 of the Arab Charter on Human Rights²⁴, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms recognizes and protects privacy as a right²⁵, Article 14 International Convention on the Protection of Rights of All Migrant Workers and Members of their Families adopted by General Assembly Resolution 45/158 of 18 December 1990 protects privacy as a right²⁶ and Article 21 of the ASEAN Human Rights Declaration protects a person from arbitrary interference²⁷.

Although the right to data protection can be inferred from the right to privacy, some regional instruments also stipulate a more specific right to the protection of personal data, including; the OECD's Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, the Council of Europe Convention 108 for the Protection of Individuals with regard to the Automatic Processing of Personal Data, a number of European Union Directives and its pending Regulation, and the European Union Charter of Fundamental Rights, the Asia-Pacific Economic Cooperation (APEC) Privacy Framework 2004, and the Economic Community of West African States has a Supplementary Act on data protection from 2010.

Moreover, more than 130 countries have given constitutional statements regarding the right to privacy and over 100 countries in the world have some form of privacy and data protection law included in their legislation. However, surveillance is conducted by the authorities without following privacy laws and protections.²⁸ It is also worth mentioning that the technology that exists today for the protection of privacy is greater today than ever before, still, the surveillance capabilities that exist today are matchless and unprecedented.²⁹

Interpretation of the Right to Privacy

The right to privacy has been stipulated under Article 14(1) of the Constitution of 1973.³⁰ According to the text of Article 14 in the Constitution "the dignity of man and, subject to law, the privacy of home, shall be inviolable" the protection has been made subject to the law which does not mean that the guarantee can be taken away by law. It only means that the right to privacy can be regulated by law.³¹

The scope and interpretation of Article 14 have been discussed by the Supreme Court in the case of *Mohtarma Benazir Butto vs. President of Pakistan*. The court clarified that the individual's privacy is vulnerable even outside his home and the emphasis was on the right regardless of the location. The term 'home' was construed as a space where an individual enjoys personal freedom and feels secure. The court

held that subject to law, the privacy of a person could not be intruded upon in public spaces.³² According to a report published by Privacy International, there is no direct data protection law or authority in Pakistan.³³ In this situation data, privacy and protection were theoretically regulated under the provisions of the Electronic Transaction Ordinance 2002 and Freedom of Information Ordinance 2002. PECA contains provisions related to the right to privacy and these provisions are intended to grant government agencies access to the private data of citizens or restrict citizens from gaining access to government data. Moreover, many provisions of the law (PECA) make it a crime for anyone to gain unauthorized access to any information system or data or copying or transmission of critical infrastructure data.

Right to privacy has recently been discussed in *Justice Qazi Faez Isa vs The President of Pakistan* where a Presidential Reference against the judge of the Supreme Court (who was the petitioner) was pending before the Supreme Judicial Council concerning the properties bought by her spouse and children in a foreign country that was not declared in the judge's tax return. Multiple constitutional petitions were filed by different Bar Councils, Bar Associations, and Lawyers (the petitioners) before the Supreme Court calls into question the constitutionality and legality of the reference against the judge. The tax and property records of the judge and his family were accessed/searched to frame the reference against him and the question was raised that whether such searches amounted to a breach of the petitioner's and his family's right to privacy, dignity, and personal liberty enshrined in the Constitution and thus amounted to covert surveillance. Moreover, it was stated that Article 14(1) of the Constitution is related to the privacy home subject to the law.³⁴

Prevention of Electronic Crimes Act 2016 (PECA)

Pakistan has made comprehensive legislation to deal with the affairs related to modern-day technology. Before the promulgation of PECA, unlawful and unauthorized access to information was prosecuted under the Electronic Transactions Ordinance 2002 (ETO). The provisions of ETO theoretically regulated data privacy and protection but did not regulate data protection directly.³⁵ It also envisions the establishment of a governmental authority to certify electronic documents and make regulations for the protection of the privacy of its users.³⁶

An increase in the use of digital gadgets and social media has developed the need for legislation that can be implemented to protect the digital rights of individuals.³⁷ PECA was introduced in Pakistan to help deal with growing terrorism and control the use of the internet and cyberspace for this purpose. So, PECA was drafted as a part of the National Action Plan (NAP) which was developed in response to the APS attack in December 2014.³⁸ Due to happening of such serious incidents, government officials stressed the need for an unfettered ability to monitor, locate and prosecute alleged militant activity and to prevent the occurrence of like incidents in the future.³⁹ PECA was introduced as key legislation to assist law enforcement agencies in the war against terrorism. By introducing this law fundamental rights of the citizens were curtailed by spreading fear and panic. PECA is a legal framework that defines various electronic crimes, and mechanisms for investigation, prosecution, and adjudication concerning electronic crimes.⁴⁰ PECA focuses to curb the misuse of technology by proposing appropriate punishments for the crimes committed in cyberspace. The law is, on the one hand, praised by many experts for its being effective and, on the other hand, is put under severe criticism by lawyers, scholars, academia, and human rights activists for its potential to violate certain fundamental rights. So to see which fundamental rights guaranteed by the constitution are infringed by the law introduced, it is necessary to analyze PECA critically.

Special protection to women has been granted under Sections 21 and 22 of the law. Section 21 of the law says that the use of electronic means for reputational damage or breach of privacy is punishable with imprisonment for up to seven years or with a fine which may extend to up to 5 million rupees or both.⁴¹ In the case of *Abdul Rehman vs The State*, the privacy of a young lady was grievously intruded

upon to the extent of an utter embarrassment to her family. Even her marriage went into peril. The incident was reported by her father-in-law. In the facts and circumstances of the case, the concurrent view of the courts below in denying the bail to the accused was correct. The petition for leave to appeal was dismissed. Leave was declined and the accused was refused bail.⁴² Under Section 22 committing an offence of producing, distributing, or transmitting pornographic material showing underage girls engaged in sexually explicit conduct is punishable with imprisonment of up to seven years or with a fine of up to five million rupees or both.⁴³ In the case, *Umer Khan vs. The State*, child pornography was shared on social media through a mobile device. The accused allegedly shared the content himself on the social media platform. The aggrieved contacted the Federal Investigation Agency (FIA) himself and provided information against the accused upon which the FIA inquired into the matter. The mobile phone of the accused was taken into possession and was sent to Forensic Science Laboratory (FSL), and according to the report of FSL the social media profile of the accused was found active on his mobile phone, and child pornographic videos and images were also extracted therefrom. Mobile numbers that the accused was using on his mobile device were also found active and the same were registered in his name. The petition for leave to appeal was dismissed and bail was refused.⁴⁴

Criticism over the Prevention of Electronic Crimes Act 2016 under IHRL

Despite criticism from human rights activists and politicians, PECA came into force in August 2016.⁴⁵ The main criticism that the law faced by different groups in the society was that it halted the enjoyment of the fundamental rights that are guaranteed to Pakistani citizens under the constitution. Under Article 4 of the Constitution, every citizen has the right to be treated according to the law.⁴⁶ The invasion of the rights of a citizen, whether by a private or public individual or body, must be legally justified under the law of the country. Article 10-A of the Constitution entitles citizens to a fair trial and due process of law (applicable to criminal charges only).⁴⁷ In the *Begum Shorish Kashmiri* Case, the doctrine of due process was discussed for the first time. The court discussed the meaning of the word “law” and asserted that it is the constitutional right of every citizen to be tried following the law of the land.⁴⁸ Whereas, PECA violates the constitutional guarantees of due process provided under the Constitution. The law does not define or elaborate on different terms used in the statute such as what would amount to criminal conduct under the law.

Under the definitions section, some terms are defined in a very subjective manner and need a further explanation for the appropriate implementation of the law.⁴⁹

PECA contains some stipulations related to data privacy however the purpose to insert these provisions in the law appears to grant government agencies access to the private data of citizens or to restrict the citizens from gaining access to government data.⁵⁰ Many provisions of the law make it a crime for anyone to gain unauthorized access to any information, system, or data or copying or transmission or critical infrastructure data.⁵¹ PECA also gives PTA and law enforcement agencies access to private data without their consent, along with restricting citizens from gaining access to government data. Moreover, the provisions of the law allow the retention of data by Internet Service Providers (ISPs) for supplying data to foreign entities, and the empowerment of officials to force citizens to give up their private information which later on can be used against them.

Section 31 of the Act grants limitless powers to Pakistan Telecommunication Authority (PTA) to remove or block any information if it considers that the information is against the injunctions of Islam, the reputation or security of Pakistan, friendly relationships of Pakistan with other countries, public peace and order, morality, concerning contempt of court and concerning committing or

provocation to commit an offence. This clause has granted extensive powers to governmental institutions to block content online. Under this law, a warrant is either a formality or not required at all, though the defendant is allowed an opportunity to be dealt with under due process of law which *prima facie* appears to be insufficient. The law also allows Internet Service Providers (ISPs) to retain a user's history for 90 days. Furthermore, Section 31 also grants power to law enforcement agencies they may require an individual to hand over data without producing any court warrant only if it is 'reasonably required' during a criminal investigation. The provision empowers an officer to take this action as per his discretion and requires him to only bring this to the notice of a court within 24 hours after the acquisition of the data.⁵² So in the incidents involving 'cyber terrorism,' the investigating officer can search, seize and retain data without a warrant and notify the court within 24 hours of the seizure of the data to comply with the legal procedure under the law. In *Mehram Ali vs. Federation of Pakistan*, the right to privacy *vis-a-vis* the power to enter, search, and seize was discussed, wherein the Supreme Court declared Section 10 of the Anti-Terrorism Act (ATA) to be unconstitutional.⁵³ Section 10 of the ATA, empowered an authorized official, on him being satisfied that there were reasonable grounds for suspecting that a person had in his possession some written material or recording in contravention of Section 8 of the ATA, to enter and search the premises, and seize any suspicious material or recording.⁵⁴ Supreme Court held in the decision that while there was no doubt that the right to privacy was subject to reasonable restriction still the law is supposed to be reasonable and in conformity with the constitutional mandate.⁵⁵

Under Section 28 the investigators have the authority to access all of the user's data that is available online and on the information systems.⁵⁶ These provisions of the law are in contradiction to the rights provided to the citizens under the Constitution of the Islamic Republic of Pakistan, 1973. The law encroaches upon the rights such as free expression, privacy, access to information, free media, protection from undue searches and seizures, the conduct of business plus not incriminating oneself.

Section 32 of PECA requires ISPs to retain specified traffic data for a minimum of one year and subject to the demands of PTA, provide data to the investigation agency or authorized agent.

There are also provisions in PECA that are a threat to the exercise of freedom of speech. In a country like Pakistan where there is comparatively low digital literacy, PECA does not provide enough protection for the right to privacy, freedom of speech and expression, and right to access to the internet. Section 48 of PECA empowers the government and (Pakistan Telecommunication Authority) PTA the power to issue directives to service providers to prevent the commission of an offence under the law. The lack of any safeguard in the law gives PTA warrantless discretion to issue additional rules that generate other problems especially related to the curtailment of free speech.⁵⁷

Conclusion

PECA is a comprehensive law that can effectively tackle the issues related to cyberspace. However, the legislation is a potential threat to the right to privacy, access to information, freedom of speech, and expression of individuals. Therefore, there is a need to revisit the law to bring it in conformity with international human rights norms so that human rights and fundamental freedoms can be enjoyed by individuals in society. Access to basic human rights and freedoms is a key feature of any democratic society and Pakistan being a democratic state must incorporate democratic values for the progress, welfare, and prosperity of the society.

PECA is a threat to multiple constitutional rights under the veil of curbing and controlling cybercrime. Freedom of speech is criminalized and law enforcement authorities have a free hand under the law. PECA violates Articles 4, 10-A, 14, and 19 of the Constitution of the Islamic Republic of Pakistan 1973. These provisions of the constitution are the cornerstone of the Pakistani democratic society. If they are ignored or halted, it will result in the deprivation of people the constitutional

fundamental rights.

Recommendations

It is suggested that there should be amendments in the law that would remove the threats to the right to privacy of individuals so that people would feel free to speak for themselves and be sure about the security and safety of the data which they put online.

There is a need to revamp PECA so that the fundamental rights of the public are not snatched in the name of national security.

There is a need for an international legal regime and treaty to control cyber crime as being a global village it is possible that one doing a crime is sitting in one state and the one being a victim is in another state. so it is the need for the hour that the international community must come together and join hands to control cyber crime and find practical solutions to control and regulate cyberspace so that we can make cyberspace free and secure where people can exercise and enjoy their right to privacy, right to information, freedom of speech and expression.

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