

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT: MR. JUSTICE MIAN SAQIB NISAR
 MR. JUSTICE UMAR ATA BANDIAL
 MR. JUSTICE MAQBOOL BAQAR
 MR. JUSTICE FAISAL ARAB
 MR. JUSTICE IJAZ UL AHSAN

CIVIL APPEALS NO.125-K TO 131-K AND 2306 TO 2309 OF 2016 AND CIVIL MISCELLANEOUS APPLICATIONS NO.1254-K AND 8973 OF 2018 AND CIVIL PETITION 2312-L OF 2018

(Against the impugned judgment dated 04.07.2016 passed by the learned High Court of Sindh in Const.P. No.D-1692/2011, etc. and dated 03.04.2018 passed by the learned Lahore High Court in I.C.A. No.1359/2017)

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| C.A.125-K/2016: | Government of Sindh through Secretary Health Department Vs. Dr. Nadeem Rizvi etc. |
| C.A.126-K/2016: | Province of Sindh through Secretary, Sindh and another Vs. Altaf Shakoor etc. |
| C.A.127-K/2016: | Province of Sindh through Chief Secretary, Sindh and another Vs. Dr. A.R. Jamali etc. |
| C.A.128-K/2016: | Province of Sindh through Chief Secretary, Sindh and another Vs. Tahir Amin Chaudhry etc. |
| C.A.129-K/2016: | Province of Sindh through Chief Secretary, Sindh and another Vs. Seemin Jamali etc. |
| C.A.130-K/2016: | Province of Sindh through Chief Secretary, Sindh and another Vs. Rohail Ali Jamali etc. |
| C.A.131-K/2016: | Province of Sindh through Chief Secretary, Sindh and another Vs. Dr. Sikandar Hayat etc. |
| C.A.2306/2016: | Jinnah Sindh Medical University, Karachi Vs. Dr. Seemi Jamali etc. |
| C.A.2307/2016: | National Institute of Cardiovascular Diseases, Karachi Vs. Dr. Nadeem Rizvi etc. |
| C.A.2308/2016: | Muhammad Anwar etc. Vs. Federation of Pakistan etc. |
| C.A.2309/2016: | Ms. Tahmina Fatima etc. Vs. Federation of Pakistan etc. |

C.M.A.1254-K/2018: Application for seeking permission that Mrs.Umaima Anwar Khan, ASC High Court to proceed the subject appeal filed by Mr.K.A. Wahab, AOR for respondents No.38,89 & 90

C.M.A.8973/2018: Government of Sindh through Secretary Health Department Vs. Dr. Nadeem Rizvi etc.

C.P.2312-L/2016: All Pakistan Paramedical Staff Federation Unit, Lahore Vs. Federation of Pakistan through Secretary Cabinet, Islamabad etc.

For the appellant(s):
Mr. Salman Talib-ud-Din, A.G. Sindh
Mr. Farooq H. Naek, Sr. ASC
Raja Abdul Ghafoor, AOR
(In C.A. No.125-K to 131-K/2016)

Mr. Salahuddin Ahmed, ASC
Prof. S.M. Tariq, V.C. JSMU, Karachi
(In C.A. No.2306/2016)

Mr. Raza Rabbani, ASC
Mr. Salim Salam Ansari, ASC
(For NICV in C.A. No.2307/2016)

Mr. Haider Waheed, ASC
(In C.A. No.2308 & 2309/2016)

Mr. Zafar Iqbal Chaudhry, ASC
(In C.P. No.2312-L/2018)

For the respondent(s): Barrister Umaina Anwar, Advocate
(with permission of the Court)
(In C.A. No.125-K/2016)

Mr. Salim Salam Ansari, ASC
(For NICV in C.A. No.2306 & 2309/2016)

Mr. M. Iqbal Chaudhry, AOR
(In C.A. No.127-L/2016)

Mr. Abdul Rauf Rohaila, ASC
(In C.A. No.2306/2016)

Mr. Sajid Ilyas Bhatti, Addl.A.G.P.
Mr. Khurram Saeed, Addl.A.G.P.

Capt. (Retd) Zahid Saeed, Secy. M/o
NHSR&C
Mr. Asif Sohail, Dir. Litigation M/o
NHSR&C

Raja Abdul Ghafoor, AOR for HEC
(In C.A. No.2306/2016)

Mr. Hamid Khan, Sr. ASC

Mr. Ahmed Awais, A.G. Punjab
 Mr. Qasim Ali Chohan, Addl.A.G. Punjab
 (In C.P. No.2312-L/2018)

Dr. Seemi Jamali, Executive Director,
 JPMC
 Prof. A.R. Jamali, JPMC
 Prof. Dr. Kausar Amir, JPMC
 Dr. Riaz Gill, JPMC
 Dr. M. Attique

Dates of hearing: 03.01.2019, 04.01.2019 and 07.01.2019

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JUDGMENT

IJAZ UL AHSAN, J.- The instant matters pertain to an important legal and constitutional question, i.e. whether Jinnah Postgraduate Medical Centre ("JPMC"), National Institute of Cardiovascular Diseases, Karachi ("NICVD"), National Institute of Child Health, Karachi ("NICH"), National Museum of Pakistan, Karachi ("NMP") and Sheikh Zayed Postgraduate Medical Institute, Lahore ("SZPMI") could be transferred from the Federal to the Provincial domain after the Constitution (Eighteenth Amendment) Act, 2010 ("18thAmendment").

2. Various doctors and medical professionals (respondents in Civil Appeals No.125-K, 127-K to 131-K and 2306 to 2309 of 2016) had filed constitution petitions before the learned High Court of Sindh challenging the devolution of JPMC, NICVD and NICH by the (Federal) Ministry of Health to the Province of Sindh. Another constitution petition was filed before the learned High Court of Sindh against the transfer of NMP from the (Federal) Ministry of Culture to the Department of Culture & Tourism, Government of Sindh. The main contention in all the writ petitions was that the said institutions were federal subjects and were covered by the Federal Legislative List, therefore they should continue to function as Federal institutions. The writ petitions were clubbed together and allowed *vide* impugned judgment dated 04.07.2016 passed by the learned High Court of Sindh. The High Court held the transfer/devolution of JPMC, NICVD, NICH and NMP to the Province of Sindh to be unconstitutional, without lawful authority and of no legal effect. Aggrieved, the appellants filed civil petitions before this Court and leave was granted *vide*

orders dated 25.07.2016 and 19.10.2016. In the Province of Punjab, the All Pakistan Paramedical Staff Federation Unit, Lahore (the petitioner in Civil Petition No.2312-L/2016) had filed writ petition(s)(No.6104/2012) before the Lahore High Court challenging the transfer of the SZPMI by the then Prime Minister of Pakistan from the Federal Government to the Province of Punjab on the same premise as that of JPMC, NICVD, NICH and NMP mentioned above. The said petition(s) was earlier allowed *vide* judgment dated 16.06.2017, however upon an intra-Court appeal the matter was remanded *vide* impugned judgment dated 03.04.2018 to the learned Single Judge and the order of the learned Division Bench was challenged through the instant civil petition. In the meantime, *vide* judgment dated 28.12.2018 the learned Single Judge again allowed the writ petition(s), and though the said judgment has not been specifically challenged before this Court, we intend to decide the legality of the same through the instant opinion as it involves an identical question as the aforementioned matters. This is also necessary to avoid the possibility of conflicting judgments on an important question of constitutional interpretation.

3. Mr. Farooq H. Naek, learned counsel for the appellants (in Civil Appeal No.125-K to 131-K/2016) made the following submissions: (i) health and hospitals have never been either on the Federal or Concurrent list; they always fell within the purview of the residuary list which is within the domain of the Provinces; in this regard Article 142(c), 146 and 147 of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution") are relevant; (ii) devolution of JPMC, NICVD and NICH never took place under Article 270AA(8) and (9) of the Constitution; and (iii) as far as JPMC is concerned it was originally Jinnah Central Hospital("JCH") which was combined with Basic Medical Sciences Institute ("BMSI") in 1963-64 and by executive action/notification it was given the name JPMC. On the basis whereof the learned High Court of Sindh held *vide* the impugned judgment that it fell within the ambit of Entry No.16 of Part I of the Federal Legislative List contained in the Fourth Schedule to the Constitution. He also wished for the Court to consider the concept of a Cooperative

Federation (an entirely academic concept) while deciding the ambit of Entry No.16. To support his arguments, he referred to the Cabinet Division Notification No.4-9/2011-Min dated 29.06.2011 according to which, *inter alia*, the Ministry of Health was to cease to exist with effect from 01.07.2011 and a (Federal) Ministry of Health Notification No.Dy 3852-DS(Admn) dated 30.06.2011 transferred JPMC, NICVD and NICH to the Government of Sindh with effect from 01.07.2011.

4. Mr. Raza Rabbani, learned counsel for NICVD (in Civil Appeal No.2307/2016) argued that health and hospitals were provincial subjects under the Government of India Act 1935 ("Act of 1935"), the Constitution of the Islamic Republic of Pakistan, 1956 ("Constitution of 1956"), the Constitution of the Islamic Republic of Pakistan, 1962 ("Constitution of 1962"), the Interim Constitution of the Islamic Republic of Pakistan, 1972 ("Interim Constitution") and the Constitution. According to him, JPMC was with the Federal Government not because the subject of hospitals was a Federal subject but because it happened to be in Karachi which at the relevant point in time was the Federal Capital Territory. He stated that in 1961 when Karachi ceased to be the Federal Capital, JPMC should have devolved upon the Province of Sindh. This did not happen which was a historical and constitutional wrong which was perpetuated by the Federal Government and admittedly not ever agitated by the Provincial Government. However he urged that there can be no estoppel against the Constitution. Learned counsel referred to Articles 97, 137 and 142(c) of the Constitution and dilated upon his understanding of the phrase "executive authority" to argue that legislative competence determines executive competence and that the Federal Government cannot be allowed to construct and run hospitals in Provinces. According to him there is a fundamental difference between the capacity of an individual citizen and the capacity of the State – an individual citizen is in a position to construct hospitals in any Province within the legislative competence and executive authority of the Province; but when it comes to the Federal Government then it is a question of inter-governmental relationship; where the Federal Government creates

an institution of its own which would have employees belonging to the Federal Government and the hospital would be run in accordance with the rules of such Government, a conflict would arise between the respective authorities of the Federal and Provincial Governments rendering Article 137 *supra* redundant. At one point learned counsel did admit that the Federal Government can construct a hospital but then went on to say that it (the Federal Government) cannot run such hospital and must then hand it over to the concerned Provincial Government, because while the power to construct a hospital is not explicit, but the power not to run it, according to him, stems from Article 137 *supra*. Adverting to the issue of whether JPMC, NICVD and NICH fall within Entry No.16 of the Federal Legislative List, learned counsel stated that the test to be employed is that of the pith and substance of the institution to see what is the core function of the institution involved. According to him, the primary function of JPMC, NICVD and NICH was that of a hospital and the research aspects were merely ancillary thereto. Therefore, they did not fall within Entry No.16 of the Federal Legislative List. In this regard, he referred to Entries No.15, 16 and 17 to argue that when read in juxtaposition, the scheme of the three entries was education, therefore Federal Institutions relating to research and other special functions would primarily be in the field of education and not health, because where "hospitals" have been provided in the Federal Legislative List, they have been specifically mentioned as such. Finally, on the issue of the fate of the Federal Government's properties upon devolution, learned counsel referred to Article 274(1) of the Constitution to argue that since the purpose of the buildings in question was provision of health services, therefore they vest in the Province.

5. Mr. Salman Talib-ud-Din, the learned Advocate General for Sindh traced the constitutional history of Pakistan to argue that legislation on provision of health services through establishment of hospitals has always been an exclusively provincial subject. Furthermore, to ensure good governance, decentralization of the centralized dispensation in a federal structure is of paramount importance – devolution of power from

the center to the province and onward to the local level is *sine qua non* for heterogeneous countries like Pakistan where large segments of citizenry remain marginalized by the centralist and patronage-based governance mechanism. Finally he stated that any further step(s) towards centralization of legislative subjects in general and the subject of public health and hospitals in particular may lead to complications of various nature. According to him, keeping in view the political scenario, there exists a genuine apprehension that if the legislative subjects are to be shifted, the political party forming the federal government may on account of differences in political views, policies and manifestos, exploit the legislative subjects which in turn would affect the rights and interests of the provinces.

6. Mr. Salah-ud-Din Ahmed, learned counsel for the appellant (in Civil Appeal No.2306/2016) pointed out the practical problems that have arisen as a result of the impugned judgment. He stated that his client, Jinnah Sindh Medical University, Karachi ("JSMU") has two constituent hospitals, i.e. JPMC and NICH, and as per the Jinnah Sindh Medical University Act, 2013, ("JSMU Act") JSMU is responsible for the overall administration of these hospitals. According to him, JSMU is a provincial body from its very inception by virtue of the JSMU Act passed by the Provincial Assembly, although it was previously affiliated with a body that purportedly belonged to the Federal Government which was then transferred to the Province of Sindh. He stated that there was ample material before the learned High Court of Sindh to examine the predominant function of the institutions in question. He further argued that there is no dispute between the Federal and Provincial Governments – the former accepts that it has transferred the institutions whereas the latter concedes that it has received the same. According to the learned counsel, he adopted the argument of Mr. Raza Rabbani, learned ASC that a private person has certain liberties which governments do not, because the former can do anything unless prohibited whereas the latter cannot do anything unless permitted by law to do so. According to him, the ownership of property by the Federal Government would be an exercise of its executive power.

7. The learned counsel for the appellants (in Civil Appeals No.2308 and 2309/2016) submitted that if JPMC is transferred back to the Federation, in other words if the impugned judgment is upheld by this Court, then JSMU would fall foul of certain criteria laid down by the Pakistan Medical and Dental Council ("PMDC") for the purpose of licensing and running of medical colleges. Therefore, he prayed that this aspect be considered and appropriately dealt with by this Court in its judgment. In this regard, learned counsel was allowed to submit written submissions which has been done. This aspect of the matter has been considered in paragraph No.29 of this opinion.

8. Mr. Hamid Khan, learned counsel for the respondent (in Civil Petition No.2312-L/2018) referred to various documents to argue that SZPMI was established by the Federal Government and its management and control lay with the Board of Governors appointed by the Government of Pakistan; that at the time of devolution SZPMI was being run by the Cabinet Division and not the Ministry of Health; and that on the basis of its constitutive documents it was clear and obvious that SZPMI squarely fell within Entry No.16 of the Federal Legislative List. Thus, it could not have been devolved onto the Provincial Government.

9. Barrister Umaima Anwar, learned Advocate appearing on behalf the respondents (in Civil Appeals No.125-K and 129-K/2016) with the permission of the Court, submitted that the transfer of JPMC, NICVD and NICH was indeed done in light of the process of devolution as per the recommendation of the Implementation Commission after the 18th Amendment; the Federal Government purposely retained JCH and later the derivations in the shape of JPMC, NICVD and NICH, even though Karachi ceased to be a capital because the basis of their Federal status was not due to the capital city but that these were not merely hospitals, rather institutions that fell within Entry No.16 of the Federal Legislative List (and its counterpart entries in the predecessor Constitutions). According to her, the pith and substance of JPMC, NICVD and NICH was research and training.

Learned counsel pointed out that the power of the Federation cannot be restricted when it comes to the fulfillment of the fundamental rights enshrined in the Constitution. In this regard she relied upon the judgments reported as *Liaqat Hussain and others v Federation of Pakistan through Secretary, Planning and Development Division, Islamabad and others*(PLD 2012 SC 224)and *Sindh Revenue Board through Chairman, Government of Sindh and another v The Civil Aviation Authority of Pakistan through Airport Manager*(2017 SCMR 1344). Finally, as per the learned counsel, Entry No.59 of the Federal Legislative List permits ancillary functions to any of the other entries in the said List to be carried out by the Federal Government.

10. The learned Additional Attorney General for Pakistan supported the impugned judgments with respect to all the institutions.

11. The learned Advocate General for Punjab submitted that SZPMI had been validly devolved onto the Government of Punjab.

12. We have heard the learned counsel at length and examined the documents on record and the written arguments submitted with us. Before proceeding further, we consider it pertinent to mention that the validity and constitutionality of the 18th Amendment is nowhere under question, which has been upheld by this Court in the judgment reported as *District Bar Association, Rawalpindi and others v Federation of Pakistan and others* (PLD 2015 SC 401). Further, the question of provincial autonomy and distribution of executive and legislative power between the Federation and the respective Provinces as provided in the Constitution and the 18th Amendment have been affirmed and reiterated in various judgments of this Court. This opinion does not in any manner re-open the said issue. The question before us is of a limited nature, namely, the legality and *vires* of the action whereby certain federal institutions were transferred to the Provinces. As the highest constitutional court of the country having the mandate to interpret the Constitution, we have

examined the transfers in question in light of the constitutional provisions. It may be noted that pursuant to the 18th Amendment an Implementation Commission was constituted to implement and give effect to the provisions of the 18th Amendment. In order to answer the key question mentioned in the opening paragraph of the judgment, we must first consider the constitutional mandate given to the Implementation Commission. In this regard, Clauses (8) and (9) of Article 270AA of the Constitution (as substituted by the 18th Amendment) provide as under:-

(8) On the omission of the Concurrent Legislative List, the process of devolution of the matters mentioned in the said List to the Provinces shall be completed by the thirtieth day of June, two thousand and eleven.

(9) For the purposes of the devolution process under clause (8), the Federal Government shall constitute an Implementation Commission as it may deem fit within fifteen days of the commencement of the Constitution (Eighteenth Amendment) Act, 2010.

[Emphasis supplied]

As is clear from Clause (8) of Article 270AA of the Constitution, matters which were devolved to the Provinces were those specifically mentioned in the Concurrent Legislative List, and this was the precise constitutional mandate given to the Implementation Commission constituted by the Federal Government under Clause (9) thereof. This is bolstered by, *inter alia*, Clauses (i) and (iv) of the Terms of Reference of the Implementation Commission which provided that it "...shall perform such functions as may be necessary for the implementation of Clause 8 of Article 270(AA) of the Constitution...and such other steps needed for the implementation of the [18thAmendment]" and "to review and examine the existing administrative structures at the level of the Federal Government relating to the subjects being devolved as a result of omission of the Concurrent Legislative List from the Fourth Schedule of the Constitution, other related Articles/provisions and to suggest a mechanism for a smooth transition to the provinces" respectively [Emphasis supplied]. Therefore, as rightly observed by the learned High Court of Sindh, the Implementation Commission had to first satisfy itself as to whether the federal matter that came before it related to any

Entry in the Concurrent Legislative List that was omitted, and if so, only then could such Commission take steps for the purposes of devolution. We find from a perusal of the entries contained in the Concurrent Legislative List, as it stood prior to its omission by the 18th Amendment, that none of them cover any of the institutions, i.e. JPMC, NICVD, NICH and NMP (hereinafter collectively referred to as the "Institutions").

13. It must be noted that the argument put forth by Mr. Farooq H. Naek that the devolution of the Institutions did not take place pursuant to Article 270AA(8) and (9) of the Constitution is misplaced. This is manifest from the various actions taken and notifications issued by the Federal and Provincial Governments in this regard. For example:-

- i. Notification No.4-9/2011-Min dated 29.06.2011 issued by the Cabinet Division provides that "Consequent upon the deliberations/decisions of the Implementation Commission, constituted under clause (9) of Article 270AA of the Constitution and with the approval of the Cabinet the following Federal Ministries, alongwith all their Divisions/components shall cease to exist with effect from 1st July, 2011...";
- ii. Notification No.Dy 3852-DS(Admn) dated 30.06.2011 issued by the (Federal) Ministry of Health provides that "On reorganization of Federal Secretariat (sic)in pursuance of Constitution (Eighteenth Amendment) Act, 2010 (Act No.X of 2010), the following departments under the Ministry of Health are transferred w.e.f. 01.07.2011 to Government of Sindh:-
 1. Jinnah Postgraduate Medical Centre (JPMC), Karachi
 2. National Institute of Child Health (NICH), Karachi
 3. National Institute of Cardiovascular Diseases (NICVD), Karachi";
- iii. Notification No.SO(Devolution Matters)/2011-12 dated 21.07.2011 issued by the Government of Sindh, Health

Department provides that "In pursuance of Ministry of Health, Government of Pakistan Islamabad's Notification No.Dy.3852-DS (ADMN) dated 30th June, 2011 the Health Department, Government of Sindh hereby takes over the Administrative Control of following **devolved Institutions** from Federal Ministry of Health to the Sindh Province with effect from 01.07.2011...";

- iv. Notification No. SO(Devolution Matters)/2011-12 dated 21.07.2011 issued by the Government of Sindh, Health Department provides that "In pursuance of Ministry of Health, Government of Pakistan Islamabad's Notification No.Dy.3852-DS (ADMN) dated 30th June, 2011 the Officers and Staff of the Jinnah Postgraduate Medical Centre (JPMC), Karachi...are hereby allowed to join the Sindh Government w.e.f. 01.07.2011...";
- v. Notification No.10-5/2010-C&C dated 05.04.2011 issued by the (Federal) Ministry of Culture provides that "On reorganization of Federal Secretariat **in pursuance of Constitution (Eighteenth Amendment) Act, 2010** (Act No.X of 2010) National Museum of Pakistan, Karachi, of Department of Archaeology & Museums under the Ministry of Culture is transferred to the Department of Culture & Tourism, Government of Sindh with immediate effect";
- vi. Notification No.F.1(2)/DG-I/MSW/2011 dated 05.04.2011 issued by the Establishment Division provides that "On transfer of National Museum of Pakistan, Karachi of Department of Archaeology & Museums to the Department of Culture & Tourism, Government of Sindh **in pursuance of Constitution (Eighteenth Amendment) Act, 2010** (Act No.X of 2010), the following officers of National Museum of Pakistan, Karachi...are transferred to the Department of Culture & Tourism, Government of Sindh..."; and

vii. Notification No.SO(G)CD/16-11/2011 dated 22.04.2011 issued by the Culture Department, Government of Sindh provides that "**Consequent upon approval of 18th amendment in the Constitution...resultant abolition of concurrent legislative list and thereby devolution of National Museum of Pakistan, Karachi**" vide Establishment Division, Govt. of Pakistan's Notification No. 1(2) DG-I/MSW/2011 dated 5th April 2011 to Culture Department, Government of Sindh, the following employees of the said **devolved office**, having reported for duty, are allowed to join and continue working at their present respective places of posting."

[Emphasis supplied]

14. There is no doubt from the foregoing executive instrument that the transfer of the Institutions was indeed carried out pursuant to the 18th Amendment. However, we find that the transfer of the Institutions from the Federal to the Provincial Government was unconstitutional, in that the Institutions did not fall within the Concurrent Legislative List as required by Clause (8) read with Clause (9) of Article 270AA of the Constitution, hence the Implementation Commission went beyond its constitutional mandate in this regard. Consequently, any purported transfer/devolution of the Institutions by the Federal Government and the subsequent notifications and orders issued pursuant thereto were unlawful and of no legal effect.

15. The issue can and ought to be dealt with from another angle. The case of the respondents (writ petitioners before the learned High Courts) is that JPMC, NICVD and NICH fall within Entry No.16 of the Federal Legislative List whereas NMP falls within Entry No.15 thereof. Hence they remained Federal Institutes and could not be devolved upon the Provinces. Entry No.16 has always been a part of Part I of the Federal Legislative List (as opposed to being subsequently inserted therein). It is worthy to note that this entry corresponds to Entry No.12 of the Federal

Legislative List in the Fourth Schedule to the Interim Constitution, Entry No.30 of the Third Schedule (matters with respect to which the Central Legislature has exclusive power to make laws) to the Constitution of 1962, Entry No.21 of the Federal Legislative List in the Fifth Schedule to the Constitution of 1956, and Entry No.12 of the Federal Legislative List contained in the Seventh Schedule to the Act of 1935. Entry No.16 as it now stands reads as under:-

16. Federal agencies and institutes for the following purposes, that is to say, for research, for professional or technical training, or for the promotion of special studies.

At this juncture it would be relevant to note an important principle of interpretation of legislative lists, i.e. they must be liberally construed and given the widest possible meaning and amplitude. In this regard, reference may be made to the judgment reported as *Messrs Sui Southern Gas Company Ltd. and others v Federation of Pakistan and others* (2018 SCMR 802) in which this Court, while declaring the Industrial Relations Act, 2012 to be *intra vires* the Constitution, extensively considered case law from the Indian and Pakistani jurisdictions regarding interpretation of legislative lists in a constitution and laid down the following principles of interpretation:-

- i. The entries in the Legislative Lists of the Constitution are not powers of legislation but only fields of legislative heads;
- ii. In construing the words in an Entry conferring legislative power on a legislative authority, the most liberal construction should be put upon the words;
- iii. While interpreting an Entry in a Legislative List it should be given widest possible meaning and should not be read in a narrow or restricted sense;
- iv. Each general word in an entry should be considered to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it;
- v. If there appears to be apparent overlapping in respect of the subject-matter of a legislation, an effort has to be

made to reconcile the Entries to give proper and pertinent meaning to them;

- vi. A general power ought not to be so construed so as to make a particular power conferred by the same legislation and operating in the same field a nullity;
- vii. Legislation under attack must be scrutinized in its entirety to determine its true character in pith and substance; and
- viii. After considering the legislation as a whole in pith and substance, it has to be seen as to with respect to which topic or category of legislation in the various fields, it deals substantially and directly and not whether it would in actual operation affect an item in the forbidden field in an indirect way.

Keeping the foregoing principles of interpretation in mind, Entry No.16 *supra* has two basic requirements: (i) the agency or institute in question must be “federal”; and (ii) such federal agency or institute must be for the purposes of research, professional training, technical training, or the promotion of special studies. As rightly observed by the learned High Court of Sindh in the impugned judgment, these purposes for which the federal agency or institute exists are not mutually exclusive, rather can be in relation to any or all of these purposes, or a combination thereof of varying degrees. Furthermore, each of the words/phrases “research”, “professional”, “technical”, “training”, “promotion” and “special studies” must be construed liberally and given their widest possible meaning, therefore they can relate to any discipline or field as the noted Entry itself does not contain any restriction in this regard.

16. We now proceed to examine whether or not JPMC, NICVD and NICH fall within the ambit of Entry No.16 of the Federal Legislative List. Though there are somewhat varying versions of the creation and history of JPMC, it is undisputed that a hospital, JCH, and an institute, BMSI, had combined to form

JPMC sometime in the year 1963/64. Undoubtedly, BMSI was an institute falling within the ambit of the predecessor to Entry No.16 of the Federal Legislative List. Be that as it may, the year 1963/64 is important for the reason that it is after the year 1961 that is vital to the argument put forth by Mr. Raza Rabbani, learned ASC that JPMC only remained with the Federation because Karachi was the capital and was never transferred to the Province of Sindh when Karachi ceased to be the capital (in 1961) which was a historical and constitutional wrong perpetuating till devolution took place. We find that since JPMC only truly came into existence in 1963/64 which is post-1961, therefore, Mr. Rabbani's argument loses its significance and the only relevant date (if any) is that of 14.08.1973 when the present Constitution came into force. Therefore it is the nature of JPMC on such date that would be germane to the issue before this Court. It is an admitted fact that JPMC was a federal agency/institute and therefore satisfies the first limb of Entry No.16 of the Federal Legislative List. As regards the second limb, while it may be difficult to pinpoint whether the research and/or training on the one hand or the hospital aspect on the other was predominant, the question ultimately boils down to whether the research and/or training taking place at JPMC was merely ancillary or incidental to the operation of the hospital. The answer to this question, in our opinion, is in the negative. The hospital and institute aspects of JPMC are interdependent and mutually supporting. Bearing in mind the cardinal principle of interpretation that legislative lists ought to be construed liberally and be given the widest amplitude possible, we find that JPMC did fall within Entry No.16 *ibid.*

17. As far as NICVD is concerned, though originally created through a trust deed dated 08.05.1976 ("Trust Deed"), it was subsequently reconstituted as a statutory body by the National Institute of Cardiovascular Diseases (Administration) Ordinance, 1979 ("NICVD Ordinance") (See Sections 3, 4 and 5 of the NIVCD Ordinance). Since at the time of the purported transfer/devolution to the Province of Sindh the NICVD Ordinance was in force hence that shall be considered as relevant for the purposes of determining whether NICVD falls within the ambit of

Entry No.16 of the Federal Legislative List. As regards the first limb of Entry No.16 *supra*, NICVD was a federal agency/institute in terms thereof for the following reasons: (i) NICVD was constituted by the NICVD Ordinance which was a Federal statute; (ii) according to Section 7 of the NICVD Ordinance, the predominant members of the Governing Body of NICVD were of the Federal Government, i.e. the Minister for Health, Social Welfare and Population (Chairman), the Secretary, Ministry of Health, Social Welfare and Population (Vice-Chairman), the Director General, Health, Ministry of Health and Population (Member), a nominee of the Pakistan Federation of Chambers of Commerce and Industry (Member), two persons to be nominated by the Federal Government, of whom one shall be a person possessing medical qualifications (Members), and a nominee of the Auditor-General of Pakistan(Member), whereas only two members were of the Provincial Government, i.e. the elected Mayor of the Karachi Metropolitan Corporation, or if there is no elected Mayor, a social worker of Karachi to be nominated by the Government of Sindh (Member), and a social worker of Sindh, excluding Karachi, to be nominated by the Government of Sindh (Member); (iii) Section 8(2) of the NICVD Ordinance provides that in the discharge of its functions, the Governing Body shall be guided on questions of policy by the instructions, if any, given to it from time to time by the Federal Government which shall be the sole judge as to whether a question is a question of policy, and the Governing Body shall be bound to carry out such directions; (iv) the power to remove any of the Members (other than ex-officio Members) lay with the Federal Government and they could resign by addressing the letter of resignation to the Federal Government [Section 9(1) and (2) of the NICVD Ordinance]; (v) as per Section 13 of the NICVD Ordinance, the funds of NICVD were to consist of, *inter alia*, grants made by the Federal Government and foreign aid and loans obtained with the approval of the Federal Government; (vi) the accounts of NICVD were to be maintained in such form and manner as the Auditor-General of Pakistan may determine in consultation with the Federal Government [Section 14(4) of the NICVD Ordinance]; (vii) the accounts of NICVD were to be audited by one or more auditors who were chartered accountants within the meaning of the Chartered Accountants Ordinance, 1961, and were appointed by NICVD in

consultation with the Auditor-General of Pakistan [Section 14(5) of the NICVD Ordinance]; (viii) the Governing Body may appoint, subject to such general or special orders as the Federal Government may give from time to time, such officers in Grade 18 and above, and engage such consultants or experts, as it may consider necessary for the efficient performance of the functions of NICVD, on such terms and conditions as it may deem fit (Section 15 of the NICVD Ordinance); NICVD may, with the approval of the Federal Government, cooperate with any foreign agency or International Organization for the further development of its technical capabilities and research activities, pursuant to an international agreement or arrangement made before or after the establishment of the Institute (Section 16 of the NICVD Ordinance); (ix) it was the Federal Government that was relevant for the purposes of the approval or issuance of orders, etc. relating to the terms and conditions of service of Government servants working in NICVD (Section 18 of the NICVD Ordinance); (x) the Federal Government was empowered to make rules for carrying out the purposes of the NICVD Ordinance (Section 21 of the NICVD Ordinance); and (xi) the Governing Body was empowered to, with the previous approval of the Federal Government by notification in the official Gazette, make such regulations not inconsistent with the provisions of this Ordinance and the rules made thereunder as it may consider necessary or expedient for the administration and management of the affairs of NICVD (Section 22 of the NICVD Ordinance).

18. With respect to the second limb of Entry No.16 *supra*, Section 6 of the NICVD Ordinance is relevant which provided for the functions of NICVD:-

- 6. Functions of the Institute.-** The functions of the Institute shall be-
- (1) to undertake modern treatment of cardiovascular diseases;
 - (2) to acquire latest physical facilities required for carrying out necessary investigation and treatment of cardiovascular diseases;
 - (3) to seek and enter into cooperation with international and other foreign agencies with the prior approval of the Federal Government in furtherance of the objectives of the Institute;

- (4) to carry out research in Cardiovascular Diseases for prevention and control of cardiovascular diseases as well as for its treatment;
- (5) to undertake training of medical students and nurses, both under-graduate and post-graduate, in cardiovascular diseases; and
- (6) to develop itself into a Centre of super excellence for the treatment of cardiovascular diseases.

As with JPMC, while it may be hard to say with certainty as to whether the research/training aspect outweighed that of treatment, a perusal of the foregoing provisions makes it abundantly clear that the research/training aspect of NICVD is not ancillary or incidental to the functioning of the hospital and therefore, we are of the view that NICVD falls within Entry No.16 *supra*.

19. There is another aspect of NICVD which requires attention. The Provincial Assembly of Sindh has passed the National Institute of Cardiovascular Diseases (Sindh Administration) Act, 2014 ("NICVD Sindh Act") which is basically a replica of the NICVD Ordinance. The former appears to have been enacted to displace the latter. We find this act of the Provincial Assembly attempting in effect to overturn a Federal law and nullify the same to be unconstitutional, particularly considering the fact that NICVD fell within the domain of the Federal Government as stands established hereinabove.

20. Admittedly, NICH was separated from JPMC in the year 1990 and made an attached department of the Federal Ministry of Health, thereby satisfying the first limb of Entry No.16 *supra* of being a federal agency/institute. While NICH has hospital facilities, it is an established fact that it is also a teaching/training institute offering various degrees/diplomas including FCPS, MCPS, nursing programs and paramedical courses. Furthermore, NICH also has facilities for clinical research, resulting in the production of numerous research papers in the relevant field. Like JPMC and NICVD, these aspects as a whole bring NICH within the purview of the second limb of Entry No.16 *supra*.

21. Finally, advertiring to NMP, Entry No.15 of the Federal Legislative List is relevant which, like Entry No.16, has always been a part of Part I of the Federal Legislative List (as opposed to being subsequently inserted therein). It is worthy to note that this entry

corresponds to Entry No.11 of the Federal Legislative List in the Fourth Schedule to the Interim Constitution, Entry No.29 of the Third Schedule (matters with respect to which the Central Legislature has exclusive power to make laws) to the Constitution of 1962, Entry No.21 of the Federal Legislative List in the Fifth Schedule to the Constitution of 1956, and Entry No.11 of the Federal Legislative List contained in the Seventh Schedule to the Act of 1935. Entry No.15 of the Federal Legislative List as it now stands reads as under:-

15. Libraries, museums, and similar institutions controlled or financed by the Federation.

It is an undisputed fact that prior to the purported transfer/devolution, NMP was a museum controlled/financed by the Federation and therefore squarely falls within the ambit of Entry No.15 *supra*. In any case, there is no relevant entry in the Concurrent Legislative List within which NMP would fall.

22. With respect to the case of SZPMI in particular, it is clear from the record that it was established *vide* Resolution dated 29.05.1986 ("Resolution") issued by the Ministry of Health, Special Education and Social Welfare (Health Division), Government of Pakistan (see the Preamble to the Resolution). According to the Resolution, the "Institute" means the Federal Postgraduate Medical Institute, Lahore and includes (i) the Sheikh Zayed Hospital, Lahore; and (ii) the National Clinical Research Complex of the Pakistan Medical Research Council [Clause 1(c) thereof]. The Federal Government may, from time to time, issue to the Institute such directives and instructions as it may consider necessary for carrying out the purposes of this Resolution and the Institute shall follow and carry out such directives and instructions (Clause 3). The management of the Institute was to comprise of the (a) Board; (b) Executive Committee; and (c) Chairman (Clause 4). The overall control, direction and superintendence of the affairs of the Institute shall vest in a Board of Governors which may exercise all powers, perform all functions and do all acts and things which may be exercised, performed and done by the Institute [Clause 5(1)]. In particular and without prejudice to the generality of the

power conferred by sub-paragraph (1) the Board shall: (i) approve overall plans, policies and programmes of the Institute in relation to the approved policy of the Federal Government; (ii) examine and approve teaching and research programme of the Institute; (iii) examine and approve the annual report and evaluation report of the Institute for submission to the Federal Government; and (iv) approve the annual development and non-development budget of the Institute [Clause 5(2)]. The patron-in-Chief of the Board was the President of Pakistan [Clause 6(1)]. The list of members of the Board are: (a) Federal Minister for Health, Special Education & Social Welfare (President); (b) Secretary, Ministry of Health, Special Education & Social Welfare (Vice-President); (c) Auditor-General of Pakistan (Member); (d) One Member of the National Assembly to be nominated by the Federal Government (Member); (e) Secretary, Federal Ministry of Science and Technology (Member); (f) Secretary, Ministry of Finance (Member); (g) Vice-Chancellor, the University of Punjab (Member); (h) Director-General, Health, Health Division, Islamabad (Member); (i) Chairman, Pakistan Medical and Research Council (Member); (j) Secretary, Health, Government of the Punjab (Member); (k) Elected Mayor of Lahore Municipal Corporation (Member); (l) President of College of Physicians and Surgeons of Pakistan (Member); and (m) Chairman (Secretary) [Clause 6(2)]. The Chairman is to be appointed by the Federal Government on such terms and conditions as may be determined by the Federal Government; the Federal Government could, at any time, terminate the appointment of the Chairman without assigning any reason; the Chairman was to work under the general policy guidelines of the Board (Clause 8). The funds of the institute were to consist of (a) grants by the Federal Government; and (b) income from other sources [Clause 12(3)]. The funds of the Institute were to be maintained and operated in accordance with the directions of the Federal Government [Clause 12(4)]. The budget of the Institute was to be submitted every year to the Federal Government; the accounts of the Institute to be maintained in such form and manner as the Federal Government may determine in consultation with the Auditor-General of Pakistan; and the accounts were to be audited by the Auditor-General of Pakistan (Clause 13). The Institute was allowed to invest its funds in any security of the

Federal Government subject to such instructions as the Federal Government may, from time to time, issue (Clause 14). The appointment and termination of officers, advisors, consultants, employees, etc. was in the hands of the Federal Government (Clause 15). The Institute was required to submit annual reports to the Federal Government (Clause 16). Finally, the Federal Government was empowered to make rules for the purposes of the Resolution (Clause 18). The foregoing features of SZPMI make it clear beyond any doubt that it was a federal agency/institute in terms of Entry No.16 of the Federal Legislative List. With respect to the second limb, the objectives of the Institute as identified in Clause 2 of the Resolution are relevant which were to: (a) manage the administration and development of the Institute, Federal Postgraduate Medical Institute and the National Clinical Research Complex; (b) provide treatment facilities in the Sheikh Zayed Hospital of an internationally accepted high standard; (c) develop training facilities for postgraduate medical qualifications of the University of the Punjab and the College of Physicians and Surgeons, Pakistan, and any other examining body after approval of the Board; (d) educate and train medical men and women to become leaders in the medical research, education and health delivery system; (e) develop a system to impart continuing medical health education and training; (f) The Pakistan Medical Research Council of the Ministry of Science and Technology will develop in the Institute the National Clinical Research Complex which would arrange clinical research studies on national health problems and provide research support at primary and higher levels, and co-ordinate with National Institute of Health, Islamabad, other research centres of the Pakistan Medical Research Council, Universities and other national and international research organizations; (g) develop as a centre for dissemination of knowledge of medical sciences and establish liaison with international centres for medical research and education; and (h) perform such other function as may be assigned to it by the Government for the purposes of this Resolution. It is manifest from the aforementioned objectives/functions that SZPMI has a predominant research/training aspect which was far from ancillary or incidental to the functioning of Sheikh Zayed Hospital, Lahore

and therefore, we are in no manner of doubt that SZPMI falls within Entry No.16 *supra*.

23. Besides, at the time of the purported transfer to the Province, the administrative control of SZPMI along with its staff and equipment vested with the Ministry of Health and was given to the Cabinet Division *vide* notification No.F.8-1/94-Estt-I dated 13.02.1994. Therefore falling strictly within the domain of the Federal Government (i.e. Cabinet Division), it could not have been transferred to the Provincial Government. Furthermore, notwithstanding the foregoing, on the basis of the law laid down in the judgment reported as *Messrs Mustafa Impex, Karachi and others v the Government of Pakistan through Secretary Finance, Islamabad and others* (PLD 2015 SC 808) wherein this Court defined the phrase "Federal Government" as the Federal Cabinet comprising of the Prime Minister and the Federal Ministers, the notification No.4-3/2012-Min-I dated 14.02.2012 purportedly issued by the Cabinet Division is held to be illegal for it provides that the "Prime Minister has been pleased to order transfer of administrative control of..." SZPMI to the Government of Punjab. The Prime Minister alone does not have the power or authority to make such transfer without the approval of the Federal Cabinet as held by the post-remand judgment dated 28.12.2018 passed by the learned Single Judge of the Lahore High Court. Even otherwise there is nothing on record to indicate that the above transfer was approved by the Federal Cabinet. Therefore, the transfer in question was clearly in excess of the powers available to the Prime Minister under the Constitution, the law and the Rules of Business, 1973.

24. There is another vital constitutional aspect of the instant issue – the respective "executive authority" of the Federal and Provincial Governments which stem from the legislative competence of the Federal and Provincial Legislatures. In this regard, the relevant constitutional provisions are reproduced hereinbelow for ease of reference:-

97. Extent of executive authority of Federation. Subject to the Constitution, the executive authority of the Federation shall extend to the matters with respect to which Majlis-e-Shoora (Parliament) has power to make laws, including exercise of rights, authority and jurisdiction in and in relation to areas outside Pakistan:

Provided that the said authority shall not, save as expressly provided in the Constitution or in any law made by Majlis-e-Shoora (Parliament), extend in any Province to a matter with respect to which the Provincial Assembly has also power to make laws.

137. Extent of executive authority of Province. Subject to the Constitution, the executive authority of the Province shall extend to the matters with respect to which the Provincial Assembly has power to make laws:

Provided that, in any matter with respect to which both Majlis-e-Shoora (Parliament) and the Provincial Assembly of a Province have power to make laws, the executive authority of the Province shall be subject to, and limited by, the executive authority expressly conferred by the Constitution or by law made by Majlis-e-Shoora (Parliament) upon the Federal Government or authorities thereof.

142. Subject-matter of Federal and Provincial laws. Subject to the Constitution-

- (a) Majlis-e-Shoora (Parliament) shall have exclusive power to make laws with respect to any matter in the Federal Legislative List;
- (b) Majlis-e-Shoora (Parliament) and a Provincial Assembly shall have power to make laws with respect to criminal law, criminal procedure and evidence.
- (c) Subject to paragraph (b), a Provincial Assembly shall, and Majlis-e-Shoora (Parliament) shall not, have power to make laws with respect to any matter not enumerated in the Federal Legislative List.
- (d) Majlis-e-Shoora (Parliament) shall have exclusive power to make laws with respect to all matters pertaining to such areas in the Federation as are not included in any Province.

The foregoing provisions and the Federal Legislative List (along with the Concurrent Legislative List that existed prior to the 18th Amendment) have been considered by this Court in various judgments albeit in differing contexts. In the judgment reported as *Messrs Gadoon Textile Mills and 814 others v WAPDA and others* (1997 SCMR 641) this Court was faced with the question as to whether the item of "electricity" was a Federal or Provincial subject(prior to the 18th Amendment) for the purposes of ascertaining who has the power to determine the tariff for electricity supply by the Water and Power Development Authority ("WAPDA"). In this regard, Articles 97 and 137 of the Constitution were briefly discussed as under:-

14. A perusal of the above-quoted Article 97 indicates that it provides that subject to Constitution, the executive authority of the Federation shall extend to the matters with respect to which Parliament has power to make laws including exercise of rights, authority and jurisdiction in and in relation to areas outside Pakistan. It may further be noticed that proviso to the above Article limits the executive authority of the Federation by providing that the said authority shall not, save as expressly provided (i) in the Constitution or (ii) in any law made by Parliament; extend in any Province to a matter with respect to which the Provincial Assembly has also power to make laws.

The above position is reinforced by Article 137 which lays down that the executive authority of the Province shall be co-extensive with its legislative power, however, the proviso to the above Article provides that in any matter with respect to which both Parliament and the Provincial Assembly of a Province have power to make laws, the executive authority for the Province shall be subject to, and limited by, the executive authority expressly conferred by the Constitution or by law made by Parliament upon the Federal Government or authorities thereof.

After a considerable discussion regarding the President's power under Article 268(3) of the Constitution to, *inter alia*, bring the provisions of any existing law into accord with the provisions of the Constitution (other than Part II of the Constitution) within a period of two years from the commencing day, this Court held that:-

15. ...The effect of Article 70 read with item No.3 of Part II of the Federal Legislative List of the Constitution was to confer exclusively legislative power in respect of WAPDA on the Federal Legislature. As a corollary to the same, the Federal Government shall have executive power in respect of WAPDA in terms of Article 97 of the Constitution. The factum that "electricity" is given in the Concurrent Legislative List as Item No.34 is of no consequence as above Item No.3 of Part II of the Federal Legislative List would exclude the application of the former in the case of WAPDA subject to Articles 154 and 161 of the Constitution.

In the case of *Shamas Textile Mills Ltd. and others v The Province of Punjab and 2 others*(1999 SCMR 1477), while this Court made reference to Articles 141, 142 and 143 of the Constitution (as they existed prior to the 18th Amendment), the case primarily pertained to Article 268 of the Constitution (as in *Gadoon Textile Mills*' case *supra*) and the effect of legislation by the Federal and Provincial Legislatures both falling within the sphere of 'labour' in the erstwhile Concurrent Legislative List in the Constitution. Although not directly related to the issue faced in the instant matter, it is worthy to reproduce a tangentially relevant extract from *Shamas Textile Mills*' case *supra* which reads as under:-

20. Moreover, there is no dearth of authority for the proposition that the doctrine of occupied field is concomitant of the larger doctrine of pith and substance and incidental encroachment under the doctrine of pith and substance with all its concomitants, postulates for its applicability on a competition between Federal legislation and Provincial legislation and it would be erroneous to invoke the doctrine where there is no such competition, merely because a Provincial law conflicts with another law which has not been passed by the Federal Legislature but deals with a matter in the Federal List...

In the judgment reported as *Pakistan Flour Mills Association and another v Government of Sindh and others* (2003 SCMR 162), while considering the question of whether the 'market committee fees' fell under Items No.49 and 54 of the Federal Legislative List empowering the Parliament to impose such fees and not the Provincial Assembly, this Court examined Article 142 of the Constitution (as it existed prior to the 18th Amendment) and observed that:-

After reading Item Nos.49 and 54 of the Federal Legislative List and items/entries provided in the Concurrent Legislative List one could say that the subject-matter of the imposition of fees on the agricultural produce does not fall substantially within any of the Legislative List, therefore, in view of sub-Article (c) of Article 142 of the Constitution of Pakistan, 1973, Provincial Assembly could legislate/make the laws with respect to the matter not enumerated in either the Federal Legislative List or the Concurrent Legislative List...

However it is pertinent to note that all the foregoing cases primarily pertained to the President's power under Article 268 of the Constitution and pertained to the Federal and Concurrent Legislative Lists and the corresponding Articles of the Constitution as they existed prior to the 18th Amendment and in was in such context that the foregoing observations were made. In the judgment reported as *Messrs Elahi Cotton Mills Ltd and others v Federation of Pakistan through Secretary M/o Finance, Islamabad and 6 others* (PLD 1997 SC 582) this Court, while considering the meaning of the word "income" used in Entry No.47 of Part I of the Federal Legislative List (prior to the 18th Amendment), held that:-

16. We may point out that in a Federal Constitution like we have in Pakistan, the legislative power is distributed between the Provincial and the Federal Legislatures. With that view legislative lists are prepared. The entries contained therein indicate the subjects on which a particular Legislature is competent but they do not provide any restriction as to the power of the Legislature concerned. It can legislate on the subject mentioned

in an entry so long as it does not transgress or encroach upon the power of the other Legislature and also does not violate any fundamental right as to Legislative power is subject to constraints contained in the Constitution itself...

[Emphasis supplied]

25. We now advert to the post-18th Amendment era. In the case of *Liaqat Hussain and others v Federation of Pakistan through Secretary, Planning and Development Division, Islamabad and others* (PLD 2012 SC 224), the petitioner invoked the jurisdiction of this Court under Article 184(3) of the Constitution challenging the decision to close down various projects run by the Federal Government in the Provinces (including the Basic Education Community Schools) pursuant to the omission of the Concurrent Legislative List by virtue of Article 270AA(8) and (9) of the Constitution through the 18th Amendment. It was the petitioners' case that despite devolution of the subject of education to the Provinces after the 18th Amendment, the Federal Government is not absolved of its duty to ensure improvement/development of the formal and informal education in the country. In this context, the relevant extracts of the said judgment read as follows:-

29. ...our State, by means of 18th Constitutional Amendment has incorporated Article 25A...whereby Fundamental Right have (sic) been conferred upon all the children of the age of 5 to 16 years to receive free and compulsory education...Under Article 7 of the Constitution, the State includes the Federal and the Provincial Governments, therefore while inserting Article 25A in the Constitution the Parliament, in view of the definition of the State had not absolved the Federal Government from conferring the Fundamental Rights upon the children.

[Emphasis supplied]

While discarding the argument of the learned Attorney General that after the 18th Constitutional Amendment as the Concurrent Legislative List has been abolished, therefore, except Provincial Governments, the Federal Government has no responsibility to enforce the fundamental right to education to its subjects, particularly to the citizens who were receiving education through the informal system of education, this Court opined as follows:-

In this context, it is to be noted that in terms of Article 37(a) of the Constitution, the State shall form such policies on the basis of which it shall promote, with special care, the educational and economic interest of backward classes or areas. We are conscious of our jurisdiction regarding the Principles of Policy of the State

but at the same time we are not oblivious of our duties to enforce Fundamental Rights with regard to free education to the children as now has been guaranteed under Article 25A of the Constitution.

30. ...it is concluded that under Article 29 read with Article 25A of the Constitution of the Islamic Republic of Pakistan **the Fundamental Rights are required to be enforced by the State.** Especially in view of newly added Article 25A of the Constitution, it has been made mandatory upon the State to provide the education to the children of the age of 5 to 16 years.

[Emphasis supplied]

In the judgment reported as *Province of Sindh through Chief Secretary and others v M.Q.M. through Deputy Convener and others* (PLD 2014 SC 531), the question involved was whether the Federal as opposed to Provincial Government had the power regarding delimitation of constituencies. This Court discussed the nature of fundamental rights and observed that:-

43. Human rights law makes a distinction between positive and negative rights, wherein positive rights usually oblige action and negative rights usually oblige inaction. Similarly, many of the fundamental rights granted by our Constitution pertain to both positive and negative rights. The holder of a negative right is entitled to non-interference, while **the holder of a positive right is entitled to provision of some good or service.**

45. **Positive rights place a positive duty on the state and include social and economic rights. The right to** education (Article 25A), **protection of person and property (Article 9** and Article 24 respectively) and the promotion of social justice and eradication of social evils (Article 37) for instance, **would be classified as positive rights...**

[Emphasis supplied]

Thereafter the Court proceeded to observe as under:-

62. Since Article 222(b) does not exclude the delimitation of constituencies for local government, and as the body of the Constitution specifies the appropriate legislature which should pass the law, any reference to the provisions of the legislative entries contained in Item 4 of the Fourth Schedule are of no consequence. There are similar provisions in the Constitution qua which there is no corresponding entry in the Federal Legislative List. For example, Article 6 clearly provides that the Majlis-e-Shoora (Parliament) will pass the law for high treason. But there is no corresponding entry in the 4th Schedule prescribing the subject of high treason in the Federal Legislative List. Article 142(c) could not be pressed into service to say that since the 4th Schedule is silent, in terms of Article 142(c), the Provincial Legislature would legislate in respect of high treason. **When the main body of the Constitution provides for the competent legislature it is not necessary to look into the legislative list.** Under Article 87(2), the Majlis-e-Shoora (Parliament) may enact law for conditions of service of secretarial staff, whereas in this regard there is no corresponding entry in the Federal Legislative List; that Article 237 empowers the Majlis-e-Shoora (Parliament) to make laws for indemnity; against there is no entry to that effect

in the Federal Legislative List; that under Article 253 the Majlis-e-Shoora (Parliament) may make laws pertaining to maximum limits as to property etc; however, there is no corresponding entry in the Federal Legislative List; Article 146(2) states that the Majlis-e-Shoora (Parliament) may enact laws to confer powers on Provinces or their officers, but there is no entry in this regard in the Federal Legislative List; that under proviso to clause (2) of Article 212, the Majlis-e-Shoora (Parliament) may make laws in relation to administrative tribunals, however, there is no corresponding entry in the Federal Legislative List; that even though "electricity" falls under entry 4 of the Part II of the Federal Legislative List, under Article 157(2)(b) the Provincial Government is empowered to levy tax on consumption of electricity within the Province and that Entry 58 of the Part I of the Federal Legislative List, clearly provides that the matters which under the Constitution are within the legislative competence of Majlis-e-Shoora (Parliament) or related to the Federation, would fall under the domain of the Federal Legislature. In the instant case, as explained above, under the relevant Articles of the Constitution, the subject matters of delimitation and conduct of Local Government Elections fall under the domain of Parliament/Federal Legislature.

[Emphasis supplied]

In *Mustafa Impex's casesupra* wherein this Court defined the phrase "Federal Government" as the Federal Cabinet comprising of the Prime Minister and the Federal Ministers, Article 97 of the Constitution was discussed in the following terms:-

64. ...The use of the phrase "subject to the Constitution" in Article 97 indicates that the executive authority of the Federation, as exercised by the Federal Government, is subordinated to the constitutional schema in relation to the conferment of constitution powers and responsibility on the three great organs of the State...

In the case of *Lahore Development Authority D.G. and others v Ms. Imrana Tiwana and others* (2015 SCMR 1739) pertaining to the Signal Free Corridor Project which the scope of Article 140A of the Constitution and the vires of various provisions of the Lahore Development Authority Act, 1975 were considered, this Court held:-

52. The words "Subject to the Constitution" in Articles 142 and 137 of the Constitution simply mean that where the Constitution itself places a bar on the exercise of legislative or executive authority by the Province such authority cannot be exercised in spite of its conferment by these Articles. For instance, while the Province has executive authority under Article 137, this authority must be so exercised so as to secure compliance with federal laws, which apply in that Province [Article 148(1)]. Likewise, the legislative authority of the Province under Article 142 of the Constitution can be conferred on the Federation under Article 144. Further, neither the executive nor the legislative authority of a Province can be exercised in

a manner which violated Fundamental rights. Any such exercise would fall foul of Article 8 of the Constitution.

53. The words, "Subject to the Constitution" do not, therefore, make Articles 137 or 142 subservient to the remaining provisions of the Constitution. All that these mean is that where the Constitution creates a specific bar to the exercise of such executive or legislative authority or provides a different manner for such exercise then that authority must either not be exercised at all or exercised in such manner as the Constitution permits. It does not mean that the provision prefaced with such words is a subordinate constitutional provision. It also cannot mean that once the Province has devolved certain powers on the Local Government, its legislative and executive authority is effaced by that of the Local Government. The said provisions are not subordinate, but provisions, the exercise of authority under which, is untrammeled except where the Constitution itself creates a specific and overriding bar.

[Emphasis supplied]

In the judgment reported as *Sindh Revenue Board through Chairman Government of Sindh and another v The Civil Aviation Authority of Pakistan through Airport Manager* (2017 SCMR 1344), this Court was faced with the question as to whether the Provincial Legislature of Sindh was constitutionally empowered to levy sales tax on a federal body like the Civil Aviation Authority ("CAA"). It held that the functions of CAA are those which are listed in the Federal Legislative List, and that the Constitution does not permit the imposition of sales tax by a Province on various subjects contained in such list by virtue of Article 142(a) thereof. The judgment then goes onto to discuss in great detail the American case law regarding the legislative domains of the Federation and the States.

23. Item 59 of Part I and item 18 of Part II of the Federal Legislative List of our Constitution provide that the "matters incidental or ancillary to any matter enumerated in the Federal Legislative List" are also within the exclusive domain of the Federal Legislature. These provisions are similar to the American "necessary and proper" powers...

28. ...The fees and charges levied by CAA are under the authority of the Federal Legislature. Therefore, the province's imposition of sales tax in effect constitutes taxing the fees and charges billed and recovered by CAA. This cannot be permissible because it would mean that the province is taxing the constitutional means employed by the Federal Legislature to execute its constitutional powers. In doing so the province is also interfering in Federal functions.

30. Pakistan like the United States of America is a federal republic or a federation. The Constitution states that Pakistan is a "Federal Republic" (Article 1(1) of the Constitution) comprising of the provinces, the Islamabad Capital Territory, the Federally

Administered Tribal Areas and such States and territories as are or may be included in it (Article 1(1) of the Constitution). This amalgamation of territories constitutes the Federation (Article 1(3) of the Constitution). The seventh recital to the preamble to the Constitution mentions the "Federation" which comprises of "units"...

32. In a federal republic or federation matter of common concern to all the units are attended to by the republic or federation...

35. Mr. Raza Rabbani's submissions in [Pakistan Workers Federation, Balochistan v. Government of Pakistan (2014 PLC 351)] also help in understanding the background and the manner in which the Eighteenth Amendment to the Constitution was discussed, enacted and implemented and also what were the objectives that were sought to be achieved. Mr. Rabbani states, and the Balochistan High Court agreed with him, that despite the removal of the Concurrent Legislative List from the Constitution the Federal Legislature may still legislate in respect of a subject that was mentioned in the Concurrent Legislative List provided it came within the purview of another subject on the Federal Legislative List or was incidental or ancillary thereto. The Balochistan High Court held that despite the omission of the Concurrent Legislative List from the Constitution the Federal Legislature could still constitutionally legislate with regard to the subjects contained therein provided they applied to federally controlled institutions, inter-provincial matters or corporations (items 3, 13 and 31 respectively of Part II of the Federal Legislative List)...

37. The Constitution, which is characterized as a living and organic thing, is not to be interpreted narrowly or restrictively, and a pedantic interpretive approach is to be avoided. Whilst the provincial legislatures are independent, they must operate within the sphere allotted to them and within their prescribed limit. Neither the Federation nor the provinces should invade upon the rights of the other nor encroach on the other's legislative domain. The pith and substance of the legislated subject is to be examined to determine in whose legislative sphere a particular subject comes under. And above all a reasonable interpretation which does not produce impracticable results should be adopted.

[Emphasis supplied]

Finally in the case of *Sui Southern Gas Company Ltd. supra* this Court observed as below:-

2. The Islamic Republic of Pakistan is a democratic State (Federation) with its Federating Units (Provinces) and the Constitution...recognizes and creates a balance between the authority of the Federation and the autonomy of the Provinces, which recognition has been given an iron cladding by virtue of the Eighteenth Amendment, passed vide the Constitution (Eighteenth Amendment) Act, 2010. This Amendment to the Constitution has inter alia introduced a drastic enhancement in the legislative authority of the Provinces by deleting the Concurrent Legislative List (CLL), whereby previously both the Parliament and the Provincial legislatures could legislate on the subjects enumerated therein. The omission of the CLL, left only a single Legislative List (CLL) in the Constitution which exclusively list subjects that can be legislated upon by the Parliament alone, and by virtue of Article 142(c) of the Constitution any subject not enumerated in these two lists would subject to the Constitution, be within the legislative competence of the Provinces...

After considering Articles 97, 137, 141, 142 and 232(2) of the Constitution, the Court found that only the Federal Legislature, and not the Provincial Legislatures, has extra-territorial authority to legislate, therefore the Industrial Relations Act, 2012 which regulated trade unions functioning at a trans-provincial level was within the legislative competence of the Parliament.

26. This Court in the foregoing cases has to a great extent examined and laid down the constitutional contours of the legislative competence of the Federal and Provincial Legislatures which in turn determines the executive authority of the Federal and Provincial Governments respectively as per Articles 97, 137 and 142 of the Constitution read with the Federal Legislative List. However, we find it pertinent to clarify that in the broader scheme of things, notwithstanding the fact that it has been held in the earlier portion of this opinion that the various institutions involved in this matter fall within the respective entries of the Federal Legislative List, these institutions draw constitutional and legal validity from a very significant and core feature of our democratic constitution, i.e. fundamental rights. With respect to the medical institutions in particular, i.e. JPMC, NICVD, NICH and SZPMI, the relevant fundamental right is the right to life enshrined in Article 9 of the Constitution which provides that "No person shall be deprived of life or liberty save in accordance with law." As highlighted above in the case of *Province of Sindh supra*, this Court held that the right to life is a positive right thereby entitling the holder of such right to provision of some good or service; and being a positive right, it placed a **positive duty** on the state to act. Therefore the State, which undoubtedly includes the Federal Government as per Article 7 of the Constitution, is duty-bound and is under an obligation to guarantee the enforcement of the fundamental rights enshrined in the Constitution, with the most important one being the right to life. The significance of such right cannot be overstated and the plethora of Pakistani judgments on the various shapes and forms this right can take is evidence of such fact. The right to life undoubtedly entails the right to healthcare which means that everyone has the right to the highest

attainable standard of physical and mental health and this comprises of access to all kinds of medical services including but not limited to hospitals, clinics, medicines and services of medical practitioners which must not only be readily available and easily accessible to everyone without discrimination, but also of high standard. As the State, the Federal Government has an obligation to carry out all necessary steps to ensure realization of this goal. This right has been recognized by the Supreme Court of India in the context of Article 21 of the Indian Constitution which provides that "No person shall be deprived of his life or personal liberty except according to procedure established by law." In this respect, the Indian Supreme Court has held in the case of *State of Punjab and others v Mohinder Singh Chawala and others* [(1997) 2 SCC 83] that "It is now settled law that right to health is integral to right to life. Government has a constitutional obligation to provide health facilities." Moreover in the judgment reported as *State of Punjab and others v Ram Lubhaya Bagga and others* [(1998) 4 SCC 117] while making reference to *Mohinder Singh Chawala's* case *supra*, the Indian Supreme Court opined that:-

23. When we speak about a right, it correlates to a duty upon another, individual, employer, Government or authority. In other words, the right of one is an obligation of another. Hence the right of a citizen to live under Article 21 casts obligation on the State. This obligation is further reinforced under Article 47, it is for the State to secure health to its citizen as its primary duty. No doubt Government is rendering this obligation by opening Government hospitals and health centers, but in order to make it meaningful, it has to be within the reach of its people, as far as possible, to reduce the queue of waiting lists, and it has to provide all facilities for which an employee looks for at another hospital. Its up-keep; maintenance and cleanliness has to be beyond aspersion. To employ the best of talents and tone up its administration to give effective contribution. Also bring in awareness in welfare of hospital staff for their dedicated service, give them periodical, medico-ethical and service oriented training, not only at the entry point but also during the whole tenure of their service. Since it is one of the most sacrosanct and valuable rights of a citizen and equally sacrosanct sacred obligation of the State, every citizen of this welfare State looks towards the State for it to perform its this obligation with top priority including by way of allocation of sufficient funds. This in turn will not only secure the right of its citizen to the best of their satisfaction but in turn will benefit the State in achieving its social, political and economical goal.

In *Ram Lubhaya Bagga's* case *supra*, the Indian Supreme Court referred to the judgment reported as *Paschim Banga Khet Mazdoor*

Samity and others v State of West Bengal and others(AIR 1996 SC 2426) in which it was held that:-

It is no doubt true that financial resources are needed for providing these facilities. But at the same time it cannot be ignored that it is the constitutional obligation of the State to provide adequate medical services to the people. Whatever is necessary for this purpose has to be done. In the context of the constitutional obligation to provide free legal aid to a poor accused this Court has held that the State cannot avoid its constitutional obligation in that regard on account of financial constraints. The said observations would apply with equal, if not greater, force in the matter of discharge of constitutional obligation of the State has to be kept in view.

Furthermore, international law also emphasizes the right to health and imposes a duty on Pakistan, as a Member State of various organizations such as the United Nations and World Health Organization and has ratified various international covenants including the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights to ensure enforcement of such right.

27. As held by this Court in *Liaqat Hussain's case supra*, the Federal Government is not absolved from conferring the fundamental rights contained in the Constitution upon its citizens and the State is required to enforce such rights. We find that this duty prevails, notwithstanding the respective domain of Federal and Provincial executive authority as determined by the respective Federal and Provincial legislative competence in light of the provisions of Articles 97, 137 and 142 of the Constitution read in conjunction with the Federal Legislative List. It is a duty that transcends and surpasses other provisions of the Constitution and cannot, in any circumstance whatsoever be curtailed or abridged. The more one scrutinizes the argument that the Federal Government cannot set up and run hospitals or similar facilities/institutions providing medical and healthcare services in any of the Provinces, the more unsustainable and flawed it becomes. Surely, the intention behind the 18th Amendment could not have been to prevent the Federal Government from opening healthcare facilities in any of the Provinces of Pakistan, for concluding so would be tantamount to attributing absurdity to a

constitutional provision, something which we are not prepared to do bearing in mind the well-known canons of statutory and constitutional interpretation.

28. This takes us to Entry No.37 of the Federal Legislative List which provides for "Works, lands and buildings vested in, or in the possession of Government for the purposes of the Federation (not being military, naval or air force works), but, as regards property situate in a Province, subject always to Provincial legislation, save in so far as Federal law otherwise provides." This entry allows the Federal Government to exercise its executive authority with respect to works, lands and buildings vested in it or in its possession (apart from military, naval or air force works) but with a caveat, that if such works, lands and buildings are situated in a Province, then they shall be subject to Provincial legislation unless Federal law provides for otherwise.

29. In light of the foregoing, to sum up, we are of the view that the Institutions were purportedly transferred/devolved onto the Province of Sindh by the Federal Government pursuant to the 18th Amendment. However, the Implementation Commission could only act in terms of Clauses (8) and (9) of Article 270AA of the Constitution and since it failed to satisfy itself that none of the Institutions were covered by the entries contained in the Concurrent Legislative List (as omitted by the 18th Amendment), therefore such Institutions could not have been devolved, consequently the purported transfer/devolution was unconstitutional and unlawful. Besides, as established in this opinion, JPMC, NICVD, NICH and SZPMI fell within the ambit of Entry No.16 of the Federal Legislative List while NMP fell within the purview of Entry No.15 thereof and were therefore within the exclusive federal domain and could not have been transferred/devolved upon the Province of Sindh. Moreover, NICVD was governed by the NICVD Ordinance which was a federal law. This is an additional reason for which the transfer to the Provincial Government was found by us to be unlawful. Notwithstanding the foregoing, the transfer of SZPMI was also unlawful for the reason

that it was done by the Prime Minister and not the Federal Cabinet as defined by *Mustafa Impex's case supra*.

30. Before parting, we would like to deal with the issue mentioned above in paragraph No.7 of this opinion regarding the practical difficulties that JSMU would face in case JPMC, NICH and NICVD are reverted to the Federation. It is the stance of JSMU that if the reversion takes place, it would lose the beds and faculty of JPMC, NICH and NICVD resulting in JSMU falling foul of the requirements of recognition by PMDC. Therefore the learned counsel prayed that certain savings be granted so that no prejudice is caused to the students. Before proceeding further, the structure of JSMU needs to be understood. Section 4(1) of the Jinnah Sindh Medical University Act, 2013 ("JSMU Act") provides that all properties and assets, right and interest of whatever kind, used, enjoyed, possessed, owned or vested in, or held in trust by the Sindh Medical College ("SMC") and all liabilities legally subsisting against them shall stand transferred to JSMU. Section 2(h) thereof defines a "constituent college" as a college maintained and administered by the university, i.e. JSMU, and according to Section 22, SMC shall be the constituent college of JSMU. Adverting to the Medical and Dental Institutions (Recognition, Eligibility Criteria for Enhancement in Annual Admissions and Accreditation Standards) Regulations, 2018 ("2018 Regulations"), Regulation 2(f) defines an "institution" as any college or institution within Pakistan recognized under the Ordinance which trains for, or grants or both trains for and grants, degrees or diplomas in dentistry or medicine along with its affiliated teaching hospital. Regulation 3(1) provides that an institution, desirous of new recognition under the Medical and Dental Council Ordinance, 1962 ("PMDC Ordinance") and the Regulations made thereunder, may apply through the affiliating University or Degree Awarding Institution to PMDC on the prescribed application form as set out in Appendix-I; first time recognition, subject to fulfillment of conditions set out in the Ordinance and the Regulations, shall be for one hundred MBBS students or fifty BDS students only, as the case may be, irrespective of additional facilities available. We are of the view that it is undisputed that SMC is recognized under the

PMDC Ordinance as is evident from the official website of PMDC, with JPMC, NICH and NICVD as its attached teaching hospitals, and permission to admit 350 MBBS students per year¹, therefore, SMC is an "institution" for the purposes of the Regulation. Regulation 5 pertains to renewal of recognition, sub-clause (1) whereof provides that the renewal and continued recognition of an institution is subject to verification of the fulfillment of provisions of the PMDC Ordinance and Regulations made thereunder; it shall be the responsibility of the institute to apply to PMDC six months prior to next scheduled visit (Appendix-VIII) for the purpose of maintaining continuation of recognition; thereafter a comprehensive inspection may be made after every five years; however, the President of PMDC may order a surprise comprehensive inspection of any institution at any time. As per sub-clause (2), any failure to comply with the Regulations shall result in de-recognition of the institution in the prescribed manner. In light of the foregoing, it needs to be seen as to whether SMC continues to comply with the Regulations upon reversion of JPMC, NICH and NICVD to the Federal Government.

31. The first issue to be dealt with is the requirement of beds. In this regard, Regulations 9 and 14 are important which read as under:-

9. Ownership of medical institution.- (1) The title of the ownership of the teaching medical institution and the hospital shall vest in the name of any of the following persons, namely:-

- (a) body corporate registered under the relevant laws of companies or societies or trust;
 - (b) Federal Government or Provincial Government or Local Government or public-sector Pakistan University;
 - (c) Private sector Pakistan University; and
 - (d) Public, religious or charitable trust registered under the relevant law.
- (2)
- (3)

(4) For training of one hundred medical students annually, the applicant shall own or possess by way of duly registered thirty three years lease, a suitable plot of land measuring not less than three acres for college building separate from teaching hospital

¹ At Serial No.3 of the list of Sindh Public Sector Medical Colleges available at <http://www.pmdc.org.pk/aboutus/recognizedmedicaldentalcolleges/tqid/109/default.aspx>.

according to the covered area as set out in Appendix-I with surrounding open area.

(5) The medical institution is required to have five hundred bedded teaching hospital to train one hundred MBBS students of which a minimum of one hundred and fifty bedded multidiscipline hospital to be owned and managed by the college at the time of application for recognition. Rest of the requirement of hospital and teaching beds may be met by a public-public or private-private or public-private partnership. These hospitals, together, must comply with the requirements of infrastructure and facilities as set out in sections 21, 22, 23, 24 and 25 of Appendix I. For institutions admitting more than 100 students the hospital beds and facilities are proportionately enhanced.

14. Partnership.-An institution may enter into partnership with other hospitals, in addition to their own hospital in pursuance of sub-regulation (3) of regulation 9 or as the case may be sub-regulation (3) of regulation 10, and engage them as teaching hospitals by executing a ten year agreement with a notice period of five years, duly registered under the relevant law and such agreement shall be submitted along with the application. The partnership deed shall expressly provide complete details of working relationship between the college and the attached or affiliated hospital categorically providing for the student training arrangement. Any anticipated change in partnership/affiliation agreement, shall be communicated to PM&DC at least one year in advance. The agreement shall, among other conditions, contain,-

- (a) defined responsibilities of each party related to the educational program for MBBS and BDS students;
- (b) clauses assuring student and faculty access to appropriate resources for MBBS and BDS student education;
- (c) any incentive to employees and staff of the affiliated hospital like subsidy in tuition fee and scholarships for their children, allocation of seats etc;
- (d) any financial settlement between the two parties including remuneration, capitation fee, financial compensation to students in case of closure of college, investment in infrastructure and equipment's etc; and
- (e) that the medical and dental college shall have absolute control over the academic and administrative affairs of the hospital under this agreement.

[Emphasis supplied]

Regulation 9(1) provides that the title of the ownership of the teaching medical institution and the hospital shall vest in the name of any of the persons listed in parts (a) to (d), of which the Federal Government and a public-sector Pakistan University contained in part (b) are relevant to the instant case. Sub-clause (1) of Regulation 9 cannot be read in isolation, and must be read with sub-clause (5) thereof which provides that while the medical institution is required to have a five hundred bedded teaching hospital to train one hundred MBBS students, a minimum of one hundred and fifty bedded multidiscipline hospital must be owned and managed by the college at the time of application for

recognition. This conditions is not only for the first time the institute applies for recognition, but is also for renewal and continued recognition as per Regulation 5 which reads as under:-

5. Renewal of recognition.- (1) The renewal and continued recognition of an institution is subject to verification of the fulfillment of provisions of the Ordinance and regulations made thereunder. It shall be the responsibility of the institute to apply to the Council six months prior to next scheduled visit (Appendix-VIII) for the purpose of maintaining continuation of recognition. Thereafter a comprehensive inspection may be made after every five years. However, the President of the Council may order a surprise comprehensive inspection of any institution at any time.

(2) Any failure to comply with these regulations shall result in de-recognition of the institution in the prescribed manner.

(3)

Regulation 9(5) read with Regulation 14 allows for the rest of the requirement of the hospital and teaching beds to be met by a public-public or private-private or public-private partnership. However at the time of promulgation of the Jinnah Sindh Medical University Act, 2013 ("JSMU Act") by the Provincial Assembly of Sindh, the Medical and Dental Institutions (Recognition, Eligibility Criteria for Enhancement in Annual Admissions and Accreditation Standards) Regulations, 2012 ("2012 Regulations") were in force. The 2012 Regulations were very similar to the 2018 Regulations. Regulation 9(3) of the 2012 Regulations, the predecessor to Regulation 9(5) of the 2018 Regulations regarding ownership of medical institutions is relevant which is reproduced below for ease of reference:-

The medical institution is required to have five hundred bedded teaching hospital to train one hundred MBBS students of which a minimum of one hundred and fifty bedded multidiscipline hospital with infrastructure and facilities as set out in Appendix V and VI **is to be owned and managed by the college at the time of application for recognition. Rest of the requirement of hospital and teaching beds may be met by a public-public or private-private or public-private partnership.**

[Emphasis supplied]

Regulation 5(1) of the 2012 Regulations provided for renewal and continued recognition as follows:-

5. Renewal of recognition.- (1) **The renewal and continued recognition of an institution is subject to verification of the**

fulfillment of provisions of the Ordinance and regulations made thereunder. It shall be the responsibility of the institute to apply to the Council six months prior to next scheduled visit (Appendix VIII) for the purpose of maintaining continuation of recognition. This process may continue till completion of establishment of the institution, expansion of hospital facilities thereof and till first batch of students graduate. Thereafter a comprehensive inspection may be made after every five years. However the President of the Council may order a surprise comprehensive inspection of any institution at any time.

(2) Any failure to comply with these regulations shall result in derecognition of the institution in the prescribed manner.

[Emphasis supplied]

At the time of promulgation of the JSMU Act, SMC did not own and manage a minimum of one hundred and fifty bedded multidiscipline hospital as per Regulation 9(5) of the 2012 Regulations. Through the Jinnah Sindh Medical University (Amendment) Act, 2015 ("JSMU Amendment Act"), the following provisions were added to the JSMU Act:-

(h-i) "constituent center" means the constituent center administered and maintained by the University;

(4-A) The Jinnah Post Graduate Medical Center and National Institute of Child Health shall be the constituent center and constituent institute of the University.

Post the JSMU Amendment Act, according to Section 2(h-i) read with Section 4-A of the JSMU Act, JPMC and NICH became the constituent centers of JSMU (and hence SMC) being administered and maintained by the latter. It appears that the idea was so that SMC did not fall foul of the "own and manage" requirement under Regulations 9(3) and 5 of the 2012 Regulations [and subsequently under Regulations 9(5) and 5 of the 2018 Regulations], although whether the JSMU owned and managed JPMC and NICH by virtue of the JSMU Amendment Act is a moot point.

32. Be that as it may, it seems that upon reversion of JPMC and NICH to the Federal Government, SMU would cease to own and manage the two noted teaching hospitals (it is presumed for the purposes of this opinion that JSMU owned and managed JPMC and NICH by virtue of the JSMU Amendment Act as this issue is not before us in the instant *lis* and be liable to be de-recognized by PMDC under Regulation 5(2) of the 2018 Regulations. It has come to the Court's notice that *vide*

Notification No.E&A(HD)10-166/14 dated 14.04.2014 issued by the Health Department of the Government of Sindh, Sindh Government Hospital Korangi No.5, Sindh Government Hospital Ibrahim Hyderi and Sindh Government Hospital Saudabad Karachi were notified as "teaching hospitals" affiliated with JSMU with immediate effect until further orders. However, none of them appear to have been utilized by JSMU as is evident from the list of attached teaching hospitals of SMU on PMDC's official website. In light of the foregoing and in order to protect the interests of the students of SMC whose education must not be disrupted at any cost, a six-month grace period is granted to JSMU to ensure that Sindh Government Hospital Korangi No.5, Sindh Government Hospital Ibrahim Hyderi and Sindh Government Hospital Saudabad Karachi which were notified as "teaching hospitals" affiliated with JSMU, are utilized in order to comply with the requirements of infrastructure and facilities as set out in Clauses 21, 22, 23, 24 and 25 of Appendix I of the 2018 Regulations as per Regulation 9(5) thereof. If required, JSMU may also make arrangements to enter into a public-public or private-private or public-private partnership as per Regulations 9(5) and 14 of the 2018 Regulations within the same timeframe. Similar arrangements may be agreed upon with JPMC and NICH in order to ensure that the status of JSMU is prevented from falling foul of PMDC's regulations. The regulator may also in appropriate cases, and keeping in view the facts and circumstances of this case and bearing in mind the relevant provisions of law, grant waivers or time extensions in order to facilitate SMC in meeting the regulatory requirements.

33. The second issue is that of faculty. In this regard, Regulations 2(j), 2(k) and 28 of the 2018 Regulations read with Clause 26.1 of Appendix I thereof are relevant which read as under:-

2(j) "Complete teaching faculty" means the faculty which is available in the College/Hospital for teaching, training and education for at least 6 hours during College hours.

2(k) "Full time faculty" means the faculty that is available in the College/Hospital for teaching and training for at least 245 days of the year for at least 6 hours of every working day.

28. Number, qualifications, and functions of the faculty.-The recruitment and development of an institution's faculty shall take into account its mission, the diversity of its student body and the population that it serves. **The number of faculty members and ancillary staff in the subjects of basic sciences and in the clinical disciplines, to meet the needs of the educational program and the other missions of the medical institution, shall be as set out section 20.1 and 26.1 of Appendix-I for medical college** and section 25.2 and 25.3 of Appendix-V for dental college. For determining the number of faculty needed for

the educational program, institutions must consider the clinical services to be run in the teaching hospital. The number and kind of faculty appointed shall relate to the amount of patient care activities required to conduct meaningful clinical teaching across the continuum of medical HR of clinical faculty are detailed in Section 26 of Appendix-I for medical college and section 25.3 of Appendix-V for dental college. The minimal faculty requirement in clinical sciences for 100 medical students is detailed in Section 26 of Appendix-I...

26.1 FACULTY AND STAFF REQUIREMENT FOR MBBS (CLINICAL SCIENCES)

Total Marks - 120; Minimum Required – 90

The academic staff must be physically present in the college/hospital/on duty for minimum of 6 hours every working day for at least 245 days in a year, Any duration less than that mentioned before is considered as "part-time faculty" and as such will be credited ZERO score.

- i. The College must provide the Attendance register of the faculty, financial record related to their salary payments, Faculty duty rosters and evidence of **presence of all the faculty members in College/Hospital 6 hours per day** accordingly with appropriate evidence manual/electronic, duty roster, salary disbursement etc. appropriately signed by Principal and Director Finance
- ii.
- iii.
- iv. It must be ensured that the **faculty members are on duty and are physically present in the college premises at least 6 hours per day. Any faculty member with less than 6 hours per day presence in the college/Attached Hospital will be excluded from the evaluation Proforma.**

[Emphasis supplied]

According to the foregoing, the faculty members of SMC are required to be physically present in the college or attached hospital for at least 245 days of the year for at least six hours of every working day, only then will they be considered as full-time faculty rather than part-time faculty, the latter of which would result in zero score for the institution during evaluation. It is our understanding that currently JSMU has hired, *inter alia*, employees of JPMC and NICH as its teaching staff. Learned counsel for JSMU has stated in his proposal submitted *vide* C.M.A. No.70/2019 that “It is impossible for the University to have such a [full-time] faculty unless the same are solely on its own payroll. Part-time faculty can never give such hours to JSMU therefore JSMU needs to have its own faculty.”

34. Be that as it may, upon reversion of JPMC and NICH to the Federal Government, SMU would cease to fulfill the faculty requirements mentioned above and be liable to be de-recognized by PMDC under Regulation 5(2) of the 2018 Regulations. However, in order to protect the interests of the students of SMC whose education must not be disrupted at any cost, a six-month grace

period is granted to JSMU during which the past arrangement vis-à-vis the faculty shall continue. Within such time period, if required, JSMU shall ensure compliance with the faculty requirements as set out in the 2018 Regulations either by hiring separate full-time faculty for SMC on JSMU's payroll; or JSMU negotiates with the Federal Government to allow the employees of JPMC and NICH to continue to be employed as the teaching staff at JSMU while holding a lien on their respective posts in the Federal Government. The Federal Government, the Provincial Government and JSMU shall mutually agree on the workable methodology to retain and preserve the status of JSMU and safeguard the interests of present and future students. In this regard, in case persons working in JPMC and NICH are required to perform services at JSMU, the Federal and Provincial Government shall discuss and agree upon mutual financial and fiscal adjustments so that the interests of all concerned parties are adequately and fairly safeguarded. JSMU is required to file compliance reports within the last week of the six-month time period for perusal in Chambers.

35. The foregoing are the detailed reasons for our short order of even date which is reproduced hereinbelow for ease of reference and is to be read as a part of the detailed reasons:-

For detailed reasons to be recorded later, by a majority of four against one (Maqbool Baqar, J dissenting) these appeals as well as petition are dismissed.

2. The case of Sheikh Zayed Medical Complex, Lahore ("SZMC"), is relatively simple and straightforward. Our attention has been drawn to its constitutive instruments including the trust deed through which it was established. It clearly and unambiguously provides that the main purpose for setting up SZMC was for research and professional and technical training of doctors and related medical staff. That being the case, we are in no manner of doubt that the case of the SZMC is clearly covered under Entry No.16 of the Federal Legislative List. Further, the SZMC has been transferred by the Federal Government without due application of mind, examining the constitutional position and without following the necessary legal procedures.

3. The case of Jinnah Postgraduate Medical Center, Karachi ("JPMC"); National Institute of Cardiovascular Health, Karachi ("NICH"), and National Museum of Pakistan ("NMP") also shows complete lack and absence of application of mind on the part of the Federal Government. The requisite legal procedures were not followed. The real intent, import and impact of the Eighteenth Constitutional Amendment was ignored and misinterpreted.

4. We are conscious of the fact that there is a balance of powers between the Federation and the Provinces as spelt by the

Constitution of the Islamic Republic of Pakistan, 1973 which grants provincial autonomy in specified areas. The provincial autonomy granted by the Constitution deserves the highest respect and is sacrosanct. However, at the same time, a declaration to the effect that the aforesaid Institutions have been transferred by the Federal Government to the Provinces without following due process of law, application of mind and in a mechanical manner does not by any stretch of the imagination impinges upon or encroaches the provincial autonomy granted by the Constitution.

5. In the above context, the contents of Entry No.37 of the Federal Legislative List are also significant. These permit the Federal Government to undertake projects in any of the Federating Units for its purposes. However, in such circumstances, the Provinces have full authority to perform the executive and regulatory function. They can enact and enforce legislation involving such projects and implement and enforce the same within its territorial limits. This judgment, however, does not in any way obstruct, deny or curtail the power of the Federal Government to transfer any project, works, lands or buildings owned and controlled by it to any of the Provinces. However, such transfer must be undertaken in accordance with law, through a legal instrument specifying the terms and conditions on the basis of which such transfer is to take place and the nature and duration of such transfer.

6. We find that the power of the Federation to set up, run and operate projects including hospitals and related research facilities where enforcement of fundamental rights is involved is an obligation of the Federal Government under the Constitution. In the instant case, enforcement of right to life is involved which is one of the most fundamental of the fundamental rights. To curtail or circumscribe the power of the Federal Government to enforce Fundamental Rights guaranteed by the Constitution would be anathema for the concept of Federalism. The performance of its positive obligations under the fundamental rights, for example right to life, prevention of slavery, forced labour, human trafficking, etc. constitute a "purpose" of the Federation for which it can carry out projects throughout Pakistan. For performance of the said purpose, it is not necessary to look into the legislative list when the main body of the Constitution provides the requisite powers. Refer to Province of Sindh v. MQM(PLD 2014 SC 531). We however reiterate that in doing so in the territorial jurisdiction of a Province, the projects and institutions of the Federal Government shall be subject to the Provincial Laws and regulatory control. Consequently, neither the legislative nor executive authority of the Provinces in relation to the subject of hospitals is encroached upon.

7. While upholding and reiterating the declarations and orders passed in the impugned judgment, we declare as follows:-

- i. The transfer/devolution of JPMC, NICVD, NICH and the National Museum to the Province is declared to be unconstitutional, without lawful authority and of no legal effect.
- ii. All acts done or orders, directions, notifications or directives issued or made pursuant to the purported transfer/devolution or to give effect to the same in any manner whatsoever are declared to be without lawful authority and of no legal effect and, without prejudice to the generality of the foregoing, the following notifications, orders and directives are so declared: (a) notification No. 4-9/201-Min.I dated 29.06.2011 issued by the (federal) Cabinet Division, insofar as it relates to JPMC, NICVD and NICH; (b) two office orders dated 30.06.2011 issued by the (federal) Ministry of Health in relation to JPMC and NICVD; (c) notification No. E&A(HD) 10-39/2010 issued by the (provincial) Health Department dated 02.07.2011; (d) two notifications No. SO (Devolution Matters)/2011-12 issued by the (provincial) Health Department dated

21.07.2011; (e) notification No. 10-5/2010-C&C dated 05.04.2011 issued by the (federal) Ministry of Culture in relation to the National Museum; and (f) notification No. F.1(2)/DG-I/MSW/2011 dated 05.04.2011 and office order No. F.1(2)/DG-I/MSW/2011 dated 05.04.2011, both issued by the Establishment Division in relation to the National Museum.

- iii. Notwithstanding sub-paras (a) and (b), till such time as the exercise contemplated by sub-paras (d) to (g) below is not completed, all matters pertaining to the Institutions shall continue on the same basis as on the date of this judgment including, but not limited to, financial and budgetary matters, disbursements, outlays and expenditures, including disbursements relating to the payment of salaries, pensions and suchlike matters.
- iv. Within 90 days of this judgment, the Federal and Provincial Governments and all concerned and related authorities, entities, bodies, departments, establishments and officers shall complete all matters relating to the return of JPMC, NICVD, NICH and the National Museum from the Province to the Federation such that the position of these Institutions is restored, to the maximum extent possible, to the status quo ante, being in relation to JPMC, NICVD and NICH the position as on 29.06.2011, and in relation to the National Museum the position as on 05.4.2011, and without prejudice to the generality of the foregoing, such restoration and return shall include the actual resumption by the Federation of all financial obligations in relation to the Institutions and all serving or retired officers, employees or servants thereof.
- v. If the exercise cannot be completed within 90 days, the Federal Government or the Provincial Government may apply to the Court for an extension and such extension may be granted for such period or periods as the Court deems appropriate but such that the said period(s) shall not in the aggregate exceed 90 days.
- vi. Once the exercise is complete, the Federal and Provincial Governments shall file an appropriate joint statement (duly supported by the necessary and relevant record) before the Court, which may give such notice of the same to such persons or parties as it deems appropriate, and may thereafter and thereupon make a declaration that the exercise has been completed.
- vii. If in completing the foregoing exercise, it is not possible to restore the status quo ante in respect of any Institution in any material respect, then any concerned party may make an appropriate application to the Court, which may issue such directions and make such orders as are deemed expedient and appropriate thereon, but in such manner and to such extent as is consistent with the expeditious restoration of the Institution from the Province to the Federation, and under no circumstances shall any such application be permissible if, and after, the Court has made the declaration (if any) in terms of sub-para (f).
- viii. The Province shall be entitled to a suitable reimbursement/ adjustment from/with the Federation of all disbursements and financial outlays made and expenditures incurred from the date of the transfer/devolution of the Institutions to the Province from the Federation till the date of the return and restoration thereof from the Province to the Federation and/or the actual resumption of financial obligations in relation thereto by the Federation, being disbursements and financial outlays made and expenditures incurred by the Province that it would not have made or incurred but for the devolution/transfer.
- ix. In case the Province and the Federation are unable to resolve any matter within the scope of sub-para (h), that shall be deemed to be a dispute between them and the aggrieved party shall be entitled to its remedies in accordance with the Constitution and the law.
- x. The National Institute of Cardiovascular Diseases (Sindh Administration) Act, 2014 (Sindh Act IV of 2015) is hereby suspended, but such suspension shall be subject to the other sub-paras of this paragraph, which shall apply in all respects to NICVD, and nothing in the Provincial Law nor in the suspension thereof shall in any manner hinder, restrict, impede or otherwise affect the return and restoration of NICVD to the Federation.

- xi. All references to the "Court" in this paragraph (or for any purpose in relation to this judgment insofar as the High Court is concerned) shall mean the concerned Division Bench of this Court sitting according to roster and, without prejudice to the generality of the foregoing, any application or statement hereby made permissible shall be filed and disposed off accordingly.

*Mr. Justice Mian Saqib Nisar, HCJ
Sd/-Umar Ata Bandial,J*

*My note of dissent followed by detailed reasons
therefore is already on record.
Sd/-Maqbool Baqar,J*

*Sd/-Faisal Arab,J
Sd/-Ijaz Ul Ahsan,J*

Islamabad, the
17th of January, 2019
Not Approved for Reporting
ZR/

DAB
27/1/19

U.A.

"The right to dissent is the only thing that makes life tolerable
for a judge of an appellate court."
- Justice William O. Douglas

MAQBOOL BAQAR, J.- Brought under challenge

through various constitution petitions before the Sindh High Court, was the transfer/devolution of three different entities, namely, Jinnah Postgraduate Medical Centre (JPMC), National Institute of Child Health (NICH), and National Institute of Cardio Vascular Diseases (NICVD), by and from the Federal Government to the Province of Sindh. It was submitted that the transfer/devolution, was *ultra vires* the Constitution of Islamic Republic of Pakistan, 1973 (**Constitution**) as the three entities were federal institutes of the nature as described by Entry No. 16 of Part-I of the Federal Legislative List (FLL) of the Constitution. Entry No. 16 reads as follows:

"16. Federal agencies and institutes for the following purposes, that is to say, for research, for professional or technical training, or for the promotion of special studies."

2. The genesis of JPMC lies in Medical Corps Hospital, established in the year 1930 to provide medical aid to the military personnel during World War-II. In the year 1947, it was a 100 bed hospital with all basic facilities. After independence the hospital was renamed, Pakistan Central Hospital and subsequently as Jinnah Central Hospital ("JCH"). In April 1953 an institute, namely Basic Medical

Science Institute ("BMSI"), was established in a building situated at the site of JCH. In the year 1959 JCH and BMSI were amalgamated to create JPMC. Upto this point in time Karachi was the Capital of Pakistan. On 01.07.1959 the West Pakistan Administration, (merger of the federal territory of the Karachi) Order 1961, (Presidential Order No. 9 of 1961), came into effect; Karachi was thus merged into the province of West Pakistan, and ceased to be the capital of Pakistan. From this date onwards, Karachi fell under the legislative and administrative domain of the province.

3. Mr. Raza Rabbani, learned ASC for the appellants in Civil Appeal No.2307/2016, submitted that being a hospital was the primary function of JPMC, NICVD and NICH. The learned ASC submitted that JPMC and its derivatives, being NICVD and NICH, could not be treated as entities falling within Entry No. 16 of the FLL, merely due to some of their functions, which were incidental and ancillary to the main functions of being a hospital, supposedly falling within the scope of the said entry. Mr. Rabbani submitted that "health" and "hospitals" have always been in the exclusive domain of the province, and any exception in that regard, if ever intended, was specifically so provided for through a separate and distinct entry. By way of illustration, he referred to Entry No. 19 of Part-I of the FLL, which specifically

provides for "Seamen's and Marine hospital and hospitals connected with port quarantine", and to Entry No. 23, of the former concurrent list, which pertains to "places for the reception or treatment of the mentally ill and mentally retarded". However, the learned counsel emphasized that hospitals in general neither found place in the federal list, nor had they been on the concurrent list, and were thus exclusively in the provincial domain. In his endeavour to demonstrate that the subject entities were nothing but general hospitals, the learned counsel referred to various documents/material, highlighting the various aspects of the said hospitals. He emphasized that if at all there were any activities which may at all be perceived as pertaining to "research", the same were entirely incidental and ancillary to the institutes' primary function of being a hospital, and nothing more.

4. The learned counsel referred to the prospectus of the JPMC and submitted that the overwhelming majority of its various departments are those of a hospital and only a few relate to research based activities. He referred to the "quality and research based ranking of Pakistan High Educational Institutes (HEI) issued/ published by the Higher Education Commission of Pakistan (HEC) (page 371-374, Part-II CMA 15/19), to show that none of the said hospitals/ institutes

find any place therein. The learned counsel submitted that the hospitals/institutes are also not mentioned in the list of "Research Institutes in Pakistan" posted at the website of ILM.com.pk, which according to him is the biggest educational portal in Pakistan (page-366, Part-II, CMA 15/19). According to the learned counsel, the research activities attributed to JPMC in its own publication/booklet, titled "JPMC- A National Pride" (pages 290-297, Part-II CMA 15/19), are the compilation of medical research, management of medical library and publication of a medical journal titled "Annals of JPMC". The booklet admits that "the response of local researchers to submit papers in Annals of JPMC is lukewarm, may be due to non-recognition of Annals with the PMDC".

5. Mr. Rabbani while concluding his arguments reiterated that JPMC and its derivative units had previously been under federal control; not because they were research institutes or because the federation has legislative competence over "health" and "hospitals" in general, but simply because Karachi had been the federal capital after independence; where the constituent elements of JPMC were set up. Elaborating his arguments Mr. Rabbani submitted that in relation to the federal capital territory, the federation ² has always had plenary power i.e. it could legislate in respect

of matters exclusive to the federation, and concurrent, as well as those otherwise exclusive to the provinces within their respective territories. The province obviously could not legislate in respect of the federal capital territory and it was solely for this reason that the federation had been able to set up the constituent units of JPMC, and to exercise control over them. However, with the passage of time Karachi ceased to be the federal capital and became part of the erstwhile province of West Pakistan, and subsequently the Province of Sindh. The federation, therefore, ceased to have any competence or power over JPMC, and it ought to have been transferred to the province. The transfer however did not take place, and JPMC continued to remain under the federal control, which certainly was against the mandate of the constitution. The correction came about only at the time the various ministries, departments and organizations were being devolved/transferred in pursuance of the 18th Constitutional Amendment. The subject transfer, according to Mr. Rabbani, was no more than a long deserved factual recognition and regularization of a situation that had in law, come about decades ago.

6. Mr. Farooq H. Naek, Senior ASC appearing for the Government of Sindh in Civil Appeals No. 125-K to 131-K/2016, at the very outset submitted that the present dispute

is a dispute between the Federal Government and the Province of Sindh. As such, he submitted that only the Supreme Court was competent to adjudicate the dispute and the judgment rendered by the High Court is liable to be set aside for want of jurisdiction. He argued that the Honourable Sindh High Court in its impugned judgment had conclusively determined three issues; (1) that the three institutions do not fall under Entry No. 11 and 12 of Part II of the FLL, (2) that the institutions fall under Entry No. 16 of Part I of the FLL, and (3) that the transfer of the hospitals to the Province of Sindh was unauthorized and untenable because they had no relationship with the concurrent list which was abolished and entries whereof were devolved to the provinces under Article 270AA (8) of the Constitution. The learned Senior ASC submitted that the subject of public health was never a part of the Federal or concurrent list but the same has throughout our history vested exclusively in the provinces. Resultantly, the devolution/transfer of the hospitals to the Province was in view of the fact that the Federal Government could not legitimately exercise any executive authority over a hospital in any of the provinces in the face of inter alia, Articles 142(c) and 137 of the Constitution.

7. Mr. Salman Talibuddin learned Advocate General Sindh recapitulated the submissions advanced by M/s. Raza

Rabbani, ASC and Farooq H. Naek, Sr ASC. Additionally, he argued that the JPMC ought to have been transferred to the Province of Sindh when the capital was moved from the city of Karachi and when the city resultantly became part of the Province of West Pakistan. To substantiate his view, he relied on Article 231(1) of the Constitution of 1956 which stipulated as follows:

"All property and assets which immediately before the Constitution day were vested in Her Majesty's for the purposes of the Federal Government shall, as from that day, vest in the Federal Government, unless they were used for the purposes which on the Constitution Day became purposes of the Government of a Province, in which case, they shall, as from that day, vest in the Provincial Government."

8. The learned Advocate General also submitted that similar provisions were inserted in subsequent constitutional documents. Article 232(1) of the Constitution of 1962, Article 284 of the Interim Constitution of 1972 as well as Article 274 of the Constitution of 1973 are in *para materia* to Article 231 in the Constitution of 1956. Transferring or devolving the hospitals to the Province of Sindh he argued, was therefore righting a wrong that should have long been rectified. The Learned Advocate General also argued that decentralization was the *sina qua non* for heterogeneous countries like Pakistan where large segments of the citizenry remain

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marginalized by the centralist and patronage-based governance mechanism.

9. Mr. Salahuddin Ahmed, ASC for the Jinnah Sindh Medical University ('JSMU') in Civil Appeals 2306/2016, echoed the arguments advanced by Mr. Raza Rabbani. Recounting the Constitutional history of Pakistan, he submitted that the subject of public health and hospitals has, throughout our history, vested in the provinces, sometimes by way of an entry in the provincial list and sometimes by consigning it to the realm of residuary subject. He further submitted that neither the Province of Sindh nor the Federal Government assailed the transfer/devolution of the said hospitals before the Sindh High Court. He contended that in the absence of any objections by the Federal Government or the Province of Sindh, the employees working in these hospitals did not have the *locus standi* to challenge the transfer/devolution. While maintaining that the hospitals did not fall under the rubric of Entry No. 16 of the FLL, he contended that the Federal Government was vested with the power to transfer the hospitals under Article 173 of the Constitution, even if the said hospitals were considered to fall within the said entry. The mere fact that the notification of transfer does not refer to Article 173 could not preclude the Federal Government from exercising its powers under the said

Article. He submitted that what has to be considered is whether the Federal Government had the power to transfer the hospitals or not.

10. Mr. Haider Waheed ASC appeared on behalf of the students and teachers of JSMU. He stated that the JPMC is an attached hospital of JSMU. He argued that in case the ownership and control of the JPMC is reverted to the Federation, JSMU would fall foul of the Medical and Dental Institutions (Recognition, Eligibility Criteria for Enhancement in Annual Admissions and Accreditation Standards) Regulations, 2018, especially Regulation 9 and 5 thereof. Said regulations stipulate that degrees from a medical university would be recognized only when the said university has an attached hospital of 1,750 beds. He contended that this requirement can only be filled by the JPMC in Karachi. He further diverted our attention to the fact that the JSMU has four constituent colleges, i.e. colleges which are managed and administered by JSMU in addition to nine affiliated colleges, i.e. private medical and dental colleges whose degrees are issued by JSMU. He submitted that setting aside the transfer/devolution of the JPMC would strip the JSMU of its status as a university and thus preclude it from awarding degrees. The fate of thousands of students pursuing their education from JSMU and the constituent and affiliated

colleges thereof hinges on the outcome of the *lis* before us.

Mr. Waheed argued that since the subject of public health is within the sphere of the provinces' delegated powers, any executive authority exercised by the Federation over hospitals is constitutionally and legally barred.

11. Appearing for the respondents in C.A 125-K and 129/2016, Ms. Umaima Anwar Khan (with permission of this Court) argued that JPMC has never been a part of the Provincial List and always fell in the category as described by Entry No. 16 of the FLL. Relying on Sindh Revenue Board vs Civil Aviation Authority of Pakistan (2017 SCMR 1344, paragraphs 18 and 22) and Sui Southern Gas vs Federation of Pakistan (2018 SCMR 802, paragraphs 14(1) to 14(4)), she argued that entries in the FLL must not be interpreted in a "narrow or pedantic" manner but the same should be given the broadest possible import. She contended that the three hospitals were carrying out a number of research activities and would, thus, squarely fall within Entry No. 16 of the FLL. Moreover, it was submitted that the fact that public health and hospitals is admittedly a provincial subject would not obviate the Federal Government from owning and operating its own hospitals in the provinces. As regards the nature and character of JPMC for the purpose of its legislative classification she submitted that JPMC is a premier teaching

institute, imparting higher medical education, and providing training to House Officers, Medical Graduates, medical students from SMC, nurses, technicians and paramedics in the various fields of medicine, surgery and its allied sub specialities. The institute she claimed, is affiliated with the University of Karachi for advance training leading to M.Phil. and Ph.D. degrees. According to the learned counsel more than 768 M.Phil., and 28 Ph.D. degrees have been awarded to the students of JPMC till date, and that its various departments are recognized/accredited by the College of Physicians and Surgeons Pakistan (CPSP) for FCPS, MCPS and MRCS diplomas in various specialities. Its department of thoracic medicine, for instance, was recognized as a centre for Post Graduate training and diploma courses, such as MCPS, FCPS and DTCD, and further that its department of ophthalmology has produced many FCPS and FRCS surgeons, which has also been recognized for second fellowship training in Vitreo-retinal surgery by CPSP. The learned counsel claimed that many pulmonologists practicing in the country have received their training at BMSI. The list annexed to the synopsis of arguments submitted by the learned counsel for the respondent, described as "Education and Training Section JPMC Annual Report 2019", shows that varying number of doctors, students and trainees have been selected by the hospital for different professional degrees,

diploma courses and training programmes. These include Post Graduate (PG), FCPS-II training, PG MCPS training, PG MS Training and PG MD, M.Phil. degree, etc., in different subjects. She submitted that the pursuit of a Ph.D. degree at JPMC essentially requires an extensive research work and the thesis based thereon has to be defended before a panel of experts, which is then required to be published in a HEC and PMDC approved journal.

12. The learned counsel also submitted that JPMC, NICD and NICVD, are considered active centres of research and have been acknowledged and recognized by Pakistan Council for Science and Technology as a scientific and technological research centres in Pakistan and that "Pakistan Medical Research Centre for Gastroenterology and Hepatology", at JPMC is recognized by CPSP as a specialized research centre for training, research, publications and workshops.

13. Mr. Khurram Saeed learned Additional Attorney General for Pakistan appeared on behalf of the Federation and supported the impugned judgment. He argued that the transfer/devolution of the hospitals was ultra vires the Constitution and the same may be set aside. It may be interesting to note here that in the proceedings before the Sindh High Court, the Federal Government had supported the

transfer/devolution of the three hospitals. One can only wonder as to what prompted the Federal Government's change of heart in the present proceedings.

14. We have heard the learned counsel and have, with their able assistance, perused the relevant record. However, without going into the veracity of the rival claims detailed in paragraphs 4, 11 and 12 above, it may be observed here that the above claimed activities, pursuit and, engagements, cannot and do not overwhelm or eclipse the basic and primary character and nature of the JPMC being a tertiary care public hospital. The research, education and training activities are made possible at JPMC because of it being a hospital, and that too, with at least twenty eight different department for treatment of as many diseases and ailments and their different strands. It may also be relevant to note here that not all the departments and facilities at JPMC are being used for imparting education and training. There is no denying the fact that JPMC is one of the leading tertiary care public hospital in the country. It provides services not only to the mega cosmopolitan city of Karachi but to the people from all over Sindh and also from different parts of the entire country. Way back in the year 2006, the hospital had 1185 beds to provide in patient facility, covering all aspects of medical and surgical sub specialities (and in all probability

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the facilities may now have expanded further). Research, training and education, thus, contrary to being a derogation to its function as a hospital are in fact amongst the means, tools and resources through which its main purpose/function of providing the most adequate and the best possible health care and treatment actualizes.

15. While NICVD has evolved from the central heart clinic of ward 10 of JCH, the present day JPMC. NICVD, as such, was set up in 1963, and was so registered under the Societies Registration Ordinance 1860. The Society was later converted into a trust; through a trust deed dated 08.05.1976. The aims and objects of the Trust as set out in the deed (Clause-4), were "providing modern facilities for treatment of Cardiovascular diseases, setting up a teaching and training centre for postgraduate and undergraduate medical students and nurses and a centre for research into Cardiovascular Diseases and carrying on the Institute's hospital, its attached units and subsidiaries for the treatment of persons suffering from Cardiovascular Diseases and development, research and training in the relevant fields."

16. From the above, one can clearly appreciate that the primary and the predominant, object, purpose and function, of NICVD was "treatment of cardio vascular diseases", and "running and managing institutes, hospitals,

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its attached units, and subsidiaries for the treatment of persons suffering from cardio vascular disease". The proposed research and training was to be a part of the said purpose and effort. Later, in the year 1979, NICVD Ordinance was promulgated, section 6 whereof enumerates the function of the institute as follows:

"6. Function of the Institute. The functions of the Institute shall be-

- (1) to undertake modern treatment of cardiovascular diseases;
- (2) to acquire latest physical facilities required for carrying out necessary investigation and treatment of cardiovascular diseases;
- (3) to seek and enter into cooperation with international and other foreign agencies with the prior approval of the Federal Government in furtherance of the objectives of the Institute;
- (4) to carry out research in Cardiovascular Diseases for prevention and control of cardiovascular diseases as well as for its treatment;
- (5) to undertake training of medical students and nurses, both under graduate and post-graduate, in cardiovascular diseases; and
- (6) to develop itself into a Centre of super excellence for the treatment of cardiovascular diseases."

The above does not leave any nature of doubt, or ambiguity regarding the fact that the predominant, rather the core function/purpose of the institute is that of a cardio vascular hospital, while training and research were to be employed merely as tools and means to achieve and realize such purpose. These activities were thus subservient to the principal object of providing the most appropriate and the best possible medical treatment and health care to its patients. The explicit language of the above provision, and the

order of placement of the different functions set out therein, do not require any elaboration with regard to the primary and core function/purpose of the institute, being that of a hospital. It may also be observed here that the purported NICVD Ordinance 1979, was no impediment in the transfer of the institute; firstly for the reason that the Ordinance did not exist in the eyes of law, having been promulgated by the federal government beyond its constitutional mandate and in violation of the restriction placed on it by means of Article 142 (c) of the Constitution, as hospitals and public health (the entry to which the purported Ordinance pertains) never fell within the legislative sphere of the federation and have always, exclusively remained provincial subjects. More significantly and above all, the impugned transfer, though made belatedly, was in compliance with the constitutional mandate, as prescribed by Article 274 of the Constitution.

17. The origins of the NICH on the other hand lie in the paediatric ward of JPMC. It has now developed into a five hundred bed children hospital, where teaching and training is carried out merely as an ancillary activity.

18. As noted earlier, throughout the constitutional history of Pakistan, and even before independence, "public health, hospitals & dispensaries" have remained provincial subjects. Thus, in the Government of India Act, 1935, (which

was the only instrument available for governing the country at the time of independence), the above subjects were enumerated in the provincial legislative list as entry No. 14. The very first constitution of this country, which received assent on the 2nd March, 1956, also entrusted the subjects of "public health sanitation, hospitals and dispensaries" to the provinces (Entry No. 26 of the Provincial Legislative List). The Constitution of 1962, which did not contain any provincial list and enumerated certain subjects only in the Central legislative list, left "public health" etc., for the provinces as residuary subjects. The interim Constitution of 1972 restored the provincial list with "public health" etc. as Entry 13 thereof. The Constitution of 1973 originally contained two legislative lists, a federal legislative list, and a concurrent legislative list. The above subjects did not find place in any of the two lists, and thus being residuary subjects fell within the legislative competence of the province, & remained under the executive domain thereof. The concurrent list was abolished through the 18th Constitutional Amendment. Some of the entries of the concurrent list were shifted by the Amendment to the federal list. Most however were omitted.

19. Hence in the above backdrop, and from the very inception, public health, hospitals, and matters relating thereto have remained under the provincial domain, and as

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such public hospitals in general have throughout been owned, controlled and managed by the provinces within their respective territories. However, in terms of "The Pakistan (Establishment of the Federal Capital) Order 1948, GCO No. 15 (Order of 1948), Karachi (where JPMC, previously known as JCH, was/is located,) was declared the Capital of Pakistan, whereas section 5 of the said Order provided that the executive authority for Karachi shall be exercised by the Governor General. Such authority also extended to matters enumerated in List-II of the Seventh Schedule to the Act of 1935, being the provincial legislative list, wherein "Public Health, "Hospital & Dispensaries" found place by way of Entry 14, hence JPMC (JCM of that time) was then being managed and controlled by the Federal/Central government. Thus, it can be seen that it was only by virtue of Section 5 of the Order of 1948 that the hospital, which otherwise fell within the provincial sphere of authority, was being managed and controlled by the Federal/Central Government. The situation however changed when after establishment of the Province of West Pakistan, under the "Establishment of West Pakistan Act, 1955, the federal capital territory of Karachi was, through the West Pakistan Administration (Merger of the federal territory of Karachi) Order, 1961, merged into the province of West Pakistan. Article 3 of the said merger Order 1961, provided that "the specified territory shall, with effect

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from the appointed day, cease to be administered as federal territory and be known as the Karachi division of West Pakistan and administered accordingly." Under the West Pakistan Administration (Merger of federal territory of Karachi) Order, 1961 (enforcement), 1st July 1961 was appointed as the day when the said ordinance would come into force and thus the executive authority acquired by the federal/central government over the provincial subject through section 5 of the Establishment of the Federal Capital Territory Order 1948 would cease to exist. Thus, from the 1st day of July 1961, on which date the 1956 Constitution was in force, hospitals, along with public health, fell exclusively within the provincial domain. The subject hospitals thus ought to have been transferred to the province. Unfortunately, however, it took a few decades to so happen.

20. The fact that "public health" encompasses and embraces a large spectrum of responsibilities, activities, obligations, undertakings and functions hardly needs any emphasis. It involves and requires the deployment of various tools, means and resources; medical education, training and research, being the most crucial of them all, without which components no government can effectively provide appropriate and adequate health care to its people. This obligation undoubtedly includes prevention, diagnosis,

diseases treatment, surveillance, prescription, invasive and non-invasive procedures, human resources development, and a lot more, which in turn essentially require a continuous research and training process/effort in different fields and spheres relating to health and medicine. Research, education and training are also essentially required to discover, diagnose, prevent, control and treat the various strains of different diseases and ailments which always keep mutating. Health System as described by the World Health Organization (WHO) is the sum total of all the organizations, institutions and resources whose primary purpose is to improve health. WHO defines 'public health' as "the art and science of preventing disease, prolong life and promoting health through organised efforts of society". The University of Pittsburgh defines the terms as "the science of protecting life and providing health through education, policy making and research for diseases and injury prevention". According to the Pan American Health Organization, "the principal or exclusive objectives of the health sector are to safeguard the health of individuals or population and the activities of the health sector institutions are designed to prevent and control diseases, care for the ill, conduct health research and training." Research and training are therefore the most essential components of the public health, without which, the obligation to provide quality and affordable healthcare cannot

be discharged, dispensed and fulfilled. It would therefore not be fair to say that health related research education and training cannot lawfully form part of a "hospital" and/or "public health", in the context of the distribution of legislative, hence executive powers in a federal dispensation. Had it been the intent of the Constitution givers to assign general hospital with research, teaching and training facilities to the federal government, they could have conveniently created as a separate category for such hospitals and placed them on the FLL, like "Seamen's and Marine hospital and hospitals connected with port quarantine", which was so placed through entry No. 19, and the "places for the reception or treatment of the mentally ill and mentally retarded", which category was enumerated in the erstwhile concurrent list as entry No.23. It should be kept in mind that classifying a general hospital as of the category falling under entry No.16 of the FLL, for its conducting research and/or imparting professional or technical training in the fields of health sciences would dissuade hospitals owned and operated by the provincial governments from pursuing such activities, for a fear of being so branded, and thus being taken over by the Federal Government. It is a matter of common understanding that in this day and age of scientific and technologic advancement and professionalism, and for keeping abreast with the social and scientific development around, it is

imperative for us to conduct research, and undertake teaching and training in all the fields and disciplines. However, declaring such activity as a qualifier for falling into entry No.16 of the FLL would prevent the various provincial departments, organizations and undertaking from indulging in the same, descending them into stalemate, redundancy nay retardation with disastrous results.

21. It is in recognition of the fact that research, education and training in health related disciplines are essential components of public health that public hospitals throughout Pakistan, other than those situated in the federal capital (irrespective of the extent and volume of their involvement in the aforesaid three activities) have been treated as Provincial entities only. They have thus been owned, managed, and controlled exclusively by the Provinces. By way of a few examples one may mention, The Children's Hospital and The Institute of Child Health, Lahore, The Children Hospital and the Institute of Child Health, Multan, The Mayo Hospital, Lahore City, Lahore, The Service Institute of Medical Sciences/Services Hospital, Lahore, Postgraduate Medical Institute, Peshawar (PGMI, Pesh), and Postgraduate Medical Institute/Lahore General Hospital, Lahore (PGMI, Lhr/LGH, Lhr).

22. The Children Hospital and The Institute of Child Health, Lahore is recognized by the College of Physicians & Surgeons Pakistan (CPSP) for postgraduate training. It is also recognized for house job by Pakistan Medical & Dental Council (PMDC). As per the institute's website, 234 postgraduate trainees are currently getting training in 55 different disciplines and allied specialties of paediatric medicine, including various programme of fellowship, 2nd fellowship, & membership of CPSP and for MD, MS & M.Phil degrees. The institute is recognized for M. Phil Histopathology & MD Development & Behavioural Paediatrics with University of Health Sciences, Lahore. It is also conducting scientific research and encompasses a school of nursing, and a School of Allied Health Sciences.

23. The Children's Hospital & The Institute of Child Health, Multan is a tertiary care teaching hospital, and is recognized by CPSP for its membership and fellowship programs in Medicine, Surgery, Neonatology, Anaesthesiology, Radiology etc. The University of Health Sciences, Lahore is running its MD, MS and DCH training programs at the Institute. The Institute has also been recognized by PMDC for imparting training for the aforementioned degree and Diploma programmes. The Institute also claims to be regularly involved in continuous medical educational activities and

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research projects in collaboration with National and International Institutes.

24. The School of Nursing, Mayo Hospital, Lahore, is imparting a three years general training of nursing, and presently 250 Nursing Students are getting training of nursing at the school, whereas CPSP has approved the East Medical Ward of Mayo Hospital for FCPS training in rheumatology, making it the third major centre in public sector hospital in Punjab, offering level IV qualification in super specialization.

25. The Services Institute of Medical Sciences/ Services Hospital, Lahore is recognized for, and offers FCPS training in 26 specialities. It is also recognized for MCPS training in various disciplines.

26. The Post Graduate Medical Institute, Peshawar (PGMI, Pesh) was established by the Government of KPK as a separate and independent Postgraduate Medical Institute at Lady Reading Hospital, Peshawar, to be a Provincial centre of excellence which could offer the highest quality tertiary health care services and to promote research in all field of health in the Province. The Institute now stands recognized as a teaching and training institute by PMDC, CPSP and Royal College of UK & Ireland. It is said to be serving the health

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needs of the Province as a major human resource development centre. The Institute is also engaged in conducting research and its research work is now regularly published in various national and international medical journals. PGMI Peshawar offers FCPS-II training and numerous diploma courses to health professionals throughout KPK. The institute consists of 41 teaching units at Lady Reading Hospital and Hayatabad Medical Complex and is accredited by the CPSP, it is also affiliated with Khyber Medical University.

27. The Postgraduate Medical Institute, Lahore/Lahore General Hospital, Lahore (PGMI, Lhr/LGH, Lhr) is also engaged in imparting education and training in the various fields of medicine & surgery and is conducting training for various FCPS & MCPS programmes.

28. Adverting now to the nature of our constitutional dispensation, suffice to say that Pakistan is a Federal Republic (Article I of the Constitution). The preamble to our Constitution envisaged the State of Pakistan to be a federation, comprising of autonomous units (Provinces), enjoying power and authority as may accordingly be prescribed. Being true to its aspiration, the Constitution laid out a comprehensive scheme in consonance with a federal dispensation, some aspects whereof have been highlighted

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hereinafter. The principle and spirit of federalism and provincial autonomy has been reinforced and made watertight and sacrosanct, through the 18th Amendment, adopted by the Parliament with unanimity.

29. Dilating upon the concept of federalism in the context of the United States' Constitution, KC Whease, former professor at the University of Oxford and Chairman of Rhodes Trust stated: "If we examine the American Constitution, we must conclude that, as a matter of law there laid down, the field of government is divided between the general authority and the regional authority which are not subordinate to each other, but coordinate with each other. In the words of a modern American historian, the general government "is a government supreme within its spheres, but that sphere is defined and limited". As the tenth amendment made clear in 1971, "the power not delegated to the United States by the constitution nor prohibited by it to the states, are reserved as to the states respectively or to the people".

30. In the Oxford Handbook of Indian Constitution, edited by Sujit Choudhry and Pratap Mehta, following commonly accepted features of federalism have been highlighted:

- (i) existence of two levels of government; a general government for the whole

- country and two or more regional governments for different regions within that country;
- (ii) distribution of competence or power-legislature, executive, judicial and financial between the general and the regional governments; and
- (iii) supremacy of the constitution- that is, the foregoing arrangements are not only incorporated in the constitution but they are also beyond the reach of either governments to the extent that neither of them can unilaterally change nor breach them.

31. Mr. AK Brohi in his book "Fundamental Law of Pakistan - 1958" has described "federalism" as a "device by which a system of double government is made to operate in one and the same State. It envisages a scheme of securing division of power between the National Government, on the one hand, and the Regional Governments, on the other hand, in such a way that, both of them discharge their law making and executive functions strictly within the sphere of their allotted jurisdiction.... The two governments accommodated within the framework of a federal polity are of coordinate authority and work independently of each other in the sphere marked out to them... in a Federal Constitution there are really two governments working side by side, and the operation of each one of them, within the limits defined by the

Constitution, is independent of the control by the other. They are coordinate, independent organs sovereign power, each being a master in the sphere of its own allotted jurisdiction".

32. And thus, in terms of Article 97 of the Constitution "subject to the Constitution, the executive authority of the Federation extends to the matter with respect to which Majlis-e-Shoora (Parliament) has powers to make laws". Similarly, Article 137 of the Constitution grants such authority to the Provinces to the extent "of the matters with respect to which the Provincial Assembly has powers to make laws". Article 142 of the Constitution, on one hand, through its clause (a), grants exclusivity to the Parliament in legislating with respect to matters enumerated in the FLL, and on the other, vide clause (c) thereof, secures the legislative power in respect of all the residual matters, i.e. the matters not listed in the FLL, exclusively in favour of the Provincial Assembly. The Article emphatically forbids the Parliament from legislating in such matters, save and except in respect of areas in the Federation that are not included in any Province, in relation whereto, as provided by clause (d), the Parliament exercises exclusive powers. However, in terms of clause (b) of Articles 142, law making in respect of criminal law, criminal procedure and evidence has been left open for the Parliament as well as the Provincial Assemblies to venture

into. It can, therefore, be seen that the Constitution has laid down a well-defined scheme, prescribing the extent and limitation of the respective legislative and executive competence and sphere of the Federation and the Provinces, leaving no ambiguity regarding such demarcation, and no room either for the Federation, or the Provinces, to manoeuvre any encroachment over the exclusive domain of the other. The above delineation of power is so well secured that it is only in case where the President, being satisfied that a grave emergency, threatening the security of the country by (i) war or external aggression, or (ii) by internal disturbances beyond the power of a Provincial Government to control exists, proclaims emergency, as envisaged by Article 232(1) of the Constitution, that the Parliament may be able "to make laws for a Province or any part thereof, with respect to the matters not enumerated in FLL" [Article 232(2)(a)]. It may, in such an eventuality, by order assumes to itself, all or any of the functions of the Government of the Province, and make such incidental and consequential provisions as appear to it to be necessary and desirable for giving effect to the objects of the proclamation [Article 232(2)(c)]. However it is not just the satisfaction of the President that a grave emergency threatening the security of the country exists, that a proclamation can be made, but in case the emergency occurs because of internal disturbance beyond the power of a

Provincial government to control, a resolution from the Provincial Assembly for making such imposition is, (as provided under clause-I of the said Article), an essential prerequisite. In case the President proceeds on his own, however, the proclamation is required to be placed before the two Houses of the Parliament for approval of each House within ten days. Yet, a law made by the Parliament which, but for a proclamation of emergency, would not have been competent to make, shall to the extent of incompetency, cease to have effect on the expiration of six months after the proclamation of emergency has ceased to be in force [Article 232(5)]. Furthermore in terms of clause 7(a) of the above Article a proclamation, within thirty days of its being made, shall be laid before a joint sitting of the Parliament, and shall cease to be in force at the expiration of two months, unless it has been approved by a resolution of the joint sitting by such time. Conversely, a proclamation shall subject to clause 7(a) above, cease to be in force upon a resolution disapproving the proclamation being passed by the majority of the total membership of the two Houses in a joint sitting. The federal character of our Constitution and provincial autonomy, hence, remain unimpeachable even during a war or external aggression, or internal disturbance beyond the power of a Provincial Government to control, resulting in a proclamation of emergency, issuance of which, requires a resolution of the

relevant Provincial Assembly and in the second case, has to be approved by both Houses of the Parliament. It may also be recalled that the assumption of power to make laws with respect to matter beyond the FLL, and so also the assumption of the functions of the Provincial Government by the Federation are limited to the relevant Province, and that too only for a limited period. The Federal Government's consequential ability to make any incidental provision also is limited to those that are inevitable to give effect to the object of the proclamation. Furthermore, the proclamation ceases to be in force, at the expiry of two months, unless it is approved by a resolution of the joint sitting of the Parliament before such expiry.

33. The basic feature, rather the spirit and soul of federalism, is the distribution of legislative powers between the federation and the province, with its core being provincial autonomy. Interpretation of constitutional provisions should thus be in consonance with the said principle, rather than in a manner that encroaches upon the space reserved for the provinces. The scope of an entry in the FLL should not be expanded or enlarged in a manner that infringes provincial autonomy. It is also to be kept in mind that the nature and character of the Constitution carries great significance and is of utmost relevance in construing the legislative entries and

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determining the scope and extent of the subjects assigned by it to the Federation and the Provinces. The Court should therefore avoid an expansive construction of a federal legislative power which renders redundant or nugatory the legislative field, power and authority assigned to the provinces, either expressly or as residuary, thus undermining provincial autonomy.

34. As regards fundamental rights, it may be observed here that indeed the State has guaranteed the protection of fundamental rights enshrined in the Constitution. Nonetheless, one must resist conflating the State with the federal government as the provincial and also the local governments too constitute the State. The State's obligation with regard to fundamental rights is, therefore, to be fulfilled and discharged by all tiers of the government and all organs of the State as per their power, authority, obligation, and competence, strictly as prescribed under the Constitution. Under no notion can any of the said governments be stripped of their rights, authority, or power, nor can they be exempted from discharging or fulfilling their prescribed obligations. If allowed, this would result in complete anarchy and the Constitution would not only be undermined but would become redundant. It may also be relevant to observe here that the scope and extent of the "right to life", as protected

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under Article 9 of the Constitution is so wide spread that it embraces almost every aspect and facet of human existence. Allowing the federation to assume power and authority under such a rubric would, thus, hardly leave anything for the provincial government to undertake, discharge, or fulfil, jeopardizing this nation's collective odyssey towards greater provincial autonomy, as witnessed in the unanimous approval of the 18th Amendment.

35. It was in order to ensure the faithful and instant compliance of the delineation of power between the federation and the provinces and ultimately between the provincial and the local governments that the Parliament enacted Article 140A in the Constitution. Article 140A in its present form prescribes that "each province shall, by law, establish a local government system and devolve political, administrative and financial responsibilities and authority to the elected representatives of the local government." Adhering to the above would certainly foster in the people, a greater sense of participation and reinforce and strengthen their faith in the State machinery of governance, bringing cohesion and giving strength to the country.

36. Disregarding the mandatory provisions of the Constitution and the categorical mandate prescribed thereunder would embolden and encourage those who are

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averse to the rule of law and have scant regard for the supremacy of the Constitution, thereby strengthening those who want to create dissension and discord in our national polity.

37. Now before parting with this note, it may be relevant to state that while a dissenting note has no legal force, the purpose of this endeavour is to appeal to the brooding spirit of the law in the hope that what may be a dissent today becomes the law tomorrow.

38. Above are the reasons for my short order dated 17.01.2019.

Sd/-Maqbool Baqar,J

'APPROVED FOR REPORTING'
(Aamir Sh.)

AMQ
13/6/19
K28/11

MAB ✓ 28/11/2019