Criminal Defamation Laws in Pakistan and Their Use to Silence Victims of Sexual Harassment, Abuse, or Rape

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Abstract

In Pakistan, the discourse around defamation laws in the context of sexual harassment and abuse cases is underdeveloped. With the #MeToo movement on a rise, several victims of sexual harassment and abuse have used social media to disclose their horrific stories. These claims are generally met with counterclaims of defamation by the alleged perpetrator or their supporters, which creates further hindrance for these victims trying to speak up. The victim, while fighting their case of harassment, has to simultaneously defend themself against the defamation charges. This problem seems to be exacerbated through criminal defamation laws where a First Information Report can also be registered against the victim under Sections 499 and 500 of the Penal Code of Pakistan 1860 ("Penal Code") and under Section 20 and 21 of the Prevention of Electronic Crimes Act 2016 ("PECA") for speaking up. Therefore, it is imperative to revisit criminal defamation laws in Pakistan to analyse their misuse in such claims. This paper aims to distinguish between civil and criminal defamation laws in Pakistan: the Defamation Ordinance 2002 ("2002 Ordinance"), the Penal Code, and PECA. It analyses cases of harassment and defamation, both inside and outside of the courtrooms. However, since the jurisprudence is underdeveloped, case law alone might not be an adequate source to formulate a definitive argument. For this purpose, the paper includes interviews with lawyers, social activists, and law enforcement personnel to gauge their understanding and views on the topic. Based on these interviews, this paper attempts to analyse the jurisprudential and practical lapses in the system that cause impediments in dispensation of justice. Thus, it will also look at criminal and civil defamation laws to determine whether they hinder sexual harassment claims and violate constitutional rights to freedom of speech and expression.

Introduction

Globally, feminist movements campaigning for equal rights have gained momentum over the last few decades. In Pakistan, despite several efforts of providing equal opportunities to women and curbing discrimination, public debate and legislation on tabooed crimes including sexual harassment, psychological and physical abuse, and rape remain elusive. Moreover, a trend has recently emerged where if a victim speaks up about their abuse or harassment, the alleged perpetrator counterclaims by using defamation laws to exert undue pressure on the alleged victim. In August 2019, the Women's Action Forum ("WAF"), a Pakistan-based social organisation, released a statement where they reported

an alarming rise in the registration of defamation cases against individuals speaking about or reporting incidents of harassment, assault, and rape.[1] WAF also stated that this violates the fundamental right to free speech and called for the repeal of Pakistan's criminal defamation laws. In light of this statement, this paper will analyse whether criminal defamation laws in Pakistan are being misused to silence victims of sexual harassment, abuse, or rape who seek redressal from the country's justice system.

A UK-based NGO published a paper on defamation and its remedies. The paper concluded that in cases of harassment, criminal defamation is violative of free speech; therefore, legal principles on defamation need to be updated to facilitate free speech and reflect legal and political developments that have taken place over the last fifteen years to balance these rights.[2] The primary purpose of criminal defamation law, it seems, is to enable citizens to take immediate criminal action when a defamatory statement is made against them. However, numerous activist organisations such as WAF, Bolo Bhi, and the Digital Rights Foundation ("DRF") have raised concerns about Pakistan's criminal defamation laws, and their alleged misuse as a deterrent against women seeking relief.

Defamation Laws in Pakistan

There are three pieces of legislation in Pakistan that cover the offence of defamation. The offence of defamation can be categorised into civil and criminal defamation. Civil defamation is defined under Section 3 of the Defamation Ordinance 2002 ("2002 Ordinance") which defines it as follows:

> Any wrongful act or publication or circulation of a false statement or representation made orally or in written or visual form which injuries the reputation of a person, tends to lower him in the estimation of others or tends to reduce him to ridicule, unjust criticism, dislike contempt or hatred shall be actionable as defamation.[3]

On the other hand, criminal defamation is defined under Section 499 of the Penal Code. It states:

> Whoever by words either spoken or intended to be read, or by sign or by visible representations, makes or publishes any imputation concerning any person intending

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[1] Editorial, 'WAF Decries 'Misuse of Defamation Laws to Silence Rape, Harassment Victims' *The News* (2019) <https://www.thenews.com.pk/print/518300-waf-decries-misuse-of-defamation-laws-to-silence-rape-harassment-victims> accessed 23 December 2019.

[2] 'Revised Defining Defamation Principles: Background Paper' (2016) Article 19 <https://www.article19.org/data/files/medialibrary/38362/Defamation-Principles-Background-paper.pdf> accessed 25 December 2019.

[3] Defamation Ordinance 2002, s 3.

> to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.[4]

Defamation is also criminalised in the Prevention of Electronic Crimes Act ("PECA"). Defamation under PECA is discussed in detail in the next chapter. In this section, the paper distinguishes between civil and criminal defamation under the 2002 Ordinance and the Penal Code, and the repercussions that follow the commission of the offence. Broadly, defamation has two essential elements that can be derived from case law. First, there must be words either spoken or intended to be read or by signs or by visible representation that aim to harm the repute of a natural person.[5] Second, intention or *mens rea* is a precondition for the offence of defamation.[6]

Distinction Between Criminal and Civil Defamation in Pakistan

In the case of *Dr Aijaz Hassan Qureshi v District Magistrate Lahore*, the Lahore High Court emphasised the three exceptions under Section 499 of the Penal Code:

> **First Exception.** It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.
>
> **Second Exception.** It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.
>
> **Third Exception.** It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct and no further.[7]

In *Khondkar Abu Taleb v the State*, a three-member bench of the Supreme Court ruled that the burden of proof in defamation cases lies on the prosecution.[8] The Court in this case also laid down the necessary ingredients needed to prove criminal defamation.

[4] Pakistan Penal Code 1860, s 499.
[5] 1993 PCr.LJ 764.
[6] PLD 2017 Isl 370.
[7] PLD 1976 Lah 314, [6].
[8] PLD 1967 SC 32.

The Court stipulated that the prosecution must satisfy the Court on three counts for the charge of criminal defamation: first, the accused party should be accountable for the publication; second, the imputation made in the publication should not be true; and third, the imputation should have been made with *mens rea* or knowledge to harm the reputation of the person against whom the publication is made.[9] Unlike civil defamation, criminal defamation may be brought against a group, class, or race if it causes a breach of peace among the general public.[10]

In *Shariq Saeed v Mansoob Ali Khan*,[11] the Court relied on Lord Denning's speech in *Plato Films Ltd v Speidal* where it was established that in a civil defamation case, a defendant may mitigate damages by proving through evidence that the plaintiff is generally someone of bad reputation and the alleged offence does not harm their repute in the society.[12] On the other hand, the plaintiff may rebut such a claim by producing witnesses who can attest to the fact that the plaintiff does in fact enjoy a good reputation in the society.[13] Moreover, in the case of *Dr Mukhtar Ahmed v Mst. Shamim Hashmi*, the Court held:

> Under the criminal law all benefit of doubt is to be granted to an accused and the prosecution must establish its case beyond a reasonable doubt. In a suit for damages under civil law, however, a very strong burden of proving a statement false is to be discharged by the plaintiff and the mere fact that it could not be proved does not necessarily show that it was false.[14]

Therefore, the primary distinction between civil and criminal defamation is that it is only under the former that damages can be sought by the aggrieved party. There is no such relief available in criminal defamation. In Pakistan, criminal trials are generally considered more expeditious compared to civil trials which is why many people resort to seeking a criminal remedy. However, there exists no substantial difference between the two other than the fact that damages can only be sought under a civil suit and not under criminal proceedings.

Prevention Of Electronic Crimes Act 2016 (PECA)

PECA is a federal legislation enacted to combat cybercrime in Pakistan. The purpose of the Act was defined in *Muhammad Azam Davi v the State*, wherein the Court stated that

[9] Ibid.
[10] Ibid.
[11] 2010 YLR 1647.
[12] [1961] A.C. 1090.
[13] *Shariq* (n 11), 1655.
[14] 2007 CLC 941.

it was promulgated to prevent unauthorised acts concerning information systems and to provide a mechanism for investigation, prosecution, trial, and international cooperation in respect of offences relating to electronic crimes.[15] The Act aims to criminalise harassment, hate speech, unauthorised access to information, and data transmission on the internet. However, the Act has faced heavy criticism for violating fundamental rights because it confers arbitrary and blanket powers to regulatory agencies, including the Federal Investigation Authority ("FIA") and the Pakistan Telecommunication Agency ("PTA").[16] Lawyers and social activists are sceptical about this law since it allows perpetrators of harassment to file criminal defamation suits against their victims who open up about their harassment experience on online forums, and hence violates the fundamental right to free speech.[17] Apart from this, PECA has also been criticised by media groups which allege that it gives blanket powers to PTA to regulate content and to charge journalists with "electronic crimes."[18] Although PECA does not have any explicit provisions on defamation, certain sections can be construed as criminalising defamation of a person. Section 20(l) of the Act states:

> Offences against dignity of a natural person-(l) Whoever intentionally and publicly exhibits or displays or transmits any information through any information system, which he knows to be false, and intimidates or harms the reputation or privacy of a natural person, shall be punished with imprisonment for a term which may extend to three years or with fine which may extend one million rupees or with both.[19]

This offence is non-cognizable, bailable, and compoundable. Thus, law enforcement agencies cannot arrest the accused without a warrant.[20] Similarly, Section 21 of the PECA states:

> Offences against modesty of a natural person and minor. - (1) Whoever intentionally and publicly exhibits …any information which, …(c) intimidates a natural person with any sexual act, or any sexually explicit

[15] 2017 PCrLJ 1715.
[16] An example of the arbitrary powers given to law enforcement agencies would be section 37 of PECA which gives PTA the authority to interpret electronic content, apply restrictions and block the content from reaching the public.
[17] Gathered as observation during the research for this paper. These claims are explained and analysed later in the paper.
[18] Editorial, 'Pakistan Journalists Face Charges for Criticizing Military: DW: 18.01.2021' *Deutsche Welle* <https://www.dw.com/en/pakistan-journalists-military-press-freedom/a-56265949> accessed 11 September 2021.
[19] Prevention of Electronic Crimes Act 2016, s 20.
[20] Ibid s 43.

> image or video of a natural person; or (d) cultivate, entices or induces a natural person to engage in a sexually explicit act, through an information system lo harm a natural person or his reputation, or to take revenge or to create hatred or blackmail, shall be punished with imprisonment for a term which may extend to five years or with fine.[21]

This offence is cognizable, non-bailable, and non-compoundable.[22] Judicial precedent shows that in most cases where Section 20 of the PECA is attracted, Section 21 is also invoked. The procedure followed for an offence committed under Section 21 of the PECA is laid out in Section 497 of Criminal Procedure Code 1898 ("CrPC"). Although this is a special law, Section 29 of the PECA states that the law enforcement agency empowered under this Act would carry out its duties and functions according to the procedure detailed in the CrPC unless explicitly stated otherwise in the Act.[23]

The investigation procedure under the PECA is laid down in Sections 30, 43, 44, and 50 of the Act. Moreover, the PECA Rules state that there shall be a circle in-charge with whom the complaint shall be filed. The FIA cannot start an investigation independently; thus, it is essential to file a complaint to start the investigation. In case of a non-cognizable offence, the circle in-charge must seek the competent court's permission for investigation under Section 155 of the CrPC.[24] Thus, only the circle in-charge is empowered to seek the court's approval for such investigations. However, in the case of cognizable offences under the PECA, the FIA exercises power to investigate upon receiving an order from the Magistrate.

Harassers try to pressurise their victims into silence by filing defamation complaints under Section 20 and 21 of the PECA. If a victim of sexual harassment shares their story online, the alleged harasser could press defamation charges under the PECA, and the FIA could then summon the victim for preliminary investigation. This law puts victims of sexual harassment at a disadvantage; they have to defend their harassment allegations and also defend themselves against the FIA's investigation for the defamation charges. However, recent judgments from the lower courts have revealed that the courts scrutinising defamation allegations are inclined to favour the victim if they believe that the defamation charges are vexatious in nature. A case decided by a Judicial Magistrate in Lahore and published by the DRF on their website reads:

[21] Ibid s 21.
[22] Ibid.
[23] Ibid s 29.
[24] Ibid.

> In an important decision, a Judicial Magistrate of Lahore convicted an offender under PECA.[25] This has come about as a result of a criminal case filed, under sections 20, 21 and 24 of PECA as well as section 420 of the PPC, with the Cyber Crime Circle FIA by complainant whose wife became the victim of cyber harassment at the hands of convict.[26]

Though numerous cases expand upon claims that constitute defamation, very few deal with criminal defamation against sexual harassment claims in Pakistan. Since only the Supreme Court and the High Court cases are reported in law journals, one can only get a limited view of what happens generally in courtrooms. However, activists still argue that the existence of criminal defamation laws do extend a defence to the person accused of a sexual crime. The case law is not sufficient to clearly state that the courts do not accept defamation as a defence in a case of harassment or abuse. Interestingly, from what one sees at the appellate level, it can be said that the High Courts often side with the victims and do not accept defamation as a valid defence.

In *Farhan Kirmani v the State*, a woman claimed to have been sexually harassed online.[27] The accused was alleged to have established a fake Facebook identity of the complainant to post doctored pictures of her. To defend himself, the accused tried to bring a claim for defamation against the complainant under Sections 20 and 21 of the PECA. The accused claimed that the complainant attempted to blackmail him by planting incriminating material against him. However, the Court, while noting that it seemed very far-fetched that a married woman with four kids would post her own superimposed photos to blackmail the accused, held:

> The accused has apparently gone to grotesque lengths to humiliate the complainant online, which may cause a detrimental effect on her…the impact of uploading on internet the superimposed porn photographs of a woman is more than the shame and shock that one might feel when she discovers herself to be the victim of this crime.[28]

Thus, the Court refused to grant relief to the accused and ruled in favour of the complainant. The accused's actions demonstrate how Section 20 of the PECA can be misused to counter allegations of harassment by using the threat of defamation to deter

[25] 'Man Convicted In The First Judgment Under The Prevention Of Electronic Crimes Act (PECA)' (*Digital Rights Foundation*, 2019) <https://digitalrightsfoundation.pk/man-convicted-in-the-first-judgement-under-the-prevention-of-electronic-crimes-act-peca/> accessed 12 December 2019.
[26] There is limited reported case law available on PECA since the first trial takes place in lower courts. Cases filed under PECA are only published in law journals if they are appealed before the superior courts.
[27] 2018 YLR 329.
[28] Ibid.

victims from speaking up. Despite the use of defamation as a counter, some courts realise the issue and often lean towards the victim. Similarly, in another case, the victim's sexual conduct was raised as a defence by the accused and it was argued that the victim was attempting to defame him, while he had solicited favours, both monetary and carnal, by disseminating her obscene pictures.[29] The Court, while dismissing defamatory grounds taken up by the accused, argued that the victim's naïve volitional intimacy cannot be pleaded as a defence for a most grievous misconduct based upon a criminal betrayal resulting into unmitigated intrusion into a woman's privacy.[30]

In *Usman Bin Mehmood v the State*, the complainant filed an FIR under Sections 20, 21, and 24 of the PECA against the accused. It was alleged that the accused had an affair with the complainant's wife and subsequently disseminated intimate pictures and videos through his email. The prosecution argued that the accused coerced the complainant to pronounce divorce upon his wife. The accused petitioned to get bail, but the Court sided with the complainant and dismissed the bail petition by reasoning:

> In the present case, allegation against the petitioner, supported by technical evidence is that he by betraying the trust reposed by the prosecutrix exposed her on the Internet and shared indecent images not only with her better half but with others as well; it is a flagrant intrusion into privacy that brings a young lady into perennial embarrassment and ridicule within and outside family fold.[31]

In *Muhammad Ashraf v the State*, the petitioner sought post-arrest bail in a case registered under Sections 20, 21, and 24 of the PECA read with Sections 420, 500, and 109 of the PPC. According to the complainant, her daughter was allured into an intimate liaison with the accused. The accused had captured the prosecutrix's graphic exposure and subsequently disseminated it through a fake Facebook identity to blackmail the girl.[32] The Court rejected the request for bail and held:

> Prosecutrix's naive volitional intimacy cannot be pleaded as a defence for a most grievous misconduct based upon a criminal betrayal resulting into unmitigated intrusion into a woman's privacy. Similarly, petitioner cannot

[29] *Muhammad Ashraf v the State* 2018 PCrLJ 1667.
[30] Ibid.
[31] 2018 PCrLJ 408.
[32] *Ashraf* (n 29).

> claim bail as of right merely on the ground that offences complained do not fall within the prohibitory clause of section 497 of the CPC.[33]

These judgments can be deemed as a win for victims because on the face of it, it seems that the courts understand that criminal defamation charges are generally vexatious and a deliberate attempt to squash the other proceeding. However, it is pertinent to mention here that the aforementioned judgements constitute just a small chunk of the total number of litigated cases since only very few judgements end up getting reported in law journals. Many cases go unreported, and many do not even reach the appellate level. Furthermore, countless cases are mediated by the law enforcement agencies and are never litigated. The jurisprudence regarding criminal defamation under the PECA has not developed to the extent where conclusive arguments can be drawn on this subject. However, from the few reported cases, it can be seen that the courts are diligent and have, in some cases, discarded claims of defamation against victims of online harassment. Moreover, it is important to keep in mind that the case law discussed in this paper is primarily from the Lahore High Court. The High Courts of Peshawar, Sindh, and Balochistan do not have reported cases on this issue. Furthermore, since this Act is very recent, it cannot be stated conclusively that the PECA does not violate the fundamental right of free speech in sexual harassment claims made online.

The criminal courts and the law enforcement agencies in Pakistan are notoriously patriarchal, something which might possibly be a reason why countless women do not even file a case of harassment. Several cases in Pakistan go unreported because of the tedious processes in the justice system. Pursuing a case of harassment can become a daunting and intimidating process for a woman in Pakistan, who has to fight against social stigmatisation and patriarchal hierarchies all at the same time. Many victims do not find the strength to endure this long and tedious journey to seek justice; and the defence of criminal defamation available to the accused makes registration and following up on harassment cases even harder.

Current Instances of Harassment and Defamation

I. Ali Zafar and Meesha Shafi case

In April 2018, singer Meesha Shafi posted a tweet where she claimed that singer Ali Zafar had sexually harassed her.[34] This led to Zafar sending a legal notice to Shafi for defamation under the 2002 Ordinance. Shafi retaliated by filing a complaint at the

[33] Ibid.
[34] Editorial, 'A Timeline Of The Meesha Shafi-Ali Zafar Controversy' *Images* (12 May 2018) <https://images.dawn.com/news/1179925> accessed 31 December 2019.

Ombudsperson office. However, her complaint was rejected on technical grounds, and it was held that the provisions of the Protection Against Harassment of Women at Workplace Act 2010 were not attracted since Shafi and Zafar "did not have an employer-employee relationship."[35] While the Lahore High Court did hear Shafi's petition against the Ombudsperson's decision, it ended up dismissing her petition.

Meanwhile, Zafar filed a suit for damages worth one billion Pakistani rupees against Shafi in the Sessions Court, Lahore for accusing him of sexual harassment.[36] In response, Shafi filed a countersuit for damages worth two billion Pakistani rupees for mental torture and agony, along with loss of reputation and goodwill.[37] Furthermore, she asked the Court to pass a decree to declare Zafar's statements regarding her as "false, malicious and defamatory" and "made to injure the reputation of the plaintiff."[38] However, the case was suspended after Shafi and her witnesses failed to appear before the Court.[39] Later, both the Supreme Court and the Lahore High Court dismissed Shafi's petition on the basis that it lacked merit and that the witnesses were aware and had reasonable time to prepare for cross-examination.[40] In Pakistan, witnesses try to avoid legal proceedings when they do not want to upset the opposing party if the said party has social status and power.

Although Zafar did not pursue criminal remedy against Shafi's allegations, he did file a civil defamation suit. This case shows that the first defence of any accused in cases of harassment is defamation. Therefore, the state needs to restrict this remedy to only civil courts so that the remedy is not used to pressurise the victim.

II. Allegations against a famous videographer

A famous social media influencer and vlogger was accused of harassing multiple women on different occasions:

[35] Rana Bilal, 'Meesha Shafi Appeals To LHC Against Punjab Governor's Dismissal Of Complaint Against Ali Zafar' *Dawn* (2 Aug 2018) <https://www.dawn.com/news/1424471> accessed 31 December 2019.

[36] Editorial, 'Ali Zafar Files Rs1bn Damages Suit Against Meesha' *Dawn* (24 Jun 2018) <https://www.dawn.com/news/1415699/ali-zafar-files-rs1bn-damages-suit-against-meesha> accessed 31 December 2019.

[37] Rana Bilal, 'Meesha Shafi Files Rs2bn Damages Suit Against Ali Zafar' *Dawn* (18 Sep 2019) <https://www.dawn.com/news/1505901> accessed 31 December 2019.

[38] Ibid.

[39] Editorial, 'Meesha Case Adjourned' *The News* (8 Oct 2019) <https://www.thenews.com.pk/print/538047-meesha-case-adjourned> accessed 31 December 2019.

[40] Haseeb Bhatti, 'SC Takes Up Meesha Shafi's Appeal In Defamation Case Filed By Ali Zafar' *Dawn* (9 May 2019) <https://www.dawn.com/news/1481246> accessed 31 December 2019.

> Multiple women came forward with their claims against the influencer, alleging that he harassed them and acted inappropriately. There were several screenshots of the conversations between the vlogger and other girls that were offered as evidence, wherein the influencer was seen asking women for bold pictures and sending unsolicited ones of himself.[41]

However, the influencer denied the allegations against him on social media and made a YouTube video in his defence. The video also had an interview with the Additional Director ("AD") FIA, Chaudry Asif Iqbal, and there appeared to be a clear bias on the part of the FIA official in favour of the influencer as he dismissed all claims against him.

The influencer decided to file a defamation case under Section 20 of the PECA against one of the women. Interestingly, the influencer resided in Lahore whereas the woman was a resident of Karachi, but he filed the FIR against the woman in Gujranwala. "The FIR claims that following an inquiry by FIA Cyber Crime Reporting Centre Gujranwala, it had been registered on the complaint of the influencer."[42] While interviewing AD Iqbal for this paper, the influencer was also present but only commented on certain things. When specifically asked for the reason for filing the FIR in Gujranwala, none of them seemed to have an answer. "This FIR has been lodged after due investigation by the FIA," was all that AD Iqbal had to say.[43] The actual reason for filing the FIR in a city where neither of the parties resides remains unknown. It can only be speculated that this was done to pressurise the woman to drop the charges.

Furthermore, during this interview, the influencer and AD Iqbal negated all claims raised by social activists regarding criminal defamation being a hindrance to sexual harassment claims. They reiterated that if a person tries to defame someone on social media (by accusing them of harassment or abuse), strict action must be taken against them. AD Iqbal acknowledged that criminal remedies are comparatively quicker than civil remedies, so they are often relied upon in defamation cases.

III. Rape allegations by Jami Moor

In October 2019, filmmaker Jami Moor revealed on Twitter that he had been raped thirteen years ago by a powerful and influential media personality who was his friend and

[41] Editorial, 'Vlogger Ukhano Accused of Sexual Harassment, Releases Public Statement in Response' *Express Tribune* (18 July 2019) <https://tribune.com.pk/story/2016103/4-vlogger-ukano-responds-sexual-harassment-allegations/> accessed 31 December 2019.
[42] Editorial, 'Ukhano Registers FIR In Response To 'False' Allegations of Harassment, Abusive Behavior' *Express Tribune* (18 July 2019) <https://tribune.com.pk/story/2016103/4-vlogger-ukano-responds-sexual-harassment-allegations/> accessed 31 December 2019.
[43] Interview with Chaudry Asif Iqbal, Additional Director, FIA (Lahore, 2 Dec 2019).

client. Moor lamented that the loopholes within the system suppress the voices of the people who want to speak up against their oppressors. He believed that he had zero means to fight a legal battle against the alleged rapist and that if he filed a suit, the alleged rapist would respond with a defamation suit. And since the alleged rapist was an influential media tycoon, Moor continued, he holds more power. In an interview with Gulf News, Moor said that his friends in journalism did not help him because they themselves were afraid of the alleged rapist.[44] Lately, Moor disclosed the alleged rapist's name, who happened to be the CEO of Dawn News, Hameed Haroon. As rightly feared by Moor, Haroon denied the accusation and decided to file a defamation suit against him.[45]

With the #MeToo movement's rise, many women spoke up on social media about their experiences of being harassed, abused, or raped. There have been many cases in which the allegations of harassment were not brought before a court of law. Social activists blame the weak judicial system, dubious laws, patriarchal society, and infamous criminal defamation laws for this. It is believed that these factors put women at a disadvantage in comparison to men. It can be seen through the cases discussed above that filing harassment suits is not easy for women, let alone going through a criminal trial and reliving the trauma during the stressful and intimidating proceedings. As Jami Moor clearly stated in his interview, he could not file his case in a court because he feared that a defamation suit might follow and make it more difficult to pursue his rape case.

Analysis

As explained above, not many defamation cases are reported in law journals. Hence, it is difficult to establish a conclusive argument about legal jurisprudence on this topic. Mr. Ahmed Pansota was Misha Shafi's attorney during her trial against Ali Zafar. He believes that defamation laws are not, in themselves, a deterrent; instead, the problem is premised on the public's perception of the law.[46] Criminal proceedings are considered more expeditious than their civil counterparts, but in Pakistan, they are also more stressful and tiresome. Pansota humorously remarked that if his office were to receive a criminal notice, the whole office would panic.

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[44] Mehr Tarar, 'Pakistani Filmmaker Jamshed Mehmood Recounts The Day He Was Raped And The Aftermath' *Gulf News* (10 Nov 2019) <https://gulfnews.com/world/asia/pakistan/pakistani-filmmaker-jamshed-mehmood-recounts-the-day-he-was-raped-and-the-aftermath-1.1573378236204> accessed 31 December 2019.

[45] Editorial, 'Dawn CEO Hameed Haroon Responds To Jami's Allegations' *The Nation* (30 Dec 2019) <https://nation.com.pk/30-Dec-2019/dawn-ceo-hameed-haroon-responds-to-jami-s-allegations> accessed 30 December 2019.

[46] Interview with Barrister Ahmed Pansota, Advocate of the Supreme Court of Pakistan (Mall Road Lahore, 10 Oct 2019).

Criminal proceedings can be intimidating for women wanting to fight harassment cases due to various social factors. Since sexual harassment is a taboo topic in Pakistan, women are often frightened to speak up. If they choose to come forward and fight their harasser, they have to weigh in a lot of factors to determine whether the trial is worth the uphill battle. Pansota supported this paper's claim that there is no concrete jurisprudence developed under this topic in Pakistan. He claims that typically when a victim files a harassment case and the alleged harasser brings a countersuit of defamation, then the FIA or the Police coerce a settlement between the parties. Pansota stated that since many of these cases result in settlements, they are thus never reported and never get to see the light of day.

Pansota also believed that criminal defamation laws have the potential of being used in favour of women. Since it is an expeditious process, it can prove effective for women trying to seek immediate relief when perpetrators invade their privacy by disseminating private content online. This appears to be somewhat accurate as witnessed in the cases of *Farhan Kirmani v the State* and *Usman Bin Mehmood v the State*.[47] However, the timeline of the trial and its effectiveness cannot be accurately measured.

Pansota claims that in Shafi's case, the FIA summoned the witnesses, who were meant to appear before the court in Shafi's defence because they were supporting her on social media. He added that the FIA asked them random and meaningless questions. He drew parallels with a practice in place ten to fifteen years ago where a person who had accused someone of a negligible harm done to them would then be met with an FIR for dacoity or theft filed by the accused party. He called defamation suits filed as revenge for harassment accusations the modern version of this practice. While Pansota leaned towards decriminalising defamation, he also insisted that this law could prove beneficial for women given its effectiveness in terms of expediency and pressure.

Another lawyer, Mr. Abuzar Salman Khan Niazi, believes that the use of criminal defamation is a more expeditious, result-oriented, and effective means in comparison to a civil suit.[48] He however asserts that civil defamation provides a recourse for punitive damages whereas criminal defamation does not. Hence, it can be argued that the existence of criminal defamation is of no use if damages can only be sought under civil defamation. The entire point of a defamation suit is to seek relief for the harm or damage caused to a person due to defamatory content. This can either be done through specific performance

[47] *Farhan* (n 27); *Usman* (n 31).
[48] Interview with Mr. Abuzar Salman Khan Niazi, Advocate of the Supreme Court of Pakistan. (Lahore, 10 Oct 2019).

or by awarding damages. Imprisonment does not provide any sort of monetary compensation to loss of reputation and hence, it seems to be a pointless remedy.

Niazi also elaborated on another difference between civil and criminal defamation. In a civil case, one has to cross the threshold of the balance of probabilities to prove that the crime occurred; however, in a criminal case, the crime has to be proved beyond reasonable doubt. Thus, while it is easier to prove liability under a civil suit, it can be a lengthy process. On the other hand, in criminal cases, it is harder to prove the crime; however, the process is more effective because after a complaint is handed over to the police, the fear of incarceration forces the parties to sit together and settle the dispute. This is the reason why many defamation cases are tried under criminal law. For a social media influencer (as seen in the videographer case) who could lose fans over harassment allegations, only a civil suit can help him recover the loss incurred. The argument that only criminal law can provide effective and instantaneous justice is not valid because the same relief (i.e., barring the person from further disseminating defamatory content) also exists in civil defamation under interim injunctions.

Ms. Shmyla Khan, an attorney working at the DRF, believes that the working of the FIA as an institution is flawed.[49] She listed instances where lapses can be observed in FIA investigation proceedings. Also, in the videographer's case, the FIA sent two notices to Dua Asif asking her to appear before them in Gujranwala. Asif requested to transfer the proceedings to Karachi, where she resided. When Asif did not comply with the summons served on her and refused to appear before the FIA in Gujranwala, the FIA filed an FIR against her in Gujranwala, making the situation harder for her. Shmyla speculates that this was a tactic employed by the videographer to pressurise her into dropping the case.

Shmyla argues that there is no need for criminal defamation laws in Pakistan because gender inequality is still a very big issue. She believes that Pansota's argument that these laws might be used as an effective remedy in favour of women is flawed since there is no practical evidence supporting it. She believes that since women in Pakistan are already at a disadvantage because of the patriarchal structure of the society and the ineffective criminal justice system, it is more often used to pressurise women to withdraw their cases. If a law adversely affects one party more than the other, then generally, that legislation should be reviewed. Khan stated:

[49] Interview with Shmyla Khan, Researcher, Digital Rights Foundation (Garden Town Lahore, 11 Nov 2019).

> Journalists are also caught up in this for defaming institutions like the military. The general principle is that when it should affect a fundamental right under the constitution, it should be read narrowly. The criminal law is loosely worded which makes room for misuse and restriction of free speech.[50]

Barrister Jannat Ali, a lawyer and social activist, explained the procedural loopholes in the videographer's case: the defendant resided in Karachi and was being summoned in Gujranwala which patently was a tactic by the videographer to make her drop the case.[51] These procedural lapses on part of the law enforcement agencies make it even harder for women to pursue justice. She referred to a case which came under her office's observation where a 12-year-old girl had a defamation case filed against her after she had posted a comment about her teacher on a closed Facebook account. When her teacher found out, he filed a defamation case against the girl. The father of the girl was threatened by the FIA and hence they had no option but to seek settlement outside of court. "This is an example where free speech is curtailed because of defamation."[52]

Jannat reasoned that the FIA charged Shafi's witness, Leena Ghani, with defamation to pressurize her into not giving her statement to the court. This action of the FIA violated Ghani's right to free speech.[53] Jannat blames the patriarchal attitudes prevalent in government institutions and the society at large for these issues, and believes that it is pertinent for the public to be sensitised on the issue. The lack of importance given to sensitising people can be seen in government institutions, including law enforcement agencies and the judiciary. Jannat believes that the judge in Shafi's case should have taken a more purposive approach instead of dismissing the case on a mere technicality. However, AD FIA Iqbal believed that there was nothing wrong with criminal defamation laws and that they function as an effective remedy.[54] He negated all concerns raised by the DRF and believed that there was nothing which suggested that the right to free speech was being violated.

I. Abuse of Power by FIA

AD Iqbal argued that FIA's investigations are better and more comprehensive than those conducted by the Police, and that FIA is very flexible and accommodating during

[50] Ibid (n 46).
[51] Interview with Ms. Jannat Ali Kalyar, Legal Officer, Digital Rights Foundation (Garden Town Lahore, 11 Nov 2019).
[52] Ibid.
[53] Ibid.
[54] Ibid(n 41).

investigations. However, claims such as Leena Ghani's suggest otherwise. Farieha Aziz, a lawyer working on defamation laws, submitted a note for the Senate Functional Committee on Human Rights under the topic "Use of Section 20 of PECA and Abuse of Power by the FIA."[55] In her note, she listed three ways in which the FIA abuses its power. First the FIA does not, in practice, take permission from the court to investigate non-cognizable offences where it is required by law to do so. This procedural lapse on part of the FIA raises several red flags since this violates several fundamental rights guaranteed under the Constitution. Second, they often seize devices without a warrant and thereby breach the law. This again is a violation of fundamental rights, and it has a very adverse impact on people who are unaware of their basic rights (especially women, children, and minorities). Lastly, the FIA often does not respect the privacy of the parties and compromises the confidentiality of the cases.[56] This impacts women more in comparison to men because of societal pressures and cultural definitions of female modesty; and any woman who defies the cultural norms might have to pay a hefty price (as seen in the Qandeel Baloch murder case[57]). Since honour killings are prevalent in South Asia, instances of compromised confidentiality can wreak havoc for a woman and might put her life in danger.

II. Ambiguity of the term "Human Dignity" in Section 20 of PECA

Section 20 of the PECA vaguely defines defamation since it uses the term "offences against dignity of a person." Although "human dignity" is mentioned in local and international laws, the term does not have a unified legal definition. Rinie Steinmann writes that it is difficult to define human dignity in a legal context as the concept is not even defined in the first international legal instrument which recognised dignity as an inherent virtue: the United Nations Universal Declaration of Human Rights.[58] Legal philosophers have argued that the law needs to have certainty in order for it to be effective.[59] It needs to be transparent and predictable; otherwise, as a result of it being vague, compliance of the law becomes difficult. Section 20 uses a vague term which can lend itself to misuse. It can be broadly read as defamation, but the law does not explicitly use the word "defamation."

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[55] Farieha Aziz, 'Note For Senate Functional Committee On Human Rights On: Use Of Section 20 Of PECA & The Abuse Of Power By The FIA' (Digital Rights Foundation, 2019).
[56] Ibid.
[57] BBC, 'Viewpoint: Qandeel Baloch Was Killed for Making Lives 'Difficult'' *BBC News* (30 Sep 2019) <https://www.bbc.com/news/world-asia-49874994> accessed 13 September 2021.
[58] Rinie Steinman "The Core Meaning of Human Dignity" (2016) Potchefstroom Electronic Law Journal 19 <http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812016000100023>
[59] Zipursky BC, 'The Inner Morality of Private Law' (2013) 58 The Fordham Law Archive of Scholarship and History 27.

III. Vagueness in the law

The other problem with Section 20 of the PECA is that it provides a criminal remedy to alleged sexual harassers, who can use it against their victims by threatening criminal proceedings. Jami Moor stated that he did not file a case against his alleged rapist because he knew that the latter would file a defamation case. And since the alleged rapist was a powerful media tycoon, he had the means to defeat Moor in a legal battle.[60] Social activists in Pakistan argue that the Moor case is just one example, and there are many other cases as well where there exists this deep-rooted fear.

Furthermore, the language of Section 20 is problematic in the sense that privacy is normally breached or violated when true information is disclosed or leaked. Moreover, reputation cannot be intimidated as such; "intimidation" is a concept distinct from the harm that may arise from the dissemination or disclosure of false or true information. Thus, this section is unclear since it seeks to cover too much ground. It endeavours to deal with too many "different kinds of privacy wrongs" under one broad heading.[61]

A publication by the DRF suggests that the language of Section 20 of the PECA should be amended to narrow its scope by introducing "a knowledge requirement in relation to false information and a more affirmative requirement that such information should cause 'harm' or 'intimidate' the reputation or privacy of natural persons."[62]It has also been suggested by several human rights activists that the publication of sensitive and private information or its misuse should be treated as a civil wrong and not as a criminal one.[63] Since this is a tortuous claim, damages should be sought as a recourse to the false allegation. It makes no sense to try defamation under criminal law since the recourse for damages is not available.

IV. Defamation and its effects on free speech

Section 20 of the PECA punishes those who intentionally and publicly exhibit or display or transmit any information which they know to be false and intimidate and harm the reputation and privacy of an individual with criminal sanction.[64] Under criminal law, the

[60] Haseeb (n 40).
[61] 'The Prevention Of Electronic Crimes Bill 2015 - An Analysis' (2016) *Article 19* <https://www.article19.org/data/files/medialibrary/38416/PECB-Analysis-June-2016.pdf> accessed 22 December 2019.
[62] Ibid.
[63] Ibid (n 2).
[64] Ibid.

vagueness doctrine is generally used to test the vagueness and technicality of provisions.[65] The doctrine demands that criminal laws must explicitly state the criterion used to determine what amounts to a punishable offence. Therefore, a law which fails to clearly and emphatically meet this criterion must be struck down for its vagueness.[66] Thus, for all intents and purposes, Section 20 of the Act can be deemed as ultra vires to the Constitution.

There is another issue with the language of Section 20(2) of the PECA.[67] This provision provides for a new remedy for aggrieved persons to file for injunctions that order the removal, destruction, or blocking of access to material in breach of sub-section (1). Even though such attempts at protecting the privacy and upholding the dignity of citizens should be lauded, the relief afforded by sub-section (2) is ineffective for achieving the purpose of Section 20. In blocking access to online material, there is the risk of PTA restricting legitimate and useful information. The lack of any clarity gives PTA unbridled discretion to issue additional rules that would exacerbate various problems, especially those relating to the curtailment of free speech. There have been several instances where PTA has used its unbridled discretion to stop free speech and crack down on journalists, activists, and political workers. Hence, the provision can be misused to curtail free speech under the guise of safeguarding human dignity. This is the primary argument made by many social activists in the country.[68]

V. International Trend in Decriminalising Defamation

Countries like the UK have decriminalised defamation because of the repercussions it has on freedom of speech. These steps have been hailed by social activists.[69] Similarly, in India, a bill was introduced in the Lok Sabha to decriminalise defamation because of its incompatibility with free speech.[70] In both the countries, similar arguments have been made in support of decriminalising defamation: that it hinders free speech, thereby rendering the law of criminal defamation dangerous and risky. A Karachi based lawyer,

[65]Faisal Daudpota, 'An Examination of Pakistan's Cybercrime Law' (2016) <https://poseidon01.ssrn.com/delivery.php?ID=532027087100110107001087026088104028126078127&EXT=pdf> accessed 22 December 2019.
[66] Ibid.
[67]Ibid (n 19), s 20(2).
[68] Sara Malkani, 'Criminal Defamation' *Dawn* (21 Sep 2019) <https://www.dawn.com/news/1506467/criminal-defamation> accessed 31 December 2019.
[69] 'UK: Defamation Decriminalized - Human Rights House Foundation' (*Human Rights House Foundation*, 17 Nov 2019) <https://humanrightshouse.org/articles/uk-defamation-decriminalized/> accessed 11 December 2019.
[70] Shreeja Sen, 'Bill Seeking To Decriminalize Defamation Introduced In Lok Sabha' (*Mint*, 11 Mar 2017) <https://www.livemint.com/Politics/fIW8n4Y3DRK88vCT9X16CN/Bill-seeking-to-decriminalize-defamation-introduced-in-Lok-S.html> accessed 3 December 2019.

Sara Malkani, who researches on this topic, argues in support of this argument. She believes that such laws tend to be used in retaliation for raising issues of public concern, that the threat of prosecution under criminal law deters open debate and expression, and that this contributes to stifling free speech.[71]

The United Nations Special Rapporteur on the Promotion and Protection of the Right to Free Speech has declared that criminal defamation laws should be abolished as they unjustifiably impinge on the freedom of expression.[72] Malkani also reports that other organisations, such as the Organization for Security and Cooperation ("OSCE") in Europe, have also condemned criminal defamation.[73] The OSCE representative on the freedom of media has noted that mere existence of these laws poses a threat to press freedom and violates the right to free expression even where they are rarely used. The European Court of Human Rights has asserted on numerous occasions that states may not impose prison sentences for defamation on matters of public or political concern.[74]

Conclusion

Although the law is not in itself a hindrance to any legal remedy, its practice is very different on ground, especially in countries like Pakistan where the judicial system is still developing. Criminal defamation laws are used, as witnessed in videographer's and Jami Moor's cases, to threaten and pressurise the victims speaking up about their stories. Criminal defamation not only deters victims of abuse or harassment from speaking up, but it also stands in violation of the fundamental right to free speech guaranteed under the Constitution. The fear of a defamation trial is always one of the primary concerns for a victim trying to speak up.

In a society marred with gender inequality, it is the responsibility of the legislature to enact laws that facilitate the marginalized groups in society. The language of the law is vague and requires re-evaluation. Free speech is a fundamental right and must be guaranteed under all circumstances. This paper has attempted to establish that when a certain legislation collides with constitutional principles, then the said law needs to be amended. Construing free speech as a fundamental right ensures a fair democratic society. Criminal defamation laws in the PPC and the PECA are violative of Article 19 of the Constitution and must be revoked or amended. Criminal remedy only poses the fear of

[71] Ibid (n 68).
[72] 'Report Of The Special Rapporteur On The Promotion And Protection Of The Right To Freedom Of Opinion And Expression' (2014) Mission to Montenegro (11–17 June 2013) United Nations General Assembly, Human Rights Council.
[73] Sara (n 68).
[74] Ibid (n 72).

imprisonment; on the other hand, a proper remedy of damages can only be sought in civil courts. Therefore, in the presence of such a remedy, there appears to be no reasonable argument for a criminal remedy. Hence, it is suggested that criminal defamation laws as contained in Sections 499 to 502 of the PPC and in Sections 20 and 21 of the PECA should be repealed, and reviewed and clarified, respectively.