IN THE HIGH COURT OF SINDH, KARACHI
CP D-7826 of 2017
and connected petitions

Date Order with signature of Judge

Present: **Munib Akhtar and Omar Sial, JJ.**

For hearing of main case and
miscellaneous applications

Dates of hearing: 29 and 30.11.2017

Counsel for petitioners and NTS in respective
Petitions:

Mr. Anwar Mansoor Khan a/w
Mr. Muhammad Ali Talpur.
Mr. Sajjad Ahmed Chandio.
Mr. Ghulam Asghar Pathan
Mr. Mian Mohsin Raza Arain and Mr. Zahid
Farooq Mazari.
Mr. Qadir Hussain Khan.
Mr. A. Khursheed Khan.
Mr. Imtiaz Ali.

Mr. Ghulam Shabbir Shah, AAG a/w
Mr. Fazlullah Pechuho,
Secretary and
Mr. Ijaz Ahmed Mahesar,
Special Secretary,
Health Department,
Government of Sindh.

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Munib Akhtar, J.: By this judgment, we intend disposing off the petitions noted in para 25 below. The petitions arise in relation to the admission test held for admissions to the MBBS and BDS programs in public sector medical universities/colleges, which was held on 22.10.2017 on a Province-wide basis by the National Testing Service ("NTS"). As explained below, certain questions arose in relation to the holding of the test and the content thereof, which resulted in an inquiry committee being set up, on 26.10.2017, by the Health Department of the Provincial Government. Acting, it appears, on a certain preliminary report presented by the committee the Chief Minister, by notification issued on 11.11.2017, cancelled the admission test and directed that it be held all over again.

2. There are two sets of petitions before us. In one (comprising of two petitions) the petitioners submit that the test was properly conducted and should therefore be upheld and applied in and to the admissions process. These petitioners challenge both the setting up of the inquiry committee and

the order of the Chief Minister on legal and factual grounds. In the second set (comprising of three petitions) the petitioners assail the test and submit that it has been rightly annulled and must be held again. The Provincial Government of course defends the actions taken by its Health Department and the decision of the Chief Minister. NTS on the other hand defends the admission test as conducted by it. We will first note the submissions made by learned counsel appearing in those petitions where the petitioners seek to have the test upheld (CP Nos. D-7826/2017 and 7799/2017), followed by the submissions of learned counsel for NTS. We then note the submissions made by learned counsel in the second set of petitions (CP Nos. D-7324/2017, 7464/2017 and 7599/2017), and finally the submissions of the learned AAG. We may note that we also permitted Mr. Ijaz Ahmed Mahesar, Special Secretary in the Health Department, and one of the petitioners from the second set of petitions (as representative of the others) to address the Court. Finally, we may note that at our request (keeping in mind the urgency involved in these petitions) most of the learned counsel at the outset also filed written synopses of their respective cases and submissions.

3. Learned counsel appearing in CP D-7826/2017 (who filed a written synopsis) submitted that it was for the first time this year that an admission test on a Province-wide basis was held for admissions to the MBBS and BDS programs in the public sector medical universities/colleges. The test was held under, and as mandated by, the MBBS and BDS (Admissions, House job and Internship) Regulations, 2016 ("2016 Regulations"). The 2016 Regulations have been framed under s. 33(2) of the Pakistan Medical and Dental Council Ordinance, 1962 ("PMDC Ordinance"). Referring to the prospectus issued in relation to the admissions process, learned counsel submitted that it provided for the holding of a multiple-choice admission test (referred to as the "entry test"), which was (to quote from the prospectus) to be "conducted from the prescribed intermediate syllabus of Board of Intermediate and Secondary Education, Karachi, Hyderabad, Larkana, Sukkur & Mirpurkhas". The test was to comprise of 100 questions, distributed as follows: 30 questions each relating to Biology, Physics and Chemistry, and 10 relating to English. There would be negative marking, i.e., candidates would be penalized for a wrong answer. The overall final merit list would be prepared on a weighted average, with 50% weight being given to the entry test, 40% to the candidate's result in his/her HSC/A-level exams and 10% to the result in the Matric/O-level exams.

4. Referring to the 2016 Regulations, learned counsel drew attention to Part II thereof (comprising of Regulations 3 to 15), which relates to admissions in the MBBS and BDS programs. Learned counsel submitted that Regulation 3 establishes an admission board and lays out the nature and scope

of its powers and duties. Regulation 4 sets up a committee in and for each Province and region (the latter being defined in Regulation 2(h)). In particular, learned counsel referred to sub-regulation (2) of Regulation 4, which states that a provincial committee "shall have powers to oversee and monitor the entire admission process and ensure transparent conduct of admission test in its area of jurisdiction". Learned counsel also relied on Regulation 9, which is a lengthy provision comprising of not less than 22 sub-regulations (and from which the portions relevant for present purposes are reproduced below). According to learned counsel, the basic position that emerged from the 2016 Regulations and the particular regulations relied upon was that the entire matter of conducting the admission test was entrusted to the admission board set up under Regulation 3 and, more particularly, the provincial committee constituted under Regulation 4. Neither the Health Department of any Provincial Government nor the Chief Minister of any Province figured anywhere in the process, and thus they had no jurisdiction to conduct any inquiry into or investigate any objection taken to the admission test or to cancel the same. That power lay only where the 2016 Regulations placed it, in the bodies set up in terms of Regulations 3 and 4. Although the latter provided that the Health Secretary was to be the chairperson of the provincial committee, learned counsel submitted that that did not mean that the Health Department was entitled or empowered to act. The entire action taken (as set out below) was thus fundamentally without jurisdiction, and this submission constituted the heart of learned counsel's case.

5. Learned counsel further submitted that the PMDC Ordinance was federal legislation that related in its pith and substance to what had been entry No. 43 of the erstwhile Concurrent Legislative List. The entry had read as follows: "Legal medical and other professions". The 18th Amendment, while omitting the Concurrent List, had shifted entry No. 43 to the Federal Legislative List. It was now, in identical form, entry No. 11 of Part II of the Federal List. Learned counsel also referred to entry No. 12 of Part II (which was newly added by the 18th Amendment). It was submitted that as a result of these changes, while previously the legislative competence to which the PMDC Ordinance (and hence the 2016 Regulations) related was concurrent, it was now exclusively federal. This was also another fundamental reason why the actions taken by the Health Department in setting up an inquiry committee and the Chief Minister in purporting to cancel the admission test were entirely without lawful authority; the entire matter, post the 18th Amendment, lay wholly beyond provincial competence and exclusively within the domain of the Federation.

6. Learned counsel submitted that the admission test was held on 22.10.2017 and the result announced on 25.10.2017. On 26.10.2017 the Health Department of the Provincial Government issued a notification/order constituting an inquiry committee "to probe the allegations of improper conduct" of the admission test. The composition of the committee and its terms of reference were set out in the order. Learned counsel submitted that the committee was entirely different from the provincial committee constituted under Regulation 4. Learned counsel submitted that thereafter, for several days, nothing happened and then on 06.11.2017 a notice was issued summoning a meeting of the committee on 08.11.2017. It was submitted that on the very same day the committee issued a preliminary report, and purportedly acting on this report the Chief Minister issued the impugned notification dated 11.11.2017 whereby the admission test was cancelled and it was directed that a fresh test be held within 15 days. Learned counsel submitted that this entire exercise was contrary to the 2016 Regulations and hence was liable to be declared unlawful and invalid. Referring to the para-wise comments filed by NTS and the Provincial Government, learned counsel (without prejudice to his submissions as above) submitted that even on the facts there was no justification for the impugned action. The allegations against the admission test rested primarily on two grounds: firstly, that either the test paper and/or the answer key had "leaked" prior to the holding of the test and secondly, that some questions were beyond the syllabus prescribed for the test. As to the first ground, learned counsel submitted that the para-wise comments of NTS showed that it had also conducted an in-house inquiry into the matter. The inquiry report, and the documents and material annexed thereto, categorically asserted and showed that the admission test had not "leaked" at all. Even the inquiry committee set up by the Health Department had not given any clear finding on this ground, neither in its preliminary nor the final report (which was issued on 20.11.2017). As regards the second ground, NTS had clearly refuted the allegation that some questions were outside or beyond the syllabus. While some questions were undoubtedly difficult that was only to be expected: the test examined candidates over a whole range. Thus, learned counsel submitted, there was no case made out, either in law or the facts. The setting up, and reports, of the inquiry committee and the action of the Chief Minister were unlawful and liable to be quashed. It was prayed that the petition be allowed. At the conclusion of his submissions learned counsel also filed certain additional documents under statement. Learned counsel appearing in CP D-7799/2017 (who also filed a written synopsis) adopted the submissions just noted and in addition submitted that the petitioners (i.e., the candidates who supported the admission test as conducted) had been condemned unheard.

7. Learned counsel for NTS (who also filed a statement along with further material/documents) submitted that NTS entered into a memorandum of understanding with the Dow University of Health Sciences (the institution notified in terms of Regulations 2(a) and 9(2)) for conducting the test. Referring to various clauses of the MOU, learned counsel emphasized that NTS took all steps necessary to ensure the secrecy and transparency of the test. Learned counsel also submitted that NTS had very good experience and background in conducting such tests, and had developed a countrywide reputation in this regard. It was submitted that NTS had even conducted such tests for the High Courts, including this Court. After the admission test on 22.10.2017 and responding to certain concerns expressed in relation thereto, NTS on its own initiative set up an internal inquiry committee for carrying out a thorough investigation. Referring to the para-wise comments filed by NTS and the material and record (including the report of the committee) annexed thereto, learned counsel submitted that the possibility of a "leakage" of the admission test (certainly before the date thereof, which was all that mattered) was categorically ruled out. Reference was made to the clear findings of the committee, based on a thorough forensic examination. As regards the claim that some of the questions were outside the syllabus prescribed for the test, learned counsel submitted that the committee's report again refuted this allegation. Thus, learned counsel contended, the allegations leveled against NTS and/or the conduct of the test were completely baseless. The admission test was held in a proper manner, and ought to be upheld and applied. It was prayed accordingly.

8. Learned counsel for the petitioner in CP D-7599/2017 (who assailed the test) focused his attention on the ground that some of the questions were outside the prescribed syllabus. According to learned counsel, there were not less than 14 such questions. Learned counsel submitted that the petitioner, who was one of the candidates, had made a complaint to NTS almost immediately in this regard, but no reply had been forthcoming. On a query from the Court as to how disputed questions of fact (i.e., whether the questions were outside the syllabus) could be taken up in constitutional jurisdiction, learned counsel relied on the report prepared by the inquiry committee set up by the Health Department. Learned counsel submitted that that report clearly showed that quite a few questions were outside the prescribed syllabus. Even if the constitution of the committee suffered from any legal infirmities (a view to which learned counsel did not subscribe) nonetheless its findings of fact ought to be given due consideration and proper weight by the Court. Since serious and credible doubts had been cast on the test as conducted, learned counsel submitted that there was a sufficient basis for scrapping the same and holding the test afresh. Learned counsel who had

filed power for the first petitioner in CP D-7464/2017 (who also assailed the test) drew attention to paras 6 and 7 of the petition and also relied on certain written submissions as filed by the first petitioner. It was submitted that there was sufficient material on record to establish that the test paper and/or answer key had been "leaked", and that quite a few of the questions were outside the prescribed syllabus. It was prayed accordingly. Learned counsel for the petitioner in CP D-7324/2017 (who also assailed the test) made submissions similar to those already made and prayed accordingly. (We may note that this petitioner was not himself a candidate; he is an advocate and the petition was filed in the public interest.) As noted above, we allowed one of the petitioners (in CP D-7464/2017) also to make submissions. The petitioner made submissions similar to those made and already noted, and placed before us certain material that, according to the petitioner, established that the test paper had indeed "leaked" before the test was held.

9. The learned Additional Advocate General submitted that at its core, the objection of those petitioners who sought to uphold the test was jurisdictional, i.e., that neither the Provincial Government nor the Chief Minister had the legal power to do what they had done both in terms of inquiring into the conduct of the test and, based on the report of the inquiry committee, the cancellation thereof. The learned AAG submitted that the Provincial Government had full legal, and indeed constitutional, power and authority in this regard. Reliance was placed on Article 137 of the Constitution, which provides that (subject to the Constitution) the executive authority of the Province extends to all those matters which respect to which the Provincial Assembly has power to make laws. It was submitted that the necessary executive authority vested in the Provincial Government in the present case. Furthermore, the executive authority in any case necessarily extended to ensuring that law and order was properly maintained. Referring to the para-wise comments filed by Government and the material and documents annexed thereto, the learned AAG referred to various newspaper reports that had started appearing after the conduct of the test, raising serious questions regarding the same. The Provincial Government was fully empowered to take note of the situation and, through its Health Department, constitute an inquiry committee with appropriate terms of reference. The learned AAG submitted that based on the preliminary report of the committee, the Chief Minister cancelled the admission test and directed that it be held again. This was all well within the executive authority of the Province. At the same time, and without prejudice to this submission, the learned AAG submitted that the Provincial Government was in any case empowered even in terms of the 2016 Regulations. Reliance was placed in particular on sub-regulations (2) and (15) of Regulation 9, which refer respectively to the "provincial department" and

the “Provincial Government”. It was submitted that the first reference meant, in this Province, the Health Department. Thus, powers were specifically and explicitly conferred on the provincial authorities. Regulation 9(2) directed the provincial department to intimate to the PMDC one recognized public sector medical university in terms and for purposes of Regulation 2(a), and Dow University had been duly nominated in this regard. Regulation 9(15) directed and empowered the Provincial Government to “ensure conduct of admission test” within the stipulated period. Thus, the learned AAG submitted, a specific statutory duty and, concomitantly, power had been cast and conferred by the 2016 Regulations directly on the Provincial Government. Referring to Regulation 4 whereby the provincial committee was set up it was submitted that sub-regulation (2) thereof, relied upon by the other side, had to be properly interpreted, and applied in context. In particular, the learned AAG submitted that the question was whether the powers conferred on the provincial committee were exclusive or whether the Provincial Government also had concurrent powers? It was submitted that on a reading of the 2016 Regulations as a whole and in context, it was the latter that was the proper interpretation. Hence even in terms of the said Regulations the Provincial Government was fully empowered to act. The learned AAG quite fairly and properly recognized (though very much without conceding the point) that perhaps there could be some concern regarding the notification issued by the Chief Minister whereby the admission test was cancelled inasmuch it was not, as such, the act of the Provincial Government. However, it was submitted that this notification had also to be considered in context and, based as it was on the report of the inquiry committee constituted by the Health Department, ought not to be disregarded in the facts and circumstances of the case. Reference was also made to the Rules of Business of the Provincial Government. Furthermore, the learned AAG again drew attention to a proposal that had been made on instructions from the Provincial Government on 29.11.2017 (which however, was not accepted by the other side). It was submitted (again without conceding) that even if the other side were right in asserting that the power with regard to the conduct of the admission test lay only with the provincial committee under Regulation 4, the Provincial Government stood ready to refer the matter to the said committee and abide by its decision. It was submitted that even if this Court came to the conclusion that the decision of the Chief Minister could not stand the result would be the same: the matter would end up with the provincial committee for it to decide what to do about the admission test. The power of the Provincial Government to itself initiate an inquiry, and for the result of that inquiry to be taken up and considered by the provincial committee, would remain unaffected. As regards his submissions regarding the executive authority of the Provincial Government, the learned AAG relied on a decision of a learned Division

Bench of the Lahore High Court reported as *Punjab Higher Education Commission v. Dr. Aurangzeb Alamgir and others* PLD 2017 Lah 489, where a constitutional principle, that of cooperative federalism, has been articulated. (To this decision may be added a more recent judgment of a learned Full Bench of that High Court, *Punjab College of Law v. University of Punjab and others* PLD 2017 Lah 830, where the aforesaid principle has been affirmed and applied.) The learned AAG also relied on two decisions of the Supreme Court of India, *Chairman All India Rec. Board and another v. K. Shyam Kumar and others* (2010) 6 SCC 614 and *Sanchit Bansal and another v. The Joint Admission Board and others* AIR 2012 SC 214 (also reported at 2012 SCMR 1841).

10. The learned AAG referred to a notification dated 18.08.2017 in terms of which the provincial committee under Regulation 4 was constituted. The minutes of the meetings held by this committee, and the decision to conduct the admission test as required by the 2016 Regulations were referred to. The learned AAG then referred to the final inquiry report of the inquiry committee constituted by the Health Department, which was released on 20.11.2017. The findings of the inquiry committee, both in relation to the "leak" of the admission test, as well as the allegations that questions were beyond the prescribed syllabus were referred to and several paragraphs read out and relied upon. It was submitted that the report confirmed the conclusions that had been provisionally arrived at earlier, and on the basis of which the Chief Minister took the decision to cancel the test. Thus, it was contended, both on the facts and in law the actions taken were correct and proper and no exception could be taken to the same. It was prayed that the decision to cancel the test should be allowed to stand and the way cleared for the holding of a fresh test, as provided for by the notification of 11.11.2017. Learned counsel for the petitioners in CP D-7826/2017 exercised the right of reply.

11. We have heard learned counsel as above, examined the record and material placed before us and considered the case law relied upon. It will be convenient to begin by setting out the relevant provisions of the 2016 Regulations. As noted, these have been framed under s. 33(2) of the PMDC Ordinance. As presently relevant, subsection (2) provides as follows:

> "(2) Notwithstanding anything contained in sub-section (1) the Council shall make Regulations which may provide for---
>
> (a) prescribing a uniform minimum standard of courses of training for obtaining graduate and post-graduate medical and dental qualifications to be included or included respectively in the First, Third and Fifth Schedules;
>
> …
>
> (c) prescribing the conditions for admission to courses of training

as aforesaid; …."

The 2016 Regulations provide in relevant part as follows:

"**2. Definitions**.—In these regulations, unless the context otherwise provides,—

(a) "Exam conducting university" means the university entrusted with responsibility under these regulations to conduct medical and dental college admission test and make admissions in all public sector colleges of that Province/Region and its constituent and affiliated private medical and dental colleges….

…

(h) "region" means any separate administrative territory which is not included in any Province."

"**3. Admission board**.—The following shall be an admission board comprising members of the Council, namely:—

(a)	President or a member of the Council nominated by him	Chairperson
(b)	One member of the Council from each Province	Members
(c)	One member of the Council from Federally Administered Tribal Areas	Member
(d)	One member of the Council from Islamabad Capital Territory	Member

(2) The board constituted under sub-regulation (1) shall —

(a) oversee the process of admission in MBBS and BDS in all provinces and regions;

(b) have powers to inspect any examination under clause (a);

(c) ensure implementation of these regulations and any other directions of the Council, from time to time, for transparent and merit based admissions under clause (a);

(d) for implementation, give to the concerned provincial and regional authorities recommendations regarding breach of secrecy, conduct of admission test and any irregularity pointed out in the admission process and in case of non-implementation of the recommendation, the decision of the board shall be final."

"**4. Provincial or regional admission committee.-** (l) There shall be a provincial or regional admission committee for each province and region, comprising the following members, namely:-

(a)	Health Secretary of respective province or, as the case may be, region	Chairperson
(b)	a member nominated by the Council from amongst its members	Member
(c)	member of the Council of respective province or, as the case may be, region	Member

(d)	Vice Chancellor of the university conducting entry test for admission in MBBS or, as the case may be, BDS	Member
(e)	Principal of one medical or, as the case may be, dental institute to be nominated by the Vice Chancellor mentioned under clause (d)	Member

(2) The provincial or regional admission committee constituted under sub-regulation (1) shall the powers to oversee the entire admission process and to ensure transparent conduct of admission test in its area of jurisdiction."

…

"**9. Medical and dental institutions admission test.—** (1) Unless otherwise provided in these regulations, no candidate shall be admitted to any public and private medical and dental institution unless he, in addition to other eligibility criteria under these regulations, passes admission test for this purpose.

(2) Every provincial or, as the case may be, regional department dealing with admissions in medical and dental institutions shall, each year by notification under intimation to the Council, authorize one recognized public sector medical university or authority as exam conducting university sub regulation 2(a), as the case may be, to conduct a single test for admission in MBBS and BDS courses in that province or, as the case may be, region and prepare a result and order of merit under these regulations. This test result and order of merit shall be applicable to public and private sector medical and dental institutions of same province or region, as the case may be, unless otherwise provided in these regulations.

(3) For the purpose of admission in MBBS and BDS course, no public and private medical or dental institution or its admitting/affiliating university under section 2(b) shall hold its own admission test, aptitude test or interview, by whatever name called for, other than the test specified under sub-regulation 2(a).

(4) The conduct of examination, secrecy and paper-setting shall be the sole responsibility of the exam conducting university authorized under these regulations section 2(a) for conducting the admission test.

(5) A uniform pattern and syllabus for admission test shall be approved by the Council and the syllabus of the admission test shall be commensurate with HSSC or F.Sc. curriculum level.

…

(7) A candidate desirous of admission in MBBS and BDS course in a public and private medical and dental institution of a province or, as the case may be, region shall apply to the concerned affiliating /admitting university sub-regulation 2(b). The admitting university shall process the applications strictly on merit by preparing open merit list for the concerned public and private medical and dental institutions.

(8) The candidate shall apply to concerned admitting university for admission by submitting his SSC, HSSC or F.Sc. and his admission test score under sub-regulation 2(b). The concerned admitting university shall prepare a merit list by a weightage formula as under:—

(a) SSC (10%);
(b) F.Sc. (40%); and
(c) admission test (50%).

…

(13) The pattern of admission test shall be based on multiple choice questions (MCQs).

…

(15) The Federal and provincial governments shall ensure conduct of admission test before the 31st October each year or within four weeks of declaration of result of HSSC and F.Sc. by the Boards of Intermediate and Secondary Education, whichever is earlier, so that whole admission process of public medical and dental institutions is completed before the 31st October each year.

…

(17) The admissions in public-sector medical and dental institutions shall be completed before the 31st October each year by displaying three consecutive merit lists by the concerned admitting university or authority….

…

(19) The admission to MBBS and BDS course in a medical and dental institution shall be made strictly on the basis of merit and in accordance with these regulations….

…"

12. Turning to the constitutional plane, the erstwhile Concurrent List had the following competence as entry No. 43: "Legal medical and other professions". Insofar as educational matters were concerned, the said List had two entries: Nos. 38 ("Curriculum, syllabus, planning, policy, centres of excellence and standards of education") and 39 ("Islamic education"). The Federal List always had, in Part I, an entry relating to education abroad by Pakistanis and in this country by foreigners (No. 17) and there were also two entries which had an educational dimension (entry Nos. 15 and 16). None of these are relevant for present purposes. The 18th Amendment omitted the Concurrent List but shifted entry No. 43 to the Federal List as a newly added entry No. 11 to Part II of the latter. In addition, a new entry No. 12 was also added to Part II: "Standards in institutions for higher education and research, scientific and technical institutions".

13. The manner in which the legislative power of the State is divided in a federal system like ours between the federal and provincial levels, and the scheme adopted in this regard by the Constitution (as indeed, by the predecessor constitutions going back to the Government of India Act, 1935 and, for comparative purposes, the Indian Constitution), the manner in which the legislative entries in various lists are to be interpreted and applied, their interaction, the allocation of laws existing at the time that the Constitution comes into force and other matters relating to legislative competence have been considered in many judgments. These matters have also been treated in

some detail in two recent decisions of this Court, *Pakistan International Freight Forwards Association v. Province of Sindh and another* 2017 PTD 1 (DB) and *Dr. Nadeem Rizvi and others v. Federation of Pakistan and others* PLD 2017 Sindh 347 (FB). Reference can also be made to another Division Bench judgment of this Court, dated 07.09.2017, in CP D-7097/2016 (*Karamat Ali and others v. Federation of Pakistan and others*). It will only unnecessarily burden and lengthen this judgment if the relevant passages from those judgments were to be extracted here. It suffices to note that this judgment is informed by, and is based on and relies upon, what has been held and observed there. What does require consideration here is a matter that is raised by the learned AAG, is intimately linked to legislative power and hence to the distribution of legislative competences in our federal system, but did not arise in the cases just referred to and was therefore not treated there, namely the extent of the executive authority of the Federation and the Provinces. It is to this matter that we therefore turn.

14. The key provisions as regards executive authority are Article 97, which relates to the Federation, and Article 137, which applies to the Provinces. Both set out what may be called the basic rule in identical language: executive authority extends to those matters in respect of which the relevant legislature has power to make laws. It follows that if a legislative competence (or field or entry) falls exclusively in the federal domain, then the executive authority in relation thereto lies only with the Federation (and, since Parliament can make laws for the whole of Pakistan and also with extra-territorial effect, the executive authority of the Federation operates accordingly). On the other hand, if a legislative competence (or field or entry) falls exclusively in the provincial domain, then the executive authority in relation thereto lies only with the Provinces (and since provincial laws are territorially constrained, i.e., apply only in the Province concerned, provincial executive authority operates accordingly). There are of course many exceptions to, and refinements of, the basic rule, such as contained (e.g.) in Articles 148 and 149, and also stemming in part from how the power to make laws can vary or operates in certain circumstances (e.g., under Articles 144 and 151, and the Emergency provisions). These (and other) aspects need not detain us here since we are concerned with the basic rule. What does require consideration is what happens in relation to those legislative competences where, in the normal and ordinary course, both the Federation and the Provinces can make laws, i.e., areas of legislative power which are concurrent. Those competences were of course previously to be found in the Concurrent List. Notwithstanding the omission of that List, there are three (very important) competences that are still concurrent: criminal law, criminal procedure and evidence (see Article 142(b)). So, the question still remains. It

was, and continues to be, answered by the provisos to Article 97 and 137. The proviso to the first mentioned Article states that in respect of a concurrent legislative competence, the Federation does not have concomitant executive authority in a Province unless either the Constitution or federal law expressly so provide. On the other hand, the provincial executive authority does extend to, and thus runs concomitantly with, a concurrent legislative competence. However, the proviso to Article 137 provides (in effect and at any rate as here relevant) that if there is a situation to which the proviso to Article 97 applies, then in respect thereof the provincial executive authority shall be subject to, and limited by, the executive authority of the Federal Government or its authorities.

15. Now, the PMDC Ordinance, which was promulgated in 1962, was an "existing law" within the meaning of Article 268 when the present Constitution came into force on its commencing day (14.08.1973). It is common ground that in its pith and substance, it relates to the legislative competence of "legal medical and other professions", which was then of course an entry in the Concurrent List. The PMDC Ordinance therefore stood allocated to the Federation on the commencement of the Constitution. Since the entry to which it related was in the Concurrent List, the executive authority in respect of this competence lay (in each Province) with the Provincial Government concerned in terms of Article 137. Insofar as the Federation was concerned, its executive authority in relation thereto in a Province applied only in terms of the proviso to Article 97. As explained, it was only when, and to the extent that that proviso applied (as it did, e.g., by virtue of and in relation to the PMDC Ordinance) that Federal executive authority became effective in a Province, and then trumped provincial executive authority by reason of the proviso to Article 137 (and even then only to the extent of any express conferment). The 18th Amendment has upended this position. The legislative competence having been shifted to the Federal List is now exclusively in the federal domain. Insofar as the PMDC Ordinance itself is concerned, there is no change. It was previously a federal law and continues to remain so. But, the executive authority in relation to the legislative competence has drastically altered. Since the competence is now exclusively federal, the provincial executive authority in relation thereto has ceased to exist and disappeared. Furthermore, since the competence has ceased to be concurrent, federal executive authority, which previously was constrained by, and applied only in terms of, the proviso to Article 97 now applies in full and of its own accord.

16. With respect therefore, the submission by the learned AAG that the Provincial Government or the Chief Minister were empowered to take the

actions that they did in exercise of provincial executive authority cannot be accepted as such. Insofar as the matter in issue relates to what is now the exclusive federal competence of "legal medical and other professions", there is no provincial executive authority at all. It is all exclusively in the federal domain. The learned AAG has however relied on the two decisions of the Lahore High Court referred to above. We must therefore consider more closely the matter with which we are concerned and determine how it relates to the aforementioned legislative competence. Stated most narrowly, the matter in issue is the admission test for admissions to the MBBS and BDS programs in public sector medical universities/colleges. The statutory power for making regulations in regard thereto is expressly conferred by s. 33(2)(c) of the PMDC Ordinance. However, clause (c) must be understood in the overall context of the PMDC Ordinance and, in particular, of s. 33(2) when read as a whole. When the other clauses of the subsection, and in particular clauses (a) to (h), are also taken into consideration, it is clear that what s. 33(2) is largely concerned with is professional education in, of and for the medical profession. The 2016 Regulations have been framed with reference to this aspect of the medical profession. The question therefore is whether the legislative competence of "legal medical and other professions" can be regarded as including professional education as well? In our view, this question must be answered in the affirmative. Legislative entries (i.e., competences) must be construed in broad and expansive terms. These are fields of legislative power and are to be understood and applied accordingly. To exclude professional education from such a legislative competence would, in our view, be to artificially and incorrectly limit its scope and extent. However, it must be understood that the legislative competence is not concerned with professional education as such or in general, but rather only with such education in relation to a particular and specific profession. It follows that in our view professional education in relation to the medical profession must be regarded as falling within the scope of the legislative competence. But, this is now exclusively in the federal domain. It therefore follows that executive authority in relation to such education must also be exclusively federal. It lies beyond the provincial domain.

17. Before proceeding further, we may note that in *Punjab College of Law v. University of Punjab and others* PLD 2017 Lah 830 the Lahore High Court also had to consider the aforementioned legislative competence, though with reference to the legal profession. In para 20, the learned Full Bench observed as follows (pg. 841; emphasis in original):

> "Without going into the question whether *legal education* falls within the above Entry (this matter has not been argued before us and can be taken up in an appropriate case), we proceed further with the

assumption that legal education is part of Legal Profession under Entry 11 above."

We would respectfully note that in our view the question is not whether "legal education" or "medical education" as such comes within the scope of the legislative competence. It is, rather, whether *professional* legal education or *professional* medical education comes within its scope, a question that we are required to answer since it does arise here, though in the context of executive authority (and has been answered in the affirmative). "Legal" or "medical" education can, both conceptually and practically, be broader than "professional legal" or "professional medical" education. The distinction is best explained by us with reference to the profession with which we are most familiar, i.e., the legal profession. Courses prescribed for many professions, such as accountancy and business management/administration, include courses in law. Also, the law can be studied and read as an academic discipline in its own right, leading to an appropriate degree at the graduate or post-graduate levels. In such situations and contexts, there is certainly "legal education" involved, but it is not "professional legal education". (Even though a person may be studying the law as part of a professional degree, e.g., accountancy, it is there incidental to the profession concerned.) What has been said about "legal education" should also be true of "medical education". Subjects that are taught as part of "professional medical education" may well also be taught separately and independently in their own right. What comes within the scope of the legislative competence in respect of any specific or particular profession therefore is education that is required to enable that profession to be practiced as such, and not education in more general terms even though it may in some sense be relatable or referable to the profession. (Incidentally, the question whether it is all or only some types of professions that come within the scope of the legislative competence may well require consideration in some appropriate case in future. The question does not of course arise here since the legal and medical professions are specifically included.)

18. It is therefore our conclusion that professional medical education (of which an admission test for purposes of determining enrollment in the MBBS/ BDS programs in medical universities/colleges is one aspect) is part of the legislative competence of "legal medical and other professions". Post the 18th Amendment, the executive authority in respect thereof vests exclusively in the Federation, and the Provinces stand excluded. When the impugned notification of 11.11.2017 is considered, it is clear that the authority that has been purportedly exercised is in respect of the admission test as conducted

under the 2016 Regulations. The direction for holding the test afresh is also in those terms. The notification is as follows:

> "On the recommendations of the enquiry committee constituted by Health Department Government of Sindh vide notification No. SO(ME)__AP/2017 dated 26th October 2017 and with the approval of Competent Authority i.e. Chief Minister Sindh the entry test for admissions in Public Sector Medical Colleges/Universities conducted by National Testing Service (NTS) on 22nd October 2017 is hereby cancelled.
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> II
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> The test will be reconducted within (15) fifteen days through Dow University of Health Sciences (DUHS) Karachi. DUHS is advised to follow the notified Standard Operating Procedures (SOPs)/Policy for conduct of Entry Test in letter and spirit."

The reference to "standard operating procedures" and "policy" can only mean the 2016 Regulations. Therefore, with respect, contrary to what the learned AAG has submitted, in law the Provincial Government and the Chief Minister must be regarded as having acted (i.e., exercised executive authority) entirely within the framework of the afore-stated legislative competence. But, as already explained that executive authority no longer vests in the Provinces.

19. The learned AAG has however sought to justify and defend the actions taken directly in terms of the 2016 Regulations, his case being that the Provincial Government is duly empowered to act as provided in sub-regulations (2) and (15) of Regulation 9. The learned AAG has further submitted that on a proper reading of the 2016 Regulations the jurisdiction of the provincial committee constituted under Regulation 4 and the Provincial Government is concurrent. Thus, if the provincial committee has the legal power to act in relation to the admission test then so does the Provincial Government. Having considered the point, we are, with respect, unable to agree. No doubt the two sub-regulations of Regulation 9 make specific reference to the "provincial department" (i.e., the Health Department for this Province) and the Provincial Government. However, it is to be noted that the 2016 Regulations do not appear to contain any other specific reference to either the provincial department or the Provincial Government. Although Regulation 3(d) does refer to "provincial authorities", the context places those authorities in very much a subsidiary role. It is clear that the admission board and provincial committees set up under Regulations 3 and 4 respectively have been specifically created for purposes of matters relating to admission to the MBBS and BDS programs. In our view, when the 2016 Regulations are read as a whole the conclusion is contrary to what is suggested by the learned AAG, and in conformity with what is contended by learned counsel who appear for the petitioners who seek to have the test upheld. The jurisdiction of

these bodies is exclusive, with the provincial committees being subordinate to the admission board. The role of the Provincial Government or the Chief Minister is non-existent. The duties cast on the provincial department and the Provincial Government in terms of sub-regulations (2) and (15) of Regulation 9 must be construed and apply accordingly. In our view, the role and duty of the provincial department in terms of Regulation 9(2) is only ministerial, and that of the Provincial Government in terms of Regulation 9(15) is essentially facilitative so that, e.g., it is obliged to provide and marshal the resources that may be required for the conduct of the test in the manner as required by the 2016 Regulations. However to expand from these sub-regulations, and equate the jurisdiction of the Provincial Government with that of the admission board or the provincial committee is, with respect, completely untenable, and would amount to a misreading and misapplication of the 2016 Regulations. It is also to be noted that Regulation 5 requires each institution to set up an "institutional admission committee", and sub-regulation (3) requires this committee to report any "discrepancy or irregularity" to the provincial committee. Thus, if at all any question, challenge or issue arises as regards the admission test then neither the Provincial Government nor the Chief Minister has any jurisdiction in the matter. It is true that the chairperson of the provincial committee is the Health Secretary. However, as correctly pointed out by learned counsel for the petitioners who seek to uphold the test, this certainly does not mean that the Provincial Government as a whole or even the Health Department stand empowered with regard to the admission test. The Health Secretary acts only as a constituent member of the provincial committee and not otherwise.

20. It is our conclusion therefore that on any view of the matter the impugned notification dated 11.11.2017 was without jurisdiction and cannot stand. Something must now be said about the two judgments of the Lahore High Court and the principle of cooperative federalism articulated and applied therein. One of those judgments has already been referred to. In the first case, *Punjab Higher Education Commission v. Dr. Aurangzeb Alamgir and others* PLD 2017 Lah 489, the High Court was concerned with entry No. 12 of Part II of the Federal List. The second decision, *Punjab College of Law v. University of Punjab and others* PLD 2017 Lah 830, as already noted concerned the legislative competence also before us, entry No. 11 of Part II, though in relation to the legal profession. In both cases there was what the High Court described as an overlap between the two federal legislative entries and the (exclusive) provincial competence of "education" in general. In each case, the concerned authority, acting under federal law, set certain standards. In the first case those standards were with regard to the qualifications required to hold high posts in universities and in the second the standards related to the

academic qualifications required for admission to the LL.B program. In each case, the concerned provincial authority, acting under provincial law, also set standards, which were stricter and more stringent than the former. The question arose as to which would prevail. In terms of the principle of cooperative federalism the High Court held that the federal standards were to be regarded as a minimum and the provincial standards could be set at a level higher than the floor so set: see para 24 (pg. 512) of the first judgment, and paras 22 and 23 (pp. 846-7) of the second decision. It will be seen that the facts and circumstances of both these cases were rather different and quite removed from those at hand. We are therefore, with respect, not at all satisfied that what has been held in the two cases is applicable to the issues raised here. But, even more fundamentally, we would respectfully like to reserve the position of this Court as regards the principle of cooperative federalism. No doubt, the Lahore High Court has marshaled powerful arguments in seeking to find, or place, such a principle in our constitutional law. Both judgments merit, and repay, close and careful consideration. But, with great respect, we would like to keep the position open, insofar as this Court is concerned, for consideration of this principle in some appropriate case where the point arises directly.

21. Although in one sense the finding that the impugned notification of 11.11.2017 is without jurisdiction could be dispositive of these petitions, something must nonetheless be said also on the factual aspects, since these were also touched upon by learned counsel. Two questions arise here: firstly, whether there had been any “leak” of either the test paper or the answer key and secondly, whether any of the questions were beyond the prescribed syllabus. As regards the first question, the report prepared by the NTS internal inquiry is categorical in its findings: there was no “leakage” at all. After a careful forensic examination of the record and material, the conclusion is stated emphatically. The report of the inquiry committee set up by the Health Department is much more circumspect in this regard. (The final report is dated 20.11.2017.) It notes that none of the complainants who appeared before it could produce any credible material of the “leakage”. The finding ultimately recorded is that the allegation “can only be proved by any premier investigating agency”. Certainly, on the committee’s own findings it would not be possible to sustain any case in this regard. Having considered the material and record as placed before us, it is our conclusion that no such case has been made out.

22. As regards the second allegation, namely that certain questions were beyond the prescribed syllabus, the NTS has robustly defended itself. It has placed on record material and documents that, according to it, establish that

the questions were very much within the syllabus. Of course there were difficult questions, and some may have been very much so for the average student, but that is only to be expected. The report of the Department's inquiry committee on the other hand takes a different view. Here, the inquiry committee clearly regards itself on surer ground since it has taken a firm position: 14 specifically identified questions have been found by it to be beyond the prescribed syllabus. We may note that as per the report, the committee took assistance from subject specialists in Chemistry, Biology and Physics, who are specifically identified in the report and whose responses are annexed thereto. It will be recalled that the 100 questions were primarily divided between Chemistry, Physics and Biology and a few were allocated to English. The questions found discrepant however are very unevenly distributed. No questions in the Physics portion were found beyond the syllabus. One question each in English and Biology was regarded as discrepant. The balance (12) all relate to Chemistry. Now, as regards the English question (No. 5), the committee's report regards it as discrepant because of the four options two could be correct. In our view, with respect, this is nothing but pedantry on the part of the committee. In suchlike situations, which can occur in multiple choice tests, the solution is obvious: selection of either of the two options would be marked correct. As regards the Biology question (No. 98) the report regards it as "not explained in syllabus". The report of the subject expert, which is annexure P to the committee's report, has this to say about question No. 98: "1. Asked MCQ does not possess answers in text book. 2. Question is from the prescribed syllabus. 3. Options are not given in prescribed book." Given that the subject specialist has categorically held that the question was from the prescribed syllabus, the fact that its answer could not be readily ascertained from the prescribed syllabus means simply that it was a very difficult question. That candidates were tested in such manner in respect of one question out of all those allocated to this subject is not something that, in our view, ought to be regarded as vitiating the entire test, requiring it to be re-held.

23. Finally, we turn to Chemistry where, as per the committee's report, the bulk of the problem lay. As noted, 12 questions were found to be discrepant. According to the report of the subject specialist (annexure O to the committee's report), six questions (Nos. 45, 48, 49, 51, 52 and 64) were beyond the prescribed syllabus although the specialist notes that these were "most probably taken from Punjab Text Book". NTS on the other hand has refuted all such allegations. Furthermore, learned counsel for the petitioners in CP D-7826/2017 filed certain material along with statement at the conclusion of the hearing wherein the petitioners have with reference to each question (other than No. 52) given the specific page number of the Chemistry text book

where matter relating to the question is to be found, although the petitioners appear to accept that the options for question No. 51 contained a typing mistake. As regards question Nos. 46 and 47, the subject specialist noted in his report that the questions were from the syllabus but the manner in which the questions were put in the test was "not appropriate". In the material filed by the petitioners, they have again given the page numbers of the Chemistry textbook where matter relating to these questions is to be found. As regards question No. 68, the subject specialist reports that the "stem is wrong". However, the petitioners again give the page number of the textbook relevant to this question. As regards question No. 41, the subject specialist claims that NTS admitted that this question contained a typing mistake. However, NTS does not appear to have made such a concession, and the petitioners refer to the page number of the textbook where matter relating to the question is to be found. Perhaps the subject specialist's report contains an inadvertent error inasmuch as the typing mistake was (it seems) in relation to question No. 51 and not No. 41. The subject specialist states that the answer given for question No. 54 was wrong and that this was admitted by NTS. Again, NTS does not appear to have made any concession, and the petitioners have given the page number of the textbook where the relevant material is to be found. However, the petitioners state that the answer key has a mistake, since according to them the correct answer is "D", whereas the key gives the correct answer as being "C". Finally, as regards question No. 70 the subject specialist accepts that the question is within the prescribed syllabus but reports that the "NTS answer key is incorrect so the question is invalid". The petitioners again give the page number from the textbook where material relating to this question is to be found. Having carefully considered the material before us, it appears that the claims that the Chemistry questions were beyond the syllabus or otherwise discrepant is strongly contested not only by NTS but also (by and large) by the petitioners who seek to uphold the test. These are therefore clearly disputed questions of fact, which cannot be gone into in these proceedings.

24. On an overall basis, it is our view that not enough has been shown or established even on the factual plane as would require the admission test to be set aside and for the test to be held all over again. We have been informed that around 22,000 students sat for the admission test. There are 144 petitioners who have joined in CP D-7826/2017 (and another three in CP D-7799/2017) who seek to have the test upheld. In contrast, only 9 (in CP Nos. D-7464/2017 and 7599/2017) seek to have the test invalidated. Of course, and obviously, decisions are not a numbers' game. But in an appropriate context they do, or should, count for something. In a situation where the position in law is clearly against the impugned notification whereby the test was cancelled, and one factual ground for challenging the test (i.e., that there was a "leakage") is

found to be invalid while the other (i.e., that questions were beyond the prescribed syllabus) is found (at least) to be hotly contested, in our view the balance lies in this Court exercising its jurisdiction so as to allow the admission test to stand. The grant of relief under Article 199 is ultimately discretionary and equitable in nature. Here, there are competing claims by two sets of candidates, one seeking to have the test upheld and the other in favor of its cancellation. A consideration of the facts and circumstances at hand leads us to conclude that even on the factual plane it is more appropriate for the Court to uphold the test rather than to allow its cancellation to stand. The discretion of the Court should be so exercised and we decide accordingly.

25. This judgment disposes off CP Nos. D-7826/2017, 7799/2017, 7324/2017, 7464/2017 and 7599/2017, and in the following terms:

a. The notification dated 11.11.2017, whereby the admission test held on 22.10.2017 was cancelled and a fresh test was directed to be held, is quashed and declared to be without lawful authority and of no legal effect;
b. The notification/order of the Health Department dated 26.10.2017 constituting an inquiry committee is quashed as are the reports of the said committee dated 08.11.2017 and 20.11.2017;
c. The respondents and all concerned authorities and institutions acting under, in terms and/or for purposes of the 2016 Regulations are directed to proceed with the processing of admissions to the MBBS and BDS programs in public sector medical universities/colleges on the basis of the admission test held on 22.10.2017 and to conclude the same expeditiously and, if and as required, any and all deadlines and timeframes under the said Regulations shall be extended suitably (if necessary, from time to time) by the provincial committee constituted under Regulation 4;
d. The respondents and all concerned authorities and institutions are restrained from acting in any manner contrary to the above;
e. There will be no order as to costs.

26. This judgment is suspended for 10 days in order to enable any aggrieved person/party so desirous to avail the remedy of appeal. During this period the notification dated 11.11.2017 shall stand suspended accordingly.

JUDGE

JUDGE