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Judgment Sheet

IN THE LAHORE HIGH COURT, LAHORE.

(JUDICIAL DEPARTMENT)

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Writ Petition No.15453/2024.

Human Rights Commission of Pakistan.

Versus

Federation of Pakistan through Secretary, Ministry of Economic Affairs, Islamabad and another.

JUDGMENT

Date of hearing: **28.06.2024**

Petitioners by: M/s Hina Jillani, Muhammad Saqib Jillani and Rai Asad Ahmad, Advocates.

Respondents by: Ch. Imtiaz Ellahi, Deputy Attorney General for Pakistan.
Mr. Aftab Ahmad Khan, Deputy Secretary Ministry of Economic Affairs.

ASIM HAFEEZ, J. Through this and connected constitutional petitions, numbered W.P. No. 29024/2024 and W.P. No.34713/2024, the legality-cum-enforceability of the Policy bearing No.2(2) NGO/Policy/2016 DATED 24th November 2022 - ***"Policy for Local NGOs/NPOs Receiving Foreign Contributions-2022"***, (in short, the '***Policy***') is questioned on the premise that it fails to meet

requirements of qualifying clause; clause (a) of Article 18 of the Constitution of Islamic Republic of Pakistan 1973 ('the Constitution'), and the Federal Government / Federal Cabinet (in short "Federal Cabinet" for the purposes of the lis) lacked requisite legislative authorization for the purposes of framing the Policy.

2. Policy, manifestly, intended to regulate and enhance the effectiveness of foreign funding being received, availed and utilized by Non-Profit Organizations [in short 'NPO'] and Non-Governmental Organizations [in short 'NGOs']. Petitioners claimed their registration/incorporation under the statutory framework, which is the Societies Registration Act, 1860 (**Act, 1860**), and pleaded that no restriction(s)/limitation(s) could be imposed qua their right(s)/entitlement(s) to receive and utilize foreign funds / contributions without the sanction of law, and especially when their operations, affairs and activities, including management of fiscal matters including foreign funding, are managed and regulated by law, wherein no breach is reported or alleged.

Essentially the question tossed for judicial determination is,

> *"Whether an act of framing and enforcing of the Policy by the Federal Cabinet constitutes lawful exercise of executive authority in the context of*

enumeration in clause (a) of Article 18 of the Constitution".

3. Profiling of the Policy is imperative to understand its scope and legal reach. Policy envisages introduction and enforcement of constraints and regulatory checks on NPOs and NGOs with respect to the receipt, availability and utilization of foreign funding/contribution(s). Not specifically expressed but, apparently it resonates the steps taken and efforts made to deal with the difficulties encountered in wake of classification of the Country in non-compliant category under the FATF regime. Policy provided that the authorized officer of the Ministry of Economic Affairs (MoEA), not below the rank of BS-21, shall approve or reject the request of the NPOs and NGOs for execution of MOU with MoEA. Policy, conspicuously, has extended superintending role for the security agencies – whose designation remained unidentified. Policy spelled out that security agencies are required to grant clearance before signing of MOU. MOU is required to sign for each project and its validity is for three years, unless suspended or terminated. MOU is sort of permission granted to the entities, in receipt of foreign funding, and it envisages monitoring of project(s) funded through foreign funds.

Report and para-wise comments were submitted on behalf of respondent No.1 - Federal Government.

4. Learned counsel submit that previously a similar attempt was unsuccessfully made through promulgating the policy, approved by Economic Coordination Committee of the Cabinet, for regulation of Organizations receiving foreign contributions vide Notification No. I(5)INGO/05 dated 28.11.2013, which policy was, by and large, identical in content and objectivity. Adds that policy stood invalidated through decision reported as "*MARIE STOPES SOCIETYVS v. FEDERATION OF PAKISTAN through Federal Secretary and 4 others."* (**2022 CLC 880**) -, wherein, besides observing that policy was non-compliant in the context of the dictum laid in the case of *'Messrs Mustafa Impex Karachi and others v. Government of Pakistan, through Secretary Finance, Islamabad and others"* (**PLD 2016 Supreme Court 808**), the most crucial ground was absence of sanction of law and authority available for framing and enforcing the policy. Adds that likewise no sanction of law is available for extending requisite legal support / cover to the Policy. Learned counsel elaborates that petitioners are registered entities under Act, 1860 and are dealing with foreign funding / contributions, subject to the existing legal framework. Adds that mere Policy, without sanction of law, cannot be employed to prejudice fundamental rights extended under Article 18 of the Constitution. Further submits that the Policy is otherwise arbitrary, partial, oppressive and unique in the sense that supervisory role was assigned to the security agencies, which are required to grant clearance to the petitioners for confirming their eligibility to execute MOU. Adds

that exercise of authority by the Federal Cabinet, in the garb of assumption of powers under Rules of Business 1973, is misconceived and no authority could be drawn from the said Rules without the sanction of law. Learned counsel for the petitioners submitted written material explaining the scope of FATF regime and details of applicable regulatory regime to tackle money laundering, terrorism financing, etc.

5. Conversely, learned Deputy Attorney General, assisted by Officer of MoEA, explained that Federal Cabinet, in exercise of its executive authority, is competent, eligible and vested with the authority to frame and introduce the Policy, purpose whereof is to regulate foreign funding/contribution(s) received, collected and utilized by the NGOs / NPOs. Submits that Article 18 of the Constitution provided for regulating the trade / profession through a licensing system, and mechanism provided in the Policy for executing the MOU, is manifestation of prospective licensing arrangement, ought to be implemented. Submits that role of the security agencies is limited to the rendering of assistance regarding matters touching national security and terrorism financing issues, and absence of such-like checks would exacerbate difficulties for the Government in the context of FATF regime, which if not addressed, have had the potential of threatening the financial autonomy of the Country. Adds that requirements prescribed in *Messrs Mustafa Impex* (case) were met.

6. Heard. Report / Para-wise comments and written material perused. In nutshell, the argument and counter argument hinges upon the construction of clause (a) of Article 18 of the Constitution; context being the Policy.

7. Jurisprudence, defining the scope and extent of fundamental rights acknowledged in terms of Article 18 of the Constitution, is well settled, which provision underpinned the concept of grant of qualified right(s) – envisaging imposition of "reasonable restrictions" for regulating the trade or profession through licensing system. It is not disputed that the entities, seeking indulgence against the enforceability of the Policy, are registered/incorporated under Act, 1860, which are otherwise carrying activities subject to existing / applicable legal framework, including matters dealing with foreign funding/contribution, and violation of any statutory direction is not alleged against any of the petitioners. In aforesaid context, the scope of subject matter determination is confined to the question that whether the Policy is in accord with the mandate of and fulfills the requirement under first proviso to Article 18 of the Constitution – [*clause (a) in particular*]. No objection regarding locus-standi of the petitioners to approach this Court is raised.

8. Learned counsel for the petitioners emphasized that incumbent Policy also suffers from similar vices / deficiencies / defects, found fatal to the previous policy and ratio of the decision in the case of

"*MARIE STOPIES SOCIETY"* (supra) is fully attracted. In the context of the precedent cited, evidently previous policy was struck down, largely on two grounds. Firstly, non-adherence to the dictum laid in the case of *'Messrs Mustafa Impex'* (supra), and secondly, absence of requisite sanction of law to draft and enforce the policy. Learned Division Bench of Sindh High Court observed that policy itself acknowledged absence of requisite legal authority, and paragraph 17 thereof is reproduced hereunder, for better comprehension,

> *"17. In the celebrated Judgment of* ***Messrs Mustafa Impex v. Government of Pakistan*** ***PLD 2016 SC 808****, THE Honourable Supreme Court while examining different Articles of the Constituting, has observed that under Article 90 of the Constitution of the executive authority of the Federal Government. The Federal government is then described as consisting of fundamentally, in the opening paragraph of the Policy it has been incorporated that "****until legislation for a regulatory framework for foreign economic assistance flowing outside government channels is enacted, for improved accounting of such flow of funds and greater and effectiveness the following policy will operate.****" The word "until" used in the aforesaid paragraph of the policy is defined in the Black's Law Dictionary Sixth Edition as under:-*
>
> > *"****Until.*** *Up to time of. A word of limitation, used ordinarily to restrict that which precedes to what immediately follows it, and its office is to fix some point of time or some event upon the arrival or occurrence of which what precedes will cease to exist."*
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> ***Interestingly enough the Notification was issued in the November, 2013 and till date no legislation for a regulatory framework for foreign economic assistance flowing outside governmental channels is enacted*** *nor there anything on the record or submitted by the learned DAG that the Policy was placed before the Cabinet for decision / approval, as the case may be."*
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> [Emphasis supplied]

9. Regarding the question of sustainability of incumbent Policy, evidently approval of the Federal Cabinet was secured, but absence of sanction of law continue to haunt the Policy. Conspicuously, Policy contained no reference to any law, authorizing Federal Cabinet to

frame and introduce the Policy - there are over one dozen laws dealing with FATF, accessible at https://fatf.gov.pk/LawsRegulations/Laws#. Para-wise comments contained no reference to any law, authorizing the Federal Cabinet to frame the Policy. Whether, the Policy, simplicitor, could be employed to jettison the fundamental rights acknowledged through Article 18 of the Constitution. Policy, in the absence of sanction of law or legislative authorization, cannot be acknowledged as a vehicle to restrict exercise and enjoyment of qualified fundamental rights. Executive authority cannot be allowed to expropriate the rights through policy-making mechanism, unless policy is hedged by law. Observations recorded in paragraph 26 of the *"Pakistan Muslim League (N) through Khawaja Muhammad Asif, M.N.A and others Vs. Federation of Pakistan through Secretary Ministry of Interior and others"* (**PLD 2007 Supreme Court 642**) are apt for understanding the scope and extent of the authority of the executive, which read as,

> 26. It may not out of place to mention here that **"*There is no inherent power in the executive, except what has been vested in it by law, and that the law is the source of power and duty*.** *The structure of the machinery of government, and the regulation of the powers and duties which belong to the different parts of this structure are defined by the law, which also prescribes, to some extent the mode in which these powers are to be exercised or those duties performed.* ***From the all pervading presence of law, as the sole source of governmental powers and duties, there follows the consequence that the existence or non-existence of a power or duty is, a matter of law and not of fact, and so must be determined by reference to same enactment or reported case. Consequently there are no powers or duties inseparably annexed to the executive Government. It cannot be argued that a vague, indefinite and***

> ***wide power has keen vested in the executive to invade upon the proprietary rights of citizens and that such invasion .cannot be subjected to judicial scrutiny if it is claimed that it is a mere executive order. This is not the position in law. Any invasion upon the rights of citizens by anybody no matter whether by a private individual or by a public official or body, must be justified with reference to some law of the country. Therefore, executive action would necessarily have to be such that it could not possibly violate a Fundamental Right. The only power of the executive to take action would have to be derived from law and the law itself would not be able to confer upon the executive any power to deal with a citizen or other persons in Pakistan in contravention of a Fundamental Right****. Functionaries of State, are to function strictly within the sphere allotted to them and in accordance with law. No Court or Authority is entitled to exercise power not vested in it and all citizens have an inalienable right to be treated in accordance with law. Therefore, an action of an Authority admitted to be derogatory to law and Constitution, is liable to be struck down."*
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> [Emphasis supplied]

Learned Division Bench of this Court in the case of *"Province of Punjab through its Home Secretary, and 3 others Vs. Gulzar Hassan, Advocate and 8 others"* (**PLD 1978 Lahore 1298**) had dilated upon the effect of the notifications issued through executive action, not backed by law – [in which case question of fundamental rights and scope of Article 4 of the Constitution was discussed in the light of the ratio laid in the case of "*Ch. MANZOOR ELAHI v. FEDERATION OF PAKISTAN ETC*. (**PLD 1975 Supreme Court 66**)]. It is expedient to reproduce paragraphs 59, 60 and 61 from the decision in case of "*Gulzar Hassan, Advocate and 8 others"* (supra), which read as,

59. *"In view of the above observations of the Supreme Court,* ***it is absolutely clear that no executive authority can take any executive action without the support of a valid law*** *and any action taken in violation of the above rule can be struck down by the High Court under Article 199 of the Constitution as being without lawful authority".*

60. As noted above Article 233(1) only refers to future legislation. The executive actions contemplated therein, therefore, necessarily concern the future legislation and not any of the void existing laws. ***Secondly the Constitution prohibits under Article 8(2) to make any legislation in violation of Fundamental Rights and also does not permit any legislation with the exception of the 6 Fundamental Rights mentioned under Article 233(1) it cannot be said that tie executive authorities can achieve the same result by purporting to take executive actions.*** *In any case, observed by their Lordships of the Supreme Court in Manzoor Elahi's case the guarantee under Article 4 is quite separate and distinct from the Fundamental Rights and as no inroads have been permitted, even during Emergency into that provision, by any of the constitutional provision, the said guarantee cannot be allowed to be flouted.* ***The executive authority, therefore, must rely on some valid law in order to support its action.***

61. The present case is placed at a better footing. ***The so-called executive action in the form of notifications had been published in this case on a date when no order under Article 233(2) was in the field. As discussed above, there was no law in operation authorising the respondents to have issued those notifications either. The law under which those two notifications were issued is admittedly inconsistent with the Fundamental Rights No. 17 and was void and so unenforceable. It, therefore, was not available for any executive action in the light of the discussion already made.*** *It was never revived so as to be operative once again on the issuance of the Proclamation Emergency. The two notifications, therefore, could be scrutinized by the High Court and we respectfully agree with the learned Single Judge that they were issued without lawful authority and are of no legal effect."*

[Emphasis supplied]

10. Action of the Federal Cabinet lacked sanction of law and legislative authorization. Unless Policy is hedged by legislative instrument / statutory law, it cannot be enforced to prejudice rights granted under constitutional mandate. Ratio of decision in the case of *"PAKISTAN BROADCASTERS ASSOCITION and others v. PAKISTAN ELECTRONIC MEDIA REGULATORY AUTHOROITY and others"* (**PLD 2016 Supreme Court 692**) is aptly attracted for the purposes of elucidating the proposition of law, involved. It is expedient to reproduce observations recorded in paragraph 16 thereof,

> *"Undoubtedly no one can be deprived of his fundamental rights. Such rights being incapable of being divested or abridged.* ***The legislative powers conferred on the State functionaries can be exercised only to regulate these rights through reasonable restrictions, and that too only as may be mandated by law and not otherwise****. The authority wielding statutory powers conferred on it must act reasonably (emphasis supplied) and within the scope of the powers so conferred.*
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> *[Emphasis added]*

11. A seven members Bench of Hon'ble Supreme Court of Pakistan in the case of *"ARSHAD MEHMOOD and others v. GOVERNMENT OF PUNJAB through Secretary Transport Civil Secretariat, Lahore and others"* (**PLD 2005 Supreme Court 193**), interpreted Article 18 of the Constitution in the context of Section 69-A of West Pakistan Motor Vehicles Ordinance 1965, which observations, relevant for the purposes of present *lis*, are reproduced hereunder,

> *Para 23.* *"It is well settled that the right of trade / business or profession under Article 18 of the Constitution is not an absolute right but so long a trade or business is lawful a citizen who is eligible to conduct the same cannot be deprived from undertaking the same,* ***subject to law which regulates it accordingly*** *……."*
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> [Emphasis supplied]

12. Constitutional scheme does not envisage exercise of legislative powers by the Federal Cabinet, unless such power / authority is exercised under the authority of the legislature. An act of policy making, in absence of legislative authorization, manifests encroachment in legislative domain vis-a-vis the requirements prescribed under qualifying provision of law – clause (a) of Article 18 of the Constitution. No prerogative / authority could be extended to the Federal Cabinet to curtail fundamental rights through executive action, upon framing of policy, unless such action is backed by law. Assumption and exercise of powers, without legislative authorization, for regulation of trade through licensing system in garb of clause (a) of Article 18 of the Constitution, constitutes patent abuse of executive authority and violation of constitutional scheme of trichotomy of powers. Policy under reference cannot be elevated to the status of law for obvious reasons. Federal Cabinet cannot claim concurrent powers with the legislature for the purposes of clause (a) of Article 18 of the Constitution. Federal Government, in terms of Article 7 of the Constitution, is one of the constituents of the State, along with the *Majlis-e-Shoora* (Parliament) and others. Federal Government cannot

claim entitlement to make law(s), on the analogy that use of the expression 'State' in clause (2) of Article 8 of the Constitution merely restrains the State from making law in derogation of fundamental rights, and otherwise entitles the State, *inter alia* the Federal Government to make law(s) in accordance with the qualifications / limitations prescribed without prejudicing fundamental rights under Chapter-I of Part-II of the Constitution. This assumption is misplaced. Power of the executive to legislate is subject to delegation through legislative authorization – often termed as subordinate legislation or delegated authority by the legislature. Expression "Federal law" is defined under Article 260 of the Constitution, which means the law made by or under the authority of the *Majlis-e-Shoora* (Parliament). Policy, claiming force of law, can be framed by the executive provided it is made under the authority of *Majlis-e-Shoora* (Parliament), but not otherwise. The authority of law is conspicuously missing. Policy manifests exercise of colorable authority, overlooking the principle that "*What cannot be achieved directly cannot be achieved indirectly"*. Hence, the restrictions / limitations introduced through the Policy without the sanction of law are not sustainable under clause (a) of Article 18 of the Constitution.

13. Reliance upon the Rules of Business 1973, while claiming authority to frame the Policy, is misplaced, which Rules do not confer any authority / power to frame Policy without availability of delegated

legislative powers. Import of Clause (3) of Article 99 of the Constitution is clear and requires no interpretation, which prescribed that *"The Federal Government shall also make rules for the allocation and transaction of its business"*. Rules do not extend policy making authority without the sanction of law / legislative authorization.

14. Policy and conditionalities proposed thereunder, on bare reading, are otherwise found unlawful and unreasonable whereby gatekeeper's role, for assessing entity's suitability, for the purposes of qualifying an entity for signing of MOU, was assigned to the security agencies, without identifying the description / title of the security agencies and explaining that under what authority of law such role could be assigned. [Clause 7(e) of the Policy caters for such requirement].

In the context of the proposition confronted, I lay my hands on the decision, in the case of *'SHOUKAT ALI v. GOVERNMENT OF PAKISTAN through Secretary Interior, Ministry of Interior, Islamabad and 2 others'* (**PLD 2024 Islamabad 135**), where learned Single Judge in Chambers had denied declaration of legitimacy sought qua an informal and unwritten practice of seeking no objection certificate from the Ministry of Interior, Islamabad, prior to the issuance of license rights by Pakistan Electronic Media Regulatory Authority (PEMRA), terming such requirement – when the parent law does not envisage intended discourse – as fraud on the statutory scheme. In the same vein,

role proposed for the security agencies through the Policy, having no force of law, manifests commission of gross illegality, unreasonableness and unwarranted intrusion in the exercise of permissible fundamental rights. No policing powers, without the sanction of law [either through primary or subordinate legislation], are available nor could be extended to the executive for the purposes of restricting or denying constitutionally guaranteed rights of the petitioners, including right to receive and utilize foreign funding / contribution – [*In terms of sub-clause (b) of clause (2) of Article 4 of the Constitution, petitioners cannot be prevented from or be hindered in doing that which is not prohibited by law, and in terms of sub-clause (c) of clause (2) of Article 4 of the Constitution, petitioners cannot be compelled to do that which the law does not required them to do]*. And likewise, no leeway could be conceived or extended to the security agencies, to act as an instrumentality of the executive, when no legislative authorization was available with the executive to frame the Policy. In fact, allowing superintendence by the security agencies, without the backing of law or requisite legislative authorization, negates the principle and practice of constitutional / parliamentary democracy. Federal Cabinet is constitutionally obligated to adhere to the principle of supremacy of the legislature.

15. Ratio settled in the case of "*MARIE STOPES SOCIETY"* (supra) – judicial findings in paragraphs 9, 10, 11, 12 and 13 are fully

attracted. It goes without saying that notwithstanding the magnitude of the problem encountered, the Executive / Government has to follow the mandate of law, either by resorting to the options available under existing legal framework or approach the legislature for seeking fresh legislation – subject to legislative competence.

16. In view of the aforesaid, the impugned Policy fails to meet the conditions prescribed for encumbering the qualified rights, extended in terms of clause (a) of Article 18 of the Constitution, hence, these petitions are allowed, and consequently the Policy is, hereby, declared unlawful, invalid and of no legal effect.

(ASIM HAFEEZ)
JUDGE

Announced and signed in open Court on this 6th day of September-2024.

JUDGE

APPROVED FOR REPORTING

JUDGE

Imtiaz Nasir