

**IN THE HIGH COURT OF SINDH,
KARACHI**

Constitution Petition No.D-949 of 2022

Pakistan Medical Commission.....Petitioner

Versus

Province of Sindh & others.....Respondents

Additional Note

YOUSUF ALI SAYEED, J - The captioned Petition preferred by the Pakistan Medical Commission (the “**PMC**”) impugned four purported Notifications dated 07.12.2021 and 31.12.2021, through which the Government of Sindh had essentially sought to reduce the passing marks of the Medical & Dental Colleges Admission Test (“**MDCAT**”) from 65% to 50% for the admission session 2021-22 for the candidates of the Province.

2. The crux of the challenge was that the subject of those Notifications fell squarely within the PMC’s domain in terms of the Pakistan Medical Commission Act, 2020 and regulations framed thereunder, and the Provincial Government completely lacked competence in that regard. That aspect has already been addressed at length with great eloquence in the main Order authored by my learned brother, Muhammad Iqbal Kalhor, J, setting out the minutiae of the case and reasons for the short order dated 18.03.2022, whereby the Petition was allowed with the impugned Notifications being declared to be void ab initio and of no legal effect. Whilst I concur with the main Order, however, without undue reiteration, I propose to record certain further observations on the matter.

3. As far back as the Case of Proclamations (1611) Co Rep 74, Sir Edward Coke, as Chief Justice of the Common Pleas, opined that “*the King hath no prerogative but that which the law of the land allows him*”. What may well have been regarded as a radical statement over four centuries ago has since come to be established as a grundnorm of constitutional law-that power must be exercised only with appropriate lawful authority. The case continues to be referred, in the twentieth century by the House of Lords in Attorney-General v De Keyser's Royal Hotel [1920] AC 508, and more recently and perhaps even more famously by the Supreme Court in Miller (No.1) [2017] UKSC 5.
4. To that extent, the position under our Constitutional dispensation is analogous, with Article 4 guaranteeing due process and the rule of law, mandating that the ‘law’ is the sole source of executive power and state institutions can only exercise such power as is vested in them.
5. Indeed, it has been observed by the Honourable Supreme Court in the case reported as Pakistan Muslim League (N) v. Federation of Pakistan PLD 2007 SC 642) that:

“It may not be 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 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 some 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 been 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.”

6. In the same vein, a Full Bench of the Honourable Supreme Court had observed in the case of Muhammad Nawaz Sharif v. President of Pakistan PLD 1993 SC 473 that:

“In a Constitution contained in a written document wherein the powers and duties of the various agencies established by it are formulated with precision, it is the wording of the Constitution itself that is enforced and applied and this wording can never be overridden or supplemented by extraneous principles or non-specified enabling powers not explicitly incorporated in the Constitution itself. In view of the express provisions of our written Constitution detailing with fullness, the powers and duties of the various agencies of the Government that it holds in balance there is no room of any residual or enabling powers inhering in any authority established by it besides those conferred upon it by specific words.”

7. Subsequently, in *Controller of Patents and Designs v. Muhammad Qadir* 1995 SCMR 529, while examining the discretionary authority of government or its functionaries in the nature of a prerogative, either under the Constitution or any enactment, the Apex Court noted as follows:

“There can be no cavil with the proposition that the Government of Pakistan or for that matter any of the holder of its offices or any Government functionary do not enjoy conventional prerogative as was or is available to Crown in England except those discretionary powers which are either specially conferred by the Constitution or under any law passed by the Parliament. We are also of the view that any discretionary power available to Government or its functionaries in the nature of prerogative either under the Constitution or under any of the Act of the Parliament is subject to the process of Judicial review by the Superior Courts, in accordance with their jurisdiction under the Constitution. However, any exercise of discretionary power in the nature of a prerogative claimed by the Government or holder of any of its offices, or its functionaries has to be justified either under some statute law or under the provision of the Constitution, before it is pressed into service before a Court.”

8. Thus, it is evident that the edifice of the government and the powers ascribed to the different parts of its structure are as defined by the law, with it being a cardinal duty of Government to preserve the rule of law and ensure compliance of Constitutional provisions. As such, no executive authority can take any executive action without the backing and support of a valid law, else such exercise will be void and liable to be struck down as such. That being so, it is painful to note that the impugned Notifications were issued in a legal vacuum with such reckless abandon.

9. An additional point of concern meriting consideration is that as per the criteria set for admissions, the weightage attached to the MDCAT score is 50% whereas the weightage of the HSSC/FSC and SSC/Matric or Equivalent are 40% and 10% respectively. Ergo, if the arbitrary measure seeking to supplant the standard of the PMC with the lesser one of the Provincial Government were allowed to sustain, it would enable candidates scoring between the range of 50% to 64.99% in the MDCAT, who otherwise would not have qualified, to nonetheless be considered for admission. That, in turn, would give rise to the prospect and likelihood of distortion of the eventual admission results to the detriment of those who had attained the higher standard set by the PMC, so as to deprive them of their due right to admission. For that reason too, the Notifications cannot stand.

JUDGE