

"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 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 *sine qua non* for heterogeneous countries like Pakistan where large segments of the citizenry remain

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. Umair 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

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,

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

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

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 qualifiers 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

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

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

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 1791, "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 where to, 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 assume 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

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

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

averse to the rule of law and have scant regard for the supremacy of the Constitution, thereby strengthening those who want to create dissention 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 dissent today becomes the law tomorrow.

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

Judge

'APPROVED FOR REPORTING'
(Aamir Sh.)