IN THE HIGH COURT OF SINDH,
AT KARACHI

C. P. Nos. D-5558, D-5559 and D-5560 of 2016

Present:
Ahmed Ali M. Shaikh, CJ
and Yousuf Ali Sayeed, J

Petitioner	:	ARY Communications Limited, through Ayan Mustafa Memon and Umair Nabi, Advocates.
Respondents	:	(1) Council of Complaints, Islamabad, (2) Pakistan Electronic Media Regularity Authority, and (3) Muhammad Tahir, through Manzar Bashir Memon, Advocate
Date of hearing	:	30.11.2021.

JUDGMENT

YOUSUF ALI SAYEED, J. - The captioned Petitions have been preferred so as to impugn three separate decisions ostensibly taken in pursuance of recommendations made in the 39th Meeting of the Respondent No.1, the Council of Complaints (the "**COC**"), as were then presented to the Petitioner by the Respondent No.2, the Pakistan Electronic Media Regularity Authority ("**PEMRA**") as its own decisions through (i) Letter No. 13(23)/OPS/016/1869, (ii) Letter No. 13(23)/OPS/016/1870, and (iii) Letter No. 13(23)/OPS/016/1872, all dated 31.08.2016 (hereinafter referred to individually as "**Decision 1869**", "**Decision 1870**" and "**Decision 1872**", and collectively as the "**Impugned Decisions**"), whereby certain fines were imposed against along with directions for the Petitioner to air an apology within a specified period.

2. The Petitioner is a media broadcasting company, operating an array of news and entertainment television channels, and the salient facts leading up to the Petitions is that certain complaints regarding the content of different programmes broadcast on various channels operated by it were received by PEMRA, which were referred by it to the COC, with the ensuing recommendations made by that body coming to form the basis of the Impugned Decisions.

3. Being aggrieved, the Petitioner has invoked the jurisdiction of this Court under Article 199 of the Constitution, seeking judicial review on the ground that PEMRA did not properly appreciate the scheme of the regulatory framework governing its functions and did not properly discharge its adjudicatory role in as much as it failed to appreciate that the COC was only empowered to make a non-binding recommendation, whereas it (PEMRA) was the deciding authority and was required to independently apply its mind to the attendant facts and circumstances so as to determine whether those recommendations were to be adopted under the given facts and circumstances of the case.

4. The COC stands established under Section 26 of the Pakistan Electronic Media Regularity Authority Ordinance, 2002 (the "**Ordinance**"), which stipulates that:

> 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.
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> (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].
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> (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.

5. The COC's mandate and its interrelation with the functions of PEMRA has been structured and laid out in terms of the Pakistan Electronic Media Regulatory Authority (Councils of Complaints) Rules 2010 (the ("**Rules**") made by PEMRA with approval of the Federal Government in exercise of the conferred by sub-section (4) of Section 26 read with Section 39 of the Ordinance, with Rules 8 and 10 providing as follows:

> 8. **Filing of complaint and functions of the Councils:-** (1) any person aggrieved by any aspect of a program or advertisement may lodge a complaint before the Council or the authorized officer, in whose jurisdiction that programme of [sic] advertisement is viewed:
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> Provided that where a complaint is received by an authorized officer, the authorized officer shall place the same before the Council for consideration and further proceedings.

(2) A Council or the authorized officer may issue summons to the operator against whom complaint has been lodged and to such other persons as may be deemed necessary for disposal of the complaint, and record their statements.

(3) Where summons are served to the operator or a person under sub-rule (2), and such operator or person fails to appear or provide his explanation on the date fixed in the summons, the Council may proceed with the matter on the basis of the record available and make appropriate recommendation to the Authority.

(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 operator 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.

(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.

6. Furthermore, certain codes of conduct, as envisaged in terms of Section 26(5) of the Ordinance, have been formulated from time to time, with the prevailing Electronic Media (Programmes and Advertisements) Code of Conduct 2015 having been notified by PEMRA through SRO No. 1(2)/2012-PEMRA-COC dated 19.08.2015 (the "**Code**").

7. Proceeding with his submissions in that vein, learned counsel for the Petitioner referred to Rule 10 and submitted that it was manifest that the COC was merely a recommendatory body, with it clearly being provided in the said Rule that once a recommendation was made, PEMRA could either approve or disagree, but in either case had to record its reasons for doing so, and could then either pass such order/decision as was appropriate or could even or refer the matter back to the Council for reconsideration if that was considered necessary. It was argued that before taking action on a recommendation made by the COC so as to fine or censure a broadcaster, PEMRA was required to independently apply its mind to the matter so as to satisfy itself that the allegations underpinning the proceedings before the COC constituted a discernible violation of the Code, which properly stood established, as well as to then assess and satisfy itself as to the propriety of the particular recommendation made. It was contended that such exercise had not been carried out by PEMRA prior to issuing the Impugning Decisions, and the recommendations of the COC had instead been adopted in mechanical manner without any application of mind. It was submitted that the Impugned Decisions had thus been rendered in contravention of the Ordinance and Rules, were bad in law, hence ought to be set aside.

8. In opposition, learned counsel for PEMRA contended that the Impugned Decisions were in accordance with law; and argued that the Petitions were even otherwise not maintainable, firstly as the matter fell beyond the territorial jurisdiction of this Court in view of the proceedings of the COC having taken place at Islamabad and secondly as a right of appeal was provided under Section 30-A of the Ordinance.

9. Exercising his right of reply, learned counsel for the Petitioner controverted the objections as to maintainability. Firstly, it was submitted that the Impugned Decisions had been communicated and were to be implemented at Karachi, and secondly, that an appeal only lay against a decision of PEMRA, whereas the Impugned Decisions could only be regarded as being of the COC itself. It was also argued that recourse to an appeal was necessitated as the scope of challenge was restricted to impugning the decision making process and competence of the decision maker without raising any question as to the merits of the decision itself.

10. We have heard the arguments and examined the Impugned Decisions as well as the other material placed on record.

11. Turning firstly to the jurisdictional objection raised on the ground that the entire proceedings of the COC ensued at Islamabad, suffice it to say that the Petitions do not seek prohibition or certiorari in respect of those proceedings. Instead, they assail the Impugned Decisions ensuing therefrom, on the ground that their issuance amounts to a violation by PEMRA of its own mandate as a regulatory authority, without proper regard to the modalities marking its adjudicatory function. As the Impugned Decisions have been communicated to the Petitioners within the jurisdiction of this Court and are also inevitably to be implemented accordingly, we therefore do not find any force in the contention as to lack of jurisdiction.

12. Looking then to the ground advanced on behalf of the Petitioner, it is well settled that where a statutory power vests in a particular authority and the discharge of the reciprocal duty is its responsibility, that authority cannot merely rubberstamp an action taken elsewhere or simply endorse or ratify the decision of another. In that regard, it was held by the Honourable Supreme Court in the case reported as Messrs H. M. Abdullah v. The Income Tax Officer, Circle V, Karachi and 2 others 1993 SCMR 1195 that:

> “as a general rule an authority in whom discretion is vested under provisions of Statute cannot bargain away or fetter its powers. The position is however different when such fetters are authorized by the Statute itself. Reference in this connection may be made to the following observations appearing at page 588 in "Constitutional and Administrative Law" by S.A. de Smith, Second Edition:---
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> "One authority cannot lawfully act under the, dictation of another unless the other is a superior in the administrative hierarchy or is empowered by law to give instructions to it."

13. In that regard, one may also look further to the later edition of the same work (De Smith’s, Judicial Review, 8th Edition, 2018) where it was opined that:

> 9-002 A decision-making body exercising public functions which is entrusted with discretion must not disable itself from exercising its discretion in individual cases. It may not “fetter” its discretion. A public authority that does fetter its discretion in that way may offend against either or both of two grounds of judicial review: the ground of legality and the ground of procedural propriety. The public authority offends against legality by failing to use its powers in the way they were intended, namely, to employ and to utilize the discretion conferred upon it. It offends against procedural propriety by failing to permit affected persons to influence the use of that discretion. By failing to “keep its mind ajar”, by “shutting its ears” to an application, the body in question effectively forecloses participation in the decision making process.

9-004 The principle against fettering discretion does not prevent public authorities upon which a discretionary power has been conferred guiding the implementation of that discretion by means of a policy or a rule that is within the scope of its conferred powers. The principle directs attention to the *attitude* of the decision-maker, preventing him from rigidly excluding the possibility of any exception to that rule or policy in a deserving case. Nor does the principle focus upon the content of the hearing or other means of communication which must be afforded to persons interested in changing the decision-maker's mind. The decision-maker must allow interested individuals the opportunity to persuade him to amend or deviate from the rule or policy, but, unlike the principle of natural justice or fair hearing, the principle against fettering is not concerned with any particular form of hearing or with any particular technique of making or receiving representations. Thus, while the issue of fettering often arises where an authority has adopted a fixed rule or policy, complaints of fettering may also arise in the context of "one-off" decisions. In short, the no-fettering principle means that a person must know what the relevant policy of a public authority entails and must be able to make submissions about its application in their individual case. The public authority must then consider that case on its merits...”

14. On that vey note it was observed in the case reported as Messrs Gadoon Textile Mills and 814 others v. WAPDA and others 1997 SCMR 641 that[1]:

> “40. Reference has also been made to Administrative Law by Basu, in which it has been stated that "the general rule is that where a statute directs that certain acts shall be done by a specified person; their performance by any other person is impliedly prohibited". This rule is so well-settled that needs no further elaboration. Any authority vested with a discretion must exercise it himself by applying his independent mind uninfluenced by irrelevant and extraneous considerations. He should neither accept any dictation nor delegate his authority to any other person. Violation of these rules for exercise of discretion will render such decision illegal. If the argument that WAPDA has independent power under section 25 of the WAPDA Act to determine rate/tariff, then it has defaulted in exercise of its power and discretion by accepting the dictates of Task Force, Ministry of Water and Power and ECC approved by the Prime Minister ignoring CCL.”

[1] From the additional note of Saleem Akhtar, J, at Pages 799 DDD, EEE and 802 JJJ

> "45....The rule of reasonableness is so embedded in the jurisprudence that even where statute confers arbitrary powers on any authority, it is to be read in such statute that the authority while exercising its discretion shall act reasonably. The reasonableness of any action by an authority is eroded where it acts with improper motive, on irrelevant considerations, or without regard to relevant considerations, allowing the dictates of others instead of applying its own independent and judicious mind or delegates unless provided by law or surrenders its power to any other authority whether it is superior, equal or inferior to him."

15. Related to the rule against acting under dictation is that against unsanctioned delegation, derived from the maxim *delagatus non potest delegare*, which lays down that a delegate cannot further delegate the power to someone else. This is to ensure that when a specific person or body is given a statutory discretion, the discretion is exercised by that very person or body and not by someone else. In Muhammad Yusuf Ali Shah v. Federal Land Commission, Government of Pakistan, Rawalpindi and 2 others 1995 CLC 369 a learned Division Bench of the Lahore High Court articulated the principle as follows:

> "Before we proceed to deal with the contentions of the parties in regard to this point, we feel it necessary to state that it is a settled proposition of law that when a power is conferred on a particular person then that person can neither transfer its exercise to another person nor can exercise it without application of his mind to the facts and circumstances of that case. What is required, is that he has to exercise that power with application of his independent mind to the facts and circumstances of that case regardless any extraneous/dictative influence." [2]

[2] [At page 374 A]

16. Ergo, even in matters where the opinion of a recommendatory body is envisaged, the exercise of the statutory power ultimately remains that of the designated authority, and its decision is to necessarily be made for advancing the purposes of the statute, supported by valid reasons. In other words, if a statute expressly confers a statutory power on a particular body or authority or imposes a statutory duty on the same, then such power must be exercised or duty performed, as the case may be, by that very body or authority itself and none other. However, if the body or authority exercises the statutory power or performs the statutory duty acting at the behest, or on the dictate, of any other body or person, that would constitute an abdication of the statutory mandate and any decision taken on such basis would be contrary to law and liable to be quashed.

17. Since the challenge in the instant cases is confined to the specific ground advanced, the scope of our inquiry is circumscribed accordingly and we are not required to touch upon or make any determination as to the merit of the complaints underpinning the proceedings of the COC or render a finding as to the correctness of its recommendations. That being so, it is unnecessary to burden this judgment with a detailed exposition of the allegations underpinning the complaints beyond the point that they find mention in the operative paragraphs of the Impugned Decisions, which are reproduced herein below:

(i) <u>Decision 1869</u>

"10. The Council, after perusal or record produced, hearing arguments of parties concerned and detailed deliberations, recommended the following:

RECOMMENDATIONS:

"It has been observed that instead of providing information regarding current affairs, religious, knowledge, culture, science, development and good governance within the parameters set by the PEMRA laws, both of the respondent channels ARY News and Such TV have tried to create hatred in the mind of the public by calling the complainant and his family as 'traitor' and 'blasphemous', which is flagrant violation of Section 20(f) of PEMRA Ordinance, 2002 as amended by PEMRA (Amendment) Act 2007 read with Rule 15(1) of PEMRA Rules, 2009 and various clauses of Electronic Medial Programmes and Advertisements) Code of Conduct, 2015 including clause 3(1(i)), 3(1(k)), 3(1(l)), 22 and 23. It seems that ARY News and Such TV had invited the guests with deliberate attempts to malign Malala Yousufzai and her family. Therefore, the Council recommends that ARY News and Such TV may be fined with Rs.800,000/- each and the channels may also be directed to air apology in prime time with same manner and magnitude as it was aired within seven days of issuance of the decision and not to repeat the same violation in future. In case of non-compliance of the decision of the Authority, the licenses of both channels of may be processed for suspension."

11. M/s. ARY Communications (Pvt.) Ltd, (ARY News), is hereby directed to comply with the above decision of the Council of Complaints, deposit the fine of Rs.800,000/- with PEMRA, Regional Office, Islamabad and air apology in prime time within seven days i.e. on or before **7th September, 2016,** under intimation to this office."

(ii) Decision 1870

"13. The Council, after hearing the concerned parties and detailed deliberations, recommended the following:

RECOMMENDATIONS:

"ARY News has passed derogatory and unfair remarks against Senator Ishaq Dar based on assumptions merely on the basis of interview of Deputy Minister of Economy of Panama whereby he mentioned his meeting with Finance Minister instead of Finance Secretary of Pakistan which was later corrected by him through his tweet. The channel has violated Clause 3(1(f)), 3(1(i)), 4(1), 4(7(a)), 4(7(c)) and 22 of Electronic Media Code of Conduct-2015, therefore, the channel may be fined with Rs.,200,000/- and may also be directed to air apology in prime time with same

manner and magnitude within seven days of issuance of the decision and not to repeat the same violation in future. In case of non-compliance of the decision of the Authority, the license of channel of may be processed for suspension."

14. M/s. ARY Communications (Pvt.) Ltd, (ARY News), is hereby directed to comply with the above decision of the Council of Complaints, deposit the fine of Rs.200,000/- with PEMRA, Regional Office, Islamabad and air apology in prime time within seven days i.e. on or before **7th September, 2016,** under intimation to this office.

(iii) Decision 1872

"11. The Council, after viewing the content aired by ARY News and Such TV, record produced before the Council and hearing of parties concerned, recommended the following:

RECOMMENDATIONS:

"ARY News in its programme "Live with Dr. Shahid Masood" has tried to create unnecessary hype against Mr. Ishaq Dar Federal Finance Minister, by alleging him for giving favour to various persons under criminal investigation by law enforcement agencies. The channel through its said programme has targeted the integrity of the Federal Finance Minister without any substantial evidence just to create distrust of public for holding public office. It has also been observed that the channel had remained failed to seek views from the complainant or from the spokesperson of Federal Government for the defense against whom the allegations were being leveled. Therefore, the channel may be fined with Rs.800,000/- for violating Clause 3(1(f)), 3(1(i)), 4(1), 4(7(a)), 4(7(c)) and 22 of Electronic Media Code of Conduct-2015 alongwith directions to air apology in prime time with same manner and magnitude within seven days of issuance of the decision and not to repeat the same violation in future. In case of non-compliance of the decision of the Authority, the license of channel of may be processed for suspension."

12. M/s. ARY Communications (Pvt.) Ltd, (ARY News), is hereby directed to comply with the above decision of the Council of Complaints, deposit the fine of Rs.800,000/- with PEMRA, Regional Office, Islamabad and air apology in prime time within seven days i.e. on or before **7th September, 2016,** under intimation to this office.

18. A perusal of the Impugned Decisions reveals that while the same emanate from PEMRA under signature of its General Manager (Operations), the Respondent No.3, the paragraphs reproduced herein above were merely preceded by a narration as to receipt of the complaints by the COC, the substance of the allegations contained therein, and the proceedings that then ensued before the recommendatory body, but are bereft of any role played by PEMRA, either in accordance with Rule 10 or otherwise, and also do not disclose any reasons whatsoever for adoption of the COC's recommendations. In fact, just as fundamentally, it transpires that the Impugned Decisions are also equally bereft of even the findings of the COC as to how the allegations underpinning the complaints constituted violations of the Code, and do not even disclose the rationale for the COC making the particular recommendations.

19. As such, the Impugned Decisions do not possess the quality of a reasoned or speaking order. On the contrary, they reflect that the 'Authority' has acted in a cursory and mechanical manner in purported exercise of its adjudicatory function without any perceptible independent application of mind, contrary to the intent and design of the Ordinance and Rules. Needless to say, such an approach to adjudication is unsound and it is manifest that the Impugned Decisions are not sustainable in law. We are fortified in this assessment by the judgment rendered by a learned Divisional Bench of this Court in an analogous case reported as World Call Cable (Pvt.) Ltd. through Chief Executive Officer v. Federation of Pakistan through Secretary and another 2020 CLC 534, where whilst setting aside a purported decision it was observed that:

"9. The eventual purposefulness of the Council is to recommend appropriate action if found for violation of the codes of programme content and advertisements as approved by the Authority but an additional exercise of jurisdiction by the Council of Complaints has been added under Sub-rule (4) of Rule 8 of the PEMRA (Councils of Complaints) Rules, 2010 that the Council may take cognizance of such matters as referred to it by the Chairman or the Authority and render its opinion thereon. If these powers are regarded as powers of the Authority to refer any matter for opinion, then in our selfeffacing understanding and interpretation, this cannot travel or regarded beyond the power and jurisdiction of Council of Complaints or the Authority under Section 26 of the PEMRA Ordinance, 2002…"

"10. What deciphers to us in this case is that instead of exercising the jurisdiction by the Authority under Section 29 of the PEMRA Ordinance, 2002, the further proceedings arising from the show cause notice were referred to the Council of Complaints for their recommendations and rendering opinion by them and vide communication dated 08.12.2017, which is alleged to be a decision of PEMRA, the petitioner was communicated the opinion of Council of Complaints that petitioner is clearly in violation of Section 29 of the PEMRA Ordinance, 2002 and the recommendation of Council of Complaints has been reproduced in paragraph 4 but no independent decision is attached nor produced by the counsel for the PEMRA, whereas under Rule 10 of Pakistan Electronic Media Regulatory Authority (Councils of Complaints) Rules, 2010 the procedure has been laid down which makes mandatory that the Authority (PEMRA) shall take into consideration the recommendations made by the 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 applied) It is quite transparent from the alleged decision that no independent application of mind was applied by the Authority on the recommendations or the opinion of the Council of Complaints but in a slipshod manner, the recommendations were approved without recording any reasons in writing and passed such order…"

20. Furthermore, as regards the objection in relation to Section 30-A of the Ordinance, suffice it to say that while judicial review is not a substitute for an appeal, the same would nonetheless lie within its own parameters in cases where a statutory authority uses its power in a manner not provided for in the statute or passes an order without application of mind, or commits an error of law apparent on the face of the record.

21. Indeed, it would be open to a Constitutional Court to inquire whether there has actually been a "decision" from the standpoint of legally validity, and if there is no legally valid decision (that is, the purported decision is legally a nullity) there would no "decision" in respect of which the broader scope of an appeal would need to be brought to bear. As the Impugned Decisions suffer from the basic errors identified hereinabove and completely lack the quality of a legally valid decision, resort to a broader enquiry as to correctness of the Impugned Decisions through an appeal is not necessitated.

22. In view of the foregoing the Petitions stand allowed, with the Impugned Decisions being set aside. Let a copy of this Judgment be communicated to the Chairman, PEMRA for information.

JUDGE

CHIEF JUSTICE

Karachi.
Dated: