



RULING OF THE CHAIR

PLACEMENT OF REGULATORY AUTHORITIES UNDER THE LINE MINISTRIES

This Ruling arises from the following amongst other facts and grounds:-

That on 19th December, 2016, vide Memorandum No. 7-2/2016-Min-I, the Prime Minister transferred the administrative control of the following Regulatory Authorities from Cabinet Division to their respective line Ministries:-

- (a) National Electric Power Regulatory Authority
 - (b) Pakistan Telecommunication Authority
 - (c) Frequency Allocation Board
 - (d) Oil and Gas Regulatory Authority
 - (e) Public Procurement Regulatory Authority
- (i) The said transfer was reported by the national media on 20th December, 2016.
- (ii) Taking note of this executive step, in the Senate sitting held on 20th December, 2016 (257th Session), I asked the Leader of the House to call upon the Minister In-charge of Cabinet Division, to make a statement on the floor explaining the circumstances due to which the Government transferred the administrative control of five Regulatory Authorities to their line Ministries. On the proposal of the Leader of the House, it was decided that instead of the Minister In-charge of Cabinet Division, Minister for Law and Justice may make such a statement.

- (iii) That during the Senate sitting held on 21st December, 2016 (257th Session), the Minister for Law and Justice made a statement which is reproduced as under:

"Sir, with your permission, let me first read out the notification. In fact it's a memorandum dated the 19th December, 2016. The memorandum says in terms of Rule 33 of the Rules of Business 1973, the Prime Minister has been pleased to transfer administrative control of the following regulatory authorities from Cabinet Division to the Divisions mentioned below against each name:- 1. Electric Power Regulatory Authority to the Water and Power Division. 2. Pakistan Telecommunication Authority to the Information Technology and Telecom Division. 3. The Frequency Allocation Board also to the Information Technology and Telecom Division. 4. Oil and Gas Regulatory Authority to the Petroleum and Natural Resources Division. 5. Public Procurement Regulatory Authority to Finance Division.

First is National Electric Power Regulatory Authority, to the Water and Power Division. Pakistan Telecommunication Authority, to the Information Technology and Telecom Division. The Frequency Allocation Board, also to the Information Technology and Telecom Division. Oil and Gas Regulatory Authority, to the Petroleum and Natural Resources Division and the Public Procurement Regulatory Authority, to the Finance Division. Necessary amendments in the Rules of Business 1973 will be made accordingly. This is from the Cabinet Division. Sir, the basic point here that I would like to make which will clear the history of these Regulatory Bodies that I will now proceed to explain that this is nothing out of the ordinary. This has been happening time and again and it is happening since the Regulatory Authorities were first set up. Let me take each one of these authorities Sir, in so far as the Pakistan Telecommunication Authority (PTA) is concerned, this was initially with the I.T. and Telecom on the 27th September, 2000, and then it was with the Ministry of Science and Technology and on the 15th October, 2002 it was shifted by orders of then Chief Executive which I will read out, it was shifted to the Cabinet Division and now under the notification that I have issued has been shifted to the Information Technology and Telecom Division. Sir, that notification dated the 15th October, 2002 reads as follows; The reference correspondence resting on so and so, "the Competent Authority has directed for transfer of Pakistan Telecommunication Authority from the administrative control of Ministry of Science and Technology to the Cabinet Division with immediate effect. Cabinet Division is requested to please take further necessary action accordingly and issue necessary instructions today under intimation to the secretariat". This is in 2002, the transfer from Ministry of Science and Technology to the Cabinet Division. If you take the case of National Electric Power Regulatory Authority (NEPRA) set up by an Ordinance in 1995, it was initially with the Water and Power Division and when the Act was passed in 1997, in December 1998, administrative control was transferred to the Ministry of Law and Justice and then a note was put that the functions of NEPRA, in fact the summary was put up by the Water and Power Division that the functions of NEPRA justify a closer relationship with the Ministry of Water and Power rather than with Law and Justice Division. That was not approved. Instead it was with the

Law and Justice till the 6th September, 2000, when a Cabinet decision dated the 30th August, 2000, the case relates to the presentation on prices of essential commodities and amongst the five decisions that were taken on this summary, one is that the National Electric Power Regulatory.

Authority (NEPRA), the Pakistan Telecommunication Authority (PTA) and the Natural Gas Regulatory Authority (NGRA) which is predecessor of OGRA shall be placed under the Cabinet Division. So at that time on 6th September, 2000, this was transferred to the Cabinet Division. I am giving you the history of each of these organizations to show you how the transfers took place. Mr. Chairman: I am listening but in each of the histories that you have given so far, they have been taken away from their parent department and have been given under the foster care of another department so that they can act independently.

Sir, I will just tell you what happened. They are just going back and forth depending on which Government thinks which is a better option. If you take the Frequency Allocation Board, originally the Wireless Board, it was with the Ministry of Science and Technology and again on the 9th April 2004, it was transferred in the light of a decision taken in the meeting held on 21st February, 2005, under the Chairmanship of COS to the President aiming to create close linkage and coordination between PTA and FAB, The Prime Minister has been pleased to direct that The Frequency Allocation Board presently with I.T. and T Division be placed under the administrative control of PTA under the Cabinet Division. That was the decision at that time. If you look at the PEPRRA, originally with the Ministry of Finance and again in 2005, a notification of the Cabinet Secretariat, it says;

"Public Procurement Regulatory Authority (PEPRA) is placed under the administrative control of the Cabinet Division with immediate effect in terms of Rule 3(3) of the Rules of Business 1973". I should have mentioned this earlier that what is Rule 3 which has been quoted in the present notification also. Sir, you know it very well but for the benefit of others, Allocation of Business; 1) The Federal Secretariat shall comprise the ministries and divisions shown in schedule 1. 2) The Prime Minister may whenever necessary constitute a new ministry consisting of one or more divisions. 3) The business of the Government shall be distributed among the division in the manner indicated in schedule 2. Provided that the distribution of business or the constitution of the division may be modified from time to time by the Prime Minister. In schedule 2, at this moment before this notification in the Cabinet Division at Serial No. 53; The administrative control of NEPRA, PTA, FAB, OGRA, PEPRA and the Intellectual Property Organization, this is the transfer Item No. 53 under Rule 3(3) has been transferred in accordance with the orders of the Prime Minister to the original ministry. Sir, I again emphasis on this that these were the original line ministries when these regulatory authorities started. There is nowhere any consultation with the Council of Common Interests before these regulatory authorities have been transferred back and forth, because there is a fundamental difference which I will come to later. This is not a policy decision, nothing is being changed in the Act itself. The Act itself makes these regulatory authorities independent and autonomous. Nothing is being changed, it is not a policy matter which requires reference to the Council of Common Interests. Sir, this is the most interesting one which is PEMRA. PEMRA is not one of these five but I cite this only because of two things. First, it started with the

Ministry of Information and Broadcasting, which is the original line ministry. It was first transferred to the Cabinet Division in 2005 and then on 3rd May, 2007, it goes back to Information. Then a few months later, it goes back to Cabinet and then a few days later, it goes back to Information. So within a space of a few months it is going back and forth and again it is Rule 3(3), which is being cited each time and the interesting thing is for the benefit of the Opposition Members, that the last transfer from the Cabinet Division to the Ministry of Information and Broadcasting was on 30th April, 2008, which was under the Government of the Pakistan Peoples Party. Sir, I also want to refer to the other regulatory authorities and just to show that they are also in most cases under the line ministry. For example the Private Educational Institutions Regulatory Authority is under CADD. The Pakistan Architecture and Town Planning Council is under the Climate Change Division. The State Bank of Pakistan which is the ultimate regulator is under Finance. The Securities and Exchange Commission of Pakistan also a regulator is also under Finance. The Pakistan Medical and Dental Council, the Pakistan Council for Nursing, the National Councils for Tibb and Homoeopathy, the Drug Regulatory

Authority are all under the National Health Services Regulations and Coordination Division. The Pakistan Standards and Quality Control Authority is under the Science and Technology. The Pakistan Standards and Quality Control Authority is under the Science and Technology Division, the Intellectual Property Organization of Pakistan is under the Commerce Division. Sir, again the point to be emphasized is that where a policy matter is involved, the Government has no hesitation whatsoever in referring it to the Council of Common Interests. For example, in the last meeting of the CCI, just earlier this week, I happened to be present also, the proposed changes in the NEPRA law were taken to the Council. The honourable Chief Ministers present there wanted certain things; the Council decided to defer consideration of that matter till certain clarifications are made available. So, what I am trying to point out is that so far as the transfer from one division to another is concerned, this is the purely routine matter; it is under the discretion of the Prime Minister, under Rule 33 of the Rules of Business; it has always been done since inception of these authorities. These authorities are being shifted from one division to the other, as I have pointed out in the history. In so far as policy matters are concerned, we are of course, bound by the provisions of the Constitution and of course, they are required to go to the Council of Common Interests and they have been referred and will continue to be referred. Sir, I would also like to point out that the policy directive, this law, rather this notification of transfer for one division to the other, does not affect the independence or the autonomy of these institutions or their ability or competence to act independently because after all, Cabinet Division in that sense is also under the Government. If any undue influence is to be exercised, it can equally be exercised under the Cabinet Division or whether it is under the Water and Power Division. So, that is not the intention; the intention is administrative convenience. The most important thing is in each of parent legislation relating to these authorities, there are the powers of the Government to issue policy directives. For example, I brought with me all of them but I just will read out only the PTA, Section 8. "The powers of the Federal Government to issue policy directives: The Federal Government may, as and when it considers necessary, issue policy directive to the Authority, not inconsistent with the provisions of the

Act, on the matters relating to Tele Communication Policy refer to in Sub Section 2 and the Authority shall comply with such directives". There is a similar provision, as you know sir, in each of parent legislation of these Regulatory Authorities. So, I would again emphasize nothing has changed vis-à-vis either the policy directive provisions or the autonomy provisions, the independence provision in each of these parent legislation. This is an administrative measure which has been taken, it has been taken time and again in previous governments; including the previous Government of Pakistan People's Party. There is nothing to imply at all that the Government has done this with any ulterior motive other than for administrative convenience. If there were a case of formulation or amendment of policy relating to these Regulatory Authorities, then of course, the matter would have gone up to the CCI as in the case as I mentioned in the last meeting of the CCI relating to amendments in the NEPRA Act and legislative policies relating to that Act. Thank you very much sir.

- (v) Senator Aitzaz Ahsan, Leader of the Opposition and Senators Sehar Kamran, Muhammad Azam Khan Swati, Farhatullah Babar, Saleem Mandviwala, Taj Haider, Muhammad Ali Khan Saif, Lt. Gen. (Retd.) Abdul Qayyum, Mushahid Ullah Khan, Muhammad Usman Khan Kakar, Mir Kabeer Ahmed Muhammad Shahi, Col. (R) Syed Tahir Hussain Mashhadi, Lt. Gen. (R) Salahuddin Trimizi, and Dr. Jehanzeb Jamaldini spoke on the factual and legal aspects of the said subject. Arguments of the Leader of the Opposition were structured on the following grounds:-
- a. Placement of Regulatory Authorities under the line Ministries is an attempt to circumvent the scheme of oversight, for which purpose the Regulatory Authorities were conceived rather it can be categorized as "poachers have been made game keepers"
 - b. In terms of clause (1) of Article 154, Constitution, 1973, and Item Nos. 2, 4, 6, 13 and 18 of the Federal Legislative List Part-II, the Federal Government or the Prime Minister cannot take a decision as to the transfer of Regulatory Authorities which is the sole mandate of CCI, hence memorandum dated 19th December, 2016 is void ab initio.

(iv) Thereafter, in the Senate sitting held on 23rd December, 2016, the Minister replied to the arguments of the Members raised during the debate on 21st December, 2016. The Minister for Law and Justice, was of the consistent view, that the transfer from one Division to another has not affected the financial, administrative or functional independence and autonomy of these Institutions. The Law Minister's arguments are summarized as under:-

- a. Transfer of administrative control of Regulatory Authorities is a routine matter, which in the past has also taken place under the orders of the Prime Minister in terms of sub-rule (3) of rule 3, Rules of Business, 1973.
- b. A summary was sent to the Prime Minister, relating to the transfer of the administrative control of these Institutions and amendments relating to the NEPRA Act. It was decided that these items would be included on the CCI agenda, but when the agenda was being finalized the item dealing with the administrative control of these Institutions was dropped. The amendments to the NEPRA Act, which were a matter of Policy, was taken to the CCI and discussed in detail.
- c. The Cabinet Division is also under the Government like the Water and Power Division, therefore, if the intention was of exercising undue influence, it could equally be done through either. That is not the intention; the intention is administrative convenience.
- d. No consultation with the Council of Common Interests has taken place at any time, before these Regulatory Authorities have been transferred back and forth, because there is a fundamental difference. This is not a policy decision, nothing is being changed in the Act itself. The Act itself makes these Regulatory Authorities independent and autonomous. Nothing is being changed, it is not a Policy matter which requires reference to the Council of Common Interests.

- e. Reliance was placed on the case of Gadoon Textile Mills Vs WAPDA, 1997 SCMR at 641, the following paragraph was relied upon:-

"CCI is not required to make decisions as to the day to day working of the corporations mentioned in the part II in 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 working of WAPDA. It may even include the guideline for the fixation of tariff by WAPDA."

- f. The supervision and control of related institutions is not synonymous with the administrative control which has been transferred through this Memorandum, it only refers to the administrative day to day routine working of the Organization.
- g. If it was a case of formulation or amendment of Policy relating to these Regulatory Authorities, then of course, the matter would have gone to the CCI.

2. Subsequent to the Minister's statement in the House on 23rd December, 2016, I reserved the ruling on the question, whether the issue of placement of Regulatory Authorities under their line Ministers was required under Article 154(1), Constitution, 1973, to be placed before the Council of Common Interests for its decision or otherwise. The factual controversy of whether the item was a part of the CCI agenda or it was removed on the objections of Khyber Pakhtunkhwa Province, was referred to the Functional Committee on Devolution for consideration and report.

3. The upshot of the above narration tosses up the herein under question for determination:-

"Whether the transfer of control of Regulatory Authorities from the Cabinet Division to their line Ministries is a Policy decision and requires the prior approval of the Council of Common Interests in terms of Article 154, Constitution, 1973."

4. Before taking up the legal question it is appropriate to examine the documents and statements available on the record which are as under:-

- a. That on 18th January, 2017, the Ministry of IPC vide U.O. No.1(4)/2010-CCI, moved a summary to the Prime Minister with the following proposals:-

“ ----- Moreover, item-6 of the Federal Legislative List (Part-II) of the Constitution assigns the subject of all Federal Regulatory Authorities the CCI. Since, most of the issues raised by the Provinces pertain to the Federal Regulatory Authorities, and after 18th amendment, the subject falls exclusively under the domain of the Ministry, it is in the spirit of devolution that Ministry of IPC may be assigned its due role of the Constitution rather to act as a Coordinator between Federation and the Federating Units.

34. In view of the justification given vide para-32 above, it is proposed that the Ministry of IPC may be renamed as “Ministry of Inter Provincial Coordination and CCI Secretariat” and the subject of all Federal Regulatory Authorities may also be transferred from various Ministries/ Divisions to Ministry of IPC”

- b. The said summary was returned by the Prime Minister’s Officer vide U.O. No. F.8(2)/DS(IA-III)/2015(933), dated 26-01-2016, for seeking the views of IPC Division, Ministry of Information and Broadcasting and Cabinet Division on the issue of transfer of Regulatory Authorities to their line Ministries.
- c. Ministry of IPC vide U.O. No. 1(4)/2016-CCI, dated July, 14, 2016, further consolidated its position in the following terms:-

“While the Ministry of Inter Provincial Coordination has to provide general coordination between the Federal Government and the Provinces in the economic, cultural and administrative fields and promote uniformity of approach in all fields of common concern besides discussions of policy issues emanating from the Provinces which have administrative or economic implications for the country as a whole, the Council of Common Interests has been assigned the responsibility of formulation and regulation of policies in respect of Federal Legislative List (Part-II) of the Constitution. Article 154 (1) of the Constitution read with Item 6 of the List indicates that all Regulatory Authorities established under a Federal Law shall be supervised and controlled by CCI in terms of formulation of Policies and to regulate those Policies. The said Article and Item 6 of the list are reproduced as under:-

Besides above Constitutional obligations, it has been noticed that the issues raised by the Provinces reveal that most of the problems relate to the regulatory Authorities like, OGRA, PEMRA, PPRA, NEPRA and PTA but since the regulatory authorities are presently controlled and managed by Cabinet Division and Ministry of Information & Broadcasting, the Ministry of Inter Provincial coordination is unable to perform its due responsibilities effectively and the process is being prolonged.”

- d. The Cabinet Division vide U.O. No. 7-6/2015-Min-I, dated 12th August, 2016, stated the following views:-

"As far as the placement of Regulatory Authorities under the IPC Division is concerned, Cabinet in its meeting dated 30th August, 2000, decided to place National electric Power Regulatory Authority (NEPRA), Pakistan Telecommunication Authority (PTA), Natural Gas Regulatory Authority (NGRA) under the Cabinet division (Annex-XII). Later on, PEMRA, PTA, FAB, PPRA and IPO-Pakistan were also placed under the Cabinet Division (Annex-XIII). The spirit of these decisions was to ensure the objective and independent status of Regulatory Authorities as non-ministerial entities." (emphasis provided)

- e. The Senate's Functional Committee on Devolution, which was seized with the factual aspect of the matter, was informed by the Ministry of IPC that:-

- *"IPC Division/ CCI Secretariat initially requested Prime Minister's Office on 3rd June, 2016, to seek the convenience of Honourable Prime Minister to the holding/ convening of CCI meeting. A list of seven available agenda items was also conveyed. The item "Transfer of Regulatory Authorities from Cabinet Division to line Ministries" was not included as the summary on the subject was not available in the Secretariat.*
- *Again on 6th of October 2016, the IPC Division/ CCI Secretariat requested Prime Minister's Office for convenient date and time for the purpose. This time, the number of available agenda items as conveyed to Prime Minister's Office was eleven. The agenda item in question i.e. "Transfer of Regulatory Authorities" was not included therein, as the summary on the subject was not available in the Secretariat.*
- *The Prime Minister's Office conveyed approval of the Prime Minister to the convening of the CCI's 30th meeting alongwith the approved seven point agenda, including "Transfer of Regulatory Authorities to the line Ministries". Ministry of IPC/CCI Secretariat circulated the approved agenda to all concerned on 7th December, 2016.*
- *In response, Prime Minister's Office conveyed approval of the revised agenda, incorporating three additional items while excluding the previously approved item of "Transfer of Regulatory Authorities from Cabinet Division to line Ministries" from the final agenda.*
- *Accordingly, Ministry of IPC/CCI Secretariat circulated the revised agenda on 9th December, 2016 to all concerned by deleting the item of "Transfer of Regulator Authorities" while also adding the newly approved items."*

- f. The agenda that was circulated for the 30th meeting of CCI vide office letter No. F. No. 2(121)/2016-CCI, issued on December, 7, 2016, carried the agenda item "Transfer of Regulatory Authorities from Cabinet Division to respective Line Ministries". The Province of Khyber Pakhtunkhwa took exception to this and vide D.O. No. PS/CMS/KPK/2016 dated 13th December, 2016, took the following position:-

"03. It is pertinent to mention that summary related to transfer of regulatory authorities which impliedly includes NEPRA also; has yet to be furnished for our examination while CCI is to meet only day hereafter.

04. Kindly appreciate that transfer of Regulatory Authorities to respective line Ministries involve long term implications for rights of the province. Hence, there is a need for a detailed and careful deliberation at our end before firming up our view point for consideration of the CCI; which for sure cannot be done in short span of one day only.(emphasis provided)

05. In view of the foregoing, it is requested that:-

c. copy of summary related to "Transfer of Regulatory Authorities from Cabinet Division to respective Line Ministries" may kindly be provided to us at the earliest.

d. in the meanwhile, discussion on the issue may please be postponed till next meeting of the CCI"

5. I will now take up the legal question framed in para No.3 hereinabove.

- (a) While considering Article 154, Constitution, 1973, it is pertinent to mention the Constitutional Accord dated 20.10.1972, that was entered into between the Pakistan Peoples Party and other political parties for the framing of the Constitution. This Accord was followed by a Report dated 31-12-1972 submitted by the Constitution Committee, which included MNAs of various political parties including some independent MNAs. It highlighted the factum that there was a controversy as to the quantum of autonomy which the federating units were to enjoy under the then

proposed Constitution which was a burning issue for quite a long period.

In this regard paragraph 33 of the above Report, reads as follows:-

"(33). To conform to the spirit of federalism a new arrangement has been worked out to ensure the effective participation of the Provincial Governments in sensitive and important spheres of national life. In respect of the subjects in Part-II of the Federal Legislative List and the item of electricity in the Concurrent Legislative List, special provision has been made for the creation of the Council of Common Interests to be appointed by the President as envisaged in the Constitutional Accord. The Council shall consist of the Chief Ministers of the Provinces and an equal number of members from the Federal Cabinet. The Council shall formulate and regulate policies in relation to specify matters and exercise supervision and control over related institutions."

- (b) Now let us examine clause (1) of Article 154, Constitution, 1973, which is reproduced as under:

"154(1). 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."
(EMPHASIS PROVIDED)

Clause 1 of Article 154, Constitution, 1973, has to be read in conjunction with the Federal Legislative List Part-II. The words "The Council shall formulate and regulate policies in relation to matters in Part-II of the Federal Legislative List", relate to Item No.6 in the Federal Legislative List Part-II which is, "All regulatory authorities established under a Federal law". It is restricted not only to all Regulatory Authorities but also includes Railways, mineral oil and natural gas, electricity, etc.

- (c) Clause 1 of Article 154, Constitution, 1973, is not restricted to or limited to only matters of policy but it further provides, "exercise supervision and control over related institutions" in the Federal Legislative List Part-II.

6. The Government has taken a consistent position that transfer of Regulatory Authorities within the administrative Ministries is the prerogative of the Prime Minister in terms of sub-rule (3) of rule 3 of the Rules of Business, 1973. The said rule is reproduced as under:-

*"3. Allocation of Business.--(1) The Federal Secretariat shall comprise the Ministries and Divisions shown in Schedule I.
(2) The Prime Minister may, whenever necessary, constitute a new Ministry consisting of one or more Divisions."*

(3) The business of government shall be distributed among the Divisions in the manner indicated in Schedule II: Provided that the distribution of business or the constitution of the Division may be modified from time to time by the Prime Minister. (emphasis provided)

(4) The Prime Minister shall allocate amongst his Ministers the business of Government by assigning several Divisions specified in Schedule I to the charge of a Minister:

Provided that a Division or a Ministry not so assigned shall be in the charge of the Prime Minister:

Provided further that more than one Division may be assigned to a Minister."

7. Before I examine the above rule let us see the definition of the word "Regulate".

i) Stroud's Judicial Dictionary of Words and Phrases, Seventh Edition Volume 3 (P-Z) at 2328

"Regulating the marketing" (Agricultural Marketing Act 1931 (c.42) s.I (1)), A scheme "regulating the marketing" of an agricultural product had to be one which introduced some orderly system of marketing. One which was from start to finish purely discretionary did not suffice (*Tucker v Ministry of Agriculture Fishers and Food* [1960] 1 WLR 819.

ii) Hand Book of Legal Terms & Phrases(Judicial Defined) at 608 – 609,

Regulate.--

a) "On the consensus of judicial authority and dictionary meaning of the word "regulate it appears that the word truly and faithfully implies only a power to create circumstances and to lay down principles or rules to continue the existence of an existing state of affairs in a fair manner. If further connotes the obtaining of a sort of uniformity in matters of conduct so that arbitrariness, whimsically and capriciousness is avoided. It may also mean that the creation of such state of affairs that the concerned citizens or persons likely to be affected by the exercise of the power to regulate know what are their rights and their obligations in the matters which fall within the ambit of matters so regulated, it clothes the functionaries with a power to lay down a code of conduct with precision. No dictionary seems to point to the word as meaning a power to apply the principle or rule and determine whether the right or obligations of the persons affected by such regulation are correctly performed or fulfilled. *Bumrah Shell Vs. Labour Commr. PLD 1982 Kar 33.*"

b) ".....whatever the extent to which restraints may be placed by regulation it should be clear that the object in regulation is not to prevent persons from carrying on a profession but to see that the profession is carried on in the most efficient and suitable manners. PLD 1965 SC 527: DLR 1965 SC 545."

iii) The Oxford English Dictionary, Tenth Edition, at 1206,

".....They are created by legislation, hence elected officials are their principals. They are organizationally separate from governments and headed by unelected officials. They are given powers over regulation, but are also subject to controls by elected politicians and judges." {*Mark Thatcher. West European Politics, Vol.25 1 (January 2002),pp 125-147.*}

From the above discussion it is evident that these are organizations which are created essentially through a statute and are organizationally separate from the government. They have to ensure that the Act and the rules framed thereof, for

carrying out of the said business are enforced and applied equally, fairly and in a transparent manner. Therefore, by placing them under their line Ministries, the very purpose for which these Regulatory Authorities are created is to an extent largely compromised.

8. The Rule mentioned in paragraph No.6 above, deals with allocation of business of the Federal Government. Rule 2, Rules of Business, 1973, defines “business” as “all work done by the Federal Government”. This means and pertains to essentially all matters provided for in the Federal Legislative List Part- I, Constitution, 1973, it is correct that the said rules are framed under Article 99, Constitution, 1973, and therefore, at a slightly higher pedestal. The instant Regulatory Authorities have been established under various Acts of Parliament and thus fall under item 6 of Federal Legislative List Part-II, Constitution, 1973, and the regulation of their business is controlled by clause (1), Article 154, Constitution, 1973 read with Rules of Procedure of the Council of Common Interests, 2010, which are framed under Article 154, Constitution, 1973, therefore, the Rules of Business, 1973 and Rules of Procedure of the Council of Common Interests, 2010, are on the same pedestal. The stated object in the said Acts is the regulation of the business of the Government in order to ensure fairness and transparency. Therefore, the Regulatory Authorities established under a Federal law are not covered under the definition of “business” as provided in the Rules of Business, 1973. Hence, matters related to the Regulatory Authorities under a Federal law cannot be dealt with under sub-rule (3) of rule 3, Rules of Business, 1973, the said rule may come into operation after the CCI has taken a decision in relation to the Regulatory Authorities. This is further substantiated by the statement of Chairman NEPRA, which is at para No.7 of the Report of the Functional Committee on Devolution, presented in the Senate on 14th February, 2017 and adopted by the House on 14th February, 2017, the said paragraph is reproduced as under:

“Chairman NEPRA briefed the Committee that all over the world regulatory authorities are administratively, financially, and operationally independent so that they can perform their functions of protecting the interests of stakeholders; in the case of NEPRA, the stakeholders are, NEPRA, its Consumers and the Government. He further apprised the committee that Government is the major stakeholder as it has 80% ownership of the electricity and power generation setup. The Government has 100 percent ownership of distribution companies, Ministry of Water and Power and transmission Company NTDC are also

government organizations, 34 IPPS are owned by the Private Sector whereas others are owned by the Government. NEPRA, as a regulator, has to keep a check on the performance of Distribution companies, examined whether the transmission line is complete, grid station is complete, etc. Ministry of Water and Power is the main stakeholder in this entire process of regulation and placing NEPRA under the said ministry amounts to putting fetters to the independence of regulatory authority. Putting under the lone ministry will mean that the Ministry of water and power will initiate appointment of the chairman NEPRA and members, removal from the office, their extension and tenure and allied matters like salaries and other perks."

9. The unique position that the Council of Common Interests holds in the constitutional scheme has been defined in the case of *Federation of Pakistan v. United Sugar Mills*, PLD 1997 SC at 394, the relevant paragraph is reproduced as under:

"Again in one significant respect the Federal executive authority has been obliged abridged under the Constitution and has been entrusted to a newly created Institution called the Council of Common Interests. It is a body quite apart from the Federal Executive. (see Articles 153-156).

The administration of matters falling in Part-II of the Federal Legislative List (railways, minerals oil, natural gas, etc.) and Item No.34 of the Concurrent List (electricity) are entrusted to the Council of Common Interests."

10. The Minister for Law and Justice has placed reliance on a Judgment of the Supreme Court reported in 1997 SCMR at 641 (*Messrs Gadoon Textile Mills and 814 others v. Wapda and others*). One of the operative paras of the said Judgment is as under:-

"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. 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 may even include a guideline for the fixation of tariff by WAPDA but such guideline cannot be inconsistent with subsection (2) of section 25 of the WAPDA Act. Which lays down statutory parameters for fixation of tariff. The C.C.I is not required to determine tariff for the supply of electricity by WAPDA to the consumers and to vary the same from time to time as this comes within the ambit of day to day working. Fixation of tariff of electricity depends on various factors. Which regularly and frequently fluctuate warranting revision of tariff from time to time.

The effect of the incorporation of Article 154(1) and Article 161(2) of the constitution is not that C.C.I has the power to determine the tariff for distribution of electricity by WAPDA to the consumers directly. The object of the incorporation of clause (1) of Article 154 of the constitution is reflected inter alia in para. 33 of the constitution committee's Report namely, "to

conform to the spirit of federation, a new arrangement has been worked out to ensure effective participation of the provincial Government in sensitive and important spheres to national life". To achieve the above objective, C.C.I. consists of Chief Ministers of the four Federating units and an equal number of Members from the federal Government which generally includes the prime Minister of Pakistan as provided under Article 153(2) of the constitution. [p. 703]K

Article 153, 154, 155, 160 and 161 of the constitution provide an inbuilt self-adjudicatory and self-executory mechanism in the constitution set-up. The object seems to be to generate sense of participation among the federating units on sensitive issues of national impotence referred to in the above Articles, and to ensure—

(i) resolving of any dispute arising between one or more federation Units inter se between the federation and a federating Unit;

(ii) Payment of the proceeds of federal duty excise on natural gas levied at well-heads and collected by the federal Government to the federating units in which the well-heads and collected by the federal Government to the federating Units in which the well-heads of natural gas are situated:

(iii) Payment of net profits earned by the federal Government or any undertaking established or administered by the federal Government from the bulk generation of power at a hydro-electric station to the federation Unit in which the hydro-electric station is situated:

(iv) Carrying out direction issued by the parliament in its joint session to C.C.I.

(v) Equitable distribution of federal taxes among the federating Units and resolve other financial issues (Article 160 of the constitution).

The matters referred to in part II of the federal Legislative List and Item 34 of the concurrent Legislative List (electricity) are to be brought before C.C.I. for formulating policies. Before taking any action towards privatisation of WAPDA, it was mandatory to have brought the above matter before C.C.I. The rationale being that hydro-power station were situated in N.W.F.P. which was then opposing privatisation of WAPDA. It would not have been proper on the part of the federation to privatise above hydro-PowerStation and to create private interest in such sensitive installations situated in a federation Unit without the participation of the federation units. So the forum for ironing out such a controversy was C.C.I."

11. The above mentioned Judgment is distinguishable from the case in hand. Amongst other questions raised by Mr. Fakhruddin G. Ibrahim, Senior Advocate Supreme Court of Pakistan, while appearing for WAPDA, he stated the crux of the case as under;

- "a) That neither the CCI nor a Provincial Government nor Advisory Board has power to determine tariff for the electricity which is generated, transmitted and distributed by WAPDA among the consumers;
- b) That under section 25 read with sections 12 & 13 of the Act, Abridged, Conditions No.26 and 27 of the Agreement, WAPDA has the power to determine tariff for electric supply and to vary the same from time to time."

12. The Court, in the Judgment under review, has rightly held that "CCI is not required to make decisions 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". Now the question arises that whether transfer of Regulatory Authorities to their line Ministries is a decision relating to their 'day to day working' or is it essentially a policy decision? It is apparent from the Judgment of the apex Court that decisions as to determination of tariff by NEPRA, or determination of oil prices by OGRA, or grant of license by PTA can be termed as decision relating to the 'day to day working' of a Regulatory Authority. However, a decision as to the transfer of Regulatory Authorities from one Ministry to another Ministry is essentially a Policy decision which has to be taken by the Council of Common Interests in terms of clause (1) of Article 154, Constitution, 1973.

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.

14. I am conscious of the fact that the decision of the Federal Government regarding transfer of Regulatory Authorities from the Cabinet Division to the line Ministries has been challenged in High Courts, in W.P. No. 75/2017; W.P. No. 40027/16; W.P. No. 40663/16 filed in the Lahore High Court; W.P. No. 335-P/2017 filed in the Peshawar High Court and one Writ Petition in the Islamabad High Court. However, this House took cognizance of this matter on 20th December, 2016 and since then it is seized with it. One of the primary functions of Parliament is over sight of executive functions, in this case the rights of the Provinces and other territories are being infringed upon, therefore, the Senate has to act in accordance with the Constitution.

15. Before parting with this ruling, I must acknowledge the work of Functional Committee on Devolution and Legislative Branch of Senate Secretariat. The Senate Secretariat is directed to provide copies of this

Ruling to the Prime Minister, Minister for Law and Justice, Minister Incharge of Cabinet Division and Minister for Parliamentary Affairs.



MIAN RAZA RABBANI
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Chairman Senate

Dictated in Chamber
Announced in the House on 20th February, 2017
259th Session