



RULING OF THE CHAIR

Operationalization of joint ownership of mineral oil and natural gas; implementation of Article 172 (3), Constitution, 1973

1. On 20th October, 2017, the Functional Committee on Devolution, Senate of Pakistan, made a reference to my office, to the effect, if requirements of clause (3) of Article 172, Constitution of Pakistan, 1973, have been complied with based on the following factual position:-
 - a. In the meeting of Functional Committee on Devolution held on 27th June, 2016, the Committee took up consideration of agenda item pertaining to “Operationalization of joint ownership on oil and natural gas: Mechanism in view of Article 172(3) of the Constitution of Islamic Republic of Pakistan, 1973.”
 - b. Ministry of Petroleum through a working paper provided its response in the following terms:-
 - a) *“After the 18th Amendment to the Constitution through insertion of Article 172(3) providing for joint and equal vesting of mineral oil and natural gas in Provinces, the Petroleum Exploration & Production Policy 2012 was issued with the approval of the Council of Common Interests. To implement the Policy, the Petroleum Exploration and Production Rules 2013 were promulgated with consultation of Provinces. Further, a model Petroleum Concessions Agreement (PCA) has also been developed through a consultative process with Provincial Governments. All PCAs executed after 2012 Policy are exactly in accordance with model PCA.*
 - b) *The PCA also guarantees Provinces to hold rights and operations on prospective basis through forming Provincial Holding Companies. Special guidelines have been issued by Federal as well as Provincial Governments for carrying out the social welfare activities in license/lease areas which involve political representatives of the respective areas.*

- c) It is also pointed out the provisions of Article 172(3) have been introduced and made subject to the existing commitments and obligations and the Provincial Government(s) have not been conferred authority to regulate existing Petroleum Concession Agreements, Joint Operating Agreements, Exploration Licenses and the Mining Lease.
- d) Clause 1.3(6) of the Policy states one of the objectives of policy as to enable a more proactive management of resources through establishment of a reorganized Directorate General of Petroleum Concessions (DGPC) comprising of a Federal and Provincial representatives with Federal Director as ex-officio Director General and providing the necessary control and procedures to enhance the effective management of Pakistan's petroleum reserves.
- e) The following Table highlights the impact of the Constitutional Amendment with respect to Ownership;-

<i>Ownership of Oil and Gas</i>				
<i>No.</i>	<i>Subject</i>	<i>Before 18th Amendment</i>	<i>After 18th Amendment</i>	<i>Remarks</i>
<i>I.</i>	<i>Ownership of mineral oil and natural gas</i>	<i>Exclusively with the Federal Government. As per the Mineral (Acquisition and Transfer) Order, 1961(PO No. 8 of 1961)</i>	<i>Mineral oil & natural gas vest jointly and equally with the respective Provincial Governments and Federal Government. However, exclusive ownership of natural gas situated beyond 12 nautical miles (Territorial Waters) from the base line till EEZ vests with the Federal Government. Article 173(2) – Offshore Article 172(3) – Onshore</i>	
<i>II.</i>	<i>Utilization of Gas</i>	<i>Right of respective Provincial Government to</i>	<i>No change.</i>	<i>Royalty on Oil and Gas, Excise duty on Gas and</i>

		<i>utilize natural gas in the Province where the producing wellhead situated, as priority. Article 158</i>		<i>Gas Development Surcharge are being paid to provincial governments in accordance with NFC Award.</i>
III.	<i>Royalty on Gas</i>	<i>Exclusive right of the respective Provincial Government. Article 161 (a)</i>	<i>No change.</i>	
IV.	<i>Royalty on Gas</i>	<i>No specific provision on payment of royalty on oil. Article 161(b)</i>	<i>No change.</i>	
V.	<i>Federal Excise Duty on Natural Gas</i>	<i>Exclusive right of the respective Provincial Government. Article 161(a)</i>	<i>No change.</i>	
VI.	<i>Federal Excise Duty on Oil</i>	<i>Not available</i>	<i>Payment to Provinces under Article 161(b)</i>	

f) 18th Amendment, has neither affected the legislative powers of the Parliament nor executive and administrative authority of the Federal Government. This is further illustrated by following Table which differentiates the position of Oil and Gas regulation and Legislation before and after the promulgation of the 18th Amendment:-

<i>Ownership of Oil and Gas</i>				
<i>No.</i>	<i>Subject</i>	<i>Before 18th Amendment</i>	<i>After 18th Amendment</i>	<i>Remarks</i>
<i>I.</i>	<i>Legislation</i>	<i>Exclusive right of the Federal Government.</i> <ul style="list-style-type: none"> • <i>Article 142(a)</i> • <i>Article 97</i> • <i>Section 6 of 1948 Act</i> 	<i>No change.</i>	<i>The entry of 'mineral oil and natural gas' has been retained in the Federal Legislative List of the Constitution. Fourth Schedule -</i>

				<i>Part II- Para 2 "Mineral oil and natural gas; liquids and substances declared by Federal law to be dangerously inflammable."</i>
<i>II.</i>	<i>Excise Authority (Regulatory control)</i>	<i>Exclusive right of the Federal Government under the Constitution and the Regulation of Mines and Oilfields and Mineral Development (Government Control) Act 1948</i>	<i>No change.</i>	<i>After the 18th Amendment, in certain policies the coordinative role of the Provincial Governments has been created so that as joint and equal owners, the Provinces have a say in legislation and regulation of petroleum activities.</i>

g) In view of above, it is stated that Article 172(3) of the Constitution stands implemented."

- c. As per the statement of the Ministry of Petroleum, clause (3) of Article 172 stands implemented. This statement came as a shock to the Committee Members who represent all Provinces, therefore, Members belonging to the Provinces of Sindh, Balochistan, Khyber Pakhtunkhwa and Punjab were of the firm view that the said provision is yet to be implemented and a mechanism in this regard will have to be devised. Accordingly, the Committee decided to hold provincial consultations on the issue.
- d. First meeting of the series was held with the Province of Balochistan at Quetta on 31st August, 2016. Mr. Shahid Khaqan Abbasi the then Minister for Petroleum maintained the stand taken earlier, however, Balochistan

Government briefed the Committee that the Province is not being given its due share on the pretext of interpretation of “subject to the existing commitments and obligations” and till date no share has been given to the Province.

- e. Second meeting of the series was held with the Province of Sindh at Karachi on 12th October, 2016, Government of Sindh briefed the committee in the following terms:-

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“The 18th amendment to the Constitution of Pakistan through insertion of Article 172(3) has revolutionized the Constitutional and legal framework by empowering Provinces by vesting joint and equal role, power and authority in executive, administrative and regulatory affairs related to mineral oil & natural gas located within the Province or the territorial waters adjacent thereto. Article 172(3) has very clearly enhanced the role of the Provinces in administration, policy, management and regulation of matters related to mineral oil and natural gas. The new role is in addition to the role delegated to Provinces through the Council of Common Interest (CCI).

Mineral oil & natural gas appears at Entry No. 2, Part II, Federal Legislative List (FLL) and in pursuance of Article 154 (1) the related matters fall within the exclusive domain of Council of Common Interest which is required to formulate and regulate policies and shall exercise supervision and control over related institutions. Keeping this status unchanged even after 18th Amendment. Therefore, Ministry of Petroleum & Natural Resources (MoPNR) has erred in claiming the Federal Government’s exclusive executive authority over oil & gas matters as it had always been subject to the decisions of the CCI and consent of the Province. Moreover, MoPNR itself, as far as matters related to oil & gas are concerned, shall come under the supervision and control of CCI.

Article 97, which defines “extent” of the Federation to exercise its executive authority, starts with the words “subject to the Constitution. This shall mean that the Federation may exercise exclusive authority on matters appearing in Part I of the FLL only but for the matters appearing in Part II, FLL i.e. oil and gas, its authority is subject to CCI were all Provinces have equal representation. Moreover, the inclusion of Article 172(3) has further redefined the “extent” of Federation to exercise executive authority on oil & gas matters and now, “subject to the Constitution” the Federation is required to exercise its jurisdiction with Provinces equally and jointly. The MoPNR has grossly misreported that 18th Amendment has not “altered or amended” the existing Constitutional framework on oil & gas matters. Article 172(3) has altogether amended the extent of Federation’s executive authority and now Federation is required to exercise the related authority and jurisdiction with Provinces.

MoPNR has also grossly erred while maintaining that Article 172(3), which commences with the words “subject to existing commitments and obligations’ have not conferred with any authority upon the Provinces to regulate existing agreements, licenses or leases. It is to clarify that Article 172(3) only protects the existing agreements, licenses or leases as long as they are being operated

and implemented with the originally old terms and conditions. However, any change, alteration, addition, deletion, conversion or amendment in the terms and conditions of the old agreements, licenses or leases after promulgation of 18th Amendment requires approval of the Provinces. Any amendments in the terms and conditions of the old agreements, licenses or leases etc. are not covered under the opening phrase "subject to existing commitments and obligations."

The "ownership" right of the Provinces over mineral oil & natural gas had never been an issue. It had always been with the Provinces. The Constitution, since inception under Article 161(1), recognizes the ownership rights of the Provinces over mineral oil & natural gas by transferring to them all the monies collected on account of royalty and Federal duty of excise. Under Article 161(1), the net proceeds of the royalty and Federal duty of excise shall not form part of the Federal Consolidated Fund and shall be paid to the Province in which the well head of oil & gas is located. Federal Government is only required to collect these monies on behalf of the Provinces. The joint and equal "vesting" of oil & gas under Article 172 (3) has not altered the provisions of Article 161 whose scope has even been further expanded after 18th Amendment.

It is, therefore, clear that Article 172(3) read with Article 154(1) and Article 161(1) has redefined the "extent" of the jurisdiction of Federation in mineral oil and natural gas related matters and Federation is required to exercise the authority in executive, administrative and regulatory sphere jointly and equally with the Provinces.

Thus, in order to implement Article 172(3), which is not a self-executing clause the Federation may carry out following steps:

- I. Amendments in all laws, Ordinance, Presidential Orders related to oil & gas in the light of Article 172(3) especially "Regulation of Mines and Oil Fields and Mineral Development (Government Control) Act 1948," Mines Act 1923, repeal of President Order No. 8 of 1961, etc.;*
- II. Amendment in the "Oilfield (Regulation & Development) Act 1969".*
- III. Drafting and enactment of a new "Petroleum Joint Control Law" with provisions for establishment of petroleum management authority by relating or encompassing DGPC, DG Gas, DG Oil and DG LPG;*
- IV. Amendment in existing (upstream and downstream) rules, policies, PCA, D&P Lease agreements, Petroleum sharing agreements in the light of Article 172 etc.;*
- V. Legal/ administrative framework for "Joint Control" over petroleum resources;*
- VI. Amendments in OGRA Ordinance 2002 for equal representation of Provinces on the model of NEPRA Act;*
- VII. Due representation of Provinces in the Board of Directors in the Federal Government owned oil & gas companies/ entities such as OGDCL, PPL, PSO, Government Holding Pvt. Limited, Oil Refineries, HDIP etc.;*
- VIII. Amendments in relevant laws, rules, regulations on land reclamation, development of coastal regions, fishing rights and licensing regime in the light of Article 172(2);*

- IX. *Imposition, collection and disbursement of Excise Duty on crude oil in pursuance of Article 161(1)(b);*
- X. *Federal Government to stop collection of royalty on Crude Oil and respective Province to start collecting royalty of crude oil under its own law as being a constitutional residual subject;*
- XI. *Framing of guidelines/ policy in consultation with Provinces in pursuance of Article 158;*
- XII. *Economic Coordination Committee (ECC) of the Cabinet may be requested not to encroach the constitutional mandate of the CCI.*

In view of the above, it is clear that no serious measure/ step has so far been taken by the Federal Government to implement the Article 172(3) in letter and spirit. Minor consultation with the Provinces on selective matters shall not be construed as implementation of the Article 172(3) rather it falls under the domain of Article 154 i.e role, function duties and authority of CCI where Provinces have equal role even prior to 18th Amendment. Implementation of Article 172(3) requires complete overhaul of the existing law, administration, management and regulatory regime related to mineral oil & natural gas."

- f. Third meeting of the series was held with the Province of Khyber Pakhtunkhwa at Peshawar on 27th January, 2017, Government of Khyber Pakhtunkhwa briefed the committee in the following terms:-
 - a. *"Provinces are the rightful and absolute owners of oil and gas. There is no concept of "Joint Ownership" of oil and gas.*
 - b. *Provinces are allowed to legislate on matters related to Mineral Oil and Natural Gas, through passing Acts, Rules, Regulations and Policies so as to expedite Oil and Gas production.*
 - c. *CCI being recognized as an important constitutional body; be allowed all operational powers so as to deal with the day to day business related to Natural Gas and Mineral oil found in the Province. Chief Minister be allowed to take executive steps, to legislate, issue licenses, and make contracts with E & P companies regarding the upstream of Oil and Gas. It may collect Royalty, FED, Windfall Levy production bonus and all such other levies.*
 - d. *The Federation along with the Provinces needs to work jointly on issues of the establishment of Provincial Regulatory Authorities, division of OGDCL and PPL and direct interaction with E & P companies. Role of NEPRA, OGRA is to be redefined in compliance with Article 172(3).*
 - e. *Lastly MPNR is ultra vires to the Constitution and minor consultation with the Provinces shall not be construed as implementation of Article 172 (3).*
 - f. *The rights of the Provinces as per the Constitutional scheme of devolution are not yet protected nor implemented in true letter and spirit. Through 18th Constitutional Amendment Act, Article 172 (3); Provinces got the*

legislative and executive powers. Article 172 (3) is self-executing, clear in its object and intent, as it allows the provinces to regulate and execute matters in Oil and Gas found in the locality of such province, with a clear demarcation of the extent of powers that can be exercised by the Federal Government in its own sphere. All previous Acts, Regulations, Policies and Ordinances need to be streamlined along with the Constitution. All existing / future laws not to be inconsistent with any of the Articles of the Constitution of Pakistan 1973 being the supreme law of the land.”

- g. Fourth meeting of the series was held with the Province of Punjab at Lahore on 31st March, 2017, Government of Punjab briefed the committee in the following terms:-

“Federal Government is of the view that Article 172(3) stands implemented on the following basis:

- a. Right of legislation on Oil & Gas is a mandate of the Federal Govt under Article 142(a), Article 97 and Section 6 of the 1948 Act and there is no change in this after 18th amendment*
- b. Regulatory Control is an Exclusive right of the Federal Govt under the Constitution and the regulation of Mines and Oil fields and Mineral Development (Government Control) Act 1948.*
- c. With respect to Article 158, Royalty on Oil & Gas, Excise Duty on Gas and Gas Development Surcharge is being paid to the Provinces*

Whereas the Government of Punjab is of the view that,-

- a. Oil and Gas falls in Part II of the Federal Legislative list therefore it is the subject of CCI;*
- b. Amendments in all laws related to Oil and Gas may be made in the light of the 18th Amendment*
- c. Administrative framework for Joint Control over petroleum resources*
- d. Due representation in BoD in Federal Government owned Oil & Gas Companies*
- e. Formulation of guidelines in consultation with Provinces.*
- f. Management of related institutional, regulatory and legislative frameworks.*
- g. Operational arrangement/ tapping financial benefits arising out of joint control.”*

2. On 8th November, 2017, Senators Mukhtar Ahmed Dhamrah @ Aajiz and Sassui Paliyo moved the following Adjournment Motion:-

“The recent move of the Federal Government to delink petroleum and gas authority from Provincial oversight which is not only are direct violation of the Constitution but will also create trust deficit between the Centre and the Provinces.”

3. The said Motion was admitted and fixed for discussion on the Orders of the Day for the Senate sitting held on 13th December, 2017. During the discussion, the Members expressed their views as under:-

- i. Senator Farhatullah Babar stated that as per the news reports the Government has prepared a draft law namely, "Pakistan Petroleum Exploration and Production Regulatory Authority Bill, 2017". The Senator provided a copy of the draft law. Senator Farhatullah Babar further drew my attention towards a provision of the draft law wherein it has been provided that "the Government may, by Notification provide that until the Authority is constituted and the officers, employees, consultant etc. are appointed under this Act, the powers and functions of this Authority shall be exercised and performed by the Director General of Petroleum Concessions", which is the Federal Government.
- ii. Senator Mir Kabeer Ahmed Muhammad Shahi, termed this move as an attempt to circumvent the constitutional scheme and stated that being Chairman of the Functional Committee on Devolution he has serious concerns over the interpretation of Article 172(3) Constitution, 1973 provided by the Government for which a Reference has also been sent to the Chairman Senate.
- iii. Senator Usman Khan Kakar, endorsed the statement made by Senator Farhatullah Babar and stated that this is an attempt to roll back the 18th Constitutional Amendment and deprive the Provinces of their Constitutional rights.
- iv. Senator Dr. Jehanzeb Jamaldini, stated that the Government is continuously violating the constitutional provisions as neither the Province of Balochistan is being given due royalty nor new exploration are being brought into the notice of the Province.
- v. Senator Taj Haider, said that the Federal Government is misinterpreting the term "existing arrangements", the Province of Sindh is not being given any share even in the new discoveries. While making reference to the draft Bill he stated that mines have also been included in the said Bill meaning thereby that even the mines are not provincial property, this is an attempt to hijack the Thar Coal project which is a game changer. It is unfortunate that we surrender to the dictates of the World Bank.

- vi. Senator Sardar Muhammad Azam Khan Musakhel condemned the attempt at delink Petroleum Gas Authority from the provincial oversight and stated that this will widen the differences between the Center and Provinces.
 - vii. Senator Shahi Syed stated that 18th Amendment was aimed at providing due shares to the Provinces.
 - viii. Senator Birg (R) John Kenneth Williams also endorsed the sentiments of the other Members
 - ix. Mr. Jam Kamal Khan Minister of State for Petroleum wound up the discussion in the following terms:-
 - a. After Prime Minister Shahid Khaqan Abbasi, took Oath of office, in the first meeting of CCI it was felt that there is non-cooperation amongst the Federal Government and Provincial Governments regarding the implementation of Articles 154 and 172 , Constitution, 1973, and there is need to take concrete steps in this regard.
 - b. A meeting of IPCC was called on immediate basis and this issue was widely discussed that the provincial representation, wherein, a lot of things came under discussion.
 - c. The draft Bill is a mere proposal, the World Bank gave its assistance but we are keeping all the global regional and national aspects for devising a mechanism. The Bill will be finally drafted by the Federal Government and the Provincial Governments; we are also planning to hold public hearings.
 - d. Will of the Provinces will prevail as to what responsibility they want to take in the policy making, in the upstream, in downstream, in the resource sharing, in taking the blocks themselves and other matters connected with and ancillary thereto. Everything will be brought to the forum of CCI. The CCI will give direction as to the future course.
4. I directed the Ministry of Petroleum to provide in writing the nature and extent of involvement of the World Bank in the entire process and any other additional information or material, by Friday the 15th December, 2017. Thereafter I reserved my ruling.
 5. The Ministry of Petroleum did not provide information as to the nature and extent of involvement of World Bank or any other material in this regard. Consequently, I

was informed that the Prime Minister of Pakistan will make a statement in the House in this regard.

6. The Prime Minister made the following statement in the House on 20th December, 2017,-

"We are trying to make provisions for implementation of Articles 158, 172(3) and other Articles of the Constitution. We had engaged the World Bank as a consultant to allow us how to proceed further with this because this is an issue that has precedents in many other countries in the world where the provincial rights versus the Federal rights are in question or in doubt.

So, that is the only engagement of the World Bank and that engagement has now ended. And tens of meetings were held over the last three years and the provinces were engaged at every level including the highest level. There were three gas leadership committee meetings which I chaired as the Minister and the Provincial Ministers or even the Chief Ministers attended those meetings.

So, they were taken fully into confidence on the issue. The issue was, basically two separate issues were being addressed here. The first was the unbundling of the two Sui Companies; Sui Southern and Sui Northern. Today, Sui Southern deals with the issues of Sindh and Balochistan and Sui Northern deals with Khyber Pakhtunkhwa and Punjab.

Now, in the post 18th Amendment scenario we feel every province should have its own company so it can deal with the issues of that province and the issues are very unique, each province has its unique issues.

So, this actually did not require the consent of the CCI as such because these are public limited companies and they can be unbundled or they can be bifurcated in two parts. But we thought it would not to involve the provinces, get their consent and also there was to be one transmission company between the provinces to allow transmission of gas from one province to the other especially with the imported gas coming in which could be transported to any province through the Transmission company and this is the standard methodology all over the world. So, this is what we were working on.

The second thing was the DG of petroleum concessions. This is currently in the Ministry of Petroleum which after the 18th Amendment we have inducted provincial representation there and a model PCA (Petroleum Concession Agreement) has been formed which is in practice.

The choices there were that each province has their own DGPC which is not practical or we have an independent regulator in Pakistan for the petroleum concessions with provincial representation on it. So, those are the issues we are working on.

The issue is now with the CCI. We have given in writing to the CCI that as far as the situation today is concerned, all provisions of the Constitution post 18th Amendment have been implemented but these changes are required to make it more practical for the provinces to exercise their rights post 18th Amendment. So, that is what we were working on. And there are several other larger issues also at play here which we have brought to the notice of CCI. We are considering it. Several meetings of the IPC have been held. This has been discussed in the CCI and it continues to be discussed there. So, that is the situation on the ground. There is no other intent or no other thing at work here. Thank you very much."

7. In the initial I will lay bare the historical constitutional scheme with regard to the ownership of oil and gas:-

- a) The Government of India Act 1935 (which was adopted as the working Constitution of Pakistan in 1947, vide Section 8 of the Independence Act, 1947) provided for “major minerals and minor minerals”. Entry No. 36, Federal Legislative List, Seventh Schedule, Government of India Act, 1935, shows oilfields and minerals as Federal subjects. The said entry is reproduced as under:-

“36. Regulation of mines and oilfields and mineral development to the extent to which such regulation and development under Federal Control is declared by the Federal Law to be expedient in the public interest”

- b) The oilfields, mines and minerals which were not declared by the Federal law to be under Federal control were assigned to the Provincial Legislatures vide Entry No.23 of the Provincial Legislative List, Seventh Schedule, of the said Act. The said Entry is reproduced as under;

“23. Regulation of mines and oilfields and mineral development subject to the provisions of List 1 with respect to regulation and development under Federal Control”

- c) The mines and minerals under Federal control (as per entry No.36 reproduced herein above) refer to the Mines Act 1923, whereby, the law relating to regulation and inspection of Mines was enacted. The term “appropriate Government” was defined in Section 3(aa) as:-

“(aa) ‘appropriate Government’ means in relation to mines of [nuclear substances mineral oil, natural gas and liquids, and substances declared by Federal Law to be dangerously inflammable oil fields and gas fields] the [Federal Government] and in relation to other mines the Provincial Government;”

- d) “The Regulation of Mines and Oil-fields and Mineral Development (Government Control) Act, 1948”, was enforced with effect from 18th June, 1949, whereby, the appropriate Government was authorised to regulate the exploration or prospecting licenses, mining leases and mining concessions. Section 6 of the said Act defines the appropriate Government as;

“6. Definitions of appropriate Government. In this Act, ‘appropriate Government’ means, in relation to mines of nuclear substances, oil-fields

and gas fields, and development of such substances, mineral oil and gas, the [Federal Government and, in relation to the other mines and mineral development, the Provincial Government.]”

- e) “The Petroleum Act, 1934, “(Act XXX of 1934), though relates to import, transportation and storage of petroleum products but it shows the control of the Federal Government prior to 1935. Section 5 of the said Act, delegates to Federal Government the power to frame rules for production, refining or blending of petroleum products.
- f) The 1956 Constitution, provided vide Entry No. 15, Federal List, Fifth Scheduled, Oil and Gas as Federal subjects. The said Entry is reproduced as under:-

“15. Mineral oil and natural gas.”

- g) The ownership of all minerals underlying the territorial waters was vested in the Federal Government by Article 134, 1956 Constitution, the said Article is reproduced as under:-

“134. (1).....

(2).....

(3) All lands, minerals and other things of value underlying the ocean within the territorial water of Pakistan shall vest in Federal Government.”

- h) In 1961 the President of Pakistan promulgated, “President’s Order No. 8 of 1961” namely,- “The Minerals (Acquisitions and Transfer) Order 1961”, whereby, all minerals were acquired by and transferred to the Central Government. Providing further that the ownership of such minerals shall vest in the Central Government free from all encumbrances. The term “minerals” was defined to mean all surface and sub-surface natural deposits including natural deposits of fuel, oil & gas. Relevant extract is reproduced as under:-

***President’s Order No.8 of 1961,
Minerals (Acquisition & Transfer) Order 1961***

- “2. In this Order, unless there is anything repugnant in the subject or context, “minerals” mean all surface and sub-surface natural deposits of ores and metals and other metallic and non-metallic substances and include natural deposit of fuel, oil & gas.*

3. *Notwithstanding any law, custom, usage, agreement, decree or order of any court to the contrary, all minerals and rights appertaining thereto shall stand acquired by, and transferred to, and shall vest in, the Central Government free from all encumbrances:*

Provided that any lease or concession granted, or any agreement or contract made, at any time before the commencement of this Order by or on behalf of a Provincial Government or any other party shall be deemed to have been granted or made by or on behalf of the Central Government.

Provided further that where any such lease has been granted before the seventh day of October, 1958, or any such agreement or contract has been made before that date, by any party other than the Provincial Government, all receipts, royalties, fees or payments accruing or payable to such party before the commencement of this Order, shall continue to accrue and be payable to the party until the expiry of the term of the lease, agreement or contract, as the case may be, but no such party shall, notwithstanding anything contained in such agreement, lease or contract, have any right to extend the term thereof, or to vary or modify any of its conditions.

4. *No compensation shall be payable for acquisition or transfer under clause (I)."*
- i) *The Constitution 1962, placed oil & gas in the Central Legislative List, Entry No. 24 whereas, minerals under the territorial water were vested in the Central Government vide Article 146 (2), the said Article is reproduced as under:-*
- 146.....*
- 2) *"All lands, minerals and other things of value underlying the ocean within the territorial waters of Pakistan shall vest in the Central Government."*
- i) *During this period all the minerals, including oil & gas, remained vested in the Federal Government as per President's Order No. 8 of 1961 (Reproduced hereinabove).*
- j) *The Constitution, 1973, came into force on the 14th day of August, 1973, "Presidential Order No. 8 of 1961", was protected under Article 8 (3) (b) from the operation of Article 8(1) by placing the Presidential Order at*

S.No. 1, Part-II of the First Schedule. Article 8(3)(b) is reproduced as under ;

“8. Laws inconsistent with or in derogation of Fundamental Rights to be void:-

(1)

(2)

(3) The provision of this Article shall not apply to.....

(a)

(b) Any of the—

(i) Laws specified in the First Schedule as in force immediately before the commencing day or as amended by any of the laws specified in that Schedule;

(ii) Other laws specified in Part 1 of the First Schedule;

And no such law nor any provision thereof shall be void on the ground that such law or provision is inconsistent with, or repugnant to, any provision of this Chapter.”

k) The Constitution (Fourth Amendment) Act, 1975, substituted the First Schedule of the Constitution with a new Schedule, Part-II of the said Schedule pertains to Presidential Orders. The Presidents Order No. 8 was placed at S. No. 1. Part-II of the First Schedule is regulated by Article 8(4) of the Constitution, 1973. The said Article is reproduced as under;

“(4) Notwithstanding anything contained in paragraph (b) of clause (3), within a period of two years from the commencing day, the appropriate Legislature shall bring the laws specified in [Part II of the First Schedule] into conformity with the rights conferred by this Chapter:

Provided that the appropriate Legislature may by resolution extend the said period of two years by a period not exceeding six months.

Explanation.-- If in respect of any law [Majlis-e-Shoora (Parliament)] is the appropriate Legislature, such resolution shall be a resolution of the National Assembly.”

l) As no amendment has been made during the said prescribed period, therefore, the said Presidential Order is intact, except for the variation

that has taken place through the 18th Amendment (referred to herein below).

- m) In addition to the said President's Order, relating to ownership of all minerals including natural deposits of fuel, oil & gas the exclusive ownership of land, minerals and other things of value underlying the ocean within the territorial water was vested in the Federal Government by the 1956 and 1962 Constitutions as stated herein before. However the Constitution, 1973, introduced further provisions in this regard. Article 172 (2), Constitution, 1973, originally provided:-

*"172. **Ownerless property.**- (1) Any property which has no rightful owner shall, if located in a Province, vest in the Government of the Province, and in every other case, in the Federal Government.*

(2) All lands, minerals and other things of value within the continental shelf or underlying the ocean within the territorial waters of Pakistan shall vest in the Federal Government."

- n) The Constitution, 1973, introduced another provision relating to the payment of Excise duty and Royalty of gas to the Province where the well-head of the gas is situated. Thus, for the first time, the Provinces were held entitled to share in the income of gas produced in that Province. Article 161 (1), Constitution, 1973, is reproduced as under;

"161. Natural gas and hydro-electric power. (1) Notwithstanding the provisions of Article 78 the net proceeds of the Federal duty of excise on natural gas levied at well-head and collected by the Federal Government, and of the royalty collected by the Federal Government, shall not form part of the Federal Consolidated Fund and shall be paid to the Province in which the well-head of natural gas is situated."

- o) Another Article of the Constitution, 1973, vested the Provinces with the additional right of priority in the utilization of natural gas produced in the Province. Article 158, Constitution, 1973, provided as under;

*"158. **Priority of requirements of natural gas.** The Province in which a well-head of natural gas is situated shall have precedence over other parts of Pakistan in meeting the requirements from that well-head, subject to the commitments and obligations as on the commencing day."*

p) The 18th Amendment to the Constitution, 1973, introduced two major amendments for empowering the Provinces with regard to oil & gas. The first major step for the empowerment of the Provinces was the substitution of the word “within” with the word “beyond” in clause (2) of Article 172, Constitution, 1973, and the second, being the most important, was the insertion of clause (3) in Article 172, Constitution, 1973, whereby the Provinces got the equal right of ownership of oil & gas within the Province and the Territorial Waters adjacent to the Province. The amended Article 172 is reproduced as under;

“172 Ownerless property. (1) Any property which has no rightful owner shall, if located in a Province, vest in the Government of that Province, and in every other case, in the Federal Government.

(2) All lands, minerals and other things of value within the continental shelf or underlying the ocean beyond the territorial waters of Pakistan shall vest in the Federal Government.”

(3) Subject to the existing commitments and obligations, mineral oil and natural gas within the Province or the territorial waters adjacent thereto shall vest jointly and equally in that Province and the Federal Government.”

8. At the conclusion of the journey of the historical evolution of ownership of Oil and Gas, till the instant date, stated herein, the following proposition emerge;

- (i) Prior to the year 1973, the Federal Government had the exclusive legislative and executive domain over mineral oil and natural gas under the then prevailing Constitutional scheme.
- (ii) All minerals including oil & gas were acquired by and vested in the Federal Government vide President’s Order No.8 of 1961 and protected by the First Schedule, Constitution, 1973, subject to any change by the appropriate legislature.
- (iii) With effect from 14th August, 1973:-

- a) The land, minerals and other things of value (including oil & gas) within the Territorial waters and the Continental shelf were declared to be the ownership of the Federal Government.
 - b) The Provinces got the precedence, over other areas, in meeting the requirements of natural gas from the well-head of gas situated in such Province.
- (iv) With the enforcement of the 18th Amendment to the Constitution, 1973, the Provinces were further empowered as:-
- (a) The ownership of land, minerals etc. of the Federal Government was restricted to the continental shelf beyond the territorial waters.
 - (b) The Provinces were vested with equal rights with the Federation with regard to the oil & gas within the Province and the adjacent territorial waters.

9. Upon perusal the herein stated legal and factual position, in particular the view taken by the Federal Government and the Provinces, reflects a serious difference of opinion between the Federal and the Provincial Governments with regard to the interpretation of clause (3) Article 172, of the Constitution, 1973. The Federal Government is taking the position that the said constitutional provision stands implemented while the Provinces are, time and again, raising the issue as to implementation and interpretation of clause (3) of Article 172, Constitution, 1973 at the forum of the CCI. Reference is made to the following decisions of the CCI in this regard:-

Case No. CCI. 1/1/2016 Dated 29.02.2016	Status Review of Important Decisions of the CCI meeting held on March 18, 2015
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“In the 27th meeting of CCI held on March 18, 2015 the Prime Minister/Chairman CCI directed the Minister for Petroleum and Natural Resources and Minister for IPC to consider the oil and gas matters in IPCC. In compliance, three meetings of IPCC were held and the view point of Provinces was discussed in detail. Another meeting was conducted on 24th February, 2016 in the Ministry of Petroleum & NR under the Chairmanship of the Minister for Petroleum & NR and the matter was again deliberated. However, on the

request of the Government of Sindh, the issue of LNG was included as a separate agenda item (Item 4) of the 28th CCI meeting.”

Case No. CCI. 4/1/2016 Dated 29th February, 2016	Import of Liquefied Natural Gas (LNG)
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“The CCI decided that all the issues pertaining to Oil & Gas highlighted by Government of Sindh as given in para-31 of the minutes be referred to the Working Level Technical Committee under the supervision of IPCC and report be submitted to the CCI:-

- (i) Import of Liquefied Natural Gas (LNG) and associated incidental & ancillary matters;*
- (ii) Presence of supply of gas under Article 158;*
- (iii) Resolution of post-devolution issues & anomalies;*
- (iv) Utilization of GIDC receipts, Double Taxation issue related to GIDC.”*

Case No. CCI. 1/3/2016 Dated 16th December, 2016	Status Review of Important Decisions of the CCI meeting held on 29th February, 2016 and March 25, 2016
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“The CCI approved constitution of the committee under the Chairmanship of Federal Law Minister consisting of Provincial Law Ministers, Attorney General for Pakistan and Provincial Advocate Generals to resolve the issues pertaining to interpretation of constitutional provision.”

10. Before I take up clause (3) of Article 172, Constitution, 1973, it will be appropriate to peek into the intent wisdom of the drafters of this provision. The spirit and scheme of this constitutional provision and the intent of the legislature can be gathered from the discussion on the said provision during the consideration of Eighteenth Constitutional Amendment Bill in the Parliament. Reference is made to,-

Senate of Pakistan Debates, 180 Session Volume IV No. 04, Monday, April, 12, 2010, wherein, I as Advisor to the Prime Minister and Chairman of the Parliamentary Committee on Constitutional Reforms, while piloting the Constitutional Amendment Bill, briefed the House regarding the proposed amendments in the following terms:-

Mr. Chairman, I would like to take you to Article 172. There is a major amendment in Article 172 of the Constitution, right now Article 172 of the Constitution as it stands, now I will go to straight to clause 2, because clause 2 is the relative clause and that says that “all lands, minerals and other things of value within the constitutional shelf or

underlying the Ocean within the territorial waters of Pakistan shall vest in the Federal Government” that means right now the entire control over this is of the Federal Government it was a major irritant and with the help of political leadership and their wisdom and for reaching approach a major leap forward has been made. The proposed amendments with regard to the Provincial autonomy is that in clause (2) for the word “within” occurring for the second time, the word “beyond” shall be substituted. So, this is the first. Then this is with respect to territorial water. Then we move on Mr. Chairman that after clause (2) we have provided that we have proposed that a new clause be added and that is clause 3 and I think this is one of the crunch point. An integral move to ensure provincial autonomy is that “subject to the existing commitments and obligations, mineral, oil and natural gas within the province or the territorial waters adjacent thereto shall vest jointly and equally in that Province and the Federal Government.” So for the first time, it has been recognized and a constitutional guarantee has been given to the Provinces that they are equal partners with the Federal Government in these resources which I think is a major and a joint step forward.

Senate of Pakistan Debates, 180 Session Volume IV No. 05, Tuesday, April, 13, 2010, Senator Haji Muhammad Adeel (late), while taking part on the consideration of the Bill stated:-

“it has been decided with regard to the provincial autonomy that oil, gas and other minerals either in the waters upto 12 nautical miles, will be the joint and equal property of the Federal and Provincial Governments”

Senate of Pakistan Debates, 180 Session Volume IV No. 05, Tuesday, April, 13, 2010, Senator Abdul Raheem Khan Mandokhel (late), while taking part on the consideration of the Bill stated:-

“Articles 153 to 172 have been amended to ensure that provinces are joint and equal partners alongwith the federation regarding their own resources i.e. oil and gas”

11. Reference can also be made to the proceedings of the Implementation Commission which was constituted in terms of clause 9, Article 270 AA, Constitution, 1973, which states that “for purposes of the devolution process under clause (8), the Federal Government shall constitute an Implementation Commission”. Minutes of the 58th meeting of the Implementation Commission held on 26th May 2010, are as under:-

“The meeting was apprised that Constitution (Eighteenth Amendment) Act 2010 has inserted a new clause 1 (b) under Article 161 which allowed payment to the Province of the net proceeds of Federal excise duty on oil. Addition of clause 3 under Article 172 provided sharing of ownership of oil and gas and extension of ownership of the Provinces up to territorial waters.

Ministry of Petroleum was to brief the Commission about the action taken regarding implementation of Article 172(3) of the Constitution. Minister for Petroleum & Natural Resources stated that the newly inserted clause 3 of Article 172 of the Constitution was provided for joint management and equal powers to the Federation and the Provinces for exploration of mineral oil and natural gas within the Provinces and upto the territorial waters. The Ministry was looking at the interpretation of the said Article and for evolving a working mechanism for implementation of this provision of the Constitution. A proposal to constitute a Committee, under Director General Petroleum Concessions (DGPC), for the purpose was under consideration in that Ministry.

It was stated that the subject of mineral oil and natural gas appeared in Part-II of the Federal Legislative List. Prior to Eighteenth Amendment, Council of Common Interests (CCI) was a dormant body and Provinces were not playing any role in policy making on the subject. Need to examine the implications of the joint management by the Federation and Provinces and setting up of an Authority, for the purpose, was stressed. It was pointed out that matters pertaining to Petroleum concessions and production would lie with the proposed Authority. Currently the stakeholders were having reservations, thus the production was going down. It was suggested that the present interim arrangement should continue and a Committee under DGPC should be set up to handle renewal of existing leases.

It was pointed out that at the time of deliberations on Eighteenth Amendment, the Province of Balochistan had demanded devolution of natural resources to the Provinces. That demand was accommodated to some extent by insertion of a new clause under Article 172 which provided that Petroleum concessions and production to be jointly owned by the Federation and the Provinces.

Mr. Naveed Qamar, who had been the Minister for Petroleum & Natural Resources till recently, explained that an office headed by DGPC duly represented by the Provincial Governments was handling the matter. Setting up of an Authority with representatives of the Provinces for the purpose was being considered, for which a draft law was also in the process for placing before the CCI, for approval. The present set up under DGPC should continue till such time the said Authority was established. CCI was the forum to formulate policy on the subject while day to day executive functions had to be performed by the Ministry.

It was also pointed out that an ambiguity existed in the interpretation of the clause 3 of Article 172, as to how the old agreements and commitments would be honoured. It was clarified that the said provision opened with the words "subject to existing commitments, obligations". It could be assumed that the old commitments would continue as they were and there was no ambiguity, in this regard.

The Chairman observed that formulation of Committee under DGPC was the internal matter and it was the prerogative of the Ministry of Petroleum to decide. The Commission was concerned only to the extent of implementation of the amended provisions of the Constitution. The position mentioned in the brief given by the Ministry of Petroleum and Natural Resources and the legal formulations given therein were not clear. It was directed that the Ministry of Petroleum should prepare a Summary for CCI indicating the implementation of Article 172 of the Constitution. The consequences of the changed scenario and steps taken for constitution of an Authority for regulation of petroleum concessions be incorporated in the Summary. That Summary could be share with the Commission for views. It was also stated that if the Ministry had some problem in legal

interpretation of Article 172, a reference could be sent to the Commission for seeking advice, in the matter, within a week.”

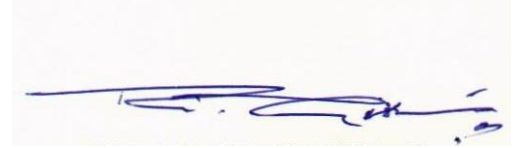
12. The intent of the drafters of the 18th Constitutional Amendment read with the proceedings of the Implementation Commission clear the mist that when clause (3) in Article 172, Constitution, 1973, was inserted the intent of the legislation was to provide equal ownership of mineral oil & natural gas within the Province or territorial waters adjacent to a Province. The Federation is required to exercise the authority in executive, administrative and regulatory spheres jointly and equally with the Province. In terms of the new role of the Federation and the Provinces, as conceived by clause (3) of Article 172, Constitution, 1973, a new mechanism was to be devised to exercise joint authority by the Federation and the Provinces with regard to Executive, Administrative and Regulator dimensions of the Oil and Gas. For this reason the Implementation Commission decided that a Regulatory Authority may be established through an Act of Parliament giving due representation and share to the Provinces. From the briefing of the Ministry of Petroleum it appears that the office of Director General Petroleum Concessions has been assumed by the Federal Government as a substitute of the Regulatory Authority to be established by an Act of Parliament. This is mainly the reason that the Provinces are consistently complaining about no or minimal consultation with them regarding the decisions being taken with regard to the Oil and Gas Sector. Not a single Province is satisfied with the operationalization of clause (3) of Article 172, Constitution, 1973 and contest the Federal Government position.

13. The Prime Minister made a statement in the House on 20-12-2017, that World Bank was engaged as a consultant and that engagement has ended. Notwithstanding the position taken by the Prime Minister of Pakistan, an attempt to delink the Petroleum and Natural Gas Regulator from Provincial oversight in contravention of the Constitutional provisions by playing with a draft law on the dictates of the World Bank is unacceptable. I will not go into the merits of the said draft law as it has not been introduced in Parliament and is a mere piece of paper. But it is unfortunate that the Federation did not act upon the decisions of the Implementation Commission for bringing a balanced law for the regulation of joint control of oil and gas, however, was willing to act upon the policy being provided by the World Bank which will impinge upon the Constitutional rights of the Provinces. This is not a first

case, since the passage of 18th Amendment to the Constitution some foreign organizations/donors are trying hard to roll back the scheme of devolution.

14. Natural resources including Oil and Gas, are strategic assets of the Sate which are directly linked with the national security of the Country. Interference of International Donor especially IMF and World Bank in policy decisions and legislations, in any form, exposes the National Security of the Country which can be manipulated to the disadvantage of the State, therefore, giving access to international donors/ organization into the internal affairs of the Federation is not only unconstitutional but can prove to be a serious threat to the national security of Pakistan. The Government should frame a policy as to the extent of involvement of International Donor/ Organization into the internal affairs of the Federation especially its policies and legislations and place the same before the Parliament for approval.
15. As a consequence of the Reference forwarded by the Functional Committee on Devolution, which sought interpretation of clause (3) of Article 172 of the Constitution, 1973, and as a result of the debate held in the House, I am constrained to interpret the said Article for the benefit of the Committee and the House in the following terms,-
- (i) Clause (3) of Article 172 of Constitution, 1973, provides for equal ownership of mineral oil & natural gas within the Province or the territorial waters adjacent to a Province (fifty percent belonging to the Federal and fifty percent to the Province) and the Federation is required to exercise its authority in the executive, administrative and regulatory sphere jointly and equally with the Province.
 - (ii) All decisions, except day to day working, pertaining to or related with these matters shall be taken by the Council of Common Interest, (CCI), as this entry falls in Part II of the Federal Legislative List, Constitution, 1973.
 - (iii) The Government should frame a policy as to the extent of involvement of International Donor/ Organization into the internal affairs of the federation especially its policies and legislations and the same shall be placed before the both Houses of Parliament for approval within a period of two months.

16. The Senate Secretariat is directed to send copies of this Ruling to the Prime Minister of Pakistan, Minister of State for Petroleum Division, Minister for Parliamentary Affairs, Chairman Functional Committee on Devolution, Provincial Chief Ministers and Speakers Provincial Assemblies.



**MIAN RAZA RABBANI
NI
CHAIRMAN**

**Dictated in Chamber
Announced in the House on 23rd January, 2018
272nd Session**