Regulation and 18th Amendment

Dr. Sania Nishtar

As one of the key instruments of governance, regulatory functions have increasingly been in the spotlight, subsequent to the 18th Constitutional Amendment.

Regulation can take many forms but in the current context it refer to interventions initiated by the government to correct market failure, or the use of state power to impose constraints on organizations and individuals through a range of instruments issued by the government or non-governmental bodies to which the government has delegated regulatory powers. Amongst the things that can be regulated, price, quality, and numbers are the most salient.

The mandate to regulate is sometimes the basis of tenuous relationship between a federation and its federating units and can lead to unnecessary turf rivalries between different levels of government. Such problems could emerge in Pakistan as provinces discover their newfound regulatory prerogatives after the 18th Amendment. With calls for new provinces whipping up, the ramifications of this trend could be immense.

The recent controversy over devolving the Higher Education Commission (HEC) helps to illustrate this point. Amongst other things, the HEC is also a regulatory agency, prescribing standards and ensuring compliance. Proponents of devolving HEC opine that education is a provincial subject whilst those that argue for its national role bring to bear its regulatory function as a justification for its existence at the federal level—a role, which the Implementation Commission has now accepted and is working towards retaining. Drug regulation is another example, which is a federal subject in most countries of the world—in fact regional regulatory models are coming up, evident in arrangements in the European Union, Gulf Cooperation Council countries and Latin America.

The question of regulatory prerogatives has many dimensions—questions about national roles in subjects that have been devolved and the much bigger debate about defining national roles in federating systems in a globalized world where there is need for uniformity of standards.

Federating systems in the developing world usually centralize normative aspects of regulation and tend to devolve implementing arrangements. The former is done to maintain uniformity and obviate duplication.

Those that drafted the 18th Amendment were cognizant of the importance of a federal role in regulation and hence an Entry was introduced in Part II of the Federal Legislative List "All regulatory authorities established under a federal law". However, there are questions centered on the validity of creating a regulatory authority to regulate a subject, which has been devolved by the 18th Amendment. This is illustrated in a question, which has arisen in the Sindh High Court with filing of a case against the Pakistan Standards and Quality Control Authority, which was created in exercise of the powers under a Federal law—the Pakistan Standards and Quality Control

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Mandate to regulate

Governance

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to the validity of federal regulation in a devolved subject is also relevant to drug regulation – Entry 20 "drugs and medicines" was part of the omitted Concurrent Legislative List.

In view of this ambiguity, various views are being mooted to establish a constitutional justification for retaining a federal regulatory role in the post 18th Amendment scenario. One view refers to Article 270AA(6) of the 18th Amendment, which saves all laws with respect to the omitted CLL, enacted prior to the 18th Amendment. These laws continue to remain in force until altered, repealed or amended by the 'competent authority'. However, this notion is subject to several concerns. First is the question of sub-constitutional vs the constitutional law, with the latter being supreme. Also, the expressions 'saved' and 'competent authority' have legal connotations in Article 270AAA. While laws have been saved, there are questions about who the 'competent authority' is with reference to the power to amend laws. Provincial assemblies and not parliament may now be the competent authorities in the given context.

Secondly, experts are also drawing on the example of the USA, where the power to regulate can be exercised by virtue of the federal subject of interstate commerce. An analogy is being drawn with the prerogative in inter-provincial commerce and federal powers by virtue of Article 151 read with Entry 6 of Part II of the FLL. However, other experts are of the opinion that on a textual analysis, Article 151 does not seem to cover 'regulation', as understood in the present context.

The third potential mechanism may be to have any draft law to create a federal regulatory authority approved by the Council of Common Interests (CCI) *prior* to promulgation by parliament. Subsequent to enactment, such regulatory authority would be subject to supervision and control of the CCI at which the four chief ministers and the federal government are represented. Based on this, it could be argued that through the forum of CCI, the provinces have acquiesced in the federal government, regulation of an otherwise devolved subject. However, one key weakness in this approach is the counter argument that the chief ministers, whilst participating in the CCI, do not directly represent or are synonymous with the provincial assemblies to which the 'legislative authority' in respect of the relevant subjects has been devolved and hence, on a strict interpretation, do not possess the authority and power to empower parliament to enact a law which is the constitutional prerogative of the provincial assemblies. Such approach could also be criticised as a circumvention of the mechanism expressly provided in Article 144.

In sum, therefore, all the constitutional mechanisms being cited as the basis for retaining regulation at the federal level are fraught with some degree of uncertainty. Article 144 is the only valid and non-controversial mechanism in the constitution, which can grant a regulatory mandate to the federal level. It is now imperative that provincial assemblies recognise the imperative and grant the federation a mandate related to regulation, where necessary. The federal government must, in turn, reform its own ability to regulate – its track record is less than desirable. The provinces will still continue to play a role in regulation in such an arrangement through policy oversight enabled through the CCI.

The political and constitutional imperative of political autonomy is well appreciated. Within that context, the 18th Amendment is an important game-changing intervention. However, it is inevitable that many questions will arise in the wake of such a major transformation. The question related to regulatory prerogatives is just one of them. It is critical to carefully think through these questions so that progress towards the premise enshrined within the 18th Amendment can be sustained.

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