

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)

- | | |
|-----------------|---|
| 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 Umaima 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

...

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, adverting 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 cases* *supra* 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 untrammelled 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 on 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/tabid/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 aforementioned 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 impinge upon or encroach 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 many 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 involves 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.

CHIEF JUSTICE

JUDGE

JUDGE

JUDGE

JUDGE

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