**IN THE HIGH COURT OF SINDH, KARACHI**
**CP D-1692 of 2011**
**(and others)**

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Date Order with signature of Judge

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Present: **Ahmed Ali Sheikh, Munib Akhtar**
**& Muhammad Ali Mazhar, JJ.**

For hearing of main case
Dates of hearing: 27.08.2013; 25.08,
22.09 and 18.12.2014; 30.03, 06.04, 13.04,
11.05, 30.05 and 24.08.2015; 21.03.2016.

Counsel for petitioners
(in respective petitions):

Mr. Anwar Mansoor Khan a/w
Ms. Umaimah Khan and Ms. Reem
Tashfeen Niaz, Mr. Abrar Hasan,
Mr. Yousuf Ali Sayeed, Dr. Tahir Rasheed.

Counsel for respondents:

Mr. Salman Talibuddin, Addl. Attorney General
Ch. Muhammad Rafiq Rajori, Addl. AG
Mr. Raza Rabbani, Mr. Farooq H. Naek,
Mr. M. Zeeshan Abdullah, Mr. Ali Almani a/w
Mr. Samiur Rehman, Mr. Haq Nawaz Talpur,
Mr. Sohail H. K. Rana, Mr. Salim Salaam Ansari.

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**Munib Akhtar, J.**: By this judgment we intend disposing off the petitions listed in para 48 below. The petitions raise issues centered on the 18th Amendment to the Constitution. Before we begin, it may be appropriate to give a word of explanation as to the rather extended period over which these petitions were heard. On 30.06.2011, a learned Division Bench of this Court referred the lead petition (CP D-1692/2011, around which the other petitions gradually accreted) to the Hon'ble Chief Justice for constitution of a larger Bench for hearing, if so deemed appropriate. A Full Bench was constituted, the composition of which changed over time on account of various exigencies, until the position crystallized in the members as noted above. As is well known, Full Benches in this Court (and, as we understand it, in other High Courts as well) do not ordinarily sit on a day to day basis on account of other judicial responsibilities of the member-Judges. The practice in this Court is that ordinarily Full (and other special) Benches sit on Mondays, and as will be appreciated this does tend to restrict the judicial time available for such matters. Furthermore, factors can intervene to prevent a hearing on the one day available, and so it proved. On many Mondays, one or the other of the

learned counsel could not be available, and on other Mondays (regrettably all too many) judicial work got suspended for one reason or another. Summer vacations intervened and, on occasion, one or the other members of the Bench had sittings in a Circuit Court/Bench. All of these factors took their toll, temporally speaking. The cumulative effect was that the hearing proceeded in fits and starts, and the dates given above are only those on which some progress was actually made. However, we would like to place on record our appreciation of the efforts made by all the learned counsel who appeared (or perhaps it might be more appropriate to say, persevered) before us and brought the hearing, ultimately, to a conclusion.

2. The central issue raised by these petitions is whether certain institutions that were, prior to the 18th Amendment, always (and exclusively) in the Federal domain could, in the post-Amendment scenario, be transferred from the Federation to the Province? It will be convenient to list the institutions at the outset. These are as follows:

| Institution | Abbreviation used | Related petitions |
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| Jinnah Post Graduate Medical Centre | JPMC | CP D-1692/2011; 2544/2011; 2860/2011; 3953/2012; 3095/2013; 3264/2013 |
| National Institute of Cardiovascular Diseases | NICVD | CP D-1692/2011; 2860/2011; 3953/2012 |
| National Institute of Child Health | NICH | CP D-1692/2011; 3953/2012 |
| National Museum of Pakistan, Karachi | National Museum | CP D-1387/2011 |

JPMC, NICVD, NICH and the National Museum are referred to as the "Institutions". We may note that the submissions by learned counsel focused on JPMC, NICVD and NICH, with the first Institution taking the lion's share of the time. Hardly any attention was given to the National Museum.

3. Mr. Anwar Mansoor Khan, learned counsel for the petitioners, submitted that the issues arising before the Court were as follows: (i) whether the subject of "health" was part of the Federal Legislative or Concurrent Legislative Lists? (The latter was of course omitted by the 18th Amendment.) (ii) Whether JPMC, NICVD and NICH came within the scope of entry No. 16 of Part I of the Federal List and/or entry Nos. 11 and 12 of Part II thereof? (iii) Whether a notification dated 22.04.2011, issued by the Provincial Government was lawful and valid? And (iv) whether the executive authority over the three Institutions was not an "occupied field" of the Federal Government and therefore they could not be taken over by the Provincial Government? Learned counsel submitted that the petitioners whom he represented were all employees of the three Institutions and hence Federal Government civil

servants. Referring to JPMC, learned counsel traced the history of this Institution and how it came to be set up. It was submitted that the roots of the Institution lay in pre-Partition days, going back to 1930, when the British had set up a Medical Corps Hospital in Karachi. Reference was made to paras 5 and 6 of the lead petition (CP D-1692/2011) where the details of the historical background and the present functioning of JPMC were given. As regards NICVD, learned counsel submitted that it was set up initially by a Trust Deed in 1976, which was dissolved and the institute made into a statutory body by means of the National Institute of Cardiovascular Diseases (Administration) Ordinance, 1979 (herein after "NICVD Ordinance"). The details of the functioning of NICVD were given in paras 7 to 10 of the lead petition. As regards NICH, learned counsel submitted that it was established initially in the pediatric ward in JPMC but was, shortly after it became functional, given the status of an institute. The details regarding this Institution were given in paras 11 to 13 of the lead petition. In support of the factual aspect of the case, i.e., the manner in which these Institutions were structured and operated, learned counsel also made reference to the reply filed by the Provincial Government, which, according to him, corroborated what had been contended by the petitioners in their pleadings.

4. Learned counsel submitted that there was nothing in the 18th Amendment as devolved any of these Institutions to the Province, and thus their purported transfer from the Federation to the Province was wholly illegal. Indeed, as per learned counsel's submissions, it was unconstitutional since these Institutions were within the scope of entry No. 16 of Part I and/or entry Nos. 11 or 12 of Part II of the Federal List. It was submitted that the subject matter of "health", in the general sense, had always vested exclusively in the Provinces and hence there was no need for, nor any question arose of, its "devolution". But, learned counsel submitted, the three Institutions did not fall within the general rubric; they were relatable to specific entries on the Federal List, and there was nothing in the 18th Amendment as "devolved" any matter so relatable to the Provinces. Thus, the notifications issued and acts done in relation to the purported transfers were unconstitutional and of no legal effect. Three executive actions were in particular mentioned by learned counsel: (a) an office order of 30.06.2011 issued by the Federal Ministry of Health whereby "on transfer of [JPMC] to the Government of Sindh in pursuance of the Constitution (Eighteenth Amendment) Act, 2010", the officials of JPMC were transferred "on deputation basis" to the Provincial Government; (b) an office order of the same date whereby, on the same basis, the officials of JPMC (in relation to NICVD) were so transferred; and (c) a notification of 21.07.2011 issued by the Provincial Health Department

whereby the officials so transferred were "allowed to join" the Provincial Government service with effect from 01.07.2011.

5. Referring to various Articles of the Constitution, and in particular, the three entries from the Federal List being relied upon, learned counsel submitted that it was well settled that the entries in the legislative lists had to be given the widest possible effect. The entries were fields of legislative power and had to be construed and applied in broad terms. Learned counsel submitted that the three Institutions clearly came within the scope of the entries being relied upon. They were relatable to matters that were, and remained, exclusively in the Federal domain. Hence, they could not be transferred to the Province. It was also submitted that the petitioners, serving in the three Institutions, could not be sent on deputation in the manner as undertaken by and between the Federation and the Province. It was prayed that the petitioners were entitled to the relief they were seeking. Mr. Yousuf Ali Sayeed and Dr. Tahir Rasheed, learned counsel appearing in some of the other petitions for the petitioners adopted the submissions made by Mr. Anwar Mansoor Khan.

6. The case for the Provincial Government was opened by Mr. Raza Rabbani, who led the case for the respondents. We may note that while Mr. Rabbani's submissions were in progress, he got elected to the office of Chairman, Senate. For understandable reasons he could not continue appearing on account of the nature and pressing demands of the high office to which he had been elevated and he conveyed his regrets to the Court accordingly. The mantle for the Province was taken up by Mr. Zeeshan Abdullah and we would like to place on record our appreciation of the manner in which he continued and concluded the case for the Provincial Government. Mr. Raza Rabbani submitted that the following questions required consideration: (i) whether being a hospital was the primary function of JPMC, NICVD and NICH? (ii) Whether JPMC (and the other two Institutions, which "derived" from it) were within the federal domain because "hospitals" and "public health" were with the Federation or because, at the relevant time, Karachi had been the federal/national capital? (iii) Whether the three Institutions could be regarded as coming within the scope of entry No. 16 of Part I of the Federal List simply because one or more of their functions, which were incidental and ancillary to the main function of being a hospital, could be said to come within the scope of the said entry? And (iv) whether the three Institutions could be regarded as coming within the scope of entry Nos. 11 or 12 of Part II of the Federal List?

7. Mr. Raza Rabbani gave the Court a detailed overview of the 18th Amendment and how it came to be enacted, and the Constitution amended in its terms. We appreciate the assistance provided by learned counsel in this regard, all the more valuable because Mr. Rabbani is widely acknowledged as one of the principal moving spirits behind the 18th Amendment. However, that history is not, with respect, strictly germane to the proper resolution of the issues before the Court and therefore (without intending any disrespect) we do not set out what was stated by Mr. Rabbani in this regard in any detail. What is of greater relevance is clause (9) of Article 270AA, which was referred to by Mr. Rabbani. Learned counsel submitted that in order meet the constitutional mandate the Implementation Commission therein contemplated was duly constituted (and Mr. Rabbani was in fact appointed the Chairman). The Commission held 68 meetings. As a result, 70 Federal Ministries were devolved on the Provinces, in three phases, in order to give proper effect to the 18th Amendment. The Federal Government issued three notifications in this regard, dated 02.12.2010, 05.04.2011 and 29.06.2011. Referring to the last notification, learned counsel submitted that it devolved the Federal Ministry of Health to the Provinces and, as expressly set out in the notification itself, this led to the devolution of JPMC, NICVD and NICH to this Province.

8. After this general introduction, learned counsel turned to the specifics of his case. It was submitted, with reference to question (i) noted above, that "health" and "hospitals" in general were always the exclusive domain of the Provinces. Whenever any specific matter was to involve the Federation, it was expressly so provided in the legislative lists. As illustrations, learned counsel referred to entry No. 19 of Part I of the Federal List, which specifically refers to "seamen's and marine hospitals and hospitals connected with port quarantine" and entry No. 23 of the erstwhile Concurrent List, which had referred to "places for the reception or treatment of the mentally ill and mentally retarded". However, it was emphasized, hospitals in general were neither part of the Federal List nor had they been on the Concurrent List. They were thus exclusively in the Provincial domain. Learned counsel submitted, by making detailed reference to the factual aspects of how JPMC was structured and functioned, that this Institution was nothing but a general hospital. If at all any research was conducted there (which was not admitted) that was entirely incidental and ancillary. Putting the matter differently, it was contended that the pith and substance of JPMC's functioning and operations was not, and never had been, research as would bring it within the scope of entry No. 16 of Part I of the Federal List. Its primary function had always been, and remained, that of a general hospital.

9. Learned counsel turned to question (ii) noted above, and this in many ways constituted the heart of his case. That case, as presented by learned counsel, can be summarized as follows. JPMC had been under federal control and dominion not because it was a research institute or because the Federation had legislative (and hence executive) competence over "health" and "hospitals" in general, but simply because Karachi had been the federal capital after Partition, when the constituent elements/parts of JPMC were set up, and for several years thereafter. In relation to the federal capital territory (a position that remains true for the Islamabad Capital Territory under the present Constitution) the Federation always had plenary powers, i.e., it could legislate in respect of matters exclusive to the Federation and concurrent, as well as those otherwise exclusive to the Provinces within their respective territories. (The Provinces of course could not legislate in respect of the federal capital territory.) It was for this reason (and this reason alone) that the Federation had been able to set up the constituent units and parts of JPMC and exercise control over them. However, with the passage of time Karachi ceased to be the federal capital and became part of the erstwhile Province of West Pakistan and subsequently of the Province of Sindh. When this came about, the Federation ceased to have any competence or power over JPMC and it ought then to have been transferred to the Province. This however, never came about, and Mr. Rabbani described this state of affairs as an "historical wrong" to the Province. JPMC continued to remain under Federal control and dominion (improperly on the legal plane, according to learned counsel) until the 18th Amendment presented a mandate and opportunity to right the "historical wrong". Thus, Mr. Rabbani's case was that the transfer of JPMC (and its "derivative" institutes, NICVD and NICH) was no more than, finally, due and proper factual recognition and regularization of a situation that had, in law, come about decades ago.

10. In order to establish his case, learned counsel referred in great detail to the various legal and constitutional instruments, Orders and Acts which had affected Karachi's position, first as the federal capital and then ultimately as part of the provincial setup. The legal and administrative changes required to give effect to the changing (constitutional) circumstances and position of the city were stated and the salient provisions of each instrument/ enactment highlighted. Since this aspect of the respondents' case is dealt with in a later section of this judgment, we do not refer to the material relied upon in detail here. It suffices (in order to give a flavor of the submissions) to note that learned counsel started with the 1948 Governor-General's Order whereby Karachi was established as the federal capital, then took us to the Act of 1955 whereby the erstwhile Province of West Pakistan was created and then to a series of Presidential Orders of the 1960's whereby the position of Karachi

shifted from being the federal capital to becoming part of the provincial setup. Reference was also made to the subsequent constitutional dispensation (the 1962 Constitution) and the Order of 1970 whereby the Province of West Pakistan was splintered into its constituent elements, the four Provinces that continue to exist today. According to learned counsel the crucial date was 01.07.1961. This was the date on which the West Pakistan Administration (Merger of the Federal Territory of Karachi) Order 1961 (President's Order 9 of 1961) came into effect. By means of this Order the (hitherto) federal territory of Karachi was merged into the Province of West Pakistan. Learned counsel referred in detail to the various articles of this Order and submitted that when this legal instrument took effect, Karachi ceased to be within the federal domain insofar as legislative (and hence executive) competence relating to exclusively provincial matters was concerned. Thus, from 01.07.1961 onwards, the constituent elements/parts of JPMC ought to have fallen in the exclusive provincial domain (being then the Province of West Pakistan and latterly, and ultimately, the Province of Sindh). This date was the fulcrum on which this part of the case put forward by learned counsel turned. According to him, all that the devolution and transfer of JPMC pursuant to the 18th Amendment did was to belatedly recognize what had transpired years, indeed decades, ago on and with effect from 01.07.1961.

11. With regard to question (iii) (see para 6 herein above) learned counsel submitted that "hospitals" in general admittedly did not come within the scope of entry No. 16 of Part I of the Federal List. It was submitted that the entry (as presently relevant) related to research. Thus, the relevant institute had to be primarily and principally engaged in research to come within the scope of the entry. If research was only an incidental or ancillary activity, then the institute did not qualify. That was precisely the situation at hand. None of the three Institutions was primarily and principally engaged in research. Such activity was at most ancillary or incidental, an offshoot of the principal activity, which was simply that of a hospital. On 30.03.2015, Mr. Zeeshan Abdullah took over from Mr. Raza Rabbani for the reason already stated above. Continuing the Province's case, learned counsel, in relation to question (iii) traced the constitutional history of the entries being relied upon by the petitioners. Learned counsel submitted that since in pith and substance the three Institutions (and in particular JPMC) were nothing but hospitals, their continued control by the Federation would have been unconstitutional. The three Institutions were not research centers. Reference was made in particular to the JPMC prospectus. It was submitted that the activities of JPMC and its derivative institutes was something that was, and could be, done by hospitals in general. Thus, those activities could not be characterized as "research" especially for the purposes or within the meaning of entry No. 16. Learned

counsel also referred to lists of research institutes in Pakistan, including that maintained by the Higher Education Commission. It was contended that JPMC did not appear on any such list. Learned counsel submitted further that entry Nos. 11 and 12 of Part II of the Federal List also had no application to the three Institutions.

12. With reference to clause (8) of Article 270AA, learned counsel candidly submitted that the transfer of the three Institutions did not, strictly speaking, come within the scope of devolution. However, learned counsel submitted, that was not the end of it. Reference was made to the terms of reference of the Implementation Commission that had been set up under Article 270AA(9), and to which reference has been made above. Learned counsel submitted that the terms of reference were settled by the Federal Government itself. Reliance was also placed on the final report issued by the Implementation Commission. The Commission only made recommendations, which were accepted by the Federal Cabinet. The transfer of JPMC and the other Institutions took place in these terms. The recommendations regarding the third phase (in terms of which the three Institutions were transferred) were approved by the Federal Cabinet on 28.06.2011, and the relevant notification (referred to above) was issued on 29.06.2011. It was submitted that once effect had been given to the recommendations of the Commission, and all the three phases notified, even the Rules of Business of the Federal Government were amended to reflect the new ground realities. It was prayed that the petitions be dismissed.

13. Mr. Ali Almani, who also appeared for the Provincial Government, adopted the submissions made by Mr. Raza Rabbani and Mr. Zeeshan Abdullah and made certain additional submissions. Referring to entry No. 16, learned counsel submitted that even assuming (without conceding) that the three Institutions came within the scope of the entry, the following questions had to be addressed: (a) could the Provinces set up similar institutes? (b) Could institutes set up by the Federation under entry No. 16 be transferred to the Provinces? And (c) had there been a valid transfer in the facts and circumstances of the present case? As regards the first question learned counsel submitted that it clearly had to be answered in the affirmative. As regards the second question, learned counsel relied on Articles 97 and 173 of the Constitution. It was submitted that the Institutions had to be considered separately from the employees and officials thereof. Clause (1) of Article 173 did not, it was contended, require a specific law being enacted. It conferred executive authority for the purposes therein specified, i.e., grant, sale disposition etc. of any property vesting (as here relevant) in the Federation. It was submitted that JPMC and NICH were transferred validly to the Province

in terms of this provision. Learned counsel also referred to certain case law in this regard. As regards the employees, learned counsel submitted that their cases had to be considered separately from the Institutions and they had been validly deputed from Federal service to the Province. As regards NICVD, which was regulated by the NICVD Ordinance, learned counsel relied on Article 146(1) read with s. 8 of the General Clauses Act to submit that there had been a valid transfer in respect of this Institution as well. Reliance was also placed on certain case law.

14. Mr. Haq Nawaz Talpur, who appeared on behalf of the Jinnah Sindh Medical University, set up under an Act of the Sindh Assembly (a respondent in CP D-3953/2012 and intervener in the lead petition) also supported the transfer of the three Institutions. Learned counsel adopted what had been said by other counsel and made certain additional submissions. It was submitted that entry No. 16 applied only to those Federal institutes where the primary and principal activity was of research. Referring to s. 172 of the Government of India Act, 1935 (equivalent to Article 173 of the present Constitution), learned counsel submitted that the former had referred to not only location but also use or purpose of the relevant property. If either was within the Federal competence, it fell within the Federal domain. Referring to Article 131 of the 1956 Constitution, learned counsel submitted that that referred only to use of the property concerned. If the use was with the Province, then the property vested in the Province. The same approach was taken in the 1962 Constitution (Article 232) and the present Constitution (Article 173). It was submitted that on this basis, JPMC vested in the Province. It was contended that none of the three Institutions had been Federal institutes in the first place, nor was research in any meaningful sense carried out thereat. JPMC did not come within the scope of entry No. 16. As regards NICVD, learned counsel referred to Article 270A(3) (the Article inserted in the aftermath of the General Zia ul Haq Martial Law to validate laws made in that era) and submitted that the "appropriate legislature" in respect of this Institution was the provincial legislature. Hence, NICVD also came within the provincial domain, and all three Institutions had been validly transferred to the Province. As regards the employees and official thereof, they had been given an opportunity to join the Provincial service, and in regard reference was made to the final report of the Implementation Commission. The learned Additional Attorney General supported the transfer and adopted the submissions made by learned counsel for the Provincial Government.

15. Mr. Anwar Mansoor Khan, learned counsel for the petitioners, exercise his right of reply. Learned counsel submitted that the devolution of the three Institutions was only by reason of the 18th Amendment and not

otherwise. The Implementation Commission could only act within the remit of the Amendment, and it had no authority to deal with any matters that fell outside the ambit thereof. Learned counsel strongly contested the respondents' case that JPMC was only or primarily a hospital in general and nothing else. It was submitted that the material placed on record clearly showed that JPMC was a postgraduate medical center, where research was carried out and medical education and training imparted. Thus, it came squarely within the scope of entry No. 16. Learned counsel relied on the descriptions given of JPMC, its structure and activities in a booklet issued by the Institution on the 50th anniversary of its establishment (in 2014), titled *Jinnah Postgraduate Medical Centre: 50th Golden Jubilee Symposium*. Learned counsel emphasized that a functional hospital was needed in order for JPMC to realize its goals of research and training especially at the postgraduate level. Referring to the material on record, learned counsel made detailed submissions as to the nature and quality of research being carried out at JPMC and the "derivate" institutes. Referring to the various notifications relating to the transfer from the Federation and the Province, learned counsel submitted that it was clear on a bare perusal thereof that the matters were treated as being in pursuance to the changes wrought by the 18th Amendment. But, it was submitted, that had nothing to do with health as such. It was submitted that the Institutions were federal institutes, had always been so, and remained so.

16. We allowed learned counsel to file written submissions/synopses. Mr. Anwar Mansoor Khan filed submissions for the petitioners. Mr. Zeeshan Abdullah filed submissions on behalf of the Provincial Government (herein after referred to as the "GOS Written Submissions"). Mr. Ali Almani also filed written submissions for the Provincial Government, but expressly reiterated that his submissions were without prejudice to the case made for the Province by Mr. Raza Rabbani, referring to the latter as the "primary submissions". Mr. Farooq H. Naek also filed a written synopsis on behalf of the Provincial Government. Other learned counsel also filed written synopses.

17. We have heard learned counsel as above, considered the (very voluminous) material and record relied upon, examined the written submissions and synopses and seen the cases cited by learned counsel. Since the transfer of the Institutions from the Federation to the Province was triggered by the 18th Amendment, we start by recalling that the Amendment omitted the Concurrent Legislative List from the Fourth Schedule. Some of the entries of the Concurrent List were shifted by the Amendment to the Federal List. Most however, were omitted. The result was that (other than in relation to the Islamabad Capital Territory and any area not forming part of a

Province, and subject to certain other contingencies contemplated by the Constitution but not presently relevant) the Federation lost legislative (and hence executive) competence in respect of the omitted matters. The 18th Amendment also substituted Article 270AA, and it is important to consider the last two clauses of the substituted Article, which are as follows:

> "(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 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."

It is pertinent to note that the term "devolution" does not appear anywhere else in the Constitution. Thus, it had a specific meaning: it only meant that process (which was to be completed by 30.06.2011) whereby federal matters relating to the omitted entries were to be transferred to the Provinces. For this purpose, an Implementation Commission was to be set up in terms of clause (9). As is clear from the opening words of this clause, the Commission was to be constituted for one purpose alone: the "devolution process" contemplated by clause (8). Thus, whenever the word "devolution" is used anywhere, and in the context of the 18th Amendment, it can have only the meaning and purpose ascribed to it in clause (8), and none other. Furthermore, the remit, jurisdiction and authority of the Implementation Commission set up in terms of clause (9) were also likewise clearly spelt out, being "for the purposes of the devolution process under clause (8)".

18. The terms of reference set for the Implementation Commission upon its constitution were as follows:

> "i. The Implementation Commission shall perform such functions as may be necessary for the implementation of Clause 8 of Article 270(AA) of the Constitution of the Islamic Republic of Pakistan and such other steps needed for the implementation of the Constitution (Eighteenth Amendment) Act, 2010;
>
> ii. To examine the policy, programmes, capacity building and other measures that are required to be taken by the Federal Government and/or the Provincial Governments for the implementation of the devolution process;
>
> iii. Review all laws, rules and regulations being affected as a consequence of this transition;
>
> iv. To create and monitor the mechanism and institutional procedures required to complete the process of devolution by June 30, 2011;

v. To assess the financial implications of such devolution and to provide guidance for financial mechanism that will make it sustainable;

vi. 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;

vii. To take any or all such actions and steps which may be necessary to perform the functions as specified above."

It will be seen that the terms of reference were formulated, as they had to be, with specific reference to the devolution process contemplated by Article 270AA(8). While clause (i) did appear to refer to "such other steps needed for the implementation of the [18th Amendment]", in fact no such steps were required. In any case, even if any steps were required, they could not be taken for any purpose other than as related directly and exclusively to the Amendment. Clause (vi) also appeared to refer, rather vaguely, to "other related Articles/provisions" but in our view these words had to be given a contextual meaning and effect. That, both in terms of clause (vi) itself and the terms of reference as a whole, was nothing other than giving effect to the consequences created by the omission of the Concurrent List. In our view, to the extent that anything in these two clauses was outside the scope of clauses (8) and (9) of Article 270AA, that would have been beyond the constitutional mandate.

19. Unfortunately, it appears that, with respect, the Implementation Commission failed to properly appreciate the constitutional context in, and purpose for, which it had been created under clause (9). We have gone through the Final Report of the Implementation Commission. Although clauses (8) and (9) are referred to in para 11, it seems that the Commission failed to properly keep in mind its constitutional mandate. As is clear from, e.g., paras 17 to 21 of the Final Report, it took a rather expansive view of what it could, or was supposed to, do. This caused the Commission, on occasion, to act beyond its constitutional authority and remit. Even if such acts were within the terms of reference (as to which we reserve our opinion), what is of importance is that clause (9) of Article 270AA created the "four corners", as it were, within which the Commission was to operate. The words in clause (9) that empowered the Federal Government to constitute the Commission "as it may deem fit" related only to regulating the composition and suchlike aspects thereof. These words certainly did not empower the Federal Government to confer whatever powers it wished on the Commission, especially such as enabled the latter to travel beyond the four corners. Those four corners were

expressly in relation to clause (8), which dealt only with the consequences of the omission of the Concurrent List and nothing else. However, the Commission appears to have misread and misunderstood these clauses. Thus, to take one example, para 19 of the Final Report narrates the actions taken by the Commission in relation to the Election Commission of Pakistan. Even if these actions could be regarded as coming within the terms of reference (and we reserve our opinion on this point) it is obvious that they had nothing whatsoever to do with the omission of the Concurrent List. These actions therefore went well beyond what was mandated by clauses (8) and (9) of Article 270AA. In our view, the constitutionally permissible approach that ought to have been taken by the Commission was as follows. In relation to any federal matter that came before it, the Commission had to ask itself this question: did the matter relate to any entry on the Concurrent Legislative List as had been omitted? If (but only if) the answer to this question was in the affirmative, then (and only then) was clause (8) engaged, and thus clause (9) and hence the Commission came into operation. If the answer to this question was in the negative, then the matter fell outside the purview of clause (8), and clause (9) was never engaged. This, in our view, was the jurisdictional basis established by the Constitution, and it necessarily had to inform all actions taken by the Commission.

20. As to the actual process of devolution itself, the Final Report states that it occurred in three stages. In each stage, various Federal Ministries were recommended to be wound up and, as noted above, the Ministry of Health came in the third stage, with the three Institutions, JPMC, NICVD and NICH going to the Province of Sindh. All of these recommendations were accepted by the Federal Cabinet, and notifications issued in relation to each phase, the notification for the third phase being No. 4-9/2011-Min.I dated 29.06.2011. We have considered the recommendations made, especially in relation to the three Institutions. It is quite obvious that in relation to the Institutions the Commission failed to ask itself the constitutionally mandated question just referred to. Each of JPMC, NICVD and NICH had to relate to an (omitted) entry on the Concurrent List for the devolution process contemplated by clause (8) to be engaged, and for clause (9) (and thus the Commission) to come into operation. (The same was true for the National Museum.) During the course of submissions, we expressly invited learned counsel for the Provincial Government to show us the entry (or entries) on the Concurrent List omitted by the 18$^{th}$ Amendment to which these Institutions related. It is telling that no such entry was referred to or relied upon. The reason is clear: there was no such entry. Indeed, as has been noted above, one of the learned counsel for the Provincial Government candidly (and quite properly in our view) accepted that the devolution of the three Institutions to the Province

could not, strictly speaking (as learned counsel put it), be related to clause (8). But if it could not, it is clear that clause (9) was not engaged at all and hence the matter lay beyond the constitutional remit, authority and jurisdiction of the Commission. It is therefore our view that the Commission erred materially (and on the constitutional plane) in purporting to recommend the devolution of the Institutions to the Province, and the Federal Cabinet and Government erred equally in accepting the recommendation and issuing the notification referred to above in relation thereto.

21. It is important to note that the record clearly establishes that all the actions taken by the Federal and Provincial Governments and authorities in relation to the Institutions were specifically in the context of the 18th Amendment and pursuant thereto, and not otherwise. For example, it has already been noted above (see para 4) that the two office orders issued by the Federal Government and the notification issued by the Provincial Government specifically impugned by learned counsel for the petitioners clearly stated that JPMC and NICVD were being transferred pursuant to the 18th Amendment. Even in relation to the National Museum, the relevant notification (dated 05.04.2011) issued by the Federal Ministry of Culture referred expressly to the 18th Amendment, and the follow up notification and office order, issued on the same day, in relation to the officers and employees likewise stated that the transfer was pursuant to the Amendment.

22. The transfer of the Institutions from the Federation to the Province therefore fails at the first, and necessarily most important, constitutional stage: it was not, and could not be, devolution within the meaning of clause (8) of Article 270AA. Hence, clause (9) was never in operation insofar as the Institutions were concerned and therefore the Commission did not have the remit, jurisdiction and authority to make any recommendation in relation thereto. Any purported acceptance of the recommendation by the Federal Cabinet and Government and the notifications and orders that followed thereon and on the foregoing basis were thus equally devoid of lawful effect or authority.

23. While the foregoing conclusion is essentially dispositive of the petitions, the matter was fully (and very ably) argued on both sides in respect also of other points and grounds. It will therefore be appropriate for us to consider the same as well.

24. It will be recalled that learned counsel for the petitioners relied on three entries in the Federal Legislative List to contend that JPMC, NICVD and NICH were, and remained, Federal institutes. These entries are as follows:

Part I

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.

Part II

11. Legal, medical and other professions.

12. Standards in institutions for higher education and research, scientific and technical institutions.

In our view, entry No. 12 from Part II has no relevance for present purposes and therefore, with respect, the reliance placed on the same is misconceived. At first sight, entry No. 11 may appear to have some relevance but having considered it we are of the view that any bearing as it may have would be, at most, tangential. This entry also does not therefore require further consideration. This leaves only entry No. 16 from Part I and in fact the submissions of learned counsel from both sides were primarily focused on this entry. We begin by noting that this entry has always been part of the Federal List, unlike the two others relied upon, which came onto the List courtesy the 18th Amendment. Furthermore, this entry corresponds to: (a) entry No. 12 of the Federal List contained in the Seventh Schedule to the Government of India Act, 1935; (b) entry No. 21 of the Federal List in the Fifth Schedule to the 1956 Constitution; (c) entry No. 30 of the Third Schedule to the 1962 Constitution; and (d) entry No. 12 of the Federal List in the Fourth Schedule to the Interim Constitution. Thus, the subject matter of entry No. 16 has been in the exclusive federal domain from inception, that is to say, for a very long time indeed.

25. The first point to make regarding entry No. 16 is the most obvious: it is a field of legislative power. As is well known, but nonetheless merits repeating, entries on legislative lists are to be construed and applied in the broadest possible terms. So it must be with entry No. 16. It was argued for the Provincial Government (see the GOS Written Submissions, pg. 33) that the agencies and institutes which could be set up in terms of the entry were "for those items which are in the Federal Legislative List only". With respect, this submission cannot be accepted. It is flatly contrary to the basic constitutional principle just noted and even otherwise finds no warrant in the language of the entry. The power and competence, subject only to what is contained in the entry itself, are plenary: an institute can be set up in relation to any subject, discipline, area, specialty, branch of knowledge, or matter. All that is required are two things. Firstly, the institute or agency must be "federal". In our view,

this inter alia clarifies that the existence of this entry does not prevent any Province from setting up a similar or even identical agency or institute. Secondly, while the agency or institute can be set up relating to any subject, discipline, etc., its purpose must conform to the three specified aspects: research, professional or technical training, or the promotion of special studies. As is obvious these are not mutually exclusive: an institute may be set up in relation to any of these aspects or any combination thereof, with such weight or importance being given to each as is deemed appropriate. Furthermore, each of these aspects, being part of a legislative entry ought, in our view, to be broadly construed. In other words, a narrow or pedantic view cannot be taken of "research", "professional" or "technical" "training", or the "promotion" of "special studies". Material was placed before us to show what is meant by, e.g., research. With respect, in our view the meaning to be ascribed to the foregoing terms cannot be restricted to that contained in any legal dictionary or other such source where, invariably, the definition given is contextual and hence limited. We are here concerned with a legislative entry operating on the constitutional plane. It is only fitting that the terms used therein are construed and applied accordingly.

26. Another important point that must be kept in mind is that, when considering entry No. 16 on the constitutional plane, the Court is not, and ought not to be, concerned with the quality, quantity or frequency of the "research", "professional" or "technical" "training", or "promotion" of "special studies" (as the case may be) that is being carried out at the relevant federal agency or institute. It may be that such considerations and inquiries are relevant and called for in other contexts. However, the relevant question on the constitutional plane is only whether the principal purpose or functioning of the institute (its pith and substance as it were) relates to any of the three aspects. If it does (i.e., those aspects are not merely incidental or ancillary to the purpose or functioning) then the institute qualifies as one within the scope of entry No. 16. The quality and quantity of what is being done is, in the constitutional context, not relevant. Much material was placed before us by both sides, the petitioners aiming to show how prodigious and high quality was the research being carried out, the respondents attempting to satisfy the Court that such research (if at all any) as was being conducted was marginal, of dubious quality and thin on the ground. We do not need to refer to this material in detail. With respect, the real point is different. The "pith and substance" test that we have noted above is of course well established, though its true and proper context, as constitutional law aficionados are well aware, is primary legislation. When a statute is tested on this anvil, it is not the quality or "quantity" (i.e., length) of the law that is relevant. The statute may be a piece of brilliant draftsmanship destined to last decades or it may be a

hopeless jumble that is scrapped (i.e., repealed) almost immediately. It may extend over hundreds of sections or may even be one section alone. All of this is of no consequence to the proper application of the test. So it must be in the present context, and the test (suitably adapted) is to be applied likewise.

27. Two other points are also important in relation to entry No. 16. Firstly, in many cases, and especially those relating to research or the promotion of special studies, there may be a gestation period before the institute or agency becomes functional in any meaningful sense. Establishing a research institute is not merely a matter of, as it were, throwing money at the project or erecting the bricks and mortar structure, or even hiring qualified personnel: a research institute is a combination of all of these (and many other) factors, the sum being greater (and hopefully far greater) than the parts. It may therefore look for some time, and perhaps even a long time, that an institute or agency that is said to come within the scope of entry No. 16 is not doing anything at all as relates to any of the three aspects thereof. Appearances can however be deceiving and care must be taken not to jump to what may prove to an erroneous conclusion. It can take years and even decades to establish a first class and certainly a world class research, etc. institute or agency; a rush to judgment may well be premature. Secondly, and this is particularly relevant in the present facts and circumstances, in many cases an institute or agency as contemplated by the entry may well have to be associated with (or have associated with it) some other institution. The very petitions at hand provide an almost classic example: oft times a medical research institute/agency or one that provides professional or technical training in medical fields or promotes special studies in such areas requires that it be associated with (or have associated with it) a hospital. The hospital would inevitably be a fully functional institution and may be either a general hospital or a more specialized establishment. It is important to appreciate that the functioning of the hospital may “mask” the functioning of the research, etc institute. After all, the hospital is what is visible to the public and with which most of the time most of the people interact. The institute itself may, in that sense, be invisible. But out of sight, out of mind can be positively misleading in such a context. It may even be that the institute is going through its gestation period whereas the hospital is, as it were, up and running much more quickly. On such bases a wholly erroneous impression may be created that it is the hospital that is the primary institution and the institute is only ancillary and incidental. What we wish to stress is that, in our view, it is in the nature of entry No. 16 that care must be taken before judgment is passed in relation to a challenge that an institute does not come within the scope thereof. Appearances can easily deceive. Thus, to continue with the example just given, it may appear in many cases that the institute is merely an appendage of the hospital, which is

the "real" institution. In some situations, it may even seem that the hospital is but incidental to the institute. The reality may, and usually would, be much more complex. It may well be that the institute functions at such a level of integration with the hospital that to try and untangle and differentiate between the two would be a futile exercise. It is to highlight this complexity that we have, in the earlier part of this paragraph, referred to the situation as being either the institute associated with the hospital or the hospital associated with the institute. It may even be simply a matter of perspective: viewed from one angle the former situation may appear to be the case, while viewed from another the latter may prevail. This apparent ambiguity may well however simply reflect the underlying (and unavoidable) reality. But that would certainly not mean that the institute does not come within the scope of entry No. 16. As will be appreciated, in such situations it may become impractical (and even impossible) to give a definite answer on the basis of the "pith and substance" test. The intermingling may result in such a situation that either case (institute or hospital) may be made out with equal facility. In our view, in such a situation another principle ought to be adapted and applied, namely that constitutionality should be upheld. Again, the true and proper context of this principle lies elsewhere. But, as here applied, what this would mean is that the institute or agency should be regarded as vesting in whichever is the tier of government that owns or controls it.

28. Before we express any view as to whether JPMC, NICVD and NICH come within the scope of entry No. 16 (as contended by the petitioners) or are mere appendages of what is simply a hospital, either general or specialist (as contended by the respondents), it will be convenient, for reasons that will presently become clear, to address what was in many ways the main ground taken by the Provincial Government. That ground, it will be recalled, was that JPMC was within the Federal domain only because at Independence and for several years thereafter, Karachi was the national capital. Once that ceased to be the case and Karachi became part of the provincial set up, JPMC ought, in law at any rate according to Mr. Raza Rabbani and Mr. Zeeshan Abdullah, to have been handed over to the Province. However, that did not come to pass. This was described as an "historical wrong", which had been set right by the post-18$^{th}$ Amendment transfer of the Institutions to the Province. It must also be recalled that according to learned counsel, the crucial date was 01.07.1961, which was when Karachi ceased to be federal territory. Before we proceed with the legal analysis and discussion, two points should be made with regard to the use of the term "historical wrong". Firstly, if at all there was any "wrong" as contended, that was only to the Province as a constitutional entity. It is to be emphasized that no wrong whatsoever was ever done to the *people* of Sindh, who have throughout been served and continue to be served (along

with people from all over the country) by these Institutions and will continue to be so served regardless of the eventual outcome of this litigation. Secondly, if the "wrong" contended for was of such magnitude, the obvious question that arises, why was it not agitated earlier? After all, the Province of (firstly) West Pakistan and then of Sindh could have agitated this issue with the Federation in all the long years and decades since 01.07.1961 and demanded that JPMC and "derivative" institutions be transferred to it. We specifically put this question to Mr. Raza Rabbani. He candidly conceded that prior to the 18th Amendment no demand was ever made on the Federation nor was such issue raised with it at all. This is all the more surprising given that on more than one occasion in the past the same political party/set up formed the government both at the Federal and Provincial levels. It would have been the easiest thing in any of those periods for the "wrong" (if indeed it was such) to have been corrected. In our view, and with respect, it is best to avoid the use of emotive phraseology. A Court of law is concerned only with the constitutional and legal aspects of the issues raised before it. Those are the only "wrongs" that lie within our remit. So-called "historical" wrongs are for History to worry about.

29. In order to assess, on the constitutional and legal plane, the merits of the case sought to be made by Mr. Raza Rabbani and Mr. Zeeshan Abdullah it will be necessary to consider the manner in which JPMC came into existence. We have considered the narratives given in this regard by both sides and are of the view that there is more or less concord on the factual plane. We reproduce below certain extracts from the GOS Written Submissions and the booklet relied upon by learned counsel for the petitioners (referred to in para 15 above) issued on the 50th anniversary of JPMC. The extracts are set out in tabular form for ease of comparison:

| GOS Written Submissions (pp. 17-19) | *JPMC: 50th Golden Jubilee Symposium* (pp. 4-5) |
|---|---|
| A brief history of the Jinnah Post Graduate Medical Centre is as under:<br><br>1. It started in 1939 as a Royal Airforce Base Hospital, to provide health care facilities to the armed forces in Karachi, during World War-II.<br><br>2. Subsequently, the British Government intended to shift all the medical equipment to Britain in the wake of partition of the sub-continent. The Government of Pakistan, signed an agreement with the British Government and | The journey of Jinnah Postgraduate Medical Centre (JPMC) started in 1930 in Medical Corps Hospital, meant for medical aid to military personnel exclusively. In 1942 it was re-named as the British General Hospital and remained as such till 1947; a 100 bedded hospital with all basic necessary facilities.<br><br>After the creation of Pakistan, the father of the nation, Quaid e Azam Muhammad Ali Jinnah was requested to grant approval to lend his name to the hospital, which he graciously accorded, with the condition that it be opened for the public. Thus, the |

| | | |
|---|---|---|
| | purchased the entire equipment.<br><br>3. As a consequence, the Medical Corps Hospital / British General Hospital was named Pakistan Central Hospital in January, 1948. The father of the nation (Quaid-e-Azam Muhammad Ali Jinnah) was invited to the said Hospital, following that, it was named as Jinnah Central Hospital, to provide health care to the Federal Government employees, who were stationed in Karachi, Capital of Pakistan, as the Civil Hospital, Karachi, was not sufficient to meet their needs.<br><br>4. In 1952, Dow Medical College was attached with Jinnah Central Hospital. Indiana University became interested in setting up a Basic Medical Sciences Institute. In August, 1954, the Basic Medical Sciences Institute, separate identity was authorized by the National Assembly of Pakistan to undertake this work. The Indiana university contract specified that the Institute was to be established at Dow Medical College, Karachi. However, in early 1957, the Government of Pakistan changed the site for the development of the Basic Medical Sciences Institute from Dow Medical College to a building situated at the site of Jinnah Central Hospital.<br><br>5. In 1964, the amalgamation of Basic Medical Sciences Institute and all the units of Jinnah Central Hospital, led to the creation of Jinnah Post Graduate Medical Centre i.e. JPMC. | Medical Corps Hospital/British General Hospital was named as Jinnah Central Hospital (JCH).<br><br>…<br><br>1n 1952, Dow Medical College (DMC) was attached with JCH. In August 1954 the National Assembly of Pakistan authorized the Basic Medical Sciences Institute (BMSI), as basic sciences education was deemed crucial for establishing a centre for higher medical education. After its initial establishment at DMC, Karachi, the Government of Pakistan changed the site for the development of BSMI to a building situated at the site of JCH. The Indiana University with its staff embarked on the establishment of BMSI…. The BMSI with six departments and laboratories, including Anatomy, Biochemistry, Microbiology, Pathology, Pharmacology and Physiology, was thus established as the most updated medical institution of its time. The official opening ceremony was held on 11th April, 1959….<br><br>… In 1963, the amalgamation of BMSI and all units of JCH led to the creation of JPMC with the combined administration headed by a Director. |

30. In summary, the above narratives show that initially there were two institutions. One was a hospital, the Jinnah Central Hospital ("JCH") and the other an institute, the Basic Medical Sciences Institute ("BMSI"). In 1963/64

these two institutions were combined to create JPMC. That was the genesis of the Institution that developed and expanded over the ensuing years and decades and became the establishment as we know it today. In our view, BMSI was clearly an institute that came within the scope of entry No. 16 (or, more precisely, its precursor at that time). Now, the year in which JPMC was created from its constituent parts (JCH and BMSI) is of importance. This is because that year (1963/64) was *after* the date crucial for the argument advanced by Mr. Raza Rabbani and Mr. Zeeshan Abdullah, 01.07.1961. As is at once obvious, if their argument is taken to its logical conclusion, JPMC ought never to have been created. This is because according to learned counsel, on and after 01.07.1961 the general hospital, JCH, ought already to have gone to the Province. In law, according to the argument advanced, it was by then a provincial establishment, Karachi having become part of the provincial set up. BMSI was however a federal institute. The two could not therefore have been joined. Thus, the very Institution that today, according to learned counsel, has been rightly transferred to the Province ought never to have come into existence. Furthermore, and again if the argument is taken to its logical conclusion, all that could or ought to be transferred now to the Province would be the hospital "component" of JPMC, since it is to that "portion" alone that the Province can lay any claim. The institute "component" would have to remain with the Federation. Thus, the Institution that exists today as one unified whole (and has so existed for decades) would somehow have to be fractured into two "components" and dealt with accordingly. This may well be a practical impossibility. Thus, on the basis of the argument advanced, what could well happen is that either something that belonged to the Province (the hospital) would vest in the Federation, or something that belonged to the latter (the institute) would vest in the former. In our view, and with respect, the bare fact that JPMC did not even exist on the date regarded as crucial by learned counsel and the contradictions that would ensue if the argument advanced is taken to its logical conclusion are sufficient to demonstrate that the submission is without force.

31. There is however, a more fundamental point involved, which is on the constitutional plane. There is a date that can possibly be regarded as relevant, but it is not 01.07.1961. As noted, on that date JPMC did not even exist and on the argument put forward, in law could not and ought not to have come into existence. But exist it does. In our view, if at all any, the date that could actually have any relevance on the constitutional plane is 14.08.1973, the commencing day of the present Constitution. We now explain why this is so.

32. Every Constitution establishes its own constitutional dispensation, creating its own legislative and executive bodies, imbuing them with requisite

powers and competences and, if the nature of the polity is federal, sharing the same between the two tiers of the State. One question that needs to be addressed is the fate of laws existing on the commencing day of the new Constitution. In terms of the Constitution itself, such laws would of course not be laws at all, since they were made under a different constitutional dispensation. Yet, to discard the existing laws (a possibility that does exist in theory) would be to invite chaos. So, each Constitution provides for continuity and gives due recognition and force to existing laws. This was done in the present Constitution by means of Article 268, but this provision is by no means unique. It had its equivalents in the 1962 Constitution (Article 225), the 1956 Constitution (Article 224), the Indian Constitution (Article 372) and even the Government of India Act, 1935 (s. 292). Article 268 was recently considered by a Division Bench of this Court (of which one of us was a member, being judgment dated 02.06.2016 in CP D-3184/2014 and connected petitions). It will be convenient to refer to what was observed there (emphasis supplied):

> "49. … Article 268(1) provided that all laws existing on that date [i.e., the commencing day, 14.08.1973] were to continue in force "until altered, repealed or amended by the appropriate Legislature". It will take us too far afield to undertake a detailed analysis of this provision. For present purposes, it suffices to note that what it meant was that each "existing law" stood allocated to one or the other of the legislatures created by the Constitution (i.e., Majlis-e-Shoora (Parliament) on the one hand and the Provincial Assemblies on the other) and till such time as the relevant legislature chose to alter, repeal or amend it, the law continued in force in the form it had on the commencing day. But how was this allocation to be made? How was it to be decided that a particular "existing law" fell to the lot of the Federation or the Provinces? In our view, given the federal structure and scheme of the Constitution, the allocation could be only on the basis of the well known test of "pith and substance". The pith and substance of each "existing law" had to be determined, and *here it is important to remember that the legislative source or origin of the statute in any previous constitutional dispensation was irrelevant. In other words, it was irrelevant whether the "existing law" in question would have been regarded as a federal or provincial statute when enacted in terms of whichever constitution was then prevailing. The "existing law" had to be considered simply as a law in its own right, and its pith and substance determined*. If the pith and substance was relatable to any entry on the Federal Legislative List or the Concurrent Legislative List (both Lists of course existed on the commencing day) then the "existing law" stood allocated to the Federation. If the pith and substance was not relatable to any enumerated power then it stood allocated to the Provinces."

We draw attention in particular to the portion that has been emphasized. The status of the law under any previous constitutional dispensation was immaterial. For purposes of the present Constitution, and Article 268, it simply had to be regarded as a law, as it stood in its own right on 14.08.1973.

33. Now, “existing laws” were defined in clause (7) of Article 268. JPMC was not created under any law but rather by executive action. Article 268 did not therefore, strictly speaking, apply. How then could the fate of JPMC have been decided, if there were a challenge (as there is, on the basis of the argument put forward for the respondents) that it should not have been regarded as a federal establishment? In our view, the principle embodied in the Article can be pressed into service. JPMC would have been considered as an “existing institution” and the principles, as explained in the extract above, applied accordingly (with suitable adaption and modification). But, it is important to note, the crucial date would be 14.08.1973. It is the position of JPMC as on that date that would have been relevant. Furthermore, JPMC would have to be considered as an institution existing on that date in its own right, i.e., without regard to how it (or its erstwhile constituent parts) were or ought to have been dealt with under any previous constitutional dispensation. With respect therefore, the legal narrative relied upon by learned counsel, and in particular the detailed consideration of the Orders and Acts relied upon, all of which fell (much) prior to 14.08.1973 was not called for or of any consequence. In particular the date so heavily relied upon, 01.07.1961, also lost relevance. What ought to have happened or could have happened was immaterial. The only thing that mattered was: did JPMC exist as on 14.08.1973? If so, in what shape or form?

34. The answer to the first question just posed is obviously in the affirmative. It is the second question that is crucial for present purposes. It will be recalled that JPMC was created as a result of combining a hospital (JCH) and an institute (BMSI). The interesting question is: why were the two combined? In our view, there is at least one answer that can reasonably be given to this question. The hospital, JCH, could well have continued to function on its own. Perhaps, that could even have been true of BMSI. But obviously, it was felt that the synergies generated by a combination of the two, and the benefits of a symbiotic relationship, would be more beneficial. The institute would benefit from the hospital and the hospital would benefit from the institute. But they could not run in parallel. They were therefore combined in one unified structure and establishment, JPMC. That was how JPMC came to be created and that was its position on 14.08.1973. The Institution has only gone from strength to strength thereafter. We again draw attention to the analysis in paras 26 and 27 herein above. It may be that from one perspective, the “hospital” component of JPMC would be regarded as predominant. It may equally be that from another perspective, it is the “institute” component that would be accorded primacy. But when the combined entity as a whole is examined (and of course, that is what JPMC is,

and was on the relevant date) it could not be said, on account of the intermingling and unification, that one decisively outweighed the other. More precisely, it is not possible to conclude that the research and training aspects of the Institution are, or were on the relevant date, merely ancillary and incidental to the operation of the hospital. The other principle, of maintaining and upholding constitutionality, also came into play. In our view therefore JPMC qualified as an institute within the meaning of entry No. 16. Had its position been questioned on the commencing day of the present Constitution, the answer would have been that it was a Federal institution.

35. The position that emerges so far may be summarized as follows. The devolution contemplated by clauses (8) and (9) of Article 270AA had no relevance for any of the Institutions. Inasmuch as the Implementation Commission purported to recommend their transfer to the Province, the Commission went well beyond its remit, authority and jurisdiction. It erred materially, and on the constitutional plane, in making the recommendation, and the Federal Cabinet and Government erred equally in accepting and acting upon the same. All actions taken in this regard were therefore legally invalid and without lawful effect. As regards the submission that JPMC was in the Federal domain only because (and up till the time that) Karachi was the federal capital, that argument, with respect, cannot be accepted for the reasons given. If at all there was any date relevant for determining the fate of JPMC that would have been 14.08.1973, the commencing day of the Constitution. JPMC was, for the reasons stated above, an institute within the meaning of entry No. 16 on all material dates and at all relevant times.

36. Learned counsel for the respondents laid emphasis on the fact that health, in general, and hospitals, in general, have always been in the exclusive provincial domain. That is certainly correct and indeed was not disputed by learned counsel for the petitioners. But to submit on such basis that JPMC therefore fell in the provincial domain does, in a sense, beg the question. The real question raised by these petitions is not that. It is whether JPMC is a federal institute within the meaning of entry No. 16. If this question is answered in the affirmative, as in our view it ought to be, then that is determinative and it becomes moot whether JPMC could have been regarded as a (general) hospital or even covered by any (general) competence relating to health as such.

37. It was also contended by learned counsel for the Provincial Government that the transfer of JPMC (and the “derivative” Institutions) was covered by Article 173(1) of the Constitution, which confers executive authority on the Federation (and the Provinces) to grant, sell, dispose off or

mortgage any property vesting in them. Mr. Ali Almani, learned counsel appearing for the Provincial Government, submitted that the transfer of the Institutions and that of the federal officials and employees thereof (on deputation basis) must be regarded as two separate acts. With respect, we are unable to agree. Firstly, there is nothing in the record to suggest, let alone establish, that the Federal Government transferred the Institutions to the Province in terms of Article 173(1). The basis on which the two Governments acted has already been elaborated. Furthermore, the very submission that the transfer of the physical infrastructure of the Institutions (both moveable and immoveable) and the sending, on deputation basis, of federal employees to the Province in a sense undercuts the argument. The two transfers were virtually simultaneous, which demonstrates that what was being transferred was not mere physical infrastructure but rather the Institutions as such, i.e., as fully functional establishments. It is clear that what the Federation and the Province sought to achieve was a complete continuity of operations without any break or gap. It is for this reason that, e.g., the Province immediately made an "offer" to the federal employees to take them into provincial employment. This, in our view, is not consistent with the putative transfer of the physical infrastructure being the "real" or intended transfer and the sending of federal employees on deputation merely a stopgap or interim arrangement. The Institutions were being transferred—more precisely, purportedly devolved—as it were, lock, stock, and barrel. It is clear from the record that both the Federal and the Provincial Governments did not regard the two events (i.e., transfer of the physical infrastructure and the employees) as separate transactions but rather as one seamless whole. The reliance placed on Article 173 is therefore, with respect, misconceived.

38. We now turn to consider NICVD. This Institution was initially established by means of a trust deed dated 08.05.1976. We have been shown the Trust Deed. Clause 4 stated that the aims and objects of the Trust (by name the National Institute of Cardiovascular Diseases) were "providing modern facilities for treatment of Cardiovascular Diseases setting up a treating and training centre for postgraduate and undergraduate medical students and nurses and a centre for research into Cardiovascular Diseases and carrying on the Institute's hospital, its attached units and subsidiaries for the treatment of persons suffering from Cardiovascular Diseases and development, research and training in the relevant fields". The physical genesis of NICVD in fact lay in the central heart clinic of Ward 10 of what ultimately became JPMC, which is why learned counsel for the respondents referred to this Institution as a "derivative" entity. In 1979 the NICVD Ordinance was promulgated, which overrode the Trust Deed and reconstituted the Institution as an incorporated

statutory body (see s. 3(1)). Section 6 set out the functions, in the following terms:

> "**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."

It is this Institution that is now sought to be transferred by the Federal Government to the Province.

39. The first question is whether NICVD was a federal institute within the meaning of entry No. 16? Since it was at the time of transfer regulated by statute, the question becomes: what was the pith and substance of the NICVD Ordinance? Mr. Zeeshan Abdullah, learned counsel for the Provincial Government, referring to s. 6 submitted that it was clearly to set up an institute (i.e., specialized hospital) for the treatment of cardiovascular diseases (clause (1) of s. 6). The research and training aspects (clauses (4) and (5)) were ancillary and incidental. We have considered the NICVD Ordinance, and in particular s. 6. With respect, we are unable to agree. The background of the institute, and its setting up under the Trust Deed should also be kept in mind. In our view, the purpose was for the institute to develop into a "centre for super excellence" in relation to cardiovascular diseases. The object was not simply to "treat" such diseases, but also to "investigate" them. NICVD is, in our view, an almost textbook example of the need for a top class research and training institute to have associated with it a functional hospital. We recognize that from one perspective, it could also be said that NICVD was a research and training institute that had to be associated with a functional hospital. However, we again draw attention to the analysis in paras 26 and 27 herein above. In our view, when the matter is considered holistically, the pith and substance of the NICVD Ordinance was clearly such as brought the Institution within the scope of entry No. 16.

40. There is however another aspect in relation to NICVD that requires consideration. It is that, at the time of the transfer it was not simply an establishment created by and operating under executive action and authority. It was in law a statutory body created and continued by, and operating under, a federal law, i.e., the NICVD Ordinance. Mr. Haq Nawaz Talpur, learned counsel for one of the respondents, submitted that this statute ought to be regarded as a provincial law within the meaning of Article 270A, which was added to the Constitution by the 8th Amendment and sought to give cover to the General Zia ul Haq Interregnum. Learned counsel submitted that the Province should be regarded as the competent authority/legislature in relation to the NICVD Ordinance within the meaning of the aforementioned Article. With respect, we are unable to agree. The genesis of NICVD, i.e., its "derivation" from JPMC has already been noted. We have already concluded that JPMC was a federal institute within the scope of entry No. 16. Clearly, a provincial law could not appropriate for a Province a portion of a federal establishment. The NICVD Ordinance was what it purported to be on the face it, a federal law.

41. Since NICVD is a statutory body created and continued by, and operating under, a federal law, during the course of submissions we asked learned counsel for the respondents to satisfy us as to how the Federal Government could transfer the subject matter of a federal law to a Province thereby rendering the federal law nugatory. Putting the matter more generally, how could federal executive authority be exercised in such manner as nullified or defeated a federal law? (The same would of course apply in a provincial context.) It is a fundamental aspect of constitutional law that executive authority must be exercised such that it enforces and ensures compliance with the law. On what basis then could the Federal Government simply hand over the subject matter of the NICVD Ordinance to the Province? Indeed, Article 148(1) categorically states that the "executive authority of every Province shall be so exercised as to secure compliance with Federal laws which apply in that Province". Thus, the Provincial Government was under a constitutional obligation to ensure compliance with and enforcement of the NICVD Ordinance. How could it then, as it were, aid and abet the Federal Government in nullifying and defeating the federal law? To these questions, with respect, no satisfactory answer was forthcoming from learned counsel. Mr. Ali Almani, learned counsel for the Provincial Government, while conceding that being a creature of statute, NICVD could only be disposed of "through legislative action and not executive action", submitted that the situation was regulated by Article 146(1) (see paras 14-16 of the written submissions filed

by learned counsel). With respect, we are unable to agree. Article 146(1) of the Constitution provides as follows:

> "Notwithstanding anything contained in the Constitution, the Federal Government may, with the consent of the Government of a Province, entrust either conditionally or unconditionally to that Government, or to its officers, functions in relation to any matter to which the executive authority of the Federation extends."

Were Article 146(1) to apply at all (as to which we do not record any finding) the situation would have to be that NICVD continued to remain in the federal domain, but was being manned and operated by provincial employees and officers. But of course, the situation as contended for by the respondents is the exact opposite. According to them, NICVD is now in the provincial domain, but is being manned and operated by federal employees and officers on deputation. That situation is wholly alien to Article 146(1).

42. Our attention has also been drawn to a law enacted by the Sindh Assembly, the National Institute of Cardiovascular Diseases (Sindh Administration) Act, 2014 (Sindh Act IV of 2015) (herein after referred to as the "Provincial Law"). We have considered this law. In its material provisions it is nothing but a replication of the NICVD Ordinance. We are at a loss to understand as to how this law came to be enacted. Simply put, it in effect purports to displace the federal law (without even referring to or acknowledging the same) and take over NICVD. Indeed, the Provincial Law proceeds on the basis not merely that the NICVD Ordinance does not exist, but that it was never promulgated at all. Thus, s. 2(e) purports to define the "Institute" as meaning "the National Institute of Cardiovascular Diseases set up in 1963 and registered as such under the Societies Registration Ordinance, 1860". But of course, in 2015 there was no such body: it had long since been absorbed into the NICVD Ordinance and replaced by a statutory body. Sections 3 and 4 of the provincial law simply copy ss. 3 and 4 of the federal law. These provisions (of the latter statute) related to the Ordinance overriding the Trust Deed of 1976 and the vesting of the powers of the Trustees in the Board of Governors of the (federal) statutory body. How could the Provincial Law purport to cover circumstances that had long since ceased to exist? Section 5(1) of the provincial law, which replicates s. 6(1) of the federal law, purports to establish NICVD, all over again, as a statutory body. Again, it is a complete mystery as to how this could come about. NICVD already existed as a statutory body under federal law. It is pertinent to note that the Bill relating to the Provincial Law was passed by the Sindh Assembly on 10.12.2014 and the Governor gave his assent on 01.01.2015, i.e., while these petitions were being heard. It could therefore be that perhaps as a result of queries from, and

apprehensions expressed by, the Court an attempt has been made to give some legislative cover to the transfer of NICVD. However, this simply will not work. The NICVD Ordinance is a federal law, which was indisputably in the field at the relevant time (and continues to be so). The Province (with the assistance and at the prompting of course of the Federal Government) cannot usurp the subject matter of a federal law and effectively nullify the same, and then provide protection to itself, by passing its own law. The Provincial Law is clearly unconstitutional.

43. In our view therefore, quite independently of all of the other reasons above, the purported transfer of NICVD to the Province must necessarily fail (on the constitutional plane) for the reason that it nullifies and defeats, and purports to displace and replace (at the provincial level), a federal law—the NICVD Ordinance. Neither the Federal Government nor the Province (whether in its legislative or its executive capacity) could act in this manner.

44. We turn to NICH. This is another "derivative" establishment. It is derived from the pediatric ward of JPMC. It evolved from 1979 onwards such that it today operates a 500 bed hospital dealing with all manner of children's diseases. It is to be noted that like JPMC, NICH has been operating under executive action and authority. According to learned counsel for the petitioners it is a teaching and research institute where undergraduate and postgraduate training and education is imparted. According to learned counsel for the respondents it is simply a children's hospital, with ancillary teaching and training facilities. In our view, it is not necessary to consider in detail these rival submissions. (However, we clarify that this does not mean that we have decided, one way or another, on the question whether NICH comes within the scope of entry No. 16, a question that we prefer to leave open.) For present purposes, it suffices simply to note that this Institution was devolved to the Province pursuant to the 18$^{th}$ Amendment. That devolution failed at the constitutional plane for reasons already stated. The purported transfer was therefore unlawful.

45. Turning lastly to the National Museum, it has been noted above that virtually no time was devoted by learned counsel during submissions to this Institution. We have therefore considered its position on the basis of the record as available. In our view, the Institution clearly comes within the scope of entry No. 15 of Part I of the Federal Legislative List, which provides as follows: "Libraries, museums, and similar institutions controlled or financed by the Federation". There was no entry relating to museums in the Concurrent List nor were we shown any (omitted) entry in that List as would relate to the National Museum. As noted above, this Institution was transferred to the

Province by a notification dated 05.04.2011 issued by the Federal Ministry of Culture, with a follow up notification and office order issued in relation to the officials and employees on the same day. All of this was expressly done pursuant to the 18th Amendment, i.e., by way of devolution. Since that devolution failed insofar as this Institution is concerned, the purported transfer was unlawful.

46. In our view, and in summary, the following position therefore emerges. All the Institutions were transferred to the Province by the Federal Cabinet/Government pursuant to the 18th Amendment and by way of devolution, i.e., the recommendations made by the Implementation Commission. That Commission could only act in terms of clauses (8) and (9) of Article 270AA. Devolution, in the sense presently applicable, did not at all apply to any of the Institutions. Therefore, the purported transfer of the Institutions failed on the constitutional plane and was unlawful. Furthermore, and in any case, JPMC and NICVD were federal institutes within the scope of entry No. 16. They were therefore in the exclusive federal domain and remained so notwithstanding the 18th Amendment. Additionally, NICVD was regulated by the NICVD Ordinance, a federal law, and that is an independent reason why its transfer was unlawful. Insofar as the National Museum was concerned, it was within the scope of entry No. 15 of Part I of the Federal List and remained so notwithstanding the 18th Amendment. It was thus within the exclusive federal domain.

47. On the basis of the foregoing analysis and discussion we make the following declarations and orders:

a. 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.

b. 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.

c. 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.

d. 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.

e. 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.

f. 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.

g. 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).

h. 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.

i. 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.

j. 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.

k. 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.

48. This judgment applies to the following petitions: CP Nos. D-1692/2011, 2544/2011, 2860/2011, 3953/2012, 3095/2013, 3264/2013, and 1387/2011.

49. The petitions are allowed in the foregoing terms. There will be no order as to costs.

JUDGE

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