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IMPLEMENTATION OF THE 18TH CONSTITUTIONAL AMENDMENT

Briefing paper on "Regulatory Authorities"

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List of Abbreviations

CCI	Council of Common Interests
CCP	Competition Commission of Pakistan
CPCB	Central Pollution Control Board
CRTC	Canadian Radio-Television and Telecommunications Commission
DRAP	Drug Regulatory Authority of Pakistan
ECOS	Environmental Council of the States
EPA	Environmental Protection Agency (in the U.S)
FAB	Frequency Allocation Board
FES	Friedrich-Ebert-Stiftung
FIRA	Foreign Investment Review Agency
KESC	Karachi Electric Supply Company
NEPRA	National Electric Power Regulatory Authority
NIRC	National Industrial Relations Court
OGRA	Oil and Gas Regulatory Authority
OMB	Office of Management and Budget (in the U.S)
PEMRA	Pakistan Electronic Media Regulatory Authority
PIPS	Pakistan Institute for Parliamentary Services
PLD	All Pakistan Legal Decisions
PPRA	Public Procurement Regulatory Authority
PSQCA	Pakistan Standards and Quality Control Authority
PTA	Pakistan Telecommunication Authority
SECP	Securities & Exchange Commission of Pakistan
SPCB	State Pollution Control Board
VAT	Value Added Tax
WAPDA	Water and Power Development Authority

Foreword

The Eighteenth Amendment in the Constitution of Pakistan ensures the strengthening of federating units and hence the federation overall. It is the mutual responsibility of both the federal and provincial governments to implement this landmark amendment in full spirit and letter. On one hand, provincial governments need to exercise their respective authority to legislate while on the other hand the federal government needs to trust its federating units and be responsive. This needs political will and seriousness towards the implementation of the amendment.

Due to the 18th Amendment the legislative and executive authorities of the federal and provincial governments have been delimited by assigning the exclusivity of 53 subjects to the federal government, 18 subjects to the Council of Common Interests (CCI) and all residual subjects to the provincial governments. In the aftermath of this amendment, not only the regulatory authorities on provincial level came into existence but also the federal government has placed functioning of 5 Regulatory Bodies i.e.; National Electric Power Regulatory Authority (NEPRA), Pakistan Telecommunication Authority (PTA), Frequency Allocation Board (FAB), Oil and Gas Regulatory Authority (OGRA) and Public Procurement Regulatory Authority (PPRA) under concerned ministries. An important question arises with respect to the validity of regulatory authorities to regulate the subjects which has been devolved to the provinces in the aftermath of 18th Amendment. Also, how are they going to affect the exercise of powers at the provincial level? Therefore, this paper which deals in same issue is of utmost importance and hopefully will be source of re-emphasizing the issue for future discussions.

The constitution of any country ensures the existence of the social contract between the state and its citizens and, therefore, directly deals with them on all levels, and 18th Amendment is no different in this perspective. I believe that academicians, activists and representatives of civil society are all equally important when it comes to the implementation of the 18th Constitutional Amendment.

I would like to compliment the Pakistan Institute for Parliamentary Services (PIPS) for taking the responsibility to develop this paper. I am also thankful to the Friedrich-Ebert-Stiftung Pakistan Office and PIPS for putting the best of their efforts to not only intellectually support the Senate's Functional Committee on the Devolution Process through conducting provincial consultation meetings on the implementation of the 18th Constitutional Amendment, but also for developing literature on these topics which hopefully will be a valuable source of information and awareness for the stakeholders.

Senator Mir Kabeer Ahmed Muhammad Shahi

Chairman,
Senate's Functional Committee on Devolution Process

20th December 2017

Preface

Dear Readers!

Pakistan Institute for Parliamentary Services, (PIPS) is established through an Act of the Parliament in 2008 as an exclusive research and training institution for the members of National Parliament and provincial assemblies, legislative institutions, parliamentary committees as well as their functionaries.

The institute has setup an institutionalized system of conducting research and analysis as well as holding capacity building events, public hearings and policy dialogues to assist parliamentarians in their arduous tasks of legislation, representation and oversight. The Institute provides for regular and elaborate research on demand and technical research products to individual Members of Parliament as well as Standing Committees.

Parliamentary Committees are the brain of legislature where cross party deliberations in an objective manner give way to concrete way forward in the shape of workable consensus oriented recommendations on all matters of national importance. It is one of the mandated functions of the Pakistan Institute for Parliamentary Services to provide non-partisan objective research support to the Parliamentary standing committees.

Regulatory bodies are independent authorities set up through legislation and given significant responsibility of protecting the public interest. The post-18th Constitutional Amendment supervision of regulatory authorities has emerged as a critical concern. It as being included in Federal Legislative List Part II, seems to be primarily the responsibility of Council of Common Interest (CCI) to draw policy for how to steer running of such concerns in a manner addressing point of views of federal government and all federating units. We are pleased to provide customized research on the imperative topic: "Regulatory Authorities in Pakistan to Functional Committee on Devolution Process-Senate of Pakistan, which will markedly enhance the readers' understanding viz a viz the post-18th amendment role and supervision of these regulatory authorities.

We extend our special thanks to the Friedrich-Ebert-Stiftung (FES), for providing support in holding absorbing meeting of the Senate of Pakistan's Functional Committee on Devolution Process in addition to printing this writeup by the Pakistan Institute for Parliamentary Services.

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22nd December 2017

1. Introduction:

Autonomous authorities/organizations are entrusted with the responsibility as regulators to work in the larger interest of the nation and its institutions. In order to develop understanding about the role of such organizations/ bodies it would be important to analyze the technical definition of the term regulate/regulation.

In Black's Law Dictionary the term regulation has been defined as "The act or process of controlling by rule or restriction."¹

The term "regulate" has been defined in *Burma Shell vs. Labor Comm.*² as follows:

"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 or proper manner. It further connotes the obtaining of a sort of uniformity in matters of conduct so that the arbitrariness, whimsicality and capriciousness are 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."

In *KESC vs. NIRC*³ the term 'regulate' has been defined as:

"The word 'regulate' is defined to mean, 'to control, to adopt, or to adjust by rule.' It is synonymous with the word 'control' or 'govern'. Accordingly, in ordinary parlance it implies the right to prescribe and enforce all such proper and reasonable rules as may be deemed necessary and wholesome in conducting an avocation in proper and orderly manner".

2. Regulatory Authorities in Pakistan:

Regulatory bodies play an important role in safeguarding the public interest. Before discussing the scope of regulatory bodies in Pakistan, it would be important to define the technical meaning of the regulatory bodies.

The relationship of the regulatory bodies with government has been explained in the Oxford English dictionary as:

"..... 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 power over regulation, but are also subject to the controls by elected politicians and judges."⁴

In Pakistan, the legal character of regulatory bodies has been elaborated in *Muhammad Yasin v. Federation of Pakistan through Secretary, Establishment Division*⁵, where the Supreme Court, while examining the provision of the Oil and Gas Regulatory Authority Ordinance, 2002, observed:

1. Black's Law Dictionary, Ninth ed., p. 1398.

2. PLD 1982 Kar. 33.

3. PLD 1982 SC 113

4. The Oxford English Dictionary, Tenth Edition, 1206

5. PLD 2012, SC 132.

“These material provisions of the Ordinance – independence guaranteed by the statute, coupled with the objective of protecting the public interest and efficient regulation are of particular significance in the adjudication of this petition as will become evident shortly. In terms of regulatory autonomy, OGRA is just one amongst a number of regulatory authorities which have been created in Pakistan during the past few decades to ensure good governance in important (mainly economic) sectors of the country. These include the National Electric Power Regulatory authority (“NEPRA”), Pakistan Telecommunication Authority (“PTA”), Pakistan Electric Medical Regulatory Authority (“PEMRA”), Securities and Exchange Commission of Pakistan (“SECP”) and Competition Commission of Pakistan (“CCP”). These bodies have explicitly been made autonomous to ensure that they remain free from political or other interference and thus remain focused on the objectives of their parent statutes.”

In the light of this judgment, it is quite evident that the regulatory bodies created under statutes have an independent character for protection of public interest and promotion of good governance. The statutes under which such bodies are created provide for their autonomy, so that these bodies could perform their functions without any political or administrative interference.

The above definitions imply that regulatory bodies are formed under statutes and are independent from governmental control. As these bodies are the creation of statutes, they have to perform their functions in accordance with the provisions of the said statutes in an

independent and transparent manner. The exercise of control by the government could compromise the independent role of these regulatory bodies. These regulators are required to brook no political interference and pressure.

Following are some of the regulatory bodies in the country:

- The Competition Commission of Pakistan
- The Pakistan Electronic Media Regulatory Authority
- The National Electric Power Regulatory Authority
- The Oil and Gas Regulatory Authority
- The Drug Regulatory Authority
- The Frequency Allocation Board
- The Pakistan Nuclear Regulatory Authority
- The Pakistan Standards and Quality Control Authority
- The Public Procurement Regulatory Authority
- The Private Education Regulatory Authority
- The Pakistan Environmental Protection Agency

3. The Role of Council of Common Interests in Relation to the Regulatory Bodies:

The Council of Common Interests (CCI) was created in 1973 to harmonize federal-provincial relations and conform to the spirit of federalism. The Council consists of the prime minister as its chairman and includes the chief ministers of all the provinces and three members from the federal cabinet who are nominated by the prime minister from time to time. Clause (4) of Article 153 explicitly provides that the Council of Common Interests shall be responsible to the

Majlis-e-Shoora (Parliament). The functions and rules of procedure in respect of the Council are provided under Article 154.

The 18th Constitutional Amendment has tried to reform and restructure the CCI to promote a culture of participatory federalism. This amendment has devolved several matters to the provinces by abolishing the Concurrent Legislative List. The federal parliament has been given the power to legislate on issues enlisted in Part I of the Federal Legislative List while all matters related to interprovincial claims and contestation, included in Part II of the Federal Legislative List, fall within the domain of the Council of Common Interests⁶.

The 18th Amendment added five new subjects to the Federal Legislative List-II i.e.:

- i. All regulatory authorities established under a federal law,
- ii. Supervision and management of public debt,
- iii. Legal, medical and other professions,
- iv. Standards in institutions for higher education and research, scientific and technical institutions,
- v. Inter-Provincial matters and coordination. Federation and federating units both are entrusted with the power to manage jointly the matters under Part II of the Federal Legislative List through CCI⁷.

The relevant provision of the constitution is reproduced below:

“The Council shall formulate and regulate policies in relation to matters in Part II of the

Federal Legislative List and shall supervise and control over related institutions⁸.”

This constitutional provision clearly provides that the Council of Common Interests has the mandate to regulate the policies regarding the items present in Part II of the Federal Legislative List. It is important to mention here that the regulatory authorities are also included in Part II. Item No. 6 of the Part II of the Federal legislative list is:

“All regulatory authorities established under a Federal law⁹.”

When Article 154 (1) is read in conjunction with the Item No. 6 of the Part II of the Federal Legislative List, it becomes evident that all policy decisions in relation to the regulatory authorities could only be undertaken with approval of the Council of Common Interests. The government cannot take unilateral policy decision with regard to the regulatory authorities.

4. Transfer of Regulators from Federal Cabinet to Ministries:

A number of regulatory authorities established under Federal Laws are working as autonomous and independent organizations. On 19th December 2016, the then Prime Minister Mian Muhammad Nawaz Sharif announced the transfer of administrative control of five of such agencies from cabinet division to their respective line ministries. The National Electric Power Regulatory Authority (NEPRA) had been given under the control of the Water and Power Division, Oil and Gas Regulatory Authority (OGRA) under the Petroleum and Natural Resources Division, Pakistan Telecommunication Authority (PTA) and Frequency Allocation Board

6. Five Years of the 18th Amendment: Lessons Learnt, Milestones Achieved, Development Advocate Pakistan, Volume 2, Issue 1 April 2015, p. 4.

7. 18th Amendment: Implementation Commission report unveiled, 4 May 2011. Available at <http://tribune.com.pk/story/161301/18th- The Express Tribune amendment-implementation-commissionreport-unveiled/>

8. Art. 154(1) of the Constitution of the Islamic Republic of Pakistan.

9. Fourth Schedule, Part II of the Federal Legislative List, Art. 154(1) of the Constitution of the Islamic Republic of Pakistan.

(FAB) under the Information Technology and Telecom Division and the Public Procurement Regulatory Authority (PPRA) under the Finance Division. However, this move was severely criticized by the Provinces.

The matter was taken up in the Senate of Pakistan. The Minister for Law and Justice vehemently supported this action by maintaining that the Rules of Business, 1973 gave powers to the prime minister to allocate the business of federal government. It would be important to peruse the relevant rule in this regard.

Rule 3(3), Rules of Business, 1973

The said rule is reproduced as below:

“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.”

The Minister for Law and Justice maintained that the transfer of the above-mentioned regulatory authorities to their respective line ministries was in accordance with this rule and thus there was no violation of any law. The Minister further explained that the consultation with the Council of Common Interests was only mandatory in cases involving policy decisions in relation to regulatory authorities. He contended that this action was purely an administrative decision and thus the provisions of Article 154 (1) were not attracted in this case.

The important question in this regard was whether the transfer of regulatory bodies to their line ministries was a policy decision or did it relate to the day to day working of such

bodies. A nearly similar question was addressed by the Supreme Court of Pakistan in 1997 in *Messrs Gadoon Textile Mills and 814 others vs WAPDA and others*¹⁰ where the Supreme Court 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 to their working...”¹¹

Determining what may or may not constitute a policy decision, the apex court held in the same case that privatization of WAPDA was a policy decision as that decision would have affected the federating units while decision on tariff rates relates to day to day working of WAPDA and approval from CCI was not required.

While commenting on whether the transfer of the regulatory authorities to their respective line ministries relates to day to day working or a policy decision, the Chairman Senate opined that,

“the determination of tariff by NEPRA, or oil prices by OGRA, or grant of license by PTA can be termed as decision relating to ‘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...”¹²

In the light of these arguments, the Honorable Chairman of the Senate of Pakistan gave the following ruling,

10. 1997, SCMR, at 641.

11. Ibid.

12. Ruling of the Chair on Placement of Regulatory Authorities under the line ministries, p 16. <http://senate.gov.pk/1web/ruling/2017/r20-2.pdf>

"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."¹³

The notification transferring the regulating authorities to line ministries was also set aside by the Islamabad High Court on almost similar grounds as were taken by the Chairman Senate in his ruling. The petitioners in this writ petition argued that the five regulatory authorities, which were transferred by the federal government to their respective line ministries, were in fact established under statutes and had an independent status. They also contended that the government's decision would compromise the independence of these regulatory authorities. Furthermore, they also argued that under the Constitution, the competent forum for policy decisions in relation to regulatory authorities was the Council of Common Interests. However, the government did not seek the approval of the Council of Common Interests before taking this decision, which was a contravention of the Constitution.

Representing the federal government; the assistant attorney general maintained that the decision to place the regulatory authorities

under their respective line ministries was an administrative decision and did not violate provisions of any law. He further posited that the said action was in line with the powers granted to the Prime Minister to allocate the business of federal government under the Rules of Business, 1973 and would not affect the autonomy of the regulatory authorities.

The Islamabad High Court set aside the notification of the federal government and held:

"any alteration made in the administrative arrangement relating to regulatory authorities is subject to the approval of the Council of Common Interests. The policy decisions and guidelines of the Council of Common Interests are binding on the Federal Government. The latter is not empowered to interfere with the affairs of the regulatory authorities other than as provided under Article 154 of the Constitution and the relevant legislative enactments. Rule 3(3) of the Rules of Business, 1973 is subject to Articles 153 and 154 of the Constitution. The impugned Memorandum, dated 19-12-2016, therefore, could not have been issued nor, with utmost respect, was the Prime Minister empowered to grant approval pursuant to powers vested under Rules 3(3) of the Rules of 1973. The impugned Memorandum, dated 19-12-2016, is, therefore, declared to have been issued in violation of the constitutional mandate and as such is illegal, void and was issued without lawful authority and jurisdiction. The status which had existed before the issuance of the impugned Memorandum, dated 19-12-2016, i.e. entry No. 53 of Clause

13. Ibid.

2 of Schedule II of the Rules of Business, 1973 shall stand restored. Any alteration or amendment of entry 53 of Clause 2 of the Rules of Business, 1973 shall require the approval of the Council of Common Interests.”¹⁴

In light of the above decision, it is therefore, against the Constitution to transfer any regulatory authority established under federal law or to take any policy decision before taking prior approval from the Council of Common Interests.

5. List of Ministries / Divisions along with their corresponding Regulators:

Following is the list of the regulatory authorities working under different federal ministries:

Ministry of Water and Power

- The National Electric Power Regulatory Authority (Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997)

Ministry of Petroleum and Natural Resources Division

- Oil and Gas Regulatory Authority (Oil and Gas Regulatory Authority Ordinance, 2002)

Ministry of Information Technology and Telecom

- Pakistan Telecommunication Authority (Pakistan Telecommunication (Re-organization) Act 1996)

- Frequency Allocation Board (FAB) (Under Section 42 Pakistan Telecommunication (Re-organization) Act 1996)

Ministry of Finance¹⁵

- Competition Commission of Pakistan (The Competition Act, 2010)
- Public Procurement Regulatory Authority (PPRA) (Public Procurement Regulatory Authority Ordinance 2002)

Ministry of Climate Change¹⁶

- Pakistan Environmental Protection Agency (Pakistan Environmental Protection Act 1997)

Ministry of Information, Broadcasting and National Heritage¹⁷

- Pakistan Electronic Media Regulatory Authority (Pakistan Electronic Media Regulatory Authority Ordinance, 2002)

Ministry of National Health Services Regulation and Coordination¹⁸

- Drug Regulatory Authority of Pakistan (DRAP Act, 2012)

Ministry of Science and Technology¹⁹

- Pakistan Standards and Quality Control Authority (PSQCA Act, 1996)

14. Muhammad Nawaz v Principal Secretary to the Prime Minister of Pakistan & 11 others, W.P. No. 4802/2016.

15. http://www.finance.gov.pk/functions_FD.pdf

16. <http://www.mocc.gov.pk/>

17. http://infopak.gov.pk/InnerPage.aspx?Page_ID=75

18. <http://www.nhsrca.gov.pk/>

19. <http://www.most.gov.pk/>

6. Establishment of Provincial Regulatory Authorities after the 18th Amendment:

An important question arises with respect to the validity of regulatory authorities to regulate a subject which has been devolved to the provinces in the aftermath of 18th Amendment. (To cite an example, the following regulatory authorities have been established in the province of Punjab by Punjab Government i.e. The Punjab Agriculture, Food and Drug Authority and Punjab Environmental Protection Agency.)

The provincial regulatory authorities operating in the provinces seem to be working lawfully and create no problem where a parallel authority does not exist at federal level. But the situation is aggravated when a regulatory authority is already established under a federal law and is regulating a subject which is deemed to be devolved to the provinces. Like, the Pakistan Standards and Quality Control Authority, which was created in exercise of the powers under a federal law, prescribes standards in an area—sugar— which, as an agricultural produce, is a provincial subject. Similarly, drug regulation by the federation is also controversial as the subject has been devolved to the provinces.

All regulatory authorities established under federal law with a scope to regulate matters already devolved to the provinces are still considered to be under the federation where control and management is exercised through CCI. But that does not mean that these regulatory authorities can lawfully regulate subjects devolved to the provinces when provinces have established their own regulatory authorities. One possible solution advanced by the experts refers to Article 144 according to which,

provinces can grant a regulatory mandate to the federation with respect to a subject devolved to the provinces, where necessary²⁰.

7. International Practices:

7.1. Regulatory Bodies in India

India started developing regulatory institutions with the introduction of reforms in 1991. Centre and states have mixed role in handling regulators in India. The state governments deal with subjects of law & order, agriculture, irrigation, water supply, electricity, roads, minor ports, health, education, VAT etc. under its exclusive jurisdiction²¹. With liberalization, the entrepreneurs mainly require to interact with state governments and local bodies to seek various regulatory approvals and for getting land and necessary infrastructure. Therefore, the state government's role and practice becomes important in the implementation of the project. In this context, red tape is an important factor constraining project implementation. At the state level, there are regulatory constraints manifested in opaque and burdensome labour laws, inefficient land acquisition process and poor implementation of policies and procedures which are subject to political underpinnings and administrative inefficiency. Often, there is a disconnect between laws and implementation. For example, in Special Economic Zones, the function of administering compliance with labour laws is vested in the development commissioner of the zone. Yet in some zones, visits from inspectors of the state labour department continue to take place.

Each sector might have its exclusive regulatory law and policy which is shaped by sector realities. Thus, the telecom regulator might advocate for the lowering of entry barriers (for example,

20. Mandate to Regulate, Dr. Sania Nishter, The News International, April, 30, 2011.

http://www.heartfile.org/pdf/99_Mandate_to_regulate.pdf

21. Regulatory Management and Reforms in India

<https://www.oecd.org/gov/regulatory-policy/44925979.pdf>

multiple and cheaper licenses) to promote competition; however, the water sector might be regulated appropriately to maintain the natural monopoly of the state. While policies/regulations relating to market reforms which apply to the economy as a whole are important, so are sector specific ones. Sector regulation can take account of specific technical nuances that characterize a sector and modify the behavior of actual and potential participants²².

To elaborate mixed control of centre and states is regulatory mechanism of Environment and Forests may be discussed. However, several states have also enacted their own legislation besides the major ones enacted by the Central Ministry. The State Pollution Control Board (SPCB) established in each state, is responsible for implementing these legislations as well as issuing rules and regulations prescribing the standards for a clean environment. The activities of SPCBs are coordinated by the Central Pollution Control Board (CPCB).

Environmental clearances for investment projects in India take a huge amount of time, and for certain types of investment projects such as power, the number of approvals required is higher than for others. Environmental issues around any industrial project are highly sensitive and quite often lead to civil society activism. Therefore, this aspect requires careful handling both by the central and state governments.

7.2. Regulatory Bodies in the United States

Regulation in the United States is a complex mixture of federal, state, and local rules and enforcement responsibilities. The 50 state governments have legal and regulatory authority in their areas of competence, including all areas

not expressly pre-empted by federal legislation, and may delegate legal and regulatory authority to regional, local, or municipal governments²³. Interactions between federal and state regulatory powers are in constant flux, with concentration in some policy areas and decentralization in others. The states are often seen as laboratories for regulatory innovation and experimentation, but, as in other federal governments, however, the United States has experienced a dramatic and increasing centralization of regulatory power toward the federal level. Many of the concerns heard about regulation in the United States focus on the complexity, coherence, and lack of accountability resulting from the interaction of federal and state regulations.

Given the structure of the United States as a federation of fifty states, co-ordination of regulatory management and its reform between levels of government is of major importance. The states have constitutional authority to issue laws and regulations in areas not pre-empted by federal law, while the federal government also delegates authority to the states to implement many federal regulatory programs, often on a cost sharing basis. Municipalities and local governments, such as counties, are creations of the states, and typically have regulatory and legal authorities of their own. A substantial volume of regulation is issued by the states, and, like the federal government, state governments are regulating more. "This increased rulemaking activity threatens to rival, or even replace, state legislatures as the principal source of new laws emanating from state government," an observer wrote in 1990. 47 federal regulatory reform does not necessarily affect state regulations, and Office of Management and Budget (OMB) has not done much to promote reforms at the state level. Many of the states, however, have

22. Institutional Endowments and Electricity Regulation in India by Devendra Kodwani

http://regulation.upf.edu/bath-06/10_kodwani.pdf

23. https://www2.gwu.edu/~clai/recent_events/2010/Fall_Regulatory_Program/Fall_2010_Reg_Program_Presentations/Oct_2010_Ernie_Englander.pdf

employed some form of review to oversee their own regulatory agencies, and 27 states require economic impact analysis for their proposed rules. This suggests that co-ordination and exchange of good practices could have significant benefits. Expansion of federal regulation over many decades has centralized more and more regulatory authority in the federal government. The federal government has also increasingly regulated the activities of the states themselves, by mandating large new burdens and costs that have often proved difficult for state and local governments to finance.

For elaboration the case of environmental control system may be discussed. A key problem, according to the Environmental Council of the States (ECOS), was that federal agencies have no procedures for dealing with new ideas. That is, innovations do not fit into standard operating procedures, and hence cannot be pursued effectively by civil servants. A solution was to create new procedures through which civil servants could legitimately deal with experimentation and innovation. The 1998 ECOS-EPA agreement to Pursue Regulatory Innovation²⁴ “creates a path and a process that is clear to everyone” for how EPA will deal with state innovations. The agreement contains operating principles giving states greater scope to implement innovative ideas to achieve better environmental outcomes and giving states and regional EPA offices the freedom to test different projects, as well as providing monitoring and information-sharing of the results.

7.3. Regulatory Bodies in Canada

There are three main types of regulatory agencies in Canada: self-governing bodies, which regulate the conduct of their own members;

independent government agencies and boards; and regular line departments headed directly by ministers, which regulate specified industries and activities. Familiar examples of self-governing bodies include the professions, e.g. law, medicine and accounting, which are empowered by provincial legislatures to determine their own requirements for admission and to discipline members who do not adhere to prescribed standards of professional conduct²⁵.

With self-governing bodies, the regulators are drawn from the professions themselves. Government regulatory agency members on the other hand are appointed by government. They are called commissions (e.g., Public Service Commission), boards (e.g., Nova Scotia Board of Public Utility Commissioners) or tribunals (eg, Ontario Commercial Registration Appeal Tribunal). These agencies derive their authority from the legislature, and no regulatory agency has any more authority than that expressly delegated to it by the legislature.

An occupational safety branch of a provincial department of labour that decides and enforces employment safety standards is an example of a departmental regulatory agency. Certain agencies may appear more independent than they really are; e.g. the Foreign Investment Review Agency (FIRA) assessed the benefits of foreign investments but in reality, only advised the federal Cabinet, which made the actual decisions²⁶. In many fields of public policy (e.g. energy, communications) often all three types of regulatory agency are in existence. A typical agency of this type is the Canadian Radio-Television and Telecommunications Commission (CRTC), which regulates the Canadian broadcasting system and the federal telecommunications carriers. It has its own staff

24. Regulatory Reforms in United States:

<http://www.oecd.org/gov/regulatory-policy/2478900.pdf>

25. <http://www.cpa.ca/public/whatisapsychologist/regulatorybodies>

26. Regulating the regulators: Why Canada’s current regulatory system works? Financial Post Canada, December 22, 2004, Accessed on September 23, 2017.

and is completely separate from the Federal Department of Communications. Although these types of agencies are created by the legislatures and are answerable to them and rely on them for operating funds, they are still, when compared to a branch of a government department, relatively independent. Independence, however, is rarely absolute, in that the cabinet or a particular minister (or both) may often issue directives to a board and has the power to appoint regulators and approve their budgets.

8. Conclusion and Way Forward:

The functioning of regulatory authorities established under federal laws is joint responsibility of the federation and the provinces in the aftermath of 18th Amendment. This is due to the fact that each federating unit has a stake in these regulatory bodies. The Council of Common Interests is an important institution which has the mandate to monitor the regulatory bodies established under the federal law. Therefore, federal government is not authorized to make policy decisions related to regulatory authorities without taking prior approval from Council of Common Interests.

It is important to note that the framers of the 18th Amendment knew the importance of federal role in regulation, thus they had included it in the part II of the Federal Legislative List. The important question regarding federal regulation of those subjects which have been fully devolved to the provinces has not been settled yet.

Following are the policy choices which may be taken regarding the regulatory authorities in the country:

1. With respect to the subjects devolved to the provinces, a federal regulatory authority may exercise its powers until the establishment of a provincial regulatory authority. Once the provincial

regulatory authority is established in a province, the federal regulatory authority would cease to carry out its functions in that province.

2. It is also noticeable that most federating systems in the developing world usually centralize the normative aspects of regulation and tend to devolve implementing arrangements. This approach is effective in maintaining uniformity and avoiding duplication. To achieve this, the federation and the federating units may come to an arrangement that a federal regulatory authority may deal with the policy formation and monitoring mechanisms while the implementation and enforcement may be vested to the provincial regulatory authority. This two-tier mechanism may result in better coordination and harmonization between the federation and federating units. The same system is in use in the discussed examples of international practices in section-7 of the study.

3. The regulation of devolved subjects may be given to the federation by the provinces by passing a resolution under Article 144 of the Constitution. The federal regulatory authority will implement its policies uniformly throughout the country to achieve clarity in role of the regulatory bodies and formulation of uniform and coherent policies in all provinces of the country. However, this may restrict the power of provinces to regulate their own affairs and an already devolved subject would be reverted to the federation.

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