[**The regulatory state**](https://www.dawn.com/news/1684950/the-regulatory-state)

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ON March 15, the Supreme Court of Pakistan commenced hearings on appeals from the October 2020 judgement of the Lahore High Court in ‘LPG Association of Pakistan vs Federation of Pakistan’ to finally decide the constitutionality of Pakistan’s competition regime, nearly 13 years after these petitions were first filed before the Lahore High Court.

Despite the focus of the appeals on the competition regime, one question raised in them — whether the regime is operating a ‘parallel judicial system’ in the country — has implications for other regulatory regimes in the country, all of which authorise their agencies to exercise some adjudicatory or judicial powers in the execution of their mandates.

To understand whether the Competition Commission of Pakistan (CCP), or indeed other Pakistani regulatory agencies, are in fact encroaching upon the dispute resolution mandate of the judiciary, it is important to trace the history of regulation, how it arrived in Pakistan, and the nature and limits of the adjudicatory powers exercised by the agencies established to enforce regulation.

The idea of regulation first emerged in the United States, which in a brief period of 30 years — between 1887 and 1917 — went from a purely judicial system in which all commercial disputes were decided through private litigation brought before the courts, to one in which regulatory agencies had taken over the control of competition, railroad pricing, food and drug safety, as well as many other economic activities.

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Regulation and specialist regulatory agencies introduced in the US were intended to supplement rather than supplant the judicial system. By bringing sector-specific expertise, and simplified procedures, and with their power to take pre-emptive action against possible infringements of the law, these agencies were not only able to offer a safeguard against the clout and the resources of big business to influence the decision of the courts but also to provide a uniform economic policy in their sectors.

Unlike the US regulatory state that had emerged organically, the idea of regulation was transplanted in Pakistan in the late 1990s as part of the World Bank’s second-generation reforms but was nevertheless popular for the relief it provided from the endemic delay in the judicial system. Soon key economic activities were brought under the control of agencies such as the Pakistan Telecommunication Authority, the Securities and Exchange Commission of Pakistan (SECP), the National Electric Power Regulatory Authority (Nepra), the Pakistan Electronic Media Regulatory Authority, and the Oil and Gas Regulatory Authority (Ogra) which continue to function to date.

According to the World Bank recommendations, the majority of these agencies are designed as per the integrated agency model in which a single body — usually a multi-member commission — that is part of the executive, is authorised to take notice of infringements, investigate cases and deliver enforcement decisions in respect of complaints received by them from persons they regulate. Whilst critics argue that this agency model is akin to a single person acting as the judge, the jury and the executioner and is in violation of the principle of separation of powers enshrined in Pakistan’s Constitution, the issue has only now properly come before the Supreme Court.

Interestingly, this complaint about the aggregation of the judicial role by regulatory agencies is not unique to Pakistan. Even in the EU, where it is generally accepted that the integrated agency model allows an expert, specialised agency to develop a coherent policy and to make accurate and efficient decisions, the EU Commission has been criticised for conducting its proceedings like a court, imposing large fines, and violating human rights.

Closer to home the integrated agency model was challenged in India in ‘Brahm Dutt vs Union of India’ (2005)in which it was argued that the Competition Commission of India (CCI) could not exercise adjudicatory powers unless its members were appointed from the judiciary and that exercising judicial powers in the absence of judges would be in violation of the principle of separation of powers provided in the Indian constitution.

Whilst the EU Commission addressed the critique levelled at it by providing strong procedural guarantees and ensuring that its decisions are subject to judicial control by a body with ‘full jurisdiction’ on questions of fact and of law, and with the power to quash challenged decisions in all respects, the Indian government responded to the petition filed against the CCI by establishing a competition appellate tribunal, comprising judicial as well as technical members, to hear appeals from decisions of the CCI.

The EU and Indian response to the operation of their regulatory agencies suggests two points that are relevant in the Pakistani context: first, that it is critical that decisions of regulatory agencies be submitted to judicial scrutiny, and second, that regulatory agencies must ensure that their actions are governed by clear rules which are not only publicly available but are also uniformly and transparently applied to all proceedings before them.

Whilst most regulatory agencies operating in Pakistan meet the requirement of judicial scrutiny, it is the requirement of transparency and due process that eludes all but the most mature of these agencies. So, for instance, appeals from decisions of SECP and Nepra, etc lie to the high courts and those of the CCP to the Supreme Court, but whilst the SECP has published clear rules for its proceedings which it supplements with detailed internal guidelines, the CCP’s procedures remain opaque in several areas.

In these circumstances, rather than contemplating a wholesale restructuring of Pakistan’s regulatory infrastructure, the focus of the Supreme Court should be on ensuring that regulatory agencies devise and publish appropriate rules and guidelines for responsible decision-making and, more importantly, on building judicial capacity so that future judges have both the competence and the inclination to engage meaningfully and efficiently with issues emanating from regulatory agencies rather than undermining their effectiveness by allowing cases that come before the courts, whether in their appellate or constitutional jurisdictions, to fester for decades.

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