

The Mustafa Impex Case: ‘A Radical Restructuring of the Law?’

Mustafa Impex, Karachi v The Government of Pakistan
PLD 2016 SC 808

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Introduction

Since 2016, the judgment passed in the *Mustafa Impex* case¹ is all pervasive on the judicial landscape of the country. The reasons are obvious; by expanding the meaning and scope of the Federal Government - which was referred to as a ‘cabinet form of government’ - the judgment drastically re-ordered the internal dynamics of the federal government and the provincial governments.² Using the language of Article 90 of the Constitution,³ the judgment stated that in the capacity of the Chief Executive of the country, the Prime Minister ‘executes policy decisions, but does not take them by himself’.⁴ The Supreme Court held that the Prime Minister could not move any legislation, finance or fiscal bill, or approve any budgetary or discretionary expenditure, without consulting and obtaining approval from the Cabinet.⁵ As was expected, the Federal Government filed a review, which was also dismissed.⁶ This case note outlines the facts of the case, the reasoning and findings of the judgment, and the consequences that might follow from it.

Facts of the Case

Certain companies which imported cellular phones and textile related items were exempted from sales tax in 2008, through a Federal Government

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¹ *Mustafa Impex, Karachi v The Government of Pakistan* PLD 2016 SC 808.

² *Ibid*, 846.

³ The Constitution of the Islamic Republic of Pakistan 1973, art. 90:

‘The Federal Government. — (1) Subject to the Constitution, the executive authority of the Federation shall be exercised in the name of the President by the Federal Government, consisting of the Prime Minister and the Federal Ministers, which shall act through the Prime Minister, who shall be the chief executive of the Federation.

(2) In the performance of his functions under the Constitution, the Prime Minister may act either directly or through the Federal Ministers.’

⁴ (n 1) 866.

⁵ (n 1) 867.

⁶ Review petitions No. 380 and 393 to 395/2016. The Review Petition was dismissed on a technical ground by discussing the scope of review in the Supreme Court of Pakistan.

notification⁷ - signed by a government official⁸ – and issued under Sections 3(2) (b), 3(6), 13 and 71 of the Sales Tax Act, 1990.⁹ However, through two later notifications¹⁰ in 2013, the earlier notification issued in 2008 was dismissed,¹¹ withdrawing the exemptions and leading to the imposition of sales tax on cellular phones and textile items at different rates. The two notifications issued in 2013 were signed by an Additional Secretary of Finance¹² under the same statutory framework who, during the litigation, revealed that approval for the same had been sought from an advisor of the Prime Minister.

A company styled as M/S Mustafa Impex, along with other companies, challenged the 2013 notifications in the Islamabad High Court on the grounds that the notifications could only be issued by the Federal Government, and that an Additional Secretary was not competent to issue such notifications. The challenge failed in the High Court. An Intra-Court Appeal was filed, which also failed. The companies then filed a Civil Leave to Appeal to the Supreme Court of Pakistan, which was accepted, leading to the judgment under consideration. The case was heard by a three-member bench of the Supreme Court, comprising Mian Saqib Nisar J. (now the Chief Justice), Iqbal Hameedur Rahman J. and Maqbool Baqar J. Mr. Syed Ali Zafar, a senior advocate of the Supreme Court of Pakistan, was appointed as *amicus curiae* in the case.

The Judgment

Authored by Justice Mian Saqib Nisar, the judgment demonstrates a painstaking attempt to interpret the words of the Constitution. After recording the averments of the petitioners, the representative of the Attorney General for Pakistan, and the *amicus curiae*, it discusses different issues such as the definition of the term ‘Federal Government’ and the meaning of the word ‘business’ in the Rules of Business. The constitutional law of the US, the UK and India is also looked at for a comparative perspective. In his analysis, the point of emphasis was the constitutional history of the country,

⁷ SRO No. 452(I)/2008 dated 11th June 2008.

⁸ The Notification was issued by Mr. Abdul Wadood Khan, Additional Secretary, Revenue Division, the Ministry of Finance, Economic Affairs, Statistics and Revenue, Government of Pakistan.

⁹ (n 1) 808.

¹⁰ SRO No. 280(I)/2013 dated 4th April 2013; and SRO No. 460(I)/2013 dated 30th May 2013.

¹¹ As stated in SRO No. 460(I)/2013 dated 30th May 2013.

¹² (n 1) [1].

especially the constitutional enactments passed in the colonial era. Tracing the origins of the legal and constitutional basis of power from the East India Company Act, 1773, to the Government of India Act, 1935, the learned judge elucidated that the powers of the Crown, the Secretary of State and the Council of Ministers, had always differed and remained distinct. With this basic premise, Justice Nisar then discussed the definition of the term 'Federal Government'.¹³ Disagreeing with the submission that there was no definition of the term in the law, he reproduced verbatim the definition of the term 'Federal Government' as stated in the General Clauses Act, 1897, before analysing it and connecting it to the 1973 Constitution. The gist of his discussion was that in the post-1973 Constitution era, the Prime Minister and the Federal Ministers in the Cabinet constituted the Federal Government. In an impassioned piece of writing, Justice Nisar noted that while the Prime Minister was the single-most important person in the Cabinet, he could not stand in the Cabinet's position. Deeming the office of the Prime Minister equivalent to the Cabinet would amount to holding the Prime Minister, a single individual, the entire Federal Government. Such an inference, according to the Court, was the 'antithesis of democracy'.¹⁴ He then utilized the 'template'¹⁵ of the Government of India Act, 1935, and explained how the 'architectural framework' of the 1973 Constitution was framed in the light of the 'template' that dealt with the 'Federal Executive'.¹⁶ The Federal Executive, in his view, was a synonym of the term 'Federal Government'. The 'template', he described, clearly distinguished between the powers of the Governor General¹⁷ and the Council of Ministers.¹⁸ It also explained the process of authentication and constitutional rule-making which dealt with the business of the Federal Government.¹⁹ Justice Nisar then analysed the analogous constitutional provisions of the 1956, 1962²⁰ and 1973 Constitutions; specifically, in the context of the 1973 Constitution, he discussed Articles 90 and 99.²¹

¹³ (n 1) 837.

¹⁴ (n 1) 865.

¹⁵ (n 1) 835.

¹⁶ *Ibid.*

¹⁷ Government of India Act 1935, s. 7.

¹⁸ *Ibid.*, s. 9.

¹⁹ *Ibid.*, s. 17.

²⁰ J. Nisar did not elaborate much on the 1962 Constitution due to its presidential form of government.

²¹ Article 99 of the Constitution reads:

'Conduct of business of Federal Government. (1) All executive actions of the Federal Government shall be expressed to be taken in the name of the President.

(2) The Federal Government shall by rules specify the manner in which orders and other instruments made and executed in the name of the President shall be

Justice Nisar presented different versions of the two constitutional provisions: the pristine form of Articles 90 and 99 in the period from 1973 to 1985, the form of the Articles in the era after 1985, and finally the post-Eighteenth Amendment form. Interpreting the language of the extant form of Article 99, he drew two conclusions:

- (a) Unlike the earlier language of Article 99, the post-Eighteenth Amendment text conspicuously omitted the delegation clause that enabled delegation of functions to officers and subordinate authorities;
- (b) The insertion of the word ‘may’ instead of ‘shall’ in the latest version of Article 99 made the Rules of Business²² mandatory.²³

The aforementioned two conclusions, in his view, introduced ‘radical restructuring’²⁴ of the law.

After examining the constitutional provisions, Justice Nisar discussed the latest version of the Rules of Business.²⁵ In the first place, he accorded wide interpretation to the term ‘business’²⁶ and included ‘all’ work done by the Federal Government within the ambit of the term. He stated that both the executive action (which was coterminous to the federal legislative authority) and the delegated law-making (which was conferred by some statutory instruments) were amply covered under the term ‘Business’.²⁷ This necessarily implied that the applicable legal framework *vis-à-vis* the working of the Federal Government was the Rules of Business. Any deviation from the Rules of Business, in his judgment, was ‘fatal to the exercise of executive power’.²⁸ Justice Nisar specifically dealt with the constitutional provision

authenticated, and the validity of any order or instrument so authenticated shall not be questioned in any court on the ground that it was not made or executed by the President.

(3) The Federal Government shall also make rules for the allocation and transaction of its business.’

²² The Rules of Business 1973 issued under Articles 90 and 99 of the Constitution of Pakistan 1973.

²³ (n 1) 841.

²⁴ *Ibid.*

²⁵ Before the judgement was passed, the Rules of Business were last revised in July 2016 vide SRO 634(I)/2016 (F. No. 4-2/2016-Min-I) dated 22nd July 2016.

²⁶ Rules of Business 1973, rule 2(iii).

²⁷ (n 1) 852.

²⁸ (n 1) 841.

dealing with fiscal law-making²⁹ that required the levying of tax to be backed by the law. After detailed discussion of the Rules of Business, Justice Nisar discussed comparative constitutional law of the jurisdictions of the United States, the United Kingdom, and India, evaluating it with respect to Pakistan's constitutional regime. Towards the end, the judgment addressed the question of law-making through ordinances³⁰ by the President. Once again employing the technique of literal interpretation, Justice Nisar held that the ordinance-making power could only be exercised after prior consideration by the Cabinet.³¹ An Ordinance issued without the prior approval of the Cabinet would be invalid. Similarly, no bill could be moved in the Parliament on behalf of the Federal Government without the prior approval of the Cabinet. Rule 16(2) of the Rules of Business - which allowed the Prime Minister to bypass the Cabinet - was held to be *ultra vires* of the Constitution. On the principle so established, and in concurrence with its earlier judgment in *Case of Ex-Prime Minister Raja Pervaiz Ashraf*,³² the discretionary spending by the Prime Minister was also held to be unlawful.

Analysis

The significance of this judgment cannot be emphasised enough; unlike other court rulings, the impact of this judgment will not be merely rhetorical. Any government action that does not conform to the judgment will be susceptible to a challenge issued upon its validity. Moreover, although the case arose out of a decision of the Federal Government, its ruling applies equally to the provincial governments because the constitutional provisions governing both are phrased similarly.

This judgment is likely to have a significant impact on the tax regime in Pakistan. Imposition and variation of tax rates is usually carried out through Statutory Regulatory Orders (SROs) issued by either the Prime Minister or the Finance Minister at the behest of the Federal Board of Revenue officials. However, this judgment essentially invalidates this entire procedure. It was held that 'all statutory rules, including those of a fiscal nature, are subordinate legislation. The power to enact subordinate legislation has to be conferred by substantive law. The Rules of Business, which merely regulate procedural modalities, cannot conceivably do so'.³³

²⁹ The Constitution of the Islamic Republic of Pakistan 1973, art. 77.

³⁰ The Constitution of the Islamic Republic of Pakistan 1973, art. 89 (dealing with temporary law making, i.e. when the Parliament is not in session).

³¹ (n 1) 871.

³² PLD 2014 SC 131.

³³ (n 1) 853.

This means that the power assumed by government to frame rules or regulations needs to be grounded in clear statutory provisions, and wherever such power has been delegated to the executive by the legislature, the Cabinet must authorise such rules. The ripples this judgment has caused among the ranks of government officials can be judged by the officials' actions with regards to the proposed constitutional and legislative amendments. To neutralize the effect of the judgment on the working of the government, two constitutional amendments bills were initiated,³⁴ which are still pending on the agenda of the National Assembly of Pakistan. The Twenty-Sixth Constitutional Amendment Bill aims to amend Article 99 to allow the government to delegate its business to subordinate authorities and functions. Similarly, amendments were made, through Finance Bill 2017, in Customs Act, 1969 (section 221A), Sales Tax Act, 1990 (section 74A), Income Tax Ordinance, 2001 (section 241), and Federal Excise Act, 2005 (section 43A), to nullify the effect of the judgment. The amendment, virtually the same for all statutes, is a validation clause which stipulates that, 'All notifications and orders issued and notified in exercise of the powers conferred upon the Federal Government, before the commencement of Finance Act, 2017, shall be deemed to have been validly issued and notified in exercise of those powers, notwithstanding anything contained in any judgment of the High Court or Supreme Court'. Although it is unclear whether these amendments, designed to bypass Article 77 of the Constitution, would stand a test of constitutional validity, their inclusion in the finance bill demonstrates the inhibitive impact the judgment has had on the functioning of the government.

Justice Nisar's reasoning was detailed, but literal; he interpreted the constitutional provisions on a textual basis. While there is nothing unusual about literal interpretation, the problem is that, in his analysis and reasoning, he tends to be both a positivist and a naturalist simultaneously. In the larger jurisprudential debate about whether the judges should apply the black letter law (the positivist approach) or the high morals and ideals (the naturalist approach), he features on both sides. He stated that compliance to the constitutionally-sanctioned rules of business would result in 'good governance'³⁵. Likewise, at another place³⁶ - while elaborating the role of the Cabinet and negating the centrality of the office of the Prime Minister to the

³⁴ The Constitution of the Islamic Republic of Pakistan [1973] Twenty-Sixth Amendment Act (2017); The Constitution of the Islamic Republic of Pakistan [1973] Twenty-Ninth Amendment Act (2017), <<http://www.na.gov.pk/en/bills.php?type=1>> accessed 16 August 2017.

³⁵ (n 1) 848.

³⁶ (n 1) 865.

system of government in Pakistan - he offered the protection of the 'hard won liberties of the people of Pakistan'³⁷ as one of the reasons for his judgment. However, the positivist undertones of the judgment, if any, are secondary to the strictly textual approach taken with regards to the interpretation of the Constitution. Justice Nisar exhibited judicial creativity by interpreting the Constitution in an unprecedented manner, which resulted in the placement of restrictions on the power of the Prime Minister without any judicial overreach on his part.

From a political science perspective, the judgment noted that the theory of separation of powers, as understood in the United States, was not rigidly adhered to in the Constitution of Pakistan.³⁸ The judgment is in line with an earlier judgment of the Supreme Court, in which the Court held that the 'executive primarily emanates out of the legislative branch of the state...'³⁹ Justice Nisar took pains to elaborate the relationship of the Prime Minister with the Cabinet. In his reasoning, the Cabinet's primacy was at the heart of the constitutional democracy, and any tendency opposing the primacy was the 'antithesis'⁴⁰ of democracy. He pegged his reasoning in the interpretation of Article 91 of the Constitution of Pakistan, which deals with the responsibilities of the Cabinet. Emphasizing the principle of collective responsibility,⁴¹ as enshrined in the Constitution of Pakistan, he noted that Pakistan's system was 'based'⁴² on the British system, where the Prime Minister was treated as '*primus inter pares*' (a first among equals). The diffusion of executive power, as envisaged by this judgment, is arguably valuable in the context of our society; a tendency towards authoritarianism is particularly pronounced amongst government officials and the style of governance is personalized. Spreading power more widely amongst cabinet members offers hope for a more deliberative and inclusive decision-making culture.

Finally, a discussion about whether the 'law' was indeed 'radically restructured', as noted by the judgment, is warranted. The statement begs many questions. First, which 'law' was under discussion? Was it the law relating to the devolution of the 'law-making authority', or was it the law relating to the devolution of the 'executive authority'? If it were the law relating to the devolution of the 'law-making authority', what was its source:

³⁷ Ibid.

³⁸ (n 1) 859.

³⁹ *M/S MFMY Industries Ltd. and Others vs. Federation of Pakistan* 2015 SCMR 1550.

⁴⁰ (n 1) 865.

⁴¹ The Constitution of the Islamic Republic of Pakistan 1973, art. 91(6).

⁴² (n 1) 866.

the constitutional law, the primary legislation, or the constitutionally sanctioned rules of business? If the source were the primary legislation i.e. the Sales Tax Act, 1990, as in the present case, how could constitutionally sanctioned rules of business dealing with ‘allocation’⁴³ and ‘transaction’ control the primary legislation? Without addressing these issues neatly, the judgment has applied interlocking reasoning of construing a broad definition of the word ‘Business’ and lumping all the authority of the executive power under it. The confounding situation is not unique to Pakistan. Similar debate about the very source of law ensued in *R (On the Application of Miller and another) v Secretary of State for Exiting the European Union*⁴⁴ in the United Kingdom (UK), which decided whether the government could initiate the UK’s withdrawal from the EU without reference to Parliament. The UK Supreme Court, in a majority decision, found that the matter was to be referred to the Parliament. One of the questions, at the heart of the *Miller Case*, was the constitutional value of the European Communities Act, 1972 (the ECA). Was the ECA an independent source of law unto itself? Therefore, the Supreme Court of Pakistan deserves to be given a discount for not unequivocally discussing the issues. It is hoped that, sooner rather than later, the issues might be addressed by the apex court and the law shall definitely stand settled in order to be categorized as ‘radically restructured’.

Conclusion

The significant impact of this landmark judgment of the Supreme Court is far from being realized. The judgment not only rebukes but also completely abolishes the personalized style of governance adopted by both elected and non-elected officials in Pakistan. Its far-reaching impact is visible in how the Federal Government is trying to circumvent it by proposing constitutional and statutory amendments. Similarly, the ratio set out in the judgment has become a touchstone against which the actions of the government are being challenged in the superior courts on a regular basis. Recently, the Lahore High Court struck down the devolution of the Sheikh Zayed Postgraduate Medical Institute (SZPMI), which had been effected through a 2012 notification issued by the Cabinet Division. This notification was issued on the direction of the then Prime Minister, transferring the administrative control of the institute to the provincial government of Punjab.⁴⁵ One of the reasons set out in the judgment was that the impugned notification was issued by the Prime Minister, to the exclusion of his Cabinet, and did not

⁴³ (n 1) 848.

⁴⁴ [2017] UKSC 5.

⁴⁵ *All Pakistan Paramedical Staff Federation Unit, SZPMI, Lahore v Federation of Pakistan* PLD 2017 Lah 640.

carry any legal sanction. The *Mustafa Impex* judgment thus also serves to demonstrate how the Supreme Court, without indulging in any anti-government rhetoric or display of judicial outreach, is still capable of having a significant impact on the governance structures of the country.