Yahya Afridi, J:- The President of the Islamic Republic of Pakistan **('President')** has sought the opinion of this Court in its Advisory Jurisdiction under Article 186 of the Constitution of the Islamic Republic of Pakistan, 1973 **("Constitution")**, on the following two questions of law:

I. Whether the earlier judgement of this Honourable Court reported as Maulvi Abdul Haque Baloch v. Federation of Pakistan, PLD 2013 SC 461 of the law, **public policy** or the Constitution of Pakistan prevent the GoB and the GoP from entering into the Implementation Agreement and the Definitive Agreements or affect their validity?

II. If enacted, would the proposed Foreign Investment (Protection and Promotion) Bill, 2022 be valid and constitutional?

The Hon'ble Chief Justice of Pakistan constituted a five-member Bench to consider and report the opinion of this Court on the questions referred to in the Reference. After thorough deliberation of all aspects of the referred questions, and considering the valuable submissions of the learned Additional Attorney-General for Pakistan and all other learned counsel, this Court rendered its opinion on both questions *vide* short order dated 09.12.2022, stating that the reasons thereof would follow. I had, with respect to my learned brothers on the Bench, abstained from rendering any opinion on a part of Question No. I, to the extent of "public policy", referred for the opinion of this court by the worthy President.

Advisory Jurisdiction

2. Before I elucidate the reasons for my abstaining in recording my opinion on the said part of Question No. I, it would be appropriate to consider the contours of the Advisory Jurisdiction vested in this Court under Article 186 of the Constitution, which reads:

> **186. Advisory jurisdiction.**
> (1) If, at any time, the President considers that it is desirable to obtain the opinion of the Supreme Court on any question of law which he considers of public importance, he may refer the question to the Supreme Court for consideration.

> (2) The Supreme Court shall consider a question so referred and report its opinion on the question to the President.

I had in detail penned down in my earlier opinion recorded in Presidential Reference No.1 of 2020[1] the salient features of the Advisory Jurisdiction of this Court under Article 186 of the Constitution, and the essentials whereof, relevant for my present abstention in responding to a part of Question No. 1, are as under:

> First, the worthy President has the exclusive authority under Article 186 to refer a 'question' of 'public importance' to the Supreme Court for consideration and reporting its opinion thereon, but authority to determine whether a particular 'question' is a 'question of law' does not fall within his exclusive domain but remains with this Court. And that too, as a jurisdictional fact;
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> Secondly, in case this Court finds the 'question' referred not to be a 'question of law' or not clear in its content, the same can be sent back to the worthy President, unanswered;
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> Thirdly, the framers of the Constitution being cognisant of the intended legal efficacy of an 'opinion' of this Court given in its 'advisory jurisdiction' did has not provided a forum of redressal to any person aggrieved thereof, like right to appeal or review, etc.; and
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> Finally, the finding of a nine-member bench of this Court in Hisba Bill Reference (PLD 2005 SC 873) declaring the 'opinion' recorded by the Court under Article 186 of the Constitution to be binding, which in my earnest view, disturbed the settled jurisprudential consensus on the status of 'opinion'; as this finding was recorded in exercise of its 'advisory jurisdiction'; and that too without taking any judicial heed of a principle of law already expressed by a five-member Bench of this Court, exercising its 'adjudicatory jurisdiction', while deciding two constitution petitions and answering a Reference together in Al-Jehad Trust v. Federation (PLD 1997 SC 84). However, I found it appropriate to leave this aspect of the matter for an authoritative decision in an appropriate case by this Court in its 'adjudicatory', and not 'advisory' jurisdiction.

Reasons for abstention

3. The part of the Question No. 1 which has been referred by the worthy President which, to my earnest understanding, ought not to be responded to by this Court in its Advisory Jurisdiction, reads:

> Whether ..... **public policy** ..... prevent the GoB and the GoP from entering into the Implementation Agreement and the Definitive Agreements or affect their validity?

I had, in regard to the said part of Question No.1, noted that:

> I may not respond to question No.1 to the extent of "public policy." My detailed reasons shall follow.

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[1] PLD 2021 SC 825.

Given the scope and extent of the Advisory Jurisdiction of this Court, I had abstained from stating my opinion on the said part of Question No. 1 for two reasons: first, that the said part of the question did not cross the threshold of being a 'question of law', and that too as a jurisdictional pre-condition for invoking the Advisory Jurisdiction of this Court under Article 186 of the Constitution; and second, that the matters of policy are best left to the other organs of the State— the Executive and the Legislature- to respect the fundamental principle of 'Trichotomy of Power' as enshrined in the Constitution.

Public Policy – Question of law

4. To understand the true purport of the term 'public policy', it is important to know how the said term germinated in legal jurisprudence from a timid ground into such a powerful one that can strike down otherwise valid agreements between parties, and with time extended in special cases to policy matters, rules and even enacted laws.

5. Legal historians are of the view that the genesis of the term 'public policy' originated from the expression *'encounter commone ley',* which was seen in common-law jurisdictions to be acts or omissions prejudicial to the community. This judicial trend continued until the eighteenth century when, for the first time, the term 'public policy' was coined in common law in the case of **Mitchel v. Reynolds**[2], wherein Lord Macclesfield struck down a contract as it offended freedom of trade and had imposed restrictions thereon. Even though there was no *dolus malus* in contracts regarding other persons, yet if the interests of public were in peril, the same were exposed to being struck down for offending 'public policy'. This was referred to in common law jurisdictions as the 'public policy

[2] 24 Eng. Rep. 347 (1711).

exception' to the enforcement of contracts; a doctrine that allows courts to refuse to enforce a contract that is contrary to the public interest, even if the contract is otherwise valid and enforceable. The doctrine was based on the principle that when the enforcement of a contract is harmful to public good, then the Courts have a duty to protect the public interest by refusing to enforce such a contract. This watchful judicial approach then slowly extended beyond mere contracts to other social, commercial and economic areas; safeguarding against perpetuities, sales of offices, marriage contracts, and wagering.[3] Thus, with time, there was a paradigm shift in viewing 'public policy'; the pendulum had moved from being simply the 'protector' of the community to that of the *res publica.* This fundamental shift in judicial approach had, in fact, politicized the idea of public policy in the legal domain.

6. The Courts were initially apprehensive of entering the untested waters of politics, and thus, were inclined to show judicial restraint in positively exercising this judicial power, unless the harm to the public was an admitted fact with no contest from the opposing parties. The apprehension was that the temptation to judicially indulge in these untested waters was rather unsafe. Justice Burroughs famously remarked:

> I for one protest, as my Lord has done, against arguing too strongly upon public policy—it is a very unruly horse, and when once you get astride it you never know where it will carry you.[4]

This guarded view was later echoed in cases that followed.[5]

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[3] Farshad Ghodoosi,The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements, 94 Neb. L. Rev. 685 (2015)

[4] Richardson v. Millish [1824-34] All ER Rep 258

[5] Driefontein Consolidated Mines Ltd. Gaison (1901) 17 T.L.R. 604, "This public policy is a high horse to mount and is difficult to ride when you have mounted it." The reason for such restraint was later more clearly articulated by Lord Wright in Fender v. Mildmay (1937), 3 All England Reports 402) to be based on two paramount reasons:

(1) The traditional reluctance of judges, and of English Judges in particular, to close or discuss openly the ideological assumptions underlying the administration of the law.

(2) The acceptance of separation of powers and the consequent reluctance to compete with the legislator in the application of legal policy.

Public Policy – Polycentric issue

7. One serious objector to Courts interfering in matters of policy is the eminent jurist Lon Fuller, who maintained that issues of public policy arising during adjudication represent 'polycentric problems': complex matters influenced by numerous interdependent variables.[6] He further elucidated that any decision concerning one variable by implication affects all others, and is thus best left to be dealt with by elected representatives, given the complex nature of such problems, which necessitate negotiation, compromise and consensus-oriented decision-making. Further, the reasons for the need for Courts to show restraint in 'polycentric problems' is extremely desirable when the issue revolves around or affects economic policy. In such cases, the Executive has been given room for 'trial and error', as long as it is acting within the limits of its lawful authority and is *bona fide*. This view has been felicitously expressed by Frankfurter J. in his inimitable style in **Morey v. Doud**[7]:

> In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The Legislature after all has the affirmative responsibility. The Courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events - self limitation can be seen to be the path of judicial wisdom and institutional prestige and stability.

Similar views have been voiced by this Court,[8] the Indian Supreme Court,[9] and likewise, the South African Constitutional Court.[10]

Constitutional – Trichotomy of Power

8. What we must not ignore is that the command for judicial restraint is implicitly engrained as a pillar of the 'Basic Structure' of our

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[6] Lon L Fuller and Kenneth I Winston, 'The Forms and Limits of Adjudication' (1978) 92 Harvard Law Review 353.
[7] (1957) 354 US 457.
[8] Elahi Cotton Mills v. Federation of Pakistan PLD 1997 SC 582 (5-MB); Akhtar Hassan v. Federation of Pakistan 2012 SCMR 455.
[9] Indian Ex-Servicemen Movement and Ors. Vs. Union of India (UOI) and Ors. (2022) 7 SCC 323; Balco Employees Union v. Union of India AIR 2002 SC 350.
[10] International Trade Administration Commission Vs. SCAW South Africa (Pty) Ltd [2010] ZACC 6; Minister of Health and Others vs. Treatment Action Campaign and Others [2002] ZACC 16.

Constitution - 'trichotomy of power' - whereby each organ of the State is allocated separate functions. This separation of powers is a key element in the proper functioning of any healthy democracy. As far as public policy is concerned, Chapter 2 of our Constitution (Articles 27 to 34) lays down the 'Principles of Policy' for each organ or authority of the State, and each person performing functions on behalf of such an organ or authority of the State. It does not, however, expressly lay down what substantive policy should be.

9. What is also crucial to note is that the framers of the Constitution had clearly indicated under sub-rule-2 of Article 30[11] the non-justiciability of challenging any inaction of any organ or authority of the State to fulfil its obligation as per the 'Principles of Policy' mandated thereunder. Though the Courts cannot declare any law to be void being in breach of any of the directives stated in 'Principles of Policy', they can take cognizance of the tendency of the directives when examining the constitutionality of the law.[12] In contrast, the Fundamental Rights (Article 9 to Article 27) enshrined in the Constitution are very clear in content, and the respect they command over any piece of legislation (Article 8)[13]. The 'Principles of Policy', on the other hand, are non-justiciable guiding principles for the Executive and the Legislature, specifying the scope and extent of the policy to be made – an idea originating from Ireland[14]. Thus, the judiciary has been conspicuously restrained from interfering with

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[11] 30(2) The validity of an action or of a law shall not be called in question on the ground that it is not in accordance with the Principles of Policy, and no action shall lie against the State, any organ or authority of the State or any person on such ground."

[12] Hanif Quareshi V. State of Bihar (AIR 1958 SC 731)

[13] **8. Laws inconsistent with or in derogation of fundamental rights to be void.**

(1) Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void.

.....

(5) The rights conferred by this Chapter shall not be suspended except as expressly provided by the Constitution.

[14] Article 45 of the Constitution of Eire, 1937, followed in the Constitution of Burma of 1948, and in the constitutions of the Sub-continent.

matters relating to policy, as it cannot encroach upon the domain of the Executive, which is overseen by the Legislature, in deciding whether a policy is in or against public interest[15]. However, since the ultimate responsibility to uphold the supremacy of the Constitution and the rule of law in the country lies with the Judiciary, the Courts could interfere in policy decisions of the Executive, but only if the same are found to be violative of any provision of the Constitution or a law, or suffering from the *vice* of *mala fides*[16].

10. I endorse this cautious approach of Courts in dabbling in policy matters, as these involve the intricate interplay of technical and economic elements requiring the balancing of competing interests, a forte of the functionaries of the Executive or the elected members of the Legislature, and not the unelected justices of the superior Courts.

Conclusion

11. When we test the legal validity of the Implementation Agreement and the Definitive Agreements on the touchstone of Public Policy, what emerges is not simply a 'question of law', but a web of complex commercial mining transactions, transcending international borders, thus giving rise to 'polycentric issues'. In my view, such complex transactions do not cross the threshold of being justiciable as 'questions of law' under the Advisory Jurisdiction of this Court. This guarded treading by the Courts in matters relating to 'Public Policy' is magnified ten-fold when a Court, such as the Supreme Court, and that too in its Advisory Jurisdiction under Article 186 of the Constitution, is to render its opinion - an opinion that is not only legally binding but also final as

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[15] The Constitution, Article 91(6): "The [Federal] Cabinet, together with the Ministers of State, shall be collectively responsible to the Senate and the National Assembly." Article 130(6): "The [Provincial] Cabinet shall be collectively responsible to the Provincial Assembly..."

[16] Dossani Travels v. Travels Shop 2013 SCMR 1749 (Short Order) PLD 2014 SC 1 (Detailed reasons).

declared by a nine-member Bench of this Court in the **Hisba Bill Reference**[17].

12. The judicial intrusion of this Court in the **Maulvi Abdul Haq Baloch case** (*supra*), with all the humility at my command and with utmost respect to my learned brothers, when viewed in retrospect, appears to be a rushed decision where there was no 'live issue'[18] left for determination. The very issuance of a mining license, which was the subject matter of the petition before the Court, had already been cancelled by the appropriate licensing authority. In fact, time has proved that the financial exposure[19] for such a judicial intrusion far exceeded the benefits it aimed to achieve, and the financial losses it purportedly claimed to save.

13. Thus, the lesson learnt from the said case must not be forgotten and such kind of judicial adventure of riding on the 'unruly horse' of 'public policy' must not be repeated by this Court, and that too in its Advisory Jurisdiction under Article 186 of the Constitution – hence my abstention in answering the said part of Question No.1.

Judge

[17] PLD 2005 SC 873.
[18] The licensing authority rejected TCCPS application for issuance of mining lease on 15.11.2011. the appeal thereof was also dismissed on 03.03.2012 and this Court despite there being no live issue proceeded to decide the case on 07.01.2013.
[19] The ICSID and ICC awards totalled approximately US$11 billion at the time of the filing of this reference. In the same window, during the month of October 2022, State Bank of Pakistan reports that Pakistan's total liquid foreign exchange reserves stood at approximately US$ 14 billion.