# Judicial Review in policy matters



RESEARCH CENTER, HIGH COURT OF BALOCHISTAN

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**FOR** **HON'BLE MR. JUSTTICE SHOUKAT ALI RAKHSHANI**

**SUBJECT:** CONSTITUTIONAL LAW

**DATE:** 01ST OCTOBER 2024

**BY:** WASEEM AHMED RESEARCH OFFICER

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***Query:***

***When SROs issued by the Government are subject to judicial review, if so, what would be the grounds?***

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**RESPONSE**

In response to the aforementioned query, it is submitted as under:-

The doctrine of ***vested rights***, asserts that individuals or entities possess certain rights that are protected under the law and cannot be arbitrarily altered or revoked without due process. In *Federation of Pakistan v. Ammar Textile Mills (Pvt.) Limited* **(2002 SCMR 510),** the petitioners challenged *the government* ***notification altering the procedure for allocating textile quotas,*** **arguing that it** ***violated their vested rights under the previous 1992 notification***. The Supreme Court dismissed the petition, ***holding that the government had the authority under the 1992 notification to amend the procedure and that no vested rights were violated.*** The Court stated that:

> "17. Thus for the above reasons we are of the considered opinion that ***there was no bar upon the Federal Government in issuing Notification No.228(I)/94, dated 8th March, 1994 because it has been issued in exercise of powers conferred upon it under para. 13 of earlier Notification No.166(I)/92, dated 7th March, 1992 and the respondents/appellants (exporters) have not been deprived from their vested right because by issuing Notification dated 8th March, 1994 only the mode of allocation of the Quota to the Textile Exporters has been changed by allowing the Association either to opt for such entitlement for the year 1994 on the basis of formula contained in Notification S. R. O. No.166(I)/92 dated 7th March, 1992*** or on the basis of the quantity of exporters by the performance holders in 1993 and as the Associations being representative bodies in their meetings have held for allocation of Textile Quota on basis of performance of 1993, therefore, on behalf of some of the exporters (respondents) and

> appellants in Civil Appeal No.1205 of 1997 ***the Policy of the Government contained in Notification dated 8th March, 1994 for the export of Textile cannot be declared illegal or without lawful authority nor individual exporters can attach legitimate expectancy that Textile Quota for the year 1994 must be allocated to them in view of the formula envisaged in Notification dated 7th March, 1992.*** For an added reason that subsequent Notification dated 8th March, 1994 has been issued in supersession of earlier Notification and respondents have not challenged the vires of the subsequent Notification.

This case affirms that policy-changes ***affecting procedures***, ***rather than rights***, fall within the government's domain and are subject to ***judicial deference*** unless they violate statutory or constitutional provisions.

In the case of *Shaheen Cotton Mills v. Federation of Pakistan* ***(P L D 2011 Lahore 120)***, the Lahore High Court addressed ***the scope of judicial review*** in matters of government policy. The petitioners challenged the government's ***notification restricting the export of cotton yarn***, claiming it violated their fundamental rights under Article 18 of the Constitution (*freedom of trade and business*). The Court dismissed the petition, concluding that the ***government's notifications were lawful, reasonable, and necessary to protect the broader interests of the national economy and employment***. The Court noted that:

> "39. ***There can be no escape from the fact that at the end of the day the offending order/notification in generic terms are delegated legislation. It is an order issued by the Government in purported exercise of powers vested in it by section 3(1) of the Import and Export (Control) Act, 1950 and every piece of delegated legislation can be subject to judicial review by this Court and struck down on the following grounds:***
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> ***(a) The statutory procedure prescribed for making them, has not been followed.***
> ***(b) They are repugnant to a provision of some other Statute.***
> ***(c) They must not conflict with the Parent Act itself.***
> ***(d) They are uncertain.***
> ***(e) They are unreasonable.***
> 2002 CLC 1819 (Muzaffar Khan and others v. Evacuee Trust Property).
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> 40. In the instant case, the petitioners have challenged the validity of the order/notification inter alia on the grounds mentioned above including reasonableness. The challenge thrown in this behalf by the petitioners must necessarily be adjudicated upon by this Court.
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> 44. Article 18 of the Constitution of the Islamic Republic of Pakistan, 1973 guarantees to the citizens the right to carry on any lawful trade or business. ***The restrictions in the instant case have been imposed through orders/notifications issued under section 3(1) of the Import and Export (Control) Act, 1950 and by virtue of section 5 thereof any export in violation of any such orders would be liable to prosecution, hence the restrictions in question have been imposed by law.*** The apparent purpose of the said orders/notifications and its social and economic impact has been discussed in great details above and the right claimed by the petitioners must

> be examined in context thereof. Article 18 and the right guaranteed thereby cannot be interpreted by excluding or ignoring any other provisions of the Constitution including Article 38 which casts responsibility upon the State to secure the wellbeing of the people and to promote and protect employment. In this behalf, categorical command of Article 3 of the Constitution can also not be ignored. The right claimed by the petitioners must necessarily be exercised in harmony with the overriding needs and interest of the community and the State and its responsibilities under the Constitution. A balance in this regard has to be struck between the rights of individuals and the interest of the community and the State. The petitioners cannot claim to exercise the right under Article 18 in a manner which would result in a dramatic loss to export earnings of the country further widening in trade deficit with all its attending adverse impacts on the economy and resulting in increase of unemployment. ***The interest of the State and the community cannot be ignored or sacrificed for the profits sought to be made by the individual at the cost of great hardship to a significant segment of the population. In the above perspective, this Court is not persuaded to hold that the offending orders/notifications contravene or violate Article 18 of the Constitution of Islamic Republic of Pakistan."***

It is an established principle of law that the Courts should exercise ***caution*** and ***judicial restraint*** when intervening in ***matters of economic policy*** and legislative authority. In case *Peshawar Electric Supply Company Ltd. (PESCO) v. SS Polypropylene (Pvt.) Ltd.* **(PLD 2023 Supreme Court 316),** the Supreme Court highlighted that the High Court had overstepped its jurisdiction by interfering in a policy decision that fell within the purview of the National Electric Power Regulatory Authority (NEPRA). The Court asserted that such matters involve complex economic considerations that are better suited for resolution by specialized regulatory bodies rather than the judiciary. It was observed that:

> *"24.* ***As noted above, the High Court appears to have arbitrarily interfered in a policy matters which it should have been reluctant to do considering that such matters concern complex factors which have a direct impact on the economy of the country.*** *Where the legislature has expressly provided an authority for determination in such matters, in the shape of NEPRA, then, such authority allowed to perform its functions because it has technical knowhow owing to the fact that it comprises members from various technical fields. It has been held by this Court that in cases involving utilities and economic regulation, there are good reasons for judicial restraint and/or judicial deference to legislative judgment. It is not the responsibility of the Court to regulate economic policy. The responsibility of the Courts is limited to legal interpretation. The Court is expected to enforce fundamental rights reasonably and not in a manner which creates hurdles and unnecessary complications. In the instant case with all due respect, the learned High Court has overstepped its jurisdiction under Article 199 of the Constitution and, has overridden the policy/framework of NEPRA which matter is beyond the jurisdictional parameters of the High Court. In such a situation, the learned High Court was required to exercise self-restraint and defer the matter for determination to NEPRA. Reliance in this respect is placed on the case of Elahi Cotton Limited v. Federation of Pakistan (PLD 1997 Supreme Court 582."*

In the case of **Kashif Law Book House vs. Federation of Pakistan (LEX/LHPK/0043/2024)** the Lahore High Court addressed the constitutional validity of S.R.O. No. 927(I)/2019, which imposed a ban on the import of law books and journals of Indian origin. The Court concluded that while the impugned SRO was not unconstitutional per se, it directed the Federal Government to establish a review mechanism for the import of law books and journals. ***Copy of judgment published on Manupatra and available on the Lahore High Court's website is annexed.***

In the case <u>*Moazzam Habib and others vs Federation of Pakistan and others*</u> **(2018 YLR 222)** the petitioners, acting pro bono, challenged the validity of SRO No. 83(k)/2002 issued by the Federal Government. This notification excluded certain urban areas of Islamabad, including Zone-V, from the application of the Islamabad Rent Restriction Ordinance, 2001 (IRRO 2001). The court observed that the notification was arbitrary and lacked intelligible differentia, thereby violating the equal protection of law guaranteed by Article 25 of the Constitution of Pakistan. The court directed the Federal Government to amend the notification to include Zone-V and other excluded areas within the urban limits of Islamabad under the IRRO 2001, providing equal protection to landlords and tenants in those areas. The writ petition was allowed. However, ***the Court recognized the power of authority to vary, amend, add or rescind while referring to section 21 of the G.C Act.*** It stated that:

> "*23. It is also settled proposition of law that the authority, which can pass an order, is entitled to vary, amend, add, or to rescind that order in terms of section 21 of General Clauses Act, 1897, whereas the said section reads as under:--*
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> > *"21. Power to issue, to include power to add, amend, vary or rescind, notifications, orders, rules, or by-laws - Where, by any (Central Act) or Regulations, a power to (issue notifications) orders, rules, or by-laws is conferred, then that power includes a power, exercis-able in the like manner and subject to the like sanction and condition (if any) to add to, amend, vary or rescind any (notifications), orders, rules or by-laws so (issued)."*

In conclusion, the principle of judicial restraint is crucial when it comes to courts intervening in policy matters, as illustrated by aforesaid cases, Courts are tasked with interpreting the law rather than making policy decisions, particularly in areas that involve complex economic considerations and specialized knowledge. Therefore, Court, in the light of afore-cited cases, have to exercise judicial restraint unless, such policy decision are patently arbitrary, illegally, unreasonable and violate any vested right of an individual.