

IN THE SUPREME COURT OF PAKISTAN
(ORIGINAL JURISDICTION)

PRESENT: MR. JUSTICE MIAN SAQIB NISAR, HCJ
MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE IJAZ UL AHSAN

SUO MOTU CASE NO.28 OF 2018

(Regarding Discussion in TV Talk Show
with regard to a Sub-judice Matter)

In attendance: Mr. Sohail Mehmood, DAG
Mr. Faisal Fareed Hussain, ASC a/w
Mr. Arshad Sharif in person.

Mr. Faisal Siddiqui, ASC
(For PBA)

Mr. Saleem Baig, Chairman PEMRA

Date of hearing: 12.9.2018

JUDGMENT

MIAN SAQIB NISAR, CJ.- While conducting a talk show titled 'Power Play' on 28.08.2018 on ARY News, the anchor Mr. Arshad Sharif made certain comments and raised queries about a matter pending adjudication before this Court. Despite the fact that the panelists on the show repeatedly advised him that his comments may amount to encroachment upon the proceedings before this Court, Mr. Sharif insisted that the Chief Justice of Pakistan should call him before the Court in order for him to point out the contradictions in the affidavit filed by Former President, Mr. Asif Ali Zardari, and to further respond to his queries. In the above background, this Court initiated the instant *suo motu* proceedings against Mr. Arshad Sharif. A summary/excerpt of this program is reproduced below (as provided in pages 3 to 6 of the main paperback):-

چینل: اے آر وائی نیوز

پروگرام: پاور پلے

وقت: 10:05 pm

تاریخ: 28-08-2018

● Summary of Talk Show

پروگرام پاور پلے ابتدا میں ایٹکار شدہ شریف نے سپریم کورٹ آف پاکستان میں money laundering کے حوالے سے چلنے والے کیس پر بات کی جس میں رپورٹرز القرآنین حیدر نے کیس میں developments کے بارے میں بتاتے ہوئے کہا کہ ایف آئی اے نے سپریم کورٹ آف پاکستان میں رپورٹ پیش کی اور ایک جے آئی ٹی تشکیل دینے کی گزارش کی۔ جعلی اکاؤنٹس، انور مجید اور ان کے بیٹے عبدالغنی مجید کی غیر قانونی Transactions پر رپورٹ پروگرام کے دوران share

کی گئی۔ پروگرام کے participant مصطفیٰ نواز کھوکھر نے اعتراض اٹھایا کہ نجف مرزا جو کہ معاملے کی تحقیقات کر رہے ہیں وہ سابق صدر زرداری پر تشدد کے معاملے میں ملوث رہے ہیں۔ اس کے علاوہ مصطفیٰ نواز کھوکھر اور فواد چوہدری نے اس بات پر زور دیا کہ کیس سپریم کورٹ آف پاکستان میں ہے اور اسی نے اس کیس پر فیصلہ کرنا ہے۔

مزید برآں ارشد شریف نے سابق صدر زرداری کے حوالے سے بات کرتے ہوئے بتایا کہ آصف زرداری کے behalf پر عدالت میں ایک affidavit جمع کروایا گیا ہے اور یہ ذکر کیا کہ affidavit میں یہ درج ہے کہ سابق صدر زرداری کے نام پر پاکستان کے اندر اور باہر کوئی پراپرٹی نہیں ہے اور ان کا کوئی فارن اکاؤنٹ نہیں ہے۔ As of Today۔

ارشد شریف نے سابق صدر آصف زرداری کا Declaration of Assets کا فارم

دیکھ لیا جس میں ان کی دیٹی میں ایک پراپرٹی Show ہو رہی تھی۔

مصطفیٰ نواز کھوکھر:

جو ہم اس چینل پہ اس وقت اس پروگرام میں بیٹھ کر کر رہے ہیں ہم judgement pass

کر رہے ہیں۔

ارشد شریف:

ہم تو سب سے رائے لے رہے ہیں کون سا affidavit صحیح ہے۔

مصطفیٰ نواز کھوکھر:

اب مجھے اپنا موقف بھی تو دینے دیں نا۔ سپریم کورٹ نے آج سے چند دن پہلے راجہ صاحب بھی اس کے گواہ ہوں گے۔ کہ نیب کولا ہور کے اندر جو instructions دیں۔ اور بڑی clear انہوں نے instructions دیں۔ کہ inquiry کی بنیاد کے اوپر آپ لوگوں پر الزامات نہیں لگا سکتے۔ ایک second مجھے بات مکمل کر لینے دیں۔ اور ان کا میڈیا ٹرائل نہیں کر سکتے۔ اس وقت معذرت کے ساتھ آپ میرے دوست بھی ہیں بھائی بھی ہیں قابل احترام بھی ہیں اس وقت یہ جو آپ کر رہے ہیں میڈیا ٹرائل کر رہے ہیں۔ آپ نے دونوں چیزیں سامنے رکھیں انہوں نے بھی آپ کو یہ ہی reply دیا۔ معاملہ جو ہے وہ کورٹ میں اور تحقیقاتی اداروں، آپ ہم سے میرا ئے کیسے قائم کروا سکتے ہیں۔ کہ یہ چیز اس وقت ایسے تھی اب ایسے ہے۔ یہ معاملہ سپریم کورٹ کے اندر بھی اور ایف آئی اے بھی اس کو کر رہی ہے۔ برائے مہربانی یہ میڈیا ٹرائل نہ کیجیے۔

ارشد شریف:

میڈیا ٹرائل as a journalist چہذا یہ فرض ہے کہ آپ کے سامنے چیزیں رکھوں اور یہ نیب

document نہیں آئے یہ دونوں affidavit سپریم کورٹ آف پاکستان میں submit

(5)

کئے گئے۔ راجہ عامر عباس صاحب آپ بھی سپریم کورٹ کے وکیل ہیں یہ دونوں affidavit سپریم کورٹ میں submit ہوئے ہیں۔ اس میں سے صحیح کون سا تصور ہوگا۔

راجہ عامر عباس:

دیکھیں صحیح وہ ہی بات ہے ان کی کہ اس میں ہم اور آپ نہیں فیصلہ کر سکتے کہ صحیح کون سا ہے۔ صحیح کے لئے forums آئیں گے۔ دونوں place ہو جائیں گے اور یہاں تک judgment سپریم کورٹ نے لکھا بھی تھا۔ کہ اگر اس میں کچھ ایسی گڑبڑ ہوتی ہے۔ یا کوئی mis-declaration آتی ہے۔ یا کوئی false declaration آتی ہے۔ you can come straight to۔ us then we will take care اس میں سپریم کورٹ میں ایف آئی اے بھی دوبارہ داخل کر سکتی ہے۔ کہ جناب یہ تھا لیکن انہوں نے اس میں لکھ دیا ہے۔ as of today

مصطفیٰ کھوکھر:

نہ صرف ایف آئی اے بلکہ کوئی Concerned Citizen بھی جا کر پیش کر سکتا ہے آپ بھی پیش کر سکتے ہیں آپ صبح چلے جائیں سپریم کورٹ۔۔

ارشاد شریف:

مجھے کیا ضرورت ہے آپ جائیں حکومت جانے۔۔

مصطفیٰ کھوکھر:

نہ نہ آپ جو یہاں بیٹھ کر اتنا میڈیا ٹرائل کر رہے ہیں صبح ایک وکیل پکڑیں اور جا کر پیش کر دیں ارشد بھائی فرینکلی۔

ارشاد شریف:

مصطفیٰ نواز کھوکھر وکیل بھی ہیں باہر سے پڑھے ہوئے ہیومن رائٹ

مصطفیٰ کھوکھر:

اتنا جو پندرہ منٹ آپ نے میڈیا ٹرائل کیا ہے میں نے آپ کو یہ بھی بتایا کہ سپریم کورٹ already کہہ چکی ہے کہ آپ لوگوں کا میڈیا ٹرائل اس طرح نہ کریں۔

ارشاد شریف:

اب یہ دو affidavits آئے ہیں اس کا میں کیا کروں۔۔

مصطفیٰ کھوکھر:

آپ نے سپریم کورٹ کی visible Directions کو آپ نے۔۔ اس کی انہوں نے دھجیاں اڑا کر رکھ دی ہیں۔

ارشاد شریف:
 میں اس کو فالو کرتا ہوں کرتا ہوں نیب کو ہدایت ہے۔۔۔
 مصطفیٰ کھوکھر:
 میں تو یہ سمجھتا ہوں سپریم کورٹ کو اس چیز پر نوٹس لینا چاہیے جس طرح اس پروگرام کے اندر میڈیا
 ٹرائل ہوا۔
 ارشد شریف:
 آنر ایبل چیف جسٹس صاحب آپ مجھے بلائیں۔ جو دونوں affidavit میں نے پیش کیے مصطفیٰ
 کھوکھر صاحب کی فرمائش پر میں آپ کے سامنے آ کر دونوں پیش کر دوں گا۔ وقفہ لیتے ہیں۔

Notice was issued to Mr. Sharif vide order dated 29.08.2018 to explain his position in this regard, particularly considering the fact that the content of his show could potentially cause prejudice to a matter *sub judice* before this Court, not only in the minds of the public at large but also the Bench seized of the matter. Mr. Sharif appeared and tendered an unconditional and unqualified apology before the Court.

2. Apart from the foregoing, vide order dated 29.08.2018, this Court also issued notice to the Pakistan Broadcasters Association (PBA) to explain whether there exists any code of professional ethics for the media and whether the same was being followed and if not, what kind of action should be initiated against the delinquents. Pursuant thereto, the learned Deputy Attorney General, learned counsel for PBA and the Chairman, Pakistan Electronic Media Regulatory Authority (PEMRA) appeared. At the outset, this Court was informed that about 24 other television (TV) programmes were aired the same day, i.e. 28.08.2018, with similar content although the prejudicial remarks made therein were not as serious as those made in 'Power Play'. When questioned whether the conduct of Mr. Sharif and other media persons conducting their programmes on any *sub judice* matters was acceptable under international standards of responsible journalism, a significant number of media personnel present in Court were unable to justify the same. When questioned, Mr. Sharif agreed that as a

journalist he lacked the legal acumen to analyze a document submitted as evidence in the matter pending before this Court. He admitted that he lacked expertise and knowledge of the law of evidence, etc., and in discussing a purely legal issue, he risked causing serious prejudice to the case. Mr. Faisal Fareed learned counsel for Mr. Sharif also agreed that there was a need for a code of conduct for the print and broadcast media relating to matters pending before Courts. At this juncture, Mr. Faisal Siddiqi, learned counsel for PBA, pointed out that in fact a statutory code of conduct already exists namely, the Electronic Media (Programmes and Advertisements) Code of Conduct, 2015 (*the Code of Conduct*), which was notified by the Federal Government *vide* S.R.O. No.1(2)/2012-PEMRA-COC on 19.08.2015 in exercise of its powers under Section 39 of the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 [*the Ordinance, as amended by the Pakistan Electronic Media Regulatory Authority (Amendment) Act, 2007*]. He submitted that the Code of Conduct came into being on the basis of consensus reached between PBA, other stakeholders and the Federal Government pursuant to a case before this Court titled **Hamid Mir and another Vs. Federation of Pakistan and others** (Const. P. No.105 of 2012, etc.) and enjoys the force and blessings of an order of this Court dated 18.06.2015. He pointed out that Clause 4(3) of the Code of Conduct (*reproduced below*) prohibits airing of subjective commentary on *sub judice* matters by media licensees. He also stated that if implemented in its letter and spirit, the Code of Conduct enjoins upon licensees the duty to strictly monitor implementation and compliance therewith. Be that as it may, the learned counsel present and the Chairman, PEMRA agreed that despite existence of the Code of Conduct since 2015, and the punitive measures available in Section 33 of the Ordinance for violations of its provisions, *sub judice* matters are being openly discussed in talk shows thereby acting as *de facto* Courts, announcing what they deem would and should amount to justice. A prime example of such

conduct is the episode of the programme 'Power Play' hosted by Mr. Sharif from which these *suo motu* proceedings were initiated.

3. In light of the above, it is deemed appropriate to scrutinize the issue of commentaries on *sub judice* matters as it has become a recurring problem and professional standards (*national and international*) of media reporting on such matters are being disregarded. First and foremost, it is important to lay out the essential elements of the particular programme presently under consideration which triggered the risk of causing serious prejudice to the relevant *sub judice* case:-

- i) Documents/affidavits which are or may be relevant to a pending proceeding were deliberated upon;
- ii) Two affidavits of the former President, Mr. Asif Ali Zardari were placed before the guests in the programme and the fate of the pending trial was discussed by asking them to determine which of the two was the correct affidavit, insisting that the two were mutually contradictory and implying that at least one did not reflect the truth;
- iii) A shadow of doubt was cast on the veracity of statements made and documents submitted by the person involved in the ongoing proceedings; and
- iv) Despite being told that his leading questions amounted to a 'media trial' in a *sub judice* matter, the anchor, Mr. Sharif, repeatedly insisted on grounds of his mistaken belief that it was his duty as a journalist to inquire from experts to determine the veracity of these documents/affidavits.

It is in the light of the above circumstances and the absolutely flawed belief of the anchor regarding his responsibility as a journalist which leads us to the conclusion that the journalist community and media at large is either misinformed or if not misinformed have silently tolerated such demeanor for so long that the internationally accepted standards for responsible journalism are so far from their line of sight that they fail to see its limits

that they so carelessly and recklessly exceed without so much as a speck of remorse.

4. At the heart of the debate is the need for a balance to be struck between freedom of expression and the administration of justice. In the context of International law and Pakistan's international commitments in this regard, lies the International Covenant on Civil and Political Rights (ICCPR) to which Pakistan is a signatory since 2008. While Article 19 of the ICCPR protects, *inter alia*, the right to hold opinions without interference, the right to freedom of expression and right to impart information (*although Pakistan has made reservations to Article 19 ibid stating that it shall be so applied to the extent that it is not repugnant to the provisions of the Constitution of the Islamic Republic of Pakistan, 1973 and Sharia laws*), Article 14 thereof protects the administration of justice, particularly the right to a fair trial and the principle of presumption of innocence until proven otherwise, and provides in part that:-

*“(1) All persons shall be equal before the courts and tribunals. **In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.** The **press and the public may be excluded from all or part of a trial** for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the Parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances **where publicity would prejudice the interests of justice;** but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or guardianship of children.*

(2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”

[Emphasis supplied]

Pursuant to the above Article, to the extent of international commitments of Pakistan, the right of presumption of innocence under Article 14(2) of the ICCPR and the power of the Courts to exclude the press and public from all

or part of the trial in the interest of justice and in order to protect a person's right to a fair trial by an impartial judiciary, trumps the right of expression under Article 19 of the ICCPR in the light of the fact that Pakistan has specifically made reservations to Article 19 *ibid* to the extent that it conflicts with the Constitution of the Islamic Republic of Pakistan, 1973 (*the Constitution*) and Shariah laws.

5. For a closer perusal of the international standards laid down for reporting or commentary on *sub judice* matters in other countries, the laws prevailing in the United Kingdom (*UK*), United States of America (*USA*), Australia and India have been touched upon in this judgment. However at the very outset, we find it pertinent to mention that under the law prevailing in Pakistan as well as the other jurisdictions examined below, there are two means of dealing with prejudicial comments on *sub judice* matters: (1) imposing prior restraints on discussions/comments by the media or any other form of publication; and/or (2) imposing sanctions in the form of *sub judice* contempt, for interference in the administration of justice. It is also worthy to note certain distinctions between the prevailing laws in these countries and the law in Pakistan with regard to freedom of information and the protection of the right to a fair trial. In USA, after the First Amendment to the US Constitution, freedom of press and right to information is recognized as an absolute right, as can be gauged from the language thereof reproduced below:-

“Article [I] (Amendment 1 – Freedom of expression and religion).

Congress shall make no law...abridging the freedom of speech, or of the press...”

This is in stark contrast to the fundamental rights of freedom of speech and information guaranteed under Article 19 and 19A of our Constitution, the

language used in which specifically subjects both these rights to 'reasonable restrictions' imposed by law:-

“19. Freedom of speech, etc. Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law 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.

19A. Right to information. Every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law.”

[Emphasis supplied]

The aforementioned difference in the constitutional provisions of the USA and Pakistan need to be kept in mind when considering American cases such as **Bridges Vs. California** [314 US 252 (1941)] in which it was held that any restrictions on the press prior to a trial or proceeding or during its pendency are *prima facie* unlawful. Nevertheless, in light of the Fourteenth Amendment to the US Constitution and the due process and equal protection clauses contained therein, in certain cases where a display of irresponsible journalism has led to tainting the presumption of innocence of a person prior to trial, it has been deemed necessary to 'neutralize' the effect of prejudicial comments on *sub judice* matters through neutralizing techniques/procedural safeguards which broadly fall into three categories: (1) the availability of procedural protections during trial to the concerned individual; (2) placing of limitations on statements made by lawyers, court officers and law enforcement officers; and (3) Bench-Bar agreements. The first category includes procedural safeguards, such as, where the Court deems it necessary, it may adjourn the case till the threat of prejudice abates or transfer the case to another jurisdiction, or if the need arises the Court

may on its accord, order sequestration of jury or the judge may issue certain instructions to the jury or caution the press against reporting certain matters etc., or it may place a limit on the number, position and activity of the press in the Courtroom *{Sheppard v. Maxwell [348 US 333 (1966)]}*. In this category of neutralizing methods, where a person involved in a *sub judice* matter apprehends prejudice during a trial due to the media attention on it he may request for in-camera hearing, alternatively, where he feels that the Court has failed to place adequate procedural protections to protect his right to a fair trial, he may move for a new trial or appeal against the conviction. The second category entails placing certain standards for regulating information which may be released to the press by attorneys, court officers and law enforcement officers prior to the proceedings, for example, prohibiting the release of prior criminal record of the accused, prohibiting any opinion with regards to the guilt of the person involved or prohibiting the release of an opinion on the merits of the case, although the first two categories of these safeguards differ from State to State. The third category entails agreements between the Bench, Bar and broadcasters such as radio, newspapers or television channels etc. which places on them voluntary regulations and the responsibility of safeguarding certain information with regards to the trial or prevent discussion thereof. However, these safeguards to 'neutralize' the effect of prejudicial comments are not available to every *sub judice* matter and may be imposed on a case to case basis where the same is deemed necessary *{Near v. Minnesota Ex Rel. Olson, County Attorney [283 US 697 (1931)]}*.

6. In the absence of a written constitution, there exists no constitutional provision for the protection of the right to speech or information in the UK, and it is the Courts and the Parliament that carve out the permissible protections and limits to the same through judgments and legislation including, for instance, common law principles that have evolved over the years, the Freedom of Information Act, 2000 and the Contempt of

Court Act, 1981 (*Act of 1981*). A brief historical background of the common law principles in this regard is essential in order to comprehend as to how the law of *sub judice* contempt has evolved in the UK. The approach of the UK Courts as well as the Legislature has been to promote the protection of the administration of justice, while striking a fair balance with the protection of right of expression and information. One of the most lauded judgments which prompted the debate of the unacceptability of a simultaneous 'media trial' in a pending proceeding as well as the common law rule of 'sub judice contempt' in the UK was that of Lord Denning in the case of **Attorney General v. Times Newspaper** ([1973] 1 All ER 815) wherein he laid down the outer ambit of the *sub judice* contempt rule in the following words:-

“It is undoubted law that, when litigation is pending and actively in suit before the court, no one shall comment on it in such a way that there is a substantial danger of prejudice to the trial of the action, as for instance by influencing the judge, the jurors or the witnesses, or even by prejudicing mankind in general against a party to the cause...Even if the person making the comment honestly believes it to be true, still it is contempt of court proceedings...To that rule about fair trial, there is this further rule about bringing pressure to bear on a party, none shall, by misrepresentation or otherwise, bring unfair pressure to bear on one of the parties to a cause so as to force him to drop his complaint, or give up his defense, or to come to a settlement on terms which he would not otherwise have been prepared to entertain...We must not allow trial by newspaper or 'trial by television' or trial by any medium other than the courts of law.”

The learned Judge had strong reservations on trial by any medium besides the Courts of law. This translated into his belief in a complete prohibition on any discussions by the press/media during the time when a proceeding is 'active' before any Court, i.e. not only when the Court has taken cognizance of the matter, but when proceedings have commenced therein. Evidently therefore, according to the principles enunciated by him, while a mere risk

or potential danger was sufficient to trigger protection by the law, a “*real or substantial danger of prejudice to the trial of the case or to the settlement of it*” could only exist when a proceeding is actively ongoing before the Court and hence only in such circumstances could complete prohibition on publication with regards to it be justifiably placed. He strongly maintained that the Court should simultaneously also not be oblivious of the interest of the public in matters of national concern and freedom of press to make fair comment on such matters, adding that:-

“Our law of contempt does not prevent comment before the litigation is started, nor after it has ended. Nor does it prevent it when litigation is dormant and is not being actively pursued. If the pending action is one which, as a matter of public interest, ought to have been brought to trial long ago, or ought to have been settled long ago, the newspapers can fairly comment on the failure to bring it to trial or to reach a settlement. No person can stop comment by serving a writ and letting it lie idle; nor can he stop it by entering an appearance and doing nothing more. It is active litigation which is protected by law of contempt, not the absence of it.”

Hence, he clarified that before such proceedings become ‘active’, and after a final decision has been announced by the Court(s), the press is free to discuss or comment on the matter concerned. To put it simply, dormant proceedings are free for comment or discussion by the media/publications/press, but ongoing proceedings are not. Although this decision of the Court of Appeal was unanimously overturned by the House of Lords for an even narrower view by five Law Lords (*Lord Reid, Lord Morris of Borth-Y-Gest, Lord Diplock, Lord Simon of Glaisdale and Lord Cross of Chelsea*);¹ the latter view too was overturned on appeal to the European Court of Human Rights² which, in a decision increasingly in favor of public interest and freedom of expression held that the law of contempt may be used for “*maintaining the*

¹ ([1973] 3 W.L.R. 298).

² *The Sunday Times v. United Kingdom* [(1979) 2 EHRR 245].

authority and impartiality of the judiciary". Lord Reid's opinion in the House of Lords judgment holds importance with regard to the matter before us since he held that what was regarded as most objectionable was "*that a newspaper or television programme could seek to persuade the public, by discussing the issues and evidence in a case before the Court, whether civil or criminal, that one side is right and the other is wrong.*" In 1974, the Phillimore Committee submitted its report on contempt of Court, *inter alia*, on account of prejudicial comments on *sub judice* matters wherein it concluded that it was "*necessary to preserve the principle of the law of contempt, as a means of preventing or punishing conduct which tends to obstruct, prejudice or abuse the administration of justice.*"

7. Several years after this report, the law of *sub judice* contempt was codified in the Act of 1981 and in line with the abovementioned principles, the rule of strict liability was created in Section 2 thereof whereby any conduct, regardless of intent, which tended to interfere in the course of justice, constituted contempt. The prohibited conduct in this rule included any publication (*speech, writing, broadcasting or any other communication to the public at large*) which creates a substantial risk that the course of justice in the concerned pending proceedings will be seriously impeded or prejudiced. In other words, under UK law the protection afforded to *sub judice* matters against publication in the form of speech, broadcasted content or any other widely circulated publication, extends to any proceeding wherein the mere danger of substantial prejudice exists and where the concerned pending proceedings are active [*Section 2(3) of the Act of 1981*], i.e. they had not remained dormant for a considerable period of time. The only defense to this was if the publisher or broadcaster despite having taken reasonable care was not aware of the fact that the relevant proceedings were 'active'. In **Odhams Press Ltd., ex p. Attorney-General** ([1956] 3 All ER 494), the Divisional Court stated that "*The test is whether the matter complained of is calculated to interfere with the course of justice, not whether the authors and printers intended that result.*" In the UK, prejudicial comments which amount to interference with the right to fair

trial or constitute 'trial by media' in a civil or criminal proceeding fall in the category of criminal contempt, as opposed to civil contempt where an individual disobeys a court order. It is given the same weightage as that of scandalizing the Court, which also constitutes criminal contempt as both these result in undermining public confidence in the Courts and lack of faith in the judiciary to protect their lawful rights, including the right of presumption of innocence unless proven guilty. The same has been emphasized by Lord Diplock in **Attorney General v. Leveller Magazine Ltd.** **[(1979) AC 440]** in the following words:-

“[A]lthough criminal contempts of court may take a variety of forms they all share a common characteristic: they involve an interference with the due administration of justice, either in a particular case or more generally as a continuing process. It is justice itself that is flouted by contempt of court, not the individual court or judge who is attempting to administer it.”

8. In Australia, although no constitutional provision for protection of the right of freedom of speech or information exists nor is there any statutory law with regards to *sub judice* matters, much uncertainty has prevailed in the Courts with regards to the balancing of the right to information in public interest matters and the right to fair trial and thus to cure this ambiguity, certain measures were identified in the 2003 report of the New South Wales Law Reform Commission (*NSWLRC*), which focused specifically on issues arising within contempt by publication and rules regarding *sub-judice* contempt. These measures largely consisted of adopting a 'substantial risk' rule similar to that in the UK, however emphasis was maintained on using the right to information in public interest as a defense although the burden of proving the same lies on the publisher. Applying the traditional common law rule, in the New South Wales Court of Appeal judgment of **John Fairfax Publications Pty. Ltd. v. Doe** **[(1995) 37 NSWLR 81]**, Kirby P. stated:-

“[I]t would be a complete misreading of the recent development of constitutional law in Australia to suggest that the implied constitutional right of free communication deprives courts such as this of the power and, in the proper case, the duty to protect an individual’s right to a fair trial where it is, as a matter of practical reality, under threat. Whatever limitations may be imposed by the constitutional development protective of free communication upon certain matters upon the law of contempt...I could not accept that the constitutional implied right has abolished the longstanding protection of fair trial from unlawful or unwarranted media or other intrusion. Fair trial is itself a basic right in Australia.”

Thus, as evident from the above paragraph, to uphold the right of fair trial the Australian Courts impose publication bans through the exercise of their inherent jurisdiction to regulate their own proceedings.

9. The law in India regarding protection of the right to fair trial and protection from prejudicial comments with regards to *sub judice* matters, in some ways is similar to the law in Pakistan since in the Indian Constitution as well, the right to freedom of speech has been made subject to reasonable restrictions by law in terms of Article 19(2) thereof. In **In Re: Harijai Singh and others [1996 (6) SCC 466]** the Indian Supreme Court held that journalists do not hold any special freedom of expression or immunity from the law and their right to expression is also a qualified one:-

“9. ...It, therefore, turns out that the press should have the right to present anything which it thinks fit for publication.

10. But it has to be remembered that this freedom of press is not absolute, unlimited and unfettered at all times and in all circumstances as giving an unrestricted freedom of the speech and expression would amount to an uncontrolled licence. If it were wholly free even from reasonable restraints it would lead to disorder and anarchy. The freedom is not to be misunderstood as to be a press free to disregard its duty to be

responsible. Infact, the element of responsibility must be present in the conscience of the journalists. In an organised society, the rights of the press have to be recognised with its duties and responsibilities towards the society. Public order, decency, morality and such other things must be safeguarded. The protective cover of press freedom must not be thrown open for wrong doings...It is the duty of a true and responsible journalist to strive to inform the people with accurate and impartial presentation of news and their views after dispassionate evaluation of the facts and information received by them and to be published as a news item. The presentation of the news should be truthful, objective and comprehensive without any false and distorted expression.”

The High Court of Orissa in the case of **Bijoyananda Patnaik Vs. Balakrushna Kar and another** (AIR 1953 Orissa 249) observed that “[i]t is not necessary that the mind of the Judge should be affected”, rather anything that “has a reasonable tendency to prejudice and obstruct the orderly administration of justice” could constitute contempt. Furthermore, the High Court of Punjab in the judgment reported as **Rao Harnarain Singh Sheoji Singh Vs. Gumani Ram Arya** (AIR 1958 Punjab 273) held that:-

“20. ...It is little realised that improper news items and comments regarding causes which are either pending or about to be taken up before Courts of law, very often hamper and hinder the proper functioning of the Courts. Taking of sides in criminal cases, suggesting innocence or guilt of accused persons can cause grave prejudice, by either influencing the minds of Judges, Jurors, witnesses, or by creating a climate of sympathy for, or prejudice against the accused. It is but essential, that those, who are engaged in the administration of justice, should be free from outside influence, and the judicial machinery should be left unaffected by popular feelings as to guilt or innocence of persons being tried or awaiting trial on a criminal charge. The legal machinery, according to our law for adjudging the culpability of accused persons, or in civil causes, for determining the rights of the parties, carefully excludes from consideration facts and circumstances, other than those which

are presented in a formal manner, according to the rules of procedure and evidence. The decision rests on the material on the record, and extraneous matters, howsoever palpable, or seemingly important, are kept severely outside the judicial purview. Any outside comment upon a pending case, and any criticism of the parties or the witnesses, which is calculated to influence the decision, has to be placed under a legal ban. Journalists, whether out of good or evil intentions, who intrude themselves on the due and orderly administration of justice, are guilty of contempt of Court and can be subjected to summary punishment. The Courts do not countenance any interference which is calculated to impede, embarrass or obstruct the administration of justice. Any publication, which has a tendency to foil or thwart a fair and impartial trial, or any conduct, which in any manner prejudices or prevents judicial investigation, whether by intimidation of or by reflection on the Court, counsel, parties or witnesses, in respect of a pending cause, constitutes contempt of Court.”

Therefore, like the approach of the Courts in the UK and the USA, the Indian Courts too hold the view that judges are not immune from influence when prior to the proceedings the judges seized of the matter come across any publication that promotes the perspective of one of the parties involved therein. In the case of **Sahara India Real Estate Corporation Limited and others Vs. Securities and Exchange Board of India and another [(2012) 10 SCC 603]** the Supreme Court of India held that excessive prejudicial publicity leading to usurpation of functions of the Court not only interferes with the administration of justice which is sought to be protected under Article 19(2) of the Indian Constitution, it also interferes with legal proceedings by encroaching upon the right to be presumed innocent until proven otherwise and therefore, superior courts are duty-bound under their inherent jurisdiction to protect the presumption of innocence which is now recognized by them as a human right. One method of protecting this right by the Courts is by imposing 'prior restraint', i.e. limitations be put in place prior to the proceedings or placing a ban or delaying publication of

prejudicial publications for the duration of the trial/proceeding, although such prior restraints are imposed only where there exists a substantial danger or risk of causing prejudice to the proceeding *sub judice* at the time and this is not a blanket protection available to all *sub judice* matters but is imposed on a case to case basis. The concept of prejudicing a *sub judice* matter was recently given hype in the case relating to the airing of a controversial documentary titled as 'India's Daughter' regarding the infamous 2012 gang rape in India wherein, in relation to placing a ban on the documentary 'India's Daughter' it was held that while the proceedings against the accused in the Delhi gang rape were *sub judice*, the said documentary which reflected that the accused showed no remorse for their conduct, amounted to substantial danger of influencing the judges seized of the matter as it explored an aspect of the matter which should otherwise be determined during the proceedings.³ In the case of **State of Maharashtra Vs. Rajendra Jawanmal Gandhi [(1997) 8 SCC 386]** it was held that “A trial by press, electronic media or public agitation is the very antithesis of rule of law.” Thus, similar to the view of the Courts in the UK and the USA, it is strongly opposed to 'trial by media' in a *sub judice* matter, as also observed in **R. K. Anand Vs. Registrar, Delhi High Court [(2009) 8 SCC 106]**:-

“...What is trial by media? The expression "trial by media" is defined to mean:

The impact of television and newspaper coverage on a person's reputation by creating a widespread perception of guilt regardless of any verdict in a court of law. During high publicity court cases, the media are often accused of provoking an atmosphere of public hysteria akin to a lynch mob which not only makes a fair trial nearly impossible but means that, regardless of the result of the trial, in public perception the accused is already held guilty and would not be able to live the rest of their life without intense public scrutiny...”

³ As referred to and described by the Delhi District Court in a case titled **Satyaveer Singh Rathi Vs. M/s. Zee Television Ltd. (judgment dated 23.01.2016 passed in CS No. 324/2013).**

While we may not share the strong views in the above quoted paragraph entirely, it is not uncommon for the media to sensationalize issues of public importance and deduce guilt before any substantial finding has been recorded regarding the person undergoing trial/investigation/inquiry, and where this results in the mere risk of a substantial danger of the judges seized of the matter no longer remaining impartial, the right to fair trial of the person facing trial/investigation is irreparably lost.

10. The foregoing discussion of the law in various other jurisdictions with regards to *sub judice* contempt as well as the common law principles on the protection of right to fair trial in *sub judice* matters reveals that the international community at large gives the right to fair trial the highest priority and that measures have been taken either *vide* statutory law or common law principles to ensure that the right to freedom of speech and expression is safeguarded so long as it does not encroach upon any person's right to be treated in accordance with the law without any extraneous influences. At the heart of this *sub judice* rule lies the view that an essential element of fair trial is an impartial judiciary and one simply cannot turn a blind eye to the fact that comment on a *sub judice* matter in the media or any other widely circulated publication has at least the potential of having an indirect effect on the minds of the judges seized of a matter. Although judges have the ability to ignore any irrelevant considerations while adjudicating a matter, the mere risk or danger of causing prejudice to a pending matter is sufficient for the law to step in to protect the right of the one being adversely affected. While public interest may at times require that information be provided regarding a certain case, strict guidelines with regards to such publication are necessary to be imposed so as to ensure that the fundamental rights of all persons are given equal weightage including the accused or those involved in such proceedings. The International community in terms of Article 14 of the ICCPR as well as the law in their respective

jurisdictions on *sub judice* contempt is in consensus to the extent that anything in the nature of pre-judgment of a case or specific issues thereof is objectionable and although it is believed that the mass media and broadcasters would do their best to be fair in their comments but there is always the possibility of ill-informed, inconsiderate or careless comments that may prejudice *sub judice* proceedings and this **potential or risk of substantial danger of pre-judgment** is sufficient to trigger the protection of the law with regards to the right of a person to an impartial judiciary, due process and right to put forth his defense before anyone else gives his subjective opinion on the same. Therefore, we deem it expedient that strict guidelines be implemented to prevent any prejudicial comments on pending cases; believing that this will in no manner take away from the freedom of the press/mass media/broadcasters and will only aid in upholding the rule of law and fair and impartial trials in the larger interest of justice.

11. Under Pakistani law, prejudicial comments on *sub judice* matters are dealt with through prior restraint and/or contempt of Court proceedings. The latter is rooted in the provisions in the Constitution which read as under:-

“204. Contempt of Court. – (1) *In this Article, “Court” means the Supreme Court or a High Court.*

(2) *A Court shall have the power to punish any person who,*

(c) *does anything which tends to prejudice the determination of a matter pending before the Court.”*

The above constitutional provision is similar to the provisions on *sub judice* contempt in the Act of 1981 of the UK, except that the said statute requires further that these pending proceedings be ‘active’ and a ‘substantial danger’ must exist with regards to prejudicing the pending trial/proceedings. However, in light thereof, while we reserve our inherent jurisdiction under the above constitutional provision (*which shall be elaborated below*), the approach of imposing prior restrictions on the media and other publications with regards

to all *sub judice* matters is the more logical approach. This is because contempt laws cannot erase the prejudice caused to a *sub judice* case nor can it erase the damage caused to the case of the person involved in such proceedings, particularly, since the Code of Conduct already exists which is in consonance with Article 14 of the ICCPR which promotes the right of presumption of innocence until proven guilty and the right to a fair trial before an impartial judge/judiciary. With regards to imposing prior restraints on the media, it must be clarified that while in the UK there is a complete ban on discussions on *sub judice* matters and in the USA and India publications may be banned or delayed, the Code of Conduct in fact takes a relatively more lenient approach by allowing the media to provide information about *sub judice* matters and only subjective and prejudicial commentary is prohibited as is elaborated upon later in this judgement. No doubt, Article 19 of the Constitution ensures to every citizen the right to freedom of speech and expression and that there shall also be freedom of the press, however these rights and freedoms have been specifically made subject to reasonable restrictions imposed by law. The same is the case with Article 19A of the Constitution which guarantees every citizen the right to have access to information in all matters of public importance but subject to regulation and reasonable restrictions imposed by law. At this juncture, we find it appropriate to reproduce various extracts from the judgment reported as **Pakistan Broadcasters Association and others Vs. Pakistan Electronic Media Regulatory Authority and others (PLD 2016 SC 692)** which are germane to the instant matter:-

“11. No doubt freedom of speech goes to the very heart of a natural right of a civilized society to impart and acquire information about their common interests. It helps and individual in self accomplishment, and leads to discovery of truth, it strengthens and enlarges the capacity of an individual to participate in decision making and provides a mechanism to

facilitate achieving a reasonable balance between stability and social change.

12. The concept of freedom of media is based on the premise that the widest possible dissemination of information from diverse and antagonistic sources is sine qua non to the welfare of the people. Such freedom is the foundation of a free government of a free people. Any attempt to impede, stifle or contravene such right would certainly fall foul of the freedom guaranteed under Article 19 of the Constitution of Pakistan.

13. However even the core free speech, which propagates social, political or economic ideas, promotes literature or human thought, though fully protected, is subject to reasonable restrictions contemplated under Article 19 of the Constitution...”

However, this Court went further and elaborated upon the phrase ‘reasonable restriction’ and held as under:-

“16. Undoubtedly no one can be deprived of his fundamental rights, such rights being incapable of being divested or abridged. The legislative powers conferred on the State functionaries can be exercised only to regulate these rights through reasonable restrictions, and that too only as may be mandated by law and not otherwise. The authority wielding statutory powers conferred on it must act reasonably (emphasis supplied) and within the scope of the powers so conferred.

18. However, in examining the reasonableness of any restriction on the right to freedom of expression it also should essentially be kept in mind as to whether in purporting to exercise freedom of expression one is infringing upon the aforesaid right of others...”

12. This indicates that the rights provided in Articles 19 and 19A of the Constitution are in no manner unqualified rights and may be made subject to regulation and reasonable restrictions. Therefore, while they are to be safeguarded, they cannot be used as a casual excuse to trample on other fundamental rights of another, particularly those which guarantee citizens

the right to be dealt in accordance with law and the right to fair trial and due process enshrined in Articles 4 and 10A of the Constitution:-

“4. Right of individuals to be dealt with in accordance with law, etc. (1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.

10A. Right to fair trial. For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.

[Emphasis supplied]

13. A balance therefore must be struck between the right to freedom of speech and information on one hand and the right to fair trial, to be dealt with in accordance with law and of due process on the other. No person must be deprived of his fundamental right to be tried by an impartial judiciary and unbiased judge and an objective and fair trial unless a certain allegation is proved against him strictly in accordance with the law. We find that the Code of Conduct, particularly Clause 4(3) thereof (*reproduced later in this opinion*), encompasses these principles. In Clause 4(3) *ibid* a balance has been struck with regards to programmes on *sub judice* matters. While on one hand such programmes are allowed to be aired thereby protecting the freedom of speech and the right to information; the requirement that they ought to be aired in an informative and objective manner and that no content should be aired which tends to prejudice the determination by a court, tribunal or any other judicial or quasi-judicial forum, ensures that the right to fair trial, to be dealt with in accordance with law and of due process are duly safeguarded. In fact, the Code of Conduct aids the broadcast media and distribution services in compliance of their responsibility under the Code of Conduct by providing pragmatic measures to ensure that they stay within the permissible boundaries of freedom of speech prescribed in the law when it comes to reporting *sub judice* matters. In order to regulate the rights

under Articles 19 and 19A of the Constitution, PEMRA has, under Section 4 of the Ordinance, been entrusted with the responsibility to regulate the establishment and operation of all broadcast media and distribution services in Pakistan. Section 39 of the Ordinance empowers PEMRA to make rules, with the approval of the Government, to carry out the purposes of the said Ordinance while Section 19(5) thereof states that PEMRA shall devise a Code of Conduct for programmes and advertisements for compliance by the licensees. Pursuant thereto, PEMRA has issued the PEMRA Rules 2009 (*the Rules*) and the Code of Conduct (*incorporated as Schedule A*). According to Section 20(f) of the Ordinance, a person who is issued a license under the Ordinance shall, *inter alia*, comply with the codes of programmes and advertisements approved by PEMRA. Furthermore, Rule 15(1) of the Rules provides that the contents of the programmes and advertisements which are broadcast or distributed by the broadcast media or distribution service operator shall conform to the provisions of Section 20 of the Ordinance, the Rules, the Code of Conduct and the terms and conditions of the license. This Code of Conduct to which reference is made multiple times in the Ordinance and the Rules that admittedly exists, was made with the blessings of the Supreme Court of Pakistan and the consensus of all the stakeholders and PEMRA, was duly notified by the Federal Government and incorporated in the Rules. The language of the Code of Conduct reflects that primary responsibility to comply therewith lies with the licensees which covenant with PEMRA that such compliance shall be ensured.

14. Clause 4 the Code of Conduct is relevant for the purposes of the instant matter which reads as follows:-

“4. News and current affairs programmes: - the licensee shall ensure that:

*(3) **Programmes on sub-judice matters may be aired in informative manner and shall be handled objectively:***

Provided that no content shall be aired, which tends to prejudice the determination by a court, tribunal or any other judicial or quasi-judicial forum;

- (4) News shall be clearly distinguished from commentary, opinion and analysis;
- (6) **Content based on extracts from court proceedings, police records and other sources shall be fair and correct;**
- (9) **News or any other programme shall not be aired in a manner that is likely to jeopardize any ongoing inquiry, investigation or trial.”**

[Emphasis supplied]

While Clause 4(3) of the Code of Conduct allows programmes on *sub judice* matters to be aired, thereby guaranteeing the rights enshrined in Articles 19 and 19A of the Constitution mentioned above, the regulation and reasonable restrictions imposed are that such programmes are aired in an **informative manner**, are handled **objectively** *[Clause 4(3) of the Code of Conduct]*, and that no content is to be aired which would **tend to prejudice** the determination by a Court, Tribunal or any other judicial or quasi-judicial forum *[Proviso to Clause 4(3) of the Code of Conduct]*. Furthermore, Clause 4(6) of the Code of Conduct states that content based on extracts from court proceedings, police records and other sources shall be **fair** and **correct**, while Clause 4(9) thereof prohibits news or any other programme from being aired in a manner that is likely to **jeopardize** any ongoing inquiry, investigation or trial. Therefore, the foregoing clauses ensure that the freedom of speech and right to information (*Articles 19 and 19A of the Constitution*) are protected, and at the same time provide that the discussion of *sub judice* matters must be conducted in a manner which does not negatively affect another person's fundamental right to be dealt with in accordance with the law (*Article 4 of the Constitution*) and the right to fair trial and due process (*Article 10A of the Constitution*).

15. It is imperative to clarify that there is a difference between causing prejudice to a *sub judice* matter as opposed to merely providing

information regarding the case without going into its merits. In this regard, we find it expedient to discuss the meaning of 'tend' and 'prejudice' as provided in various treatises. The term 'tend' means *“to serve, contribute or conduce in some degree or way...to have a more or less direct bearing or effect...to...have a tendency to an end, object or purpose”* (as per Black's Law Dictionary, 9th Edition) whereas the term 'prejudice' on the other hand is defined as follows:-

Chambers 21st Century Dictionary (June 1996):-
“bias, injury, hurt, disadvantage.”

Words and Phrases (Permanent Edition, Vol. 33):-
“to the harm, to the injury, to the disadvantage of someone. Com. v. DeBellas, Pa., 9 Bucks 87, 91.”

““Prejudice” imports formation of a fixed anticipatory judgment as contra-distinguished from those opinions which may yield to substantial evidence, and it includes the forming of an opinion without due knowledge or examination, though it does not necessarily indicate any ill feeling. In re Adoption of Richardson, 59 Cal. Rptr. 323, 251 C. A.2d 222.”

Black's Law Dictionary (9th Edition):-
“damage or detriment to one's legal rights or claims.”

Corpus Juris Secundum, Volume 72:-
“As a noun, “prejudice” is defined as meaning a bias or leaning toward one side or the other of a question from considerations other than those belonging to it; an unreasonable predilection prepossession for or against anything, especially an opinion or leaning adverse to anything, formed without proper grounds or before suitable knowledge; an opinion or judgment formed beforehand, or without due examination;

As a noun “prejudice” has been held synonymous with “prejudgment”.”

[Emphasis supplied]

From the above definitions, it is clear that the phrase 'tend to prejudice' in the context of *sub judice* matters would mean that a *sub judice* matter is

discussed in a manner which is likely to, or has a **mere tendency** to result in a **pre-judgment** or forming of an opinion to the disadvantage of any person involved therein, without proper grounds or knowledge with regards to such proceedings/investigation/inquiry. As observed in the above paragraphs, the mere tendency to cause substantial prejudice has been deemed sufficient in the UK for placing a complete ban on commentary by the press on *sub judice* matters throughout the period of its active pendency, while in the USA and India the same has been deemed as a sufficient ground to place prior restraints on case to case basis. The law in Pakistan by virtue of the Code of Conduct in fact places greater trust in its media and journalist community by trusting that they will provide objective information about pending proceedings while taking precautions that they do not pass subjective or prejudicial comments in such regard.

16. The identical phrase 'tends to prejudice' contained in Clause 4(3) of the Code of Conduct is reflected in Article 204(2)(c) of the Constitution and therefore in our view, such phrase has the same meaning and parameters as discussed above. We find that the said powers of the Supreme Court or any High Court which have been conferred thereupon by the Constitution and therefore superlative to, and shall apply notwithstanding, the powers granted to PEMRA under the relevant statute, rules, and codes of conduct, etc., whenever the Supreme Court or any High Court is of the opinion that it is appropriate in the facts and circumstances of the case for such Court to take cognizance of the matter and exercise its powers under Article 204 *ibid*.

17. The oft-used term of 'media trial' is a real phenomenon and cannot be allowed. Where the fate of *sub judice* matters is being decided on public forums, not only the minds of the public are being influenced, but also potentially the minds of the judges seized of the *sub judice* matter, and lawyers and investigators, etc. involved in such matter, this would obviously tend to prejudice the *sub judice* matter. Most alarmingly, as had happened in the particular episode of 'Power Play' that caused this Court to take notice of

the instant issue, evidence brought on the record in a *sub judice* case was critically examined and experts were invited to express their opinions on the veracity of such evidence and the possible fate of the case. Drawing assumptions, inferences and conclusions from evidence or the documents filed in a case and stepping into the shoes of a judge on broadcasted programmes may not only convict the accused in the eyes of the public regardless of whether he is ultimately exonerated by a Court, but certain comments or opinions may be voiced which could potentially instill bias and prejudice in the minds of the judges, particularly to those who are dealing with the *sub judice* matter, thereby violating the fundamental rights under Articles 4 and 10A of the Constitution of the persons involved in such matter. Taking support from Lord Diplock's words, it is fair to state that prejudicial comments which interfere in the administration of justice, in a way amount to the flouting of justice itself, and must be treated as such by the society in the spirit of upholding the rule of law. Notwithstanding the fact that the alleged contemnor, Mr. Sharif has tendered an unqualified apology, we find it absolutely necessary to explicitly state that considering the pending proceedings before this Court, *inter alia*, regarding the inquiry by FIA against the former President, Mr. Asif Ali Zardari, the comments made on this particular episode of the programme 'Power Play' led to a substantial danger of prejudicing his case and thus potentially trampled upon his right to a fair trial and due process guaranteed under Article 4 and Article 10-A respectively of the Constitution.

18. The Ordinance and the Code of Conduct mandate that licensees maintain a strict check on the programmes being conducted and periodically update PEMRA as to whether they are duly discharging this duty. The relevant provisions of the Ordinance are reproduced below:-

“20. Terms and conditions of license.– A person who is issued a license under this Ordinance shall.–

(f) *comply with the codes of programmes and advertisements approved by the Authority and appoint an in-house monitoring committee, under intimation to the Authority, to ensure compliance of the Code;*

26. Council of Complaints.– (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.”*

The relevant clauses of the Code of Conduct read as under:-

“4(10). Editorial Oversight: *the licensee shall ensure that its representatives, hosts and producers shall discuss and review the contents of the programme prior to programme going on air/being recorded and ensure that its contents conform to, in letter and spirit, this Code of Conduct.”*

17. Monitoring committee:- *Licensee shall comply with this Code and appoint an in-house monitoring committee under intimation to the PEMRA to ensure compliance of the Code.*

19. Facts and opinion:- *The licensee shall ensure that:- (1) If during a talk show or news show a guest makes or asserts an opinion that is presented as a fact, on a serious issue, the channel and or its representative must intervene and protect the audience by clarifying this is an opinion and not a fact.*

(2) *If the host/moderator is giving his or her own opinion, he or she must also clarify that this is a personal opinion and not a fact.*

20. Responsibility for compliance and training of employees:-

(1) *It shall remain the sole responsibility of the Licensee to ensure that the content aired by it complies with the Code.*

(2) *Licensee shall arrange for regular training of its employees that may be helpful in performing their duties better.*

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 the basic values and objectives that licensees, including its employees and officials shall adhere to, and these shall be observed in letter and spirit.”

Clause 4(10) of the Code of Conduct is very important because by discussing and reviewing the contents of a programme prior to the time it is aired or recorded, the licensee can ensure that the contents of such programme conform to the Code of Conduct. Therefore, licensees can make certain that programmes on *sub judice* matters are aired in an informative manner and are handled objectively [*Clause 4(3) of the Code of Conduct*] and that content based on extracts from court proceedings, police records and other sources are fair and correct [*Clause 4(6) of the Code of Conduct*], and that no programme is aired or recorded which contains content that tends to prejudice the determination by a court, tribunal or any other judicial or quasi-judicial forum [*Proviso to Clause 4(3) of the Code of Conduct*] or that is likely to jeopardize any ongoing inquiry, investigation or trial [*Clause 4(9) of the Code of Conduct*]. Section 20(f) of the Ordinance mandates licensees to comply with the codes of programmes and advertisements approved by the Authority. A plain reading of Clauses 20 and 24 of the Code of Conduct makes it crystal clear that the responsibility of ensuring compliance with the Code of Conduct is primarily that of the licensee, including its employees and officials. Licensees are also required to arrange regular training of its employees to ensure that they perform their duties better [*Clause 20(2) of the Code of Conduct*]. Section 20(f) of the Ordinance read with Clause 17 of the Code of Conduct requires the licensee to appoint an in-house monitoring committee (*Monitoring Committee*) under intimation to PEMRA to constantly ensure compliance of the Code of Conduct, while Clause 19 places on the licensee, the responsibility to ensure that any opinion expressed in a broadcasted programme is distinguished and presented in a manner that it is not mistaken as a fact by the average

viewer/audience. Finally, Section 26(5) of the Ordinance provides that the Council of Complaints may recommend to PEMRA appropriate action of censure or fine against a broadcast station or licensee for violation of the Code of Conduct. The foregoing appears to be an adequate mechanism to prevent violations of the Code of Conduct by the media so long as such measures are practically and effectively adopted and enforced.

19. There remains no ambiguity in our minds with regards to the laxity of the licensees in ensuring compliance with the Code of Conduct and of PEMRA as a regulatory authority in penalizing licensees on account of any violations of the Code of Conduct. If voluntary violations of the Code of Conduct or even negligence by the licensees to ensure adherence thereto is not penalized by PEMRA, the Code of Conduct will be reduced to a mere paper tiger and be rendered absolutely redundant. We therefore issue a writ of mandamus to PEMRA to ensure that the following parameters laid down in the law and the Code of Conduct are adhered to in letter and spirit and that no violations thereof shall be tolerated by PEMRA:-

- i) The Code of Conduct ensures that the freedom of speech and the right to information (*Articles 19 and 19A of the Constitution*) are protected, and at the same time provide that the discussion of *sub judice* matters must be conducted in a manner which does not negatively affect another person's fundamental right to be dealt with in accordance with the law (*Article 4 of the Constitution*) and the right to fair trial and due process (*Article 10A of the Constitution*).
- ii) All licensees should be sent a notice/reminder of their basic ethics and objectives, standards and obligations under the Code of Conduct, particularly Clause 4(10) thereof, in that, editorial oversight should be observed prior to the airing of all programmes and any programme, the subject or content of which is found or deemed to be in violation of the Code of Conduct in its true letter and spirit, should not be aired by the licensee;
- iii) Any discussion on a matter which is *sub judice* may be aired but only to the extent that it is to provide information to the public

which is objective in nature and not subjective, and no content, including commentary, opinions or suggestions about the potential fate of such *sub judice* matter which tends to prejudice the determination by a court, tribunal, etc., shall be aired;

- iv) While content based on extracts of court proceedings, police records and other sources are allowed to the extent that they are fair and correct, any news or discussions in programmes shall not be aired which are likely to jeopardize ongoing inquiries, investigations or trials;
- v) In compliance with Clause 5 of the Code of Conduct, all licensees should strictly ensure that an effective delaying mechanism is in place for broadcasting live programmes to ensure stern compliance with the Code of Conduct and Articles 4, 10A and 204 of the Constitution;
- vi) In compliance with Clause 17 of the Code of Conduct, an impartial and competent in-house Monitoring Committee shall be formed by each licensee, with intimation to PEMRA which shall be duty bound to ensure compliance of the Code of Conduct;
- vii) With regards to the Monitoring Committee, we direct that licensees include (*for each of its meetings*) at least one practicing lawyer of at least 5 years or above practice, with adequate understanding of the law to advise the licensee regarding any potential violations of the Code of Conduct by programmes to be aired in the future;
- viii) In compliance with Clause 20 of the Code of Conduct, each licensee shall be required to hold regular trainings of its officers, employees, staff, anchors, representatives etc. with regards to ensure compliance with the Code of Conduct with the schedule and agenda of these regular trainings to be intimated to PEMRA through the Monitoring Committee;
- ix) If any licensee is found to have violated or failed to observe the Code of Conduct in its true letter and spirit, particularly Clause 4 of thereof, and/or Articles 4, 10A and 204 of the Constitution, strict and immediate action should be taken against such licensee in accordance with Section 33 of the Ordinance. The

Supreme Court or any High Court retains the power to take cognizance of the matter and shall exercise its powers under Article 204 *ibid* where such Court is of the opinion that it is appropriate in the facts and circumstances of the case for it to do so; and

- x) The unconditional and unqualified apology tendered by Mr. Sharif is accepted in view of the fact that in our opinion it has been tendered sincerely and he has expressed remorse and regret promising not to repeat such reckless and irresponsible behaviour in the future. Mr. Sharif is also warned to be extremely careful in the future.

In light of the foregoing, this matter is accordingly disposed of.

CHIEF JUSTICE

JUDGE

Islamabad, the
12th of September, 2018
Approved For Reporting
M. Azhar Malik/*

JUDGE