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### PROTECTING ONLINE PRIVACY IN PAKISTAN

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#### ABSTRACT

Right to online privacy is one of the most pressing issues in recent times. Constitution of Pakistan protects and promote right to privacy of individuals online as well as offline in country. The Prevention of Electronic Crime Act 2016 (PECA-2016) is one of the laws which was passed recently and has direct influence on right to online privacy in the country. This study critically comprehends PECA-2016 with regard to right to online privacy in Pakistan. Under present study doctrinal legal research method is adopted. Doctrinal method is adopted to ascertain, describe, and analyze the attitude of Pakistan towards the protection of privacy generally and online privacy more specifically. This study finds out that there are several provisions in the PECA-2016 which adversely affect online privacy in the country. It is concluded that some of the provisions of the PECA-2016 should be improved or repealed to protect and promote right to online privacy of people in the country.

**Keywords:** Constitution of Pakistan, Right to Privacy, PECA-2016.

#### INTRODUCTION

Technological advancements have revolutionized various aspects of contemporary society, ranging from the ability to accumulate, communicate and to disseminate information. (Heyer, 2007) During old times, documents, information's, and letters moved at the very slow pace. The speed of information flow started to change dramatically in the early nineteenth century as human beings attained the ability to control electricity (Fang, 1997). Human Beings also learned about the ability to gather information by using electrical impulses. During the last couple of decades, the speed of information flow has also improved with the expansion of the Internet facility (Weaver, 2019). For

the very first time in history, people can easily approach communications technologies and transmit their notions with ease. Indeed, with a single click of a computer mouse, any person can post a document on the internet for the entire universe to see and connect information around the universe by videos, websites, blogs, and pictures (Lasso, 2002). This ease of communication technology has hugely played its role in the downfall of long-time rulers in Tunisia, Egypt, and many other countries (Weaver D. D., 2012). It has also transformed the politics in U.S, Pakistan, and other countries. This explosion of information technologies has also posed a great danger to the personal privacy of the individuals. New computer technologies have also made it feasible for governments, private companies, and even some private individuals to accumulate a large amount of personal information of peoples, and have also made it possible to analyze, store and distribute that personal data of the individuals (Russell L. Weaver, 2012).

Personal Data Protection is one of the most debated matter of recent times. Due to constant data breaches of individuals, the governments around the world have started to prioritize protection and promotion of personal data of citizens (Zubik, 2020). Data protection of the individuals is also imperative as unlimited personal data of the individuals is collected every second by private and public entities. Till date more than 80 countries have enacted laws for data protection and online privacy of individuals. However, so far Pakistan has not been able to legislate law for data protection in the country (Malkani, 2020). Once the data collected and stored by the “(NADRA)National Database & Registration Authority” was the largest biometric database of the world, but this position have now been taken by the India’s Aadhaar. Aadhaar program was launched in 2016. However, despite storing a large amount of sensitive information on over 200 million individuals in the country, NADRA database has been breached and leaked multiple times, and while one would expect that laws should have been made for data protection and responsible would have been held accountable but there was no recourse (State of Privacy Pakistan, 26th January 2019). There have been several other such incidents like data leakage of 14 million clients of online ride-hailing company “CAREEM” in Pakistan (Jahangir, 2018). These alleged breaches call for strong and comprehensive personal data protection laws that prioritizes privacy and safety of citizens above all interests in the digital spaces. While there is no protection for citizens of Pakistan against these personal data susceptibilities, various laws infringe and violate fundamental right to privacy enshrined and promoted under Article 14 of the current Constitution of Pakistan (Basit, 2015).

Constitution of Pakistan protects and promote right of privacy of individuals online as well as offline in country. There are some laws which are passed recently which directly affects right of privacy online. These laws and rules made in pursuance of these laws are severely criticized for allegations of infringing fundamental right to privacy of individuals in Pakistan (State of Privacy Pakistan, 26th January 2019). Therefore, it becomes imperative to analyze these laws which have serious impact on right to online privacy in Pakistan. In this short paper, we map out the implications of Pakistani laws for online privacy, deliberate Constitutional foundations of privacy protection in Pakistan, and offer some submissions about a way forward for laws affecting online privacy in Pakistan. This short article is divided into five parts. First parts

present an introduction to the subject matter of short article, second part elucidates the research methods adopted under current study, third parts present an overview of foundations of right of privacy as enunciated in the Constitution of Pakistan, fourth part explicates and analyze the laws affecting online privacy in Pakistan. Whereas fifth and last parts presents the conclusion and suggestions regarding laws effecting online privacy in the country.

### **METHODOLOGY**

Legal research method is separated into doctrinal and non-doctrinal (Socio Legal) (Yaqin, 2008 ). Under present study doctrinal legal research method is utilized. Anwarul Yaqin 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 the protection of privacy generally and digital privacy more specifically. As this study attempts to gain an in-depth analytical perspective by using doctrinal legal research method, therefore data is collected from textbooks, articles in law journals, decisions of higher judiciary regarding privacy and from other relevant sources (Singer, 2005).

#### ***Constitution of Pakistan and Right of Privacy***

The Constitution of Pakistan has protected privacy right as an important fundamental right under Article 14 (Basit, 2015). Pakistan has also signed “International Covenant on Civil and Political Rights (ICCPR)” which protected privacy right under Article 17 (ICCPR ratified, 2010). It states that “no one shall be subject to arbitrary or unlawful interference with his privacy, family or correspondence”. Whereas Article 14(1) of Pakistani Constitution preserves the right to privacy in the chapter of fundamental right as “The dignity of man, subject to law, the privacy of home, shall be inviolable”. Article 14(1) of Pakistan Constitution is divided into two parts. The first part of Article 14 (1) deals with dignity of man while the second part is related with privacy of home. Supreme Court of Pakistan declared that the dignity of man is an absolute right and is not subject to any law, but it is an unqualified guarantee. Supreme Court of Pakistan in a famous and important case of “Benazir Bhutto v President of Pakistan” (BENAZIR BHUTTO VS PRESIDENT OF PAKISTAN, 1997) declared that.

“The inviolability of right to privacy is straightly associated with the dignity of human being. If a man is to protect and preserve his dignity, if he is to live with honor and reputation, his privacy whether in home or outside the home has to be protected from invasion and protected from illegal intrusion”

Salem Akhtar judge further stated in the same case that

“According to our history and belief, under Islam, great value has been attached to the dignity of man and privacy of home. If a person intrudes into the privacy of any man, pries on the private life, it injures the dignity of man, it violates the privacy of home. It disturbs the peace and tranquility of the family and above all it puts such persons to danger of being black-mailed”

Constitution of Pakistan under Article 8 made it quite clear that the fundamental rights as protected under the present Constitution are of paramount importance, and no law can be made in contravention to those rights (Rana, 2014). If any of the laws is made in contravention to those fundamental rights than that law will be invalid to the extent of such contradiction. Article

9 and Article 14 of the Constitution affirms the sacred status of dignity of man and the also the relationship between the privacy and dignity of human beings (Shaukat, 2006). The landmark case of Benazir Bhutto reiterated one more important thing that the focus of all protections is the “human being” himself.

It was stated that

“The dignity of man and privacy of home is inviolable, it does not mean that except in home, his privacy is vulnerable and can be interfered or violated. Home in literal sense will mean a place of abode-a place where a person enjoys personal freedom and feels secure. The emphasis is not on the boundaries of home but he person who enjoys the right wherever he may be. The term ‘Home’ connotes meaning of privacy, security and noninterference by outsider which a person enjoys”

Article 4 of the Constitution deliberates the right to due process of laws in Pakistan. Under due process clause, a reference is also made to right of privacy under Article 4.2 (b). Article 4.2(b) provides that “No action detrimental to the body, liberty, life, reputation or even property of any individual shall be taken except in accordance with relevant laws”. US Constitution has an identical section under Fifth along with Fourteenth Constitutional Amendment and it provide that “Neither the United States federal govt nor governments of respective states shall deprive any person of liberty, life, or even property without due process of law (Malik, 2013)”. Justice Hamoodur Rehman in Begum Shorish Kashmiri case stated that it is an absolute right of all citizens of the country to be dealt in accord with the law and nothing except law. Life of person includes quantitative as well qualitative element of life (GOVERNMENT OF WEST PAKISTAN AND ANOTHER VS BEGUM AGHA: ABDULKARIM SHORISH KASHMIRI, 1969).

Privacy right is the foundation of all liberties and individual’s liberty is largely reliant on permitting human to exercise privacy right. The human body, property and repute of individuals is closely connected with privacy and have vigorous linkages thereof. Present Constitution of Pakistan extends further in this section of “fundamental rights” to reaffirm the enormous importance provided to liberty and life in Pakistan under Article 9 of Security of persons clause. Security of person has a direct connection with right to individual’s privacy. It is also amongst the first of fundamental rights. The words used in Malaysian Federal Constitution are same as Pakistani words and it says under Article 5 that “No person shall be deprived of his life or personal liberty save in accordance with law”. The provisions of the Article 5 of the Pakistani Constitution and Article 21 of the Indian Constitution of 1948 and Article 5 of the Malaysian Federal Constitution amounts to a declaration that no person is to take life and liberty of another person without the authority of law (Basu, 2013). The right to life can never be restricted to just animal existence or vegetative life. Life means more than physical survival of the individual. The right of life must include right to live with dignity. Human dignity comprises necessities of life like required nutrition, shelter, clothing, and other necessities of life. The same can be witnessed in US constitution under provisions of Fifth and Fourteenth amendments. These provisions say that no person shall be deprived of his “life, liberty or property without due process of law” (Malik, 2013). The US Supreme Court in ( Munn v. Illinois, 1877)declared the right to life means “By life as adopted here is meant something much more than mere human existence”.

In a case involving “Employees of Pakistan Law Commission against the Ministry of Works” the Pakistani Supreme Court concluded that the right to life includes maintaining adequate level of living and the right to enjoyment of life. The Constitution of the country doesn’t stop here; it further categorizes the person’s right to privacy and the inviolability of every individual’s dignity in Pakistan to be a fundamental right. Constitution further pledges the inviolability of privacy of home. Dignity of human being is the center of debate of right of privacy in any system of law (*Employees of Pakistan Law Commission v Ministry of Works*, 1994). There are several personal life aspects that a person doesn’t want to share with public.

Sindh High court in a famous case of “*Shariq Saeed v Mansoob Khan* declared that although right of speech is an important fundamental right, but the privacy of home is also protected under the same part of constitution. While protecting privacy of home, dignity of human being should also be protected. Dignity of human being attains more significance when the defamation is made against any individual, because honor, dignity and respect is of paramount importance as compared to necessities and comforts”. As discussed before that the dignity of human being is the cornerstone of any civilized society. This judgment also clearly mentioned that the dignity of human beings is one of the most valuable rights among the list of fundamental rights in Pakistan. Privacy and defamation are the protectors of dignity of man in Pakistan and all over the world. This part elaborated the concept of right to privacy as envisioned and comprehended by the Pakistani higher courts in the country (*Shariq Saeed v. Mansoob Ali Khan and 5 others*, ), 2010). The next part explains and analyze the right to online privacy and laws affecting online privacy in the country.

### ***Pakistan Electronic Crimes Act 2016 and right to online Privacy in Pakistan***

There are various laws which directly or indirectly affect right of privacy in Pakistan. Some of them are related with regulation of privacy offline and some of them have regulated online privacy in Pakistan. As the laws regulating data protections are not available in the country so data protections and privacy were regulated by the provisions and rules of “*Electronic Transactions Ordinance 2002 and Freedom of Information Ordinance 2002 (The Right to Privacy in the Islamic Republic of Pakistan* , 2017)”. More recently a law for online crimes was passed and named as *Pakistan Electronic Crimes Act 2016* (hereinafter called as PECA 2016). Several provisions of PECA 2016 are related with online data and privacy of individuals (Khan). These provisions grant the authority to government and its agencies to access to the personal data of citizens and to some extent restrict people from acquiring access to govt data. Such authorization of intervention to the government regarding the personal data of the citizens has the tendency to seriously affect online privacy in Pakistan (Khan). The provisions of PECA 2016 related with the data of individuals are comprehended and critically analyzed under this portion. While analyzing these provisions it is also examined as to how some of these provisions of the PECA 2016 are affecting online privacy in Pakistan.

Section 31, 32, 37 and 42 of the PECA 2016 are the important Sections which grants sweeping powers to the government agencies regarding data of the individuals. These sections have the tendency to seriously influence digital or online privacy in the country. Section 31 of the Act provides that if data is required for criminal investigation than law enforcement agencies may ask

residents to transfer their private data without the requirement of court warrant. However, he is required to intimate court within twenty-four hours after the acquisition of required data from any individual (Malkani, 2020). This provision grants an absolute authority to the concerned officer to take any decision as per his sole discretion. In a similar situation, such search and seize powers were granted to the government agencies under “Section 10 of Anti- Terrorism Act 1996 (ATA)”. This section 10 the ATA, permitted government officials to enter the premises and also the power of searching of the premises was granted if the concerned govt official was satisfied about the possession of suspicious material as described under section 8 the ATA (in Mehran Ali v Federation of Pakistan, 1998). However Supreme Court of Pakistan in Mehran Ali v Federation of Pakistan, declared such unauthorized and uncontrolled powers are unconstitutional and further declared Section 10 of the ATA as unconstitutional. Pakistani Supreme Court also reiterated that “although there is no denying the fact that privacy right is subject to restrictions, but all those restrictions are required to be reasonable and also in conformism with the mandate provided by the constitution”. The present part of PECA 2016 also grants similar powers to the government agencies with regard to the storage of data of individuals.

PECA-2016 under section 32 demands that “Internet Service Providers” (ISPs), are obligated to hold the specific traffic data for at-least of one year. This section also provides that if demanded by the Pakistan Telecommunication Authority (PTA), the ISPs are required to provide that data to the investigative agencies. This requirement of retention of data for one year is significantly lengthier as compared to the previous requirement of ninety days. Much more length was provided in the earlier drafts of the PECA-2016. As there is no law regulating private data protection in Pakistan therefore PECA-2016 provides for the retaining of private data by ISPs, if required than for the transfer of that private data to external entities, and the empowering govt officials to force citizens to leave their personal information (which could be utilized against those individuals in criminal inquiries). In 2014, a United Kingdom Higher Court proclaimed “The Data Retention and Investigatory Powers Act, 2014 (DRIPA-2014)” as illegal. Violations of right to individual privacy was the chief grounds for challenging DRIPA-2014 (ARSHAD). Additionally, DRIPA-2014 was also found to be inconsistent with Article 8 of the renowned “European Convention on Human Rights (ECHR). Article 8 of the ECHR is related with “the right to respect for private as well as family life of individuals. It also protects personal data of peoples”. (All General Obligations to Retain Traffic Data Found Illegal under EU Law, 2016)“Court of Justice of the European Union” in the same year of 2014 declared that the retaining of data by the companies on the requests of the governments may permit “particular inferences to be drawn regarding the private lives of the people whose personal data has been retained by the concerned companies”. Therefore, it was decided that such attainment of data by technological companies is a misappropriate intrusion with the right to online privacy. Similar arguments are made for challenging the constitutionality of this such power of retention. The practical insinuations of this specific provision regarding retention of data are already beginning to materialize in the country. During July- December 2019, globally Facebook has received 15,826 requests for content restrictions. Out of those 15thousands content requests, Pakistan, Russia, and Mexico made almost half of total requests. During the second half of the 2019, Facebook restricted 2300 items inside of Pakistan on the request of

government. Only Russia had more requests as compared to Pakistan for content removal in second half of 2019. If we compare this increased trend of requests with total number of requests in 2016 and 2017 then it can be concluded that after the enactment of PECA 2016 there has been noticeable surge in application of content requests in Pakistan (Jahangir, Pakistan among countries with most content removal requests: Facebook, 2020). However, it is not known as to why this access by the government was demanded and whether PECA-2106 was actually utilized to avoid tangible injury from materializing.

International cooperation in relation to data sharing is discussed under Section 42 of the PECA 2016. This section grants sweeping powers to the government agencies with regard to sharing material with external entities (Vagueness in Cybercrime Law', 2016). This provision is challenging in the sense that it permits for one-sided assistance between other countries and the government agencies of the country. Furthermore, subsection 2 authorizes the governments to transfer data attained under this Act with foreign countries and international agencies. These sweeping powers are alarming as the entire process of accessing data involves no resource to judicial intervention or authorization or even oversight. Under Section 42, once the private data have been stored by government organizations then it could be used by them as they deem fit. It can even be misused by the foreign agencies as they have the right to approach the required data from the respective governments or agencies.

## CONCLUSION

Regulating online privacy is one of the most pressing and challenging issues in recent times. In Pakistan, right to privacy is protected and promoted under the present Constitution of 1973. As there is no data protection law in the country therefore the enactment of PECA- 2016, is a step in the right course due to the evolving cyber threats and the necessity to provide protection to the rights of the citizens. However, the threats posed by some of the provisions of the Act has grave implications for right to privacy and some of the other fundamental rights of the citizens. This article analyzed right to privacy as promoted and protected under the current Constitution of the country. Secondly this article investigated the threat posed by the PECA for right to online privacy in the country. However, problems of PECA 2016 which are related with fundamental rights other than online privacy are not discussed in this article. This Act in current shape and form has the tendency to pose blatant attacks on constitutional right to online privacy and it needs to be revised. In pure constitutional terms, PECA violates Articles 4, 10-A, 14, and 19 of the Constitution of the Islamic Republic of Pakistan 1973<sup>1</sup>. 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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