



Participatory Federalism Rulings of the Chair



Senate of Pakistan



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Preface

This document compiles the Rulings of the Chair on the issues of non-holding of meetings of CCI, constitutional requirement of announcement of National Finance Commission award, operationalization of joint ownership of mineral oil and natural gas; implementation of Article 172 (3), Constitution, 1973 and placement of regulatory authorities under the line ministries. These Rulings, which are part of the documentation as to Rulings of the Chair, are being published separately to reflect the vision, understanding and provision of Chairman Mian Raza Rabbani in the dimension of participatory federalism.

Amjed Pervez Malik
Secretary Senate



Executive Summary

Participatory Federalism and bicameralism have always been interlinked, since in highly decentralized or constitutionally regionalized states, the *raison d'être* of the Upper House is to play the essential balancing role between the centre and the geographical components of the federation.

The Constitution of Pakistan envisages the role of Senate to act as a pivot to swerve away from, and ward off, confrontation between the executive and the federating units, especially where parliamentary regimes are dominated by the will of the majority and lack a separate body as a counterweight. In this way, it helps check the power of majoritarian elements that might otherwise dominate the governmental process.

The 18th Amendment brought in its wake a new paradigm for federalism in Pakistan, underlining the many strengths of federalism, including its potential contribution to, and implications for, Pakistan's democratic and economic development, mode of governance and constitutional architecture. The said constitutional amendment empowered the Senate so that it can play its role more effectively as a House of Federation especially.

Over a period of time, the Senate of Pakistan has emerged as a defender of the rights of the Federating Units and jealously guards encroachments on the devolution of power to the Provinces. Various Parliamentary tools are being utilised by the House, Committees and Members to highlight and address the issues being faced by the federating units.

The most significant and important contour of Parliamentary jurisdiction is decision or Ruling of the Chair which decides a question of law or fact and is final in nature. The Rulings are being issued for the purpose of consolidating a consistent and sound legal and procedural edifice for

smooth regulation of House proceedings, ensuring the implementation of constitutional scheme especially in the wake of the Eighteenth Constitutional Amendment and for protection of the rights of the federating units.

In the recent past, the Presiding Officers have used this authoritative tool to effectively represent the provinces/territories of the country and to promote a feeling of equality, peace and harmony, which is so essential for the growth and prosperity of a nation. Rulings of the Chair on the issues of non-holding of meetings of CCI, constitutional requirement of announcement of National Finance Commission award, operationalization of joint ownership of mineral oil and natural gas; implementation of Article 172 (3), Constitution, 1973 and placement of regulatory authorities under the line ministries, are testimonial to the fact that the upper House and its custodian i.e. the Chairman Senate are striving to protect the interests of the federating units by ensuring that constitutional provision are implemented in true letter and spirit.

The first Ruling regarding the Council of Common Interests (CCI) came at a time wherein 331 days had passed and the CCI failed to meet or summoned to meet in complete violation of clause (3) of Article 154 of the Constitution, 1973, which provides that Council of Common Interests shall meet once in every 90 days. The House extensively discussed the matter in the form of a Motion under rule 218, Rules of Procedure and Conduct of Business in the Senate, 2012, which provided that “the House may discuss the domain and jurisdiction of the Council of Common Interests (CCI) and the situation arising out of non-convening of meeting of the Council as required under clause (3) of Article 154 of the Constitution, 1973”. Observing the gravity of the issue and noting that the pivotal role of the Council of Common Interests (CCI) and such like institutions in a participatory federal constitutional frame work cannot be under played, Chairman Senate Mian Raza Rabbani issued a detailed

Ruling on this matter. The Chairman while touching upon the historical context with respect to evolution of CCI and examining the constitutional provisions, ruled that “I am conscious of the constitutional chaos and mayhem that can be created, therefore, I, reluctantly, restrain to hold all such decisions, actions and orders to be unconstitutional. However, any action taken in violation of the constitutional scheme from fifteen days after the date of announcement of this Ruling will be in violation of the Constitution.” As a consequence of the Ruling, the Government held a meeting of the CCI within fifteen day of the issuance of the Ruling.

Similarly, on 19th December, 2016, five regulatory bodies were transferred from the Cabinet Division to their respective line Ministries. As the regulatory bodies fall in the Federal Legislative List II, under the Constitution the policy decisions regarding the Regulatory bodies had to be made through the CCI in the greater interest of the Federation; however the said transfer was made by the Prime Minister without taking CCI on board. Moreover, the Provincial Government of the Khyber Pakhtunkhwa had tried to include this matter in the agenda of a CCI meeting but did not succeed. The matter of raised in the House and the Minister for Law and Justice made a statement on behalf of the Government. A detailed discussion was also held in the House on the said matter and the Committee on Devolution was also consulted. The Chairman Senate issued a detailed Ruling on this matter on February 20th, 2017, in the following terms:-

“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.”

The matter was also challenged before the Islamabad High Court and

the Lahore High Court. The Islamabad High Court in its Judgment dated 20th June, 2017, in Writ-Petition No. 4802/2016 held as under:-

“It would not be out of place to refer to the ruling, dated 20-02-2017, of the Chairman of the apex forum of the Federating Units i.e. the Upper House of Majlis-e-Shura, the Senate. This ruling was enough for the Federal Government to have recalled the impugned Memorandum, dated 19-12-2016, out of deference for the forum representing the Federating Units.”

The Chief Justice, Lahore High Court in his order dated 21st February, 2017, in Writ Petition 1198/2017 held as under:-

“Recently the Ruling of the Chairman Senate dated 20-02-2017 holds that control of regulatory authorities cannot be transferred from one ministry to another without obtaining the approval from CCI under Article 154 of the Constitution.”

Similarly, National Finance Commission (NFC) is the constitutional fora to regulate distribution of revenues between provinces and federation. Article 160 of the Constitution of the Pakistan provides that NFC shall be constituted in intervals not exceeding every 5 years. The NFC that recommended 7th award was constituted on 21st July, 2010. According to constitutional provision the NFC for 9th award should have been constituted by 21st July, 2015. The President had constituted the NFC on 24th April, 2015. However, the Commission had not provided recommendation for NFC award. The Government contended the provision of that Constitution does not obligate the NFC to announce the award every five years rather it just necessitates its constitution. This issue was raised in Senate time and again because this had resulted in the grievance of the provinces in getting their required constitutional share from government. Observing the gravity of the situation, Chairman Senate Mian Raza Rabbani issued a 'Ruling' on this matter. The 'Ruling' held Government position unsubstantiated by holding that in terms of clause (1) read with clause (2) of Article 160, Constitution, 1973, the

National Finance Commission is bound to give its recommendations to the President of Pakistan before the expiration of its tenure i.e. five years. The issue of the ownership of the Minerals Oils and Natural gas has long been a bone of contention between the centre and the federating units, the Eighteenth Constitutional Amendment addressed this issue by inclusion of Article 172 (3) in the Constitution, 1973. The Ruling that interpreted this Article and the consultative process initiated by the Senate for this matter is a prime example of Participatory Federalism in action. The issue came into limelight when during a meeting of the Senate Functional Committee of Devolution, the Ministry for Petroleum, which was then headed by the incumbent prime Minister claimed that the Article 172 (3) of the Constitution has been implemented, the members of the Committee representing all federating units however disagreed and it was decided that the provinces be consulted on this matter. The Committee then held its meetings in all the four provincial capitals and collected input from the respective Provincial Governments, none of whom agreed with the claim made by the Federal Government. Moreover, the interpretation of the said provision also came under debate, as it appeared that the interpretation by the Federal Government was significantly different from by the Federating units. Therefore, a reference was sent to the Chairman Senate for interpretation of clause (3) of Article 172, Constitution, 1973 and a comprehensive Ruling was issued in this regard on 23rd January, 2018. The Ruling interpreted the said Article while specifically addressing the ambiguities that had arisen during the discourse provided that (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., moreover, it also directed the Government to form a policy regarding the extent of involvement of International Organisations in the affairs of the Federation. It also directed that such policies and legislations be placed before both the Houses of Parliament within a period of two months.

This document compiles the above-mentioned Rulings as a ready reference for the Executive, Provinces and public at large with the purpose of creating awareness and creating a strengthened network for participatory federalism.



COUNCIL OF COMMON INTERESTS (CCI)

A motion under rule 218, Rules of Procedure and Conduct of Business in the Senate, 2012, notice of which was received on 26th November, 2015, was moved by Senator Sassi Palijo on 21st December, 2015, in the 122nd Session of the Senate, on the subject that, “this House may discuss the domain and jurisdiction of the Council of Common Interests (CCI) and the situation arising out of non-convening of meeting of the Council as required under clause (3) of Article 154 of the Constitution of the Islamic Republic of Pakistan”.

2. As this important constitutional question had been raised frequently in prior sessions of the Senate, some Members urged the Chairman to make an observation. A tentative observation was made, which is part of the proceedings of the said sitting, but I reserved my Ruling.

3. The pivotal role of the Council of Common Interests (CCI) and such like institutions in a participatory federal constitutional frame work cannot be under played. In the Pakistani constitutional framework, it is necessary to trace the historic continuity of inter-provincial and federal government foras.

4. CONSTITUTIONAL HISTORY:

(i) The Government of India Act, 1935:

Section 135 of the said Act provided as under:-

*“(135) Provisions with respect to an Inter-Provincial Council
If at any time it appears to His Majesty upon
consideration of representations addressed to him*

by the Governor-General that the public interests would be served by the establishment of an Inter-Provincial Council charged with the duty of—

- (a) inquiring into and advising upon disputes which may have arisen between Provinces;*
- (b) investigating and discussing subjects in which some or all of the Provinces, or the Federation and one or more of the Provinces, have a common interest; or*
- (c) making recommendations upon any such subject and, in particular, recommendations for the better co-ordination of policy and action with respect to that subject,*

it shall be lawful for His Majesty in Council to establish such a Council, and to define the nature of the duties to be performed by it and its organisation and procedure. An Order establishing any such Council may make provision for representatives of Indian States to participate in the work of the Council.”

(ii) The Constitution, 1956:

- (a) The Constitution, 1956, also set in place a dispute resolution mechanism to settle any disagreement(s) between and within the Central and Provincial Governments. It provided under Article 156, that the Supreme Court in its original jurisdiction may take up any dispute between, (a) the Federal Government and Government of one or both Provinces, or (b) the Federal

Government and one Province or other Provinces, and (c) between the Provinces.

- (b) The said Constitution authorized the President to establish an Inter-Provincial Council if it appeared to serve the public interest. Articles 130 and 156 are reproduced as under:

ARTICLE 130:

“130. Inter-Provincial Council. -If at any time it appears to the President that the public interest would be served by the establishment of an Inter-Provincial Council charged with the duty of – (a) investigating and discussing subjects in which the Provinces, or the Federation and one or both of the Provinces, have a common interest; or (b) making recommendations upon any such subject and, in particular, recommendations for the better co-ordination of policy and action with respect to that subject, the President may, with the consent of the Governors of the Provinces, establish such a Council and define the nature of the duties to be performed by it, and its organization and procedure.”

ARTICLE 156:

“156. National Economic Council.—(1) The President shall constitute a National Economic Council which shall consist of—

- (a) the Prime Minister, who shall be the Chairman of the Council;*
- (b) the Chief Ministers and one member from each Province to be nominated by the Chief Minister;*
- and*

- (c) *four other members as the Prime Minister may nominate from time to time.*
- (2) *The National Economic Council shall review the overall economic condition of the country and shall, for advising the Federal Government and the Provincial Governments, formulate plans in respect of financial, commercial, social and economic policies; and in formulating such plans it shall, amongst other factors, ensure balanced development and regional. equity and shall also be guided by the Principles of Policy set out in Chapter 2 of Part-II.*
- (3) *The meetings of the Council shall be summoned by the Chairman or on a requisition made by one-half of the members of the Council.*
- (4) *The Council shall meet at least twice in a year and the quorum for a meeting of the Council shall be one-half of its total membership.*
- (5) *The Council shall be responsible to the Majlis-e-Shoora (Parliament) and shall submit an Annual Report to each House of Majlis-e-Shoora (Parliament)."*
- (c) Under Article 200, Constitution, 1956, the President could appoint a Board for each Province consisting of representatives of the Federal and Provincial Governments to advise the Federal Government on matters relating to Post and Telegraph (Federal subject) in the Province.
- (d) The Constitution, 1956, further provided for the establishment of two other governmental foras, where both the Federal and

Provincial Governments were represented. Said Foras were the National Finance Commission (NFC) and the National Economic Council (NEC).

- (e) The NFC comprised of the Federal Finance Minister, as Chairman, along with the Provincial Finance Ministers and other relevant officials who could only be appointed after consultation with the Governors of the Provinces.
- (f) The NEC was to be constituted by the President, consisting of four (4) Federal Ministers, three (3) Ministers from each Province and the Prime Minister was to be the Ex-Officio Chairman.

(iii) The Constitution, 1962:

- (a) The Constitution, 1962, to a great extent adopted the mechanism for dispute resolution between the Centre and the Provinces as was provided in the Constitution, 1956. It granted powers to the Supreme Court in such disputes, however, the modalities of dispute resolution under-went certain changes.
- (b) The provision of Inter-Provincial Council as provided under Article 130 of the Constitution, 1956, was not included in the said Constitution. It continued with the provisions of the NFC and NEC.
- (c) Article 132, Constitution, 1962, gave powers to the Provincial Assemblies to legislate on residual matters. The Central Legislature had exclusive jurisdiction to make laws with respect to any matter enumerated in the Third Schedule thereof. However, the powers of the Central Legislature were greatly enhanced through clause (2) of Article 131 which is reproduced as under:

- “(2) Where the national interest of Pakistan in relation to---*
(a) the security of Pakistan including the economic and financial stability of Pakistan; or
(b) planning or co-ordination; or
(c) the achievement of uniformity in respect of any matter in different parts of Pakistan.

so requires, the Central Legislative shall have power to make laws (including laws having extra-territorial operation) for the whole and any part of Pakistan with respect to any matter not enumerated in the Third Schedule.”

- (d) The said Constitution, granted special legislative powers to the Central Legislature in the name of national interest.

(iv) The Constitution, 1973:

The Constitution, 1973, in the matter of dispute resolution provided for the Council of Common Interests (CCI), under Article 153 of the said Constitution.

- (a) Article 153 is reproduced herein as under:

- “153. (1) There shall be a Council of Common Interests, in this Chapter referred to as the Council, to be appointed by the President.
- (2) The members of the Council shall be -
- (a) the Chief Ministers of the Provinces, and
- (b) an equal number of members from the Federal Government to be nominated by the Prime Minister from time to time.
- (3) The Prime Minister, if he is a member of the Council, shall be the Chairman of the Council but, if at any time he is not a member, the President

may nominate a Federal Minister who is a member of the Council to be its Chairman.

(4) The Council shall be responsible to Parliament.”

- (b) The said Constitution also provided under Article 154 that Parliament, in Joint Sitting, may from time to time, by resolution issue directions through the Federal Government to the Council generally, or in particular matters to take action as Parliament may deem just and proper and such directions shall be binding on the Council. It further provided that if the Federal Government or a Provincial Government is dissatisfied with a decision of the Council it may refer the matter to Parliament in a Joint Sitting whose decision in this behalf shall be final.
- (c) Article 155, provided that if an interest of the Province, the Federal Government or the Federal Administrative Tribal Areas or any of the inhabitants thereof, in water from any natural source of supply have been or are likely to be effected prejudicially, the Federal or Provincial Governments concerned may make a complaint in writing to the Council.
- (d) Article 184, provided for resolution of disputes between any two or more Provincial Governments or Federal and Provincial Governments, by invoking the original jurisdiction of the Supreme Court of Pakistan.
- (e) Article 160, provided for the constitution and functioning of the National Finance Commission (NFC). A major departure from the past constitutional practice of the NFC being constituted on the prerogative of the President was taken away.

- (f) Article 156, provided for the constitution of the National Economic Council. Departure from the past constitutional practice of the prerogative of the President in its constitution was omitted.
- (g) Article 70(4), provided for three (3) Legislative Lists in the Fourth Schedule namely, the Federal Legislative List Part-I, the Federal Legislative List, Part-II and the Concurrent Legislative List. All residuary powers of legislation rested with the Provincial Assemblies.

I will now proceed to examine the function and responsibilities of the Council of Common Interests (CCI) as they stood prior to the 18th Constitutional Amendment.

FUNCTION OF THE COUNCIL OF COMMON INTERESTS:

- (aa) Article 154, Constitution, 1973, provided that the CCI shall, formulate and regulate policies in relation to matters in the Federal Legislative List, Part-II, and shall exercise supervision and control over related institutions.
- (bb) There were a of total 8 Items in the Federal Legislative List, Part-II, over which the CCI was to formulate and regulate policies and exercise supervision and control over related institutions. The said List is reproduced as under:

PART II

1. Railways.
2. Mineral oil and natural gas; liquids and substances declared by Federal law to be dangerously inflammable.
3. Development of industries, where development under Federal control is declared by Federal law to be expedient in the public interest; institutions, establishment bodies and corporations

administered or managed by the Federal Government immediately before the commencing day, including [Pakistan Water and Power Development Authority and the Pakistan Industrial Development Corporation]; all undertakings, projects and schemes of such institutions, establishments, bodies and corporations, industries, projects and undertakings owned wholly or partially by the Federation or by a corporation set up by the Federation.

4. Council of Common Interests.
 5. Fees in respect of any of the matters in this Part but not including fees taken in any court.
 6. Offences against laws with respect to any of the matters in this Part.
 7. Inquiries and statistics for the purposes of any of the matters in this Part.
 8. Matters incidental or ancillary to any matter enumerated in this Part.
- (cc) Clause (2) of Article 154, Constitution, 1973, provided that the Council may frame its own Rules of Procedure unless provision in this regard was made by an Act of Parliament.
- (dd) Clause (4) of Article 154, Constitution, 1973, provided that, the Council shall act in accordance with the directions of Parliament given in a Joint Sitting.
- (ee) Article 155, Constitution, 1973, provided that the Council shall take cognizance of disputes pertaining to distribution of water.
- (ff) Article 153, Constitution, 1973, provided that the CCI is responsible to the Parliament.
- (v) **Constitution, 1973 (as amended by the Eighteenth Constitutional Amended Act, 2010).**
- (a) The All Parties Constitutional Committee, which drafted the 18th

Constitutional Amendment, and subsequently Parliament which passed the 18th Amendment, with deliberate intent and design enhanced and widened the scope, functions and responsibilities of the Council of Common Interests (CCI).

- (b) This intent of the legislature drew from amongst other strands of the 18th Amendment namely, (i) the increase in Items in the Federal Legislative List, Part-II, from 8 to 18, and (ii) the abolition of the Concurrent Legislative List. Their wisdom perceived that with devolution of 48 Items in the Concurrent Legislative List, the necessity for greater inter-provincial and provincial-federal harmony in policy formation and other related matters will be necessary. This laced with and, placed in juxtaposition to the increase in Items in the Federal Legislative List, Part-II, as a consequence, the enlargement in the number of related institutions, over which it is to exercise supervision and control, the role of the Council will be magnified in comparison to when it functioned under the Constitution, 1973, prior to the 18th Amendment. Therefore, the said Amendment provided for and amended Articles 153 & 154 of the Constitution, 1973, in the following amongst other terms:-

- (aa) Article 153 was amended to provide – (i) The Council shall consist of, the Prime Minister, as the Chairman of the Council; (ii) the Chief Ministers of the Provinces (iii) three (3) Members from the Federal Government to be nominated by the Prime Minister from time to time. The CCI shall submit an Annual Report to both the Houses of Majlis-e-Shoora (Parliament).
- (bb) Article 154 was amended to provide, (i) the Council shall be constituted within 30 days of the Prime Minister taking oath of office; (ii) the Council shall have a permanent secretariat and shall meet at least once in 90 days.

The said Article provides that Prime Minister may convene the meeting on the request of the Province on an urgent matter.

- (cc) The 18th Constitutional Amendment, made a departure from the Constitution, 1973, and provided that the Prime Minister shall be the Chairman of the Council. No Federal Minister can act or be appointed as its Chairman. This amendment was made in order to underlie the importance of the Council for amongst others, the reasons stated hereinabove.
- (dd) The 18th Constitutional Amendment, further emphasized the importance of the CCI, when it provided that the same shall be constituted within 30 days of the Prime Minister taking oath of office.
- (ee) The intent of the amendment, as reflected in para (dd) above, whereas, on the one hand was to clip the delay in its formation, on the other, it emphasized the role of the CCI in terms of, and in relation with, the Items listed in the Federal Legislative List, Part-II, is no less than the Federal Cabinet provided under Article 91, Constitution, 1973.
- (ff) The drafters of the 18th Constitutional Amendment, were conscious of the sordid history relating to or pertaining with the meetings of the CCI, wherein from its creation in 1973 till 2010, approximately only 11 meetings were held. Therefore, the intermingling of the almost non-functional status of the CCI, inter-twining it with the increase in the number of Items in the Federal Legislative List, Part-II, and finally twisted by the devolution of 49 Items through the abolition of the Concurrent Legislative List, provided the rope which necessitated that a minimum number of meetings and the stipulated period within which they are to be held, be provided for

in the Constitution. Therefore, it is a constitutional obligation that the CCI meet at least once in 90 days.

- (gg) For the sake of avoiding repetition, let it suffice, that for the reasons stated herein above, it became necessary and imperative, that with the enhanced quantum of work, the CCI functions with its own Secretariat in order to receive cases, summaries and reports etc. and subsequently to oversee the implementation of the decisions, directives and orders of the CCI. Therefore, it was so provided.
- (hh) Clause (5) of Article 154, provided that the CCI, until Parliament so frames, can formulate its Rules of Procedure. The said Rules known as, “Rules of Procedure of Council of Common Interests, 2010,” were published in the Gazette of 2nd August, 2010.
- (ii) Rule 4 of the said Rules provides for, “The Functions of the Council”, Schedule-I of the said rules provides a list of cases to be submitted to the Council, it has 22 Entries. Rule 4, gives operation to the command contained in clauses (1) & (2) of Article 154 of Constitution, 1973. The said Entries are reproduced as under:

SCHEDULE I

CASES TO BE SUBMITTED TO THE COUNCIL

- (1) Railways;
- (2) Mineral oil and natural gas, liquids and substances declared by Federal law to be dangerously inflammable;
- (3) Development of industries, where development under Federal control is declared by Federal law to be expedient in the public interest; institutions, establishments,

bodies and corporations administered or managed by the Federal Government immediately before the commencing day, including Water and Power Development Authority and Pakistan Industrial Development Corporation and all undertakings, projects and schemes of such institutions, establishments, bodies and corporations; industries, projects and undertakings owned wholly or partially by the Federation or by a corporation set up by the Federation;

- (4) Electricity;
- (5) Major ports, that is to say, the declaration and delimitation of such ports, and the constitution and power of port authorities therein;
- (6) All regulatory authorities established under a Federal law;
- (7) National planning and national economic coordination including planning and coordination of scientific and technological research;
- (8) Supervision and management of public debt;
- (9) Census;
- (10) Extension of the powers and jurisdiction of members of a police force belonging to any Province to any area in another Province, but not so as to enable the police of one Province to exercise powers and jurisdiction in another Province without the consent of the Government of that Province; extension of the powers and jurisdiction of members of a police force belonging to any Province to railway areas outside that Province;
- (11) Legal, medical and other professions;

- (12) Standards in institutions for higher education and research, scientific and technical institutions;
 - (13) Inter-provincial matters and co-ordination;
 - (14) Council of Common Interests;
 - (15) Fees in respect of any of the matters specified in Part-II of the Federal Legislative List but not including fees taken in any court;
 - (16) Offences against laws with respect to any of matters in Part-II of the Federal Legislative List;
 - (17) Inquiries and statistics for the purposes of any of the matters in Part II of the Federal Legislative List;
 - (18) Matters incidental or ancillary to any matter enumerated in Part-II of the Federal Legislative List;
 - (19) Complaints as to interference with water supplies (Article 155);
 - (20) Implementation of the directions given by the Parliament for action by the Council under Article 154(6);
 - (21) Submission of Annual Report to both Houses of Parliament (Article 153(4); and
 - (22) Resolutions of disputes with respect to construction of Hydro electric station in any Province (Article 157(3).
- (jj) Similarly, rule 10 provides for the manner of submission of cases, the preparation of summaries and documents that are to be submitted before the CCI. The same are more fully described in Schedule-II & III of the said rules.
- (kk) In order to elaborate the enormity of work of the CCI, in terms of formulation and regulation of policies, supervision and control over related institutions i.e. all autonomous and semi-

autonomous bodies or those created or functioning under a Federal Statute as provided under the Federal Legislative List, Part-II. The said List is reproduced as under:

- “(1) Railways;
- (2) Mineral oil and natural gas, liquids and substances declared by Federal law to be dangerously inflammable;
- (3) Development of industries, where development under Federal control is declared by Federal law to be expedient in the public interest; institutions, establishments, bodies and corporations administered or managed by the Federal Government immediately before the commencing day, including Water and Power Development Authority and Pakistan Industrial Development Corporation and all undertakings, projects and schemes of such institutions, establishments, bodies and corporations; industries, projects and undertakings owned wholly or partially by the Federation or by a corporation set up by the Federation;
- (4) Electricity;
- (5) Major ports, that is to say, the declaration and delimitation of such ports, and the constitution and powers of port authorities therein;
- (6) All regulatory authorities established under a Federal Law;
- (7) National planning and national economic coordination including planning and coordination of scientific and technological research;

- (8) Supervision and management of public debt;
- (9) Census;
- (10) Extension of the powers and jurisdiction of members of a police force belonging to any Province to any area in another Province, but not so as to enable the police of one Province to exercise powers and jurisdiction in another Province without the consent of the Government of that Province; extension of the powers and jurisdiction of members of a police force belonging to any Province to railway areas outside that Province;
- (11) Legal medical and other professions;
- (12) Standards in institutions for higher education and research, scientific and technical institutions;
- (13) Inter-provincial matters and co-ordination;
- (14) Council of Common Interests;
- (15) Fees in respect of any of the matters in this Part but not including fees taken in any court;
- (16) Offences against laws with respect to any of the matters in this Part;
- (17) Inquiries and statistics for the purposes of any of the matters in this Part;
- (18) Matters incidental or ancillary to any matters enumerated in this Part.”

2. Now turning to the question raised in the motion under rule 218, the subject matter of this Ruling, namely, “situation arising out of non-convening of the meeting of the Council as required under clause (3) of Article 154 of the Constitution of Islamic Republic of Pakistan”, from the record available, the last meeting of the CCI was held on 18th March, 2015.

3. Clause (3) of Article 154, Constitution, 1973, provides, “.....and shall meet once in 90 days:”, therefore, the CCI should have stricto-senso met on the 16th June, 2015 i.e. on the 90th day as required by the Constitution, 1973. According to the statements of Ministers, made on the floor of the House, the Council of Common Interests has not met till the announcing of this Ruling i.e. 331 days have passed and the CCI has failed to meet or be summoned to meet. The Federal Government is, and continues day to day, to violate the provisions of clause (3) of Article 154 of the Constitution, 1973.
4. The consequences that flow there-from , are grave and can have a chaotic effect bringing the entire state machinery pertaining to or dealing with the Items in the Federal Legislative List, Part-II to a grinding halt. All matters relating to the formation and regulation of policies and exercising supervision and control over related institutions covered in the Federal Legislative List, Part-II, will be of no legal effect, if they have not been passed or approved by the Council of Common Interests. Further, the Rules of the Council do not provide for the Prime Minister to take a decision and subsequently refer it to the Council for its approval, nor can the Federal Cabinet constituted under Article 91 of the Constitution, 1973, arrogate to itself the powers conferred on the CCI through Articles 154 & 155 of the Constitution, 1973.
5. I am conscious of the constitutional chaos and mayhem that can be created, therefore, I, reluctantly, restrain to hold all such decisions, actions and orders to be unconstitutional. However, any action taken in violation of the constitutional scheme from fifteen days after the date of announcement of this Ruling will be in violation of the Constitution.

6. Before parting with this Ruling, the Senate Secretariat, is directed to send a copy of the Ruling to the President of Pakistan, Prime Minister of Pakistan, Speaker, National Assembly, the Minister for Inter-Provincial Coordination, Minister for Law and Justice and the Provincial Chief Ministers.

MIAN RAZA RABBANI

NI

Chairman Senate

Senate Sitting dated 12th February, 2016

124th Session – Announced in the House.



PLACEMENT OF REGULATORY AUTHORITIES UNDER THE LINE MINISTRIES

This Ruling arises from the following amongst other facts and grounds:-

That on 19th December, 2016, vide Memorandum No. 7-2/2016-Min-I, the Prime Minister transferred the administrative control of the following Regulatory Authorities from Cabinet Division to their respective line Ministries:-

- (a) National Electric Power Regulatory Authority
- (b) Pakistan Telecommunication Authority
- (c) Frequency Allocation Board
- (d) Oil and Gas Regulatory Authority
- (e) Public Procurement Regulatory Authority

- (i) The said transfer was reported by the national media on 20th December, 2016.
- (ii) Taking note of this executive step, in the Senate sitting held on 20th December, 2016 (257th Session), I asked the Leader of the House to call upon the Minister In-charge of Cabinet Division, to make a statement on the floor explaining the circumstances due to which the Government transferred the administrative control of five Regulatory Authorities to their line Ministries. On the proposal of the Leader of the House, it was decided that instead of the Minister In-charge of Cabinet Division, Minister for Law and Justice may make such a statement.
- (iii) That during the Senate sitting held on 21st December, 2016 (257th Session), the Minister for Law and Justice made a statement which is reproduced as under:

“Sir, with your permission, let me first read out the notification. In fact it's a memorandum dated the 19th December, 2016. The memorandum says in terms of Rule 33 of the Rules of Business 1973, the Prime Minister has been pleased to transfer administrative control of the following regulatory authorities from Cabinet Division to the Divisions mentioned below against each name:- 1. Electric Power Regulatory Authority to the Water and Power Division. 2. Pakistan Telecommunication Authority to the Information Technology and Telecom Division. 3. The Frequency Allocation Board also to the Information Technology and Telecom Division. 4. Oil and Gas Regulatory Authority to the Petroleum and Natural Resources Division. 5. Public Procurement Regulatory Authority to Finance Division.

First is National Electric Power Regulatory Authority, to the Water and Power Division. Pakistan Telecommunication Authority, to the Information Technology and Telecom Division. The Frequency Allocation Board, also to the Information Technology and Telecom Division. Oil and Gas Regulatory Authority, to the Petroleum and Natural Resources Division and the Public Procurement Regulatory Authority, to the Finance Division. Necessary amendments in the Rules of Business 1973 will be made accordingly. This is from the Cabinet Division. Sir, the basic point here that I would like to make which will clear the history of these Regulatory Bodies that I will now proceed to explain that this is nothing out of the ordinary. This has been happening time and again and it is happening since the Regulatory

Authorities were first set up. Let me take each one of these authorities Sir, in so far as the Pakistan Telecommunication Authority (PTA) is concerned, this was initially with the I.T. and Telecom on the 27th September, 2000, and then it was with the Ministry of Science and Technology and on the 15th October, 2002 it was shifted by orders of then Chief Executive which I will read out, it was shifted to the Cabinet Division and now under the notification that I have issued has been shifted to the Information Technology and Telecom Division. Sir, that notification dated the 15th October, 2002 reads as follows; The reference correspondence resting on so and so, "the Competent Authority has directed for transfer of Pakistan Telecommunication Authority from the administrative control of Ministry of Science and Technology to the Cabinet Division with immediate effect. Cabinet Division is requested to please take further necessary action accordingly and issue necessary instructions today under intimation to the secretariat". This is in 2002, the transfer from Ministry of Science and Technology to the Cabinet Division. If you take the case of National Electric Power Regulatory Authority (NEPRA) set up by an Ordinance in 1995, it was initially with the Water and Power Division and when the Act was passed in 1997, in December 1998, administrative control was transferred to the Ministry of Law and Justice and then a note was put that the functions of NEPRA, in fact the summary was put up by the Water and Power Division that the functions of NEPRA justify a closer relationship with the Ministry of Water and Power rather than with Law

and Justice Division. That was not approved. Instead it was with the Law and Justice till the 6th September, 2000, when a Cabinet decision dated the 30th August, 2000, the case relates to the presentation on prices of essential commodities and amongst the five decisions that were taken on this summary, one is that the National Electric Power Regulatory.

Authority (NEPRA), the Pakistan Telecommunication Authority (PTA) and the Natural Gas Regulatory Authority (NGRA) which is predecessor of OGRA shall be placed under the Cabinet Division. So at that time on 6th September, 2000, this was transferred to the Cabinet Division. I am giving you the history of each of these organizations to show you how the transfers took place. Mr. Chairman: I am listening but in each of the histories that you have given so far, they have been taken away from their parent department and have been given under the foster care of another department so that they can act independently.

Sir, I will just tell you what happened. They are just going back and forth depending on which Government thinks which is a better option. If you take the Frequency Allocation Board, originally the Wireless Board, it was with the Ministry of Science and Technology and again on the 9th April 2004, it was transferred in the light of a decision taken in the meeting held on 21st February, 2005, under the Chairmanship of COS to the President aiming to create close linkage and coordination between PTA and FAB, The Prime Minister has been pleased to direct that The Frequency Allocation Board presently with I.T.

and T Division be placed under the administrative control of PTA under the Cabinet Division. That was the decision at that time. If you look at the PEPPRA, originally with the Ministry of Finance and again in 2005, a notification of the Cabinet Secretariat, it says;

“Public Procurement Regulatory Authority (PEPPRA) is placed under the administrative control of the Cabinet Division with immediate effect in terms of Rule 3(3) of the Rules of Business 1973”. I should have mentioned this earlier that what is Rule 3 which has been quoted in the present notification also. Sir, you know it very well but for the benefit of others, Allocation of Business; 1) The Federal Secretariat shall comprise the ministries and divisions shown in schedule 1. 2) The Prime Minister may whenever necessary constitute a new ministry consisting of one or more divisions. 3) The business of the Government shall be distributed among the division in the manner indicated in schedule 2. Provided that the distribution of business or the constitution of the division may be modified from time to time by the Prime Minister. In schedule 2, at this moment before this notification in the Cabinet Division at Serial No. 53; The administrative control of NEPPRA, PTA, FAB, OGRA, PEPPRA and the Intellectual Property Organization, this is the transfer Item No. 53 under Rule 3(3) has been transferred in accordance with the orders of the Prime Minister to the original ministry. Sir, I again emphasis on this that these were the original line ministries when these regulatory authorities started. There is nowhere any consultation with the Council of Common Interests before these

regulatory authorities have been transferred back and forth, because there is a fundamental difference which I will come to later. This is not a policy decision, nothing is being changed in the Act itself. The Act itself makes these regulatory authorities independent and autonomous. Nothing is being changed, it is not a policy matter which requires reference to the Council of Common Interests. Sir, this is the most interesting one which is PEMRA. PEMRA is not one of these five but I cite this only because of two things. First, it started with the Ministry of Information and Broadcasting, which is the original line ministry. It was first transferred to the Cabinet Division in 2005 and then on 3rd May, 2007, it goes back to Information. Then a few months later, it goes back to Cabinet and then a few days later, it goes back to Information. So within a space of a few months it is going back and forth and again it is Rule 3(3), which is being cited each time and the interesting thing is for the benefit of the Opposition Members, that the last transfer from the Cabinet Division to the Ministry of Information and Broadcasting was on 30th April, 2008, which was under the Government of the Pakistan Peoples Party. Sir, I also want to refer to the other regulatory authorities and just to show that they are also in most cases under the line ministry. For example the Private Educational Institutions Regulatory Authority is under CADD. The Pakistan Architecture and Town Planning Council is under the Climate Change Division. The State Bank of Pakistan which is the ultimate regulator is under Finance. The Securities and Exchange Commission of Pakistan also a

regulator is also under Finance. The Pakistan Medical and Dental Council, the Pakistan Council for Nursing, the National Councils for Tibb and Homoeopathy, the Drug Regulatory

Authority are all under the National Health Services Regulations and Coordination Division. The Pakistan Standards and Quality Control Authority is under the Science and Technology. The Pakistan Standards and Quality Control Authority is under the Science and Technology Division, the Intellectual Property Organization of Pakistan is under the Commerce Division. Sir, again the point to be emphasized is that where a policy matter is involved, the Government has no hesitation whatsoever in referring it to the Council of Common Interests. For example, in the last meeting of the CCI, just earlier this week, I happened to be present also, the proposed changes in the NEPRA law were taken to the Council. The honourable Chief Ministers present there wanted certain things; the Council decided to defer consideration of that matter till certain clarifications are made available. So, what I am trying to point out is that so far as the transfer from one division to another is concerned, this is the purely routine matter; it is under the discretion of the Prime Minister, under Rule 33 of the Rules of Business; it has always been done since inception of these authorities. These authorities are being shifted from one division to the other, as I have pointed out in the history. In so far as policy matters are concerned, we are of course, bound by the provisions of the Constitution and of course, they are required to go to

the Council of Common Interests and they have been referred and will continue to be referred. Sir, I would also like to point out that the policy directive, this law, rather this notification of transfer for one division to the other, does not affect the independence or the autonomy of these institutions or their ability or competence to act independently because after all, Cabinet Division in that sense is also under the Government. If any undue influence is to be exercised, it can equally be exercised under the Cabinet Division or whether it is under the Water and Power Division. So, that is not the intention; the intention is administrative convenience. The most important thing is in each of parent legislation relating to these authorities, there are the powers of the Government to issue policy directives. For example, I brought with me all of them but I just will read out only the PTA, Section 8. "The powers of the Federal Government to issue policy directives: The Federal Government may, as and when it considers necessary, issue policy directive to the Authority, not in consistence with the provisions of the Act, on the matters relating to Tele Communication Policy refer to in Sub Section 2 and the Authority shall comply with such directives". There is a similar provision, as you know sir, in each of parent legislation of these Regulatory Authorities. So, I would again emphasize nothing has changed vis-à-vis either the policy directive provisions or the autonomy provisions, the independence provision in each of these parent legislation. This is an administrative measure which has been taken, it has been taken time and again in previous governments;

including the previous Government of Pakistan People's Party. There is nothing to imply at all that the Government has done this with any ulterior motive other than for administrative convenience. If there were a case of formulation or amendment of policy relating to these Regulatory Authorities, then of course, the matter would have gone up to the CCI as in the case as I mentioned in the last meeting of the CCI relating to amendments in the NEPRA Act and legislative policies relating to that Act. Thank you very much sir.

- (v) Senator Aitzaz Ahsan, Leader of the Opposition and Senators Sehar Kamran, Muhammad Azam Khan Swati, Farhatullah Babar, Saleem Mandviwala, Taj Haider, Muhammad Ali Khan Saif, Lt. Gen. (Retd.) Abdul Qayyum, Mushahid Ullah Khan, Muhammad Usman Khan Kakar, Mir Kabeer Ahmed Muhammad Shahi, Col. (R) Syed Tahir Hussain Mashhadi, Lt. Gen. (R) Salahuddin Trimizi, and Dr. Jehanzeb Jamaldini spoke on the factual and legal aspects of the said subject. Arguments of the Leader of the Opposition were structured on the following grounds:-
 - a. Placement of Regulatory Authorities under the line Ministries is an attempt to circumvent the scheme of oversight, for which purpose the Regulatory Authorities were conceived rather it can be categorized as “poachers have been made game keepers”
 - b. In terms of clause (1) of Article 154, Constitution, 1973, and Item Nos. 2, 4, 6, 13 and 18 of the Federal Legislative List Part-II, the Federal Government or the Prime Minister cannot take a decision as to the transfer of Regulatory Authorities which is the sole mandate of CCI, hence memorandum dated 19th December, 2016 is void ab initio.
- (iv) Thereafter, in the Senate sitting held on 23rd December, 2016,

the Minister replied to the arguments of the Members raised during the debate on 21st December, 2016. The Minister for Law and Justice, was of the consistent view, that the transfer from one Division to another has not affected the financial, administrative or functional independence and autonomy of these Institutions. The Law Minister's arguments are summarized as under:-

- a. Transfer of administrative control of Regulatory Authorities is a routine matter, which in the past has also taken place under the orders of the Prime Minister in terms of sub-rule (3) of rule 3, Rules of Business, 1973.
- b. A summary was sent to the Prime Minister, relating to the transfer of the administrative control of these Institutions and amendments relating to the NEPRA Act. It was decided that these items would be included on the CCI agenda, but when the agenda was being finalized the item dealing with the administrative control of these Institutions was dropped. The amendments to the NEPRA Act, which were a matter of Policy, was taken to the CCI and discussed in detail.
- c. The Cabinet Division is also under the Government like the Water and Power Division, therefore, if the intention was of exercising undue influence, it could equally be done through either. That is not the intention; the intention is administrative convenience.
- d. No consultation with the Council of Common Interests has taken place at any time, before these Regulatory Authorities have been transferred back and forth, because there is a fundamental difference. This is not a policy decision, nothing is being changed in the Act itself. The Act itself makes these Regulatory Authorities independent and autonomous.

Nothing is being changed, it is not a Policy matter which requires reference to the Council of Common Interests.

- e. Reliance was placed on the case of Gadoon Textile Mills Vs WAPDA, 1997 SCMR at 641, the following paragraph was relied upon:-

“CCI is not required to make decisions as to the day to day working of the corporations mentioned in the part II in the Federal Legislative List and of the related institutions. It is supposed to formulate and regulate general policy matters as to their working which may include general policy for working of WAPDA. It may even include the guideline for the fixation of tariff by WAPDA.”

- f. The supervision and control of related institutions is not synonymous with the administrative control which has been transferred through this Memorandum, it only refers to the administrative day to day routine working of the Organization.
- g. If it was a case of formulation or amendment of Policy relating to these Regulatory Authorities, then of course, the matter would have gone to the CCI.

2. Subsequent to the Minister's statement in the House on 23rd December, 2016, I reserved the ruling on the question, whether the issue of placement of Regulatory Authorities under their line Ministers was required under Article 154(1), Constitution, 1973, to be placed before the Council of Common Interests for its decision or otherwise. The factual controversy of whether the item was a part of the CCI agenda or it was removed on the objections of Khyber Pakhtunkhwa Province, was referred to the Functional Committee on Devolution for consideration and report.

3. The upshot of the above narration tosses up the herein under question for determination:-

“Whether the transfer of control of Regulatory Authorities from the Cabinet Division to their line Ministries is a Policy decision and requires the prior approval of the Council of Common Interests in terms of Article 154, Constitution, 1973.”

4. Before taking up the legal question it is appropriate to examine the documents and statements available on the record which are as under:-

- a. That on 18th January, 2017, the Ministry of IPC vide U.O. No.1(4)/2010-CCI, moved a summary to the Prime Minister with the following proposals:-

“ ----- Moreover, item-6 of the Federal Legislative List (Part-II) of the Constitution assigns the subject of all Federal Regulatory Authorities the CCI. Since, most of the issues raised by the Provinces pertain to the Federal Regulatory Authorities, and after 18th amendment, the subject falls exclusively under the domain of the Ministry, it is in the spirit of devolution that Ministry of IPC may be assigned its due role of the Constitution rather to act as a Coordinator between Federation and the Federating Units.

34. In view of the justification given vide para-32 above, it is proposed that the Ministry of IPC may be renamed as “Ministry of Inter Provincial Coordination and CCI Secretariat” and the subject of all Federal Regulatory Authorities may also be transferred from various Ministries/ Divisions to Ministry of IPC”

- b. The said summary was returned by the Prime Minister's Officer vide U.O. No. F.8(2)/DS(IA-III)/2015(933), dated 26-01-2016, for

seeking the views of IPC Division, Ministry of Information and Broadcasting and Cabinet Division on the issue of transfer of Regulatory Authorities to their line Ministries.

- c. Ministry of IPC vide U.O. No. 1(4)/2016-CCI, dated July, 14, 2016, further consolidated its position in the following terms:-

“While the Ministry of Inter Provincial Coordination has to provide general coordination between the Federal Government and the Provinces in the economic, cultural and administrative fields and promote uniformity of approach in all fields of common concern besides discussions of policy issues emanating from the Provinces which have administrative or economic implications for the country as a whole, the Council of Common Interests has been assigned the responsibility of formulation and regulation of policies in respect of Federal Legislative List (Part-II) of the Constitution. Article 154 (1) of the Constitution read with Item 6 of the List indicates that all Regulatory Authorities established under a Federal Law shall be supervised and controlled by CCI in terms of formulation of Policies and to regulate those Policies. The said Article and Item 6 of the list are reproduced as under:-

Besides above Constitutional obligations, it has been noticed that the issues raised by the Provinces reveal that most of the problems relate to the regulatory Authorities like, OGRA, PEMRA, PPRA, NEPRA and PTA but since the regulatory authorities are presently controlled and managed by Cabinet Division and Ministry of Information & Broadcasting, the Ministry of Inter Provincial coordination

is unable to perform its due responsibilities effectively and the process is being prolonged.”

- d. The Cabinet Division vide U.O. No. 7-6/2015-Min-I, dated 12th August, 2016, stated the following views:-

“As far as the placement of Regulatory Authorities under the IPC Division is concerned, Cabinet in its meeting dated 30th August, 2000, decided to place National electric Power Regulatory Authority (NEPRA), Pakistan Telecommunication Authority (PTA), Natural Gas Regulatory Authority (NGRA) under the Cabinet division (Annex-XII). Later on, PEMRA, PTA, FAB, PPRA and IPO-Pakistan were also placed under the Cabinet Division (Annex-XIII). The spirit of these decisions was to ensure the objective and independent status of Regulatory Authorities as non-ministerial entities.” (emphasis provided)

- e. The Senate's Functional Committee on Devolution, which was seized with the factual aspect of the matter, was informed by the Ministry of IPC that:-

- *“IPC Division/CCI Secretariat initially requested Prime Minister's Office on 3rd June, 2016, to seek the convenience of Honourable Prime Minister to the holding/convening of CCI meeting. A list of seven available agenda items was also conveyed. The item “Transfer of Regulatory Authorities from Cabinet Division to line Ministries” was not included as the summary on the subject was not available in the Secretariat.*
- *Again on 6th of October 2016, the IPC Division/CCI Secretariat requested Prime Minister's Office for convenient date and time for the purpose. This time, the number of available agenda items as conveyed to Prime Minister's Office was eleven. The agenda item in question i.e. “Transfer of Regulatory Authorities” was not*

included therein, as the summary on the subject was not available in the Secretariat.

- *The Prime Minister's Office conveyed approval of the Prime Minister to the convening of the CCI's 30th meeting alongwith the approved seven point agenda, including "Transfer of Regulatory Authorities to the line Ministries". Ministry of IPC/CCI Secretariat circulated the approved agenda to all concerned on 7th December, 2016.*
 - *In response, Prime Minister's Office conveyed approval of the revised agenda, incorporating three additional items while excluding the previously approved item of "Transfer of Regulatory Authorities from Cabinet Division to line Ministries" from the final agenda.*
 - *Accordingly, Ministry of IPC/CCI Secretariat circulated the revised agenda on 9th December, 2016 to all concerned by deleting the item of "Transfer of Regulator Authorities" while also adding the newly approved items."*
- f. The agenda that was circulated for the 30th meeting of CCI vide office letter No. F. No. 2(121)/2016-CCI, issued on 7th December, 2016, carried the agenda item "Transfer of Regulatory Authorities from Cabinet Division to respective Line Ministries". The Province of Khyber Pakhtunkhwa took exception to this and vide D.O. No. PS/CMS/KPK/2016 dated 13th December, 2016, took the following position:-
- "03. It is pertinent to mention that summary related to transfer of regulatory authorities which impliedly includes NEPRA also; has yet to be furnished for our examination while CCI is to meet only day hereafter.*
- 04. Kindly appreciate that transfer of Regulatory Authorities to respective line Ministries involve long term implications for rights*

of the province. Hence, there is a need for a detailed and careful deliberation at our end before firming up our view point for consideration of the CCI; which for sure cannot be done in short span of one day only. (emphasis provided)

05. In view of the foregoing, it is requested that:-

- c. copy of summary related to "Transfer of Regulatory Authorities from Cabinet Division to respective Line Ministries" may kindly be provided to us at the earliest.*
- d. in the meanwhile, discussion on the issue may please be postponed till next meeting of the CCI"*

5. I will now take up the legal question framed in para No.3 hereinabove.

- (a) While considering Article 154, Constitution, 1973, it is pertinent to mention the Constitutional Accord dated 20.10.1972, that was entered into between the Pakistan Peoples Party and other political parties for the framing of the Constitution. This Accord was followed by a Report dated 31-12-1972 submitted by the Constitution Committee, which included MNAs of various political parties including some independent MNAs. It highlighted the factum that there was a controversy as to the quantum of autonomy which the federating units were to enjoy under the then proposed Constitution which was a burning issue for quite a long period.

In this regard paragraph 33 of the above Report, reads as follows:-

"(33). To conform to the spirit of federalism a new arrangement has been worked out to ensure the effective participation of the Provincial Governments in sensitive and important spheres of national life. In respect of the subjects in Part-II of the Federal

Legislative List and the item of electricity in the Concurrent Legislative List, special provision has been made for the creation of the Council of Common Interests to be appointed by the President as envisaged in the Constitutional Accord. The Council shall consist of the Chief Ministers of the Provinces and an equal number of members from the Federal Cabinet. The Council shall formulate and regulate policies in relation to specify matters and exercise supervision and control over related institutions.”

- (b) Now let us examine clause (1) of Article 154, Constitution, 1973, which is reproduced as under:

“154(1). The Council shall formulate and regulate policies in relation to matters in Part-II of the Federal Legislative List and shall exercise supervision and control over related Institutions.” (EMPHASIS PROVIDED)

Clause 1 of Article 154, Constitution, 1973, has to be read in conjunction with the Federal Legislative List Part-II. The words “The Council shall formulate and regulate policies in relation to matters in Part-II of the Federal Legislative List”, relate to Item No.6 in the Federal Legislative List Part-II which is, “All regulatory authorities established under a Federal law”. It is restricted not only to all Regulatory Authorities but also includes Railways, mineral oil and natural gas, electricity, etc.

- (c) Clause 1 of Article 154, Constitution, 1973, is not restricted to or limited to only matters of policy but it further provides, “exercise supervision and control over related institutions” in the Federal Legislative List Part-II.

6. The Government has taken a consistent position that transfer of

Regulatory Authorities within the administrative Ministries is the prerogative of the Prime Minister in terms of sub-rule (3) of rule 3 of the Rules of Business, 1973. The said rule is reproduced as under:-

“3. Allocation of Business.--(1) The Federal Secretariat shall comprise the Ministries and Divisions shown in Schedule I.

(2) The Prime Minister may, whenever necessary, constitute a new Ministry consisting of one or more Divisions.

(3) 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. (emphasis provided)

(4) The Prime Minister shall allocate amongst his Ministers the business of Government by assigning several Divisions specified in Schedule I to the charge of a Minister:

Provided that a Division or a Ministry not so assigned shall be in the charge of the Prime Minister:

Provided further that more than one Division may be assigned to a Minister.”

7. Before I examine the above rule let us see the definition of the word “Regulate”.

i) **Stroud's Judicial Dictionary of Words and Phrases, Seventh Edition Volume 3 (P-Z) at 2328**

“Regulating the marketing” (Agricultural Marketing Act 1931 (c.42) s.1 (1)), A scheme “regulating the marketing” of an agricultural product had to be one which introduced some orderly system of marketing. One which was from start to finish purely discretionary did not suffice (*Tuker v Ministry of Agriculture Fishers and Food* [1960] 1 WLR 819.

**ii) Hand Book of Legal Terms & Phrases(Judicial Defined)
at 608 – 609,**

Regulate.--

- a) “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 manner. If further connotes the obtaining of a sort of uniformity in matters of conduct so that arbitrariness, whimsically and capriciousness is 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. *Bumrah Shell Vs. Labour Commr. PLD 1982 Kar 33.*”
- b) “.....whatever the extent to which restraints may be placed by regulation it should be clear that the object in regulation is not to prevent persons from carrying on a profession but to see that the profession is carried on in the most efficient and suitable manners. *PLD 1965 SC 527: DLR 1965 SC 545.*”

iii) The Oxford English Dictionary, Tenth Edition, at 1206,

“.....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 powers over regulation, but are also subject to controls by elected politicians and judges.” {Mark Thatcher. West European Politics, Vol.25 1 (January 2002),pp 125-147}.

From the above discussion it is evident that these are organizations which are created essentially through a statute and are organizationally separate from the government. They have to ensure that the Act and the rules framed thereof, for carrying out of the said business are enforced and applied equally, fairly and in a transparent manner. Therefore, by placing them under their line Ministries, the very purpose for which these Regulatory Authorities are created is to an extent largely compromised.

8. The Rule mentioned in paragraph No.6 above, deals with allocation of business of the Federal Government. Rule 2, Rules of Business, 1973, defines “business” as “all work done by the Federal Government”. This means and pertains to essentially all matters provided for in the Federal Legislative List Part- I, Constitution, 1973, it is correct that the said rules are framed under Article 99, Constitution, 1973, and therefore, at a slightly higher pedestal. The instant Regulatory Authorities have been established under various Acts of Parliament and thus fall under item 6 of Federal Legislative List Part-II, Constitution, 1973, and the regulation of their business is controlled by clause (1), Article 154, Constitution, 1973 read with Rules of Procedure of the Council of Common Interests, 2010, which are framed under Article 154, Constitution, 1973, therefore, the Rules of Business, 1973 and Rules of Procedure of the Council of Common Interests, 2010, are on the same

pedestal. The stated object in the said Acts is the regulation of the business of the Government in order to ensure fairness and transparency. Therefore, the Regulatory Authorities established under a Federal law are not covered under the definition of “business” as provided in the Rules of Business, 1973. Hence, matters related to the Regulatory Authorities under a Federal law cannot be dealt with under sub-rule (3) of rule 3, Rules of Business, 1973, the said rule may come into operation after the CCI has taken a decision in relation to the Regulatory Authorities. This is further substantiated by the statement of Chairman NEPRA, which is at para No.7 of the Report of the Functional Committee on Devolution, presented in the Senate on 14th February, 2017 and adopted by the House on 14th February, 2017, the said paragraph is reproduced as under:

“Chairman NEPRA briefed the Committee that all over the world regulatory authorities are administratively, financially, and operationally independent so that they can perform their functions of protecting the interests of stakeholders; in the case of NEPRA, the stakeholders are, NEPRA, its Consumers and the Government. He further apprised the committee that Government is the major stakeholder as it has 80% ownership of the electricity and power generation setup. The Government has 100 percent ownership of distribution companies, Ministry of Water and Power and transmission Company NTDC are also government organizations, 34 IPPS are owned by the Private Sector whereas others are owned by the Government. NEPRA, as a regulator, has to keep a check on the performance of Distribution companies, examined whether the transmission line is complete, grid station is complete, etc.

Ministry of Water and Power is the main stakeholder in this entire process of regulation and placing NEPRA under the said ministry amounts to putting fetters to the independence of regulatory authority. Putting under the lone ministry will mean that the Ministry of water and power will initiate appointment of the chairman NEPRA and members, removal from the office, their extension and tenure and allied matters like salaries and other perks.”

9. The unique position that the Council of Common Interests holds in the constitutional scheme has been defined in the case of Federation of Pakistan v. United Sugar Mills, PLD 1997 SC at 394, the relevant paragraph is reproduced as under:

“Again in one significant respect the Federal executive authority has been obliged abridged under the Constitution and has been entrusted to a newly created Institution called the Council of Common Interests. It is a body quite apart from the Federal Executive. (see Articles 153-156).

The administration of matters falling in Part-II of the Federal Legislative List (railways, minerals oil, natural gas, etc.) and Item No.34 of the Concurrent List (electricity) are entrusted to the Council of Common Interests.”

10. The Minister for Law and Justice has placed reliance on a Judgment of the Supreme Court reported in 1997 SCMR at 641 (Messrs Gadoon Textile Mills and 814 others v. Wapda and others). One of the operative paras of the said Judgment is as under:-

“The words “formulate”, “regulate”, “policy”, “control” and “supervise” employed in clause (1) of Article 154 of the Constitution carry wide connotations. The word “formulate” inter alia carries the meaning, set forth, reduce to a formula: whereas the word “regulate” inter alia connotes control,

subject to guidance. The word “policy” inter alia carries meaning, as the general principles by which a Government is guided in its management of public affairs. the word “control” inter alia connotes to regulate or guiding or restraining power over; whereas the word “supervise” inter alia carries the meaning, to look over and to inspect. The above words cannot be construed in isolation, but the same are to be construed in the context in which they are employed. In other words, their colour and contents are to be derived from their context. C.C.I is not required to make decision 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 as to their working, which may include general policy for the working of WAPDA. It may even include a guideline for the fixation of tariff by WAPDA but such guideline cannot be inconsistent with subsection (2) of section 25 of the WAPDA Act. Which lays down statutory parameters for fixation of tariff. The C.C.I is not required to determine tariff for the supply of electricity by WAPDA to the consumers and to vary the same from time to time as this comes within the ambit of day to day working. Fixation of tariff of electricity depends on various factors. Which regularly and frequently fluctuate warranting revision of tariff from time to time.

The effect of the incorporation of Article 154(1) and Article 161(2) of the constitution is not that C.C.I has the power to determine the tariff for distribution of electricity by WAPDA to the consumers directly. The object of the incorporation of

clause (1) of Article 154 of the constitution is reflected *inter alia* in para. 33 of the constitution committee's Report namely, "to conform to the spirit of federation, a new arrangement has been worked out to ensure effective participation of the provincial Government in sensitive and important spheres to national life". To achieve the above objective, C.C.I. consists of Chief Ministers of the four Federating units and an equal number of Members from the federal Government which generally includes the prime Minister of Pakistan as provided under Article 153(2) of the constitution. [p. 703]K

Article 153, 154, 155, 160 and 161 of the constitution provide an inbuilt self-adjudicatory and self-executory mechanism in the constitution set-up. The object seems to be to generate sense of participation among the federating units on sensitive issues of national impotence referred to in the above Articles, and to ensure—

(i) resolving of any dispute arising between one or more federation Units *inter se* between the federation and a federating Unit;

(ii) Payment of the proceeds of federal duty excise on natural gas levied at well-heads and collected by the federal Government to the federating units in which the well-heads and collected by the federal Government to the federating Units in which the well-heads of natural gas are situated:

(iii) Payment of net profits earned by the federal Government or any undertaking established or administered by the federal Government from the bulk generation

of power at a hydro-electric station to the federation Unit in which the hydro-electric station is situated:

(iv) Carrying out direction issued by the parliament in its joint session to C.C.I.

(v) Equitable distribution of federal taxes among the federating Units and resolve other financial issues (Article 160 of the constitution).

The matters referred to in part II of the federal Legislative List and Item 34 of the concurrent Legislative List (electricity) are to be brought before C.C.I. for formulating policies. Before taking any action towards privatisation of WAPDA, it was mandatory to have brought the above matter before C.C.I. The rationale being that hydro-power station were situated in N.W.F.P. which was then opposing privatisation of WAPDA. It would not have been proper on the part of the federation to privatise above hydro-PowerStation and to create private interest in such sensitive installations situated in a federation Unit without the participation of the federation units. So the forum for ironing out such a controversy was C.C.I.”

11. The above mentioned Judgment is distinguishable from the case in hand. Amongst other questions raised by Mr. Fakhrudin G. Ibrahim, Senior Advocate Supreme Court of Pakistan, while appearing for WAPDA, he stated the crux of the case as under;

- “a) That neither the CCI nor a Provincial Government nor Advisory Board has power to determine tariff for the electricity which is generated, transmitted and distributed by WAPDA among the consumers;*
- b) That under section 25 read with sections 12 & 13 of the Act, Abridged, Conditions No.26 and 27 of the*

Agreement, WAPDA has the power to determine tariff for electric supply and to vary the same from time to time.”

12. The Court, in the Judgment under review, has rightly 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 as to their working, which may include general policy for the working of WAPDA”. Now the question arises that whether transfer of Regulatory Authorities to their line Ministries is a decision relating to their 'day to day working' or is it essentially a policy decision? It is apparent from the Judgment of the apex Court that decisions as to determination of tariff by NEPRA, or determination of oil prices by OGRA, or grant of license by PTA can be termed as decision relating to the '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 which has to be taken by the Council of Common Interests in terms of clause (1) of Article 154, Constitution, 1973.

13. In view of the above-mentioned, factual, rules and legal position the question at para No.3 is answered in the following terms:-

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.

14. I am conscious of the fact that the decision of the Federal Government regarding transfer of Regulatory Authorities from the Cabinet Division to the line Ministries has been challenged in High Courts, in W.P. No. 75/2017; W.P. No. 40027/16; W.P. No. 40663/16 filed in the Lahore High Court; W.P. No. 335-P/2017 filed in the Peshawar High Court and one Writ Petition in the Islamabad High Court. However, this House took cognizance of this matter on 20th December, 2016 and since then it is seized with it. One of the primary functions of Parliament is over sight of executive functions, in this case the rights of the Provinces and other territories are being infringed upon, therefore, the Senate has to act in accordance with the Constitution.

15. Before parting with this ruling, I must acknowledge the work of Functional Committee on Devolution and Legislative Branch of Senate Secretariat. The Senate Secretariat is directed to provide copies of this Ruling to the Prime Minister, Minister for Law and Justice, Minister Incharge of Cabinet Division and Minister for Parliamentary Affairs.

MIAN RAZA RABBANI
NI
Chairman Senate

Dictated in Chamber
Announced in the House on 20th February, 2017
259th Session



CONSTITUTIONAL REQUIREMENT OF ANNOUNCEMENT OF NATIONAL FINANCE COMMISSION AWARD

This Ruling flows from the following, amongst other, facts:-

- (i) In the Senate sitting held on 12th May, 2015, Senator Sassui Palijo drew attention of the Minister for Finance, Revenue, Economic Affairs and Privatization towards delay in the announcement of 8th NFC Award. Engineer Khurram Dastgir Khan, Minister for Commerce, on behalf of the Minister for Finance made a statement in the following terms:-

“Article 160 of the Constitution of the Islamic Republic of Pakistan provides for setting of the National Finance Commission at intervals, not exceeding five years and the last NFC which was the 8th Award, was constituted on 21st of July, 2010. Therefore, it was a legal obligation of this Government to constitute the 9th National Finance Commission Award on or before 21st of July, 2015. I am with some humility wish to report to the House that this Government fulfils its responsibility well ahead of time and in pursuance of Article 160 of the Constitution, the President of Pakistan constituted the 9th National Finance Commission on the 24th of April, which was eighteen days ago. Therefore, the question of delay in announcement of the NFC Award does not arise, it's only been eighteen days.”

I restrained from giving a Ruling on the matter, however, I did inform the Government that traditionally NFC Award is supposed to be finalized and announced within five years.

- (ii) Again, in the Senate sitting held on 14th May, 2015, Senator Mir Hasil Khan Baziño raised the matter of non-issuance of NFC Award by the Federal Government prior to the announcement of Budget. He demanded a Ruling from the Chair on the issue.
- (iii) In the Senate sitting held on 12th November, 2015, during discussion on the report of the 1st Biannual Monitoring on the Implementation of National Finance Commission (NFC) Award (July-December, 2014), Members raised the issue of non-announcement of the Award within the constitutional timeline of five years.
- (iv) In the Senate sitting held on 13th November, 2015, Minister for Finance, during his winding up speech, stated that “the previous Award which was technically *stricto sensu* was valid till 30th June, 2015, has been extended and that has been happening. The impression that it is unconstitutional, no this extension is constitutional.”
- (v) In the Senate sitting held on 19th April, 2016, Senator Saleem Mandviwala, through a Calling Attention Notice, drew attention of the Minister for Finance towards non-convening of meeting of the National Finance Commission for the new NFC Award. Minister for Law and Justice, on behalf of the Minister for Finance, made a statement that, “*sub-Article (1) of Article 160 of the Constitution provides that the National Finance Commission will be constituted at intervals not exceeding five years. Now, the last NFC that is the 8th NFC was constituted on the 21st July of 2010. We were, of course, required to constitute the 9th NFC before the 21st July, 2015. In fact, it was constituted on the 24th of April, 2015.*”
- (vi) Again, in the Senate sitting held on 22nd July, 2016, Senator Sassui Palijo moved a Calling Attention Notice to draw attention

of the Minister for Finance towards the continuous delay in the 8th NFC Award. Minister for Law and Justice, on behalf of the Minister for Finance, stated that 7th NFC Award is still in the field as it has a legal cover vide President's Order No. 5 of 2010. I, once again, brought it to the notice of the Government that, "this is the second Budget which has been passed without the announcement of the Award. It is correct that President of Pakistan has given new life to the old NFC, however, new NFC Award should come after five years."

- (vii) In the Senate sitting held on 20th January, 2017, during discussion on the 2nd Biannual Monitoring Report on the Implementation of National Finance Commission (NFC) Award (January-June, 2016), Members raised concerns regarding non-announcement of the new NFC Award. Mr. Baligh-ur-Rehman, Minister of State for Interior, on behalf of Minister for Finance, made a statement. While replying to the concerns raised by Members, he stated that, *"when it has been said that an Award shall come after every years then there should also be a consensus that when to take up the new Award"*.
- (viii) In the Senate sitting held on 21st March, 2017, Senator Sassui Palijo on her behalf and on behalf of Senator Mukhtiar Ahmed Dhamrah, through a Calling Attention Notice, drew attention of the Minister for Finance, towards the continuous delay in finalization of NFC Award. Mr. Shahid Khaqan Abbasi, Minister for Petroleum and Natural Resources, on behalf of the Minister for Finance, made a statement, wherein he stated that, "it is not necessary that there should be an Award of every NFC" and made reference to previous NFCs in this regard. He further stated that, "it has a five years' life. It is deliberating the issue and it will come up with the Award if a consensus is reached. That is

the situation, the Commission has a five years' life; it will deliberate it. Hopefully, it will reach a consensus.”

- Senator Aitzaz Ahsan, Leader of the Opposition, objected to this stance of the Government and stated that, “National Finance Commission is the basic component of the federal structure of the Constitution; the Commission is under obligation to give an Award. Commission is not constituted to only sit, have tea and TA/DA, it has to give an Award under which a smooth and adequate of financial and resources distribution between the Provinces will take place”.

- I made an observation in the following terms:-

“Article 160 is very clear. NFC is the basis of federalism; if Award is not being announced, each day that it is not coming, it is an unconstitutional step. For this reason we have talked about increase in powers of the Senate and passed a unanimous Resolution that the Constitution should be amended to provide that if NFC Award is not announced within five years then the Government should take permission from the Senate for extension of the Award and Senate should have power to increase the share of provinces to one percent.”

(ix) In the Senate sitting held on 9th June, 2017, Senator Taj Haider raised the issue of non-issuance of NFC Award and under transfer of funds to the Provinces.

(x) Finally, in the Senate sitting held on 23rd October, 2017, Senator Mukhtiar Ahmed Dhamrah @ Aajiz moved that the House may discuss the situation arising out of non-announcement of NFC Award and if this situation continuous the Budget for 2017-18, will also be without the Award. Members raised concerns as to

the constitutional violation and demanded that a Committee of the Whole be constituted to take up this matter. I reserved my ruling on this point.

2. On 31st October, 2017, I asked the Minister for Law and Justice to assist the Chair as to how the Government interprets clause (1) of Article 160, Constitution, 1973. Whether National Finance Commission is to be constituted within five years or the Award should be announced within five years. In the Senate sitting held on 7th November, 2017, Minister for Law and Justice made a statement (verbatim annexed). The gist of his statement is as under:-

- i) Two most important aspects of clause (1) of Article 160, Constitution, 1973, are, - the constitution of a National Finance Commission at intervals not exceeding five years and that the Federal Minister for Finance, the Ministers for Finance for the Provincial Governments and the other persons to be appointed by the President.
- ii) Wording of the Constitution does not bind the National Finance Commission to finalize an award every five years; the requirement is that a National Finance Commission be constituted every five years.
- iii) The first, fourth, fifth and seventh National Finance Commissions have given Awards; first National Finance Commission Award enforced for 16 years, fourth award enforced for 6 years, fifth award enforced for 13 years and now the seventh award has been enforced since 2010 onwards.
- iv) In the Presidential Orders there is a commencement date, but there is no thought of a validity date; it remains enforced till the next Award comes. Every new Award or rather every new Order that is issued after the Award is made, repeals the earlier Order. This is an indication that it remains enforced till such time as the

new Order is issued. Every Order repeals the earlier Order.

- v) Amending Orders have been issued by the President; previously modifications of Awards were made mainly because of the census and due to the failure of the Commission to give recommendations.

After hearing the arguments of Minister for Law and Justice, I reserved my Ruling.

3. In terms of the aforementioned facts and queries raised, the question which needs to be answered is,-

“In terms of clause (1) of Article 160, Constitution, 1973, whether the National Finance Commission is to be constituted every five years or the Award should also be announced every five years?”

4. In order to examine and answer the question framed herein, it will help us in understanding the delays in the announcement of the awards if we travel through the pages of history. Prior to the Constitution, 1973, the position was as under;

- (i) After the independence, Sir Jeremy Raisman was asked to formulate a feasible revenue sharing formula between the Federation and federating units of the country. The Raisman formula was presented in December, 1947 and subsequently adopted on April 1, 1952.
- (ii) After the 1952, Award, there were three NFC Awards of 1961, 1964 and 1970.

After the Constitution, 1973, came into existence, the following position emerged:

- (i) 1974 National Finance Commission gave the First Award, the same year, after the promulgation of the Constitution, 1973, and a new Award was due in 1979.
- (ii) The Second National Finance Commission was constituted in

1979, during Martial Law. It never held any meeting and consequently made no recommendations. Therefore, for resources distribution in the interim period, the 1974 Award was followed. After the new census conducted in 1981, the population proportion changed and the resources shares were adjusted accordingly.

- (iii) The Third National Finance Commission was constituted in 1985, during the tenure of General Ziaul Haq. The Commission held 9 meetings in 3 years but was unable to finalize its recommendations. The resources distribution from the Divisible Pool remained as of the 1974 Award, and it continued till 1990.
- (iv) After almost 16 years, the Fourth National Finance Commission constituted in 1990, under civilian rule gave recommendations in April, 1991.
- (v) The Fifth National Finance Commission was constituted in December, 1996. The Commission announced the Award in February 1997.
- (vi) The Sixth National Finance Commission was constituted on 22nd July, 2000, under General Musharaf. It held 11 meetings but could not finalize its recommendations.
- (vii) Another National Finance Commission was constituted on 21st July, 2005, under General Musharaf, it also failed to give its recommendations. This gave rise to a deadlock, as a consequence of which the Provincial Chief Ministers vested the authority to the President (General Musharaf) to announce the Award. As a result, the President under Article 160(6) of the Constitution, 1973, through Ordinance No.1 of 2006, made amendment in the "Distribution of Revenues and Grants in Aid, Order 1997. The new Award was announced to take effect from 1st July, 2006.

- (viii) The Seventh National Finance Commission was constituted by the President of Pakistan on 21st July 2009. The Award was announced vide Presidential Order No.4 of 2010 on 18th March, 2010. On 10th May, 2010, the Presidential Order No. 5 of 2010, made an amendment to the Presidential Order No. 4 of 2010. The Award became effective from the 1st July, 2010, and still in force because the Eighth National Finance Commission constituted on 21st July 2010, failed to make recommendations.
- (ix) The Ninth National Finance Commission was constituted on 24th of April, 2015 which, till date, is effective.

5. After walking through the pages of historical facts on the composition of the National Finance Commissions and the Awards they were able to announce or not announce, one glaring fact that should not be lost sight of it, is a tossed up period where the Constitution has been held in abeyance or restrained. I will now take up the legal position and examine Article 160, Constitution, 1973, the said Article is reproduced as under;

- (i) Article 160, Constitution, 1973;

“160. National Finance Commission.—(1) Within six months of the commencing day and thereafter at intervals not exceeding five years, the President shall constitute a National Finance Commission consisting of the Minister of Finance of the Federal Government, the Ministers of Finance of the Provincial Governments, and such other persons as may be appointed by the President after consultation with the Governors of the Provinces.

(2) It shall be the duty of the National Finance Commission to make recommendations to the President as to—

- (a) the distribution between the Federation and the Provinces of the net proceeds of the taxes mentioned in clause (3);*

- (b) the making of grants-in-aid by the Federal Government to the Provincial Governments;*
 - (c) the exercise by the Federal Government and the Provincial Governments of the borrowing powers conferred by the Constitution; and*
 - (d) any other matter relating to finance referred to the Commission by the President.*
- (3) The taxes referred to in paragraph (a) of clause (2) are the following taxes raised under the authority of Majlis-e-Shoora (Parliament)], namely:—*
- (i) taxes on income, including corporation tax, but not including taxes on income consisting of remuneration paid out of the Federal Consolidated Fund;*
 - (ii) taxes on the sales and purchases of goods imported, exported, produced, manufactured or consumed;]*
 - (iii) export duties on cotton, and such other export duties as may be specified by the President;*
 - (iv) such duties of excise as may be specified by the President; and*
 - (v) such other taxes as may be specified by the President.*
- (3A) The share of the Provinces in each Award of National Finance Commission shall not be less than the share given to the Provinces in the previous Award.*
- (3B) The Federal Finance Minister and Provincial Finance Ministers shall monitor the implementation of the Award biannually and lay their reports before both Houses of Majlis-e-Shoora (Parliament) and the Provincial Assemblies.]*
- (4) As soon as may be after receiving the recommendations of the National Finance Commission, the president shall, by Order, specify, in accordance with the recommendations of the*

Commission under paragraph (a) of clause (2), the share of the net proceeds of the taxes mentioned in clause (3) which is to be allocated to each Province, and that share shall be paid to the Government of the Province concerned, and, notwithstanding the provision of Article 78 shall not form part of the Federal Consolidated Fund.

(5) The recommendations of the National Finance Commission, together with an explanatory memorandum as to the action taken thereon, shall be laid before both Houses and the Provincial Assemblies.

(6) At any time before an Order under clause (4) is made, the President may, by Order, make such amendments or modifications in the law relating to the distribution of revenues between the Federal Government and the Provincial Governments as he may deem necessary or expedient.

(7) The President may, by Order, make grants-in-aid of the revenues of the Provinces in need of assistance and such grants shall be charged upon the Federal Consolidated Fund.”

- (ii) Clause (1) of Article 160, Constitution, 1973, provides that “*at intervals not exceeding five years, the President shall constitute a National Finance Commission consisting of.....*”. the words “shall” and “not exceeding five years”, makes it mandatory to constitute a National Finance Commission within five years, this is the maximum outer time limit as a Commission can be constituted within one year or as early as the previous Finance Commission finalizes an Award.
- (iii) Clause (1) of Article 160, Constitution, 1973, cannot be read in isolation, it has to be linked with the remaining clauses of the said Article in order to ascertain the intention of the legislature and understand the modus operandi for fiscal decentralization.

- (iv) Clause (2) of Article 160, Constitution, 1973, provides that, “*it shall be the duty of the National Finance Commission to make recommendations to the President as to...*”(emphasis provided). The words 'shall' and “duty” have been defined in Black's Law Dictionary, Ninth Edition, at pages 580 and 1499 respectively, as;

Duty

“A legal obligation that is owed or due to another and that needs to be satisfied; an obligation for which somebody else has a corresponding right.”

Shall

“Has a duty to; more broadly, is required to <the requester shall send notice> <notice shall be sent>. This is the mandatory sense that drafters typically intend and that courts typically uphold.”

- (v) The legal definition, of the two words when read in the said clause, enunciates that the National Finance Commission, constituted under clause (1) of Article 160, Constitution, 1973, will have to give recommendations before its conclusion. In terms of the definition of the term 'duty' it is an obligation of the NFC to give recommendations and Provinces have a corresponding right to have distribution of net proceeds of the taxes mentioned in clause (3) of Article 160, Constitution, 1973, after every five years. It becomes all the more important in terms of sub-Article (3A) of the said Article which provides that the, “share of the Provinces, in each award of National Finance Commission shall not be less than the share given to the provinces in the previous Award”.
- (vi) Clause (4) of Article 160, Constitution, 1973, provides that “As soon as may be after receiving the recommendations of the

National Finance Commission, , the president shall, by Order, specify, in accordance with the recommendations of the Commission under paragraph (a) of clause (2).....” (emphasis provided) the use of the words “after receiving the recommendations”, “the President shall”, shows the intent of the legislature that the recommendations of the NFC shall be given affect by a Presidential Order, as soon as possible.

- (vii) The legal position as stated above is corroborated with the intent of the legislature, which can be gathered from the debates of the Constitution making Assembly in 1973. Reference is made to the statement of the then Minister for Law, Mr. Abdul Hafeez Pirzada (Late), who while responding to an amendment moved in clause 160, made the following statement:-

The National Assembly of Pakistan Debates (Vol. II No. 27-36) 1973 (Page - 1971)

*“I would say that we have worked, as admitted by him, in the spirit of co-operation and particularly the larger provinces in Pakistan have shown some magnanimity to create institution which will inspire confidence of the smaller provinces. We have tried to strike at the root of the problem. The problem has existed in this country is the lack of the faith and confidence in each other. Unnecessarily, people have been taking blame for something which they never did. People have been excused but that has always been a limited group responsible for exploitation. The institution that we have suggested is more or less on the line of the council of common interest. The Federal Finance Minister and the Provincial Finance Ministers and such other number of persons as President may decide shall form the National Finance Commission. **Every five years it will give a***

report, and in this all the Provinces will have participation as well as sense of participation, and when five Finance Ministers of the Federation and of Provinces sit together with the help of such other members as the President may be pleased to appoint, and the President shall do so under the advice of the Prime Minister”.

- (viii) It is evident from the statement made by the then Minister for Law that the Commission is obligated to submit its report before or at the expiration of five years.
- (xi) This intent is further provided in the Distribution of Revenues and Grants-in-Aid (Amendment) Order, 2006, wherein the provincial Chief Ministers vested the authority to the President to announce an Award due to the failure of the NFC to give recommendations, as a result the President under clause (6) of Article 160 of the Constitution, 1973, through Ordinance No. 1 of 2006, made amendment in the “Distribution of Revenues and Grants in-Aid Order, 1997. Preamble to the said Order provides as under:-

“And whereas the Commission could not submit its recommendations with regard to the said distribution and the matter being of urgent and national importance cannot be further delayed;”

The Preamble is testimonial to the fact that the NFC was under obligation to give recommendations.

- (x) Another recent example establishing that a fresh Award needs to be given every five years, is the Seventh NFC Award itself. Clause (3) of Article 4 of the Presidential Order No. 5 of 2010, while laying down special arrangement for Balochistan, provided that *“this arrangement for Balochistan shall remain protected throughout the **remaining four years of the Award** based on annual budgetary projections”* (emphasis provided).

The drafters of the Presidential Order were conscious of the fact that this Award will remain enforced only for five years and after the expiration of five years a new Award will have to be announced. As the new Award could not be announced within the stipulated time, therefore, vide Presidential Order No. 6 of 2015, the above mentioned words of Clause (3) of Article 4 of P.O. No. 5 of 2010, were substituted with the words that, *“this arrangement for Balochistan shall remain protected throughout the Award period based on annual budgetary projections”*.

- (xi) Provisions of Article 160, Constitution, 1973, are not unique as such like provisions are provided in Constitutions of other countries. It is imperative to make reference to the Indian Constitution in this regard as clause (1) of Article 160, Constitution, 1973, is para materia to Article 280 of the Constitution of India, which is reproduced as under:-

“280. Finance Commission

(1) The President shall, within two years from the commencement of this Constitution and thereafter at the expiration of every fifth year or at such earlier time as the President considers necessary, by order constitute a Finance Commission which shall consist of a Chairman and four other members to be appointed by the President

(2) It shall be the duty of the Commission to make recommendations to the President as to

(a) the distribution between the Union and the States of the net proceeds of taxes which are to be, or may be, divided between them under this Chapter and the allocation between the States of the respective shares of such proceeds;

(b) the principles which should govern the grants in aid of the

revenues of the States out of the Consolidated Fund of India;

(c) any other matter referred to the Commission by the President in the interests of sound finance.

(3) The Commission shall determine their procedure and shall have such powers in the performance of their functions as Parliament may by law confer on them”

- (xii) Clause (1) of Article 280, Constitution of India, also provides a Constitutional obligation to constitute a Finance Commission at the expiration of every fifth year or at such earlier time as the President considers necessary. Clause (2) of the said Article provides that “*It shall be the duty of the Commission to make recommendations to the President as to*” (emphasis provided). In essence, clauses (1) and (2) of Article 280, Constitution of India, with slight variation, are identical to clauses (1) and (2) of Article 160, Constitution of Pakistan, 1973. In order to give effect to the spirit of this Constitutional provision, the Indian Finance Commission is set up every five years to suggest principles governing the distribution of tax proceeds among the Centre, states and local bodies. The Commission gets two years to submit its report after consultations with central and state bodies and a cross-section of society; it becomes *functus officio* after completing its assigned work. A chronological order of the Indian Finance Commissions and Awards is as under:-

Finance Commission	Constituted Year	Report Submitted Year
First Finance Commission	1951	1953
Second Finance Commission	1956	1957
Third Finance Commission	1960	1962
Fourth Finance Commission	1964	1965

Finance Commission	Constituted Year	Report Submitted Year
Fifth Finance Commission	1968	1969
Sixth Finance Commission	1972	1973
Seventh Finance Commission	1977	1978
Eight Finance Commission	1982	1984
Ninth Finance Commission	1987	1989
Tenth Finance Commission	1992	1994
Eleventh Finance Commission	1998	2000
Twelfth Finance Commission	2002	2004
Thirteenth Finance Commission	2007	2009
Fourteenth Finance Commission	2014	2015

6. In view of the Constitutional, legal, factual and international position explained above, the question at para 2 hereinabove is answered in the following terms:-

- (i) In terms of clause (1) of Article 160, Constitution, 1973, the President of Pakistan shall constitute a National Finance Commission within five years.
- (ii) In terms of clause (1) read with clause (2) of Article 160, Constitution, 1973, the National Finance Commission shall give its recommendations to the President of Pakistan before the expiration of its tenure i.e. five years.
- (iii) In order to give effect to paragraphs (i) and (ii), the following procedure may be adopted:-
 - a. Immediately after the announcement of an Award, the President shall constitute the next NFC to give recommendations within its tenure;
 - b. NFC shall give its recommendations to the President

well before the expiration of its tenure;

- c. The recommendations shall be given effect vide a Presidential Order, in terms of clause (4) of Article 160, Constitution, 1973, hence, completing the entire procedure within five years.
7. I agree with the contention of the Minister for Law and Justice that historically the NFC Awards have remained effective for more than five years, sometimes till sixteen years. However, I am also conscious of the fact that the constitutional derailments and discontinuity of the Parliament has also remained a factor in this regard. Therefore, without touching upon the merits of previous NFCs and their Awards and disturbing the scheme of the present Award, which remains effective, position reflected at para 6 above will play a pivotal role in ensuring fiscal decentralization and participatory federalism through enforcement of constitutional rights of the Provinces.
8. The Secretariat is directed to send a copy of this ruling to the President of Pakistan, Prime Minister, Minister for Law and Justice, Minister for Parliamentary Affairs, Provincial Chief Ministers and Speakers of Provincial Assemblies for necessary action.

MIAN RAZA RABBANI
NI
Chairman Senate

Dictated in Chamber
Announced in the House on 17th November, 2017.
270th Session



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 affect, 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 Table on next page highlights the impact of the Constitutional Amendment with respect to Ownership;-*

Ownership of Oil and Gas				
No.	Subject	Before 18th Amendment	After 18th Amendment	Remarks
I.	Ownership of mineral oil and natural gas	Exclusively with the Federal Government. As per the Mineral (Acquisition and Transfer) Order, 1961(PO No. 8 of 1961)	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	
II.	Utilization of Gas	Right of respective Provincial Government to utilize natural gas in the Province where the producing wellhead situated, as priority. Article 158	No change.	Royalty on Oil and Gas, Excise duty on Gas and Gas Development Surcharge are being paid to provincial governments in accordance with NFC Award.
III	Royalty on Gas	Exclusive right of the respective Provincial Government. Article 161(a)	No change.	
IV.	Royalty on Gas	No specific provision on payment of royalty on oil. Article 161(b)	No change.	
V.	Federal Excise Duty on Natural Gas	Exclusive right of the respective Provincial Government. Article 161(a)	No change.	
VI	Federal Excise Duty on Oil	Not available	Payment to Provinces under Article 161(b)	

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

<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. · Article 142(a) · Article 97 · 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 – 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>

position of Oil and Gas regulation and Legislation before and after the promulgation of the 18th Amendment:-

- 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 where 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 Palijo 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.....

- ii) *“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

“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

Import of Liquefied Natural Gas (LNG)

Dated 29th February, 2016

“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

Status Review of Important Decisions of the CCI meeting held on 29th February, 2016 and March 25, 2016

Dated 16th December, 2016

“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 there 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 State 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



House of the Federation

Senate Secretariat,
Parliament House, Islamabad