

**JUDGMENT SHEET**  
**PESHAWAR HIGH COURT, PESHAWAR**  
**JUDICIAL DEPARTMENT**

**Writ Petition No.4684-P/2016**

**JUDGMENT**

Date of hearing...13.04.2017 (Announced on 17.05.2017)

Petitioner: (Wali Muhammad) by Barrister Babar Shahzad Imran, Advocate.

Respondents:(Government of Khyber Pakhtunkhwa through Chief Secretary and others) by Mr.Waqar Ahmad Khan, Additional Advocate-General alongwith Ms.Tanzeela Sabahat, Additional Secretary P&D Department and M/s Shumail Ahmad Butt and Hazrat Bilal, Advocates.

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**YAHYA AFRIDI, C.J.-** Wali Muhammad Khan,

the worthy member of the Khyber Pakhtunkhwa

Provincial Assembly from PK-59 Battagram, seeks

the constitutional jurisdiction of this Court, praying

that:-

*“It is, therefore, most respectfully prayed that on acceptance of this constitutional petition, this Honourable Court may be pleased to Order/Decree:*

- a. That the letter No.125/1-H dated 22.07.2015 of the respondents be kept intact & the petitioner be allowed to identify the feasible site to process PC-I, PC-II as per Development Scheme of 150845-Construction/Improvement & black topping of (a) Internal roads of Tehsil Battagram & (b) Thakot Bana Road via Kar Kalay Koz Cheena District Battagram in ADP 2015/2016 reflected as ADP No.1151/150845 (2015-2016) &*

*work be done only on those sites.*

- b. Set aside the request dated 14.09.2015 of Members Local Council Battagram identifying projects to be completed under ADP No.1151 as illegal, void ab initio & contrary to law.*
- c. Set aside the notification dated 05<sup>th</sup> Oct, 2015 of the respondents approving internal roads as per ADP No.1151 on the request of District Nazim Battagram as illegal, void ab initio and contrary to law.*
- d. Set aside the letter dated 24.11.2016 of the respondents approving revised Administrative approval for the implementation of scheme under ADP No.1059/150845 (previously ADP No.1151 in 2016/2017) for roads identified by LG's on the request of District Nazim Battagram as illegal, void ab initio & contrary to law.*
- e. Set aside the Tender advertised via advertisement dated 24<sup>th</sup> Nov, 2016 of the respondents for roads identified by LG's on the request of District Nazim Battagram as illegal, void ab initio & contrary to law.*
- f. Restrain the Approval, Work Order & the whole Tender Process advertised via advertisement dated 24<sup>th</sup> Nov, 2016 of the respondents for roads identified by LG's on the request of District Nazim Battagram as illegal, void ab initio & contrary to law.*
- g. That the allocation of funds to non-members of the Provincial Assembly be declared null and void and the Provincial Government be directed to allocate developmental funds to all the members equally without discrimination.*

2. In essence, the contentions of the petitioner are that he contested in the general election held in May, 2013 on Pakistan Muslim League (Nawaz) ticket and was declared the returned candidate from PK-59 Battagram seat of Khyber Pakhtunkhwa Provincial Assembly; that he is being discriminated against by the Provincial Government for his party affiliation in illegally approving developmental projects in his constituency; that the unlawful influence of District Nazim, Battagram affiliated to the ruling Pakistan Tehreek-e-Insaf Party (“PTI”) and that too in violation of law, and in particular, the Khyber Pakhtunkhwa Establishment of District Development Advisory Committee Act, 1989 (“**Act of 1989**”). In this regard, he has specifically challenged the Developmental Project (ADP No.1059) Construction/ Improvement and Black Topping of (a) Internal Roads of Tehsil Batagram and (b) Thakot Bana Road via Kar Kalay Koz Cheena District Battagram (“**Objected Scheme**”).

3. The worthy counsel for the petitioner confined his legal submissions to section 3 of the Act of 1989, which he vehemently contended clearly mandated that the selection of site and allocation of

projects within a district would fall within the domain of District Development Advisory Committee (“DDAC”), and the *Objected Schemes* introduced by the District Nazim Battagram, without it being approved by the DDAC is a clear violation of the law.

4. The official respondent-Department in response to *Objected Scheme* explained that it was reflected in ADP 2015-16 at Sr.No.1151/150845 with an estimated costs of Rs.2500.00 million, and after its approval by Planning and Development Department (“P&D”) was referred to Communication and Works Department (“C&W”) for preparation of PC-1, which was finally approved by the Provincial Development Working Party (“PDWP”) headed by Additional Chief Secretary, and has now been put to its execution through a public notice, which has been challenged and stayed by this Court in the instant petition.

5. The worthy Additional Advocate General admitted that the District Nazim, Battagram approached the Chief Minister Khyber Pakhtunkhwa for the inclusion of the *Objected Scheme* in the ADP for the year 2016-17. He further contended that the *objected project* was processed and finally approved

by PDWP and the tenders have been invited through publication. On the constitutional stand, the worthy AAG contended that the *Executive Authority* of the Province under the Constitution of Islamic Republic of Pakistan, 1973 (**“Constitution”**) vested in the Chief Minister and his Cabinet having full spectrum of powers available to it for carrying out development activities after the required authorization from the Provincial Assembly under Article 122 of the Constitution, which in the case in hand culminated in Khyber Pakhtunkhwa Finance Act, 2016. As for the scope of DDAC, it was contended that the developmental activities carried out by or under the directions of the Provincial Government were beyond the scope of the DDAC under the Act of 1989. It was further contended that the Act of 1989 did not aim to exclude the powers of the Provincial Government for carrying out any developmental activity in any District of the Province. He finally opposed the legal claim of the petitioner in regard to the domain of DDAC, contending that the same if allowed would result in violating the powers of the Provincial Government under the Constitution and the same cannot be abridged except by a constitutional amendment.

Finally, it was argued that the subject of Communication and Works has been devolved upon the District Government under the LGA 2013, as per *Entry 21* of the *First Schedule* provided therein.

6. The District Nazim, Battagram, the private respondent, who had the *objected scheme* included in the ADP took serious legal objection to the very maintainability of the petition and emphasized the diminished legal influence and effect of the Act of 1989 after the promulgation of the Khyber Pakhtunkhwa Local Government Act, 2013 (“**LGA 2013**”). The worthy counsel even went to the extent of contending that the provision of sections 4 and 5 of the Act of 1989 be *read down* in view of the legal dominance of the LGA, 2013. In addition to the legal objection, on the factual side, it was brought to the attention of the Court that the petitioner had himself not come to the Court with *clean hands*, as he had requested the Chief Minister for inclusion of his scheme in the ADP, which was respected and accordingly, the scheme, without it being carried through the procedure provided under the Act of 1989, was approved as ADP Scheme No.1152-150873 titled “*Construction/ Rehabilitation/ Widening Road Chata Bata, Landay Road Chilar*”

*Sokadr Sarkhel Banda, Chapar gram Markhani and Batangi Road, (Petitioner's Scheme).*

7. In order to fully grasp the contesting claims of the parties, this Court deemed it appropriate to be apprised about the procedure involved in formulation and the various forums for approval of the development schemes in Khyber Pakhtunkhwa. Accordingly, the worthy representative of the P&D Department was requested to explain the same to the Court, which was explained in terms that;

*“Soon after independence Development Board was established early in 1948 in Economic Affairs Division. To prepare a more comprehensive national plan on Development the Government of Pakistan decided to setup a planning Board on 18<sup>th</sup> July 1953. Subsequently, on 22<sup>nd</sup> October 1958, the National Planning Board was re-designated as Planning Commission.*

*Under Article 156 of the Constitution of Pakistan, National Economic Council (NEC) was constituted. The NEC is the supreme policy making body in the economic field. It is headed by the Chief Executive of the Country. Its members include Federal Ministers incharge of Economic Ministries, the Deputy Chairman of Planning Commission and the Governors/Chief Ministers of the Provinces. The NEC is an overall control of planning machinery and approves all plans and policies relating to development. The functions of National Economic Council as envisaged are reproduced as under:*

- i. The National Economic Council shall review the overall economic condition of the country and shall, for advising the Federal Government and the Provincial Governments, formulate plans in respect of financial,*

*commercial, social and economic policies; and in formulating such plans it shall, amongst other factors, ensure balanced development and regional equity and shall also be guided by the Principles of Policy set out in Chapter 2 of part-II.*

- ii. *The meetings of the Council shall be summoned by the Chairman or on a requisition made by one-half of the members of the Council.*
- iii. *The Council shall meet at least twice in a year and the quorum for a meeting of the Council shall be one-half of its total membership.*
- iv. *The Council shall be responsible to the Majlis-e-Shoora (Parliament) and shall submit an Annual Report to each House of Majlis-e-Shoora (Parliament).*

#### **Sanctioning Powers of Approving Authorities**

*Initiating in 1959, all the schemes of the Provincial Governments and Federal Ministries costing Rs.2.5 million non-recurring and / or Rs.0.5 million recurring were required to be submitted to Executive Committee of National Economic Council (ECNEC) constituted by the Government of Pakistan. The schemes costing less than the said amounts used to be sanctioned by the Provincial Governments themselves. Subsequently, with more and more experience and expansion in the development programmes, these limits were enhanced and sanctioning powers were gradually decentralized and delegated to various authorities by the National Economic Council (NEC). Present status of these development for a duly constituted & powers delegated by NEC is as under:*

#### **1.Executive Committee of National Economic Council (ECNEC).**

*The forum is chaired by the Federal Finance Minister and its Members include Federal Secretaries of the Economic Ministers, Provincial Finance and Planning Ministers, Chief Secretaries, Additional Chief Secretaries and Provincial Finance Secretaries.*

Sanctioning Power

- i. All Federal Projects costing more than Rs.3000 million.
- ii. All Provincial Projects costing more than Rs.10000 million.

**2. Central Development Working Party (CDWP).**

The forum is chaired by the Deputy Chairman, Planning Commission and its members include Federal Secretaries of the Economic Ministries and Additional Chief Secretaries of the Provinces.

Sanctioning power: All Federal Projects costing up to Rs.3000 million.

**3. Provincial Development Working Party (PDWP).**

The forum is chaired by the Additional Chief Secretary and its permanent members include Secretaries of Finance, C&W, Local Govt. and Environment Departments.

Sanctioning Power: All provincial Projects costing up to Rs.10000 million subject to no Federal Share and less than 25% Foreign Component. Projects exceeding the limit or having the conditionality, submitted to ECNEC for final approval.

**4. Departmental Development Working Party (DDWP).**

The forum is chaired by the concerned Administrative Secretary and its members include representatives of Finance and P&D Departments.

Sanctioning Power: All Provincial ADP Projects costing up to Rs.60 million subject to no Foreign Component”.

**5. District Development Advisory Committee (DDAC)**

Composed of local MPAs of the district and headed by one of them, it is an Advisory Committee proposing different nature of scheme and location for the project out of funds received from oil

*and gas royalty, net hydal royalty and tobacco cess or any other block allocation schemes assigned to DDAC by the provincial government. The government usually honour the advice tendered by DDAC. The Committee was created under District Development Advisory Committee Act, 1989 to ensure participation of public representative in development programme at a time when local government institutions were disbanded.”*

As for the specific position in Khyber Pakhtunkhwa that too in relation to the *Objected Scheme*, and its approval, it was explained that;

“1. **Total Development Budget outlay of the Government of Khyber Pakhtunkhwa for the fiscal year 2016-17.**

*Rs161 Billion*

*{Local component Rs 125b}*

*{Foreign component Rs 36b}*

2. **Share of Local Government for the Fiscal year 2016-17** 30% of the Provincial development budget as per Section 53(a) of LGA, 2013 which comes to Rs 33.96 Million.

3. **Criteria for Distribution of 30% Development grant among the Local Governments** Under Section 53 of LGA, 2013, Provincial Finance Commission (“PFC”) is empowered to make recommendations to the Government on the formula for distribution of grant among Local Governments in the Province. However, development grant for Village Council/Neighborhood Council is to be determined on the basis of population

*For horizontal distribution weight age is given to population, poverty, lag in Infrastructure and revenue base of Local Governments.*

*In the PFC award, which is in operation since 2011, weight age is given to three parameters as follows:*

*Population 60%*

*Backwardness 20%*

*Lag in Infrastructure 20%*

*PFC Formula for the development funds of local government for 2017-18 is as follow:-*

*Population 50%*

<i>Backwardness</i>	25%
<i>Lag in infrastructure</i>	20%
<i>Revenue base</i>	5%

#### **4. ADP Preparation Process:-**

##### **Stage-I.**

*The administrative Secretaries are asked by the Planning & Development Department to submit draft ADP for the next Financial Year which, as per schedule is submitted by the end of March.*

*This is followed by the consultative meetings with the department in April.*

*By mid May, 2<sup>nd</sup> Draft is submitted in the light of Sectoral ceilings indicated by the Finance Department.*

##### **Stage-II.**

*Final Draft is presented to the Chief Minister by the end of May.*

*Finally, draft is submitted to cabinet for approval and onward submission to Provincial Assembly with Finance Bill.*

##### **Stage-III.**

*The Provincial Assembly deliberates upon the Finance Bill. What is important to note is that the projects proposed in the ADP have to be voted by the worthy members of the Provincial Assembly.*

##### **Stage-IV.**

*This is followed by preparation of PC-Is by the departments for the individual projects.*

*PC-Is, after scrutiny, are placed before Departmental Developmental Working Party/ Provincial Development Working Party for technical clearance.*

*After approval of PC-I, administrative approval is issued by the Administrative Department concerned and the execution of the project starts.*

5. **Role of DDAC-Past and Present:-**

*District Development Advisory Committees were the outcome of Act of 1989 meant to formulate and recommend, inter alia,*

- a. *Proposals for ADP of the District.*
- b. *The list of schemes to be implemented under the Rural Development Programme other than these of union councils.*
- c. *Location and selection of sites in the following sectors;*

*Primary, middle and high schools.*

*Rural Health.*

*Public Health Engineering.*

*The enactment of the LGA 2013, mandates allocation of 30% of the Provincial Development Budget to the Local Governments comprising three tiers i-e District Council, Tehsil Council, Village Council/Neighborhood Council. After approval of the district ADP from the District Council, the schemes are placed before District Development Committee for approval. Similarly, at Tehsil level there is Tehsil Development Committee. Consequently, DDAC has no role to play in the utilization of 30% development grant to local governments.*

*Nevertheless, according to the Planning and Development Guidelines (2015) for Devolved Tiers of Local Governments under Local Government Act 2013, District Development Advisory Committee will remain intact even after implementation of Local Government Act, 2013. It will approve Provincial Annual Development Programme schemes falling within its ambit and will have no concern with ADP of District Government, TMAs and Village Councils.*

*The Provincial ADP Schemes falling within the purview of DDAC relate to:-*

*Block allocation for development in concerned districts out of federal receipts like Net Hydel Royalty, Oil and Gas Royalty and Tobacco Cess.*

*One line grants provided for District Development Initiatives.*

*Priority Project.*

*The Projects cleared by DDAC are approved by District Development Committee (DDC).”*

*(emphasis provided)*

9. Valuable arguments of the worthy counsel for the parties heard and the available record perused.

10. One of the fundamental themes engrained in the Constitution is the *trichotomy of powers*, whereby each organ of the State has been allocated its specific functions and duties to be performed within the legal contours specified therein. The *Legislature* is to legislate and enact laws, while the *Judiciary* is to interpret the enactments, and the *Executive* is to enforce the law, as enacted and interpreted by the *Judiciary*.

11. To further regulate the affairs of the *Executive Authority* of the Province, Article 129 of the Constitution mandates that the same are to be exercised in the name of the Governor by the Chief Minister and his cabinet members. In turn, the *Executive Authority* of the Province is regulated by rules framed under Article 139 of the Constitution, more commonly known as *Rules of Business*. These Rules form the foundation upon which the entire edifice of the Provincial Government is governed. It expressly provides, *inter alia*, the different departments, the distribution of business of the departments, and the attached departments. In relation

to the case in hand, it would be important to note the *Planning and Development Department (“P&D”)* has been stated to be a department of the Provincial Government, which is, *inter alia*, to provide for;

1. *Planning and Development including policy and procedure. Coordination work relating to the preparation of the Provincial Annual Development Programme and its review.*
2. *Processing of all development schemes, programmes and proposals submitted by other Departments including autonomous bodies and making recommendations to Government thereupon; Secretariat functions of the Provincial Development Working Party.*
3. *Maintaining liaison with the National Planning Agencies.*
4. *Dealing with Autonomous and Semi-Autonomous Bodies in regard to development planning programmes and projects in Khyber Pakhtunkhwa.*
5. *Foreign Aid.*
6. *Coordination of technical assistance from abroad including training facilities; expert advisory services and equipment.*
7. *Coordination of training of Local Officers and private sector candidates in foreign countries. Secretariat functions of the Provincial Selection Committee for training abroad.*
8. *Arrangement of the services of foreign experts/advisors including Secretariat functions of the Provincial Screening Committee for the appointment of foreign expert/advisors.*
9. *Economic research and matters relating to the Board of Economics Enquiry.*

*10. Coordination of Provincial statistics in general and all matters relating to the Bureau of Statistics.*

*11. General Economic appraisal evaluation of progress and performance of Development Schemes and Programmes and their critical appraisal.*

*12. Initiation of measures for giving a suitable publicity to the Development plans and educating the public on the results achieved from time to time.*

*13. Matters relating to the Regional Development Projects, Khyber Pakhtunkhwa.*

*14. Price Stabilization Policy.*

*15. Protocol functions in connection with visits of foreign economics missions and delegations; etc.*

*16. Appropriation and re-appropriation of development grants provided in the budget.*

*(emphasis provided)*

12. From the above listed functions of the P&D Department, the most essential is the preparation of the Annual Development Plan, which forms part of the 'other expenditures' entailed in *Annual Budget Statement* of the Provincial Government, provided under Article 120 of the Constitution. The *Annual Budget Statement* separately expresses;

**Firstly**, the sum required to meet the *expenditure* described by the Constitution under Article 121, which is charged upon the Provincial Consolidated Fund, and

**Secondly**, the sum required to meet *other expenditure* purposed to be made.

13. It is this *other expenditure*, which includes the developmental projects prepared by the P&D Department, and placed as *demands for grants* seeking a vote of approval of the Provincial Assembly under sub-article (2) of Article 122 of the Constitution, which reads;-

***“122. Procedure relating to Annual Budget Statement.***

*(1) So much of the Annual Budget Statement as relates to expenditure charged upon the Provincial Consolidated Fund may be discussed in, but shall not be submitted to the vote of the Provincial Assembly.*

*(2) So much of the Annual Budget Statement as relates to other expenditure shall be submitted to the Provincial Assembly in the form of demands for grants, and that Assembly shall have power to assent to, or to refuse to assent to, any demand, or to assent to any demand subject to a reduction of the amount specified therein.*

*(emphasis provided)*

14. What is crucial to note is the role of the Chief Minister of a Province in presenting the *Annual Budget Statement* of a Province. Sub-Article (3) of Article 122 and Article 123 of the Constitution, expressly vests in the Chief Minister of the Province, the authority to seek the same in terms;-

**“122. Procedure relating to Annual Budget Statement.**

- 1.....  
 2.....  
 3.No demand for a grant shall be made except on the recommendation of the Provincial Government.”

**123. Authentication of schedule of authorized expenditure.**

- (1) *The Chief Minister shall authenticate by his signature a schedule specifying-*  
 (a) *The grants made or deemed to have been made by the Provincial Assembly under Article 122, and*  
 (b) *The several sums required to meet the expenditure charged upon the Provincial Consolidated Fund but not exceeding, in the case of any sum, the sum shown in the statement previously laid before the Assembly.*  
 (2) *The schedule so authenticated shall be laid before the Provincial Assembly, but shall not be open to discussion or vote thereon.*  
 (3) *Subject to the Constitution, no expenditure from the Provincial Consolidated Fund shall be deemed to be duly authorized unless it is specified in the schedule so authenticated and such schedule is laid before the Provincial Assembly as required by clause (2).”*

15. This authority of the Chief Minister of a Province is further supplemented in Schedule VI of the *Khyber Pakhtunkhwa Rules of Business*, which reads;-

**“LIST OF CASES TO BE SUBMITTED TO THE CHIEF MINISTER FOR APPROVAL BEFORE ISSUE OF ORDER.**

- 1 to 9-----  
 10. Annual Budget Statement to be laid before the Provincial Assembly.  
 11. Authentication of the Schedule of Authorized Expenditure.

16. The legal mandate vested in the Chief Minister under the Constitution, as discussed above, clearly reflects his sole authority to seek from the Provincial Assembly the approval of all the developmental schemes to be executed in the province in that financial year.

17. Now moving on to the Act of 1989, the *Preamble* whereof aims it “*to provide for proper planning and supervision of local level developmental activities in the Khyber Pakhtunkhwa*”. It is to be kept in mind that this enactment was introduced at a time when the Local Governments in the Khyber Pakhtunkhwa were non-functional. Hence, the legislature in its esteemed wisdom deemed it appropriate for elected representatives to be also involved in planning and supervision of developmental projects at local level. Section 3 *ibid* provides for the establishment of DDAC in each District consisting, *inter alia*, all members of the Provincial Assembly from the said District. Interestingly, the Chief Minister under sub-section (3) of section 3 *ibid* retains the authority to appoint one of the members of DDAC to be its Chairman. It is also important to note that under sub-section (4) of section 3 *ibid*, all decisions of

DDAC are to be decided by majority of votes of its members, while the Chairman has been given the casting vote in case of equality of votes of the members. The exception to this rule is when a quota of developmental scheme is allocated to a Member of the DDAC. However, no arguments were addressed by the worthy counsel for the parties on the issue of allocation of development funds to a particular member and the discrimination that may be caused to the others worthy members.

18. Most crucial are the functions of DDAC, which have been provided in section 4 *ibid*, as;-

***“4.Functions of the Committee.- (1) The Committee shall formulate and recommend-***

- (i) Proposals for Annual Development Programme (ADP) of the District and Communicate it to the Planning and Development Department;*
- (ii) The list of schemes to be implemented under the Rural Development Programme, other than those of the Union Councils. This list may also include those schemes to be funded from such Federal Grants for the purpose as may be provided.*
- (iii) Location and selection of sites, subject to such planning criteria, as may be prescribed by Government for Development Schemes in the following sectors/sub-sections;*
  - (a) Primary, Middle and High Schools;*
  - (b) Rural health (establishment of basic health unit and rural health centres);*
  - (c) Public health engineering (rural drinking water supply and sanitation schemes);*

- (iv) Location or sites for such other development projects in other sectors as may be included in local programme of ADP including electrification of villages; and
- (v) *The allotment of Ration Depots in the respective Districts.*
- (2)The committee shall be responsible for conducting periodical reviews of the District Development Programmes approved by it in order to monitor its progress and ensure its timely implementation.”*
- (emphasis provided)*

Keeping in view the time when this piece of legislature was enacted and the specific function attributed to DDAC, the intent of the legislature becomes apparent; to ensure that there is political participation in identifying the projects and its locations in the Province. The subtle but underlined facet of the enactment was that the authority vested in DDAC was only *recommendatory*, with no provision provided therein for the consequence which was to ensue in case the recommendation of DDAC was not positively considered by the P&D Department.

19. All was well, and the reign of DDAC was supreme until the devolution of powers of the Provincial Government was introduced by promulgating the Khyber Pakhtunkhwa Local Government Ordinance, 2001 (**“Ordinance of 2001”**). This legal enactment was provided a

Constitutional protection by insertion thereof in *Schedule VI* of the Constitution, whereby **no** amendment therein could be introduced by the Khyber Pakhtunkhwa Provincial Assembly, unless it had the prior sanction of the President, as per the command of Article 268 of the Constitution. Then came the Constitution (18<sup>th</sup> Amendment) Act, 2010 (“**18<sup>th</sup> Amendment**”), introducing, *inter alia*, fundamental constitutional changes effecting the Local Governments throughout Pakistan. To start with, Article 268 clause (2) of the Constitution was omitted, and thereby the protection given to Ordinance of 2001 was taken away. However, Article 140-A was inserted, which reads;-

**“140A. Local Government.—**

- (1) 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.”**

20. Fundamental constitutional changes were introduced in the wake of 18<sup>th</sup> Amendment, the Khyber Pakhtunkhwa Provincial Assembly was vested with the authority to introduce law establishing Local Government System, whereby

political, administrative and financial responsibility and authority was devolved upon the elected representatives at the local level. This constitutional move culminated in enactment of **Khyber Pakhtunkhwa Local Government Act, 2013** (“LGA of 2013”), and thereby power and authority was devolved upon the Local Governments in terms:

***“Constitution of local Governments.---***

*(1) Subject to other provisions of Act, local governments constituted under this Act shall be:*

- (a) a City District Government for district Peshawar;*
- (b) a District Government for a district other than Peshawar;*
- (c) a Tehsil Municipal Administration for Tehsil;*
- (d) a Town Municipal Administration for a Town in the City District;*
- (e) a Village Council for a village in the rural areas; and*
- (f) a Neighbourhood Council for a Neighbourhood in areas with urban characteristics.”*

21. Each tier of the Local Government was allocated distinct functions and powers, expressly provided with specific subject matters it was to deal with, clearly enumerated in the *Schedules* appended to LGA of 2013. In the case of District Governments, section 12 read with section 14 *ibid* provides the District Nazim to, *inter alia*, provide vision of district wise development, develop strategies and timelines for accomplishment of goals

approved by district council and oversee formulation and execution of District Annual Development Plan. Similarly, section 18 *ibid* empowers the District Government to approve short and long term district development plans. However, specific departments, which were devolved to the District Governments have been stated in Part-A of Ist *Schedule* appended thereto, and as far as the case in hand is concerned, item XXI thereof expressly stated *Communication and Works district roads and buildings*.

22. More importantly and crucial to the case in hand, is the overriding effect expressly provided to the provisions of LGA, 2013, as provided under section 119 which reads;-

*“Act to override other laws on the subject.--- The provisions of this Act shall have overriding effect, notwithstanding anything contained in any other law, on the subject, for the time being in force.”*

23. What has to be kept in mind is that the aforementioned overriding effect rendered to LGA, 2013 cannot legally eclipse the *executive authority* of the Province as ordained in Article 137 and 142 of the Constitution vesting the Provincial Government with authority to take effective steps in carrying forward developmental schemes in the

Province. In a recent decision in *Lahore Development Authority's case (2015 SCMR 1739)*, the Apex Court has laid down, *inter alia*, that despite the overriding provision contained in Punjab Local Government Ordinance, 2013 backed by the command of Article 140-A of the Constitution, the *executive authority* of the Province as provided under Articles 137 and 142 of the Constitution, cannot be undermined, as both are to harmoniously supplement each other. It was opined that;-

*“With the introduction of Article 140A in the Constitution, the establishment of a system of Local Government is no longer a Principle of Policy. The Constitution 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 Government. Following this command of the Constitution, the Provincial Assembly of Punjab has enacted PLGA 2013. In like manner the Provincial Assemblies of Balochistan, KPK and Sindh have also enacted the Balochistan Local Government Act, 2010, Khyber Pakhtunkhwa Local Government Act, 2012 and Sindh Local Government Act, 2013, respectively.*

*Section 72 of the PLGA 2013 lists the functions of the Union Councils. Sections 76 and 77 list the functions of the District Councils. The functions of the Municipal Committees are listed in section 81 and the functions of the Metropolitan and Municipal Corporations are listed in section 87. Section 65 provides that the Provincial Government may also devolve one or more of its functions to the Local Government. Section 148 provides that*

*notwithstanding any specific provision of the PLGA, the Local Government shall also perform the functions listed in the Eighth Schedule. This Schedule lists as many as 105 general powers of Local Governments. Read in an expansive manner these functions can virtually trump the Provincial Government. It would be left with little to do except perhaps to enact legislation further broadening these functions. This Court does not favour an interpretation which would reduce the role of the Provincial Government to that of a mere cipher. It would eschew a course which makes Article 137 of the Constitution redundant by severing the link between the extent of executive authority of a Province to the matters subject to its legislative authority.*

*Articles 137 and 140A have to be read in harmony. Neither overrides the other. These provisions provide a scheme for a representative government and participatory democracy in the country. These provide a scheme to establish Local Government and articulate a framework within which the Provincial Government must function. The authority conferred on the Province and the responsibilities devolved on the Local Government form part of a common scheme. These are not to be used as trumps. One cannot cancel the other. These are co-equal norms. They weave the constitutional fabric.*

*The High Court, too, acknowledged that such provincial legislation cannot be immutable in all circumstances. In paragraphs 75, 82 and 88 of the impugned judgment, it was observed that the Provincial Government can perform the functions and exercise the authority devolved on the Local Government in three situations:*

- I. When the Local Government lacked capacity or was ineffective;*
- II. When the function was of a nature which spilled over from the territory of one Local Government into that of another; and*
- III. When economies of scale justified*

*such intervention.*

*If political, administrative and financial powers were devolved to the fullest extent, the Province would be left with no legislative or executive authority. It would also lose the means to recoup such authority by legislation. This would mean that once a Provincial Legislature conferred the full panoply of political, administrative and financial responsibility on the Local Government, its own constitutional, legislative and executive authority would be taken over by that of the Local Government now and forever. The impractical results that it may lead to and the constitutional principles against which such an interpretation runs have already been identified by us.*

*The Province is under an obligation under Article 140A of the Constitution to establish, by law, a Local Government System and to devolve political, administrative and financial responsibility on the Local Government. Yet, in doing so it is not stripped bare of its executive and legislative authority under Articles 137 and 142 of the Constitution. The Provincial and the Local Governments are to act in a manner, which complements one another. The Constitution, therefore, envisages a process of participatory democracy, where the two governments act in harmony with one another to develop the Province. The authority of neither destroys the other. Article 140A cannot be used to make the provisions of Articles 137 and 142 either subordinate to it or otiose. One constitutional provision cannot, unless it is so specifically provided, override another and must be harmoniously construed together.*

*The creation of a Local Government System, and the conferment upon the Local Government of certain political, administrative and financial responsibilities does not deprive the Province of authority over its citizens and deny it all role in the progress, prosperity and development of the Province. The creation of a Local Government System does not spell the end of the Provincial Government in the Province. To the*

*contrary it strengthens the Provincial Government by entrenching democracy at grass root level.*

*That even after the insertion of Article 140A the Provincial Government would continue to have the authority to enact and amend statutes, make general or special laws with regard to Local Government and local authorities, enlarge or diminish the authority of Local Government and extend or curtail municipal boundaries. This power of amendment has, however, to be informed by the fact that if the Provincial Government oversteps its legislative or executive authority to make the Local Government powerless such exercise would fall foul of Article 140A of the Constitution. An excessive or abusive exercise of such authority would not be countenanced by this Court. It would be struck down.*

*Likewise the Provincial Government, in the exercise of its legislative and executive authority can aid and support the Local Government. The Provincial Government is also not prevented from taking the initiative for the growth and development of the people and the Province in the exercise of its legislative and executive authority. The exercise of such authority must, however, be in the public interest. It should encourage institutional growth and harmony. It must be in consultation and with the participation of the Local Government. To complement is not to take over.*

24. The *ratio decidendi* of the aforementioned judgment clearly leads this Court to ensure that the P&D Department, the Local Governments and DDAC proceed with the development projects in the Province in harmony and in accordance with the respective laws under which they are functioning. The apex Court also

urged constitutional Courts not to be anxiously eager to strike down enactments, when the executing bodies could perform their duties and functions without encroaching upon the jurisdiction of the others. Keeping this cardinal rule as our guiding principle, it is noted that each of the three bodies have to proceed and function in accordance with the laws, which regulates each; the P&D Department according to the *Rules of Business*, the Local Governments under the LGA, 2013, and DDAC under the Act of 1989.

25. Now, let us take up the main contention of the worthy counsel for the petitioner that the site and location of all developmental projects to be carried out in District Battagram have to be recommended by the DDAC of Battagram.

26. Keeping in view the above discourse, this Court is not inconsonance with the above bold contention of the worthy counsel for the petitioner;- **Firstly**, the very *preamble* of the Act of 1989 expressly mandates for establishing DDAC to provide proper planning and supervision of local level developmental projects in the Province coupled with the conspicuous mandate of DDAC to only *recommend* the site and location of the

developmental projects, in absence of any express provision stipulating the consequences in case of failure to seek or approve the said recommendation of DDAC, renders the same to be *directory* and not *mandatory*. This would lead to the irrefutable conclusion that;

- (i) A recommendation of DDAC regarding site and location of developmental project is not final, and has to be assessed, analyzed and if found appropriate, be approved by the competent authority; the P&D Department.
- (ii) There is no legal bar restraining the Provincial Government to select the location of a developmental project in District Battagram. The authority vested in the P&D Department, as provided in the *Rules of Business* has a constitutional backing thereto seeking recommendation from DDAC is one thing but urging the entire Provincial *Executive Authority* to be subservient to the recommendation of DDAC is not what was intended by the legislature in enacting the Act of 1989.

**Secondly**, the role of DDAC in its recommendation of the site and location of developmental projects cannot be imposed upon the local governments functioning under the LGA, 2013. As discussed earlier, the 30% budgetary allocation to the Local Governments is to be dealt with by the respective

Local Governments in accordance with the provisions provided in LGA, 2013. Surely, the site and location of the developmental projects approved by the local governments do not legally require any recommendation of DDAC. Insisting the same, as argued by the learned counsel for the petitioner, would offend the overriding effect rendered to the Local Governments under section 119 of the LGA, 2013.

**Thirdly,** the *executive authority* of the Province having placed the *objected scheme* in the ADP and the same having been approved by the Provincial Assembly without any protest by the present petitioner being a worthy member at the time of its approval cannot legally object to the same at this belated stage on the touch stone of *estopple by conduct*.

**Fourthly,** the petitioner having himself approached the Chief Minister of the Province to include *petitioner's scheme* in the ADP, without it going through the procedure provided under the Act of 1989 *denudes* him to challenge the *objected scheme*.

Accordingly, for the reasons stated hereinabove, the instant writ petition is dismissed, in terms;

- I. All the developmental projects prepared by the P&D Department and placed for approval of the Provincial Assembly have to be voted upon and passed by a simple majority of the members of the Provincial Assembly.
- II. The *objected scheme* and the *petitioner's schemes* were duly included in the ADP by the P&D Department and placed before the Provincial Assembly for its approval, which was duly accorded.
- III. DDAC has no legal authority to interfere in the developmental schemes proposed and sanctioned by the Local Governments under LGA of 2013.
- IV. The *objected scheme* and the *petitioner's scheme* did not fall within 30% developmental budget allocated to the Local Governments. Hence, legally DDAC was competent to recommend the site and allocation of the said projects.
- V. Act of 1989 does not provide any penalty or a consequence in failure to recommend the site or allocation of the project to be carried out in the district. Thus, the provision of

recommending the site and allocation by DDAC is *directory* and not *mandatory*.

VI. The *objected scheme* having been approved by the Provincial Assembly without any objection by the petitioner during budget would legally bar him to oppose the same before this Court on the principle of *estoppel by conduct*.

VII. Development Projects included in the ADP and approved by the Provincial Assembly cannot be agitated in a Court of Law being *non justiceable*. The exception being those *umbrella* projects placed as block allocations without any specification of site and location. Such allocation may lead to discretionary allocations at a subsequent stage, hence, could be legally agitated on the touch stone *impropriety, bias* and *discrimination*.

**Announced:**  
**Dt. / /2017.**

**CHIEF JUSTICE**

**J U D G E**

**F.Jan/\***