

HCJD/C-121  
JUDGMENT SHEET

ISLAMABAD HIGH COURT  
ISLAMABAD

W. P. No.4802/2016

Muhammad Nawaz

*VERSUS*

Principal Secretary to Prime Minister of Pakistan & 11 others

Petitioner by : Mr Saliheen Mughal, Advocates.  
Respondents by : Khawaja Muhammad Imtiaz, Assistant Attorney General. , Advocate.  
Barrister Umer Aslam Khan, Mr Khursheed Butt,  
Barrister Munawar Iqbal Duggal, Ch. Hassan  
Murtaza Mann, Advocates.  
Date of Hearing : 27-03-2017.

ATHAR MINALLAH, J.- The petitioner has invoked the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the '**Constitution**'), assailing Memorandum, dated 19-12-2016, whereby five regulatory authorities have been placed under the administrative control of the respective Ministries/Divisions as mentioned against each.

2. The facts, in brief, are that through the impugned Memorandum, dated 19-12-2016, the Prime Minister of Pakistan, pursuant to powers conferred under Rule 3(3) of the Rules of Business, 1973, has transferred the administrative control of the National Electric Power Regulatory Authority, Pakistan Telecommunication Authority, Frequency Allocation Board, Oil and Gas Regulatory Authority and Public Procurement

W.P. No.4802/2016

Regulatory Authority to the Ministry of Water & Power, Ministry of Information Technology and Telecom Division, Ministry of Petroleum & Natural Resources and the Finance Division respectively. The said five statutory regulatory authorities were placed under the Cabinet Division pursuant to the insertion of entry 53 of clause 2 of Schedule II of the Rules of Business, 1973 vide SRO 226(I)/2010, dated 03-04-2010. The petitioner is, therefore, aggrieved due to the issuance of the impugned Memorandum, dated 19-12-2016, and hence the instant petition.

3. A notice was issued to the learned Attorney General for Pakistan vide order dated 30-12-2016.

4. The learned counsel for the petitioner has contended that; the five regulatory authorities mentioned in the impugned Memorandum, dated 19-12-2016, have been established under the respective statutes and have an independent status; the impugned Memorandum has been issued so as to undermine the independence of the regulatory authorities; the competent forum for the purposes of formulating and regulating policies in relation to matters in Part II of the Federal Legislative List is the Council of Common Interests, established under Article 153 of the Constitution; the impugned Memorandum has been issued in violation of the constitutional provisions since no approval was sought nor was the matter placed before the Council of Common Interests; Entry 6 of Part II of the Federal Legislative List explicitly relates to all regulatory authorities established under a Federal law; the Federal Government is not vested with power or jurisdiction to formulate or regulate policies in relation to

the regulatory authorities established under the Federal law; the impugned Memorandum is, therefore, without authority and jurisdiction.

5. The learned Assistant Attorney General has argued that; placement of regulatory authorities under the respective Ministries or Divisions does not involve any deviation or change in relation to the relevant statute and policy; the regulatory authorities have been established under the respective statutes and, therefore, they are to be governed there under; the placement of regulatory authorities is only for administrative purposes, having no effect on the powers or independence of such entities; the Prime Minister of Pakistan is empowered under Rule 3(3) of the Rules of Business, 1973 in respect of allocation of business whenever necessary; the business of the Government can be distributed amongst the Divisions in the prescribed manner by the Prime Minister; the regulatory authorities are required to watch, monitor and regulate the activities and functions in accordance with the instructions given by the relevant Ministry/Division; the transfer of the regulatory authority in the instant case is purely an administrative measure and the same is within the ambit of the powers vested in the Prime Minister; the apprehensions expressed in the memo of the petition by the petitioner are misconceived; the independence and autonomy of the respective regulatory authorities is derived from the respective statutes and thus their placement for administrative purposes is not material.

6. The National Electric Power Regulatory Authority, in its written comments, has supported the stance of the petitioner to the effect that the transfer of the administrative control of the latter is in violation of

Article 154 of the Constitution; the impugned Memorandum gives rise to conflict of interest since the affairs of the Federation also comes within the ambit of the regulatory jurisdiction.

7. The learned counsels and the learned Assistant Attorney General have been heard and the record perused with their able assistance.

8. The controversy is in respect of the placement of five regulatory authorities under various Ministries/Divisions as notified in the impugned Memorandum, dated 19-12-2016. The Federation of Pakistan justifies the issuance of the impugned Memorandum on the basis of powers vested in the Prime Minister under Rule 3(3) of the Rules of Business, 1973. On the other hand the case of the petitioner is in the context of powers and functions which have been explicitly assigned by the makers of the Constitution to the Council of Common Interests. The petitioner asserts that the transfer of the regulatory authorities is a policy decision and, therefore, it could only have been possible after seeking approval from the Council of Common Interests. The question for consideration, therefore, is the extent of the jurisdiction vested in the Prime Minister of Pakistan under Rule 3(3) of the Rules of Business, 1973 in matters which fall within the ambit of the powers and functions vested in the Council of Common Interests under Article 154 of the Constitution. In a nutshell, the question which this Court has been called upon to answer in the instant petition is whether the placement of the regulatory authorities is a matter which comes within the purview of the expressions

'formulate' 'regulate' 'policies' in the context of Article 154 of the Constitution.

9. The National Electric Power Regulatory Authority has been established under the Regulation of Generation, Transmission and Distribution of Electric Power Act 1997. The Oil and Gas Regulatory Authority has been established under section 3 of the Oil and Gas Regulatory Authority Ordinance, 2002. Likewise the Pakistan Telecommunication Authority has been established under Section 3 of the Pakistan Telecommunication (Re-Organization) Act 1996. The Public Procurement Regulatory Authority Ordinance, 2002 has established the Public Procurement Regulatory Authority. All the regulatory authorities, admittedly, have been established by and under the relevant statutes promulgated by the Majlis-e-Shoora (Parliament). The said statutes, therefore, fall within the expression "Federal law" used in entry 6 of Part II of the Federal Legislative List. The five statutory entities are definitely regulatory authorities established under the respective Federal laws.

10. Article 153 of the Constitution describes the composition of the Council of Common Interests. The Council consists of the Prime Minister as its Chairman and includes the Chief Ministers of all the Provinces and three members from the Federal Cabinet who are nominated by the Prime Minister from time to time. Sub Article 4 of Article 153 explicitly provides that the Council of Common Interests shall be responsible to the Majlis-e-Shoora (Parliament). The functions and rules of procedure in respect of the Council are provided under Article 154. The said provision provides that the Council shall formulate and regulate

policies in relation to matters in Part II of the Federal Legislative List and shall exercise supervision and control over related institutions. In the context of the instant petition, the five regulatory authorities in relation to which the impugned Memorandum, dated 19-12-2016, has been issued undoubtedly fall within the matters enumerated in Part II of the Federal Legislative List. To this extent the facts are not disputed. However, the Federal Government has taken a stance that the placement of the regulatory authorities under various Ministries/Division is an act which does not fall within the scope of the powers and jurisdiction vested in the Council of Common Interests. In order to answer the questions raised in the instant petition, it would be appropriate to seek guidance from the precedent law.

11. The august Supreme Court in the case of '*Muhammad Yasin v. Federation of Pakistan through Secretary, Establishment Division, Islamabad and others*' [PLD 2012 SC 132] while examining the provisions of the Oil and Gas Regulatory Authority Ordinance, 2002 has referred to various statutory entities which have been established through legislative enactments and has observed as follows.-

*"These material provisions of the Ordinance – independence guaranteed by the statute, coupled with the objective of protecting the public interest and efficient regulation are of particular significance in the adjudication of this petition as will become evident shortly. In terms of regulatory autonomy, OGRA is just one amongst a number of regulatory authorities which have been created in Pakistan*

*during the past few decades to ensure good governance in important (mainly economic) sectors of the country. These include the National Electric Power Regulatory authority ("NEPRA"), Pakistan Telecommunication Authority ("PTA"), Pakistan Electric Medical Regulatory Authority ("PEMRA"), Securities and Exchange Commission of Pakistan ("SECP") and Competition Commission of Pakistan ("CCP"). These bodies have explicitly been made autonomous to ensure that they remain free from political or other interference and thus remain focused on the objectives of their parent statutes."*

12. It is obvious from the above that the regulatory authorities regarding which the Federal Government has issued the impugned Memorandum, dated 19-12-2016, are indeed statutory entities which have explicitly been made autonomous and independent so as to protect them from extraneous interference. The intent of the legislature is obvious from the respective statutes under which the regulatory authorities have been established. There is yet another important aspect which further highlights the importance of maintaining the independence and autonomy of the regulatory authorities, and that is the stake of each Federating unit in its affairs. Each Federating Unit has an interest in oil and gas, telecommunications, energy and power and public procurement. It is for this reason that the framers of the Constitution were conscious in protecting these regulatory authorities from external interference, whether political or administrative, particularly by the insertion of entry 6 in Part II of the Federal Legislative List. The framers of the Constitution, with the object of guarding the autonomy and independence of the regulatory

authorities in which each Province has a stake and interest, have explicitly vested exclusive jurisdiction and power in the Council of Common Interests, so much so that the formulation and regulation of policies and supervision have been expressly entrusted to the latter.

13. The august Supreme Court in the case of '*Messrs Gadoon Textile Mills and 814 others v. WAPDA and others*' [1997 SCMR 641] has examined the provisions of Article 153 and 154 at great length. The august Supreme Court has observed that the object of inserting Articles 154 and 155 was essentially to generate a sense of participation amongst the Federating Units on sensitive issues of national interest. The apex Court has further interpreted the expressions 'formulate', 'regulate', 'policy', 'control' and 'supervise' and the relevant portions are reproduced as follows.-

*"It may be observed that the words "formulate", "regulate", "policy", "control" and "supervise" employed in clause (1) of Article 154 of the Constitution carry wide connotations. The word "formulate" inter alia carries the meaning, set forth, reduce to a formula; whereas the word "regulate" inter alia connotes control, subject to guidance. The word "policy" inter alia carries meaning, as the general principles by which a Government is guided in its management of public affairs. The word "control" inter alia connotes, to regulate or guiding or restraining power over; whereas the word "supervise" inter alia carries the meaning, to look over and to inspect. The above words cannot be construed in isolation, but the*



*same are to be construed in the context in which they are employed. In other words, their colour and contents are to be derived from their context. PLD 1996 SC 324 at page 429, para 23 (Al-Jehad Trust case). Applying the above principle to the case in hand, we are of the opinion that C.C.I. is not required to make decision as to the day to day working of the Corporations mentioned in Part II of the Federal Legislative List and of the related institutions. It is supposed to formulate and regulate general policy matters as to their working, which may include general policy for the working of WAPDA."*

It has been further elaborated in paragraph 10 as follows.-

*"The word 'regulate' in this context must be given wider meaning. The words "formulate and regulate policies" used in Article 154 have great significance and their meaning and interpretation will define the jurisdiction, power and sphere of activity of CCI. The word 'Policy' means, "general principles by which a Government is guided in its management of public affairs or Legislature in its measures. This term as applied to law, ordinance or rule of law, denotes its general purpose or tendency considered as directed to the welfare or prosperity of the state of community". The dictionary meaning of the word 'formulate' is to "set forth systematically". Formulation of policies is a systematic act to provide rule, regulation, scheme, plan and*

*principles for managing, administering, organizing, running, developing and controlling an organization, authority, corporation, institution or Government. The dictionary meaning of the word 'regulate' is to control, govern or direct by rule or regulation (The New Shorter Oxford Dictionary, (1993) "to control, direct or govern according to a rule, principle or system; to make uniform, methodical, orderly."*

The august Supreme Court has, therefore, held that any person authorized to regulate any matter will have the right to prescribe, rule and govern by exercising control and supervision over it. The apex Court has highlighted the importance of the Council of Common Interests in the following words.-

*"It is now well-settled that CCI occupies an important and pivotal position in the structure of the Constitution and it cannot be ignored, bypassed, surpassed or obstructed in performance of its Constitutional duties and obligations. Any attempt to obtain decisions in respect of matters referable to CCI, by any other person, authority, Government or corporation will be in violation of the Constitution lacking legal sanctity. From a close scrutiny of the relevant provisions of the Constitution and the judgments referred above it is clear that CCI is a completely separate and independent body quite apart from the Federal Executive. In respect of matters falling in Part II of the Federal Legislative*

*List, the executive and administrative authority has been entrusted to CCI.”*

14. The apex Court in the case titled '*Mian Muhammad Nawaz Sharif v. President of Pakistan and others*' [PLD 1993 SCMR 473] has observed that the Council of Common Interest is an important constitutional institution which irons out differences, problems and irritants between the Provinces inter se and the Provinces and the Federation in respect of matters specified in Article 154.

15. In the light of the above law expounded by the august Supreme Court, particularly the interpretation of the expressions used in Article 154 of the Constitution such as 'formulate', 'control', 'supervise', 'policy' and 'regulate', any alteration in the arrangement relating to placing a regulatory authority falling within the ambit of entry 6 of Part II of the Federal Legislative List would inevitably require a policy decision and guidance from the Council of Common Interests. It is beyond comprehension as to why the Federal Government is so keen in altering the position which had existed prior to the issuance of the impugned Memorandum, dated 19-12-2016. The hesitation on the part of the Federal Government to place this crucial policy matter before the Council of Common Interests is not understandable. It is probably for this reason that the action to alter the placement of the regulatory authorities is being perceived as motivated though it may not be true. Harmony between the Federating Units and the mechanism prescribed for the resolution of differences or disputes is a hallmark of the scheme of the Constitution of the Islamic Republic of Pakistan, 1973. Any doubt that the Council of

Common Interests is being ignored or bypassed essentially has to be resolved in favour of the latter. If there is doubt whether a matter falls within the ambit of jurisdiction of the Council of Common Interests, the benefit would have to be extended in favour of the latter being empowered because of its status and the significance of upholding the sanctity of Federalism.

16. As has been held by the august Supreme Court in the case titled '*Reference No.01/2012 (Reference by the President of Pakistan under Article 186 of the Constitution of the Islamic Republic of Pakistan, 1973)*' [PLD 2013 SC 279] that the Constitution is a living organ for all times and that it has to be interpreted dynamically, as a whole, to give harmonious meaning to every Article of the Constitution. The Constitution has been conceived in a manner so as to apply to the situations and conditions which may arise in the future and, therefore, the words and expressions used therein must receive interpretation based on the experience of the people in the course of the working of the Constitution. Moreover, the apex Court has elucidated to the basic principles of interpretation of the Constitution in the case of '*Constitutional Petition No.127/2012 Regarding pensionary benefits of the Judges of superior courts from the date of their respective retirement, irrespective of their length of service as such Judges*' [PLD 2013 SC 829] and has, inter alia, held that legislative history was relevant for interpreting constitutional provisions. The Constitution of Islamic Republic of Pakistan, 1973 was the first fundamental and basic law framed by elected representatives after the painful debacle of losing a significant part of the country. Suppression and the absence of Federalism were attributed as some of the major

factors which gave rise to the events which led to separation. It was in this background that the framers of the Constitution have based it on a Federal parliamentary scheme. The Federal principle of governance is the premise of the Constitution. In this scheme of Federalism the Council of Common Interests holds a pivotal status. Obstructing or impeding its functions and bypassing or ignoring this forum which was established to strengthen the bonds between the Federating Units would inevitably lead to defeating the intent of the framers of the Constitution, besides giving rise to unfounded suspicions and doubts. In the instant case the placement of the five regulatory authorities is not a matter relating to day to day functioning, but it falls within the fold of general principles by which the Federal Government is to be guided by the Council of Common Interests in its management of public affairs. It falls within the expressions used in Article 154 of the Constitution and is, therefore, subject to the exclusive power and jurisdiction vested in the Council of Common Interests.

17. It would not be out of place to refer to the ruling, dated 20-02-2017, of the Chairman of the apex forum of the Federating Units i.e the Upper House of Majlis-e-Shura, the Senate. This ruling was enough for the Federal Government to have recalled the impugned Memorandum, dated 19-12-2016, out of deference for the forum representing the Federating Units. The relevant portion is as follows.-

"13. In view of the above-mentioned, factual, rules and legal position the question at para No.3 is answered in the following terms:-

***The powers of the Prime Minister under sub-rule (3), rule 3, Rules of Business, 1973 remains in force on matters which are exclusively the business of the Federal Government i.e. Federal Legislative List, Part I, Constitution, 1973.***

***Therefore, the control of Regulatory Authorities cannot be transferred from one Ministry to another Ministry without obtaining prior approval from the CCI, in terms of Article 154, Constitution, 1973. Any attempt to bypass CCI in taking such policy decisions is a constitutional violation affecting the rights of the federating units, hence against the spirit of participatory federalism and the scheme of the Constitution."***

18. It is axiomatic that the Federal Government in any case cannot interfere with or influence the matters relating to regulatory authorities other than as provided under the respective statutes. The expression 'administrative control' used in the impugned Memorandum, dated 19-12-2016, in itself creates the perception of undermining the legislative intent in establishing independent and autonomous regulatory authorities. In the context of the instant petition it would be beneficial to refer to two passages from the celebrated *treaties* by De Smith, as quoted with approval by the august Supreme Court of Pakistan in the case of

'*M.A.Rahman Versus Federation of Pakistan and others*'[1988 SCMR 691].

The said two passages are as follows.-

*"The relevant principles formulated by the Courts may be broadly summarized as follows. The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it: it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do. It must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously."*

And:--

*"An authority entrusted with a discretion must not, in the purported exercise of its discretion, act under the dictation of another body or person. In at least two modern Commonwealth cases licensing bodies were found to have taken decisions on the instructions of the heads of Government who were prompted by extraneous motives. But, as less colourful cases illustrate, it is enough to show that a decision which ought to have been based on the exercise of independent judgment was dictated by those not entrusted with the power to decide, although it*

*remains a question of fact whether the repository of discretion abdicated it in the face of external pressure. And it is immaterial that the external authority has not sought to impose its policy.”*

19. The august Supreme Court has observed and held in the case of ‘*M.A.Rahman Versus Federation of Pakistan and others*’ [1988 SCMR 691], supra, that discretion must be exercised only by the authority to which it is committed, and that in exercising the same the authority must genuinely address itself to the matter before it and must act in good faith, having regard to all relevant considerations. It was further held that in exercising discretion, the authority must not be swayed by irrelevant considerations, nor must it seek to promote purposes alien to the letter and/or spirit of the legislation that gives it the power to act and, therefore, must not act arbitrarily or capriciously. It is, therefore, obvious that any purported control, acts or orders of the Federal Government which are not in consonance with the provisions of the relevant statutes under which the five regulatory authorities have been established would definitely be a nullity in law and void, besides being unconstitutional. The regulatory authorities can only be governed and matters relating thereto be dealt with strictly according to the relevant legislative enactments and not otherwise. The regulatory authorities have a duty and statutory obligation to guard their independence and autonomy by refusing to accept any interference not contemplated by the legislature in the respective statutes.



20. The upshot of the above discussion is that any alteration made in the administrative arrangement relating to regulatory authorities is subject to the approval of the Council of Common Interests. The policy decisions and guidelines of the Council of Common Interests are binding on the Federal Government. The latter is not empowered to interfere with the affairs of the regulatory authorities other than as provided under Article 154 of the Constitution and the relevant legislative enactments. Rule 3(3) of the Rules of Business, 1973 is subject to Articles 153 and 154 of the Constitution. The impugned Memorandum, dated 19-12-2016, therefore, could not have been issued nor, with utmost respect, was the Prime Minister empowered to grant approval pursuant to powers vested under Rules 3(3) of the Rules of 1973. The impugned Memorandum, dated 19-12-2016, is, therefore, declared to have been issued in violation of the constitutional mandate and as such is illegal, void and was issued without lawful authority and jurisdiction. The status which had existed before the issuance of the impugned Memorandum, dated 19-12-2016, i.e. entry No. 53 of Clause 2 of Schedule II of the Rules of Business, 1973 shall stand restored. Any alteration or amendment of entry 53 of Clause 2 of the Rules of Business, 1973 shall require the approval of the Council of Common Interest.

21. The above are the detailed reasons for the short order, dated 27-03-2017, which is reproduced below.

*"For reasons to be recorded later, the instant petition is allowed and the impugned notification dated 19-12-2016 is hereby set aside. The Federal Government shall be at liberty to place the matter before the Council of Common Interests for its decision*

W.P. No.4802/2016

*pursuant to powers conferred under Article 154 of the Constitution of the Islamic Republic of Pakistan, 1973. The said constitutional provision unambiguously provides that the formulation and regulation of policies in relation to matters in Part II of the Federal Legislative List exclusively falls within the ambit of the powers and jurisdiction of the Council. Likewise, the latter has been expressly mandated to exercise supervision and control over the regulatory authorities established under the Federal laws. The arrangement prior to the issuance of the notification, dated 19-12-2016 i.e. the regulatory authorities being dealt with by the Federal Government through the Cabinet Division shall continue till varied, altered or amended pursuant to a decision by the Council of Common Interests.”*

(ATHAR MINALLAH)  
JUDGE

20-06-2017.

Approved for reporting.

\*Luqman Khan/

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