

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
(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
Dr. Abdul Jabbar (Acting Chairman)

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

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:

Nemo. (Sh. Ahsan ud Din)(in Const.P.117/12)

For the respondent,9&10: 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
alongwith Faisal Siddiqi Advocate.

For AAJ TV, Kashash TV, AVT,
DHOOM, APNA TV: Mr. Mehmood A. Sheikh, ASC

For Express TV: Mr. Asad Kharl, (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
Dr. Abdul Jabbar (Acting Chairman)

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. Khattka, AOR
(regarding obscene and objectionable material in media)

For Indus Television: Tariq Ismail

Date of Hearing: 20.12.2012

ORDER

Jawwad S. Khawaja, J. These constitutional petitions have raised important issues concerning the twin rights of freedom of speech and access to information protected by Articles 19 and 19A of the Constitution. Since all petitions before us concern similar or connected issues, these are being heard together.

2. The brief particulars of the petitions are as follows: Constitutional Petition No. 53 of 2012 has been filed by three petitioners: Independent Media Corporation (Pvt.) Ltd. which conducts business in the name of Geo TV Network; Independent Newspapers Corporation (Pvt.) Ltd. which conducts business in the name of Jang Group and News Publications (Pvt.) Ltd. which conducts business in the name of The News Group. Constitutional Petition No. 105 of 2012 has been filed by two media persons, namely Hamid Mir, presently Executive Editor of Geo News, and Absar Alam, presently associated with Aaj News. Constitutional Petition No. 117 of 2012 has been filed by two senior advocates: Sheikh Ahsan-ud-Din, and Sajid Mehmood Bhatti. And Human Rights Case No. 23957-S of 2012 is based on a complaint filed by Syed Adil Gilani of Transparency International.

3. The Respondents in the various petitions are: Federation of Pakistan, PEMRA, PTA, Bahria Town (Pvt.) Ltd., Malik Riaz Hussain, FBR, SECP, FIA and others. Notices were also issued by the Court to a number of media houses who have filed replies and are now party to these proceedings. Asad Kharral, a journalist, has also filed an application to be made a party.

4. These petitions give rise to a large number of issues on which arguments have been heard over the course of a number of hearings. In our order dated 16.10.2012, we identified 8 issues on which the hearings were focused. During subsequent hearings, some other connected issues have also emerged. At this stage it is useful to re-state the key issues and make certain prima facie observations. Documents which still need to be submitted have also been identified. This order is meant to enable the various parties to present their concluding arguments in an informed and effective manner and to ensure that necessary documents are available on record.

I. **Maintainability.** Whether the petition raises questions of public importance in relation to the enforcement of fundamental right? If so, what are these questions and what fundamental rights are involved? Whether the allegations in the petition against the Respondents No. 4 & No. 5 and M/s Midas (Pvt.) Limited merit examination by this Court in its jurisdiction under

Article 184(3) of the Constitution? And if so, what should be the extent, scope and methodology of such an inquiry?

5. Most parties before us are in agreement that these petitions, as a whole, do raise questions of public importance with reference to the enforcement of fundamental rights, particularly the right to information (needless to say correct information) guaranteed under Article 19A and the right to free speech guaranteed under Article 19. As such, the jurisdiction of this Court under Article 184(3) is attracted.

6. However, *prima facie*, some issues arising in these cases require detailed probe into facts. These issues raised in the petitions do not require the Court to exercise its extraordinary jurisdiction under Article 184; instead, it would be more appropriate for aggrieved parties to seek their legal remedy at some other competent forum. Some general principles in respect of these issues can, however, be settled at the conclusion of the hearing.

II. Constitutionality of Federal Ministry of Information. Whether after the enactment of the 18th Amendment to the Constitution, the legislative competence of Parliament extends to the print and electronic media so as to justify the retention of the Federal Ministry of Information and Broadcasting?

7. Since this is an important constitutional issue any parties wishing to address arguments on the same may do so on the next date of hearing.

III. Principles of Media Regulation. Is this a case where the Court should lay down the contours of the fundamental rights contained in Articles 19 and 19A of the Constitution in the context of the electronic media? If so, what are the boundaries of these rights in the context of the electronic media and are there any corresponding duties owed by such media to the general public?

IV. Content Regulations and the Authority's proper constitution. Whether the Content Regulations framed by PEMRA under the PEMRA Rules, 2009 are consistent with the fundamental rights contained in Article 19 and 19A of the Constitution and the mandate conferred by the PEMRA Ordinance, 2002? If not, whether it is appropriate for the Court to formulate Content Regulations or would it be more appropriate to constitute a Commission for this purpose? Assuming that a Commission is to be constituted, what should be its terms of reference and the manner and character of its composition?

8. During the proceedings of this case, PEMRA issued a notification titled PEMRA (Content) Regulations, 2012. These regulations contain a number of affirmative obligations which are to be discharged by the licensees. However, the petitioners have raised challenges against the substantive as well as procedural validity of the regulations.

9. *Prima facie*, at this stage a full review of the substance of these regulations does not seem warranted by the facts before us. In line with the common law method, it would be better that as and when any party feels aggrieved by the various provisions of the regulations, it may invoke the jurisdiction of the appropriate forum. The constitutionality of the provisions and the proper interpretation thereof can then be ascertained. To do so now by attempting to envision all future possibilities is not necessary.

10. The procedural challenges lodged by the petitioners are more serious. The petitioners contend that the Regulations were formulated without the necessary consultation with all relevant stakeholders. Furthermore, the Regulations were notified in a period when the Authority was improperly constituted, since Dr. Abdul Jabbar, who claimed to be Acting Chairman and actually chaired the Authority's meetings, had no legal authority to hold this office. Also, since he had notice of this defect, PEMRA may not be able to rely on *de facto* exercise of authority.

11. The issue of the appointment process for key statutory offices is of the utmost importance in ensuring the integrity and independence of statutory institutions. Therefore, on 18.12.12, the Court directed Mr. Hasnain Ibrahim Kazmi, counsel representing PEMRA, to produce the full record relating to the process whereby Dr. Abdul Jabbar claims to have been appointed Acting Chairman. The Court also directed Mr. Kazmi and the learned Deputy Attorney General, to present the record of the appointment process of all other members of the Authority. The Court also directed the DAG to present similar record for the appointment to the Board of APP and PBC, the major recipients of the budget of the Ministry of Information. Some documents in this regard have been filed. However, the complete record is still awaited and may be submitted within one week.

V. Secret Funds. Whether the Federal Budgets have allocated from time to time to the Federal Ministry of Information and Broadcasting any funds that may be spent in its absolute discretion or that may be spent in secrecy without disclosing the purpose of the

disbursements or the identity of its recipients? If so, did the said Ministry have a constitutional basis for such disbursements?

12. Mr. Zulfiqar Khalid Maluka, ASC, representing the Ministry of Information and Broadcasting addressed the court about the details of the Ministry's budget. He apprised the Court that the bulk of the Ministry's budget is spent on statutory corporations: Pakistan Broadcasting Corporation, Associated Press of Pakistan, Press Council of Pakistan and a few other. He contended that there were only two – "Special Publicity Fund" and "Secret Service Fund" – which contain a total of around Rs. 14.3 crore in FY-2011-2012, details of which could not be disclosed during the course a public hearing. The Court clarified that in line with Article 19A, it is not inclined to accept this argument. At this point, Mohammad Azam, the Principal Information Officer, Ministry of Information, stated that the Secretary Information is willing to disclose the details of these funds to the Court by submitting the details in sealed cover.

13. *Prima facie*, while the Ministry may claim privilege from making public disclosure of certain parts of its budget, such privilege is not automatically available to the Government. It must be claimed from the Court. Information for which secrecy is sought must be clearly marked and the reasons for seeking secrecy must also be clearly stated. The Court can then make a determination on this point in line with the law and the Constitution.

VI. Fiscal Misappropriation. On 18.12.12, Mr. Asad Kharal, contended that the budgets of 27 other Ministries also contain secret funds similar to the ones which are in place in the Ministry of Information. This is a disturbing disclosure since secrets funds may potentially be a tool for undermining the right of citizens protected under Articles 19 and 19A. Since all public authorities are fiduciaries of the public and receive their funds from the public, the Auditor General or other constitutionally authorized bodies must have access to ensure transparency in the manner in which they spend the allocated budget.

VII. Commission. Some petitioners urge the Court to appoint a Commission which may examine issues IV, V and VI at length and propose appropriate content regulations, and record findings about the manner in which government advertisement spending is being made and determine whether it is in line with Article 19A. While we do not find it appropriate to give any finding on this issue at the present stage, the parties pressing this point are directed to suggest Terms of Reference of the proposed Commission.

14. The case is now fixed for hearing on 9.1.2013. Within 7 days from today all documents specified in this order, or anything else which the parties deem necessary for determination of the above-mentioned issues, must be filed in Court so that the hearing of this case can be concluded.

15. Having gone through the PEMRA Ordinance, 2002 and the various notifications presented in Court including Notifications dated 27.9.2008, 27.7.2009 and 14.5.2011 and also having heard the learned counsel on the question of Dr. Abdul Jabbar purporting to represent himself and to act as Chairman PEMRA, we are *prima facie*, of the view that Dr. Abdul Jabbar has no authority to act as, or to represent himself as Chairman or acting Chairman PEMRA. This aspect was also highlighted in our order dated 17.9.2012 passed in Constitution Petition No. 104 of 2012, in the following terms:-

“It has also been pointed out to us that there is no permanent Chairman of PEMRA and incumbent is an acting Chairman for the last about two years. Relevant provisions of PEMRA i.e. section 6 of the PEMRA does not contain any such provision, however, it is understandable that temporarily for a shortest possible period acting Chairman can be appointed to find suitable person to be appointed as permanent Chairman. In this behalf notice be issued to the Secretary, Ministry of Information and Broadcasting to appear and explain on behalf of the Government as to why the permanent Chairman has not been appointed so far”.

16. Despite the above, no Chairman of PEMRA has been appointed in accordance with the provisions of PEMRA Ordinance and particularly section 6 thereof. Consequently, Dr. Abdul Jabbar is restrained from acting as or representing himself as Chairman or acting Chairman of PEMRA. The questions as to the validity of acts taken in the name of PEMRA during the period starting 13.05.2011 when it had no Chairman, will be considered on the next date of hearing.

Judge

Judge

Islamabad
20.12.2012.
A. Rehman
Not approved for reporting.