
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: **30TH SEPTEMBER 2024**

BY: **WASEEM AHMED RESEARCH OFFICER**

Query:

When policy matters of the Government are amenable before the High Court for judicial review, if so, what would be the prerequisites?

RESPONSE

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

Article 199 outlines the jurisdiction of the High Courts in judicial review, allowing them to question the legality of executive actions. However, this authority is not unlimited. The Constitution envisions that certain matters, particularly those concerning government policies, should remain within the domain of the executive unless they breach constitutional rights or statutory law.

In case of *FEDERATION OF PAKISTAN through Secretary, Ministry of Industries and Production and another vs HAMZA SUGAR MILLS LTD. and others* [P L D 2021 Supreme Court 806] the petitioners argued that the High Court had exceeded its jurisdiction by delving into technical and commercial issues, which traditionally lie within the executive's domain. The Supreme Court of Pakistan addressed High Court's intervention in policy matters related to the ***pricing*** and ***market regulation of sugar***, an ***essential commodity***. The case posed the question: *to what extent can courts intervene in executive decisions related to market regulation?* The Court ultimately held that such matters fall outside the jurisdiction of judicial review *unless there is a manifest violation of constitutional rights or statutory law and highlighted following important principles:*

- *Courts must refrain from adjudicating on technical, commercial, or policy issues where they lack expertise.*
- *Judicial intervention is warranted only in cases of illegality, arbitrariness, or constitutional violations.*
- *The trichotomy of powers must be respected to prevent the judiciary from overstepping its constitutional mandate.*

The relevant paragraph of the judgment is reproduced for ready reference herein under:-

*“2. The Constitutional Courts of the country have a duty to resolve legal disputes coming before them in accordance with the Constitution and the law. **In the discharge of their duties and functions, the Courts do not supervise pricing nor monitor profit and loss dealings by or between the stakeholders. In our view, the High Court has in the present case entered the uncertain territory of monitoring commercial and policy terms regulating the supply of an edible commodity in the market. This endeavour is far removed from its jurisdiction vested by Article 199 of the Constitution and is likely to involve technical details that are outside the realm of judicial adjudication.** The common questions of law and jurisdiction raised in the petitions pending before the High Court are already noted for its determination in Writ Petition No.3834 of 2020. Notices under Order XXVII-A, C.P.C. have also been issued to the Law Officers of the Federation and the Province. The respondent private parties who are present before us are also ready to proceed with their cases. We consider that judicial consideration by the High Court ought to be devoted to resolving the legal dispute between the parties rather than the pricing mechanism regulating commercial and policy matters. Accordingly, the learned High Court shall make a serious effort to decide the legal issues arising for determination in this matter within a fortnight from the date of receipt of this order. If either party prolongs the proceedings on account of adjournments or otherwise they shall be subject to penalization, inter alia, by modification of the terms of the interim relief ordered below.”*

One of the core doctrines underpinning judicial review is the *doctrine of ultra vires*, which allows courts to invalidate executive decisions that exceed the authority granted by law. This doctrine is vital in ensuring that executive actions remain within their legal bounds. However, the application of ultra vires is limited in policy matters. Courts can strike down decisions only if they are proven to violate constitutional provisions or statutory requirements. In matters of policy discretion, the executive enjoys considerable leeway. Similarly the principle of *separation of powers* is fundamental to governance system. Courts refrain from interfering in policy decisions of the Government, leaving the executive to determine matters of economic or social policy. In case of ABDUL HAMEED and others Versus WATER AND POWER DEVELOPMENT AUTHORITY through Chairman, Lahore and others [2021 S C M R 1230] the Hon’ble Supreme Court reaffirms that courts should not

interfere with policy decisions unless it is clear that the policy in question is patently illegal or the result of an arbitrary exercise of power. The role of courts is to ensure legality, not to evaluate the efficacy of policies. The judgment speaks it in the following tone.

“11. *The roles of each organ of the State are defined within the Constitution of the Islamic Republic of Pakistan, so also in different laws.* The learned Tribunal has elaborately dealt with this issue, and, has relied on a judgment of this Court reported as Muhammad Shabbir Ahmad Nasir v. Secretary Finance Division Islamabad (1997 SCMR 1026) and Muhammad Farid Khattak v. Chief Secretary Government of N.W.F.P. (2009 SCMR 980). A transgression of those roles by one organ would amount to the usurpation of the power of another, which would be against the spirit of Article 7 of the Constitution of the Islamic Republic of Pakistan. *It is not the role of the Courts to interfere in policy decisions, unless it is manifest that, such a policy decisions are the outcome of arbitrary exercise of power, mala fides, patently illegal or manifestly unreasonable.* Reliance in this regard is placed on the case of Asaf Fasihuddin Khan v. Government of Pakistan (2014 SCMR 676) of which, the relevant part is reproduced as: -

"It is to be noted that the duty of the Court is to confine itself to the question of legality. Its content should be whether a decision-making authority exceeded its powers; committed an error of law; committed a breach of the rules of natural justice; reached a decision which no reasonable tribunal would have reached; or abused its powers".

Furthermore, powers of *judicial review* granted to the High Courts by the Constitution is concerned with **legality**, not the **merits** of policy decisions. This distinction is crucial when courts are asked to review government policies, as the judiciary must avoid overstepping into the domain of the executive, which has the discretion to formulate and implement policy. To buttress this view, reference may be made to the case of **Syed AZAM SHAH Versus FEDERATION OF PAKISTAN through Secretary Cabinet Division, Cabinet Secretariat, Islamabad and another 2022 S C M R 201** in which the Hon'ble Supreme Court defined the compass and magnitude of the judicial review of the government policies. It held;

“12. The decision of Steering Committee was not particularized or person specific to the appellant but it was made applicable across the board for all Principals, Professors and Teachers in BS-20 and above which does not seem to be discriminatory or arbitrary but on account of reasonable classification with rational nexus. *The compass and magnitude of judicial review of governmental policy is now well settled and defined in which neither the court can act or represent as appellate authority with the aim of*

scrutinizing the rightness, fittingness and aptness of a policy nor may act as advisor to the executives on matters of policy which they are entitled to formulate. The extensiveness of judicial review of a policy is to test out whether it violates the fundamental rights of the citizens or is at variance to the provisions of the Constitution, or opposed to any statutory provision or demonstrably arbitrary or discriminately. The court may invalidate laws, acts and governmental actions that are incompatible with a higher authority more so, an executive decision may be invalidated for being unlawful and also maintains check and balance. This can be sought on the grounds that a decision arises when a decision-maker misdirects itself in law, exercises a power wrongly, or improperly purports to exercise a power that it does not have, which is known as acting ultra vires; a decision may be challenged as unreasonable if it is so unreasonable that no reasonable authority could ever have come to it or a failure to observe statutory procedures. The dominance of judicial review of the executive and legislative action must be kept within the precincts of constitutional structure. In the case of Abdul Hameed and others. v. Water and Power Development Authority through Chairman, Lahore and others (2021 SCMR 1230), this Court held that the roles of each organ of the State are defined within the Constitution of the Islamic Republic of Pakistan, so also in different laws. It is not the role of the Courts to interfere in policy decisions, unless it is manifest that such a policy decisions are the outcome of arbitrary exercise of power, mala fides, patently illegal or manifestly unreasonable. The court placed reliance on the case of Asaf Fasihuddin Khan v. Government of Pakistan (2014 SCMR 676), in which it was held that the duty of the Court is to confine itself to the question of legality, whether a decision making authority exceeded its powers; committed an error of law; committed a breach of the rules of natural justice; reached a decision which no reasonable tribunal would have reached or abused its powers.

The following excerpts from landmark judgments of the Supreme Court of Pakistan also highlight important principles related to judicial review, administrative discretion, and the boundaries of the judiciary's role in policy matters:

2014 SCMR 111 (Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan): The Supreme Court emphasized that foreign policy, defense, and security issues are not justiciable under Article 199 of the Constitution. Such matters fall exclusively within the domain of the executive and are protected by the principle of the trichotomy of powers between the Legislature, Executive, and Judiciary.

2014 SCMR 676 (Asaf Fasihuddin Khan Vardag v. Government of Pakistan): Judicial review is confined to legality, ensuring that a decision-

making authority does not exceed its powers or breach rules of natural justice. Courts do not assess the fairness of policies but examine whether the decision-making process was lawful, rational, and procedurally fair. This case underscores the three grounds of judicial review: illegality, irrationality, and procedural impropriety.

2004 SCMR 1570 (Mian Muhammad Afzal v. Province of Punjab): Courts generally refrain from interfering in administrative policy decisions unless a fundamental right is violated. The court highlighted that a student's admission to a program does not create a vested right to further education or admission to other courses, and administrative decisions like setting an age limit are not within the scope of judicial review.

2016 SCMR 1021 (Government of KPK v. Hayat Hussain): Government has discretion to create rules to ensure the efficiency of services, and such matters, including promotions or eligibility rules for government employees, fall within the administrative domain. The judiciary cannot interfere unless a vested right is infringed.

2012 SCMR 455 (Dr. Akhtar Hassan Khan v. Federation of Pakistan): The court upheld the privatization of public sector banks like HBL, noting that decisions made within the law and in the best interest of economic policy cannot be challenged on mere allegations of undue influence or pressure from international financial institutions. Courts cannot interfere in policy matters that are within the executive's authority unless there is proof of illegality or malfeasance.

Case cited above clearly illustrate that while the judiciary has a critical role in ensuring the rule of law, but it respects the separation of powers by generally refraining from intervening in policy decisions made by the executive, unless clear violations of law or constitutional rights are present.