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Policy Paper:

Analyzing Content Regulation and Model of the Council of Complaints of the Pakistan Electronic Media Regulatory Authority (PEMRA) in light of the Civil Petition No.3506 of 2020, *Pakistan Electronic Media Regulatory Authority (PEMRA) & another Versus M/s ARY Communications Private Limited (ARY Digital)*

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Executive Summary

A free press is an indispensable aspect of democracy, and regulating broadcast media is essential to the right to free speech. In today's digital age, broadcast media has a major and significant impact on the nation's socio-political policies. Given the potential impacts of the broadcast media, there is a need for constant, unbiased oversight of and limitations on the broadcast media within the legal bounds.

In Pakistan, broadcast media is regulated by the Pakistan Electronic Media Regulatory Authority (**"PEMRA"** / also referred to as the **"Authority"**), which was established with the primary responsibility of overseeing and managing the broadcast media in the country and solely entrusted with the power to decide the complaint made under the PEMRA laws.

To forward the mandate of the relevant laws and regulations, the Federal Government, through notification(s) established an independent adjudicative-cum-recommendatory body, known as the Council of Complaints (**"COC"**). The COC's responsibilities include, addressing all the complaints submitted by the general public concerning violating PEMRA laws, and ensuring that media broadcast networks act responsibly by adhering to and upholding the Code of Conduct, 2015. Given the role of the COC, the selection of its members must be handled in a transparent and democratic manner, necessitating reform of the current process to ensure that members are selected on a merit basis rather than as "citizens of imminence" or "honorary appointees."

This study compares the model of PEMRA for regulating broadcast content in Pakistan with the broadcast media rules of other jurisdictions. This comparison will highlight the impact of the recent judgment by the Supreme Court of Pakistan, Pakistan Electronic Media Regulatory Authority (PEMRA) & another Versus M/s ARY Communications Private Limited (ARY Digital)¹ to understand the current regulatory schema of PEMRA. The policy paper will other nations' different

¹ Pakistan Electronic Media Regulatory Authority & another Versus M/s ARY Communications Private Limited & another, Civil Petition No.3506 of 2020 [hereinafter as the "Civil Petition No.3506 of 2020"], accessible at: https://www.supremecourt.gov.pk/downloads_judgements/c.p._3506_2020.pdf.



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strategies and models to regulate broadcast media while maintaining the fundamental principles of freedom of expression, access to information, neutrality, and transparency. In the same vein, concludes by offering recommendations/suggestions for a more efficient model to regulate the COC.



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A. Introduction

The Digital Rights Foundation (“DRF”) is a non-governmental Organization established in 2012, working on the intersection of human rights with technology, focusing on freedom of expression, the right to privacy and protections against online gender-based violence.

This document will discuss the current laws and regulations for the content aired by broadcasters in Pakistan and the role of PEMRA as a regulatory body. In the same realm exists an independent body of the COC, empowered to address consumer complaints submitted to it. As an advocate of free media and press, DRF understands the significance of this independent body, namely, the COC and appreciates its attempt at ensuring that content broadcasted is appropriate, lawful, and compliant with the relevant codes and guidelines.

This document delves into the current process for appointing members to the COC, presents an analysis of the law regarding the appointment of members of the COC, examines the Council’s model in detail by comparing it with other jurisdictions, and highlights areas for improvement, particularly in light of emerging jurisprudence. The goal is to identify best practices and areas of potential improvement within the current model of the COC. Overall, DRF aims to provide constructive recommendations to enhance the COC’s effectiveness and promote the quality and accountability of the content broadcast nationwide.

This document was drafted on 13 April 2023.



B. CASE BRIEF: Exploring Jurisprudence of Civil Petition No.3506 of 2020

Case Title:

Pakistan Electronic Media Regulatory Authority & another Versus M/s ARY Communications Private Limited (“**ARY Digital**”) & another, Civil Petition No.3506 of 2020.

Main Question of Law:

1. Whether section 27(a) of the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 [**“PEMRA Ordinance 2002”**] is an independent and self-governing provision or whether its applicability requires the opinion of the COC in terms of section 26(2) of the PEMRA Ordinance 2002 read with the Pakistan Electronic Media Regulatory Authority (Councils of Complaints) Rules 2010 [**“COC Rules 2010”**]?²
2. The interpretation of expressions such as "obscene," "vulgar," and "offensive to the commonly accepted standards of decency" as used in section 27(a) of the PEMRA Ordinance 2002.³
3. The manner of selection of the members of the COC, particularly the requirement of such members being "*citizens of eminence*".⁴

Brief Summary of Facts:

The ARY Digital broadcasted a drama serial called "JALAN" on its TV Channel, which some public members complained about on the Pakistan Citizen's Portal of the Prime Minister's Performance Delivery Unit, alleging that the story of the drama is immoral and against social and cultural values. The complaints were forwarded to PEMRA, which issued two directives to ARY to amend the script of the drama serial before broadcasting further episodes. After ARY refuted the allegations, PEMRA passed an order on 10 September 2020, prohibiting the broadcasting and rebroadcasting of the drama serial. ARY filed an appeal against the order before the High Court

² *Civil Petition No.3506 of 2020*, at para 1.

³ *Ibid*

⁴ *Civil Petition No.3506 of 2020*, at para 1



of Sindh, which was allowed, 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 to be heard.⁵

ARY objected to the jurisdiction of PEMRA to issue the show cause notice without obtaining COC's opinion under section 26 of the PEMRA Ordinance 2002. PEMRA passed a prohibition order on 29 October 2020, prohibiting ARY from airing the drama serial. ARY then appealed this prohibition order before the High Court of Sindh. The appeal was allowed and the order was set aside, holding that PEMRA could not bypass the Councils of Complaints in making the prohibition order. PEMRA then filed a petition for leave to appeal against this judgment of the High Court.⁶

Decision:

The Supreme Court dismissed the petition and declined the leave to appeal. The relevant excerpt of which is reproduced hereinbelow:

*"22. ...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 [.]"*⁷

Reasoning:

1. Two-tiered regulatory system for media content in Pakistan: Responsibility of regulating the right to freedom of expression and right to information.

⁵ Civil Petition No.3506 of 2020, at para 2-3

⁶ Ibid

⁷ Civil Petition No.3506 of 2020, at para 22



In essence, PEMRA is mandated to regulate and administer the standard of information broadcasted through media to the public. In the constitutional context, PEMRA's function 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.⁸

To regulate these two important fundamental rights, the media content broadcasted and received in the public space is regulated under the PEMRA Ordinance 2002 through a two-tiered regulatory system, the Council of Complaints and the PEMRA.⁹ The primary responsibility of these two bodies is to create a balance between safeguarding the right to freedom of speech and expression while ensuring that the media content is compliant with the Constitution under Articles 19 and 19A and meets the reasonable restrictions under the PEMRA Ordinance, Rules, Regulations and the Code of Conduct.¹⁰

2. Scope of Sections 26 and 27 of the PEMRA Ordinance 2002

With this conceptual background of establishing a two-tiered regulatory system, a plain reading of section 26 of the PEMRA Ordinance 2002, read with Rules 8 and 10 of the COC Rules 2010, shows that the function of receiving and reviewing complaints against any aspects of programmes or such matters as referred to it by PEMRA Authority and of rendering an opinion on such complaints or such matters is assigned by the legislature to the COC.¹¹ The "opinion" of a COC rendered under section 26(2) of the PEMRA Ordinance 2002 is then placed before PEMRA, which after giving due consideration to the said opinion, is to decide the matter in accordance with the parameters spelt out in section 27(a) of the PEMRA Ordinance 2002.¹² Likewise, in the case of

⁸ *Civil Petition No.3506 of 2020*, at para 6

⁹ *Civil Petition No.3506 of 2020*, at para 10

¹⁰ *Civil Petition No.3506 of 2020*, at para 9-10

¹¹ *Civil Petition No.3506 of 2020*, at para 12

¹² *Ibid*



any "recommendations" made by a COC under section 26(5) of the PEMRA Ordinance 2002, PEMRA may approve or disapprove the recommendations and pass such order as deemed appropriate or refer the matter back to the COC for reconsideration under Rule 10 of the COC Rules 2010.¹³

It is also worth noting that under section 13 of the PEMRA Ordinance 2002, PEMRA allows delegation of its powers and functions to its Chairman or a member or any member of its staff, or an expert, consultant or adviser. This delegation of the powers and functions of a 13-member authority to a single person also necessitates that the COC, 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 under section 27 of the PEMRA Ordinance 2002 as to "any aspects of programmes", the matter has to be first sent to a COC for its opinion and after considering the said opinion, PEMRA or its Chairman, as the case may be, may take the final decision.¹⁴

3. Selection and appointment of members of the COC

The selection and appointment of COC members should reflect a range of diverse interests and perspectives while also ensuring independence and impartiality. To meet those requirements, the Federal Government must establish:¹⁵

- 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 through various channels, such as newspapers, websites, social media and community organizations.

¹³ *Ibid*

¹⁴ *Civil Petition No.3506 of 2020*, at para 19

¹⁵ *Civil Petition No.3506 of 2020*, at para 20



- 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.
- iv. Establish an independent selection committee composed of representatives from different sectors, e.g. media, academia, civil society, to review applications and recommend candidates.
- v. Provide the members, once appointed, with training and orientation on media regulation, ethics and relevant laws.

After reading the provisions of sections 26 and 27 of the PEMRA Ordinance 2002 in conjunction with other relevant provisions and the COC Rules 2010 made thereunder, it was observed that section 27(a) of the PEMRA Ordinance 2002 is not an independent and self-governing provision; it rather requires for its applicability the opinion of a COC regarding the objectionable aspect of a programme or advertisement in terms of section 26(2) of the PEMRA Ordinance 2002 read with the COC Rules 2010.¹⁶

4. What is "obscene", "vulgar", and "offensive to the commonly accepted standards of decency"?

In section 27(a) of the PEMRA Ordinance 2002, the terms "obscene", "vulgar", and "offensive to the commonly accepted standards of decency" are interconnected. An expression can only be considered "obscene" or "vulgar" if it is deemed "offensive to the commonly accepted standards of decency". Therefore, the benchmark for determining whether a particular expression of one's thoughts, ideas, or opinions in a play or drama is "obscene" or "vulgar" is the "commonly accepted standards of decency" within the community. The "commonly accepted standard of decency" is a measure of tolerance, not taste. It is not determined by what people believe is appropriate for

¹⁶ *Civil Petition No.3506 of 2020*, at para 21



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themselves to see, but by what they would not allow others to be exposed to, based on the degree of harm it may cause to "public decency" or "public morality."¹⁷

¹⁷ *Civil Petition No.3506 of 2020*, at para 29



C. Content regulation under PEMRA Ordinance 2002

The PEMRA Ordinance 2002 provides the legal framework to regulate, oversee, and monitor electronic media services in Pakistan. The Ordinance also enacted guidelines for the licensing, owning, and managing of electronic media channels. It outlines the standards for content aired on electronic media, including television, radio broadcasting, and other electronic media services, and also provides a framework to promote responsible journalism by regulating media content and ensuring the right to free expression within limits prescribed by the law.

The content regulation powers of PEMRA are derived from the “terms and conditions” which apply to license holders under the Ordinance which impose obligations, under section 20, to ensure:

- “preservation of the *sovereignty, security and integrity* of the Islamic Republic of Pakistan [emphasis added]”;¹⁸
- “preservation of the *national, cultural, social and religious values* and the *principles of public policy* as enshrined in the Constitution of the Islamic Republic of Pakistan [emphasis added]”;¹⁹
- “that all programmes and advertisements do not contain or *encourage violence, terrorism, racial, ethnic or religious discrimination, sectarianism, extremism, militancy, hatred, pornography, obscenity, vulgarity or other material offensive to commonly accepted standards of decency* [emphasis added]”.²⁰

Furthermore section 27 states that PEMRA may prohibit the distribution of content if it is seen that “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*

¹⁸ Section 20(a), PEMRA Ordinance 2002.

¹⁹ Section 20(b), PEMRA Ordinance 2002.

²⁰ Section 20(c), PEMRA Ordinance 2002.



public peace and tranquility or endangers national security or is pornographic, obscene or vulgar or is offensive to the commonly accepted standards of decency [emphasis added]".²¹

This mandate was expanded upon by the Electronic Media (Programmes and Advertisements) Code of Conduct, 2015 ("**Code of Conduct**")²². For instance, the "ideology of Pakistan" criteria was expanded to include any content against the founding fathers, specifically Quaid-e-Azam and Dr. Allama Muhammad Iqbal.²³ Furthermore, the Code also covers the nebulous concept of misinformation by prohibiting any content that is "false", or in instances where "there exist sufficient reasons to believe that the same may be false beyond a reasonable doubt."²⁴ Additionally, any content that casts "aspersions against the judiciary or armed forces of Pakistan"²⁵ is also prohibited, with aspersions being defined as "spread false and harmful charges against someone; attack the reputation of a person with harmful allegations."²⁶

The broad regulatory regime provided by PEMRA has arguably led to over-regulation of content on electronic broadcast media and allows for subjective determinations of what constitutes "prohibited" content. It bears noting that many sections of the Code of Conduct exceed the language used under the PEMRA Ordinance, raising concerns about the Code being *ultra vires* of its parent legislation. According to a study of PEMRA notices issued between the 18-month period between January 2018 to June 2019, a total of 110 notices were issued by the regulatory body.²⁷ Among the top three reasons for notification, the most related to "derogatory remarks against army and judiciary" (31.8%), followed by "offensive or hateful content" (23.8%) and "indecent content"

²¹ Section 27(a), PEMRA Ordinance 2002.

²² "Electronic Media (Programmes and Advertisements) Code of Conduct, 2015," S.R.O.No.1(2)/2012-PEMRA-COC, May 9, 2015, <http://www.moib.gov.pk/MediaLaws/coc2015.pdf>.

²³ Section 3(1)(a), Code of Conduct.

²⁴ Section 3(1)(i), Code of Conduct.

²⁵ Section 3(1)(j), Code of Conduct.

²⁶ Section 2(1)(a), Code of Conduct.

²⁷ Saher Asad, "Electronic Media Regulation in Pakistan: Possibilities for an Unnatural Experiment," Mahbub ul Haq Research Center, LUMS, June 24, 2022, <https://mhrc.lums.edu.pk/electronic-media-regulation-in-pakistan-possibilities-for-an-unnatural-experiment/>.



(14.5%).²⁸ Subjective determinations of what constitutes “indecent content” is often based on “individual public complaints or just PEMRA’s own understanding of indecent justified by religious or social norms.” The research study noted that during the 18-month period, a female journalist received a PEMRA notice for simply wearing a red sweater on Television.²⁹ In light of the 2023 Supreme Court Judgment referred to above, it would be prudent for PEMRA to reflect on the subjective nature of terms such as ‘obscene’ and ‘vulgar’ in light of changing societal norms, as observed by Justice Mansoor Ali Shah.

Many of these stipulations, constituting content-based restrictions, exceed the “reasonable restrictions” criteria as defined by Article 19 of the Constitution of Pakistan.³⁰ Furthermore, based on international human rights principles, particularly under Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR), which imposes a three-part test for any speech restrictions: (a) it is provided by law; (b) it pursues a legitimate aim; and (c) it is “necessary in a democratic society”. In the oft-cited General Comment No. 34, the UN Human Rights Committee states that:

“Restrictions must not be overbroad. The Committee observed in general comment No. 27 that “restrictive measures must conform to the *principle of proportionality*; they must be appropriate to achieve their protective function; they must be *the least intrusive* instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected... The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law”. The principle of proportionality must also take

²⁸ Ibid.

²⁹ Ibid.

³⁰ Article 19 of the Constitution states: “in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, commission of or incitement to an offence.”



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account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.”³¹ [emphasis added]

Free speech jurisdiction in the United States posits that “content-based laws” are deemed to be “presumptively unconstitutional”³² and violative free speech principles. In order for these content regulation laws to pass Constitutional muster, courts apply a strict scrutiny criteria under which the law needs to serve a: a) compelling state interest; and b) adopt the least intrusive means of achieving that interest.³³ Examining the criteria laid out for content regulation under the Ordinance and Code of Conduct under these international human rights laws and best practices is important.

³¹ “General comment No. 34,” Human Rights Committee, 102nd session, 2011, CCPR/C/GC/34, <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

³² Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

³³ Sable Commc’ns of Cal. v. FCC, 492 U.S. 115, 126 (1989).



D. The Council of Complaints

To uphold and implement the mandate by the Ordinance and expounded upon by the Code of Conduct, the regulatory authority established the COC pursuant to section 26 of the PEMRA Ordinance 2002. The COC is a vital body that addresses public complaints on any aspect of the program(s) aired or transmitted by electronic media.³⁴ It has the power to entertain complaints that are filed against the licensee(s) who violate the provision(s) of the PEMRA Ordinance 2002 or the Code of Conduct 2015.³⁵

Before the establishment of the COC, there were limited avenues available to the public for addressing complaints concerning electronic media. These options included contacting electronic media organizations through letters or phone calls or resorting to legal action in the courts. However, these options were often ineffective and insufficient for resolving and addressing complaints related to electronic media. There was a growing need for a centralized body with a

³⁴ PEMRA Ordinance 2002, S 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.* (3 A) *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.*

³⁵ The Code of Conduct, 2015 was passed by the authority in exercise of the powers conferred by sub-section (1) of section 39 of the Pakistan Electronic Media Regulatory Authority (Amendment) Act, 2007.

The Code of Conduct 2015, Clause 24 Standards of behavior:-*(1) This Code presents the standards to be complied with by all the licensees and it shall always be the sole responsibility of the licensee to ensure the content aired by it is in compliance with the Code of Conduct. (2) This Code represents an affirmative declaration of understanding and compliance with basic values and objectives that licensees, including its employees and officials shall adhere to, and these shall be observed in letter and spirit.*"

The Code of Conduct 2015 covers a range of topics, including the fair and accurate documentary of news and current affairs, ensures that coverage of incidents will not promote violence or anti-social behavior, also prohibits airing of any allegation against any person or organization without credible information or content that amounts to defamation, and more.



role that could address complaints more effectively and efficiently. The establishment of the COC to address public complaints on any aspect of programs aired or transmitted by electronic media has successfully filled this gap by providing a platform for the public to raise their concerns and address violations related to electronic media in Pakistan.

The COC is entrusted with the responsibility and power of reviewing complaints,³⁶ summoning the licensee for an explanation,³⁷ rendering an opinion,³⁸ and recommending appropriate action(s).³⁹ Thus, the COC plays a significant adjudicative-cum-recommendatory role concerning public complaints and regulating electronic media in the country.⁴⁰

i) Laws Relevant to the Composition/Appointment and Powers of the COC

For the ease of your reference, relevant provisions of the law related to the powers and composition/appointment of the members at the COC are herein reproduced below;

- a. Section 26 of the PEMRA Ordinance 2002 describes the composition of the COC:

"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 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

³⁶The PEMRA Ordinance 2002, S 26(2)

³⁷*Ibid*, S 26(3A)

³⁸*Ibid*, S 26(2)

³⁹*Ibid*, S 26(5).

⁴⁰Civil Petitions No.1716 to 1724 of 2022, *Pakistan Electronic Media Regulatory Authority, etc (in all cases) Versus ARY Communications Ltd, etc (in all cases)*, ["hereinafter referred to as ARY Communications"], at para 05



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.

(3 A) 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."

b. Section 30 of the PEMRA Ordinance 2002 provides that opinion of the COC shall be obtained before the revocation of the license of the licensee:

"30. Power to vary conditions, suspend or revoke the licence.-

(1) The Authority may revoke or suspend the licence of a broadcast media or distribution service by an order in writing on one or more of the following grounds, namely:-

(a) the licensee has failed to pay the licence fee, annual renewal fee or any other charges including fine, if any;

(b) the licensee has contravened any provision of this Ordinance or rules or regulations made thereunder:

Provided that in the case of revocation of a licence of a broadcast media an opinion to this effect shall also be obtained from the Council of Complaints;

(c) the licensee has failed to comply with any condition of the licence; and

(d) where the licensee is a company, and its shareholders have transferred a majority of the shares in the issued or paid up capital of the company or if control



of the company is otherwise transferred to persons not being the original shareholders of the company at the time of grant of licence, without written permission of the Authority.

(2) The Authority may vary any of the terms and conditions of the licence where it deems that such variation is in the public interest.

(3) Except for reason of necessity in the public interest a licence shall not be varied, suspended or revoked under sub-section (1) or (2) unless the licensee has been given reasonable notice to show cause and a personal hearing."

3. Content Regulation in Other Jurisdictions

I. United States of America

Relevant Law	Communications Act, 1934
Regulating Agency	Federal Communications Commission (FCC)
Appointment	The FCC is composed of five commissioners (one of whom shall be designated as chairman) appointed by the US President (after having attained advice and consent of the Senate).
Expertise of Commissioners	All commissioners in the current FCC have immense experience in communication and public policy. They have both public as well as private sector experience in the field. ⁴¹
Mandate	Granting of licenses, Promoting competition, innovation & quality. Revising and reviewing media regulation, strengthening the defense of the nation's communications

⁴¹ Communications Act, S 394(2)



	infrastructure. Supporting the nation's economy by ensuring an appropriate competitive framework for the unfolding of the communications revolution. ⁴²

II. United Kingdom

Relevant Law	Office of Communications Act, 2002
Regulating Agency	Office of Communication (Ofcom)
Appointment	Ofcom Board is governed by eleven members, including chairman and chief executive. The members of Ofcom board are appointed by the UK government's Secretary of State. ⁴³
Expertise of Commissioners	Constituting non-executive Chair, Executive Directors, and non-executive Directors with experience in media economics and communication. ⁴⁴
Mandate	Quality controls, fine, revocation, and licensing.

III. Canada

Relevant Law	Broadcasting Act, 1991

⁴² *Ibid*, S 303

⁴³ Office of Communications Act 2002, S 3

⁴⁴ [Ofcom Board - Ofcom](#)



Regulating Agency	Canadian Broadcast Standards Council (CBSC)
Appointment	The Chairperson is appointed by the Canadian Association of Broadcasters (CAB), the members of the Board are recommended by the Chair, approved by the existing Board and then officially elected by the CAB.
Expertise of Commissioners	Members of the panel include a diversity of individuals with respect to gender, language, ethno-cultural community, geographic representation, abilities and professional experience. There are representatives from both the broadcasting industry and the general public on each Panel. ⁴⁵
Mandate	he CBSC administers five industry codes covering various issues relating to ethics, violence on television, equitable portrayal, journalistic ethics, and cross-media ownership which set out the guidelines for television and radio programming. ⁴⁶

IV. Australia

Relevant Law	Australian Communications and Media Authority Act, 2005
Regulating Agency	Australian Media and Communications Authority (ACMA)
Appointment	The members of ACMA are appointed by the Governor-

⁴⁵ [CBSC Structure · CBSC / CCNR](#)

⁴⁶ [About Us · CBSC / CCNR](#)



	General in Council, on the recommendation of the Australian Government Minister for Communications, Cyber Safety and the Arts. ⁴⁷
Expertise of Commissioners	The appointment process for ACMA Board members involves a rigorous selection and assessment process, considering the candidates' skills, experience, and suitability for the role.
Mandate	ACMA collects broadcasting, radiocommunication and telecommunication taxes and regulates Australian media. ACMA is a converged regulator, created to oversee the convergence of telecommunications, broadcasting, radio communications and the internet. ⁴⁸

V. Bangladesh

Relevant Law	Bangladesh Press Council Act, 1974
Regulating Agency	Bangladesh Press Council (BPC)
Appointment	The chairman is appointed by the President of Bangladesh, while the other members are appointed by the Ministry of Information.
Expertise of Commissioners	Usually, a Supreme Court Judge is nominated as the President

⁴⁷ Australian Communications and Media Control Act 2005, S 20

⁴⁸ *Ibid*, Part-2 Division-2



	of the Council, who heads as the Chairman of the Council. Three members should be currently working journalists, three editors of news agencies, and three owners of news agencies. Expert panelists should comprise three members: one nominated by the University Grants Commission. The second by the Bangla Academy, and the third by the Bangladesh Bar Council. ⁴⁹
Mandate	The Council was established to protect the freedom of press and improve newspapers and news agency standards. ⁵⁰

VI. Malaysia

Relevant Law	Malaysian Communications and Multimedia Commission Act, 1998
Regulating Agency	Malaysian Communications and Multimedia Commission (MCMC)
Appointment	The members of the Commission appointed by the Minister. The Commission consists of Chairman, three members representing the Government and not less than two but not more than five other members. ⁵¹

⁴⁹ Press Council Act 1974, S 4

⁵⁰ *Ibid*, S 11

⁵¹ Malaysian Communications and Multimedia Commission Act 1998, S 6



Expertise of Commissioners	Members of the MCMC possess the knowledge, experience, and qualifications in areas such as law, finance, economics, engineering, telecommunications, broadcasting, multimedia, and consumer affairs.
Mandate	MCMC has the authority to regulate various aspects of the communications and multimedia industry, including broadcasting, telecommunications, and digital media. It is responsible for granting licenses, enforcing industry codes of conduct, and addressing consumer complaints related to the industry. ⁵²

VII. India

Relevant Law	Press Council of India Act, 1978
Regulating Agency	Press Council of India (PCI)
Appointment	The President of India appoints the members of the Press Council of India based on the recommendations of a committee consisting of the Chairman of the upper house of the Indian Parliament, the Speaker of the lower house of the Indian Parliament, and a nominee of the Press Council. ⁵³

⁵² *Ibid*, S 16

⁵³ The Press Council Act 1978, S 5



Expertise of Commissioners	The Council consists of members, including representatives from the media, the bar, the education sector, and the general public. The Chairman of the Council is a retired judge of the Supreme Court of India or a High Court appointed by the President of India.
Mandate	Its objective is to maintain and improve the standards of newspapers, news agencies, and journalists and to ensure their freedom and independence. The Council also adjudicates complaints against the press for violation of journalistic ethics and professional norms and can censure or reprimand erring newspapers or journalists. ⁵⁴

4. The model of COC

As discussed above, the COC plays a crucial role in regulating content broadcasted by electronic media and ensuring that the licencees abide by the existing laws and regulations, including but not limited to the Code of Conduct 2015 and/or PEMRA's other Rules/Regulations. On coming to a decision, the COC normally makes a recommendation to the PEMRA and these recommendation(s) may vary from simple imposition of fines to penalties such as disciplinary action(s) against licencees, including, suspensions, and revocations of the licenses of those complained against.⁵⁵ The COC is making important determinations regarding the dissemination of content for mass circulation on broadcast media, placing it at the centre of discourse and

⁵⁴ *Ibid*, S 13

⁵⁵ PEMRA Ordinance 2002, S 30



conversations essential for a free democracy.

Given this important role of the COC, it is increasingly essential to ensure that the appointment of its members must be based on merit, impartiality, and transparency. The COC's ability to function effectively depends on the credibility of its members. Therefore, it is imperative to examine the appointment processes of other jurisdictions to identify best practices that can be implemented in Pakistan.

For effective justice at the COC level, there must be a Council which not only represents but understands the rights and grievances of content creators, civil society, journalists and the interests of the general public. Furthermore, members must balance these diverse views with human rights-compliant standards for free speech. The composition and appointment process for the COC must be transparent, debated upon and consulted with relevant stakeholders, including media owners, broadcasters, journalists, lawyers, public-policy makers and other civil society representatives. Following are a few suggestions, influenced by practices around the world, which, if implemented within the current COC, will help in creating a more accountable and more efficient Council;

I. Diverse Representation

The federal government is mandated to appoint COC members.⁵⁶ This discretionary appointment means that there is no general or specific representation of the public or experts within the COC. As a result, the appointment of the COC members is often politically motivated and influenced by external factors. Consequently, the members usually protect the political interest(s) of the government in power by acting in a preferential and biased manner.

For the broader perspective, one may have a look at the **Malaysian Communications and**

⁵⁶ *Ibid* at S 26(1)



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Multimedia Commission (MCMC)⁵⁷ which consists of a chairman and seven members. Unlike Pakistan's COC, Malaysia's MCMC ensures its membership is diverse and represents a wide range of expertise and perspectives. The Commission includes members with experience in the government and industry and persons with knowledge, experience, and qualifications in law, finance, economics, engineering, telecommunications, broadcasting and multimedia. This diversity of representation ensures that the MCMC can effectively regulate and promote the development of the communication industry in Malaysia, considering all stakeholders' interests. In addition, the MCMC also has several advisory committees and expert panels, which are composed of individuals with specialized knowledge and expertise in areas such as broadcasting and telecommunications. This approach ensures that the MCMC has access to a broad range of expertise and perspectives and can make informed decisions that are in the best interests of the industry and the public.

Moreover, the **Canadian Broadcast Standards Council (CBSC)**, which comprises Adjudicating Panels, and these panels are the groups of people who decide whether any broadcasting codes have been breached for complaints that reach the Panel stage in the CBSC complaints process.⁵⁸ The CBSC ensures that one or more adjudicators dealing with a complaint come from the same geographical region and/or broadcasting sector (i.e. radio, television or other) as nominated within the complaint submitted before it.

In the same realm, the Supreme Court recently observed that it is essential that the COC is constituted accordingly, i.e., to understand the complexities of the complaint(s) submitted to it, instead of being *citizens of imminence*, the members ought to be from various professions and cultural backgrounds. For instance, representatives from "*mix expertise*,

⁵⁷ <https://www.mcmc.gov.my/en/home>

⁵⁸ <https://www.cbsc.ca/about-us/structure/>



*professional backgrounds, demographic diversity and geographic representation*⁵⁹” will allow the COC to decide effectively.

In short, the COC members play a vital role in regulating electronic media in the country. Therefore, the COC should have members from diverse backgrounds, including media experts, legal experts, civil society representatives, and academia, to ensure a balanced and fair approach to regulatory matters.

II. Merit-Based Appointments

The appointment of the COC members falls under the category of honorary appointment, and there is no eligibility criterion or qualification requirement for the appointment of the members of the COC. The only requirement mentioned under section 26(3A) is being “*citizens of eminence*”. This requirement is vague and can be interpreted subjectively, coinciding with the wishes of the government or those in the power of the position. The same issue of eligibility in the COC came under discussion in the Supreme Court of Pakistan in 2022, in which the petitioner challenged the honorary appointments to public offices like the Chairperson and members of the COC. The Supreme Court, while referring to Articles 25 and 27 of the Constitution of Pakistan 1973, described the appointment to the public offices as a sacred trust and observed that these appointments ought to be discharged relatively, transparently, and non-discriminatorily.⁶⁰ Therefore, when appointed arbitrarily and against the set principles of transparency, these violate Article(s) 18, 19, 19A, 25, read with Article 4 of the Constitution of Pakistan, 1973, and the same are a nullity in the eyes of the law and liable to be set aside.

⁵⁹*Civil Petition No.3506 of 2020*, Para 20

⁶⁰ *ARY Communications; Chief Secretary Punjab v Abdul Raof 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); *Muhammad Yasin v Federation of Pakistan* (PLD 2012 SC 132)



In line with the same concept the Supreme Court of Pakistan in its recent judgment⁶¹ instructed the federal government to lay out a clear criteria for the selection of the COC instead of being citizens of eminence. Underlying that the appointment process for the COC should be in line with the best practices around the world. Different examples from various jurisdictions wherein the appointment of members to such independent bodies is based on merit, professional experience, and academic qualifications. This ensures that the Council comprises individuals with the expertise and knowledge to adjudicate complaints and regulate media content effectively.

III. Transparent appointment and working of the COC

It may be noted and has already been highlighted at several instances, no existing legislative tool addresses the procedure of appointment of members of the COC. To cater this vacuum one can follow examples set by international bodies, with the UK's communications regulator ("**Ofcom**")⁶² being one such example.

Ofcom's Board, which is usually tasked to look into the consumer complaints submitted to it just as the COC, is normally selected competitively. It may be noted that in the UK, the public appointments governance code is actively considered when appointing a member of the Ofcom Board, and the advisory assessment panel looks into the credentials and details of any person proposed to be a part of the Board. Interestingly, in case a Minister in the UK wishes to appoint the chair of the Board using his/her discretion, then they may have to submit their reasoning in writing, and the same is then published for the public and other relevant officials to scrutinize.⁶³ This extensive process of selecting members of the Ofcom only displays the UK government's efforts at ensuring fair representation of the general public within their Board, similarly, the appointment of the COC's members could

⁶¹ *Civil Petition No.3506 of 2020*, Para 20

⁶² <https://www.ofcom.org.uk/home>

⁶³ Matthew Gill (Institute for Government, 18 June 2021) <https://www.instituteforgovernment.org.uk/comment/chair-ofcom>



replicate this process to show its good-will at re-instating the original intent of the legislators of section 26 of PEMRA Ordinance 2002.

Furthermore, it is submitted that despite there being a vacuum in the law, it does not mean that the appointment(s) can be made arbitrarily and by use of discretionary powers of those in power. Instead, principles set by the apex/higher courts of Pakistan note that the safeguard(s) against discrimination is/are not limited to paid services or jobs, but these also extend to all appointments to public offices, including honorary appointments.⁶⁴ It is unfortunate to note that despite the previous ruling of the Supreme Court, the biased construction of the COC continues to exist, and prejudiced orders continue to be passed, paving way for the recent Civil Petition heard and decided by the Supreme Court.

The recent judgment of the supreme court addressed the same question and instructed that not only should the selection of the COC be advertised in newspapers, websites, social media and community organizations to attract a diverse pool of applicants and to ensure fair and equal opportunity.

5. Suggestions

In Civil Petition No.3506 of 2020, the Supreme Court of Pakistan addressed various issues related to the mandate of PEMRA and the appointment of the members at the COC. This judgment has played an important role in clarifying the issues regarding the regulatory framework of the PEMRA, and the appointment procedure of COC members. However, Pakistan can still improve its media content regulation framework by further taking a cue or inspiration from practices set by other international regulatory bodies in the media content regulation framework. Considering the practices of the most prominent and notable regulatory bodies of the world to ensure transparency, and impartiality and to secure the freedoms of the public in general, we at DRF also suggest the follows:

⁶⁴ *ARY Communications; Moinuddin v State of Uttar Pradesh (AIR 1960 All 484)*



IV. COC should act as a media watchdog and ensure transparent recommendations

After a complaint is submitted with the COC, after giving opportunity to both the parties, it sends its recommendations in writing to PEMRA. The Authority then considers these recommendations and pronounces the final order after applying its neutral and unbiased mind.⁶⁵

However, it may be noted that these order(s)/judgment(s) of the Authority is/are not published or cited anywhere. In this age of digital media, wherein everything is a click away, these recommendations of the COC and decisions of the Authority are barely found over the internet or on any digital platform, including the official website of PEMRA.⁶⁶ One can take guidance from the UK's super-regulator of electronic media, Ofcom, which actively publishes its findings on its website after deciding on any/every case.⁶⁷ In its duly published findings, Ofcom ensures to reason every aspect of the order passed. Therefore, to make the system transparent and to develop sustainable jurisprudence, it is suggested that the orders passed by the Authority are published publicly and available on the official website of the PEMRA, following the footsteps of Ofcom.

V. Creation of a Journalistic Independence Panel

Within the existing model of the COC, having an independent journalistic panel alongside the COC, is a step that may create a more comprehensive content regulation system within the country, including a model for protecting and promoting a free and independent media environment for the journalist community.

⁶⁵ *ARY communications limited Versus Council of Complaint* (P L D 2022 Sindh 552), at para 12

⁶⁶ <https://pemra.gov.pk/index.php> - Please note that the 'Decisions' tab on the official website is non-functional and the attachment accessible to the users neither contain the recommendations forwarded by the COC nor the final decisions passed by PEMRA.

⁶⁷ <https://www.ofcom.org.uk/about-ofcom/bulletins/content-sanctions-adjudications>



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This proposed *Journalistic Independence Panel* can draw inspiration from Canada's Journalistic Independence Panel.⁶⁸ The CBSC's Journalistic Independence Panel is an impartial and neutral body of six to ten adjudicators, half officers or employees of licensees of Canadian broadcasting undertakings or related/affiliated companies. In contrast, the other half are officers or employees of any association.⁶⁹ The CBSC has the sole authority to appoint adjudicators to the panel and is responsible for its good operation, ensuring its members' independence and general qualifications. Along the same line, this proposed *Journalistic Independent Panel* may be established in accordance with the model of CBSC's journalistic panel. The members of this panel could ideally include individuals from the COC as well as professionals from the journalistic field and other relevant sectors. These panel members would possess relevant qualifications and experience in journalism, enabling them to make informed decisions while adjudicating on complaints filed by journalists or complaints related to news, sub-judice matters or other matters addressing journalists and journalism.

⁶⁸ <https://www.cbsc.ca/about-us/structure/>

⁶⁹ [Journalistic Independence Code \(2008\), <https://www.cbsc.ca/codes/journalistic-independence-code/#:~:text=The%20Journalistic%20Independence%20Panel%20will,and%20half%20of%20whom%20shall>](https://www.cbsc.ca/codes/journalistic-independence-code/#:~:text=The%20Journalistic%20Independence%20Panel%20will,and%20half%20of%20whom%20shall)



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Conclusion

The regulatory regime envisioned by PEMRA presents two major issues in terms of the over-broad and subjective criteria it posits, and the constitution of the COC which is the primary decision-making body for content regulation of broadcast media within PEMRA's ambit. The document, and emerging jurisprudence, demonstrates the need for an overhaul of the criteria and Code of Conduct adopted for content moderation on the basis of constitutional principles and international human rights standards for freedom of expression. Furthermore, the appointment of members at the COC is a necessary process that requires careful consideration to ensure a fair and impartial regulatory environment for electronic media in Pakistan. If given consideration, the comments and suggestions presented in this document can help ensure that the appointment process is transparent, merit-based, and free from political influence, leading to the selection of competent and impartial COC members and in compliance with the orders of the Supreme Court.