

Legislation Review

Prevention of Electronic Crimes Act, 2016: A Critical Review of Ambiguities and Inconsistencies

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Abstract

Pakistan faces significant cybersecurity challenges nowadays and the "Prevention of Electronic Crimes Act, 2016" (PECA) was introduced to address the ever-increasing challenges of cybercrime and offences relating to information systems in Pakistan. Since its inception, the Act has been the subject of much criticism due to various ambiguities and inconsistencies that have hindered its effective implementation. This review critically examines some of the apparent and critical ambiguities with the legal lens, focusing on areas where the law remains unclear or inconsistent, particularly in relation to its enforcement and interpretation. This review also analyzes that in the existence of Cybercrime Wing of the FIA as investigation agency and delegation of Powers to police to take cognizance of offence, through the Section 30 PECA, what would be the legal status of National Cybercrime Investigation

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Agency (NCCIA) created by the Federal government through delegated legislation (NCCIA Rules, 2024). This review would spark a debate among stakeholders to enable them to clarify grey areas, rectify anomalies so that the purpose of this law is achieved while safeguarding the fundamental rights of citizens.

Keywords: PECA, Ambiguities, Cybercrimes, NCCIA, Cybercrime Wing of FIA, Digital Age

Introduction

The Prevention of Electronic Crimes Act, 2016 (hereinafter the "PECA") is a fundamental legislation aimed at combating cybercrimes in Pakistan and offences relating to information systems. The preamble to PECA speaks of preventing "unauthorized acts with respect to information systems and provide for related offences as well as mechanisms for their investigation, prosecution, and trial and for the matters connected there with". It was enacted with this *raison d'etre* that the existing criminal justice framework is often grossly inadequate to handle cybercrime in the Digital Age. It is a special law to deal with a different category of crimes involving the cyber space and use of information systems. It provides the mechanism for the investigation and prosecution of such offences. The PECA is not only a criminal substantive law, but is also procedural and regulatory in nature. However, PECA has some apparent ambiguities, vagueness's, and inconsistencies, which are resulting in the weakness of its implementation. This is one of the main reasons that this law has not achieved the desired results, which were perceived at the time of its enactment. Although, this law requires a comprehensive critical analysis, but this review is limited to some important and apparent ambiguities and inconsistencies, which beg for attention of legislature.

Glaring Ambiguities And Mistakes In The Act

To begin with, Section 22-B of PECA, which was added by Criminal Laws (Amendment) Act, 2023, (hereinafter “Amendment Act, 2023”) is reproduced as under:

1) Section in the statute:

“22B. Commercial sexual exploitation of children.

Subject to section 8. whoever is directly or indirectly involved in the use of an information system or other similar means for the purposes of the sexual exploitation of minors including child prostitution and child sex tourism by payment in money or in kind to the minor or any other person shall be punished with imprisonment of either description for a term which shall not be less than fourteen years and may extend up to twenty years and with fine which shall not be less than one million rupees.”

In the above reproduced section 22B, the words “**Subject to Section 8**” controls this section. It means that this section is overridden by Section 8 and the conditions or limitations specified in the section 8 apply to the entire section 22B of PECA.

For the proper appreciation, Section 8 is reproduced as under:

“8. Interference with critical infrastructure information system or data. —

Whoever with dishonest intention interferes with or damages, or causes to be interfered with or damaged, any part or whole of a critical information system, or data, shall be punished with imprisonment which may extend to seven years or with fine which may extend to ten million rupees or with both.”

Ambiguity Needs To Be Addressed

Reading of these two sections in juxtaposition would show that there is no relevance in these two sections. The phrase, “Subject to section 8” appears to be alien, unnecessary and confusing to this section 22B of PECA. This ambiguity requires clarification.

Now, coming to Section 24A, which was also added by the Amendment Act, 2023. This section runs as under:

2) Section in the statute:

“[24A. **Cyberbullying.** (1) A person commits the offence of cyberbullying who, with intent to harass, threaten or target another person posts or sends electronic messages, including pictures or videos by using any social media platform, including chat rooms, blogs or instant messaging.

(2)

(3)

(4)

(5) Whoever commits the offence of **child cyberbullying** as described in sub-section (1), shall be punished with imprisonment of either description for a term which may extend to five years but shall not be less than one year with a fine of up to five hundred thousand rupees and shall not less than one hundred thousand rupees.”

Ambiguity Needs To Be Addressed

In the above reproduced section 24A (1), Cyberbullying is defined without specifying the age meaning thereby that this section is applicable to any person irrespective of his/her age. However, in sub-section (5), it is mentioned that “*Whoever commits the offence of **child cyberbullying** as described in sub-section (1), shall be punished.....*”It shows that the punishment provided under sub-

section (5) is applicable to the child cyberbullying only. It is also necessary to mention that there is no punishment provided for the cyberbullying (in general), which has been defined under sub-section (1) of this section. In short, offence has been defined but punishment has not been provided while for the child cyberbullying, the punishment is provided but offence is not defined.

Section 43A, was also added by the Amendment Act, 2023. This section runs as under:

3) Section in the statute:

“43A. Complaint against cybercrimes against children.-Complaint against the offences under sections 10, 21, **21A, 21B, 21C, 21D, 21E, 21F** and abatement thereof may be lodged with concerned authorities by the complainant as defined under clause (viiia) of section 2.”

Ambiguity Needs To Be Addressed

In the above-reproduced section 43A, there is a mention of sections “**21A, 21B, 21C, 21D, 21E, 21F**”; however, these sections have not been provided in the PECA. There is a need to clarify this ambiguity.

Legal Status of National Cybercrime Investigation Agency (NCCIA)

Recently, in exercise of authority under section 51 read with section 29 of the PECA, the Federal Government on 24th April, 2024, promulgated the National Cyber Crime Investigation Agency (Establishment, Powers and Functions) Rules 2024 (hereinafter “NCCIA Rules, 2024”). Rule 3 of NCCIA Rules, 2024 runs as under:

“3. Establishment of investigation Agency. 1)

There shall hereby stand established the National cybercrime Investigation agency (NCCIA) to

exercise jurisdiction under the Act and the Federal investigation Agency (FIA) shall cease to perform functions as designated investigation agency under the Act.”

The above legislation provides that the establishment of the National Cybercrime Investigation Agency (NCCIA) rendered the Federal Investigation Agency (hereinafter the “FIA”) ‘defunct’. Previously, the Cybercrime Wing of the FIA (CCW), had been entrusted with investigation under the PECA. To ensure a smooth transition, Rule 4(7) of the NCCIA Rules, 2024 stipulates that until the appointment of new staff at the NCCIA, current officers and staff from the defunct FIA Cybercrime Wing will continue working under the Prevention of Electronic Crimes Investigation Rules, 2018 for the period of one year, and their service shall be counted as on deputation to the NCCIA. However, it is perplexing that section 30 of the PECA, 2016 authorizes not only F.I.A but also Police to take cognizance of the offence. This section was substituted by Amendment Act, 2023, which is reproduced here;

“30. Power and procedure to investigate. (1) In addition to the Federal Investigation Agency, the Police shall be authorized to take cognizance of the offences under this Act. In that case the Police shall be bound to refer the matter relating offence under this Act immediately to the Federal Investigation Agency, for technical opinion and investigation as per its mandate and rule.”

As of today, this provision is in existence on statue book. No doubt, section 29 of PECA allows the Federal government to designate or establish an investigation agency, but the above section specifically mentions that “in addition to the Federal Investigation Agency, the Police shall be authorized to take cognizance of the offences under this Act”. Prior to the substitution of Section 30 through

Amendment, 2023 the FIA was not mentioned in PECA; rather, it refers to an "investigation agency" in general. The FIA was designated as the investigation agency for PECA under Section 29 vide SRO². Additionally, Section 30 of PECA explicitly names the FIA, authorizing it to investigate offences under the PECA. This leads to a situation that as per NCCIA, Rules 2024, only NCCIA is the authorized investigation agency but section 30 of PECA, 2016 authorizes the F.I.A, as well as, Police to take cognizance of the offences under PECA. This poses a legal question that whether delegated legislation/rules have an overriding effect over the Act or statutory law?. This invites the prompt attention of the legislature.

In seeking the answer to this question, the guidance can be taken from the case of *Farrukh Raza Sheikh*³, wherein the Supreme Court of Pakistan held that "it is axiomatic that Rules being subordinate or delegated legislation, are framed under the authority of the parent statute, and are therefore subservient to the primary legislation. Rules cannot contradict or add to the clear provisions of the parent statute. It is trite law that Rules cannot override the specific provisions of the parent statute. The Rules are to carry out the purposes of the Ordinance and cannot offend, oppose or be inconsistent with the provisions of the parent statute (Ordinance in this case).⁵ Any rule, to the extent of any inconsistency with the parent statute is, therefore, ultra vires of the parent statute." This needs no further explanation.

Conferment of Jurisdiction

Another overlooked feature of PECA is that it does not provide for creation or establishment of a special court. Section 44 of PECA

² SRO 897(I)/2016 dated 22.09.2016

³ *Farrukh Raza Sheikh Versus. The Appellate Tribunal Inland Revenue and others* (2022 S C M R 1787)

authorizes the Federal Government, in consultation with the Chief Justice of the High Court, to designate a presiding judge of the court to try PECA offences. And "Court" has been defined under section 2(ix) of PECA as the court of competent jurisdiction. However, it does not speak of the determination of the Judge as who could be designated for purposes of trying offences under PECA, whether he/she would be a Judicial Magistrate, Assistant Sessions Judge, Additional Sessions Judge or Sessions Judge. This ambiguity results in the designation of the Judge, Special Court (Central) Islamabad, in terms of section 44(1) of PECA, for trial of offences under PECA in the Islamabad Capital territory. However, recently, the Islamabad High Court, in the case of *Muhammad Ayyaz Bin Tariq*⁴, held that the Special Court (Central) is not competent to try offences under PECA and further observed that, "the Federal Government can designate more than one presiding officers of the ordinary Criminal courts (Magistrates appointed under section 30 Cr.P.C, Additional Sessions Judges and Sessions Judges) for trial of offences under PECA, in terms of Section 44(1) thereof." It is pertinent to note that the legislature has mentioned two forums i-e Magistrate and Court of Sessions, whose decisions are appealable in section 47 of the PECA. There is nothing mentioned about the Assistant Sessions Judge in the PECA. It is relevant to mention here that in Sindh, for all practical purposes, Assistant Sessions Judge exercises powers which vest with Magistrate under section 30, Cr.P.C. However, in Sindh, Judicial Magistrates (who are not empowered Section 30 Magistrate) have been designated as presiding officers of the courts to try PECA offences. This ambiguity needs to be clarified.

⁴ Unreported judgment dated 03.06.2024 passed in CrI. Misc. No. 1184-B-2023 (Muhammad Ayyaz Bin Tariq Versus. The State & another).

Joint Investigation and Joint Trial of the PECA Offences and PPC Offences

The provisions of PECA do not mention whether the offences under PPC have to be investigated along with offences under PECA. It does not envisage a joint trial of such offences either. The peculiar silence of PECA leads to the ambiguities. This being the reason that two questions have repeatedly come before the Courts: (i) whether the offences under PECA and PPC can be investigated together, and (ii) whether the Special Court designated under section 44(1) of PECA is vested with jurisdiction to conduct joint trials of PECA offences, as well as, offences under PPC. Therefore, indistinct provisions in PECA have culminated into the opacities, which in turn resulted into the conflicting case law on these points.

Firstly, the Lahore High Court in the case of *Sheraz Khan*⁵ has addressed it and held that “in the light of definition clauses, the recitation and examination of relevant provisions of PECA, which are sections 27, 28, 30, 36(3) (b and c), 44 and 50, makes it clear that offences under P.P.C or any other laws cannot be tried jointly with any coordinate offence under PECA, 2016, even if it is committed in the same transaction. There is no specific provision for joint trial in PECA”. In para-9, it is also held that “Thus, court constituted under PECA, 2016 cannot try offences of P.P.C.” It was also observed that unlike section 17 read with section 21-M of the Anti-Terrorism Act, 1997, there is no provision for holding a joint trial under PECA.

⁵ *Sheraz Khan Vs. The State and others* (2022 P Cr. L J 203 [Lahore]).

The High Court of Sindh, vide judgment dated 05.12.2022⁶, in para No. 16, addressing this point, held that “the Court constituted under PECA, 2016 *prima facie* cannot try offences falls under PPC.”

The Islamabad High Court in the case of *Javed Khan*⁷ answered the referred questions in negative. It was held that that since joint investigation and trial of the offences under PECA and PPC is not permitted by law and most of the offences under PECA are non-cognizable therefore, FIA shall proceed with the matter only to the extent to offence under PECA after obtaining sanction from the Magistrate to investigate the offence, whereas, the offences under PPC were left to be investigated by the police and tried by ordinary criminal courts.

Later, the Lahore High Court in the case of *Sheraz Ahmad*⁸ had taken different view and held that “So, the offences under section 11 of PECA, 2016, and sections 295-A, 295-B, 295-C and 298-C of the Pakistan Penal Code, 1860 cannot be tried separately because the offences falling under Section 11 of PECA, 2016, and under sections 295-A, 295-B, 295-C and 298-C P.P.C. are interlinked.” The Lahore High Court was hearing criminal revision petition against dismissal of an application challenging the act of being charge-sheeted for PPC offences with PECA offences. The revision petition was dismissed.

Recently, three Judge Bench of the Islamabad High Court, in the case of *Muhammad Ayyaz Bin Tariq*⁹, in Para No.24 held that “The

⁶ Criminal Acquittal Appeals No.S-293 of 2021 & S-03 of 2022 vide judgment dated 05.12.2022 by High Court of Sindh, Circuit Court, Hyderabad.

⁷ Javed Khan and other vs. The State and others, [2023 PCrLJ 1092 Islamabad].

⁸ Sheraz Ahmad and another Vs. The State and another (2024 PCrLJ 1098 [Lahore]).

⁹ Unreported judgment dated 03.06.2024 passed in CrI. Misc. No. 1184-B-2023 (Muhammad Ayyaz Bin Tariq Versus. The State & another).

authorized agencies under PECA can investigate the offences mentioned under PECA and PPC or any other law, committed in one transaction. Similarly, offences under both the statutes can be jointly tried by the designated ordinary criminal courts. However, the allegation of the commission of offences under PECA is *sine qua non* for taking cognizance of offences mentioned in any other law”. However, one of the Members of the Bench, although agreed with the decision rendered in the judgment but had written his separate reasons and in concluding para No.34, held that “FIA as the designated agency under section 29(1) of PECA read together with the Schedule of FIA Act has the jurisdiction to investigate PECA offences and offences listed in the Schedule of the FIA Act and there is nothing in law that prohibits joint investigation of PECA offences and scheduled PPC offences (listed in the schedule to the FIA Act) by FIA.” Notably, no schedule is provided in the NCCIA Rules 2024, whereas, the FIA Act does have a schedule listing the offences of other laws including PPC. Thus, once the NCCIA is fully operational, there would also arise a legal uncertainty as to whether it can investigate the offences under the PECA and PPC together. This aspect also need be attended by the legislature on priority.

Conclusion

The law that was passed in 2016 but still flawed - confusion in jurisdiction and mechanism- and regressive in essence. The above referred ambiguities and inconsistencies will badly affect the purpose of enactment of the PECA. This review was limited to the apparent and important ambiguities and inconsistencies in the law. This law needs to be thoroughly critically examined. For this purpose, it is proposed that a joint session or workshop may be conducted at the Federal Judicial Academy, Islamabad on the implementation of PECA in courts and challenges faced by the authorized investigation agencies, Prosecutors, advocates and the

presiding officers of the Courts trying PECA offences. Moreover, the Federal Government, through the judicial academies both at Federal and Provincial level, should ensure and expedite training of judges designated under PECA, and other stakeholders for an effective implementation of the law so this new born law becomes a boon, not a bane to the nation in this age of digital inclusion.