

[Supreme Court of Pakistan]

Present: Umar Ata Bandial, C.J. and Syed Mansoor Ali Shah, JJ

PAKISTAN ELECTRONIC MEDIA REGULATORY AUTHORITY and others---Petitioners

Versus

ARY COMMUNICATIONS LTD. and others---Respondents

Civil Petitions Nos. 1716 to 1724 of 2022, decided on 25th July, 2022.

(Against the consolidated order of High Court of Sindh, Karachi dated 08.02.2022, passed in C.Ps. Nos. D-2795, D-2796, D-2797, D-3308, D-3312, D 3313, D-3314 of 2018, C.Ps. Nos.D-6644 and D-6645 of 2017)

Pakistan Electronic Media Regulatory Authority Ordinance (XIII of 2002)---

---S. 26---Pakistan Electronic Media Regulatory Authority (Council of Complaints) Rules 2010, R. 3---Constitution of Pakistan, Arts. 25 & 27---Honorary appointments to public offices---Appointment process---Chairperson and Members of the Council of Complaints ("COC"), Pakistan Electronic Media Regulatory Authority ("PEMRA")---Appointments to honorary public offices, such as the COC, are to be made through an open and competitive process including advertisement---Offices of the COC are associated with important roles and are required to be filled with the most meritorious candidates---Although neither the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 ('the Ordinance') nor the Pakistan Electronic Media Regulatory Authority (Council of Complaints) Rules 2010 ("Rules"), expressly require the public advertisement of the COC slots, however, the Ordinance, and also the Rules, require that the Chairperson and Members of the COC shall be citizens of eminence---Equally true that "citizens of eminence" may not themselves come forward to apply for these honorary positions, rather, the Government itself needs to spot such individuals through a process of headhunt---Relevant directions issued by the Supreme Court for filling places available on the COC stated.

Appointees to the Council of Complaints ("COC") play an important role in public life relating to the issue of public complaints in the realm of regulation of electronic media in the country. Obviously, the process of making such public appointments should be designed and conducted in a way to ensure that the best people, from the widest possible pool of candidates, are considered and appointed to these positions.

Sir Gerry Grimstone, 'Better Public Appointments - A Review of the Public Appointments Process' (Cabinet Office Whitehall 2016) ref.

Open selection process allows for unexpected expressions of interest. It prioritizes competition and helps discovering best possible candidates. The process, in turn, improves the governance and performance of the organization. In addition, such transparent process wins public confidence that appointees are selected on merit from a wide and inclusive pool of applicants. On the other hand, a closed selection approach limited to a headhunt itself conducted by the Government may prevent the organization from tapping in best available talent. Many outstanding candidates of whom the Government is unaware can be missed. Headhunting selectors have been observed to be looking for people like themselves and thus limiting the prospect of diversity. Besides, public appointments made behind closed doors raise eyebrows because the door of partisan intervention and patronage remains open.

Elena Doldor, Susan Vinnicombe, Mary Gaughan and Ruth Sealy, 'Gender Diversity on Boards: The Appointment Process and the Role of Executive Search Firms' (Equality and Human Rights Commission Research Report 85, International Centre for Women Leaders, Cranfield School of Management Cranfield University 2012) ref.

Making appointment to a public office is a sacred trust which is to be discharged justly and fairly in the best interest of the public, based on a process that is fair, transparent and nondiscriminatory. Highest standards of diligence, transparency and probity are to be observed so that a qualified, eligible and most deserving person is selected for a post. The constitutional guarantee of equality and safeguard against discrimination is not limited to paid services or jobs but extends to all appointments to public offices, honorary or otherwise.

Chief Secretary Punjab v. Abdul Raoof Dasti 2006 SCMR 1876; Syed Mubashir Raza Jaffri v. Employees Old Age Benefits Institutions (EOBI) 2014 SCMR 949; Muhammad Ashraf Tiwana v. Pakistan 2013 SCMR 1159 and Muhammad Yasin v. Federation of Pakistan PLD 2012 SC 132 ref.

There cannot be agreement with the argument that COC appointments being of honorary nature do not need to go through the requirements associated with other appointments' selection process. It is as if to suggest that honorary appointments are not important enough to merit a selection process based on competitive transparency. Such a notion is belied by the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 ('the Ordinance') which requires that only eminent citizens could be given a place on the COC. The words "citizens of eminence" show that seeking the best person for the job becomes the only consideration before the appointing authority. COC offices are associated with important roles and are required to be filled with the most meritorious candidates. The honorary nature of COC appointments is significant and a step in the direction to attract eminent persons willing to take up the job of independently settling complaints against electronic media without any pecuniary strings attached to the terms and conditions of their offices. This further accentuates the need that COC membership should consist of the finest and most accomplished persons.

Hadayat Ullah v. Federation of Pakistan 2022 SCP 242 (Syed Mansoor Ali Shah J) and Moinuddin v. State of Uttar Pradesh AIR 1960 All 484 ref.

Although neither the Ordinance nor the Pakistan Electronic Media Regulatory Authority (Council of Complaints) Rules 2010 ("Rules"), expressly require the public advertisement of the COC slots, however, the Ordinance, and also the Rules, require that the Chairperson and Members of the COC shall be citizens of eminence. The idea is that the composition of the COC shall consist of respected, qualified and experienced members of society who shall work independently under facilitation of PEMRA and take action on the complaints received against broadcast media and distribution service providers. The search for such an array of individuals must begin with a transparent call for candidates. Only then can optimum utilization of talent be achieved and ensured and purpose behind the provision of sending the citizens of eminence to the COC be realized.

It is also true that advertising may leave out some high-caliber candidates who would have accepted a direct appointment but would prefer not to join an open competition. It was possible that "citizens of eminence" may not themselves come forward to apply for these honorary positions, rather, the Government itself needs to spot such individuals through a process of headhunt.

Supreme Court directed that alongside the process initiated with the advertisement of the places available on the COC, the Government may carry out its own search of finding the best possible candidates for the job; that any suitable candidates identified in this executive search may be approached with the prospective offer of serving on the COC; that consent of such candidates to such offer may be treated as their application for the available positions, and such candidatures shall be added to the group of applications received in response to the public advertisement; that all candidates, whether identified in Government search or those who themselves choose to apply in response to advertisement, shall be assessed against an objective criteria which may relate to conduct, reputation, credibility, integrity, professional excellence etc., and that the most eligible candidates shall be selected out of the consolidated pool.

Moinuddin v. State of Uttar Pradesh AIR 1960 All 484; Danielle Wood, Kate Griffiths and Anika Stobart, 'New politics: A better process for public appointments' (Report No. 2022-09, Grattan Institute 2022) 16 ref.

Haroon Dugal, Advocate Supreme Court (video-link Lahore) along with Mohsin Hameed Dohar, Dir. PEMRA and Jalal Haider, Law Officer for Petitioners.

Ayan Mustafa Memon, Advocate Supreme Court for Respondents.

Date of hearing: 25th July, 2022.

JUDGMENT

SYED MANSOOR ALI SHAH, J.---We consider in this case whether honorary appointments to public offices like the Chairperson and Members of the Council of Complaints ("COC"), Pakistan Electronic Media Regulatory Authority ("PEMRA") need to be made after advertising the positions or the Government could itself headhunt and fill these slots.

2. Brief facts of the case are that a number of television broadcasting companies and a private citizen filed separate constitutional petitions in the High Court of Sindh for issuance of the writ of quo warranto against the individuals then holding the offices of the Chairperson and Members of the COC Sindh, PEMRA on the ground that they were not fit, eligible and qualified to hold said offices. The High Court dismissed the constitutional petitions and observed that the appointments in question did not seem to suffer from any inherent defect under the law. However, the High Court directed that "in the future, the appointment of Chairperson and Members of the COC PEMRA is required to be made after advertising the positions" and it is against this direction that present petitions for leave to appeal have been filed by PEMRA.

3. It has been contended by the learned counsel for the petitioners that the Chairperson and Members of the COC are appointed on honorary basis for a period of two years. There is no prevalent statutory provision, he argues, which calls for advertisement of the positions of the Chairperson and Members of the COC and, therefore, there is no such requirement. The learned counsel says that the High Court failed to appreciate the fact that the Chairperson and Members of the COC neither fall in the category of civil servant nor are permanent posts so as to require advertisement. Additionally, he submits that the PEMRA Ordinance 2002 ("Ordinance") requires that the Chairperson and Members of the COC must be "citizens of eminence" and that persons of such stature do not usually feel inclined to themselves come forward and apply for honorary positions. He maintains that the Government would be hard-pressed to find citizens of eminence if said honorary offices are to be necessarily filled after inviting applications.

4. We have heard the learned counsel for the petitioners at length and perused the record. The question before us is whether appointments to honorary public offices are to be made through an open and competitive process or the Government could itself pick and choose the suitable individuals to occupy such positions. PEMRA is envisaged, in the Ordinance, as an independent statutory body that would regulate electronic media in Pakistan. The Ordinance hands out a distinct legal personality and operational autonomy to PEMRA. One of the objects identified in the preamble is to "improve the standards of information, education and entertainment". Thus, the COC is established under section 26 of the Ordinance to address public complaints against any aspects of programmes broadcast or distributed by electronic media.

5. For the regulation of electronic media in the country, the COC evidently holds an important adjudicatory-cum -recommendatory position vis- -vis review of public complaints. The COC is required to 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 PEMRA.¹ The COC has powers to summon a licensee against whom a complaint has been made and call for explanation regarding any matter relating to their operation.² The COC is supposed to render opinions on such complaints.³ Finally, in case of violation of the codes of programme content and advertisements, the COC may recommend appropriate action of censure or fine to PEMRA.⁴ It thus appears that appointees to the COC are to play an important role in public life relating to the issue of public complaints in the realm of regulation of electronic media in the country. Obviously, the process of making such public appointments should be designed and conducted in a way to ensure that the best people, from the widest possible pool of candidates, are considered and appointed to these positions. It is said that a competition is as good as the competitors who take part in it.⁵

6. Open selection process allows for unexpected expressions of interest. It prioritizes competition and helps discovering best possible candidates. The process, in turn, improves the governance and performance of the organization. In addition, such transparent process wins public confidence that appointees are selected on merit from a wide and inclusive pool of applicants. On the other hand, a closed selection approach limited to a headhunt itself conducted by the Government may prevent the organization from tapping in best available talent. Many outstanding candidates of whom the Government is unaware can be missed. Headhunting selectors have been observed to be looking for people like themselves and thus limiting the prospect of diversity.⁶ Besides, public appointments made behind closed doors raise eyebrows because the door of partisan intervention and patronage remains open.

7. Making appointment to a public office is a sacred trust which is to be discharged justly and fairly in the best interest of the public⁷, based on a process that is fair, transparent and non -discriminatory.⁸ Highest standards

of diligence, transparency and probity are to be observed so that a qualified, eligible and most deserving person is selected for a post.⁹ Article 25 of the Constitution guarantees equality of status to all citizens of Pakistan. Article 27 of the Constitution which is an instance of the application of 'equality' commanded by Article 25, in respect of appointments in the service of Pakistan, safeguards against discrimination in respect of such appointments.¹⁰ The constitutional guarantee of equality and safeguard against discrimination is not limited to paid services or jobs but extends to all appointments to public offices, honorary or otherwise.¹¹

8. We do not agree with the argument that COC appointments being of honorary nature do not need to go through the requirements associated with other appointments' selection process. It is as if to suggest that honorary appointments are not important enough to merit a selection process based on competitive transparency. Such a notion is belied by the Ordinance which requires that only eminent citizens could be given a place on the COC. The words "citizens of eminence" show that seeking the best person for the job becomes the only consideration before the appointing authority. COC offices are associated with important roles and are required to be filled with the most meritorious candidates. We see that an individual is nominated to an honorary position in recognition of his or her individual standing and professional reputation. Some offices, though honorary or unpaid, may be highly coveted by citizens. They do not carry any salary or emoluments but they may be offices of prestige, status and dignity.¹² The honorary nature of COC appointments is significant and a step in the direction to attract eminent persons willing to take up the job of independently settling complaints against electronic media without any pecuniary strings attached to the terms and conditions of their offices. This further accentuates the need that COC membership should consist of the finest and most accomplished persons.

9. It is correct that neither the Ordinance nor the Pakistan Electronic Media Regulatory Authority (Council of Complaints) Rules, 2010 ("Rules"), framed in exercise of the powers conferred by section 26(4) read with section 39 of the Ordinance, expressly require the public advertisement of the COC slots. Notable, however, is the fact that the Ordinance, and also the Rules, require that the Chairperson and Members of the COC shall be citizens of eminence. The idea is that the composition of the COC shall consist of respected, qualified and experienced members of society who shall work independently under facilitation of PEMRA and take action on the complaints received against broadcast media and distribution service providers.¹³ The important thing here is to see as to how to fulfil legislative will and find the citizens of eminence to sit on the COC. The search for such an array of individuals must begin with a transparent call for candidates. Only then can optimum utilization of talent be achieved and ensured and purpose behind the provision of sending the citizens of eminence to the COC be realized.

10. We do recognize that advertising may leave out some high-caliber candidates who would have accepted a direct appointment but would prefer not to join an open competition. However, meritocracy does not obviate the need for transparency nor should it devolve into elitism with limited opportunities for less privileged.¹⁴ The constitutional imperative of equality and non-discrimination demands that public sector appointments be made in an open and competitive process with equal opportunity for all. Appointing authorities must factor in transparency to the design and planning of public appointments processes. The overall standard of selections to be made in an open selection would be higher than the current uncompetitive approach. We do not entirely disagree with the argument of learned counsel for the petitioners that "citizens of eminence" may not themselves come forward to apply for these honorary positions, rather, the Government itself needs to spot such individuals through a process of headhunt. Rather, we point out that the Government is missing out on the fact that advertising doesn't preclude running a headhunting process in parallel.¹⁵ Alongside the process initiated with the advertisement of the places available on the COC, the Government may carry out its own search of finding the best possible candidates for the job. Any suitable candidates identified in this executive search may be approached with the prospective offer of serving on the COC. Consent of such candidates to such offer may be treated as their application for the available positions. Such candidatures shall be added to the group of applications received in response to the public advertisement. All candidates, whether identified in Government search or those who themselves choose to apply in response to advertisement, shall be assessed against an

objective criteria which may relate to conduct, reputation, credibility, integrity, professional excellence etc. The most eligible candidates shall be selected out of the consolidated pool.

11. For the above reasons, we are not persuaded that the

COC slots should not be advertised. Consequently, the impugned consolidated order is upheld, subject to clarifications/elaborations/ observations given in paragraph 10.

12. These petitions are disposed of in the above terms.

MWA/P-21/SC Order accordingly.