

SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Bench-V:

Mr. Justice Syed Mansoor Ali Shah
Mrs. Justice Ayesha A. Malik

Civil Petition No.3506 of 2020

*(Against the order of the High Court of Sindh,
dated 11.11.2020, passed in M.A. No.45/2020)*

Pakistan Electronic Media Regulatory Authority (PEMRA) through its
Chairman & another

..... **Petitioners**

Versus

M/s ARY Communications Private Limited (ARY Digital) through its Chief
Executive Officer & another

..... **Respondents**

For the petitioners:

Mr. Shahid Mubeen, ASC.
Barrister Haris Azmat, ASC.
Barrister Hamza Amjad.
Barrister Fauzia Asad.
(Through video link from Lahore Registry)
Mr. Tahir Farooq Tarar, Head Legal,
Mr. Mohsin Hameed Dogar, Dir. (Legal), Mr.
Muhammad Jalal Haider, L.O.
Hafiz Muhammad Junaid, D.D.
(Regulations), PEMRA.

For the respondents:

Barrister Abid S. Zuberi, ASC.
Barrister Agha Ali Durrani.
Barrister Shahreen Chughtai.
Barrister Arif Ansari.

For the Federation:

Malik Javaid Iqbal Wains, Addl. A.G.
Mr. Kashif Zaman and Mr. Imran Haider,
Representatives of Ministry of Information
& Broadcasting, GoP.

Research Assistance by:

Ms. Fareeha Aziz, Co-Founder, Bolo Bhi.

Date of hearing:

24.11.2022 *(Judgement Reserved)*

JUDGEMENT

Syed Mansoor Ali Shah, J.- The main question of law that requires determination in the present case is: whether Section 27(a) of the Pakistan Electronic Media Regulatory Authority Ordinance 2002 ("**PEMRA Ordinance**") is an independent and self-governing provision or whether its applicability requires the opinion of the Council of Complaints in terms of Section 26(2) of the PEMRA Ordinance read with the Pakistan Electronic Media Regulatory Authority (Councils of Complaints) Rules 2010 ("**Councils of Complaints Rules**"). The case also necessitates some

elaboration on how the Councils of Complaints are to address complaints and deal with expressions like “obscene”, “vulgar” and “offensive to the commonly accepted standards of decency” as used in Section 27(a) of the PEMRA Ordinance, in relation to any programme, including a play or drama and advertisement (**“media content”**), broadcasted on the electronic media, in the context of our constitutional values and fundamental rights, in particular, the right to freedom of speech and expression and right to information guaranteed by Articles 19 and 19A of the Constitution of the Islamic Republic of Pakistan (**“Constitution”**). Further, the manner of selection of the members of the Councils of Complaints established under Section 26 of the PEMRA Ordinance, especially the requirement of such members being “citizens of eminence”, needs elucidation.

2. Briefly, the relevant facts of the case are that M/s ARY Communications Private Limited (**“ARY”**) broadcasted a drama serial, *JALAN*, (**“drama serial”**) on its TV Channel, ARY Digital. Some persons from the general public made complaints on the Pakistan Citizen’s Portal of the Prime Minister’s Performance Delivery Unit, alleging that the story of the drama serial is immoral and against social and cultural values. The said complaints were forwarded to the Chairman, Pakistan Electronic Media Regulatory Authority (**“PEMRA”**) for appropriate action. PEMRA, acting through its delegate i.e. the Chairman, called for the comments of ARY, which were submitted by ARY, refuting the allegations. PEMRA, however, being dissatisfied with the comments, first issued two directives to ARY to amend the script of the drama serial before broadcasting further episodes and then passed an order on 10 September 2020 under Section 27(a) of the PEMRA Ordinance, prohibiting the broadcasting and rebroadcasting of the drama serial. ARY filed an appeal against the said order before the High Court of Sindh under Section 30A of the PEMRA Ordinance, which was allowed on 15 September 2020 and the matter was remanded to PEMRA to decide the same afresh after serving a proper show cause notice to ARY, specifying the objectionable content of the drama serial and providing a sufficient opportunity of hearing.

3. In compliance with the direction of the High Court, PEMRA served two show cause notices to ARY, one of which contained the following assertions:

[The] storyline/theme of the said drama serial does not conform to the religious injunctions enshrined in the Holy Quran and established social/cultural more/values of the country containing highly objectionable content compromising sanctity of relations between brother-in-law and sister-in-law. Further, the storyline and theme of the drama serial seems a

lethal attempt to induce the younger segments of the society with an obvious intent to go against the commonly accepted standards of decency and to distort the social fabric by dislodging century old cultural & social norms/mores of the society. Transcript of a few video clips showing intimacy between brother-in-law and sister-in-law is enclosed herewith at (Annex-I) for ready reference.

In one of its replies, ARY took the following stance:

[T]he drama serial "JALAN" does not contain any objectionable content which may hurt the feelings of any viewers or violate any social, moral, religious or cultural norms. It is categorically submitted that there is no vulgarity or obscenity in the said drama serial and it only portrays a story of a social issue and further highlight[s] the adverse consequences of such conduct. The subject drama serial further highlights the issue of "mental illness". It is submitted that the said drama serial does not promote any anti-social behaviour but rather acts as a deterrent as it shows the adverse consequences that people can suffer due to their actions. There are no violations of any regulations or code in the script, dialogues or scenes of the drama, which is the reason why PEMRA has been unable to point out any particular violation(s).

In both of its replies, ARY also raised the objection regarding the jurisdiction of PEMRA to issue the show cause notice without first obtaining the opinion of a Council of Complaints under Section 26 of the PEMRA Ordinance. PEMRA did not take notice of this objection and, without catering to the same, passed a prohibition order under Section 27 of the PEMRA Ordinance on 29 October 2020, prohibiting ARY from airing the drama serial ("**prohibition order**").

4. ARY then preferred an appeal against this prohibition order before the High Court of Sindh under Section 30A of the PEMRA Ordinance. While allowing the appeal and setting aside the prohibition order by its judgement dated 11.11.2020 ("**impugned judgement**"), the High Court held that the legislature has empowered the Councils of Complaints, under Section 26 of the PEMRA Ordinance, to receive and review complaints against any aspects of the programmes and to recommend appropriate action to PEMRA, and that PEMRA could not have bypassed the Councils of Complaints in making the prohibition order. The present petition has been filed by PEMRA for leave to appeal against this judgement of the High Court.

5. We have considered the oral as well as written arguments of the learned counsel for the parties and examined the record of the case.

Regulating two fundamental rights: freedom of expression and right to information.

6. First of all, we think it appropriate to conceptualize the framework of establishing a regulatory authority like PEMRA under the law, i.e. the PEMRA Ordinance. This can best be contextualized in the framework of regulating the fundamental rights to freedom of expression

and information guaranteed by Articles 19 and 19A of the Constitution. to begin with the preamble of the PEMRA Ordinance states that it provides for the development of the electronic media to improve the standards of information and enlarge the choice available to the people of Pakistan through media in the current affairs, religious knowledge, art, culture, science, technology, economic development, social sector concerns, music sports, drama and other subjects of public and national interest. Empowering people at the grass root level by improving access of the people to mass media and ensuring accountability, transparency and good governance by optimizing the free flow of information. In essence the purpose of PEMRA is to improve and regulate the standard of information disseminated (media content) through media broadcast to the public. In the constitutional context, the function of PEMRA is to enhance, protect and regulate *freedom of speech and expression* by regulating media content and the *right of information* of the public to be able to access and receive such media content through different mediums of communication. Even though implied in the freedom of speech and expression is the freedom to communicate such speech and expression (media content) to the public, our Constitution additionally provides an independent fundamental right to information, in all matters of public importance. Media broadcasts, plays, and dramas are also matters of public importance. They can significantly impact society in various ways. Shaping public opinion: Media broadcasts, plays, and dramas often reflect or challenge societal norms and values. They can influence public opinion by shedding light on important issues, presenting different perspectives, and encouraging critical thinking. Raising awareness: These forms of communication can raise awareness about pressing social, political, or environmental issues, prompting public discourse and encouraging people to take action or make informed decisions. Cultural preservation and promotion: Plays and dramas often showcase a society's history, culture, and traditions, helping to preserve and promote cultural heritage and identity. Entertainment and escapism: Media broadcasts, plays, and dramas provide entertainment and escapism, allowing people to relax, enjoy, and momentarily escape from the stress of everyday life. This can contribute to overall well-being and social cohesion. Education: These mediums can serve as educational tools, introducing audiences to new ideas, historical events, or scientific concepts in an engaging and accessible way. Media broadcast in the shape of plays or dramas collectively play a crucial role in shaping society, influencing public opinion and fostering cultural development. Right to information under

Article 19A is therefore not limited to the access to information from public bodies as envisaged under the Right to Access of Information Act, 2017 but also includes media content disseminated to the public as an integral part of "information." So in the public space, the freedom of expression of one becomes the right to information of another. While one has the freedom to express oneself, the other has the right to have access and receive such information. If an individual has the right to express their opinions and ideas, others have the right to hear them and be informed. In this way, the right to receive information can be seen as a way to ensure that the right to freedom of expression is fully realized. Both these fundamental rights complement each other.

7. "Expression" in the context of freedom of expression (Article 19), refers to the act of conveying thoughts, ideas, emotions, beliefs, or opinions through various forms of communication. This can include: (i) spoken or written words like speeches, conversations, books, articles, and social media posts; (ii) artistic works such as painting, drawing, sculpture, music, dance, theater and film can be ways to express thoughts, ideas, or emotions; and (iii) symbolic actions that can take the form of gestures, clothing choices, or other actions that convey meaning, like protest marches or flag burning. Freedom of expression is a fundamental human right that allows individuals to openly communicate their thoughts and ideas without fear of censorship, discrimination, or punishment. It is essential for the healthy functioning of a democratic society to encourage exchange of ideas, fosters debate and allow for the development of diverse opinions and perspectives.

8. "Information", on the other hand, generally refers to data, facts or knowledge that have been organized, processed, and communicated in various formats to help people understand or make decisions about a particular topic or issue. Information can come from a variety of sources, such as books, articles, websites, social media, databases, speeches, videos, images, or audio recordings. Having "access to information", typically refers to the ability of individuals or groups to find, obtain and use information effectively and efficiently. This helps build a more informed, inclusive, cultured and a tolerant society.

9. PEMRA on the one hand has to ensure that the freedom of expression through media broadcast is enhanced without infringing the reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defense of Pakistan, friendly relations with

foreign States, public order, decency or morality or in relation to contempt of court or commission or incitement of an offence under Article 19 of the Constitution. While on the other hand, it also has to ensure that the right to information of the public is enlarged without impinging on the reasonable restrictions imposed by law under Article 19A of the Constitution. These constitutional restrictions are further actualized through the restrictions provided under PEMRA Ordinance and the rules, regulations and the code of conduct developed thereunder. The “reasonable restrictions” flow from Articles 19 and 19A of the Constitution and the statutory restrictions by and under the PEMRA Ordinance are to be interpreted in a forward looking manner in order to persistently advance and promote the constitutional values of tolerance, freedom, equality, democracy and social justice.

10. In order to regulate these two important fundamental rights, the media content¹ broadcasted and received in the public space is regulated under the PEMRA Ordinance² through a two-tiered regulatory system. First, through the independent public regulatory bodies called the Councils of Complaints, comprising citizens of eminence selected from the general public. Second, by PEMRA, a Government controlled regulatory body. The primary responsibility of these two bodies is to ensure that the media content is constitution complaint under Articles 19 and 19A and meets the reasonable restrictions under the PEMRA Ordinance, rules, regulations and the code of conduct. The importance of establishing independent Councils of Complaints from amongst citizens of eminence from the general public is to ensure that the media content for the public is also reviewed by representatives of the public, through a public regulatory body by applying commonly accepted or community based standards of decency. As the media content has to be put out in the public space, it is therefore, first and foremost, that an independent public body representing a broad cross-section of society reviews the media content. This helps protect, nurture and enhance the freedom of expression and right to information of the people and shields the media content against government interference and control.

11. The composition of the Councils of Complaints leaves little room to guess why the function of reviewing complaints against any aspects of programmes or advertisements and of rendering an opinion on such complaints has been entrusted by the legislature to them. Each

¹ Any aspects of the programmes and advertisements broadcasted or distributed by a station established through a licence issued by PEMRA.

² Read with the Councils of Complaints Rules.

Council of Complaints consists of a chairperson and five members including at least two women, who all are citizens of eminence from the general public. Although the expression "citizens of eminence", which is of wide import, is not defined in the PEMRA Ordinance, it ordinarily refers to persons who are widely recognized and respected for their knowledge and experience in their respective fields, such as media, law, human rights and social service, etc.³ The term "eminence" suggests a level of distinction, implying that these persons hold a special status or position within the circle of their vocation. Additionally, those of such persons who are considered for assigning a public function, whether paid or honorary, ought to be also known for their integrity. Such consideration must also take into account the objective of ensuring that the Councils of Complaints remain independent and impartial, and are protected against both political and commercial pressure or interference.⁴ A Council of Complaints comprising of such persons reflect a broad cross-section of our society in order to represent diverse interests, balance, inclusivity and different perspectives of the public, while ensuring their independence and impartiality. which can best ensure the public interest in reviewing complaints against any aspects of programmes and advertisements. The members of the Councils therefore hold honorary position for two years and are to perform their function independently and impartially, without any government interference.⁵ PEMRA, the government regulatory authority, on the other hand, is a body comprising a Chairman and twelve members who are appointed by the President of Pakistan for tenure of four years on payment of such emoluments as determined by him.⁶ The two tiered regulatory system is an effective regulatory mechanism to actualize and advance the fundamental rights to freedom of expression and information.

Scope of Sections 26 and 27 of the PEMRA Ordinance

12. With this conceptual background, we now examine the interpretation of Section 27(a) of the PEMRA Ordinance to see whether it is a self-governing provision, independent of Section 26(2) of the PEMRA Ordinance read with the Councils of Complaints Rules. The relevant provisions are reproduced here for ease of reference:

³ See PEMRA v. ARY Communications 2022 SCMR 1923.

⁴ Toby Mendel et al. Modernizing Media Law in Pakistan: Review of Legal Framework Governing Media, pp. 26-27 (IRADA, 2017).

⁵ Rules 3(2) and 6 of the Councils of Complaints Rules.

⁶ Section 9 of the PEMRA Ordinance.

26. Council of Complaints. (1) The Federal Government shall, by notification in the official Gazette, establish Councils of Complaints at Islamabad, the Provincial capitals and also at such other places as the Federal Government may determine.

(2) Each Council shall receive and review complaints made by persons or organizations from the general public against any aspects of programmes broadcast or distributed by a station established through a licence issued by the Authority and render opinions on such complaints.

(3) Each Council shall consist of a Chairperson and five members being citizens of eminence from the general public at least two of whom shall be women.

(3A) The Councils shall have the powers to summon a licensee against whom a complaint has been made and call for his explanation regarding any matter relating to its operation.

(4) The Authority shall formulate rules for the functions and operation of the Councils within two hundred days of the establishment of the Authority.

(5) The Councils may recommend to the Authority appropriate action of censure, fine against a broadcast or CTV station or licensee for violation of the codes of programme content and advertisements as approved by the Authority as may be prescribed.

27. Prohibition of broadcast media or distribution service operation.

The Authority shall by order in writing, giving reasons, prohibit any broadcast media or distribution service operator from:

(a) broadcasting or re-broadcasting or distributing any programme or advertisement if it is of the opinion that such particular programme or advertisement is against the ideology of Pakistan or is likely to create hatred among the people or is prejudicial to the maintenance of law and order or is likely to disturb public peace and tranquility or endangers national security or is pornographic, obscene or vulgar or is offensive to the commonly accepted standards of decency; or

(b) engaging in any practice or act which amounts to abuse of media power by way of harming the legitimate interests of another licensee or willfully causing damage to any other person.

(Emphasis added)

The relevant provisions of Rules 8 and 10 of the Councils of Complaints Rules are also reproduced here for convenience of reference:

Rule 8. Filing of complaint and functions of the Councils:-

.....
(4) A Council shall also take cognizance of such matters as referred to it by the Chairman or the Authority and render its opinion thereon.

(5) A Council may recommend to the Authority appropriate action of censure, fine upto the limit prescribed in section 29 of the Ordinance, seizure, suspension or revocation of licence against a broadcast media or distribution service provider or licensee for violation of the Ordinance, rules, regulation, code of conduct for programmes and advertisements or terms and conditions of licence.

(6) A Council shall keep the Authority informed on the feedback and public response to the contents quality and impact of the programmes and advertisements broadcast or distributed.

Rule 10. Procedure upon recommendation by a Council:- The Authority shall take into consideration the recommendations made by a Council in each matter and may approve the recommendations or disagree with the recommendations, while recording the reasons in writing for the same, and pass such order as deemed appropriate, or refer the matter back to the Council for reconsideration if so considered necessary in the opinion of the Authority.

(Emphasis added)

A plain reading of Section 26 of the PEMRA Ordinance read with Rules 8 and 10 of the Councils of Complaints Rules shows that the function of receiving and reviewing "complaints against any aspects of programmes" or "such matters as referred to it by the Chairman or the Authority" [PEMRA] and of rendering opinion on "such complaints" or "such matters" is assigned by the legislature to the Councils of Complaints, each of which consists of a chairperson and five members including at least two women, who all are citizens of eminence from the general public. The "opinion" of a Council of Complaints rendered under section 26(2) of the Ordinance is then placed before PEMRA, which after giving due consideration to the said opinion is to decide the matter in accordance with the parameters spelled out in Section 27(a) of the Ordinance. Likewise, in the case of any "recommendations" made by a Council of Complaints under section 26(5) of the PEMRA Ordinance, PEMRA may approve the recommendations or disagree with the same, while recording reasons in writing for the same, and pass such order as deem appropriate or refer the matter back to the Council concerned for reconsideration, under Rule 10 of the Councils of Complaints Rules.

13. Under Section 26(2) of the PEMRA Ordinance, the Councils of Complaint are empowered to receive and review complaints made by persons or organizations from the general public against "any aspects of programmes" and render their opinions on them. The expression "any aspects of programmes" is wide enough to include the violation of any provision of the PEMRA Ordinance, rules, regulations or code of conduct, in respect of programmes. It can, therefore, be hardly argued that the grounds provided for making an order prohibiting broadcast or rebroadcast of a programme in Section 27(a) of the PEMRA Ordinance do not fall within the expression "any aspects of programmes" used in Section 26(2). It has, however, been argued on behalf of PEMRA that the power of the Councils of Complaints and PEMRA to review the contents of a programme on the grounds mentioned in Section 27(a) is concurrent. We are not convinced with this argument. As discussed above the scope of regulatory framework under the PEMRA Ordinance is two tiered; comprising the public regulatory body (Councils of Complaints) and the governmental regulatory body (PEMRA). Further, if PEMRA had been considered suitable to make the initial review of the contents of programmes on the grounds mentioned in Section 27(a), then there would have been no plausible reason to restrict the power of PEMRA in respect of other grounds. Acceptance of this argument would negate the very

justification for establishing the Councils of Complaints, the bodies comprising the members of the public i.e. "citizens of eminence". Alternatively, it has been argued that the power of PEMRA under Section 27(a) is to be exercised by PEMRA *suo motu* i.e. on its own, while the complaints from the general public are to be dealt with by the Councils of Complaints under Section 26(2). This argument has also not impressed us. In fact, it appears to be anomalous. For, it gives no plausible answer to the question as to how the matter will proceed if PEMRA takes a *suo motu* initiative of reviewing the contents of a programme and a complaint is also filed before a Council of Complaints for the same purpose; which of the proceedings would be carried on and which stopped, or would both the proceedings continue simultaneously. Such a state of affairs would lead to confusion and thus frustrate the legislative intent and object. Such an interpretation of the statute cannot therefore be encouraged.

14. Further, the apprehension of the learned counsel for PEMRA that if the power of PEMRA to act in such matters *suo motu* is not conceded, it would frustrate the role of PEMRA as a regulatory body, is also misconceived. There is no bar on PEMRA under the PEMRA Ordinance to take notice, either on its own (*suo motu*) or on the information received from any source, of the alleged contravention of any provision of the PEMRA Ordinance, rules, regulations or code of conduct in relation to the broadcasting of any programme or advertisement, and then to refer the said matter to a Council of Complaints for reviewing the same and rendering its opinion thereon in terms of Section 26 of the PEMRA Ordinance. It is worth noting that as per Rule 8(4) of the Councils of Complaints Rules, the Councils of Complaints are bound to take cognizance of any matter referred to them by the Chairman or PEMRA and to render their opinion thereon. Rules validly made to carry out the purposes of a statute are an integral part of that statute.⁷ It is, therefore, also necessary to read them in conjunction with the statute to fully understand the operational scheme of any particular provision of the statute.

15. It has also been argued on behalf of PEMRA that the Councils of Complaints have no power under Section 26(5) to recommend an action of prohibiting the broadcast of any programme and can only recommend the action of censure or fine. As such, it has been argued, that Section 27(a) confers an independent power on PEMRA which is not dependent

⁷ Ibrahim v. Regional Transport Authority AIR 1953 SC 79 (5-MB); National Insurance Co. v. Swaran Singh AIR 2004 SC 1531 (3-MB).

upon obtaining and considering the opinion of a Council of Complaints. We find that this argument has been made without appreciating the difference between the powers of the Councils of Complaints under subsection (2) and subsection (5) of Section 26 of the PEMRA Ordinance. The power of the Councils of Complaints under subsection (2), to receive and review “complaints against any aspects of programmes” and to render “opinion on such complaints”, is a power distinct from its power under subsection (5) to recommend action of censure or fine, which is in addition to its power of rendering an opinion on any aspect of the programme complained of. Indeed, a Council of Complaints cannot recommend the action of prohibiting the broadcast or rebroadcast of any programme, and the appropriateness of taking such an action is to be decided by PEMRA by itself, but it can do so only after receiving or obtaining, as the case may be, and considering the opinion of the Council of Complaints concerned on the objectionable aspect of the programme as per Section 26(2) of the PEMRA Ordinance read with the Councils of Complaints Rules.

16. The attention of the Court was also invited to the proviso to Section 30(1)(b) of the PEMRA Ordinance, in support of the contention that the legislature has provided expressly where it intended PEMRA to act after obtaining and considering the opinion of a Council of Complaints, and that the absence of such a provision in Section 27(a) suggests that PEMRA is to act under Section 27(a) independent of any opinion of a Council of Complaints. This contention is based upon a reading of the various provisions of the PEMRA Ordinance in isolation of each other and upon their fragmented interpretation, which approach rarely leads to a correct understanding of the meaning and scope of a particular provision of law. This Court has, therefore, always preferred the approach of holistic interpretation to that of fragmented interpretation while interpreting any provision of the Constitution⁸ or a statute⁹. By this approach, the courts seek to ascertain the overall intent and purpose of the law and, by considering how its individual provisions fit within its larger framework, attempt to harmonize their meaning and scope with each other. In making the said contention, it has not been noticed that even in Section 29(6), which empowers PEMRA to impose fine on a licensee who contravenes any of the provisions of the PEMRA Ordinance, or of the rules or regulations made thereunder, no provision like proviso to Section 30(1)(b) is provided for and despite this omission, no one has argued, and perhaps rightly so,

⁸ Munir Bhatti v. Federation PLD 2011 SC 407; D.B.A., Rawalpindi v. Federation PLD 2015 SC 401; Reference No.1 of 2020 PLD 2021 SC 825.

⁹ Waqar Bakhtawari v. Mazhar Shah PLD 2018 SC 81 (Previous cases are cited in it).

that PEMRA can exercise its power to impose fine on a licensee for any such contravention in respect of any aspect of a programme or advertisement, without first obtaining the opinion of the Council of Complaints concerned. For, the provisions of Section 29(6) are to be read with the provisions of Section 26(5) and given effect accordingly.

17. It has also been argued on behalf of PEMRA that the Councils of Complaints have no power to receive and review complaints against any "advertisement" under Section 26(2), while PEMRA has such power under Section 27(a); therefore, the power of PEMRA under Section 27(a) is independent of the provisions of Section 26. It is true that the word "advertisement" is not mentioned in subsection (2) of Section 26 but it is found mentioned in subsection (5) thereof. The omission of this word in subsection (2) of Section 26 appears to be an accidental one, as it does not fit within the overall intent of the legislature manifested from reading the provisions of Section 26 as a whole. Needless to say that the ultimate object of the process of interpretation of a statute is to find out what the legislature must have intended and then to give effect to that intent of the legislature,¹⁰ and in order to give effect to the manifest intent of the legislature, the courts can supply the inadvertent omission of the draftsman by reading the necessary words in the statute.¹¹ Subsection (5) of Section 26 clearly empowers the Councils of Complaints to make a recommendation to PEMRA for the action of censure or fine against a licensee for violation of the codes not only of programmes content but also of advertisements. The provisions of subsection (5) of Section 26 thus make the intent of the legislature abundantly clear that it intended to confer the power on the Councils of Complaints to receive and review complaints against any aspects of programmes or advertisements, which shall be so read in subsection (2) of Section 26, in order to give effect to that manifest intent of the legislature.

18. Lastly, the learned counsel for PEMRA contended that it cannot be possible to hold that the power of PEMRA under clause (a) of Section 27 is dependent on obtaining and considering the opinion of a Council of Complaint but its power under clause (b) of the same Section is an independent one. The question whether the power of PEMRA under clause (b) is or is not independent, does not arise in the circumstances of the present case; therefore, we do not consider it appropriate to take up

¹⁰ Badrul Haque v. Election Tribunal PLD 1963 SC 704 (5-MB); Reference No.1 of 2012 PLD 2013 SC 279 (5-MB).

¹¹ Amir Khan v. Controller of Estate Duty PLD 1961 SC 119 (3-MB); Amir Khan v. Controller of Estate Duty PLD 1962 SC 335 (4-MB); Muhammad Ismail v. State PLD 1969 SC 241 (5-MB).

and decide the same in vacuum as an academic question. However, in view of the discussion above, especially with regard to the legislative intent in establishing the Councils of Complaints under Section 26 of the PEMRA Ordinance for making review of “any aspects” of the programmes, we deem it necessary to state that if the power of PEMRA under clause (b) of Section 27 is to be exercised in respect of “any aspects” of a programme or advertisement, then it must be exercised after obtaining and considering the opinion of the Council of Complaint concerned under Section 26(2) of the PEMRA Ordinance.

19. From the above discussion it transpires that to regulate public fundamental rights of expression and information, the PEMRA Ordinance envisages a two tiered regulatory system. The media content has to be first viewed by the Council of Complaints, an independent public regulatory body and after obtaining its opinion, PEMRA, the government regulatory body, is to consider the opinion of the Council of Complaints and finally decide the matter. It is also worth taking note that under Section 13 of the PEMRA Ordinance, PEMRA allows delegation of its powers and functions to its Chairman or a member or to any member of its staff, or to an expert, consultant or adviser¹². This delegation of the powers and functions of a 13-member authority to a single person also necessitates that the Councils of Complaints, comprising six members of eminence from the general public, must first examine the complaints. Even if *suo motu* notice is taken by PEMRA or its Chairman, as to “any aspects of programmes”, the matter has to be first sent to a Council of Complaints for its opinion and after considering the said opinion, PEMRA or its Chairman, as the case may be, can take the final decision.

Selection and appointment of members of the Councils of Complaints

20. Selecting and appointing members of the public to regulate media content on the Councils of Complaints must, therefore, represent diverse interests and perspectives of the public while ensuring independence and impartiality. The Federal Government must establish: (i) clear criteria for the selection of public representatives, which might include a mix of expertise, professional backgrounds, demographic diversity and geographic representation; (ii) announce the opportunity to serve on the Councils through various channels, such as newspapers, websites, social media and community organizations. This will help attract

¹² We have serious reservations on the blanket delegation of its powers and functions by PEMRA to its Chairman, as it *prima facie* nullifies the purpose of establishing an inclusive authority comprising a Chairman and twelve members. But as the matter of such delegation is not under challenge before us, we abstain from examining and deciding upon it.

a diverse pool of applicants; (iii) set up an application process that requires interested individuals to submit their credentials, relevant experience and a statement explaining their motivation for serving on the regulatory body. This information will be used to evaluate the suitability of each applicant; (iv) establish an independent selection committee composed of representatives from different sectors, e.g. media, academia, civil society, to review applications and recommend candidates. The committee should ensure a transparent and impartial selection process; and (v) provide the members, once appointed, with training and orientation on media regulation, ethics and relevant laws. This will help them make informed decisions and effectively contribute to the regulation of media content. The inclusion of public representatives in media regulation, in this manner, can contribute to greater transparency, diversity and public trust in the media ecosystem.

21. Having examined the contentions advanced on behalf of PEMRA and after reading the provisions of Sections 26 and 27 in conjunction with other relevant provisions of the PEMRA Ordinance and the Councils of Complaints Rules made thereunder, we are of the considered opinion that Section 27(a) of the PEMRA Ordinance is not an independent and self-governing provision; it rather requires for its applicability the opinion of a Council of Complaints regarding the objectionable aspect of a programme or advertisement in terms of Section 26(2) of the PEMRA Ordinance read with the Councils of Complaints Rules. The question is answered accordingly.

22. In view of the above answer to the question, we find that the High Court is correct in holding that PEMRA could not have bypassed the Councils of Complaints in making the prohibition order and has rightly set aside the prohibition order. However, the High Court should have also specified that the matter of making a review of the objectionable aspect of the drama serial was to be referred by PEMRA to the Council of Complaint concerned, and after receiving and considering the opinion of that Council, PEMRA could make an appropriate order. With the said clarification, we find nothing wrong in the impugned judgement. Therefore, we dismiss the petition and decline the leave to appeal.

Regulating content: what is "obscene", "vulgar" and "offensive to the commonly accepted standards of decency"

23. It is important to understand on what standards the members of the Councils of Complaints will assess the media content. Every statute is in the public interest and must always align and flow with the text and

spirit of the Constitution. Therefore, the constitutional values, fundamental rights and the principles of policy laid down under the Constitution enjoy a symbiotic relationship with any statutory framework including the one regulating media content i.e. Sections 20(c) and 27(a) of the PEMRA Ordinance, the PEMRA Rules 2009, the PEMRA (Content) Regulations 2012 and the Electronic Media Code of Conduct-2015. This statutory framework has to be read subject to the Constitution.

24. We wish to underline that the members of the Councils of Complaints while applying the constitutional and statutory standards must always view the media content through the lens of the constitutional value of tolerance. "Tolerance" is an essential preambular constitutional value that assumes more significance in the context of freedom of expression and right to information. It is a multifaceted concept and at its core, tolerance refers to the ability or willingness to accept and respect differences in opinions, beliefs, customs and practices among individuals or groups. This can include differences in race, religion, culture, gender, sexual orientation, political ideology and other aspects of human diversity. Tolerance promotes understanding, harmony and coexistence among people with diverse backgrounds, fostering open-mindedness and empathy. In a broader sense, it is an essential aspect of democratic societies, as it supports freedom of expression and the exchange of ideas, ultimately contributing to social cohesion and stability. It is important to note that tolerance does not necessarily imply agreement with or endorsement of the opinions or beliefs of others; rather, it is about respecting their right to hold those beliefs and coexist peacefully. The standard of tolerance in a society can be influenced by several factors. Societies with a tradition of valuing diversity and inclusivity tend to have higher levels of tolerance. In these societies, people are more likely to be accepting of differences and supportive of equal rights for all members of society. Societies that emphasize education and promote awareness of diverse cultures, religions and ways of life, tend to foster tolerance among their citizens. By understanding different perspectives and experiences, people are better equipped to appreciate and respect the diversity within their society. In some societies, tolerance is enshrined in the legal framework through anti-discrimination laws, human rights protections and equal opportunity policies. These measures help to create an environment in which tolerance is promoted and intolerance is discouraged. The standard of tolerance in a society is not static; it can change over time as a result of shifting cultural values, political climates

and other factors. It is essential for the Councils of Complaints to promote tolerance and inclusivity, as this is crucial for fostering peace, understanding and social cohesion in an increasingly diverse and interconnected world.

25. It is also important to underline that freedom of expression is an effective and a powerful fundamental rights as it gives voice to other freedoms and rights i.e. freedom of thought, right to life, liberty and dignity. Freedom of expression helps actualize other fundamental rights, hence its prominence and importance is easily distinguished in the cluster of fundamental rights. However, while freedom of expression is a fundamental human right, it is not absolute and can be subject to certain limitations. These limitations are usually put in place to balance the rights of individuals with the broader interests of society, public order, and national security. Some common limitations on freedom of expression include: (i) laws against defamation (libel and slander), which are in place to protect individuals' reputations from false and damaging statements; (ii) laws against hate speech, which is a speech that incites violence, discrimination or hostility towards a particular individual or group based on attributes such as race, religion, ethnicity, gender or sexual orientation. Such laws aim to protect targeted groups from harm and promote social harmony; (iii) laws against obscenity and pornography to protect public morality and decency; (iv) laws to protect national security, public order or public safety. In times of emergency or crisis, governments may impose temporary limitations on freedom of expression to maintain public order, protect national security or prevent the spread of misinformation; and (v) laws to protect personal privacy. Such laws may restrict the disclosure of certain information, such as medical records or personal correspondence, to protect individuals' right to privacy. It is important to note that these limitations should be necessary, proportionate and clearly defined by law to avoid abuse or infringement on fundamental freedoms. In democratic societies, the courts often play a crucial role in interpreting and determining the appropriate balance between freedom of expression and these limitations.

26. The fundamental point that needs to be noted in this regard is that the exhibition of any kind of works of art and literature, which includes plays and dramas broadcasted on electronic media, is a part of the fundamental right to freedom of expression guaranteed by Article 19 of

the Constitution¹³ and right to information guaranteed under Article 19A of the Constitution. Freedom of expression and right to information are complementary fundamental rights and constitute essential foundations of a democratic society. It is applicable not only to information or ideas that are favourably received but also to those which offend, shock or disturb the State or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society.¹⁴ Freedom of expression is so fundamental a human right that one can have no other right unless one has this right and can ask for his rights.¹⁵ Freedom of expression thus begets all other freedoms, and the right to freedom of expression guarantees all other rights. It is because of the paramount importance of this right that it has been included in the Universal Declaration of Human Rights (UDHR)¹⁶ and the International Covenant on Civil and Political Rights (ICCPR)¹⁷.

27. Crucial though freedom of expression and right to information are to an open and democratic society, these rights are not absolute. Some reasonable restrictions can be imposed on these right by law in the interest of any of the objectives mentioned in Articles 19 and 19A of the Constitution.¹⁸ However, such restrictions must be “reasonable”¹⁹ and any ambiguity as to the reasonableness of a restriction must be resolved in favour of protecting the exercise of the fundamental right rather than enforcing the restriction.²⁰ To ensure that they are not unnecessarily used to suppress the right, the clawback provisions of a law containing the restrictions on the right should be interpreted strictly and narrowly.²¹ The courts are to be conscious that in a fledgling democracy like ours, there is all the more need to jealously guard the right to freedom of expression and right to information. Given the pivotal importance of these fundamental rights in a democratic society, it is not enough for the State and its instrumentalities (including PEMRA) simply to claim that the restriction relates to a legitimate objective. The reasonable restrictions must also be proportionate in that the legitimate objective cannot reasonably be achieved through a means less restrictive of the right protected by the Constitution. The reasonable restrictions should therefore not only be

¹³ *Leo Communication v. Federation*, PLD 2017 Lah 709.

¹⁴ *Handyside v. United Kingdom*, (1976) 1 EHRR 737 (European Court of Human Rights).

¹⁵ *State of Human Rights in 2021 (Pakistan)*, Annual Report of the Human Rights Commission of Pakistan (Freedom of Expression, the main theme of the Report).

¹⁶ Pakistan became a signatory of the UDHR in 1948.

¹⁷ Pakistan ratified the ICCPR in 2010.

¹⁸ See also Article 19(3) of the ICCPR.

¹⁹ *East Pakistan v. Sirajul Haq*, PLD 1966 SC 854.

²⁰ *Nadeem Sarwar v. E.C.P.*, 2013 CLC 1481 (FB of LHC).

²¹ See General Comment No. 34 of the UN Human Rights Committee.

rationally connected to, but also be no more than necessary to accomplish, any of the legitimate objectives mentioned in Articles 19 and 19A of the Constitution.²²

28. The restriction imposed by law, i.e. the PEMRA Ordinance, on the right to freedom of expression in relation to any programme including a play or drama, or any advertisement, broadcasted on the electronic media, on the ground of it being “obscene”, “vulgar” or “offensive to the commonly accepted standards of decency”, is defended to achieve the legitimate objectives of securing the interest of “public decency” and “public morality” as mentioned in Article 19 of the Constitution. This restriction, however, should not be more than necessary in its scope and applicability, to accomplish the said objectives. Additionally, while it is accepted that what constitutes appropriate limitation on freedom of expression to protect morals does vary from society to society, it must be kept in mind that the concept of decency and morality is derived from many social, philosophical and religious traditions; therefore, the limitations for the purpose of protecting public decency and public morality must be based on principles not deriving exclusively from a single tradition,²³ and any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.²⁴

29. The expressions “obscene”, “vulgar” and “offensive to the commonly accepted standards of decency” as used in Section 27(a) of the PEMRA Ordinance, are actually interconnected. Only that form of an expression can be said to be “obscene” or “vulgar” which is “offensive to the commonly accepted standards of decency”. Thus, the “commonly accepted standards of decency” in the community is the benchmark to determine whether or not a particular form of the expression of one’s thought, idea or opinion in a play or drama is “obscene” or “vulgar”. The important thing to understand is that the commonly accepted standard of decency in a community is a “standard of tolerance, not taste”.²⁵ It is not what the people generally think is right for them to see but what they would not tolerate others being exposed to it on the basis of the degree of harm to “public decency” or “public morality” that may flow from such exposure. Further, the expression “commonly accepted standards of decency” must be understood to be the contemporary standards as the social mores and sensibilities change over time.

²² R v. Oakes, [1986] 1 SCR 103 (Supreme Court of Canada).

²³ General Comment No. 22 of the UN Human Rights Committee.

²⁴ General Comment No. 34 of the UN Human Rights Committee.

²⁵ R v. Butler, [1992] 1 SCR 452 (Supreme Court of Canada).

30. A work of art and literature, which includes a play or drama broadcasted on the electronic media, is usually considered a strong and effective medium to break the silence on social taboos; therefore, it is not to be labelled as "obscene" or "vulgar" readily without appraising the message it intends to convey.²⁶ In this perspective, one would need to see whether that message tends to promote or glorify the conduct or behavior which is offensive to the commonly accepted standards of decency, or it tends to condemn or deprecate such conduct or behavior. Such a review is to be undertaken on an objective assessment of the play or drama as a whole, not on the basis of pick and choose of its parts from here and there. If the ultimate message of the play or drama under review passes the test of being not offensive to the commonly accepted standards of decency, the review of a particular part thereof which depiction is necessary to convey the message effectively must be lenient and tolerant. However, where the obscenity of such part is too pronounced to eschew, only the objectionable part should be prohibited from being broadcasted and directed to be suitably modified, and the broadcast or rebroadcast of the complete play or drama must not be prohibited. In view of the applicability of the principle of proportionality to restrictions on the rights guaranteed by the Constitution as expounded above, such an approach is necessary to protect the exercise of the fundamental right to freedom of expression and right to information to the maximum extent possible and to enforce the restrictions on the exercise of these rights to the minimum.

Judge

Announced
on 12th April, 2023,
at Islamabad.

Judge

Judge

Approved for reporting
Sadaqat

²⁶ Ramamurthy v. State of Mysore AIR 1954 Mys 164 (DB).