

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE JAWWAD S. KHAWAJA
MR. JUSTICE KHILJI ARIF HUSSAIN

Constitution Petition No.105/12 alongwith CMAs-3795 & 3798 of 2012, HRC No.23957-S/2012 and Const. P. 53/2012.

AND
Constitution Petition No.104 of 2012 & CMA 3464/12.

AND
Constitution Petition No.117/12.

Hamid Mir and another. ... **Petitioner (s)**

VERSUS

Federation of Pakistan etc. ... **Respondent (s)**

For the petitioners: (In Const. P.105/12)	Hamid Mir & Absar Alam, in person.
For the petitioner: (In Const. P.53/12):	Dr. Tariq Hassan, ASC Syed Safdar Hussain, AOR
For the petitioners: (in Const. P.104/12)	Mr. Tausif Asif, ASC (Nemo) (regarding obscene and objectionable material in media)
For the petitioners: (Sh. Ahsan ud Din)(in Const.P.117/12):	Sheikh Ahsan ud Din, ASC Ch. Akhtar Ali, AOR
For the respondent-1:	Mr. Zulfiqar Khalid Maluka, ASC Mr. Mehmood A. Sheikh, AOR Mr. Nasir Jamal, DG & Rashid Ahmed (Secy.) and Muhammad Azam (Press Information Officer)
For the respondent-2:	Mr. Hasnain Ibrahim Kazmi, ASC
For the respondent-3:	Nemo.
For respondent-3: (Sh. Ahsan ud Din)(in Const.P.117/12):	Mr. Hasnain Ibrahim Kazmi, ASC Mr. Mehmood A. Sheikh, AOR
For the respondent-4: (Sh. Ahsan ud Din)(in Const.P.117/12):	Mr. Dil Muhammad Khan Alizai, DAG Mr. M. S. Khattak, AOR
For the respondent-5: (Sh. Ahsan ud Din)(in Const.P.117/12):	Mr. Jawwad Hassan, Addl.A.G.
For the respondent-4&5:	Syed Zahid Hussain Bukhari, ASC (Nemo)
For the respondent-6:	Nemo
For the respondent-7:	Mr. Naveed Ihsan Mr. Asif Hussain
For the respondent-8:	Nemo.

For the respondents:1,2,6&8: For the respondent,9&10:	Nemo. (Sh. Ahsan ud Din)(in Const.P.117/12) Mr. Jawwad Hassan, Addl. A.G. Mr. Tahir Raza, Addl. Secretary Information Deptt: Mr. Hassan Raza Khan, Dy. Director, ACE.
For the Province of KPK:	Syed Arshad Hussain Shah, Addl. A.G. (In Const.P.105/12 & in Const.P.117/12)
For the Federation:	Mr. Dil Muhammad Khan Alizai, DAG.
For the respondent-11 & Value TV:	Mr. Yasin Azad, ASC Raja Muqsat Nawaz, ASC Ch. Akhtar Ali, AOR
For the applicants:	Mr. Hashmat Ali Habib, ASC (CMA 4053/12 in Const.P.105/12) Nemo (CMA 3820/12 in Const.P.105/12) Mr. Arshad Sharif, Bureau Chief, DUNYA TV (CMA 3428/12 in Const.P.105/12) Mr. Ghulam Nabi, President Press Association SC (CMA 4063/12 in Const.P.105/12) Mr. M. Hanif Awan, in person (CMA 3464/12 in Const.P.104/12) Nemo (CMA 3631/12 in Const.P.105/12) Nemo (CMA 4210/12 in Const.P.105/12) Nemo (HRC 23957-S/12)
For M/s Vision Network:	Mr. Adnan Iqbal Chaudhry, ASC
For M/s AURORA:	Mr. Munir A. Malik, Sr. ASC (Nemo) alongwith Faisal Siddiqi Advocate. (Nemo)
For AAJ TV, Kashash TV, AVT, DHOOM, APNA TV:	Mr. Mehmood A. Sheikh, ASC
For Express TV:	Mr. Asad Khari, (Reporter)
For VIVE TV:	Nemo.
For PTV:	Mr. Shahid Mehmood Khokhar, ASC
For PUNJAB TV:	Nemo
For PEMRA: (in Const.P.104/12) (regarding obscene and objectionable material in media)	Hafiz S. A. Rehman, Sr. ASC Mr. Mehmood A. Sheikh, AOR
For Airways Media:	Mr. M. Bilal, Sr. ASC Mr. Babar Bilal, ASC
For ARY:	Nemo
For Cable Operators:	Dr. Amjad Hussain Bukhari, ASC
For Pakistan Broadcasters:	Mian Gul Hassan Aurangzeb, ASC (CMA 3521/12 in Const. P.104/12) (regarding obscene and objectionable material in media)
For Cable Operators Association: (in CMA 3464/12 of Const.P.104/12):	Dr. Amjad Hussain Bukhari, ASC Mr. M. S. Khatka, AOR (regarding obscene and objectionable material in media)
For Indus Television:	Tariq Ismail
Date of Hearing:	15.01.2013

ORDER

Jawwad S. Khawaja, J. This order is in continuation of our orders passed on 16.10.2012 and 20.12.2012, wherein the salient aspects of the present petitions were outlined. In our previous order dated 9.1.2013, the parties and/or their learned counsel were directed to propose agreed Terms of Reference (ToRs), in the event the Court agreed that a Commission be appointed as prayed for by some of the petitioners. Syed Nayyab Hassan Gardezi learned ASC, present in Court, in connection with some other matter consented to chair the meeting which was held on 9.1.2013. He has filed a report which is made part of the record as CMA No. 135 of 2013. The report records the agreed upon ToRs as well as the points of difference between the parties. The report has been seen and counsel representing the parties as well as the parties present in person have been heard.

2. Based on the previous hearings and the nature and extent of the important constitutional issues raised in these petitions, we are of the opinion that the appointment of a Commission will best serve the objectives of a fully considered decision on these petitions and the multiple constitutional issues arising therein. It will also provide the most efficient use of Court time. The report submitted by Mr. Gardezi was examined on 10.1.2013 and submissions of the parties and/or their learned counsel were also noted which are considered below.

3. In the report it has been noted that Mr. Nasir Jamal, Director General, Internal Publicity, Ministry of Information and Broadcasting was not in favour of the appointment of a Commission. Mr. Zulfiqar Khalid Maluka, ASC representing the aforesaid Ministry was asked to elaborate on the reasons behind the stance of the Ministry. He stated that the Ministry considers the appointment of a Commission unnecessary because the Press Council of Pakistan already deals with the same issue. This contention, however, is not entirely correct because the jurisdiction of the Press Council of Pakistan is restricted to the print media while the present petitions are largely in relation to the electronic media. Furthermore, even in relation to the Press Council of Pakistan and the print media, the existing laws and any Code of Conduct require examination in the context of fundamental rights guaranteed by Articles 19 and 19A of the Constitution. In this view of the matter, the reservation/objection to the appointment of a Commission is not tenable.

4. At this point it is important to bear in mind that one of the important issues arising in these petitions relates to the creation and utilization of secret funds. Some of the petitioners allege that a sum in excess of Rs.4 billion in the budget of the Ministry of Information and Broadcasting falls in this category because it remains un-accounted for. Mr. Maluka challenges this assertion. Yet, even he concedes that there is a substantial sum of Rs.140 million approximately which is designated as secret and in respect of which the Ministry claims privilege against disclosure of its details. *Prima facie*, in view of the provisions of Article 19A of the Constitution, it would appear that the Ministry of Information and Broadcasting would be obliged to disclose the nature and use of all funds allocated to it including the so-called secret funds. The Ministry asserts that it is entitled under law, to maintain secrecy in respect of such funds and the details of disbursement from these secret funds are privileged information. Mr. Maluka was directed to file in Court, in sealed cover for the Court's examination, the nature and details of the use of such funds together with the basis on which the privilege and claim for non-disclosure is based. It will then be for the Court to make a determination in respect of the privilege claimed by the Ministry. Likewise Mr. Asad Kharal one of the petitioners has stated that 27 other Ministries of the Federal Government also have secret funds, the use of which is neither accounted for nor disclosed. The learned DAG shall provide particulars of such secret funds, if any, and shall also set out reasons for non-disclosure of utilization of such funds, if privilege is claimed in respect of the same.

5. Mr. Hasnain Ibrahim Kazmi, ASC representing the Pakistan Electronic Media Regulatory Authority ("PEMRA") also contended that it was not necessary to appoint a Commission. According to him, PEMRA had already issued the Pakistan Electronic Media Regulatory Authority (Content) Regulations 2012 vide Notification No. S.R.O.1265(I)2012, dated 25th September, 2012. It was submitted by Mr. Kazmi that PEMRA being the competent authority enjoying a statutory mandate for framing content regulations and a code of conduct for the media and effective enforcement thereof, should alone determine these matters. Over the course of the previous hearings, the Court has repeatedly referred to the provisions of the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 (the "PEMRA Ordinance"). In particular the constitution of PEMRA given in section 6 of the PEMRA Ordinance has been noted. It stipulates that "*the Authority [PEMRA] shall*

consist of a Chairman and twelve members to be appointed by the President of Pakistan". We have earlier recorded that at least since 13.5.2011, PEMRA has no Chairman. In our order dated 20.12.2012, we have also noted the serious procedural challenge raised by the petitioners, who contend that when the Content Regulations were in the process of being made or when the same were adopted and notified, PEMRA did not have a Chairman and was thus not lawfully in existence. Mr. Kazmi contended that Dr. Abdul Jabbar was notified and was acting as Chairman of PEMRA. This contention is not correct because, firstly, Dr. Jabbar was never appointed as acting Chairman. The notification dated 14.5.2011 merely stipulates that *"Dr. Abdul Jabbar, Executive Member will look after the work of Chairman"*. Secondly, it is to be noted that the PEMRA Ordinance does not provide for the position of acting Chairman. In this context we had observed in our order dated 11.12.2012 as under:-

"... the learned D.A.G. and learned counsel for the PEMRA state that the question as to the status of the Acting Chairman has already been raised in Constitution Petition No. 104 of 2012 and the Government as well as the Acting Chairman, who appeared in that case are aware that this is an important issue going to the root of the authority and independent status of PEMRA. Learned counsel for the PEMRA also drew our attention to a number of documents including the letters addressed to various authorities with the object of receiving input for framing the content Regulations. These letters/documents have been issued by Dr. Abdul Jabbar indicating that he is the Chairman PEMRA although he is only Acting Chairman and prima facie, the statutory provisions of the PEMRA Ordinance appear not to have been complied with".

6. Based on the above, we are quite clear that the Content Regulations which were notified on 25.9.2012 cannot be construed as regulations issued by PEMRA. We may also add that the position of Chairman PEMRA has to be filled by a person who fulfils the exceptional and stringent requirements prescribed in the PEMRA Ordinance and not by a casual appointee. Moreover, the appointment has to be made through an open and transparent process to ensure that the appointee meets the objective criteria specified in the PEMRA Ordinance.

7. Mr. Kazmi then contended that even if Dr. Abdul Jabbar was not a validly appointed Chairman, the *de facto* doctrine, incorporated in Section 3(4) of PEMRA Ordinance, would save all his acts; and the Content Regulations too should therefore be deemed to have been saved. This contention is without merit. The statute cannot be read in

a way which makes its most important and potent parts such as the provisions about the very composition of PEMRA redundant. Such an interpretation of the *de facto* doctrine verges on utter disregard for the rule of law which is the foundation of our constitutional order. Resort to such loose and offhand reasoning will amount to an invocation of the 'doctrine of necessity' which our constitutional courts no longer adhere to. Reference may be made in this regard to our judgment in Sindh High Court Bar Association v. Federation of Pakistan (PLD 2009 SC 879). The Court, therefore, cannot condone patent disregard for the rule of law by the appointing authority, reflected in the non-appointment of a PEMRA Chairman for more than two years. Furthermore, it was pointed out to Mr. Kazmi that whatever limited benefit the *de facto* doctrine still confers upon public functionaries is limited to those functionaries who act *bona fide* and whose legal status has not been objected to. In this case, however, in our order of 17.09.2012 passed in Constitution Petition No. 104 of 2012, the Court itself observed that "*it has been pointed out to us that there is no permanent Chairman of PEMRA...*" After this defect had been highlighted in as public and authoritative a document as a Supreme Court order, it is hard to see how Dr. Abdul Jabbar's subsequent acts can be considered *bona fide* for the purpose of giving legal recognition or protection to the same. The Content Regulations purported to be prepared and issued in the name of PEMRA are, therefore, held to be of no legal consequence.

8. Be that as it may, as stated earlier in this order, the Court is of the view that some of the issues raised in these petitions require gathering, collation and perusal of extensive material as well as technical expertise in the area of media regulation. To examine these issues, the Court deems it appropriate to appoint a Commission, in exercise of powers vested in it by Order XXXII of the Supreme Court Rules, 1982 and Order XXVI of the Code of Civil Procedure, 1908.

9. The parties were asked to suggest possible names for the Commission and propose Terms of Reference (ToRs) for it. Different names were suggested by the parties. However, after considering these, the names of Justice (R) Nasir Aslam Zahid and Mr. Javed Jabbar were unanimously agreed upon to constitute the Commission. We, therefore, appoint Justice (R) Nasir Aslam Zahid and Mr. Javed Jabbar as a two-Member Commission which shall be headed by Justice (R) Nasir Aslam Zahid. The worthy members of the Commission have consented to act as a Commission. The ToRs of the Commission are as under:-

- A. To consider the role of the Ministry of Information and Broadcasting and other Government agencies in ensuring freedom of print and electronic media and whether or not there is information and material brought before the Commission to justify the continued functioning of the Ministry, consistent with Article 19 of the Constitution.
- B. To analyze whether and to what extent PEMRA has been able to fulfill its developmental mandate and regulatory functions independently under the PEMRA Ordinance.
- C. To determine if it advances or is consistent with the fundamental right under Article 19 *ibid* to allow the Government or its instrumentalities to be major players in the media through State Television and Radio broadcasters.
- D. To ascertain if PTV, PBC and APP, the recipients of public funding of billions of rupees, have independent in-house management and transparent policies in place which advance the objectives of fairness and evenhandedness expected of publicly funded entities and to determine if there are adequate checks against lop-sided or biased dissemination of information by these publicly funded entities.
- E. To consider the feasibility of letting the media adopt a self-regulatory code of conduct instead of content regulation, in the light of international standards and best practices.
- F. To enquire into allegations of media-related corruption and suggest steps to ensure impartial and independent media for the upcoming elections.
- G. To inquire whether, when giving money to different media houses directly for or on the pretext of advertisement, were the government or its functionaries pursuing a transparent, duly approved, *bona fide* government advertisement allocation policy or were the decisions to buy advertisement space with public money made arbitrarily or without objective criteria or to favour particular channels, journalists or media houses.
- H. To propose a single, transparent, objective, non-discriminatory policy for allocation of government advertisements among electronic and print media.
- I. Whether the Federal and Provincial Governments, autonomous and semi autonomous bodies, Government corporations or agencies adhere to PPRA rules or other transparent processes while granting advertisement contracts to advertising agencies or media houses. If not, then to suggest processes which are fair and transparent and which ensure the greatest value and fairest dissemination of information.

10. For the purpose of its work and to facilitate it:-

- i) the Commission shall have all the powers set out in Order XXXII of the Supreme Court Rules, 1980 together with such powers as may be considered necessary or appropriate by it to make its report on the ToRs set out in para 9 above;
- ii) the Registrar of this Court shall arrange office facilities for the Commission as and when required, at the Karachi Branch Registry of the Court or at Islamabad, if requested by the Commission;
- iii) the office is directed to provide two sets of the complete record of this case to the Commission;
- iv) the expenses on staff, logistics, travel within the country, stay outside Karachi, public notices for information or for soliciting public inputs etc. shall initially be born by the Ministry of Information and Broadcasting subject to subsequent apportionment, and reimbursement by other parties based on the report of the Commission;
- v) the Commission may seek such further orders or clarifications from the Court as it may consider necessary;
- vi) the Sindh High Court may, if so requested by the Commission, depute a Judicial Officer to act as the Secretary of the Commission.

11. The report of the Commission may be submitted in Court on or before 31.3.2013 or on such other date as may fixed by the Court if requested by the Commission.

Judge

Judge

Islamabad
15.01.2013.
A. Rehman
Approved for reporting.