



November 6, 2019

### **Misapplication of PECA 2016**

On October 24, 2019, an FIR 38/2019 under Sections 10 and 11 of PECA R/W 109 of the PPC was registered against Professor Muhammad Ismail. Below is a discussion of how the sections he has been charged with in the FIR, like many others before him, do not attract the offence nor qualify under the law.

#### **Misapplication of Section 10 of PECA:**

Section 10 of PECA, which pertains to cyber terrorism, has to be applied in connection with Sections 6 (Unauthorised access to critical infrastructure information system or data), 7 (Unauthorised copying or transmission of critical infrastructure information data), 8 (Interference with critical infrastructure information system or data) and 9 (Glorification of an offence) of PECA, which Professor Ismail has not been charged with in the FIR. Any move to add Section 9 at a later stage in the case will further strengthen the misgivings about the intent of the registration of the case in the first place. Section 10 of PECA defines cyber terrorism as:

**10. Cyber terrorism.**—Whoever commits or threatens to commit any of the offences under sections 6, 7, 8 or 9, where the commission or threat is with the intent to,—

- (a) coerce, intimidate, create a sense of fear, panic or insecurity in the Government or the public or a section of the public or community or sect or create a sense of fear or insecurity in society; or
- (b) advance inter-faith, sectarian or ethnic hatred; or
- (c) advance the objectives of organizations or individuals or groups proscribed under the law, shall be punished with imprisonment of either description for a term which may extend to fourteen years or with fine which may extend to fifty million rupees or with both.

Sections 6, 7, 8 and 9 are as follows:



**6. Unauthorized access to critical infrastructure information system or data.**—Whoever with dishonest intention gains unauthorized access to any critical infrastructure information system or data shall be punished with imprisonment which may extend to three years or with fine which may extend to one million rupees or with both.

**7. Unauthorized copying or transmission of critical infrastructure data.**—Whoever with dishonest intention and without authorization copies or otherwise transmits or causes to be transmitted any critical infrastructure data shall be punished with imprisonment for a term which may extend to five years, or with fine which may extend to five million rupees or with both.

**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.

**9. Glorification of an offence.**—(1) Whoever prepares or disseminates information, through any information system or device, with the intent to glorify an offence relating to terrorism, or any person convicted of a crime relating to terrorism, or activities of proscribed organizations or individuals or groups shall be punished with imprisonment for a term which may extend to seven years or with fine which may extend to ten million rupees or with both.

*Explanation.*—For the purposes of this section “glorification” includes depiction of any form of praise or celebration in a desirable manner.

Section 10, read in connection with Sections 6, 7 and 8, specifically pertains to “critical infrastructure” – which as per law has to be designated by the federal government. Critical infrastructure with respect to Sections 6, 7 and 8 is defined as follows:



- (x) “critical infrastructure” means critical elements of infrastructure namely assets, facilities, systems, networks or processes the loss or compromise of which could result in,—
- (a) major detrimental impact on the availability, integrity or delivery of essential services including those services, whose integrity, if compromised, could result in significant loss of life or casualties, taking into account significant economic or social impacts; or
  - (b) significant impact on national security, national defense, or the functioning of the state:

Provided that the Government may designate any private or Government infrastructure in accordance with the objectives of sub-paragraphs (i) and (ii) above, as critical infrastructure as may be prescribed under this Act;

- (xi) “critical infrastructure information system or data” means an information system, program or data that supports or performs a function with respect to a critical infrastructure;
- (xii) “damage to an information system” means any unauthorized change in the ordinary working of an information system that impairs its performance, access, output or change in location whether temporary or permanent and with or without causing any change in the system;

The definition does not extend to critique or commentary on social media. Even when Section 10 is invoked with Section 9, the speech in question has to be qualify as glorification of:



*i) an offence relating to terrorism*

*ii) a person convicted of a crime relating to terrorism*

*iii) activities of proscribed organizations or individuals or groups*

Despite this, Section 10 is routinely added to FIRs and used against dissidents – to secure arrests as this is one of the three cognizable offences under PECA. The charge against Professor Ismail, as stated in the FIR, is vague and reads: “facebook and Twitter accounts are broaden hate speech and fake information against Government institutions of Pakistan.”

There are many other examples where similar FIRs have been registered, invoking the same sections. A few examples:

1. FIR No. 15/2017 dated October 19, 2017 was lodged against Anwar Adil Tanoli under sections 9, 10(a), 20 of PECA read with Sections 500, 501, 505, 109, 34 PPC for allegedly posting “defamatory material against judges of the Supreme Court as well as members of the armed forces and the government.”
2. FIR No. 31/2018 dated July 11, 2019 (taken into custody on June 05, 2018) was lodged against Hayat Preghal under sections 9, 10 PECA read with 500, 109 PPC for allegedly posting content “critical of Pakistani state policies” on social media.
3. FIR No. 05/2018 dated September 19, 2018 lodged against former Senator Faisal Raza Abidi, Hans Masroor, the owner of a web channel Naya Pakistan, and the producer of the channel Ahsan Saleem under sections 10(a), 11 and 20 of PECA read with Sections 109 and 509 of the PPC for allegedly running “anti-judiciary” content on their channel.
4. FIR No. 06/2018 dated September 26, 2018 was lodged under sections 10(a), 11 and 20 of PECA read with Sections 109 and 506 of PPC against unidentified individuals for allegedly uploading “false and malicious material” against High Court proceedings, the judges of the Islamabad High Court.
5. FIR No. 06/2019 dated April 06, 2019 lodged against journalist Shahzeb Jillani under sections 10(a), 11 and 20 PECA read with 34, 109, 500 PPC for allegedly making “defamatory remarks against institutions of Pakistan” on a news programme.



6. FIR No. 32/2019 dated April 08, 2019 lodged against Ismail Mehsud under Sections 10, 11 PECA read with 109 PPC for “broaden hate speech and false information against Government Institution Pakistan on Facebook accounts.”
7. FIR 17/2019 dated August 25, 2019 lodged under Sections 9, 10 and 11 of PECA read with 109 PPC was lodged against Wahid Bux on the complaint of Inspector Javed Chaudhary FS Wing Hqrs Pakistan Rangers, for allegedly creating a Whatsapp group regarding “14 Aug Black Day.”

In all the cases listed above, Section 10 has been invoked to charge people for their social media posts.

### **Misapplication of Section 11 of PECA:**

Section 11, which is a non-cognizable offence, pertains to interfaith, sectarian or racial hatred

**11. Hate speech.**—Whoever prepares or disseminates information, through any information system or device, that advances or is likely to advance interfaith, sectarian or racial hatred, shall be punished with imprisonment for a term which may extend to seven years or with fine or with both.

Critique of state institutions does not qualify as an offence. Despite this, people are often charged under Section 11 of PECA for “hate speech” against the state institutions. In the following FIRs, people have been charged with hate speech against the state:

1. FIR No. 05/2018 dated September 19, 2018 (as mentioned above)
2. FIR No. 06/2018 dated September 26, 2018 (as mentioned above)
3. FIR No. 24/2019 U/S 11 and 20 of PECA R/W 123-A and 500 PPC lodged against Rizwan Razi for allegedly posting “defamatory and obnoxious” content against the judiciary, government institutions and intelligence agencies.
4. FIR No. 06/2019 dated April 06, 2019 (as mentioned above)
5. FIR registered against Waleed Butt, President of Hamza Youth Wing Punjab of PML-N, under Sections 11 and 20 of the PECA read with Sections 500, 505 and 109 of the PPC.
6. FIR No. 32/2019 dated April 08, 2019 (as mentioned above)
7. FIR 17/2019 dated August 25, 2019 (as mentioned above)



### **Addition of PPC offences to FIRs:**

The FIA, when investigating and prosecuting offences under PECA, tends to add sections of the PPC to FIRs. In Professor Ismail's case, Section 109 of the PPC has been added to the FIR. Section 109 is a cognizable offence and permits arrest without a warrant. The pattern indicates that the FIA adds cognizable sections of the PPC to FIRs to gain powers to arrest without first having to seek permission from court. FIRs have been lodged and arrests made even in non-cognizable sections under PECA by adding cognizable sections of the PPC.

The FIA has been barred from investigating and charging private individuals. In **2016 SCMR 447**, the Supreme Court defined scope of jurisdiction of FIA and differentiated it from the jurisdiction of police in these words:

*“6. Keeping in view the intent of the Act as spelt out from the preamble and the fact that through the Act the FIA, in terms of the schedule to the Act has been granted jurisdiction and power to act in respect of several offences under the P.P.C. which are cognizable by the local police also, and also in order to avoid a conflict of jurisdiction, the only conclusion that the Court may draw is that **for exercising jurisdiction in the matter of the offence enumerated in the schedule of the Act there has to be some nexus between the offences complained of and the Federal Government or else there shall be overlapping of the jurisdiction of the local police and the FIA creating an anomalous situation which certainly is not the intent of the legislature.** Another aspect of concern is that though in terms of notification, bearing SRO 977(1)/2003, section 489-F P.P.C. has been made a scheduled offence under the FIA Act, but no reasonable classification has been provided for exercising such power and it is left to the discretion of the concerned officer of the FIA to exercise his authority and jurisdiction under the Act in respect of the said offence, which militates against the protection enshrined by Article 25 of the Constitution of Islamic Republic of Pakistan. If a citizen is exposed to the proceedings in respect of an offence lodged against him which could be initiated before more than one forums, a reasonable classification is the requirement of the Constitution.”*



**NLR 1998 Criminal 103** pertains to the limits of FIA’s jurisdiction with respect to private persons and entities.

*“The allegations against private persons of allegedly opening foreign exchange accounts in foreign banks, against which certain amounts were taken as loan by direction of private limited companies cannot, by any stretch of reasoning, attract the jurisdiction and authority of FIA, so as to enable it to register cases in respect thereof. The investigations by the agency and submission of challan in Court are clearly without jurisdiction”*

When investigating and prosecuting offences under PECA, the FIA is bound by procedures under the Act as it has been designated as the investigation agency under Section 29 of PECA. It cannot draw or exercise powers under the FIA Act 1974 with respect to offences under PECA.

**2017 SCMR 1218 holds:**

*“It is a settled, canon of interpretation that where there is a conflict between a special law and a general law, the former will prevail over the latter... when there are two special laws both of which contain overriding clauses, in the case of conflict between the two laws generally the statute later in time will prevail over the statute prior in time.”*