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**Judgment Sheet**

**IN THE LAHORE HIGH COURT LAHORE  
JUDICIAL DEPARTMENT**

**Case No: W.P. No.7955/2015**

**Ms. Imrana Tiwana, etc.    Versus    Province of Punjab, etc.**

**JUDGMENT**

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| Dates of hearing | 6.4.2015, 7.4.2015, 8.4.2015, 9.4.2015, 10.4.2015, 13.4.2015, 14.4.2105, 15.4.2015, 16.4.2105. & 17.04.2015   |
| Petitioners by   | Mr. Salman Akram Raja assisted by Ms. Aneesa Agha, Ali Javaid, Hamaad Mustafa, Tariq Bashir and Ms. Atira Ikram, Advocates alongwith Ms. Imrana Tiwana, petitioner.<br>M/s Saad Rasool, Saad Amir, Fahad Malik (petitioner in person) and Angbeen Atif Mirza Advocates in connected writ petitions.   |
| Respondents by:  | Mr. Naseer Ahmad Bhutta, Additional Attorney General for Pakistan.<br>M/s. Mian Irfan Akram and Nasar Ahmad, Deputy Attorneys General for Pakistan.<br>Syed Akmal Hussain Shah, Standing Counsel for Pakistan.<br>Ms. Hina Hafeezullah Ishaq, Standing Counsel for Pakistan.<br>Mr. Naveed Rasool Mirza, Advocate General, Punjab.<br>Mr. Shan Gul, Additional Advocate General, Punjab.<br>M/s Anwaar Hussain and Ahmad Hasan Khan, Assistant Advocates General, Punjab.<br>M/s Shahid Hamid and Ayesha Hamid, Advocates for respondent No.9 in W.P. No.5323/2015.<br>M/s Khawaja Haris Ahmad, Mustafa Ramday, Waqar A. Sheikh, Salman Mansoor |

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|               | <p>and Jahanzaib Inam, Advocates for respondent LDA.</p> <p>M/s Barrister Muhammad Umar Riaz, Asjad Saeed and Parvez I. Mir and Mr. Mohammad Azhar Siddique, Advocate for respondents.</p> <p>M/s. Farooq Ahmed Sheikh, DG, EPA, Naseem ur Rehman, Director (EIA), Muhammed Rashid, Director (law), Muhammad Nawaz Manik, Deputy Director (Legal), EPA, Punjab.</p> <p>Ashfaq Ahmed Rana, Litigation Officer, TEPA.</p> <p>Mr. Sharjeel Haider, Assistant Director (Legal), EPA, Punjab.</p> <p>Asrar Saeed, Chief Engineer, LDA.</p> <p>Khalid Mahmood Alvi, Project Director, LDA.</p>   |
| Amici Curiae: | <p>Professor Roger Myerson, Glen A. Lloyd Distinguished Service Professor of Economics at the University of Chicago and the Recipient of the 2007 Nobel Memorial Prize in Economics Sciences, _</p> <p>Dr. Ali Cheema, Associate Professor of Economics Lahore University of Management Sciences (LUMS) and Senior Research Fellow in Political Economy Institute of Development and Economic Alternatives (IDEAS),</p> <p>Professor Osama Siddique, an international legal scholar and public policy expert. He is an Associate Fellow at the public policy research institute IDEAS and also on the senior faculty of the Harvard based research center IGLP.</p> <p>Mr. Waqqas Ahmad Mir, Advocate.</p> |
| Assisted by:  | <p>M/s. Qaisar Abbas and Mohsin Mumtaz, Civil Judges/Research Officers, Lahore High Court Research Centre (LHCRC).</p>   |

*“You can cut all the flowers but you cannot keep spring from coming.”*

*-Pablo Neruda*

**Syed Mansoor Ali Shah, J:-** Through this environmental public interest petition, concerned citizenry of Lahore, has invoked the constitutional and equitable jurisdiction of this Court to challenge the constitutionality and legality of the Signal Free Corridor Project (“Project”) proposed and initiated by the Lahore Development Authority (“LDA”).

2. The challenge rests on the following fundamental propositions of constitutional importance:-

(i) Whether the foundational constitutional *values* of democracy, equality, political, economic and social justice; informed with fundamental *rights* and the principles of *policy*, recognize and acknowledge environmental justice and the international environmental principles as natural and integral concomitant of these *values, rights and policies*?

(ii) Whether, the above constitutional *values, rights and policies* underline the constitutional requirement of an independent and autonomous regulator (in this case: The Provincial Environmental Protection Agency) to safeguard and protect the most primordial of fundamental rights i.e., right to life, liberty and dignity of the people (Articles 9 and 14), by protecting the most essential element of human life i.e., the *environment*?

(iii) Whether the constitutional recognition and command to establish a third tier of elected self-government under Article 140A of the Constitution, actualizes the constitutional vision of a federalist state and of guaranteeing political, economic and social justice, encouraging local government institutions

(Article 32), the right to liberty, dignity and political participation (Articles 9, 14 and 17)?

(iv) Whether, the constitutional ethos of *Federalism* (reinvigorated through the 18<sup>th</sup> Constitutional amendment) introduce a new era of constitutional maturity complimenting the traditional doctrine of *horizontal* separation of powers between different organs of the State with a more enlightened constitutional design that in addition accounts for *vertical and internal separation of powers* within the organs of the State ? And whether there exists vertical separation of powers and corresponding autonomy between the elected Provincial and Local Governments?

(v) Whether devolution and vertical separation of powers envisaged under Article 140A of the Constitution allows Lahore Development Authority (LDA), a provincial body, to trump and usurp the powers of the elected local governments, which firmly rest on constitutionally devolved political, administrative and financial responsibility and authority under Punjab Local Government Act, 2013 (“**PLGA**”) with clearly delineated powers ?

(vi) Whether Provincial Legislature can curtail or abridge the powers already devolved under Article 140A and PLGA to the local governments by introducing amendments in the LDA Act or through introducing other provincial laws?

3. The Signal Free Corridor Project is a project that redesigns and remodels existing roads that start from Qartaba *Chowk* (roundabout) and end at Liberty Market Main *Chowk*

spread over 7 K.Ms of the existing Jail Road and Main Boulevard. Remodelling would convert this stretch into a signal free, high speed expressway by introducing two underpasses at the Shadman and Fawara Chowks and seven U turns and five overhead pedestrian bridges at a cost of approx. Rs 1.5 billion of the taxpayers' money.

4. The petitioners submit that LDA inspite of having filed an Environmental Impact Assessment (“EIA”) with the respondent Provincial Environmental Protection Agency (“EPA”), has in total disregard of the law, that is, without seeking the approval of EPA under Section 12 of the Punjab Environmental Protection Act, 1997 (“PEPA”) mobilized the works and illegally commenced the construction of the Project. During the course of hearing, the Advocate General, Punjab confirmed that the EIA approval has been finally granted by the Director General, EPA on 19.03.2015 when the Project had commenced and after some of the petitioners had already approached this Court on 26.02.2015 by challenging the commencement of the *Project* without approval of EIA and before the availability of the EIA Report being made Public. It appears that EPA hurriedly granted the approval and placed it on the record, because the Court had taken cognizance of the matter and had questioned the LDA and the Provincial Government to explain how the *Project* had commenced without an EIA approval. The petitioners in the instant case and the subsequent connected petitions (all of them being public interest petitions) have also challenged the said decision of the DG, EPA.

5. The petitioners, as a community of concerned citizens, have vehemently urged that EPA, currently, is not an autonomous statutory environmental protection agency but a

mere Attached Department of the Provincial Government, functioning on the dictates of the Provincial Government. It is argued that EPA suffers from complete *Regulatory Capture* by the Provincial Government and hence the impugned decision is a result of dictation and non-application of an independent mind. It is argued, that it is not possible for the beleaguered EPA to independently dispense *environmental justice*, within the statutory framework of PEPA, the Pakistan Environmental Protection Agency (Review of IEE and EIA) Regulations, 2000 (“**Regulations**”) and the Environmental Law Guidelines, namely: (i) Policy and Procedure for Filing, Review and Approval of Environmental Assessments. (ii) Guidelines for the Preparation and Review of Environmental Reports and (iii) Guidelines for Public Consultation. EPA also falls short of protecting the constitutional values of social justice and the fundamental rights under the Constitution. As a consequence, it is argued, that the entire EIA approval process, as well as, the preparation of the EIA report by the consultant is materially deficient and defective.

6. The petitioners, as concerned citizens, have also urged this Court to take notice of the sheer absurdity and irrationality of the *Project*. It is submitted that Rs 1.5 billion, of the tax payers’ money is being spent to convert a 7 km road into a high speed corridor for only 8% motorists of the city, with no regard for the pedestrians, cyclists and other non-motorized persons who are in majority. It is also emphasized that the selection of the *Project* is at the cost of several other more important development projects in the Lahore Division. They vehemently submit that the sanction of the Project by the LDA, was without application of mind as is evident from the minutes of the meeting of LDA. They pleaded that while the patients languish

in hospitals without doctors and medicines and government schools function without teachers, the need to spend Rs 1.5 billion on a small stretch of road, in the most developed part of Lahore, is cruel, inequitable and undemocratic. They urged that such nakedly irrational development policies are subject to judicial review.

7. On the role of LDA versus the Local Government, it was urged that after devolution of political, administrative and financial responsibility and authority to the elected representatives of the local government system under Article 140A of the Constitution, and after the provincial legislature having vested the municipal service relating to urban development under PLGA in the Lahore Metropolitan Corporation (“**LMC**”), LDA has no constitutional authority to initiate the *Project* within the devolved political, administrative and financial space of LMC. It is submitted that any such *Project* can ONLY be initiated and developed by the concerned elected Local Government.

8. It has been argued that the conclusions and recommendations drawn by the EIA Consultant are based on an inadequate, incompetent, unsubstantiated and biased appraisal of the Project, and are liable to be disregarded. The EIA, prepared by LDA, is itself a vacuous document and persistently violates the Guidelines which inform its preparation. The petitioners have given a detailed list of areas in which the EIA falls short of the legal requirements. The summary of their submissions is as under and references therein are to the EIA Report submitted by LDA before the EPA:-

**HOW THE PROJECT EIA FALLS SHORT OF LEGAL REQUIREMENTS<sup>1</sup>**

| Sr. No. | Requirement with source   | What has been done in EIA  | Comments   |
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| 1.      | <p><b>Project Description:</b> Objectives; alternatives considered and reasons for rejection; description of location (with maps and photos of specific locations and layout) including land uses on site and surroundings, details of population centers and nearby dwellings, road access, topographic and vegetation features of site; description of project, including drawings showing project layout, components, etc. (<b>EIA-G: para 2.3, p.6-7 and para 5.2, p. 24</b>)</p> | <p>- Ferozpur Road MBS Project explained in more detail than actual Project (para 2.1, pp. 11-12)</p> <p>- States that the link requiring improvements plays important role in traffic and transport system of Lahore.</p> <p>- On account of its importance, crossings need improvement, and making it signal-free are inevitable. (para 2.2, pp. 12-13)</p> <p>- No map or photos whatsoever have been given of location. No detailing of land uses on site and surroundings, no details of population centers, nor of dwellings, road access, topographic or vegetation.</p> <p>- As for description of project layout and components, it is done in point form (p. 18 for Jail Rd. and p. 22 Main Boulevard). Three miniscule layout drawings are provided (p. 19, 20, 23), which are not legible and provide no details of what the Project will look like. These drawings do not cover</p> | <p>Important aspects of Project Description are omitted from the EIA, including a representation of the existing site (location) and description of the Project components. Hence, from reading the EIA, one is not certain of what the location looks like (from various perspectives, including vegetation, land use, population centers etc.) nor is one certain of what the completed Project will look like, as the diagrams provided are glaringly insufficient, unclear, and incomplete</p> <p>The existing traffic situation which presumably mandates such a major transport project is provided in the form of two diagrams for average daily traffic for Shadman Chowk and Fawara Chowk at pp. 14-15. These diagrams apart from not quoting the source of the data, fail to interpret the data presented in any</p> |

<sup>1</sup> **KEY: P&P** = Policy and Procedures for filing, review and approval of environmental assessments. **EIA-G** = Guidelines for Preparation and Review of Environmental Reports



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|  |  | <p>the entire project as described in the points.</p> <p>Alternatives are discussed and rejected in two pages (pp. 16-17). No qualitative or quantitative analysis goes into this evaluation and rejection. Discussed in more details at Sr. No. 3 below.</p> | <p>sense whatsoever. What do the figures actually mean in terms of traffic congestion? What is the extent of congestion presented by these diagrams, and what times of the day? Do these stats justify the Project, and if so, how?</p> <p>The Lahore Master Plan 2021, has the following to say of Project such as the present one, in para 8.11.2, p. 8-26:<br/><i>“LDA made a preliminary effort to produce a Manual of Traffic Engineering, but that too is not being utilized because of lack of expertise and knowledge on the part of road building agencies and local consultancy houses. Major problem lies in project preparation and planning. Project feasibilities are seldom based on traffic studies. For major projects, traffic counts are usually carried out to save from the scrutiny of the approving agencies, their utility for design solutions is witnessed in rare projects. This results towards wasteful expenditure on projects with least priority of traffic demand. It is</i></p> |
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|           |  |   | <p><i>happening because of lack of expertise on the part of sponsoring and approving agencies on one hand and political compulsions on the other. Recently completed LRRP of ex-MCL is a classical example where more than Rs. 3.4 billion are spent on a project of urban roads without carrying out any traffic study, traffic demand analysis justifying its engineering feasibility, traffic impact assessment ensuring its operational efficiency and economic and financial viability for any of its components.”</i></p> <p>The EIA is more a predetermined justification for the Project. It does not comprehensively address the issue it is trying to address (traffic congestion on roads) as there is no validation of the problem being resolved by signal-free corridors.</p> |
| <p>2.</p> | <p><b>Scoping:</b> Described as “a vital early step” and “a process of interaction between the interested public, government agencies and the proponent. Scoping refers to the process of identifying, as early as possible:</p> <ul style="list-style-type: none"> <li>• the appropriate boundaries of the</li> </ul> | <p>From a reading of the EIA, it is apparent that a scoping exercise has not been undertaken.</p> <p>There is a section devoted to public consultation (section 6). It stresses the importance of the</p> | <p>It is obvious from the reading of the Public consultation section of the EIA that a meaningful engagement with stakeholders has not been carried out.</p> <p>Whereas the EIA-G,</p>  |

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|  | <p>environmental assessment;</p> <ul style="list-style-type: none"> <li>• important issues and concerns;</li> <li>• the information necessary for decision-making; and</li> <li>• the significant impacts and factors to be considered.</li> </ul> <p><b>(EIA-G: para 2.4; p. 8)</b><br/>*Read further from this section*</p> <p><b>Role of Stakeholders in Scoping:</b> Includes, environmental practitioners and experts, those affected, and the wider community.<br/>*Read from <b>EIA-G: para 2.5, pp. 9-10</b>)*</p> <p><b>Note:</b> The Punjab EP Act, 1997, and its regulations and guidelines envisage a two-tier public participation process. The first and most important of which is to take place during the preparation of the EIA. This is evident from the Scoping requirements laid down. It is at this stage that meaningful and protracted input can be gained from various segments of society, especially those to be directly affected by the proposed projects.</p> <p>The second is the requirement to hold a public hearing on EIAs, and solicit comments/objections on proposed projects. Given the inherent constraints of such a hearing, and the fact that the scope and nature of the Project has already taken concrete form at this point, this public participation process is far less effective in addressing genuine community concerns.</p> | <p>consultation process in the assessment process (para 6.1, p. 91), however, it is apparent that a meaningful consultation process has not been carried out for the Project.</p> <p>The EIA states at para 6.2.1 (pp. 91-92) that there are no primary stakeholders for the improvement of Jail Road and Main Boulevard. It groups local residents, shop keepers, vendors, pedestrians, and businessmen of the adjoining markets as secondary stakeholders.</p> <p>Stakeholders are identified in Table 6.2 (p. 93) and it appears that the Consultant has itself surmised as to what their various concerns might be.</p> <p>It is stated that stakeholders (groups/individuals) were briefed about the project, and eventually their queries about the project were answered to their satisfaction (para 6.3.1; p 94).</p> <p>It goes on to state that 77% of the respondents favoured the Project whereas 23% were against. (para 6.3.3, p. 94).</p> <p>In para 6.4, pp. 95-96, a summary of the comments and discussions with stakeholders is</p> | <p>envisage a two-way flow of ideas, knowledge, and concerns, between those affected, the wider community, environmental experts, and the proponent, so as to highlight important issues and concerns, the EIA evidently takes a non-serious and paternalistic approach to scoping.</p> <p>There is no mention of community groups, experts or NGOs having been consulted. No criteria are given for selecting stakeholders, and the atomised individuals consulted seem to have been selected at random.</p> <p>Just some of the obvious stakeholders in the Project (some of which have been mentioned in other parts of the EIA) include Kinnaird College, Lahore College for Women (and other education providers along the Project route), Omer Hospital (and other hospitals/clinics on the Project route), owners of major shopping malls and plazas on the route, residents of Gulberg and Shadman, the custodians of the Christian cemetery on Jail Road, urban planning and environment</p> |
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|  |  | <p>provided. It is stated that most of the public considers improvement of roads/provision of underpasses to be a priority project in the city. Concerns were raised as to road crossings being disturbed (eliminated) by the Project; and employment in construction phase going to persons from outside the Project area. In response, it is stated that <i>“all fears of the community were alleviated”</i>, and that positive impacts will abound from the Project. It states that <i>“all the people showed their satisfaction for the improvement of jail road and main boulevard/in the area.”</i></p> <p>In para 6.5, p. 96 it is stated that <i>“several issues were raised by the community during the consultation, which were immediately addressed by the Consultants’ officials. Residents of the city were very much supportive to the implementation of the proposed project.”</i></p> <p>After due consideration of the comments/observations of the people, it is stated in para 6.5, p. 96, <i>inter alia</i>, that <i>“In the absence of crossings by pedestrians, the comfort level presently available will be disturbed, therefore</i></p> | <p>experts/NGOs, to name a few.</p> <p>It is evident from the overwhelming presence of concerned citizens and experts (many of whom filed comments/objections on the EIA) at the public hearing, that the Proponent and Consultant had not carried out a meaningful scoping/consultation process, but rather decided on its own the nature and scope of the Project to be foisted upon the City.</p> <p>As for the concern raised as to ease of travel by pedestrians, the EIA seems to have resolved the issue in words alone. It is shocking that the Consultant’s solution to this major issue is the construction of four (4) pedestrian bridges along the 7-km route (see: pp. 18 and 22), i.e a bridge every 1.75 km!</p> |
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|           |  | <p><i>pedestrian bridges should be take-up for completion simultaneously; “The difficulties and problems faced by pedestrians during movement on roads will be eliminated”; and “Public mental tension, frustration will be minimized.”</i></p> <p>A list of persons consulted is provided on p. 97. It includes only 23 persons, for a 7-km long Project, at an estimated cost of Rs. 1.5 billion. The list comprises entirely of individuals, no groups, organisations, NGOs consulted has been provided. The Punjab EPA review proceedings refer to this as “random sampling” at p. 23 of 87.</p> |  |
| <p>3.</p> | <p><b>Generating Alternatives:</b> <i>“A rigorous approach to generating alternatives is more commonly associated with proposals from the public sector, where the allocation of public funds and priorities is recognised as a legitimate public interest...Alternatives are generated and examined to determine the best method of achieving project objectives, while minimising environmental impacts. They can be grouped under such headings as:</i></p> <ul style="list-style-type: none"> <li>• <i>Activity alternatives (eg providing public transport rather than increasing road capacity)”</i></li> </ul> <p><b>(EIA-G: para 2,6; p. 10)</b></p> | <p>Alternatives to the Project are discussed in para 2.3, pp. 16-17 of the EIA.</p> <p>The two alternatives discussed and rejected as follows:</p> <ul style="list-style-type: none"> <li>• <b>No Project Option:</b> In the absence of the Project, the existing traffic problem and the level of service will further aggravate with the passage of time.</li> <li>• <b>Provision of Overhead Crossings:</b> In addition to increased capital cost of construction, the “fibre of the area will be significantly disturbed.</li> </ul>   | <p>The consideration of the No Project Option indicates an extremely fatalistic and myopic approach to traffic management, as if the LDA (and TEPA) can exercise no control over future traffic flows apart from observing the increase in vehicular traffic, and providing further road space to accommodate it. Regretfully, the other options that are available to the LDA and other governmental organisations have not even been</p> |

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| <p><i>“The ‘no-build’ alternative is often used as a base against which to measure the relative performance of other alternatives. In this case the relative impacts of the other alternatives are expressed as changes to the base case. If, overall, all the alternatives were judged to have unacceptable performance, the decision might be to adopt none of them, and stay with the status quo – the ‘no-build’.” (EIA-G: para 2,6; p. 11)</i></p> <p><b>EIA-G: Para 5.2, p. 25</b> states that <i>“for both the proposal and its alternative, the Environmental Report requires a description of the potential beneficial and adverse environmental impacts, both direct and indirect, for each component of the environment identified as important during the screening and coping stages.”</i></p> <p>It goes on to state that <i>“alternative proposals should be compared, focusing on the significant adverse and beneficial impacts, after allowing for mitigation measures. The preferred alternative should be identified with a complete description of those impacts considered to be of greatest significance and the measures proposed to avoid, reduce or mitigate them, and opportunities for environmental enhancement.”</i></p> <p>A very instructive summary of the evaluation of alternatives, indicating how each alternative satisfies the project objectives, is provided in the form of</p> | <p>Less invasive alternatives which might not require large-scale construction have not been considered. No quantitative assessment of the alternatives over time has been provided. That fact that only 1.5 pages is devoted to alternatives speaks volumes of the seriousness with which other options were considered.</p> <p>It should be noted that the perspective of vulnerable road users has not been factored in when assessing alternatives, in contravention of, <i>inter alia</i>, the strategy for road development laid down in the Lahore Master Plan 2021 (para 21.1.1)</p> | <p>considered. These include:</p> <ul style="list-style-type: none"> <li>• Enforcement of traffic discipline</li> <li>• Relocation of critical activities</li> <li>• Implementation of affordable and convenient public transport systems</li> <li>• Parking discipline</li> <li>• Proper signals &amp; traffic control</li> <li>• Elimination of jay-walking by catering to the needs of VRUs.</li> </ul> <p>Unfortunately it seems that the LDA wishes only to consider "mega projects" and not look for simple effective solutions. The consultant reveals the self-serving nature of the EIA when it states in para 1.4.1, p. 7, that <i>“the main objective of the EIA study is to assess the environmental impacts likely to occur due to the construction of the roads improvement project, and to suggest mitigation measures to minimize the likely negative impacts”</i>. This makes it crystal clear that Project alternatives were, in fact, not considered or evaluated.</p> <p>The consequential increase in traffic (especially private cars) will increase congestion, noise</p> |
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|  | <p><b>Figure 2, at p. 26.</b> The objectives include ‘least capital cost’, ‘least impact of physical environment’, ‘maximises community benefits, and ‘long term return on investment’.</p> |  | <p>and air pollution. Thus signal-free expressways and underpasses are ‘band-aid solutions’ which divert human, political and financial resources from the actual alternative solutions. The Lahore Master Plan in this regard states in para 8.5, p. 8-20: “<i>Provision of additional road space over and above traffic requirements is a major source of traffic indiscipline and non-judicious way of utilizing network capacity having far reaching effects on traffic control and road discipline.</i>” And again in para 8.12.2, p. 8-29: “<i>Provision of additional road space more than the requirements of the traffic does not contribute to the capacity rather it acts otherwise and is source of erroneous drive behaviour and bad safety situation in Lahore.</i>”</p> <p>Signal-free/high-speed roads cater to the minority who own cars, and ignore the requirements of the majority middle/low income stratas. The example of the signal-free corridor on Ferozpur Road has made it obvious that citizens find it</p> |
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|           |   |  | <p>dangerous to cross that road. Since the operation of that signal-free corridor has commenced, the TEPA has repeatedly had to re-design barriers and shoulders to route traffic in a safe manner, and has also been forced to install cat's-eyes even directly under overhead pedestrian bridges. For the existing Project, the proposed four (4) overhead pedestrian bridges for a 7-km route are insultingly inadequate.</p>  |
| <p>4.</p> | <p><b>Site Selection:</b> <i>“While technical and operational aspects often dominate the initial selection of a site for a proposal, proponents should give equal weight to the suitability of the site in terms of compatible land use and adequate buffer distancs.”</i><br/> <b>EIA-G: para 2.7, p. 11</b></p> <p><b>Separation Distances:</b> The following performance objectives are listed for Residential areas, hospitals or schools: <u>“Protect residential amenity and health; odour, fumes, visual amenity, noise, dust, seepage”</u> (Table 1 on p. 12)</p> | <p>As stated above, no description of adjoining land uses has been provided in the Project Description section of the EIA. The land uses adjoining the Project area consist of residential, commercial, and institutional uses, with numerous health and education providers along the route.</p> <p>However, the suitability of the site, and buffer distances has not been discussed. Given no proper diagrams of the proposed construction have been given, one cannot even evaluate the buffer distances between adjoining uses and the Project.</p> | <p>The Project proposes a signal free expressway carving its way through prime residential, commercial and institutional areas of the city centre. No exercise in “protecting residential amenity and health; and considering odour, fumes, visual amenity, noise, dust and seepage” has been undertaken. It should be noted that a 1-km stretch of the Project is a declared silence zone, with a high concentration of hospitals, clinics and schools. They were not consulted as to the affects of the Project, given no scoping was carried out, and the well-being of patients and students does not seem to factor into</p> |



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|    |  |  | the proponent's Project considerations.  |
| 5. | <p><b>Assessing Impacts – Baseline Data Collection</b></p> <p>It is stated in the <b>EIA-G: para 3.1, p. 12</b> that assessing impacts involves three tasks: (1) detailed work on impact identification, (2) detailed analysis of impacts to determine their nature, magnitude, extent and effect, and (3) judgment of significance of impacts (whether they matter and whether mitigation required)</p> <p>Baseline data collection plays an essential part in this process. <i>“The change caused by a particular impact can be evaluated by comparing the expected future state of environmental components if the proposal were not to go ahead, with the predicted state of those components if the project does proceed. Therefore, one of the first tasks involved in the detailed analysis of an impact is the collection of information that will help to describe the baseline situation at the expected time of implementation...Assumptions and extrapolations used to draw conclusions from the data should be justified. Where existing data is used, it adequacy and appropriateness for impact assessment of the proposal should be reviewed and discussed.” – EIA-G: para 3.4, pp. 14-15.</i></p> | <p><b>Section 4</b> (p. 38) of the EIA deals with Baseline Data. It breaks the analysis up into Physical Resources (para 4.3, pp. 39-63); Ecological Resources (para 4.4, p. 63), Human &amp; Economic Development (para 4.5, pp. 64-68), and Quality of Life (paras 4.6-4.7, pp. 68-73).</p> <p>Focus is drawn to portions of all of the above.</p> <p><u>Physical Resources:</u></p> <p>- Air Quality (para 4.3.8, pp. 53-63): It is stated that the main source of air pollution in the area is from traffic congestion, and increase in traffic load. 24-hr air quality testing carried out by SGS Consultants at Qartaba Chowk, Shadman Chowk, Fawara Chock, and Liberty Roundabout. Notable omission is PIC chowk, which is particularly sensitive to pollution on account of the numerous hospitals, clinics and schools located in the area. Noted that pollutants are within prescribed limits (NEQS) at all sites, with particulate matter reaching limits, and exceeding at one point (Qartaba Chowk). (Tables at pp. 55-57</p> | <p>It is pertinent to note that the EIA-G state in para 3.4, p. 15, that <i>“It is not uncommon for a situation to arise where proponents seek immediate approval for a project for which no baseline data has been collected. Clearly such a situation is untenable, and testifies to a lack of proper project planning”</i>. This is precisely what has happened here, except the LDA didn't even both for approval. Monitoring is limited to 4 days of the year, i.e. 23-27 January, 2015 (see: p. 1 of the SGS report). Grossly inadequate for a project of this scope.</p> <p><u>Physical Resources:</u> Present and anticipated emissions: Detailed tables are provided at Annex 4.2 (pp. 75-78), however no sources have been quoted for the same (obviously drawn from some prior research). Violates the EIA-G, which state that adequacy and appropriateness of this data for impact assessment must be reviewed and discussed. EIA-</p> |

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|  |  | <p>and Annexure II, pp. 1-8 of SGS Report (annexed as Annexure 4.1 of EIA)).</p> <p>- Present and anticipated emission from motor vehicles: Projections for emissions (without project) are presented in the form of tables and graphs on pp. 61-62. Details in the form of Annex 4.2 (pp. 75-78)</p> <p>- Noise: States at para 4.3.9, p. 63, that “<i>The project falls under a calm environment and presently, the noise level is within the permissible limits of 85dB.</i>” Tables of noise levels monitored at 4 sites by SGS at Annex III – pp. 1-4 of SGS Report).</p> <p><u>Ecological Resources:</u></p> <p>Flora: It is stated in para 4.4.2, p. 63 that 200 hundred trees and 100 plants exist within the Project right of way.</p> <p><u>Human and Economic Development</u></p> <p>It is incorrectly stated in para 4.5.5, p. 67, that the Project is part of the master plan of the city of Lahore. It states that the project is improvement, rehabilitation and augmentation of existing facilities, and as such land use rights are insignificantly</p> | <p>G also states in para 5.1, p. 24 that “<i>The Environmental Report should make reference to all relevant studies and investigations that have been carried out in support of the proposal, or other studies, report or literature used in the Environmental Report. These supporting documents should be available to all stakeholders at the time of the Environmental report is publicly advertised.</i>” Most alarming is the fact that no estimate is given of increased traffic flow along the route. It obviously will increase. Instead the tables simply use the baseline vehicle numbers as a constant with or without the project, and estimates that there will be a net-decrease in emissions with the Project. More vehicles = more emissions. How much, the EIA doesn’t bother to mention.</p> <p>Noise: The situation with noise pollution is even more alarming. The NEQS quoted are outdated. The latest were issued by the Fed Govt. In 2010, vide S.R.O. No. 1062(I)/2010. The</p> |
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|  |  | <p>affected, with acquisition of 28 marlas. The Project is evidently an expansion and alteration of the existing site and facilities.</p> <p><u>Quality of Life: Socio-economic conditions</u><br/>         Stated in para 4.6.1 (a), p. 68 that settlements in area include housing establishments of Shadman, GOR-1, Gulberg, and institutions such as Lahore College for Women, Kinnaird College, PIC, Services Hospital, and other commercial and business centers.</p> <p>States that there is no significant commercial activity directly on the route except small ones near Services Hospital. Completely neglects to mention various high-rises and plazas, and most blatantly, Main Market, Gulberg.</p> <p><u>Quality of Life: Socioeconomic Environment</u><br/>         States in para 4.7.3, p. 73 that various mosques fall within the project site, but fails to mention the Christian cemetery on Jail Road as a cultural and religious resource. Specifically states at para 4.7.9, p. 73 that no graveyard is located near the proposed Project!</p> <p>States in para 4.7.8 that no “Project Affected Persons found in the</p> | <p>consultant is oblivious of this fact. The present standards are: 55 – 65 dB for commercial areas, 45 – 55 dB for residential areas, and for ‘silence zones’ the maximum is 50dB (PIC Chowk being a declared silence zone). The existing noise conditions recorded at all times exceed these limits (see: Annex III, pp. 1-4 of SGS Report). EPA has a duty under s.11 of PEPA to prohibit the Project on this count, and immediately address the existing noise levels.</p> <p><u>Ecological Resources:</u><br/>         EIA fails to mention the size and age of the trees, with several of them decades-old. Ironically, it is stated in para 4.3.8, p. 55 that the presence of plantation and green areas at junctions maintain air quality thereat.</p> <p><u>Human and Economic Development</u><br/>         The Project finds no mention in the Lahore Master Plan, 2021 (argument developed later). No mention of which property is to be acquired, and when. Should occupants of</p> |
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|  |  | <p>project area. In order to take care of pedestrian traffic, overhead bridges have been proposed.</p> | <p>these properties expect to be informed by the knock of bulldozers?</p> <p><u>Quality of Life: Socio-economic conditions</u><br/>Mentions these prime housing and commercial sites, but does not state any affect on them. Certainly an expressway, with large volumes of fast-moving traffic, without signals for the flow of traffic across the route, and inadequate provision for pedestrians, will have severe impacts on both residential and commercial uses of the adjoining properties. What of safety concerns for colleges such as Kinnaird College, which will in all probability be deprived of the service lane buffer to check vehicles, and health concerns for patients in the various hospitals and clinics which will now adjoin an expressway?</p> <p><u>Quality of Life: Socioeconomic Environment</u><br/>The EIA fails to even notice the presence of the historic Christian cemetery at the site. Has adequate provision been made for access to this religious, cultural</p> |
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|    |   |  | and historic site?<br>Have the concerns of its custodians been taken into consideration?   |
| 6. | <p><b>Health Impacts:</b> The EIA-G contains a specific section dealing with health impacts (para 3.8, pp. 17-18). It is stated herein that <i>“Development project can also result in adverse effects on community health and safety. <u>Directly from changes to biophysical environment</u> (exposure to pollution) or indirectly as the result of other changes caused. Implementation of proposals <u>can also increase risk of accidents and disasters.</u></i></p> <p>Major health impacts of projects listed in <b>EIA-G: Table 3 on p. 18:</b> Under Transport:<br/>1. States 1994 study: that 88% of traffic police constables in Karachi develop respiratory problems within 2 years of commencing duty, 84% had mild to moderate pain while taking a deep breath, 37% experienced heart palpitation.<br/>2. Traffic accidents estimated to cost 1% of GNP in Papua New Guinea in the 1980s.</p> <p>Common sequence of activities to evaluate health effects of a transportation study stated at <b>EIA-G: para 8.5; p. 43</b></p> | The EIA does not address the possible health and safety impacts of the Project, though they are numerous.  | <p>The Proponent and Consultant seem oblivious to the considerable health and safety risks of having a multi-lane, dual-carriage expressway plying its way through prime residential, commercial and institutional areas of the city centre.</p> <p>Signal-free corridors pose considerable risks for vulnerable road users, which in Pakistan, make up the majority of road users. In this regard, reference may be made to the excellent article by an urban development researcher named Rabia Ezdi, published in The News on Sunday, on 7 September 2014, titled “Truths and lies about signal-free corridors”. It is annexed to the Petition (W.P. No. 5323/15) at pp. 54-56.</p> |
| 7. | <p><b>Impact Significance:</b> Once impacts analysed, important to determine their significance, i.e., whether acceptable, require mitigation, or are unacceptable to the community. <b>EIA-G: para</b></p>   | Dealt with in a cursory manner (without participation as mentioned above) in <b>Section 5</b> (p. 79) of the EIA (to be read with <b>Section 7 – Environmental</b> | Section 5 of the EIA embodies the subjective opinion of the Consultant and the Proponent on the significance of impacts, whereas the guidelines stress   |

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|  | <p><b>3.10; pp. 19-20</b></p> <p><i>“The approach used to determine significance must take into account the cultural and social aspects of local value systems and traditional practices. Key bases for assessing impact significance are:</i></p> <ul style="list-style-type: none"> <li>• <i>Level of public concern (particularly over health and safety)</i></li> <li>• <i>Disturbance and disruption of valued ecological systems; and</i></li> <li>• <i>Degree of negative impact on social values and quality of life” –</i></li> </ul> <p><b>EIA-G: para 3.10, p. 20</b></p> | <p><b>Impacts and Mitigation Measures</b> p. 98).</p> <p><u>Operation phase impacts</u> are mentioned in para 5.2.2, pp. 83-84, and Table 5.5 on p. 90.</p> <p>It is admitted in para 5.2.2 that the operation of the Project may result in “<i>safety hazards, public health and nuisance</i>” and it is stated that sound environmental management practices implemented by the project sponsor will effectively handle “<i>Noise and other public nuisance abatement</i>”</p> <p>Table 5.2 on p. 84 admits that increased vehicular traffic will cause a negative impact to air quality, noise and vibration, public health and nuisance during the operation phase of the Project (unmitigated).</p> <p>Surprisingly, air quality deterioration and increased noise levels do not find mention in Table 5.5, p. 90, which deals with impact characterization in the operation phase. This is a glaring omission, given the admission contained in Table 5.2. Table 5.5 states that the Project operation will have a high impact on surface water contamination, ground water contamination, and a</p> | <p>whether impacts are acceptable or unacceptable to the community.</p> <p>It goes without saying that “cultural and social aspects of local value systems” have not been considered. Neither has the level of public concern (particularly over health and safety), disturbance and disruption of values ecological systems, and degree of negative impact on social value and quality of life been addressed.</p> <p>It is obvious from the comments at the public hearing, the written objections filed, and the multiple petitions before this Honourable Court that a large segment of the community, including residents of Gulberg, have serious concerns on all the above.</p> |
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|    |  | medium impact on public health, and nuisance issues.   |  |
| 8. | <p><b>Mitigation Measures:</b> <i>“One of the main tasks of impact assessment is to predict and prevent unacceptable adverse effects through the implementation of appropriate project modifications – also known as mitigation measures. The purpose of mitigation in the environmental assessment process is to:</i></p> <ul style="list-style-type: none"> <li><i>• Look for better ways of doing things so that the negative impacts of the proposal are eliminated or minimised, and the benefits are enhanced; and</i></li> <li><i>• Make sure that the public or individuals do not bear costs which are greater than the benefits which accrue to them.” – EIA-G: para 4.1, p. 21</i></li> </ul> | <p>1- Summary of environmental impacts stated in Table 7.2, pp. 99-100, states the Project will have a positive impact on air quality, and an insignificant impact on noise levels, and health and safety of the public during the operation phase.</p> <p>2- Stated in Table 7.2 under the ‘Disturbance of People’ head that the Project shall have a positive impact.</p> <p>3- Stated in paragraph 7.3.1.1, p. 100, that 28 marlas of land will be acquired for the Project, but it is not stated where this land is and in whose possession. Similarly, no details are given for the 15,500 sq. ft. of structures which will have to be dismantled for the Project</p> <p>4- Stated in paragraph 7.3.1.11, p. 104 that <i>“considerable increase in number of vehicles is anticipated on the upgraded project.”</i> The figures for present and projected daily traffic and emissions presented in Tables 7.3 and 7.4 (p. 105), and Exhibit 7.1 (p. 106) are not backed up by sources, and also directly conflict with the figures quoted in the tables in Annexure 4.2 (pages 75 – 78) of</p> | <p>1- This is obviously not the case given the considerable increase in traffic volumes along the Project route once operationalised. This increase in traffic volumes is not accounted for throughout the EIA, even though it is at points admitted that the Project will have a negative impact on air quality.</p> <p>2- This obviously depends on how the Consultant and the LDA chooses to define “People”. If they are referring to the minority of persons who drive privately-owned vehicles then this may be correct, but it certainly isn’t so for the majority of people who use non-motorized modes of transport, such as pedestrians and cyclists, who do not factor into the plans of the LDA</p> <p>3- Dealt with in column to the left.</p> <p>4- Dealt with in column to the left.</p> <p>5- Dealt with in column to the left</p> <p>6- If this is in fact the case, the LDA should be called upon to prove</p> |

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|  |  | <p>the EIA.</p> <p>5- With respect to noise levels, the EIA states in paragraph 7.3.1.12 that <i>“noise generated...by vehicular traffic during operation stage is likely to affect the project area particularly the sensitive receptors like schools, hospitals etc.”</i> However, it shockingly proceeds by stating that <i>“no sensitive receptor has been observed within the project area.”</i> This directly contradicts its own finding in paragraph 4.6.1 of Section 4 (page 68) that settlements around the vicinity of the Project include Lahore College for Women University, Kinnaird College, Services Hospital, Punjab Institute of Cardiology. To this list may be added APWA College, Umer Hospital, and various other hospitals and clinics situated in the vicinity of PIC Chowk. These institutions neither factored in the Consultant’s idea of stakeholders, nor are they counted as <i>“sensitive receptors”</i> even though they fall squarely within the definition provided by the Consultant itself.</p> <p>6- for the safety of pedestrians and cyclists, the Consultant makes the ambitious</p> | <p>whether such lanes have been included in its project design drawings and maps. As far as the undersigned can make out from the barely legible design drawings included in the EIA, no such lanes have been provided for. Roadside footpaths are deemed adequate for pedestrians, whereas the signal-free corridor, by definition, will restrict the ability of pedestrians to cross the 7-km road without serious risk of injury. The LDA and the Consultant consider four (4) pedestrian bridges adequate to address the needs of pedestrians. In the Environmental Mitigation Plan at Annexure 7.3 (p. 136), the Consultant seeks to mitigate the safety issues on account of increased traffic volume, by imposing speed limits of 30 km/h for LTVs along the Project route. It goes without saying that such a suggestion does not even merit comment.</p> <p>- The mitigation measures for the Operation Phase is mentioned in para 7.5 (pp. 116-117) and stipulates no meaningful commitments by the</p> |
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|           |   | <p>claim in paragraph 7.5.3 that “<i>separate lane shall be allocated for the cyclists</i>”. Such a claim is also made in Table 8.3 ‘Environmental Management Plan’ (Operation Stage)</p>   | <p>proponent to mitigate adverse impacts. There is reason to believe that some mitigation measures have been mentioned but not factored into the actual Project at all (dedicated lane for cyclists).</p>  |
| <p>9.</p> | <p><b>Environmental Management Plan (EMP):</b><br/>An EMP is a document designed to ensure that the commitments in the EIA, subsequent review reports, and Environmental Approval conditions are fully implemented. <b>EIA-G: para 4.3, p. 22</b></p> | <p>The Consultant has supposedly framed ‘Monitoring Framework Guidelines’ for the Project, except that the guidelines provided (in Table 8.1; pages 138-139) actually relate to a farm hatchery project, and not the Signal Free Corridor. The said guidelines contain references to the spillage of feed, organic waste, manure from sheds, storing of medicines, and visits to the hatchery by medical doctors. As per para 8.1, p. 137, it seems these guidelines are meant to ensure the management and monitoring of the environment during construction and operation of the Project.</p> <p><u>Noise:</u> Particular reference is made to the management and monitoring of noise levels during operation stage, as stated in paragraph 8.3.2 (b), pp. 144-145. It is stated herein that “<i>Noise levels will be monitored to see whether they are</i></p> | <p><u>Noise:</u></p> <p>Given the fact, as stated above, that the noise level readings across the entire Project route already exceed the current NEQS, and will further exceed them on account of increased vehicular speeds, construction of further civil structures and underpasses, removal of service lanes and buffers, and uprooting of several large trees, the requisite mitigation measures should already be mentioned in the EIA. However, the Consultant has failed to provide for adequate mitigation measures to be incorporated in the Project design. As mentioned above, this alone is a reason to reject the EIA and the Project.</p> <p>In the past, mitigation measures have not been implemented, despite judicial directions to this</p> |

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|  |  | <p><i>within NEQ standard limits. When they are found to exceed NEQ limits and disturb nearby settlements, noise abatement measures, like plantation of trees, installation of noise dampening and absorbing media and construction of wall barriers will be taken.”</i></p> | <p>effect. Reference is made to the canal widening case (2011 SCMR 1743) whereby underpasses and junctions were to be corrected, and traffic management implemented. Similarly, in the air quality case (2007 CLD 533) mitigation measures to check air pollution were laid down, but have not been implemented.</p> |
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9. Learned Advocate General, Punjab while defending the Project on the environmental score submitted that the EPA review process should not be minutely examined and the EIA approval granted to LDA should not suffer at the altar of mere technicalities in the review process. He urged that the overall object and the underlying public benefit of the *Project* must be considered, while minor procedural lapses in the EIA review process be disregarded. On the structure of EPA, as a regulator, he submitted that the DG was infact the EPA and was appointed by the Government under Environmental Protection Department Service Rules, 1997 framed under section 23 of the Punjab Civil Servants Act, 1974. On EPA being an Attached Department of the Provincial Government under the Rules of Business and, therefore, under the control of the Provincial Government, the Advocate General, Punjab did not make any notable submission. On the constitutional scope of the Local Government System, he submitted that the Provincial Government is not denuded of its powers even if the political, administrative and financial responsibility and authority has

been devolved to the local governments. He further explained that the powers devolved are not absolute and do not in any manner control the executive authority of the Provincial Government and placed reliance on section 4 of the PLGA. He submitted that LDA is an Authority of the Provincial Government and the recent amendments brought about in Lahore Development Authority Act, 1975 (“LDA Act”) through Lahore Development Authority (Amendment) Act (XXVI) of 2013 are subsequent to PLGA, therefore, the final mandate of the Provincial Legislature is reflected in the amended LDA Act which will override the provisions of PLGA.

10. Learned counsel for respondent LDA raised the following preliminary objections;

(a) That the instant petition is not maintainable as *alternate remedy* is available to the petitioners to challenge the EIA approval granted by EPA. He submitted that the Environmental Tribunal was available to the petitioners. He submitted that the petitioners had a dual statutory remedy under PEPA, the right of appeal before the Environmental Tribunal and second appeal before the Division Bench of this Court. From this he concluded that by approaching this Court directly under Article 199, the remedial scheme under PEPA stands bypassed by the petitioners, who have failed to exhaust the adequate remedy available under the law. He placed reliance on *Khalid Mehmood v. Collector of Customs, Customs House, Lahore (1999 SCMR 1881)* and *Dr. Sher Afgan Khan Niazi v. Ali S. Habib and others (2011 SCMR 1813)*.

(b) That even if the impugned order is void, this Court should refrain from interfering, if such interference promotes injustice. He tried to impress upon the Court that the *Project* was hugely beneficial for the residents of Lahore. He without any technical evidence, generalized that the *Project* addresses and alleviates the gnawing issue of traffic congestion in the city. He added that the Project will bring huge savings for the public in terms of fuel and travel time. The Project, according to him, would enhance accessibility to the medical and educational institutions. On the basis of these submissions he pleaded that interference by this Court would be unjust. He placed reliance on *Rana Muhammad Arshad v. Additional Commissioner (Revenue), Multan Division and others* (1998 SCMR 1462), *Nawab Syed Raunaq Ali etc. v. Chief Settlement Commissioner and others* (PLD 1973 SC 236), *S. Sharif Ahmad Hashmi v. Chairman, Screening Committee, Lahore and another* (1978 SCMR 367), *Muhammad Baran and others v. Member (Settlement and Rehabilitation), Board of Revenue, Punjab and others* (PLD 1991 SC 691) and *Province of the Punjab through Secretary, Health Department v. Dr. S. Muhammad Zafar Bukhari* (PLD 1997 SC 351).

(c) He submitted that the Project is a *policy matter* and the Court should not interfere in such matters. Reliance is placed on *Suo Motu Case* titled *Cutting of Trees for Canal Widening Project, Lahore* (2011 SCMR 1743), *Watan Party and another v. Federation of Pakistan and others* (PLD 2013 SC 167) and *Dr. Akhtar Hassan Khan*

*and others v. Federation of Pakistan and others* (2012 SCMR 455).

(d) The learned counsel, in a somewhat sheepish whisper, submitted that, one of us (the author judge), had represented one of the petitioners in a public interest environmental litigation, several years ago, before being elevated to the bench, suggesting that he may consider recusing himself from hearing the case.

11. On merits he submitted that deficiencies in the EIA submitted by the consultant can be easily plugged by examining and evaluating PC-1 prepared by respondent LDA and submitted alongwith EIA before the EPA. He repeated the argument of the learned Advocate General, Punjab that mere technical lapses by the EPA during the EIA review process are inconsequential and the overall public benefit of the Project must be seen. He further submits that in the light of Article 140A of the Constitution, the power of the Provincial Government cannot be diluted and the subsequent amendment brought about in LDA Act, 1975 will override the provisions of the Punjab Local Government Act, 2013.

12. Learned counsel for the contractor of the Project submitted that EIA was not required in the instant *Project* as it entailed maintenance, rebuilding and reconstruction of exiting roads and placed reliance on the said exception under clause D, relating to Transport, in the 2<sup>nd</sup> Schedule to the Regulations. He quoted several international experiences including one from Karachi justifying that a signal free corridor is in the public interest. He also submitted that as far as EIA is concerned, LDA has substantially complied with review process and therefore minor lapses should be ignored. He placed reliance on Dr.

*Akhtar Hassan Khan and others v. Federation of Pakistan and others (2012 SCMR 455), Collector of Sales Tax and Central Excise, Lahore v. Zamindara Paper and Board Mills and others (2008 SCMR 615), A.M. Construction Company (Pvt.) Limited through Chief Executive Officer and another v. The National Highway Authority through Chairman and 2 others (2015 CLD 130).*

13. Some of the traders and residents of the area, represented through their counsel, while adopting the arguments of the learned counsel for LDA, supported the *Project*.

14. Professor Osama Siddique, the learned *amicus curiae* submitted that the Current Model of Urban Development in Punjab is disparate, inequitable and discriminatory – LDA is its manifestation and Local Governments are the solution for addressing such issues: The current model and the signal free corridor project discriminates against those who don't own cars, those who don't live in posh areas, those who don't live in Lahore at all and completely overlooks the needs of pedestrians, cyclists and those not owning private transport, the possibility of car pools, greater investment in public transport, and the growing international practices of taxing use of motor vehicles in congested areas as well as pollution (this project is actually encouraging them) as well as improving the environment for all (and especially for the poor and disadvantaged) and boosting public goods like ambient air quality. The project epitomizes a lop-sided and highly discriminatory view of development as it uses a major portion of the funds for the entire division for certain roads that only benefit certain already posh areas with good roads and the elite that owns fast vehicles while continuing to neglect the vast majority of less developed areas

of the metropolis and the Division – there is no parity in areas and district-wise allocation of development resources and focus. The project is unclear in terms of its benefits for traffic congestion and also unfit as fast signal free roads are inappropriate for areas where people have legitimate needs to stop for commerce, medical aid and multiple additional legitimate reasons. It actually raises traffic volume rather than regulating it as number of individual polluting vehicles will go up rather than improving amenities and facilities for the vast majority of people who don't own cars by neglecting public transport and footpaths.

15. Mr. Waqqas Mir, Advocate and learned *amicus curiae*, submitted that the Constitution moved the promise of local government from Principles of Policy to a substantive part of the Constitution. When Article 140A was being included, the framers had a choice to include a time period but they chose not to. Even with Article 175(3), over time the august Supreme Court of Pakistan and the High Courts have struck down laws that are violative of Article 175(3). Reliance is placed on *Imran v. Presiding Officer, Punjab Special Court No.VI, Multan and 2 others* (PLD 1996 Lahore 542), *Messrs Chenab Cement Product (Pvt.) Ltd. and others v. Banking Tribunal, Lahore and others* (PLD 1996 Lahore 672), *Sh. Riaz-ul-Haq and another v. Federation of Pakistan through Ministry of Law and others* (PLD 2013 SC 501), *Mehram Ali and others v. Federation of Pakistan and others* (PLD 1998 SC 1445). Furthermore, the august Supreme Court of Pakistan has itself emphasized the importance of the system of local government in ensuring good governance and protection of Fundamental Rights in *Raja Rab Nawaz v. Federation of Pakistan through Secretary, Defence and others* (2013 SCMR 1629).

16. The submissions made by Professor Roger Myerson, Glen A. Lloyd Distinguished Service Professor of Economics at the University of Chicago and the Recipient of the 2007 Nobel Memorial Prize in Economics Sciences and Dr. Ali Cheema, Associate Professor of Economics Lahore University of Management Sciences (LUMS) and Senior Research Fellow in Political Economy Institute of Development and Economic Alternatives (IDEAS) are considered and discussed in the judgment below.

### **OPINION OF THE COURT**

#### **Preliminary objections raised by LDA**

17. The summary of the preliminary objections, mentioned in detail above, is that the petitioners have an alternate remedy; the Project being in public welfare, any interference by the Court would amount to injustice; setting up of the Project is primarily a policy matter and should best be left to the executive; and in the end a fainthearted verbal submission that one of us should recuse from the bench due to conflict of interest.

18. The contours of this case go beyond the mere legality of the EIA approval granted by DG, EPA. This case raises far-reaching constitutional questions that go to the root of how we intend to define democracy and federalism under our Constitution. It brings up for examination the extent of autonomy and independence to be enjoyed by the apex provincial environmental regulator i.e., EPA and the connected constitutionalism of *environmental justice*. It has been agitated that the present EPA unashamedly suffers from naked regulatory capture at the hands of the Provincial Government.



It is vehemently argued that EIA review process is not only deficient but lacks the physical regulatory architecture mandated under the environmental laws, hence the entire review process is void *ab initio*. It is also contended that the review process is hostage to the whims of one man – the DG, EPA. The petitioners have also challenged the constitutional and legal competence of LDA to propose the Project. It has been argued that LDA does not enjoy the jurisdiction or competence to trump or usurp the municipal functions entrusted to the local government under the Constitution and the PLGA. It is submitted that the scope of the Project squarely falls under the responsibility and authority devolved on the local government under PLGA. Under Article 140A, the devolution of political, administrative and financial responsibility and authority vests in an autonomous local self-government system which cannot be transgressed or brushed aside by a provincially controlled and administered LDA because the powers of the provincial legislature are subject to Article 140A. This Court is required to interpret the contours of democracy and cooperative federalism in the country, in the wake of 18<sup>th</sup> Constitutional amendment.

19. These are deep and complex constitutional questions and undoubtedly fall outside the limited statutory jurisdiction of an Environmental Tribunal, which is empowered to simply review the EIA approval within the legislative four walls of PEPA. It is not expected of the learned Tribunal to address questions regarding the *regulatory capture* of EPA and its legal consequence, the incompetence of LDA to propose and initiate the *Project* under Article 140A of the Constitution read with PLGA and the encircling debate of democracy and federalism that emerges from these questions.

20. We wish to underline that, in this case, we are not examining the merits or demerits of the *Project* or questioning the justification and rationality for having such a *Project*. These issues do not concern us because there are other graver issues that need to be addressed. We are simply concerned with the constitutionality and legality of the environmental process adopted to review the EIA filed by LDA. We are also concerned with the legal character of the regulator (EPA) and the constitutional role of LDA, the proponent of the *Project*, in the light of Article 140A of the Constitution. We are, therefore, not examining the policy dimension of the *Project* or the technical viability of the *Project*, therefore, we are neither assuming the role of EPA or stepping into the shoes of the consultant who has prepared the EIA or the concerned members of the civil society who, *inter alia*, oppose the *Project* on the ground of misplaced, inappropriate and irrational allocation of public funds. For the above reasons, the preliminary objections are hopelessly misconceived and unfounded and are, therefore, **overruled**.

21. The faint-hearted submission of the learned counsel, that one of us should recuse from the bench because long years ago one of us (the author judge) represented one of the 29 public spirited petitioners in some public interest environmental litigation case was considered to be unflattering, in the light of the corpus of our jurisprudence on the subject, which seem to have escaped the attention of the learned counsel. Reliance is placed on *Ms. Benazir Bhutto v. The President of Pakistan and another* (1992 SCMR 140), *Malik Asad Ali and others v. Federation of Pakistan through Secretary, Law, Justice and Parliament Affairs, Islamabad and others* (PLD 1998 SC 161),

*Syed Akhlaque Hussain v. Pakistan* (PLD 1969 SC 201) and *M. H. Khondkar v. The State* (PLD 1966 SC 140).

22. Further, the fact that these cases have been heard and decided by a full bench of this Court, comprising three Hon'ble Judges, who have unanimously passed this judgment, cannot be lost sight of. These petitions are in the nature of public interest litigation, which are inquisitorial, rather than adversarial proceedings. These cases are, therefore, not about personal interests and benefits but about public interest and welfare. We found the submission of the learned counsel to be hopelessly flippant and we shrugged it aside with the grace befitting our office. Advocate General, Punjab or any other counsel for the respondents did not raise this objection. Even the learned counsel for LDA did not raise it again or agitate it through a written application, hence, the objection stood waived at the very beginning of the case. This is so because the case continued for several days thereafter and was argued by the learned counsel for LDA without a whimper of demur. We are recording this for completion of record.

**On merits**

23. This case has two important yet integrated constitutional dimensions. One pertains to the integrality of environmental justice to fundamental rights and the other about powers and autonomy of the elected local government and the diminishing role of LDA.

**Environmental Justice**

24. E.O.Wilson, in his famous book, *The Creation* writes: "If there is any moral precept shared by people of all beliefs, it is that we owe ourselves and future generations a beautiful, rich

and healthful environment.<sup>2</sup>” Environment includes air, water, land, all layers of atmosphere, all organic and inorganic matter and living organisms, the ecosystems and ecological relationships, buildings, structures, roads, facilities and works, all social and economic conditions affecting community life.<sup>3</sup> Environment (natural and built) is the overarching habitat and is intrinsic to our survival and integral to our quality of life. Protection of the environment is, therefore, an inalienable right and perhaps more fundamental than the other rights. It emerges from the right to life, liberty and dignity under Articles 9 & 14 of the Constitution. Principles of the Stockholm Declaration, 1972 state that “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.<sup>4</sup> The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.<sup>5</sup> Economic and social development is essential for ensuring a favorable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life.<sup>6</sup>

25. The corpus of environmental laws have a singular purpose of *protecting life and nature* including the International Environmental Principles of sustainable development,

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<sup>2</sup> p.5

<sup>3</sup> section 2(x) of PEPA, 1997

<sup>4</sup> Principle 1

<sup>5</sup> Principle 2

<sup>6</sup> Principle 8

precautionary principle, environmental impact assessment, inter and intra-generational equity and public trust doctrine.

Our existing jurisprudence (led by the landmark judgment of *Shehla Zia case*<sup>7</sup>) rests *environmental justice* on right to life (article 9) to mean a right to a healthier and cleaner environment. Time has come to move on. To us *environmental justice* is an amalgam of the constitutional principles of democracy, equality, social, economic and political justice guaranteed under our Objectives Resolution, the fundamental right to life, liberty and human dignity (article 14) which include the international environmental principles of sustainable development, precautionary principle, environmental impact assessment, inter and intra-generational equity and public trust doctrine. Environment and its protection has come to take center stage in the scheme of constitutional rights. Right to environment that is not harmful to the health or well-being of the people and an environment that protects the present and future generations is an essential part of political and social justice and even more integral to the right to life and dignity under our Constitution. With this reminder and background, we venture to examine the structure of EPA and the EIA review process adopted by EPA in evaluating the EIA of the *Project* filed by LDA.

### **EPA & Regulatory Capture**

26. The first question that requires determination is the constitutionality and legal character of the Regulator i.e., EPA under PEPA. Environmental Protection Agency (EPA) is an independent statutory regulator established under section 5 of the Act for the “protection, conservation, rehabilitation and

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<sup>7</sup> *Ms. Shehla Zia and others vs. WAPDA (PLD 1994 SC 693)*

improvement of the environment, for the preservation and control of pollution and promotion of sustainable development.<sup>8</sup> Section 5 states as under:-

**5. Establishment of the Provincial Environmental Protection Agency.--** (1) The Government shall, by notification in the official Gazette, establish the Provincial Environmental Protection Agency to exercise the powers and perform the functions assigned to it under this Act, the rules and the regulations.

(2) The Provincial Agency shall be headed by a Director General, who shall be appointed by the Government on such terms and conditions as it may determine.

(3) The Provincial Agency shall have such administrative, technical and legal staff as the Government may specify, to be appointed in accordance with such procedure as may be prescribed.

(4) The powers and functions of the Provincial Agency shall be exercised and performed by the Director-General.

(5) The Director-General may, by general or special order, delegate any of these powers and functions to staff appointed under sub-section (3).

(6) For assisting the Provincial Agency in the discharge of its functions, the Government shall establish Advisory Committees for various sectors, and appoint as members thereof eminent representatives of the relevant sector, educational institutions, research institutes and non-governmental organizations.

27. When the subject of Environment devolved to the provinces by virtue of 18th Constitutional Amendment, the federal law i.e., Pakistan Environmental Protection Act, 1997 was adapted, with amendments, for the Province of the Punjab by the Punjab Environmental Protection (Amendment) Act 2012 (XXXV of 2012) w.e.f 18.04.2012. Section 8 of the erstwhile Pakistan Environmental Protection Act, 1997 empowered the Provincial Government to establish through notification a Provincial Environmental Protection Agency, which was to exercise such powers and perform such functions

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<sup>8</sup> Preamble to the Punjab Environmental Protection Act, 1997

as may be delegated by the Provincial Government. Section 8 is reproduced for ready reference:-

“8. Establishment, powers and functions of the Provincial Environmental Protection Agencies.--- (1) **Every Provincial Government shall, by notification in the official Gazette, establish an Environmental Protection Agency, to exercise such powers and perform such functions as may be delegated to it by the Provincial Government under sub-section (2) of section 26.**

(2) **The Provincial Agency shall be headed by a Director-General who shall be appointed by the Provincial Government on such terms and conditions as it may determine.**

(3) The Provincial Agency shall have such administrative, technical and legal staff as the Provincial Government may specify, to be appointed in accordance with such procedure as may be prescribed.

(4) The powers and functions of the Provincial Agency shall be exercised and performed by the Director-General.

(5) The Director General may, by general or special order, delegate any of the powers and functions to staff appointed under sub-section (3).

(6) For assistance of the Provincial Agency in the discharge of its functions, the Provincial Government shall establish Sectoral Advisory Committees for various sectors and appoint members from amongst eminent representatives of the relevant sector, educational institutions, research institutes and non-governmental organizations.” *(emphasis supplied)*

28. Historically, under Pakistan Environmental Protection Ordinance, 1983 a provision was made for the establishment of Provincial Environmental Protection Agency. In 1987, Environmental Protection Agency (EPA), Punjab was formed. The staff of the existing Directorate of EPCO was transferred to EPA, Punjab under the administrative control of the HP&EP Department. In 1996, a separate administrative unit, by the name of Environment Protection Department (EPD) was formed under the Government of the Punjab. EPA Punjab was then detached from the HP&EP Department and now works as

functional unit under the EPD, Punjab.<sup>9</sup> Subsequently, in 1997, Provincial EPA was established through a notification under section 8(1) (above) and housed as a sub-agency within the Environmental Protection Department of the Government of the Punjab. It would only exercise power delegated to it by the Provincial Government. EPA, therefore, appears in the Rules of Business of the Government of the Punjab as an Attached Department. The promulgation of Punjab Environment Protection Act, 1997 w.e.f. 18-4-2012 transmutes and emboldens the erstwhile notified environmental protection agency into an autonomous statutory regulator. It is noted with regret that this structural change has gone unnoticed by the Government of the Punjab. In reality, EPA is still operating in the past, as a delegatee of the Provincial Government.

29. Section 5 of PEPA states that EPA shall be *headed* by the Director General, implying that there are other members that constitute the Agency, but in fact, EPA is actually one person i.e., the Director General (DG).<sup>10</sup> All the powers and functions of the EPA are to be performed by DG under section 5(4) of the Act. EPA can have its own administrative, technical and legal staff appointed by the DG. The DG enjoys the power to delegate any of its powers to the staff so appointed. EPA has a proactive role under the law to administer and implement the provisions of PEPA, the Regulations and Guidelines made thereunder. According to the preamble, PEPA is to provide for the *protection, conservation, rehabilitation and improvement of the environment, for the prevention and control of pollution, and promotion of sustainable development*. Under section 7,

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<sup>9</sup> <http://epd.punjab.gov.pk>

<sup>10</sup> This legal position was admitted by the learned Advocate General, Punjab and the learned counsel for the respondent LDA.



EPA can own, lease, purchase, hold and acquire moveable and immovable property, enter into contracts, execute instruments, fix and realize fees, rates and charges. EPA is a body corporate and architecturally an independent provincial environmental regulator. EPA under the law acts as a trustee and a watchdog with the responsibility of *protection, conservation, rehabilitation and improvement of the environment, for the prevention and control of pollution, and promotion of sustainable development* on behalf of the people of this Province. EPA acts as a guardian of the people and the Nature, in protecting the environment of the community. It has the onerous responsibility to safeguard the constitutional value of social justice which includes environmental principles of sustainable development, precautionary principle, inter and intra-generational equity and public trust doctrine and the fundamental rights to life and dignity. To achieve this objective EPA needs to be fiercely independent and autonomous in reality.

30. The Act provides that the Provincial Government shall appoint the DG. The mode of appointment or the qualifications of the DG are not provided under the Act or the Regulations. In the absence of any statutory framework, it is trite law that any public post has to be filled through public advertisement to ensure transparency and merit. Reliance is placed on *Ghulam Rasool v. Government of Pakistan through Secretary, Establishment Division Islamabad and others* (PLD 2015 SC 6), *Asaf Fasihuddin Khan Vardag v. Government of Pakistan and others* (2014 SCMR 676), *Khawaja Muhammad Asif v. Federation of Pakistan and others* (2013 SCMR 1205), *Muhammad Yasin v. Federation of Pakistan through Secretary, Establishment Division, Islamabad and others* (PLD 2012 SC

132) and Dr. Naveeda Tufail and 72 others v. Government of Punjab and others (2003 SCMR 291). It is also axiomatic that the post of the DG has to be filled through initial recruitment as it is not a cadre post. DG actually embodies EPA. Hence, professional qualifications, relevant experience, open and transparent recruitment process, is necessary, in selecting and appointing the DG. As a reference, the qualification of DG appointed through initial recruitment under the Environment Protection Department Service Rules, 1997, when the Provincial Environmental Protection Agency was a notified agency of the Provincial Government was as follows:

Ph.D. in Environmental Sciences / Environmental Engineering from a recognized University with ten years experience in Projects relating to environmental issues alongwith two publications in HEC recognized research Journal.

This was the qualification of the DG when EPA was under the Provincial Government. Sadly, the current DG is a serving civil servant appointed through promotion as a DG. He has an LLB degree to his credit besides some unrelated experience in various departments of the Provincial Government. He is serving as a DG since 13-11-2012 but does not have technical / professional environmental qualifications or requisite experience. He has not been appointed through an open and transparent advertisement process but has been promoted under Environment Protection Department Service Rules, 1997 (Rules framed under section 23 of the Punjab Civil Servants Act, 1974) perhaps harbouring under a mistake that EPA is still a sub-agency of the Provincial Environment Protection Department. The said Rules also describe EPA as a functional unit of EPD. The post of DG (grade 20) under the said Rules is to be filled through initial recruitment or through promotion.

31. As pointed out above, the post of DG is not a cadre post and cannot be filled through promotion, besides a person who is already an employee of the Provincial Government cannot be appointed to head a statutory regulator, which under the law is to grant approval of projects proposed by the Provincial Government. The organograms of EPA and EPD, submitted by the DG, are structurally different on paper but operationally EPA and EPD act as one and are interchangeably referred to as EPA/EPD.

32. Rule 21 of the Rules of Business provides that the heads of the Attached Department i.e., the DG in this case, shall submit cases for approval of the government through self-contained reference giving information and details necessary for an appropriate decision. Second Schedule to the Rules of Business deals with Distribution of Business among Departments. Item 2 under the head Environment Protection Department states: “Administration of Environmental Protection Agency, Punjab.”

33. It is important to underline that EPA as an environmental regulator has to regulate public, as well as, the private sector. Neutrality, autonomy and independence are foundational to the existence of any robust, dynamic and proactive EPA and are mandatory to actualize its avowed objectives under the law. Any regulator, which is controlled and dictated by the parties it regulates (in this case the Provincial Government), is infact under regulatory capture and its decisions and approvals have no credence, legal value or moral authority and amounts to fraud on the rights of the people and a mockery of environmental justice. “Regulatory capture is a theory associated with George Stigler, a Nobel laureate economist. It is

the process by which regulatory agencies eventually come to be dominated by the very industries they were charged with regulating. The term *regulatory capture* refers to the subversion of regulatory agencies by the firms they regulate. Capture implies conflict, and regulatory capture implies that the regulated firms have, as it were, made war on the regulatory agency and won the war, turning the agency into their vassal.”<sup>11</sup> “Regulatory capture happens when a regulatory agency, formed to act in the public's interest, eventually acts in ways that benefit the industry it is supposed to be regulating, rather than the public. Public interest agencies that come to be controlled by the industry they were charged with regulating are known as captured agencies. Regulatory capture is an example of gamekeeper turns poacher; in other words, the interests the agency set out to protect are ignored in favour of the regulated industry's interests.”<sup>12</sup> “We can simply define ‘regulatory capture’ as the capture of ‘regulators’ by the regulated.”<sup>13</sup>

34. EPA in its present form is a government agency rather than an independent environmental regulator. The EIA approval of Rs 1.5 billion project proposed by LDA, an Authority headed by the Chief Minister and controlled by other members of the Provincial Government cannot possibly be refused by the DG, who is himself a grade 20 employee of the same government, which also controls his appointment and transfer. In this background, EPA cannot perform its assigned role under PEPA, hence, the entire exercise of EIA approval is

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<sup>11</sup> Richard Posner. *Preventing Regulatory Capture* by Daniel Carpenter.

<sup>12</sup> <http://www.investopedia.com/terms/r/regulatory-capture.asp#ixzz3ZzUsPoha>

<sup>13</sup> This definition is taken from the article “Regulatory Capture: Causes and Effects”, by G.MacMahon at [www.iipe.org/conference2002/papers/McMahon.pdf](http://www.iipe.org/conference2002/papers/McMahon.pdf)

a sham unless and until, the post of DG is filled through an open and transparent recruitment process keeping in view the required qualifications for the post. The impugned approval of DG, EPA dated 19-3-2015 is a result of dictation and non-application of mind and hence bad in law.

**Scope and meaning of EIA**

35. One of the more important functions of EPA is to review and approve the Environmental Impact Assessment of any new project. It was the continuing environmental degradation in the developed countries that prompted the United Nations to hold its first Conference on the Human Environment, in Stockholm in 1972, to discuss sustainability at the global scale. Our Common Future (or the Brundtland Report) fashioned the most commonly used definition of Sustainable Development: “Development that meets the needs of current generations without compromising the ability of future generations to meet their own needs.” The Brundtland Report provided the basis for the landmark Rio Summit in 1992 which laid the foundations for the global institutionalization of sustainable development, to which Pakistan is also a party. EIA was internationally introduced, for the first time, as a sustainable development tool through the Rio Declaration.

“Principle 17: Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.”

EIA as a tool was created to be used at the planning stage in line with the *precautionary principle* – a principle initiated by the Rio Declaration for better and sustainable development.

“Principle 15: In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. “

Until recently, EIA was not readily understood and accepted as a tool in developing countries. Developers resisted and argued that it was anti-development because laws and policies supporting it dictated that developments causing negative impacts should be discontinued. In a nutshell, EIA was considered just another bureaucratic stumbling block in the path of development. Secondly, it was conceived as a sinister means by which industrialized nations intended to keep developing countries from breaking the vicious cycle of poverty. Thirdly, the experts in the developing countries were foreigners who were viewed as agents of colonization. The need for EIAs has become increasingly important and is now a statutory requirement in many developing countries. Historically, the choice of new projects was primarily based on one criterion: economic viability. Today, the second and a third criteria of environmental and social impact, have become a strong yardstick, hence the triple bottom-line approach (economic, environmental and social) to project viability (Modak & Biswas, 1999).”<sup>14</sup> The Department of Environment, UK (1989) defined EIA in a comprehensive manner as “a technique and a process by which information about environmental effects of a project is collected, both by the developer and from other sources, and taken into account by the planning authority in forming the judgment on whether the development should proceed”

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<sup>14</sup> Environmental Impact Assessment General Procedures :Pacifica F. Achieng Ogola

EIA has been defined under section 2(xi) of the Act as under:-

“environmental impact assessment” means an environmental study comprising collection of data, prediction of qualitative and quantitative impacts, comparison of alternatives, evaluation of preventive, mitigatory and compensatory measures, formulation of environmental management and training plans and monitoring arrangements, and framing of recommendations and such other components as may be prescribed.”

On a simple level, EIA is as essential a tool as the feasibility report at the planning stage. It is an information-gathering exercise carried out by the developer and other bodies, which enables a local planning authority to understand the environmental effects of a development before deciding whether or not to grant planning permission for that proposal. The innovation behind the formal EIA process is the systematic use of the best objective sources of information and the emphasis on the use of the best techniques to gather that information. The ideal EIA would involve a totally bias free collection of information produced in a form, which would be coherent, sound and complete. It should then allow the local planning authority and members of the public to scrutinize the proposal, assess the weight of predicted effects and suggest modifications or mitigation (or refusal) where appropriate.<sup>15</sup> Environmental impact assessments have emerged since the 1972 Stockholm Conference as an important international and domestic legal technique for integrating environmental considerations into socio-economic development and decision-making processes. An environmental impact assessment describes a *process*, which produces a *statement* to be used in guiding decision-making, with several related functions. First, it

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<sup>15</sup> Environmental Law – Stuart Beel & McGillivray. 5th edition. P.347

should provide decision-makers with information on the environmental consequences of proposed activities and, in some cases, programmes and policies, and their alternatives. Second, it requires decisions to be influenced by that information. And third, it provides a mechanism for ensuring the participation of potentially affected persons in the decision-making process.<sup>16</sup> Under clause 3 of the Policy and procedures for the filing, review and approval of environmental assessments, issued by the Government of Pakistan, the purpose of EIA is as follows:

- To ensure that decisions are taken following timely and sound advice;
- To encourage and provide opportunities for public consultation in environmental aspects of proposals before decisions are made;
- To ensure that proponents of proposals take primary responsibility for protection of the environment relating to their proposals, and carry the costs necessary for environmental protection;
- To facilitate environmentally sound proposals by minimizing adverse impacts and maximizing benefits to the community;
- To provide a basis for ongoing environmental management, including through the results of monitoring;

36. EIA is not complete and cannot be accepted for review by the EPA unless it clearly provides for the following essential constituents:

- i. collection of data.
- ii. prediction of qualitative and quantitative impacts.
- iii. comparison of alternatives.
- iv. evaluation of preventive, mitigatory and compensatory measures.
- v. formulation of environmental management and training plans and monitoring arrangements.

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<sup>16</sup> Principles of International Environmental Law. Philippe Sands. Vol-1. P.579



The RIO Declaration emphasizes the importance of Public Participation in Principle 10 in the following manner:

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Public hearing guidelines also place importance on meaningful public participation. “Guidelines for Public Consultation (Oct, 1997)” provide the objectives:

### 1.3 Objectives of consultation

Public involvement is a feature of environmental assessment and can lead to better and more acceptable decision-making. It can be time consuming and demanding, yet without it, proposals are seldom soundly based, and there is likely to be antagonism from affected people. Public involvement, undertaken in a positive manner and supported by a real desire to use the information gained to improve the proposal, will lead to better outcomes, and lay the basis for ongoing positive relationships between the participants.

The objectives of public involvement include:

- informing the stakeholders about what is proposed;
- providing an opportunity for those otherwise unrepresented to present their views and values, therefore allowing more sensitive consideration of

- mitigation measures and trade- offs;
- providing those involved with planning the proposal with an opportunity to ensure that the benefits of the proposal are maximised and that no major impacts have been overlooked;
  - providing an opportunity for the public to influence project design in a positive manner;
  - obtaining local and traditional knowledge (corrective and creative), before decision making;
  - increasing public confidence in the proponent, reviewers and decision-makers;
  - providing better transparency and accountability in decision making;
  - reducing conflict through the early identification of contentious issues, and working through these to find acceptable solutions;
  - creating a sense of ownership of the proposal in the minds of the stakeholders; and
  - developing proposals which are truly sustainable.

More intangible benefits flow from public involvement as participants see that their ideas can help to improve projects. People gain confidence and self-esteem through taking part in the process, and perceptions are expanded by meeting and exchanging views with people who have different values and ideas. The process of EIA cannot, for a moment, be trivialized to be a mere procedure that can be overlooked, ignored or bypassed as the environmental sustainability of the project relies on the effectiveness of this tool.

37. EIA is nature's first man-made check post, nothing adverse to the environment is allowed to pass through. It is for this reason, that environmental assessment is an onerous function. It is through the tool of EIA that EPA gets to regulate and protect the environment and as a result the life, health, dignity and well-being of the people who inhabit the environment. Environmental Assessment is, therefore, a substantive exercise as every step in this process cautiously guards the fundamental rights of the people. Review of EIA is not *inter partes* or an adversarial exercise but are inquisitorial proceeding carried out under the public gaze and open to public scrutiny. The review process is incomplete without effective public participation and technical advice of the experts.

**EIA review process**

38. In the present case, the highhandedness of LDA and the Government marks the beginning of the Project. Even though the LDA had submitted an EIA for approval with the EPA, it did not think it important to await the approval before commencing the Project. EIA was prepared and submitted as routine requirement not for meaningful feedback. The guidelines followed as pointed out by one of the petitioner was not of major roads but of a Hatchery. This clearly shows the quality and seriousness of the document and the subsequent approval granted. Learned Counsel for the contractor has submitted that Rs 60 million has already been spent before the approval of the EIA. Section 12 of PEPA unambiguously states that the Project cannot commence without the approval of the EIA. The admitted position of LDA and the Government is that an EIA is required for the Project, therefore an EIA was filed with the EPA for approval. It is for this reason that an interim

relief was granted to the petitioners and further work at the Project site was stopped.

39. Section 12 of the Act mandates that no project shall commence construction or operation unless the proponent has filed with the EPA, an EIA and obtained an approval thereof. Section 12(2)(b) provides that the EPA shall review the EIA and accord its approval subject to such conditions as it may deem fit or require that the EIA be resubmitted after such modifications as may be stipulated or reject the project as being contrary to environmental objectives. Section 12(3) provides that every review of EIA shall be carried out with public participation. Under section 12(7) the EPA shall maintain registers for IEE and EIA which shall contain brief particulars of each project and a summary of decisions taken thereof. The registers shall be open to inspection by the public at all reasonable hours. Section 34 provides that all rules, regulations, notifications issued under the earlier law shall be considered to have been issued under this Act unless they are inconsistent with the provisions of this Act.<sup>17</sup>

40. Under the Regulations, the process of review of EIA begins with the receipt of the EIA by the EPA. A preliminary scrutiny is to be conducted by the EPA within 10 working days. EPA is under an obligation to either confirm that the EIA is complete for purposes of initiation of the review process, or require the proponent to submit additional information or return the EIA to the proponent for revision clearly listing the points requiring further study and discussion. EPA has to pass a speaking order explaining the option exercised by EPA. **No such order has been passed in the present case.**

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<sup>17</sup> General Clauses Act 1894.

41. Once confirmation of completeness has been issued under Regulation 9(1)(a), the process of public participation commences which requires that the public be put on notice and provided with an access to EIA filed by the proponent. Public participation also includes solicitation of comments from concerned government agencies. Public Participation, which is akin to environmental democracy, and as provided above, is an integral part of EIA and affirms that public is the direct beneficiary of the environment and must be heard. Objections to the project raised during the public hearing have to be addressed by the EPA through a speaking order.

42. In this case, EIA approval dated 19.03.2015 passed by the EPA does not refer to or address a single objection raised by the public during public participation. The cosmetic public participation exercise conducted by the EPA amounts to playing a fraud on the people. Under the Regulations, the exercise of public participation requires EPA to solicit the views of other concerned government agencies which include departments, attached departments, development authorities, local authority, company or a body corporate established or controlled by the Government. **No such exercise was undertaken.** When asked in Court, **DG had no explanation to tender.** Regulation 10(5) provides that 'all comments received ...from the public or any Government Agency shall be collated, tabulated and duly considered by it before decision of the EIA. Consideration of these documents by EPA can only be established through a speaking order which discusses and analyzes these comments. This speaking order has also to be retained in the register for EIA to be maintained by EPA under section 12(7) of the Act.

43. DG is the sole embodiment of EPA, therefore, the statutory support of the advisory and expert panels becomes all the more important and mandatory. Section 5(6) provides that for the assistance of the EPA in the discharge of its functions, the Government shall establish Advisory Committees for various sectors and appoint as members, eminent representatives of the relevant sector, educational institutions, research institutes and non-governmental organizations. **No such Advisory Committee has so far been established by the Government.**

44. Regulation 11 (2) mandates that the EPA is to consult a Committee of Experts constituted *for the purpose* and may also solicit the views of the sectoral Advisory Committees constituted by the Government. As rightly provided under section 5(6) of the Act, the experts have to be neutral and independent persons with credible professional expertise and experience. The experts cannot be the staff members of the EPA or the employees of the EPD. In the present case, when the DG was asked whether a Committee of Experts was constituted and then consulted. He sidetracked the question and submitted that the Committee of Experts was actually the Review Committee constituted under Notification<sup>18</sup> dated 17.12.2008 issued in the year 2008. The notification reveals that the Constitution of the Review Committee was as follows:

|    |                        |                  |
|----|------------------------|------------------|
| 1. | Director General       | Chairman         |
| 2. | Director (P&C)         | Member           |
| 3. | Director (EIA)         | Member           |
| 4. | Deputy Director (TT)   | Member           |
| 5. | Deputy Director (L& E) | Member           |
| 6. | Deputy Director (EIA)  | Member/Secretary |

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<sup>18</sup> NO. DD(L&E) /EPA/F-02/956-A/2008

There is no mention of a Review Committee in Regulations 11(2), besides the members of the Committee include the Director General and other members of the staff of the EPA, which serves no purpose and cannot be equated with the Committee of Experts, specially constituted and designed, by selecting independent experts, to review the *Project*. In any case, the decision placed before us, after this Court had directed the EPA, to review the objections raised during the public participation is signed by three members instead of six, **hence even the so-called Review Committee was never constituted.** DG's reference to the Review Committee was to mislead the Court and clearly an afterthought to cover the omissions of EPA.

45. Under Regulation 11 (4), the review of EIA by the EPA shall be based on quantitative and qualitative assessment of the documents and data furnished by the proponent, comments from the public and the Government agencies under Regulation 10 and views of the Committees mentioned in sub-regulations (2) and (3) of Regulation 11. The approval is to be granted by the EPA that is the DG, after considering the following documents:-

- a. EIA filed.
- b. Comments of the public and the government agencies received during the public hearing.
- c. The report of the committee of experts
- d. The report of the sectoral advisory committee

**None of the above documents, except the EIA was referred to in the impugned approval.**

46. The decision of the EPA must be communicated to the proponent in the form prescribed in Schedule VI of the Regulations. This does not mean that the EPA is relieved from passing a speaking order after considering all the material as described in Regulation 11(4). EPA is bound to pass a speaking order and the reasons must be clearly specified in item No. 5(a) of the said Schedule. These reasons shall also be retained in the EIA register under section 12(7) of the Act. Anything short of a speaking order offends Articles 4 and 10A of the Constitution.

47. The captured and beleaguered EPA could not have carried out an independent review of the EIA, besides the EIA review process is itself deficient in material particulars and cannot be sustained. We, therefore, set aside the EIA approval of the construction phase granted by DG, EPA dated 19.03.2015 to be violative of the right to life, dignity of the citizenry besides offensive to environmental justice and due process protected under Articles 4 and 10A of the Constitution.

**Article 140A of the Constitution & the Local Government System**

48. The constitutional journey from mere *encouragement* of local government institutions (Article 32) to *imposition of constitutional duty* (Article 140A as enacted through the 18<sup>th</sup> Constitutional Amendment) to establish Local Government Systems has been remarkably encouraging for democracy in our country. The creation of the third tier of government based on constitutional directive to devolve political, administrative and financial responsibility and authority to the elected representatives of the local government promotes our constitutional vision of a federalist state.



49. Article 140A of the Constitution has recognized and established the Local Government System in the country which is to be energized and empowered through devolution of political, administrative and financial responsibility and authority of the Provincial Government. This constitutional mandate is to be actualized by the Provincial Legislature by passing a law.

50. In order to address the questions framed at the beginning of the Judgment regarding Local Government System, it is necessary to chart the history, meaning and importance of local government, as well as, to understand its political architecture. The political economy of devolution and federalism requires understanding in order to grapple with the constitutional questions before us. Therefore, the views of the political scientists need to be discussed and internalized before embarking upon judicial interpretation of Article 140A of the Constitution.

***Pakistan's historical experience with Local Government<sup>19</sup>***

51. One of the ironies of Pakistan's history is the paradoxically countercyclical pattern for local democracy. Three times in the history of Pakistan, elected institutions of local democracy have been created by military regimes, and each time the subsequent civilian governments have either failed to revive elected local governments or replaced them with unelected administrators (Cheema, Khan and Myerson, 2015<sup>20</sup>). During military regimes local government institutions

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<sup>19</sup> Reliance is placed on the submissions made Dr. Ali Cheema (LUMS, IDEAS), amicus curiae.

<sup>20</sup> Cheema, A., A. Q. Khan and R. Myerson (2015, forthcoming). "Breaking the Countercyclical Pattern of Local Democracy in Pakistan," in J. P. Faguet

were used by the non-representative centers to gain legitimacy by bypassing political parties at the provincial and national level (Cheema, Khan and Khwaja 2006, Cheema 2012<sup>21</sup>). These institutions were designed to dilute the vital relationship between democratic politics at the local and national level, which thwarted the democratic transition.

52. Ironically empowered local governments under the military regime and the absence of vibrant local democratic institutions under civilian democracy have both weakened the connection between political parties and their grassroots bases. The absence of local democracy has also retarded the development of the municipal relationship between the citizen and the state,<sup>22</sup> which was a foundational pillar of democracy in the US and many parts of Europe.<sup>23</sup> National political parties have used local democracy to build the foundation of strong democracy, and deepen the base of their political parties, in a variety of international contexts that include Brazil, Turkey, West Bengal, Kerala (Heller 2001, Sambur 2009, Ghatak and

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(eds) *Is Decentralization Good for Development: Perspective from Academics and Policymakers*, Oxford University Press.

<sup>21</sup> Cheema, A., A. I. Khwaja, and A. Qadir (2006) "Local Government Reform in Pakistan: Context, Content, and Causes," in Bardhan, P. and D. Mookherjee (eds.) *Decentralization and Local Governance in Developing Countries: A Comparative Perspective*, MIT Press; Cheema, A. (2012) "Devolution of Power Plan 2000" in A. Jalal (eds.) *The Oxford Companion to Pakistani History*, OUP.

<sup>22</sup> Pash, H. and A. G. Pasha (1990) *Local Government Administration in Pakistan*, AERC, Karachi; Manning, N., D. Porter, J. Charlton, M. Cyan and Z. Hasnain (2003) *Devolution in Pakistan: Preparing for Service Delivery Improvements*, World Bank, Pakistan; Rizvi, S. A. (1976) *Changing Patterns of Local Government in Pakistan*, Pakistan Historical Society, Karachi; Aziz, D. (2011) "Bureaucracy vs the People," *The News* December 13, 2011.

<sup>23</sup> Acemoglu, D. and J. A. Robinson (2012). *Why Nations Fail: The Origins of Power, Prosperity and Poverty*, Profile Books, Tocqueville, A. (1835) *Democracy in America*, 2003 edition, Penguin.

Ghatak 2002<sup>24</sup>). Article 140A, which has been enacted by Pakistan's democratic political parties, and the requirement of party-based local elections are providing the leadership of Pakistan's political parties the opportunity to deepen their grassroots base and, in doing so, strengthen the vital relationship between local and national politics. It is now time to reform the post colonial local state in order to complete the transition to a strong democracy.

53. The survey of political and the Constitutional history of Pakistan reveals that in the ambiance of fragile political ecology "local governments" were never ever taken seriously. The fragility of local governments can be further gauged by the fact that only two cycles of local government elections have been held since local governments were instituted under the military dictatorship of General Musharraf in 2001. First Local Government Elections were held in July/August 2001 and Local Government System became functional from August 14, 2001. Thereafter, Local Government Elections 2005 were held in three phases. Local Governments remained in power till 2009 for four years as Punjab Local Government (Amendment) Ordinance, 2005 on June 6, 2005 reduced the term to Four Years. Since February, 2010 amendment was made for appointment of Administrators. Since then administrators are heading the local governments. While elected local

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<sup>24</sup> Heller, P. (2001). "Moving the State: The Politics of Democratic Decentralization in Kerala, South Africa, and Porto Alegre," *Politics and Society*, 29(1); Ghatak, M. and M. Ghatak (2002). "Recent Reforms in the Panchayat System in West Bengal: Toward Greater Participatory Governance?," *Economic and Political Weekly*, January, 5; Sambur, B (2009). "The Great Transformation of Political Islam in Turkey: The Case of Justice and Development Party and Erdogan," *European Journal of Economics and Political Studies*, 2(2).

governments existed for only 8 years since 2001, elected federal and provincial governments have existed for 13 years.

**Indian experience.**

54. India had her Article 140A in the year 1993 in the shape of Articles 243 to 243ZG of the Indian Constitution when she like us was faced with similar challenges. *Durga Das Basu* in his Commentary on the Constitution of India writes that with the view to provide for setting up democratic institutions at the grass-root level, 73<sup>rd</sup> and 74<sup>th</sup> amendment to the Indian Constitution, Part IX and Part IXA alongwith 11<sup>th</sup> and 12<sup>th</sup> Schedules were introduced in the Indian Constitution.<sup>25</sup> The amendments were intended to give effect to Article 40 of the Directive Principles of State Policy, similar to our Article 32, wherein States were directed to take steps to organize *village panchayats* and *municipalities* and vest them with such powers and authority as was necessary to enable them to function as units of self-government. The object of introducing these parts was that in many States the local bodies were not working properly and the timely elections were not being held and the nominated bodies were continuing for long periods. Election had been irregular and many times unnecessarily delayed or postponed and the elected bodies had been superseded or suspended without adequate justification at the whims and fancies of the State authorities. The new provisions were added in the Constitution with a view to restore the rightful place in political governance for local bodies. It was considered necessary to provide a constitutional status to such bodies and to ensure regular and fair conduct of elections.<sup>26</sup> The idea was

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<sup>25</sup> see Durga Das Basu, Commentary on the Constitution of India, vol-8 p8591. 8<sup>th</sup> edition (reprint 2012).

<sup>26</sup> Ibid. p8591.

to place the local self-government on a sound and effective footing. **The amendments represent measures for decentralization of power and greater participation of people in self-rule. It decentralizes decision-making power from top to bottom in order to strengthen democracy at the grass-root level.**

Article 243W reads as follows:

“Art.243W. Subject to the provisions of the Constitution, the Legislature of a State may, by law, endow—

- (a) The Municipalities with such powers and authority as maybe necessary to enable them to function as institutions of self-Government and such law may contain provision for the devolution of powers and responsibilities upon Municipalities, subject to such condition as may be specified therein, with respect to—
  - (i) The preparation of plan for economic development and social justice;
  - (ii) The performance of function and the implementation of schemes as may be entrusted to them including those in relation to the matters listed in the Twelfth Schedule;
- (b) The Committee with such powers and authority as may be necessary to enable them to carry out the responsibilities conferred upon them including those in relation to the matters in the Twelfth Schedule.”

The 12<sup>th</sup> Schedule, hereunder, provides for the **core responsibilities** which the people of India thought must always remain with the Local Government.

#### **Twelfth Schedule**

1. Urban planning including town planning.
2. Regulation of land-use and construction of buildings.
3. Planning for economic and social development.
4. Roads and bridges.

5. Water supply for domestic, industrial and commercial purposes.
6. Public health, sanitation conservancy and solid waste management.
7. Fire services.
8. Urban forestry, protection of the environment and promotion of ecological aspects.
9. Safeguarding the interests of weaker sections of society, including the handicapped and mentally retarded.
10. Slum improvement and upgradation.
11. Urban poverty alleviation.
12. Provision of urban amenities and facilities such as parks, gardens, playgrounds.
13. Promotion of cultural, educational and aesthetic aspects.
14. Burials and burial grounds; cremations, cremation grounds and electric crematoriums.
15. Cattle ponds; prevention of cruelty to animals.
16. Vital statistics including registration of births and deaths.
17. Public amenities including street lighting, parking lots, bus stops and public conveniences.
18. Regulation of slaughter houses and tanneries.

The amendments to the Indian Constitution underline that the local governments shall function as institutions of self-government and will have core responsibilities to be performed by the *Panchayats* and the *Municipalities* (i.e., local governments) as provided in 11<sup>th</sup> and 12<sup>th</sup> Schedule.

**South African experience**

55. Section 151 (1) of the Constitution of South Africa, 1996 provides:-

151. **Municipalities in co-operative government**

(1) The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic.

(2) The executive and legislative authority of a municipality is vested in its Municipal Council.

(3) A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.

(4) **The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.**

**156. Powers and functions of municipalities.**

(1) **A municipality has executive authority in respect of, and has the right to administer---**

**(a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and**

(b) any other matter assigned to it by national or provincial legislation.

(2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.

(3) Subject to section 151 (4), a by-law that conflicts with national or provincial legislation is invalid. If there is a conflict between a by-law and national or provincial legislation that is inoperative because of a conflict referred to in section 149, the by-law must be regarded as valid for as long as that legislation is inoperative.

(4) The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 of Schedule 5 which necessarily relates to local government, if---

(a) that matter would most effectively be administered locally; and

(b) the municipality has the capacity to administer it.

(5) A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions. (*emphasis supplied*)

Schedule 4

FUNCTIONAL AREAS OF CONCURRENT NATIONAL AND PROVINCIAL LEGISLATIVE COMPETENCE.

PART B  
THE FOLLOWING LOCAL GOVERNMENT MATTERS TO THE  
EXTENT SET OUT IN SECTIONS 155 (6) (A) AND (7)

Air pollution  
Building regulations  
Child care facilities  
Electricity and gas reticulation  
Firefighting services  
Local tourism  
Municipal airports  
Municipal planning  
Municipal health services  
Municipal public transport  
Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law.  
Pontoons, ferries, jetties, piers and harbours excluding the regulation of international and national shipping and matters related thereto.  
Storm water management systems in built-up areas  
Trading regulations  
Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems

Schedule 5  
FUNCTIONAL AREAS OF EXCLUSIVE PROVINCIAL  
LEGISLATIVE COMPETENCE

PART B

The following local government matters to the extent set out for provinces in sections 155 (6) (a) and (7):  
Beaches and amusement facilities  
Billboards and the display of advertisements in public places  
Cemeteries, funeral parlours and crematoria  
Cleansing  
Control of public nuisances  
Control of undertakings that sell liquor to the public  
Facilities for the accommodation, care and burial of animals  
Fencing and fences  
Licensing of dogs  
Licensing and control of undertakings that sell food to the public  
Local amenities  
Local sport facilities  
Markets  
Municipal abattoirs  
Municipal parks and recreation  
Municipal roads  
Noise pollution  
Pounds  
Public places  
Refuse removal, refuse dumps and solid waste disposal  
Street trading



Street lighting  
Traffic and parking.

Section 151(4) of the Constitution provides that “...provincial government may not compromise or impede a municipality’s ability or right to exercise its powers or perform its functions.”

Section 156(1)(a) of the Constitution provides that a municipality has authority over the local government matters listed in Schedules 4B and 5B. Municipalities derive these ‘original’ powers from the Constitution itself.<sup>27</sup> A municipality also has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its Schedules 4B and 5B functions.<sup>28</sup>

56. The National Assembly has a general discretion to assign any of its legislative powers to a specific municipal council or to municipalities in general.<sup>29</sup> Provincial Legislatures have a similar power with respect to municipalities in their province.<sup>30</sup> A national or provincial minister may assign any power or function that is to be exercised in terms of an Act of Parliament or a provincial Act to a municipal council provided the latter is in agreement with the assignment.<sup>31</sup> In some instances there is an obligation to assign a function. A provincial government must, in terms of section 156(4) of the Constitution, assign to a municipal council the administration of a matter listed in Schedules 4A or 5A if four conditions are met:

- (a) the matter in question “necessarily relates” to local government;

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<sup>27</sup> De Visser, Jaap (2002) “Powers of Local Government” 17 *SA Public Law* 223

<sup>28</sup> Section 156(5) Constitution of South Africa.

<sup>29</sup> Section 44(1)(a)(iii) *ibid*

<sup>30</sup> Section 104(1)(c) *ibid*

<sup>31</sup> Sections 99 and 126

- (b) the matter would most effectively be administered locally;
- (c) the municipality has the capacity to administer it; and
- (d) the municipal council agrees to the assignment.

With regard to municipal by-laws, the basic rule of paramountcy is that a by-law in conflict with valid national or provincial legislation is invalid.<sup>32</sup> However, in some instances, a by-law may trump a provincial or national law. A national or provincial law will not prevail over a by-law if it “compromises or impedes a municipality’s ability or right to exercise its powers or perform its functions”.<sup>33</sup> This may be interpreted to mean that the national and provincial governments may not use their legislative powers in an unduly intrusive or too prescriptive manner.<sup>34</sup>

The Indian and the South African constitutions establish that Local Government has “core responsibilities” which in their countries have been listed out in the Constitution. While the South African constitution additionally provides for the autonomy of the Local Government so that these core responsibilities are performed without any interference by the higher tier of governments.

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<sup>32</sup> Section 156(3) Constitution of South Africa

<sup>33</sup> Section 151(4) Constitution of South Africa

<sup>34</sup> De Visser, Jaap (2005) *Developmental Local Government* (Antwerpen, Oxford: Intersentia) 125ff. as quoted in, “DEFINING PROVINCIAL AND LOCAL GOVERNMENT POWERS AND FUNCTIONS: THE MANAGEMENT OF CONCURRENCY by Professor Nico Steytler Mr Yonatan Fessha available at <http://p09.opennetworks.co.za/ldphs.org.za/publications/publications-by-theme/local-government-in-south-africa/powers-of-local-government/Defining%20Provincial%20and%20Local%20Government%20Powers%20and%20Functions%20The%20Management%20of%20Concurrence%20-2005.pdf>

***The 18<sup>th</sup> Constitutional Amendment as a radical departure***<sup>35</sup>

57. Article 140A, represents a radical departure from the past in terms of the constitutional status of local governments. Prior to Article 140A local governments lacked any constitutional protection in Pakistan and their basic design was at the discretion of the provincial legislature. The extent of constitutional protection in Pakistan at the time was similar to federations such as Australia, Canada and the United States. None of these countries provide protection to local governments in their Constitutions. The 10<sup>th</sup> Amendment to the United States Constitution makes local governments a matter of state rather than federal law. It neither prohibits nor requires states to establish local governments. Likewise section 92(8) of Canada's Constitution Act, 1867 mentions local government only to make it clear that it is a responsibility of the provinces. In these Constitutions local governments fall under the legal purview of the provinces or states that have untrammelled power to reorganize these governments. In the period preceding 140A local governments were seen as agents of the provinces as the Constitution did not provide any framework about the basic architecture of this system of government. This gave the provinces complete authority to define the design of local governments including the assignment of functions. This was akin to the legal concept of "Creatures of the State" in US federal law, which is embodied in Dillon's Rule<sup>36</sup> that holds

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<sup>35</sup> Reliance has been placed on the note submitted by Dr. Ali Cheema (LUMS, IDEAS), the amicus curiae.

<sup>36</sup> This basic principle of what powers a local government has in the US follows the principle first stated in 1872 in a treatise on municipal corporations, written by Iowa Supreme Court Judge John F. Dillon; it is known as Dillon's Rule. In 1868, Justice Dillon (*City of Clinton versus the Cedar Rapids and Missouri Railroad*, 24 Iowa 455) articulated America's legal doctrine on local government, calling them "mere tenants-at-will of

that the political subdivisions of a state owe their existence to grants of power from the state. This design precludes local governments from acting as tiers of self-government. It is, however, important to recognize that in these countries, unlike South Asia,<sup>37</sup> elected local governments were well entrenched long before the establishment of their independent national governments.<sup>38</sup> The enactment of Article 140A through the 18<sup>th</sup> Amendment has radically altered the constitutional status of local governments in Pakistan. Local governments are no longer a matter for principles of policy as the Constitution now mandates that “each province shall, by law, establish a local government system and devolve political, administrative and financial responsibility and authority to the elected representatives of the local governments.” The fact that the framers of the 18<sup>th</sup> Amendment chose to enact 140A, in spite of its historical antecedents being tied to the Musharraf regime, shows the importance that they placed on creating meaningful and functional local democratic governments. The commitment of the democratic parties to this Article can be gauged from the fact that while the 18<sup>th</sup> amendment repealed many of the other constitutional amendments enacted by the dictatorial regimes of Generals Zia-ul-Haq and Pervaiz Musharraf, it chose to retain

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their respective state legislatures” that could be “eliminated by legislation with a stroke of the pen”. This is different from the contrasting legal doctrine in America, the Cooley Doctrine, expounded by Justice Thomas M. Cooley of Michigan Supreme Court, in 1871, that “(l)ocal government is a matter of absolute right and the state cannot take it away” (People v. Hurlbut, 24 Mich. 44, 108).

<sup>37</sup> This is different from South Asia where the Colonial State preceded local governments and denied it meaningful space to evolve.

<sup>38</sup> Tocqueville, A. (1835), “Democracy in America, Penguin: 2003 edition”; Acemoglu, D. and J. A. Robinson (2012), “Why Nations Fail: The Origins of Power, Prosperity and Poverty, Profile Books.

Article 140A.<sup>39</sup> Survey of eight developing countries, including: Bolivia, Indonesia, Pakistan, Uganda, Chile, Brazil, India and South Africa; found that only Pakistan and China did not grant local governments independent constitutional authority at this time. Article 140A has ensured that Pakistan is now part of the rising trend in developing countries of providing local governments constitutional protection.

58. We agree with Professor Osama Siddique, learned amicus curiae, that Article 140A denotes the logical culmination point of the wave toward devolution in the federal structure of governance that has taken shape over the last decade or so. Distinct from the Basic Democracies of the 1960s where the purpose was to displace directly elected public representation at the provincial level and to create a separate constituency loyal to the regime. Now the clear intent is to deepen democracy and create a distinct third tier of public representation at the local level.

59. Without a clear vesting of certain core functions with the local government it will be unable to play its role – for democracy to deepen, for diverse opinions and legitimate interests to be taken into account, for service delivery to be closer to and held accountable by the people, for institutions to build capacity and expertise etc., local government institutions have to be empowered and given definite functions – they are not envisioned by Article 140A to be an agent or an underling of provincial governments but a distinct and empowered third tier of elected governance. Abolition of the concurrent list also

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<sup>39</sup> Bardhan, P. and D. Mookerjee (2006). “Decentralization and Local Governance in Developing Countries: A Comparative Perspective”, MIT Press.

indicates the move away from overlapping powers – therefore, distinct core activities envisioned for federal, provincial and local levels with frameworks and mechanism for dialogue and negotiations where more than one interest is at stake or where two or all three need to play their respective roles or where there is justification for one to prevail over the other.

60. Article 140A does not envision the local government to be nominal or residual or merely symbolic anymore but a real empowered stakeholder and a breeding ground for deeper and more public responsive politics. The idea is a move away from top down management and governance but for ideas, aspirations and imperatives to flow upwards to macro level.

*Scope of Article 140A*

61. Earlier Article 140A was inserted in the Constitution by item no. 16 of the Schedule to Legal Framework Order, 2002 (Chief Executive's Order No. 24 of 2002) w.e.f 21.08.2002 (as reproduced below) and later validated by section 10 of the Constitution (Seventeenth Amendment) Act, 2003 (III of 2003) w.e.f 31.12.2003. Earlier Article 140A was as follows;

Each Province shall, by law, establish a local government system and devolve political, administrative and financial responsibility and authority to the elected representatives of the local governments.

Article 140A has been substituted through section 48 of the Constitution (Eighteenth Amendment) Act, 2010 (X of 2010) in its present form w.e.f 19.4.2010 and provides as follows:-

140A. Local Government - Each Province shall, by law, establish a local government system and devolve political,

administrative and financial responsibility and authority to the elected representatives of the local governments.

(2) Elections to the local governments shall be held by the Election Commission of Pakistan

Principle of Policy under Article 32 of the Constitution, provides that State shall encourage local government institutions composed of elected representatives of the areas concerned (somewhat similar to Article 40 of the Indian Constitution). Local Government Act, 1975 and the Local Government Ordinance, 1979 drew its constitutional support from this principle of policy.

62. Article 140A, in effect, actualizes this principle of policy into a constitutional obligation and duty. The Constitution under Article 140A recognizes the need for a local government and creates a constitutional obligation on the Provinces to establish a Local Government System by law. The constitution further mandates that the provinces shall, by law, devolve their political, administrative and financial responsibility and authority to the elected representatives of the local government. The political significance of a local government is further underlined when under Article 140A(2), which commands that the elections to the local government, like the national and provincial assemblies, shall be held by the Election Commission of Pakistan. The electoral recognition adds constitutional weightage to the political importance of the local government and firmly establishes local government as a third tier of government in our political landscape.

63. Interestingly, Article 140A, in this case, unfolds questions of constitutional importance. The architecture of

powers to be vested in a local government system by the provincial legislature? The scope of autonomy enjoyed by the elected local government while exercising those powers ? The vertical separation of powers enjoyed by the provincial government and the local governments? And the constitutionality of any provincial authority like the LDA to trump or usurp the powers allocated to the elected local government?

64. Before the above questions can be fully answered, it is useful to examine the taxonomy of governments and the symbiotic relationship between federalism, subsidiarity, local government and vertical separation of powers within the same tiers of the institution (as opposed to the traditional horizontal separation of powers).

**Federalism, Local Government, Democracy, Devolution and Subsidiarity.**

65. Federalism is a system of government in which power is divided between a central authority and constituent political units.<sup>40</sup> Justice Stephen Breyer of the US Supreme Court describes *Federalism* as “an idea that concerns the level of government at which Americans should try to solve common problems.<sup>41</sup>” He goes on to explain:

“...constitutional federalism helps democracy itself work better by assuring state and local officials broader decision-making power, simultaneously places greater power in the hands of the those who elect those officials. That smaller number of people can better understand the nature of local problems. They can more easily communicate with those who stand for office and can more accurately evaluate the work of their elected officials.

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<sup>40</sup> The Free Dictionary by Farlex.

<sup>41</sup> Making our Democracy work- Stephen Breyer. P.121



Moreover, by placing power in local communities, federalism reflects the democratic ideal and encourages citizens to participate in government, particularly in local government, where they can more easily make a difference.

In addition, constitutional federalism is practical. Those whom a problem affects more directly are more often likely to understand it and find ways to resolve it... [a]t the same time, a national bureaucracy, subject to the control of national officials and a national electorate, is needed to deal with issues that are national in scope such as those associated with foreign affairs, war, interstate commerce, and much of the environment. Ideally, constitutional federalism matches the issues with government units that will best handle them.

Constitutional federalism reflects a further practical idea – the benefits of experimentation. In the mid 1930s depression, Justice Brandeis, in his *New State Ice*<sup>42</sup> dissent, succinctly expressed this idea: “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” The value of not adopting a solution, even to a national problem, to quickly; of trying different approaches; and of trying out different ideas before committing the nation to one approach – all of these reasons call for ensuring that states have a constitutional leeway to experiment.”<sup>43</sup>

The term “Local Government” literally means management of the local affairs by the people of the locality. It is based on the principle that the local problems and needs can best be addressed by the people of the locality rather than by central or state governments. Local government is a prime element of democracy and demonstrates the intrinsic values of democracy, irrespective of the services it provides in it. Government is truly

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<sup>42</sup> *New Ice State Co.*, 285 US at 311 (Brandeis J. dissenting)

<sup>43</sup> *Making Our Democracy Work*- Stephen Breyer. Pp/122-123

representative when all types of people can take part. The local government level offers the closest things to widespread consultation and participation.

66. United Nations documentary on public administration defines local government as a political sub-division of a nation or state which is constituted by law and has substantial control of local affairs, including the power to impose taxes or to enact prescribed purpose.<sup>44</sup> “Local inhabitants representing local body possessing autonomy within its spheres, raising revenue through local taxation and spending its income on local services constitute the local self government.”<sup>45</sup> According to Michael Keating “Local Governments are seen as associations of individuals choosing to govern their own affairs, defining their boundaries and negotiating their powers.”<sup>46</sup> Professor W.A. Robson opines that Local Government may be said to involve the conception of a territorial, non-sovereign community possessing the legal right and the necessary organization to regulate its own affairs. This in turn presupposes the existence of local authority with power to act independently of external control as well as the participation of the local community in the administration of its own affairs.”<sup>47</sup> On a political dimension, the operational freedom to fulfill local needs and aspirations with necessary popular mandate is the hallmark of local government, it is thus a variant of democracy.

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<sup>44</sup> The United Nations Article of Declaration (1948); Ajayi, Kunle (2000) (ed) Theory and practice of local Government, Ado – Ekiti, University of Ado – Ekiti.

<sup>45</sup> K.Venkatarangia. “Local Governments in India” - Bombay (1969) p.1

<sup>46</sup> *Comparative Urban Politics*, Aldershot England, Edward Elgar (1991). pp21-22.

<sup>47</sup> Encyclopedia of Social Sciences. Vol 9, New York, The Macmillan Company, p.574.

67. The Local Government System is established and empowered through the process of *decentralization*. The logic behind decentralization is not just about weakening the central authority, nor is it about preferring local elites to central authority, but it is fundamentally about making governance at the local level more responsive to the felt needs of the large majority of the population.<sup>48</sup>

68. Under Article 140A the Constitution establishes the structure of a Local Government System which rests on devolution of political, administrative and financial responsibility and authority upon the elected representatives of the local government, however, the areas of responsibility and authority to devolve rests on the provincial legislature.

69. The nature and degree of decentralization is important. Decentralization,<sup>49</sup> is “a process of transferring responsibility, authority, and accountability for specific or broad management functions to lower levels within an organization, system, or program. Different dimensions of decentralization are: (i) *administrative decentralization*- how responsibilities and authorities for policies and decisions are shared between levels of government and how these are tuned into allocative outcomes. (ii) *fiscal decentralization* - the assignment of expenditures, revenues and borrowing amongst different levels of governments. (iii) *political decentralization* - how the voice of citizens is integrated into policy decisions and how civil society can hold authorities and officials accountable at

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<sup>48</sup> Pranab Bardhan. *Decentralization of Governance and Development*. Journal of Economic Perspectives. Vol16, Number 4, Fall 2002. Pp.185-205

<sup>49</sup> Decentralization in Client Countries- An Evaluation of World Banks Support 1990-2007. World Bank Independent Evaluation Group (IEG)

different levels of government. Modes of decentralization include: *Deconcentration, Delegation and Devolution.*

70. Deconcentration is the shallowest form of decentralization and the least ambitious level of decentralization, where responsibilities are transferred to an administrative unit of the central government that is spatially closer to the population where service is to be provided, usually a field or regional office. Delegation is an intermediate level of decentralization, where some authority and responsibilities are transferred to a lower level of government, but there is a principal-agent relationship between the central and sub-national government in question, with the agent remaining accountable to the principal. Devolution is the deepest form and most ambitious form of decentralization, where the central government devolves responsibility, authority, and accountability to sub-national governments *with some degree of political autonomy.*<sup>50</sup> The most influential definition of “devolution” in the local government literature is by Rondinelli, et. al. (1983)<sup>51</sup>. In their definition<sup>52</sup> “devolution” creates or strengthens sub-national units of government, the activities of which are substantially outside the control of higher-tier governments. Local governments are defined to be independent, autonomous, and usually have exclusive authority over

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<sup>50</sup> *ibid.*

<sup>51</sup> Rondinelli, D.A., G. S. Cheema, and J. Nellis. (1983). *Decentralization in Developing Countries: A Review of Recent Experience*. Staff Working Paper No.581, World Bank, Washington, DC.

<sup>52</sup> For a similar definition see Faguet, J. P. (2011), “Impacts and Consequences of the New Regime of Autonomies in Bolivia: Elements for a Discussion,” Inter-American Development Bank, Policy Brief No. 122. His definition of devolution is where the central (that is, provincial government in our context) government devolves specific functions, with all of the administrative, political and economic attributes that these entail, to democratic local (that is, regional or municipal) governments which are independent of the centre within a legally delimited geographic and functional domain.

explicitly reserved functions. The word “devolve” means to transfer from one person to other; to deliver over or hand down, as from ancestor to heirs; to roll or tumble down or descend, to be transmitted by course of events or by operation of law, to pass by transmission to another, from a person dying to a person living, or from the possessor to a successor.<sup>53</sup> In other words “to transfer rights, duties, or powers to another.”<sup>54</sup>

71. Devolution, therefore, signifies transfer of power from the provincial government to the local government. The scope and nature of power, the “core functions,” to be transferred can be by the Constitution itself or left to the discretion of the provincial legislature. In the context of this case, once complying with the constitutional mandate under Article 140A, the trinitarian devolution i.e., political, administrative and financial, takes place, the elected local government enjoys the autonomy and independence to exercise these powers to the exclusion of other executive functionaries. Any interference or dilution of this power by the provincial government or any other authority, without there being any change in the legislative design, which draws its power under Article 140A, would render a democratically elected local government totally otiose. Any interference in the political, administrative and financial space of the Local Government System, would be undemocratic and not in step with the constitutional vision.

72. Post 140A, PLGA has been promulgated and powers have been devolved to the local governments. In the present case, the local government is the Lahore Metropolitan Corporation (LMC) and section 87 of the PLGA lists down the

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<sup>53</sup> (Corpus Juris Secundum Volume 26A)

<sup>54</sup> Blacks Law Dictionary. 9<sup>th</sup> Edition.

powers and functions to be exercised by LMC. It is important to understand that provincial legislature does not devolve power randomly but is bound by political logic, which emerges from federalism. The foundational theme on which our constitutional construct rests. Within the broad contours of federalism this political logic finds its roots in the age old principle of *subsidiarity*.

73. The notion of subsidiarity originated in the ancient times and has to do with conditions of subsistence and support. It is derived from the Latin root *subsidiuum*, which refers to assistance in terms of the smaller matters of life.<sup>55</sup> It also literally means “to seat” (‘sid’) a service down (‘sub’) as close to the need for that service as is feasible.”<sup>56</sup> Johannes Althusius, a writer and a philosopher, set forth his ideas in his work *Politica Methodice Digesta* published in 1603. He maintained that freedom does not emanate from the sovereignty of the larger whole, but from the autonomy of the smaller parts. The concept of “subsidiarity” originated in late medieval religious thought, yet it provides one general method for applying federalism in this more democratic age. Subsidiarity insists that governmental power to deal with a particular kind of problem should rest in the hands of smallest unit of government capable of dealing successfully with that kind of problem. One begins by assuming that power to solve a problem should remain at a local level. One then asks whether it is necessary to abandon this assumption in order to resolve the problem. One can continue to ask this question, level by level. And one should answer it by climbing no higher up the governmental unit ladder than necessary to deal effectively with the

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<sup>55</sup> Ludger Kuhnhardt, “Federalism and Subsidiarity,” *Telos* 91 (1992): 78

<sup>56</sup> <http://www.georgetown.edu/centres/woodstock/reprt/rfea54a.htm>.

problem.<sup>57</sup> Justice Breyer in his book, *Making Our Democracy Work* writes; “As used today and considered in general terms, the principle of subsidiarity incorporates an approach that can help guide...policy makers. The approach sees power as flowing from ‘below,’ it finds democratic advantages in localism, and it sees practical value in local control and local experimentation. So viewed, the concept incorporates the historical, democratic, and practical ideas that underlie American constitutional federalism. The underlying thought, like that of the constitution itself, is that the national government should resolve national problems while state and local governments should retain the power to deal with more local problems, with which they are more likely to deal effectively.” Subsidiarity is embedded in social justice and requires that “all social bodies exist for the sake of the individual so that what individuals are able to do, society should not take over, and what small societies can do, larger societies should not take over. In a political system it is the principle of devolving decisions to the lowest practical level.<sup>58</sup>”

74. Federalism and the principle of subsidiarity, offer the means to accommodate widely divergent political realities within nations. “The principle of subsidiarity maintains that issue areas and political authority are only exercised at the national state level if it is deemed necessary by the constituent units, and if the issue or political authority would better be dealt with at the national level. Otherwise, political authority should remain in the hands of the units which actually constitute society, or at more localized levels of political society. It is only through recognition and respect for this principle that

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<sup>57</sup> see Chantal Millon-Delsol, *L'état subsidiaire* 13 (1992)

<sup>58</sup> The Free Dictionary by farlex.

nation-states can be legitimate aggregates of human political society. Subsidiarity implies that political authority ultimately rests with the constituent units of society, and is only transferred to a federal/national level of it is absolutely necessary.<sup>59</sup>” According to Carl Schmitt; “control of the territory by the state may occur in two ways; either with the territorial articulation of power among the parts on the dependent whole- the centre- which monopolizes control; or with one where everything, including the centre, depends on the parts, and central control is distributed between the whole and the parts. The first is a unitary state, while the second is a federal one.<sup>60</sup>” Federalism divides sovereignty of the state between a central government and regional governments, and often times even a third order such as at local or municipal levels of government.

75. The principle of subsidiarity therefore holds that where local communities or local governments can effectively govern and manage a municipal service, they should. Where they cannot, provincial government should intervene. Only when the local governments prove ineffective or the matter spills over the local area, should the provincial government become involved. In the words of Marvin Olasky “if it is necessary to turn to government, go first to city, then to country, then to state and only then to federal offices.”<sup>61</sup> “Subsidiarity, at its core, envisions a society in which problems are solved and decisions made from the bottom up. As a model of governance, subsidiarity offers no shelter to those who seek the unbridled

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<sup>59</sup> Mark Friesen. *Subsidiarity and Federalism: An old concept with contemporary relevance for political society*. Federal Governance: A Graduate Journal of Theory and Politics (2003) .

<sup>60</sup> Luis Maria Bandieri, : Carl Schmitt and Federalism.” *Telos*, 22 (2002):48

<sup>61</sup> *Let Them Eat Beans* , AUSTIN AM.-STATEMAN, 2002 at A15



expansion of centralized government, not to those who disregard the need for a vital government role in making an empowered and connected citizenry a reality. Stripped of its partisan baggage, subsidiarity offers a model that- rooted in social justice tradition that stresses both individual liberty and communitarian values-rejects the alienations of both the market and centralized government, embracing instead individuals and the mediating structures to which they belong.”<sup>62</sup>

**Article 140A and scope and autonomy of local governments**<sup>63</sup>

76. Subsidiarity and the structure of local government system emerge from the broad principles of political, social and economic justice guaranteed to the citizens under the Objectives Resolution to the Constitution and having subsequently become a substantive part of the Constitution under Article 2A. The legislative competence enjoyed by the provincial legislature, after the 18<sup>th</sup> amendment is informed and fashioned by Article 140A when it comes to resurrecting local government system in the Province. Article 140A also “constitutionally” defines a basic architecture of local government systems that consists of “devolving” political, administrative and financial responsibility and authority to its elected representatives. The “devolution” of this critical bundle of responsibilities and authorities, which defines government, to elected representatives suggests that the framers of the 18<sup>th</sup> Amendment are no longer relegating local governments to play the role of agents of provincial governments. Instead they are envisaging a tier of democratic government that has

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<sup>62</sup> Subsidiarity as a principle of governance-beyond Devolution. Robert K. Vischer. INDIANA LAW REVIEW Vol 35:103

<sup>63</sup> Reliance is placed on the note submitted by Dr. Ali Cheema (LUMS, IDEAS) the amicus curiae.

“autonomous control,” which needs to be assigned a meaningful set of core responsibilities and functions to enable it to deliver to the citizenry. This view is echoed by the ruling party’s [PML(N)] 2013 Manifesto, which states that “apart from consolidating democratic institutions and traditions at the federal and provincial level, the imperative of democratic governance can be fulfilled only through further decentralization by devolving administrative and financial powers to elected representatives at district and lower levels.” It explicitly expresses its commitment to implementing 140A of the 1973 Constitution. It further elaborates that in implementing Article 140A, PML(N) will ensure that the new laws providing for a new local bodies system in replacement of the 2002 system are adopted by consensus and that they provide for optimum devolution and decentralization of administrative and financial powers. The use of the term “devolution” needs to be understood as it has been used in both Article 140A and the PML(N) 2013 Manifesto. As argued earlier the most influential definition of “devolution” in the local government literature is by Rondinelli, et. al. (1983)<sup>64</sup>. In their definition “devolved” local governments are defined to be independent, autonomous, and usually have exclusive authority over explicitly reserved functions.

77. Faguet (2011)<sup>65</sup> points out that “autonomy” is defined by the Oxford English Dictionary as “of a state, institution etc: The

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<sup>64</sup> Rondinelli, D.A., G. S. Cheema, and J. Nellis. (1983). “Decentralization in Developing Countries: A Review of Recent Experience”. Staff Working Paper No.581, World Bank, Washington, DC.

<sup>65</sup> Faguet, J. P. (2011). “Impacts and Consequences of the New Regime of Autonomies in Bolivia: Elements for a Discussion,” Inter-American Development Bank, Policy Brief No. 122.

right of self-government, of making its own laws and administering its own affairs.” Rondinelli et. al’s (1983) definition of “devolution,” therefore, implies autonomy and local self-government instead of these governments being an agent of a higher-tier of the state. Item 10 of the Charter of Democracy (2006), the magna carta underlying the 18<sup>th</sup> Amendment, clarifies that the notion of “devolution” that the framers of the Amendment, and hence 140A, had in mind corresponds closely to Rondinelli et. al.’s (1983) definition of the term. Item 10 of the Charter states that “...constitutional protection will be given to the local bodies to make them autonomous and answerable to their respective assemblies as well as to the people.” This is a clear commitment to the constitutional protection of local governments that are envisaged as “autonomous” institutions of self-government. This historical evidence suggests that the 18<sup>th</sup> Amendment does not envisage local governments as “agents or creatures of the province.” The condition of “autonomy” places a limitation against any encroachment by provincial governments into a “minimum set of core functions” that allow these institutions to act as meaningful governments whether on account of centralization or by creating overlapping mandates.

78. Article 140A, in our view, suggests that the assignment of functions to the local tier remains the prerogative of the provincial legislature subject to the limitation that this tier cannot be stripped off a core bundle of functions over which it is empowered to exercise self-government. Diluting the core bundle beyond a minimum threshold through centralization is tantamount to stripping these governments of their basic functionality as a tier of government.

79. The interpretation of Article 140A is that while local government legislation comes under the purview of the provincial legislature, this does not make provincial governments the “controlling authority” of local governments. While this interpretation acknowledges that local governments will have to function within the substantive framework established by the provincial legislature, it also makes clear that any framework established by the provincial legislature has to conform to Article 140A and, hence, devolve a meaningful set of core local functions to comply with this provision. It is, therefore, important for provincial legislatures to review the existing assignment of functions to ensure that this set fulfills the condition that local governments have been provided a meaningful core bundle of functions on which provincial departments do not have overlapping jurisdictions. Failure to meet the latter condition will limit the local governments’ ability to act as institutions of self-government, which is not consistent with Article 140A.

80. Gough<sup>66</sup> (2009, pp. 22-27) has conducted a comparative analysis of local functional assignment for England, South Africa, Canada, Australia, Netherlands, Germany, France and Netherlands. This sample includes unitary and federal states. He finds that in all these countries “there is a core of activities,” with local governments that include town and local planning, waste collection and disposal, some utilities usually water, local roads, some public transport and amenity services that include parks and open spaces, sports and leisure and cultural facilities. Similarly, the United Cities and Local Governments Global

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<sup>66</sup> Gough, R. (2009). “With a Little Help from my Friends: International Lessons for English Local Government”. Localis, London.

Report 2008<sup>67</sup> surveys the assignment of functions in around 85 countries across all regions of the globe and finds that “(m)ost countries have devolved a core set of local functions”... that include “local public services, like water connections, streets, solid waste, local markets, urban and land use planning, and primary care in health...and sometimes economic development and housing. ” Bardhan and Mookherjee (2006) map local functional assignments for their sample of eight developing countries. They find that six out of eight of these countries assigned primary education and health and welfare programs to local governments. They also find that all countries in their sample had assigned local infrastructure, which includes local roads, water, sanitation and town planning to the local tier. This analysis shows that comparative analysis can be a useful method of determining a minimum core set of activities for local governments by the provincial legislature. The main limitation with this method is finding the right comparison group.

81. The theory of fiscal federalism provides guidelines for assigning expenditure and regulatory functions across different tiers or spheres of government. The basic argument proposed by the literature on fiscal federalism is that functions are provided most efficiently “by the jurisdiction having control over the minimum geographic area that would internalize benefits and costs of such provision” (Frey and Eichenberger 1999)<sup>68</sup>. Put more simply, functions should be allocated to a tier of local government whose boundaries are defined by the area

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<sup>67</sup> United Cities and Local Governments (2008). “First Global Report”, Spain.

<sup>68</sup> Frey, B. S. and R. Eichenberger (1999). “The New Democratic Federalism for Europe. Functional, Overlapping and Competing Jurisdictions”. Edward Elgar Publishing Limited, Cheltenham.

in which citizens enjoy the benefits of the provision. For example, the benefits of national defense and foreign policy are enjoyed by all citizens and hence the function should be assigned to the federal government. On the other hand, the benefits of street lighting are only enjoyed by households living in a street and their visitors and may be assigned to a neighborhood council. This is also called the decentralization theorem (Oates 1972<sup>69</sup>). The underlying premise of this principle is that localities differ in their needs and preferences. Efficient delivery in this context implies cost-effective provision that corresponds to the needs and preferences of a particular locality. The local tier is argued to result in more efficient provision as it is likely to be better informed about the specific needs and preferences of the local community (Glaeser 2012, Faguet 2004, Shah 1999)<sup>70</sup>. Second-generation theories of fiscal federalism ground the argument for decentralization in political economy (Mookherjee 2015, Weingast 2013)<sup>71</sup>. This literature argues that decentralization is likely to improve service delivery outcomes by enhancing political accountability, expanding the pool of quality political leadership and enhancing citizen participation. There are three different variants of the political accountability argument in the

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<sup>69</sup> Oates, W. E. (1972). "Fiscal Federalism". New York: Harcourt Brace Jovanovich.

<sup>70</sup> Glaeser, E. L. (2012). "Urban Public Finance," National Bureau of Economic Research, Working Paper No. 18244; Faguet, J. P. (2004). "The Decentralization Increase Local Responsiveness to Local Needs? Evidence from Bolivia," *Journal of Public Economics*, 88; Shah, A. (1999). "Expenditure Assignment: Decentralization Briefing Notes", World Bank, Washington, DC.

<sup>71</sup> Mookherjee, D. (2015). "Political Decentralization," *The Annual Review of Economics*, 7; Weingast, B. R. (2013). "Second Generation Fiscal Federalism: Political Aspects of Decentralization and Economic Development, *World Development*, Vol XX.

literature. Cremer et. al. (1995)<sup>72</sup> and Seabright (1995)<sup>73</sup> argues that decentralization combined with local democracy results in efficient provision by enhancing the accountability of local providers (Mookherjee 2015). The main argument is that accountability is strengthened under decentralization because the welfare of local citizens determines the re-election of government. The same is not true of centralization as the local area votes do not matter as much for the re-election of higher tier governments. This literature also argues that centralized provision is likely to result in considerable misallocation of resources as the minimum political coalition governing the central tier may not include or be dominated by representatives of a particular locality (Besley and Coate 2003, Lockwood 2002)<sup>74</sup>. Besley and Case (1995)<sup>75</sup> argue that a comparative advantage of decentralization is that it permits yardstick competition that can be used by citizens to benchmark their government's performance against other governments (Mookherjee 2015). This benchmarking can be used to discipline governments through the electoral mechanism, which will enhance political accountability. A different strand of the literature argues that devolved systems increase the quality of political leadership as they become screening devices for governance talent. This is because governing local governments

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<sup>72</sup> Cremer J, A. Estache and P. Seabright (1995). "The decentralization of public services: lessons from the theory of the firm" in A. Estache (eds.) *Decentralizing Infrastructure: Advantages and Limitations*, World Bank: Washington, DC.

<sup>73</sup> Seabright, P (1996). "Accountability and Decentralization in Government: An Incomplete Contracts Model," *European Economic Review*, 40.

<sup>74</sup> Besley T and S. Coate (2003). "Centralized versus Decentralized Provision of Local Public Goods: A Political Economy Approach," *Journal of Public Economics*, 87; Lockwood, B (2002). "Distributive Politics and the Costs of Centralization," *Review of Economic Studies*, 69.

<sup>75</sup> Besley T. and A. Case (1995). "Incumbent Behavior: Vote-seeking, Tax-setting and Yardstick Competition," *American Economic Review*, 85.

allows local political leaders to develop reputations for governance, which they can use to become contenders for higher level office (Myerson 2014, Cheema, Khan and Myerson 2015).<sup>76</sup> Local governments have been critical in providing leadership for higher tiers in countries as diverse as Turkey, China and the United States. An important complementary argument to the decentralization theorem is the need for a clear assignment of responsibility between different tiers of government (Dollar and Hoffman 2008, Shah 1999)<sup>77</sup>. This is because the absence of a clear assignment could result in unfunded mandates for local governments because of encroachment by the higher tiers. It also compromises accountability as citizens are unclear which tier of government has the primary responsibility for delivery. This may well result in voter disillusionment with local governments.

82. There is a consensus that decentralized provision is inefficient for functions that result in inter jurisdictional spillovers and entail economies of scale. Spillovers arise when non-residents enjoy the benefits or bear the costs of provision by a local government. The case where a district government sets up factories that dump waste water in the neighboring district is an example of negative spillovers. However, if the same factories create employment for workers residing in the neighboring districts this is an example of positive spillovers.

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<sup>76</sup> Myerson, R. (2014). Constitutional Structures for a Strong Democracy: Considerations on the Government of Pakistan,” *World Development*, 53; Cheema, A., A. Q. Khan and R. Myerson (forthcoming 2015). “Breaking the Countercyclical Pattern of Local Democracy in Pakistan,” in J. P. Faguet (eds) *Is Decentralization Good for Development: Perspective from Academics and Policymakers*, Oxford University Press.

<sup>77</sup> Dollar, D. and B. Hofman (2008). “Intergovernmental Fiscal Reforms, Expenditure Assignment and Governance,” in J. Lou and S. Wang (eds.) *Public Finance in China*, World Bank: Washington, DC.



Negative spillovers create a problem because they have created costs for a jurisdiction that has no political or contractual control over the extent of the provision. Positive spillovers are an issue because the citizens of the neighboring district are enjoying a benefit for which they are bearing no cost. Therefore the presence of spillovers provides a justification for centralizing functions in high-tier governments or establishing institutions that can coordinate between different local governments. The principle is that the function should be assigned to a jurisdiction whose boundary includes all citizens who benefit or lose from the provision of a function with spillovers. The larger the spillovers the higher the tier to which the function needs to be assigned (Mookherjee 2015, Shah 1999, Oates 1972).

83. In conclusion, the principle proposed by the literature is that local governments should be assigned functions that do not entail spillovers and also do not entail significant economies of scale to justify provision by a higher tier of government or mechanisms created enabling local governments to act together. In the case of spillovers and economies of scale functions should be assigned to higher tiers of government. In any analysis of roles, relationships and functions, the principal of ‘subsidiarity’ is critical.” This principle can be used by the provincial legislature for the local assignment of functions. It states that the lowest level of government should deliver government services because it knows the demands from consumers-voters best unless significant spillovers and economies of scale exist. It is important to point out that this principle delimits the domain of different tiers of governments on both a geographical and functional basis (Faguet 2011). The principle of subsidiarity has been used as an underlying

principle of functional assignment in a range of jurisdictions. It has been used in the European Charter for Local Governments (Article 4(3)), as part of the South African Constitution (Articles 151(4) and 158 (4)) and the French Constitution among others (Article 72). The principle of subsidiarity has also been recognized as critical by the Independent Metropolitan Local Government Review Panel (2012) in Australia.”

**Local Governments as institutions that strengthen federal democracy**

84. Professor Roger Myerson,<sup>78</sup> 2007 Nobel Laureate in Economic Sciences and Professor at the University of Chicago, as an *amicus*, made his submissions through email in the following manner: “I have taken the time to study and write about Pakistan's local governments because I share people's hopes building stronger federal democracy in Pakistan and because I see compelling theoretical reasons why democratic local government may be vital for building stronger democracy at all levels in Pakistan. The key to successful democratic development is to increase the nation's supply of leaders with good reputations for managing public resources responsibly for public service.<sup>79</sup> The large number of elected local offices

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<sup>78</sup> <http://home.uchicago.edu/~rmyerson/research/rbmvita.pdf>

<sup>79</sup> Myerson, R (2014). "Local Foundations for Better Governance: A Review of Ghazala Mansuri and Vijayendra Rao's Localizing Development," World Bank Policy Research Working Paper 7131 (2014); Cheema, A., A. Q. Khan and R. Myerson (forthcoming 2015). "Breaking the Countercyclical Pattern of Local Democracy in Pakistan," in J. P. Faguet (eds) *Is Decentralization Good for Development: Perspective from Academics and Policymakers*, Oxford University Press; Fortmann, L (1983). "The Role of Local Institutions in Communal Area Development," Gaborone, Botswana: Applied Research Unit, Ministry of Local Government and Lands, 1983.

should offer the greatest number of opportunities for local leaders to begin developing such reputations for good public service. Elected offices in local, provincial, and national governments should form a ladder of democratic advancement, on which politicians can hope to rise by providing better public service to their constituents. Then parties can gain greater confidence of voters in provincial and national elections by nominating trusted candidates with proven records of good service in local government...on the question of local control of city planning and infrastructure development, there are good reasons to believe that locally elected governments can help economic development by providing better mechanisms for local public investments.<sup>80</sup> When the quality of a local public investment can be observed only by local residents, then the official who has responsibility for the public investment can be held properly accountable for its quality only by local voters. A poor community can mobilize its resources for public investments that are essential for its economic development only when members of the community are coordinated by local leaders whom they can trust to appropriately reward contributors and discipline free-riders. Such trust can be expected only from leaders whose authority is based on local politics.”

***Pakistan’s federalist state and the doctrine of separation of powers.***

85. “The doctrine of separation of power divides power horizontally, between institutions at the same tier. The division

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typically takes place between three bodies; the legislature, executive, and the judiciary. Whatever conception of separation of powers a people embrace, the animated theme of the doctrine of separation of powers is to prevent power from vesting in a single body. Typically this is thought to preserve liberty as the concentration of authority is avoided...It is worth noting that the doctrine is also thought to encourage democratic deliberation. Because competing claims are constantly asserted, dialogue is facilitated, and through pretending a single body from enjoying supremacy, each body *checks* and *balances* one another.<sup>81</sup>” Madhav Khosla<sup>82</sup> has argued that this doctrine moves beyond its typical parliamentarianism, as the constitutions also provide for an internal separation of powers within all the three traditional branches of government and in this way shape the institutional dynamics of democracy. Federalism introduces vertical separation of powers within the same institution. The Provincial legislature under Article 140A has promulgated PLGA and assigned certain executive powers to the elected local government creating a vertical separation of powers between the executive authority of the Provincial Government and the Local Government. On this construct stands our federalist state and the Local Government System. This vertical separation can be maintained if the political, administrative and financial autonomy of the political units is protected down the democratic ladder. This vertical separation of power is buttressed by Article 17(2) of the Constitution whereby every person has a fundamental right to form or be a member of a political party so that he can participate in the political life of the country. This right would be rendered

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<sup>81</sup> Madhav Khosla, *The Indian Constitution*. Oxford. p.2

<sup>82</sup> *ibid.*

meaningless if the elected political party in the Local Government System is not allowed to function in the devolved political, administrative and financial space allowed by the provincial legislature and if the citizen is not permitted to participate in this political space. Any provincial law that thwarts or restricts the elected local government from performing its functions under the law offends Article 17(2) of the Constitution. The principles of political and social justice guaranteed under the Objectives Resolution to our Constitution and now substantive part of our Constitution under Article 2A further support this vertical separation. Therefore, when the clearly delineated devolved powers of the local government are in any manner abridged, diluted or impeded by the provincial government or through its instrumentalities like the LDA, it offends the constitutional principles of political and social justice besides the fundamental rights to life, dignity and political participation.

86. PLGA succinctly captures the constitutional obligation in its preamble which states: “Whereas it is expedient to establish an elected local government system to devolve political, administrative and financial responsibility and authority to the elected representatives of the local governments; to promote good governance, effective delivery of services and transparent decision making through institutional participation of the people at the local level...” PLGA establishes (section 6) a number of local areas namely: Lahore District as the Metropolitan Corporation; rural area in a district, other than the Lahore District, as a District Council; urban area in a district, other than the area of a Municipal Committee, as a Municipal Corporation and urban area in a district, other than the area of a Municipal Corporation, as a Municipal Committee. In the

present case, we are concerned with the Lahore Metropolitan Corporation (LMC). The local governments constituted under PLGA are Metropolitan Corporation for Lahore, Municipal Corporation, Municipal Committee, District Council, Union Council, District Education Authority and District Health Authority. The Metropolitan Corporation is a body corporate having perpetual succession and a common seal, with the power to acquire, and hold property, enter into contracts, sue and be sued in its name (section 86). The functions of MCL, *inter alia*, are as follows:

- (a) approve spatial plans, master plans, zoning, land use plans, including classification and reclassification of land, environment control , urban design , urban renewal and ecological balance.
- (b) Approve proposal for public transport and mass transit systems, construction of expressways, flyovers, bridges , roads, under passes and inter town streets;
- (c) Approve development schemes for beautification of urban areas;
- (d) Develop integrated system of water reservoirs, water resources, treatment plants, drainage, liquid and solid waste disposal, sanitation and other municipal services;
- (e) Execute and manage development plans;
- (f) Exercise control over land-use, land sub-division, land development and zoning by public and private sectors for any purpose, including agriculture, industry, commerce markets, shopping, and other

employment centres, residential, recreational , parks, entertainment, passenger and transport freight and transit stations:

- (g) Roads and streets;
- (h) Traffic planning , engineering, parking places, transport stations, stops, stands and terminals;
- (i) Environmental control , including control of air, water and soil pollution in accordance with federal and provincial laws and standards;
- (j) Undertake urban design and urban renewal programmes;
- (k) Undertake landscape, monuments and municipal ornamentation;
- (l) Prepare budget, revised budget and annual and long term municipal development programmes.
- (m) Approve rates and fees;
- (n) Collect approved taxes, fees, rates, rents, tolls, charges , fines, and penalties;
- (o) Develop and manage schemes, including site development;
- (p) Prepare financial statements and present them for internal and external audit in the manner prescribed.

These provisions clearly delineate the devolved *core functions and responsibilities* of the local government (LMC).

87. The Mayor is the executive head of a Metropolitan Corporation (section 89). Chief Officer is responsible for coordination and other functions (section 90). Financial

devolution provide for local government finance under the PLGA which includes the establishment a Local Fund and maintenance of a Public Account (section 100). Through Punjab Finance Commission (section 110), the financial share of the local governments is transferred to the local governments as Provincial Allocable Amount, which provides the financial autonomy to the local government to plan, undertake and execute the local government functions. As a part of the financial devolution, the Local Government has been authorized to levy taxes under, fee, rates, etc under section 115.

88. Regarding matters that concern more than one local government either due to ‘spill overs’ or due to “economies of scale” e.g., the setting up of a highway or a dam or laying pipelines or transmission lines through the Province, etc. These matters move upto higher level of government and do not remain within the core functions of the local government. These matters can best be resolved through political dialogue and negotiations and the Punjab Local Government Commission, besides other functions, plays this vital role of coordination.

89. Section 4 which provides that the local government shall work within the Provincial framework and shall faithfully observe the Federal and Provincial laws. Provincial framework is not a term of art or a term defined under PLGA. Dictionary meaning of the word “Framework” is a basic structure underlying a system. Provincial framework, in legal parlance, cannot mean more than the sum total of all the provincial legislation, primary or subordinate. Hence all the laws, rules, regulations and instructions form part of the Provincial framework. Section 4(1) requires the Local Government to **work within** the Provincial framework. This to us means that



the elected Local Government while performing its devolved functions under the PLGA, will be complimented by the Provincial framework. It is not to mean that the Provincial framework will restrict, impede, interfere or dilute the powers or the functionality of the Local Government. In case of any conflict between the Provincial framework, which does not include PLGA, which enjoys special status and protection under Article 140A, the devolved powers under the PLGA will take preference over the provincial law and hence allow the local government operating under the said law to maintain its autonomy. If the provincial laws are allowed to usurp or trump these devolved responsibility and authority of the local government under PLGA, it would render Article 140A otiose besides offending the constitutional values of democracy, political, economic and social justice, which are guaranteed to the citizens under the Objectives Resolution. Further constitutional support comes from the constitutional Principles of Policy which encourage local government institutions [Article 32] and direct to decentralize the government administration so as to facilitate expeditious disposal of its business to meet the convenience and requirement of the public [Article 37(i)]. Article 29 of the constitution mandates that it is the responsibility of each organ or authority of the State to act in accordance with the Principles of Policy in so far as they relate to the functions of the organ or authority. This means two things: One that any organ or authority of the State will act in accordance with the Principles of Policy. For example in this case, the functions devolved to the local governments under PLGA have to be exercised by the Local Government to the exclusion of the Provincial Government. Second, which is a natural corollary, that the organ or authority, will not take any

step that reverses or rolls back what has already been achieved in realization of the Principles of Policy.

90. Another dimension is that Areas falling outside the jurisdiction of LDA are still being governed by the Local Governments. The residents of LMC are, therefore, materially disadvantaged and discriminated as their right to participate in the democratic process at the local level stands usurped, offending Article 25 of the Constitution.

91. The legislative competence of the provincial legislature is ‘subject to the Constitution’ under Articles 142 and 143. It is typically considered to be subject to two limitations. The first limitation is that no legislative action can violate fundamental rights and the second, that the legislature has the competence under the Constitution to make the law. Understanding of the legislative power by drawing these two limitations might not be correct. The legislative power under the Constitution (Articles 142 and 143) is to be exercised “**[s]subject to the Constitution**” or in other words subject to the other provisions or other constitutional values of the Constitution. Therefore, other than the two limitations, the remainder of the Constitution has to be considered. In this case, the remainder of the Constitution includes the constitutional values of Federalism, the guaranteed principles of political and social justice under the Objectives Resolution, the Principles of Policy under Articles 32 and 37(i), the mandate under article 140A and the fundamental rights under articles 9, 14, 17 and 25. Provincial Legislature while legislating will be fashioned by these constitutional limitations. The legislative powers exercised under Article 140A (PLGA) advances the federal character of our Constitution and prevail over other provincial laws that comes in conflict with it.

92. Section 4(2) of PLGA provides that the local government shall not impede the executive power of the Provincial Government. Local Government System, while drawing its design and recognition from the constitution, draws its powers from the provincial legislature. The executive authority of the Local Government is punctuated by legislation. The executive authority of the provincial government, in the absence of any legislation, in any case, cannot extend to the affairs of the local government which operates under a legislative structure.

**LDA Act, 1975**

93. LDA Act, 1975 (“**LDA Act**”) promulgated on 03.04.1975 provides for the constitution of Lahore Development Authority (LDA). The preamble to the LDA Act provides for the establishment of a comprehensive system of metropolitan planning and development in order to improve the quality of life in the area of Lahore Division, establish an integrated metropolitan and regional development approach and a continuing process of planning and development, to ensure optimal utilization of resources, economical and effective utilization of land and to evolve policies and programmes relating to the improvement of the environment of housing, industrial development, traffic, transportation health education, water supply, sewerage, drainage, solid waste disposal and matters connected therewith and incidental to. The Chief Minister, Punjab is the Chairman of the Authority [Section 4(3)] alongwith six elected representatives to be nominated by the Government, Chairman, Planning and Development Board of the Government, Secretary Finance, Secretary Housing, Urban Development and Public health Engineering Department, Secretary Local Government and Community Development

Department, Commissioner, two technical experts to be appointed by the Government, Director General and all Managing Directors.

94. Powers and functions of LDA (section 6) include the following:

“6. Powers and Functions of the Authority.--- (1) Subject to the provisions of this Act and any rules framed thereunder, the Authority may exercise such powers and take such measures as may be necessary for carrying out the purposes of this Act.

(1) Without prejudice to the generality of the foregoing sub-section, the Authority shall—

(i) Initiate and maintain a continuous of comprehensive development planning for the area with the objective of preparing a [and implementing master plan];

(ii) Periodically update such [“master plan”] and coordinate its implementation by the Authority [and] other Government Agencies, within the Area;

(iii) Develop, operate and maintain water-supply, sewerage and drainage systems within the service area of the Water and Sanitation Agency to be established under Section 10 (2) of this Act.

(iv) Prepare Annual Development Programme for the area, ensure compliance of the Annual Development Programme with priorities established in the “master plan” after its preparation, and evaluate performance under the Annual Development Programme at the end of each year;

(v) Establish, maintain and periodically revise as necessary, planning, controls and building regulations for the area to—

- (a) Provide appropriate urban design and pretext publish safety;
  - (b) Ensure compliance with the “master plan” after its preparation; and
  - (vi) Take all steps and measures necessary for the implementation and enforcement of the provisions of clauses (i) to (v) above.
- (3) Without in any way restricting the scope of subsections (1) and (2), the Authority may--
- (i) prepare, implement and enforce schemes for environmental improvements, housing, urban renewal including slum improvement and re-development, solid waste disposal, transportation and traffic, health and education facilities and preservation of objects or places of historical archaeological, scientific, cultural and recreation importance;
  - (ii) take any steps or adopt and measures for the fasce lifting and beautification of the area;
  - (iii) Acquire property both movable and immovable;
  - (iv) Sell, lease, exchange or otherwise dispose of or grant licence of concessions in respect of any property vested in it;
  - (v) Undertake any works and incur any expenditure;
  - (vi) Procure machinery, instruments or any other material required by it;
  - (vii) Enter into contracts;
  - (viii) Cause studies, surveys, experiments or technical researches to be made or contribute towards the cost of any such studies, surveys, experiments or technical researches, made by any other Agency;
  - (ix) Issue interim development orders for areas for which a scheme is under preparation and restrict or regulate by

general or special order any change in the use of land alteration in building structures and installations;

- (x) Cause removal of any works obstructing the execution of its schemes.
- (xa) Construct, maintain, upgrade and exclusively charge toll on roads, bridges, flyovers, underpass or such other facilities within the areas, and grant concessions in respect thereof;
- (xi) Seek and obtain advice and assistance for the preparation of any scheme, or for the execution of any scheme from any Government Agency or person, and such Agency or person shall give the advice and assistance sought by the Authority to the best of its ability, knowledge and judgment and the additional expenditure, if any, involved in giving such advice or assistance shall be borne by the Authority; and
- (xii) Establish as many Agencies as it may consider necessary.

Majority of these functions relating to urban development stand devolved to the local government (LMC) under section 87 of the PLGA .

95. LDA can prepare “schemes” under the LDA Act (section 13). “Scheme” means a project approved for urban development, redevelopment or renewal and includes larger area plan, areas specified and notified for specific use, traffic control plans, classification and reclassification plans, housing scheme or zoning scheme [section 3(w)]. The schemes are prepared and then executed by the LDA in the “Area,” which means the Lahore Division [section 3(c )] subject to the approval of the Government. Section 13(5) specifically provides that a “Government Agency” (which includes a local government [section 3(m)(ii)]) shall not prepare a planning or

development scheme within the Area except with the concurrence of LDA. Similarly, LDA has the power to prepare housing, building infrastructure services, commercial and semi-commercial projects (section 13A) or do land use classification (section 14), make master plan (section 14A ), or give direction to the local government to execute a scheme in consultation with the Authority, or take over and maintain any of the works and services in that area, to provide amenity in relation to the land which in the opinion of the authority ought to be provided and to enforce regulations on behalf of the Authority (section 15). General power to execute Schemes (section 16). LDA can declare any locality within an area to be controlled area and issue such directions for the prevention of haphazard growth or encroachments and unauthorized construction in such area (section 18). Power to remove sources of pollution (section 20). Imposition of betterment fee (sections 23 and 24). LDA enjoys the power to impose rates, fees, surcharges or other charges and fines (section 28). Extension of time and cancellation of approved schemes (Sections 34A and 34B). Punishment for offences (section 35). Conversion of property to different use (section 38). LDA Act is to override other laws (section 46). All these powers usurp the responsibilities and authorities devolved to the local government under PLGA and offend the constitutional mandate of article 140A.

96. **For the above reasons, the powers and functions of LDA under sections 6, 13, 13A, 14, 15, 16, 18, 20, 23, 24, 28, 34A., 34B, 35, 38 and 46 of LDA Act, 1975 to the extent that they usurp, trump, encroach, dilute and abridge the powers, responsibility and authority devolved on to the elected representatives of the Local Government System under Article 140A through PLGA are therefore, declared ultra**

**vires Articles 9, 14, 17 and 25 of the Constitution and further declared to be offensive to Articles 32, 37(i) and 140A of the Constitution.**

97. LDA, however, does continue to be a development authority of the Provincial Government for the assistance of the Provincial Government but it cannot assume jurisdiction or interfere in the political, administrative and financial powers devolved on to the local government through PLGA under Article 140A. It matters less if LDA Act has undergone amendment after the promulgation of PLGA. The constitutional mandate to devolve and establish a local government system, once devolved, cannot be usurped through subsequent collateral legislation. The Provincial Legislature has the power to alter or withdraw the devolved powers subject to the principles of subsidiarity and federalism discussed above but till then the said powers are protected under the vertical separation of powers introduced by Article 140A of the Constitution and no provincial or federal legislation can impair or impede the political, administrative and financial responsibility and authority of the elected representatives of the Local Government.

98. The Local Government is free to enter into an agreement with LDA to execute projects within the limits of the local government as provided in section 19 of the LDA Act. Therefore, in case the newly elected local governments feels technically incapacitated they may reach out to engage LDA to carry out urban development in the area but not vice versa.

99. The argument that the political representatives have yet not been elected and the local governments have not come into existence is absolutely immaterial. The constitutional mandate



to establish local government system through devolution is loud and clear. PLGA with clearly devolved political, administrative and financial powers is on the statute book. The Constitution or PLGA does not give a future timeline for the enforcement or implementation or formation of the local governments. The current delay in the elections is purely political and in violation of the law. The recent order passed by the august Supreme Court of Pakistan<sup>83</sup> in this regard is self-explanatory. Therefore, delay in holding the elections does in no manner undo devolution or by any mechanism revert power from the local governments into the hands of the Provincial Government or its statutory authorities. Elections are a consequence and not the source of devolution. Article 140A is the source and design of devolution and the provincial legislation actualizes this constitutional mandate. Delay in elections simply delays the exercise of this devolved power but cannot permit it to be exercised by another authority in the meanwhile. The failure to hold local government elections and the absence of municipal services for the benefit of the public is the sole responsibility of the executive, who have, thus far, poorly failed to discharge this Constitutional responsibility.

### **Transition**

100. We are aware that elections to the local government have been scheduled in September, 2015. We are also aware that local government elections have not been held for the last several years. Therefore, till such time the local government system is functionalized by its elected representatives, LDA may continue with its day-to-day repair and maintenance work within its area of jurisdiction and complete all the pending

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<sup>83</sup> dated 10-3-2015 in CMA no.18 of 2014 in CMA11 of 2014 in CMA 6882 of 2013 in Const P.no. 77 of 2010

projects. List of the said projects, inspite of our direction was not placed on the record by LDA. As the Signal Free Corridor Project has not commenced in terms of Section 12 of PEPA and the EIA has already been set aside by this Court, proceedings with the said Project by the respondent LDA would be in violation of Article 140A of the Constitution. Therefore, the initiation of the said Project by respondent LDA is also struck down as being unconstitutional. Respondent LDA may propose the establishment of the Project to the elected local government system and it is up to the elected Local Government to approve the same in accordance with law.

**Accountability of the officers**

100A. It is noticed with concern that the LDA proceeded with the *Project* at the cost of causing loss to the public exchequer and inconvenience to the residents of Lahore. EPA also failed to take action against LDA for unlawfully allowing the construction to continue without obtaining the environmental approval. We have been informed that Rs 60 million, of taxpayers' money, has been spent so far, till the Project was stopped through an interim order passed by this Court in W.P. No.5323/2015. These administrative excesses need to be checked and delinquent officers held accountable or else these grave lapses and blatant lawlessness will continue without remorse and regret. We, therefore, direct the National Accountability Bureau (NAB) to initiate an inquiry against the DG, LDA and the DG, EPA for failing to comply with the law and to account for the loss of public money to the tune of Rs 60 million. National Accountability Bureau shall submit its Report within two months with the Registrar of this Court. In case the Report is not filed, this case will be put up for hearing on the judicial side for necessary orders.

101. These are detailed reasons for the Short Order announced in open court on 17.04.2015 and is reproduced in **Schedule-I** for reference.

102. For the above reasons this petition alongwith petitions listed in **Schedule-II** are allowed.

**(Syed Mansoor Ali Shah)**  
Judge

**(Ayesha A. Malik)**  
Judge

**(Muhammad Yawar Ali)**  
Judge

*M. Tahir\**

**APPROVED FOR REPORTING**

**SCHEDULE-I**

"Subject to the main judgment to be released later, we are issuing the following short order. It is qualified that this short order in no manner limits the scope of the main judgment which may discuss other aspects of the case and include directions and orders which are not reflected in this short order:

- i. The Local Government System has been fully recognized as the third tier of Government by the Constitution under Article 140A of the Constitution of the Islamic Republic of Pakistan, 1973. Elected Local Government System at the grass root level is pivotal for a strong and robust democracy and actualizes the constitutional vision.
- ii. The constitutional mandate of an elected Local Government System cannot be diluted or encroached upon. Therefore, the provisions of Lahore Development Authority Act, 1975 (to be spelled out in detail in the main judgment) to the extent that they are in conflict with the powers and functions assigned to the Local Government System or in any manner assume powers and function devolved to the Local Government, in this case, Lahore Metropolitan Corporation, under the Punjab Local Government Act, 2013 are declared to be unconstitutional and *ultra vires* Article 140A and the concomitant fundamental rights of the people.
- iii. As a consequence thereof, the powers and functions of LDA shall always remain subject to Article 140A and Punjab Local Government Act, 2013.
- iv. Till such time that the Local Government elections are held, which are scheduled for September, 2015, LDA

will only attend to its existing on-going projects and the day-to-day work regarding repair and maintenance but shall not embark upon any new project which encroaches upon the powers of an elected Local Government System under the Punjab Local Government Act, 2013.

- v. The approval of Environmental Impact Assessment (“EIA”) for the construction phase of the *Signal Free Corridor Project* (“Project”) granted by the Director General, Environmental Protection Agency (“EPA”), Punjab dated 19.03.2015 is declared to be without lawful authority.
- vi. Considering that the Project has not commenced in terms of Section 12 of Punjab Environmental Protection Act, 1997, the said Project, if at all, can only be initiated after seeking permission/approval from the concerned elected Local Government System, as and when it is formed.
- vii. LDA and its contractor are directed to remove all the construction equipment and construction works from the site of the Project forthwith and restore the roads to its original position in the best possible manner.
- viii. The concerned Officers of LDA and the EPA/EPD shall be held personally accountable for allowing the Project to be mobilized on the site, causing traffic disturbance to the public, without first obtaining the approval of the EIA as mandated under section 12 of PEPA.

**(Syed Mansoor Ali Shah)**  
Judge

**(Ayesha A. Malik)**  
Judge

**(Muhammad Yawar Ali)**  
Judge

**SCHEDULE –II**

| <b><u>Sr. No.</u></b> | <b><u>Writ Petition</u></b> |
|-----------------------|-----------------------------|
| 1.                    | W.P. No.5323/2015           |
| 2.                    | W.P. No.8008/2015           |

**(Syed Mansoor Ali Shah)**  
Judge

**(Ayesha A. Malik)**  
Judge

**(Muhammad Yawar Ali)**  
Judge

*M. Tahir\**