JUDGMENT SHEET

IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

W.P No.37411 of 2015

Dr. Aurangzeb Aalamgir & others
Versus

Province of Punjab & others

J U D G M E N T

Date of Hearing.	14-11-2016
PETITIONERS BY`:	M/s Saad Rasool, Muhammad Azhar Siddique, Aftab Ahmad Bajwa, Hafiz Abdul Rehman Ansari, Malik Ghulam Abbas Nissuana, Anum Azhar, Aitzaz Aslam Ch., Waqas Asghar Jathol, Tahir Ishaq Butt, S. Perveen Mughal, Munir Ahmad, Mian Shabbir Asmail, Irfan Mukhtar, Humayun Faiz Rasul and Safdar Shaheen Pirzada Advocates.
RESPONDENTS BY:	Mr. Shakil ur Rehman Khan, Advocate General, Punjab. M/s Muhammad Jamal ud Din Mamdot and Anwaar Hussain, Ahmad Hassan Khan, A.A.Gs. Mrs. Shama Zia, Addl. Secretary, HEC. M/s Ali Zafar Syed and Iftikhar Ahmad Mian for respondent Dr.Mujahid Kamran. M/s Khurram Saeed and Malik Muhammad Awais Khalid, Advocates for P.U. Mr. Sajid Ijaz Hotiana, Advocate for HEC. M. Amir Sohail and Mian Abdul Shakoor Advocate for PHEC. Aurangzeb Rashid, Advocate for respondent No.8 in W.P No.32719 of 2016.

Shahid Karim, J:- This petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 (**"the Constitution"**) seeks the following prayer:

> *"In view of the above submissions, it is most respectfully prayed that:*
>
> *a) That the Impugned Advertisement, the Criteria Notification and the Committee Notification, be declared discriminatory, illegal and unlawful, for being in violation of provisions of the*

Constitution, as well as established principles of our jurisprudence.

b) *That the Impugned Advertisement, the Criteria Notification and the Committee Notification, be declared discriminatory, illegal and unlawful, having been issued without recourse to the process prescribed in section 14 of the Act.*

c) *That the Criteria Notification and the Committee Notification be declared illegal for not having been specifically issued under section 14 of the Act, and instead having been issued in a generic manner, without recourse to the relevant provisions of law.*

d) *That the Criteria Notification and the Committee Notification be declared to be against the letter and spirit of the law, for containing generic criteria and membership respectively, and thus not having been specifically tailored to the educational and administrative needs of any particular university.*

e) *That the Criteria Notification and the Impugned Advertisement be declared unlawful and illegal being contradictory inter se, and thus against the established principles of transparency and natural justice.*

f) *That the Criteria Notification be declared discriminatory, illegal and unlawful for having been issued through an arbitrary and whimsical exercise of executive authority, by Respondent No.2, without reference or consultation to the criteria laid down by Respondent No.4 & Respondent No.5.*

g) *That issuance of Criteria Notification by Respondent No.2, be declared illegal and unlawful, being in grave abrogation of the statutory authority of respondent No.4 and respondent No.5.*

h) *That the Impugned Advertisement, the Criteria Notification and the Committee Notification along with all executive actions being performed pursuant thereto, be suspended during the pendency of the instant writ petition, and the respondents be restrained from taking any actions*

prejudicial to the rights of the petitioner and the public at large; and

i) *That the respondents be directed to carry out the process for search, selection and appointment of the Vice Chancellor of the University of Punjab afresh in accordance with the mandate of Constitution, the Act, PHEC Act, the Ordinance as well as the rules and regulations made thereunder."*

2. The petition, it can be seen, makes polycentric prayers which will be dealt with during the course of this judgment which shall also decide connected petitions ***W.P No.37972 of 2015, W.P No.18610 of 2016, W.P No.18613 of 2016 and W.P No.32719 of 2016***. A common thread running through these petitions makes a challenge to the appointment of Vice Chancellors to the various public sector universities in Punjab.

Introduction:

3. Since a common question of law permeates these petitions, it is not relevant to narrate the individual facts of each case. Suffice to say that the facts converge on the same challenge regarding the process of appointment being undertaken for the posts of Vice Chancellors to different public sector universities in Punjab. The petitioners submit that the appointment process suffers from constitutional and legal infirmities and must be set at naught.

4. On 07.04.2015, a notification was issued by the Higher Education Department of the Government of the Punjab. By this notification, it was stated that the competent authority had been pleased to approve the qualifications, experience and other relevant requirements for the post of Vice Chancellor of public sector universities. The notification is reproduced as under:--

"GOVERNMENT OF THE PUNJAB
HIGHER EDUCATION DEPARTMENT

NOTIFICATION *7th April, 2015*

NO>SO(Univ.)5-3/09-P. The Competent Authority has been pleased to approve the following qualifications, experience and other relevant requirements for the post of Vice Chancellor of Public Sector Universities:

Sr. No.	*Criteria*	*Maxim Mark*	*Scoring*		
1.	*Ph.D*	*15*	*Maximum Score*		
2.	*Ph. D from one of the top 500 Universities of the World (QS Ranking) will be given additional marks.*	*05*	*Maximum Score*		
3.	*Teaching & Research Experience (not less than 12 years) of teaching experience at an HEC recognized University with at least 15 Research Publications in HEC recognized Research Journals).*	*20*	*Maximum Score*		
4	*Administrative Experience*	*20*		*Score*	
			Category	*Level Score*	*Length of experience (Maximum 10 Marks)*
			VC/Pro-VC/CEOO of local corporation	*10*	*2.5 marks for each year of experience*
			Dean/Director General/Head of Govt./Semi Govt. /Private Organization	*09*	*2 marks for each year of experience*

			Head of Department of a University / Director / Principal of a University/ College / Institute	*08*	*1.67 marks for each year of experience*
			Professor with experience of being Member on the two important Committees Of a University	*07*	*1.25 marks for each year of experience*
5	*Interview*	*40*			

In case of overlapping Administrative experience, the highest score in any category will be counted towards determining merit of the candidate.

(Note: Only full-time Teaching and Administrative experience will be considered. For the same period, both Teaching and Administrative experience cannot be counted).

a) *Qualification (15+5+20+20) =60 Candidate with 75% of the 60 marks will be short-listed*

b) *Interview = 40*

2. The aforesaid Criteria shall be applicable to the extent of the following Public Sector Universities:

I. *Fatima Jinnah Women University Rawalpindi.*

II. *Lahore College for Women University, Lahore.*

III. *Government College University, Lahore.*

IV. *University of Education, Lahore.*

V. *University of Sargodha*

VI. *Bahauddin Zakariya University, Multan*

VII. *University of the Punjab, Lahore*

VIII. *The Ghazi University, Dera Ghazi Khan*

IX. *Government Sadiq College Women University, Bahawalpur*

X. *Muhammad Nawaz Sharif University of Engineering & Technology, Multan*

XI. *Khawaja Fareed University of Engineering & Information Technology, Rahim Yar Khan*

SECRETARY
HIGHER EDUCATION DEPARTMENT"

5. It can be seen that the appointment process encompassed eleven public sector universities for which a common criteria was laid down. This was followed by an advertisement in the newspapers issued by the Government of the Punjab, Higher Education Department seeking the services of high class professionals for appointment as Vice Chancellors in different universities. The applications were invited from the candidates interested in the post of Vice Chancellor and the process was set into motion. While the process was underway, these petitions were brought in which challenge was laid to the process on different grounds which will be discussed and dilated upon in the latter part of this judgment. The advertisement was published in the 'Daily Jang' and other national Dailies on 04.11.2015. In the meantime, on 03.03.2015, another notification had been issued by which a Search Committee was constituted for the purposes of making recommendations for appointment of Vice Chancellors to the public sector universities. The criteria set down by the notification dated 07.04.2015 as also the constitution of the Search Committee, have been called in question in these petitions on the ground that these

have been issued outwith the authority of the Provincial Higher Education Department.

Structure of the Law:

6. Any discussion must begin with the Public Sector Universities (Amendment) Act, 2012 (**"the Act, 2012"**) promulgated on 14.11.2012. By the Act, 2012, amendments were made in different Statutes. It will suffice to reproduce the amendment in the University of the Punjab Act, 1973, brought about by the Act, 2012. It is not necessary to reproduce the amendments in the other Statutes as the nature of the amendments is similar and *in pari materia* with the one which was brought about in the Act, 1973.

"*2. Amendments in Act IX of 1973.– In the University of the Punjab Act 1973 (IX of 1973)–*

(1) for section 14, the following shall be substituted:-

"14. Vice Chancellor.-(1) A person who is eligible and who is not more that sixty five years of age on the last date fixed for submission of applications for the post of the Vice Chancellor may apply for the post.

> *(2) The Government shall determine, by notification in the official Gazette, the qualifications, experience and other relevant requirements for the post of the Vice Chancellor.*
>
> *(3) The Government shall constitute, for a term of two years, a Search Committee consisting of not less than three and not more than five members for making recommendations for appointment of the Vice Chancellor.*

(4) The Search Committee shall follow such procedure and criteria for selection of the panel for the post of the Vice Chancellor, as the Government may by notification, determine.

(5) The Search Committee shall recommend to the Government, in alphabetical order without any preference, a panel of three persons who, in its opinion, are suitable for appointment as the Vice Chancellor.

(6) The Chancellor shall appoint the Vice Chancellor for each term of four years but he shall serve during the pleasure of the Chancellor.

(7) The Government shall determine the terms and conditions of service of the Vice Chancellor.

(8) The incumbent Vice Chancellor shall not be allowed any extension in his tenure but subject to eligibility he may again compete for the post of the Vice Chancellor in accordance with the procedure prescribed by or under this section.

(9) If the office of the Vice Chancellor is vacant or the Vice Chancellor is absent or is unable to perform the functions of the Vice Chancellor owing to any cause, the Pro-Vice Chancellor shall perform the functions of the Vice Chancellor but, if at any time the office of the Pro-Vice Chancellor is also vacant or the Pro-Vice Chancellor is absent or is unable to perform the functions of the Vice Chancellor owing to any cause, the Chancellor shall make such temporary arrangements for the performance of the duties of the Vice Chancellor as he may deem fit.

(2) in section 15–

(a) for subsection (3), the following shall be substituted:-

"(3) Subject to such conditions as may be prescribed, the Vice Chancellor may, in an emergency, take an action which is not otherwise in the competence of the Vice Chancellor but is in the competence of any other Authority. (3a) The Vice Chancellor shall, within seven days of taking an action under sub-section (3), submit a report of the action taken to the Pro-Chancellor and to the members of the Syndicate; and, the Syndicate

shall, within forty five days of such an action of the Vice Chancellor, pass such orders-as the Syndicate deems appropriate";

(b) in subsection (4), clause (i) shall be deleted;

(3) for section 16, the following shall be substituted;

"16. Pro-Vice Chancellor.– (1) the Chancellor shall nominate Pro Vice Chancellor of the University, from amongst three senior most Professors of the University, for a term of three years.

(2) The Pro-Vice Chancellor shall perform such functions as may be assigned to him under this Act, statutes or regulations;

(3) The Syndicate or the Vice Chancellor may assign any other functions to the Pro-Vice Chancellor in addition to his duties as Professor."; and

(4) in section 42, after the words "an officer", the words and comma "other than the Chancellor, Pro- Chancellor and Vice Chancellor" shall be inserted."

7. The petitioners in some of the petitions invited this Court to read down sub-section (2) of section 14 of the Act, 1973 in such a manner that the criteria set down by the Federal Higher Education Commission (HEC) ought to be followed while in the others, a prayer has been made for these provisions to be held *ultra vires* the Constitution and liable to be struck down. This has been contended on the basis of the constitutional and statutory scheme which forms the nub of the arguments of the petitioners. At the other end of the spectrum is the Higher Education Commission (HEC) set up under the HEC Ordinance, 2002. The petitioners stated that

it is the exclusive domain and remit of the HEC to prescribe the criteria for appointment of Vice Chancellor to public sector universities in Punjab and the Search Committee set up for the purpose under the relevant statutes ought to follow that criteria and none else.

8. As a historical background of the constitutional framework, it may be stated that education as a subject was part of the concurrent Legislative List and was contained in Item No.38 and Item No.39 of that List. It was under these circumstances that the Parliament promulgated the HEC Ordinance creating the Federal HEC, which acted as a regulator for higher education across Pakistan. By way of Constitution (18th Amendment) Act, 2010, wide range amendments were made in the Constitutional enterprise and the process of devolution of powers to the Provinces was triggered. By the said amendment, education was devolved as a provincial subject. The concurrent list was abolished and the Federal Legislative List was retained in the fourth schedule which included Item No.12 as an entry in Part II of the Federal Legislative List, which is to the following effect:

> *"Item No.12: Standards in institutions for higher education and research, scientific and technical institutions".*

9. It clearly follows that while primary and secondary education was devolved as a provincial subject, standards of higher education were exclusively retained as a federal subject. This issue is at the heart of these petitions and while extensive arguments were addressed by all sides, the controversy is confined to whether the criteria for appointment of Vice Chancellors is comprised in the concept of standards in institutions for higher education and research.

10. The Province of Punjab (**"Punjab"**) constituted its own Punjab Higher Education Commission (**PHEC**) through the Punjab Higher Education Commission Act, 2015. Interestingly, the specific mandate of PHEC is to develop guidelines and facilitate the implementation of a system of quality assurance of institutions, based on the standards developed by the Higher Education Commission (Federal).

Submissions of Counsels:

11. The petitioners led by Mr. Saad Rasool and Mr. Azhar Siddique, Advocates divided their challenges to a 'process challenge' and a 'criteria challenge'. The

petitioners state that the criteria notification and the committee notification had to be issued separately and individually in respect of each law relating to a public sector university. It was thus *ultra vires* to have set up a common Search Committee or to have laid down a common criteria for appointment of Vice Chancellors to all public sector universities. In a word, the criteria must specifically be tailored for the requirement of each distinct university. Likewise, the Search Committee must also tailor its constitution to the specific need of each university and by taking into consideration the fact that out of the eleven universities there were at least three women-only universities and two were specialized engineering universities. It was thus imperative that the expertise of the Committee members should be such that the members are able to evaluate the candidates applying for specialized universities in contrast to universities of a general academic nature. The petitioners take cavil to the arbitrary manner in which the criteria has been set down by the HEC Department on behalf of the Government of the Punjab. In any case, the criteria must conform to the criteria laid down by the HEC.

12. The criteria challenge envisages that there are contradictions between criteria notified in the criteria notification and the advertisement published in the newspapers. Exception has also been taken to the mandatory requirement for Phd. and fifteen publications on the ground that it is discriminatory and works as such against the petitioners and similarly situated candidates. But the constitutional basis of the challenge still remains on the ground that the criteria must comply with the criteria laid down by the HEC and cannot deviate therefrom. It is on this basis that the petitioners seek reading down of the procedure in the statutes by which the Government of the Punjab has been empowered to lay down the criteria.

13. The petitioners submit that the HEC has already notified a selection criteria for the appointment of Vice Chancellors of public sector universities. A copy of that criteria titled "*Selection Criteria for the Vice Chancellor/Rector*" of public universities is attached with the instant petition at page 94.

14. A flanking rather than frontal attack was made on the ground that a power of regulator cannot be curtailed through amendments of the law of regulatee. By this, the

petitioners intended that since the regulator was the HEC, the amendments to the Statutes setting up and regulating the public sector universities in Punjab cannot override the overarching regulatory powers of HEC.

15. The Punjab was represented by the Advocate General, Punjab who argued that the HEC had issued guidelines and no criteria was laid down by HEC. He submitted that the Vice Chancellor was not part of the faculty and, therefore, the HEC Ordinance of 2002 and its provisions do not relate to the subject of appointment of a Vice Chancellor and merely confines to the criteria for appointment of faculty which is distinct and separate from appointment of a Vice Chancellor. In any case, Punjab, without equivocation, contended that the PHEC was not bound to follow the guidelines prescribed by HEC and thus it would be otiose to contend that the guidelines laid down by HEC were mandatorily to be complied with by Punjab. The A.G Punjab on instructions submitted a document bringing forth the clear stance of the Punjab in this regard.

16. HEC produced a statement of the Chairman HEC to the following effect:

"Respectfully submitted that HEC has been impleaded as respondent No.5 in the instant writ petition pending adjudication before this Hon'ble Court.

Vide order dated 24.03.2016, this Hon'ble Court directed the Chairman/Commission to file statement in the court as to whether the Guidelines and the criteria laid down by the HEC with regard to the appointment of Vice Chancellor has mandatorily to be followed by the provincial public university as well as private universities or not.

In this respect, the HEC has already filed the stance of the HEC in parawise comments followed by filing of CM in the said writ petition under section 151 of CPC. As per direction of the Hon'ble Lahore High Court, Lahore on the issue, I being Chairman of the Commission tendered the following statement:

I. The criteria, policies, conditions and guiding principles formulated and prescribed by the Higher Education Commission are mandatory and therefore, binding upon all the Public and Private Sector Universities and Degree Awarding Institutions in the country.

II. The HEC has not prescribed any criteria for appointment of Vice Chancellors/Rectors. Instead, it has laid down Guidelines for Selection of Vice Chancellors/Rectors which identify crucial aspects that need to be valued and applied by the Search Committee while processing selection of a Rector or Vice Chancellor. These guidelines are equally applicable and binding in selection of Vice Chancellors/Rectors of all Public and Private Sector Universities and Degree Awarding Institutions having Provincial as well as Federal Charters."

17. A reading of the statement submitted by the Chairman HEC above would bring forth ineluctably that the criteria policies, conditions and guiding principles formulated and prescribed by the HEC were mandatory in nature and binding upon all private and public sector

universities and degree awarding institutions of the country. It has also been brought forth that the HEC had not prescribed any criteria for the appointment of Vice Chancellors/ Rectors and has merely laid down guidelines for selection of Vice Chancellors/ Rectors and which need to be employed by the search committees while processing the selection of Vice Chancellor. These guidelines are equally applicable to the public sector universities and degree awarding institutions having provincial as well as federal charters. No clearer expression of the stance of the HEC could be envisaged.

18. Mr. Khurram Saeed, Advocate representing the University of Punjab addressed arguments on the different aspects of the matter and the issues which have been broached in these petitions. He reiterated in most part the stance taken by Punjab, in that, the guidelines by HEC were not mandatory and in fact the guidelines/ criteria issued by the PHEC improves upon the guidelines issued by HEC and thus no exception can be taken to it. The University of Punjab requested this Court to restrain from determining the constitutionality issues which was not required on the honored principle

that a resort to constitutional issues should not be had if other legal issues could determine the lis before the court.

19. Mr. Ali Zafar, Advocate represented one of the candidates and the incumbent Vice Chancellor of the University of Punjab, Mr. Kamran Mujahid. The precise submission was that HEC Ordinance, 2002 was a valid law and PHEC Act, 2014 was a mere supporting law. He contended that the faculty did not include the Vice Chancellor, however, Mr. Ali Zafar conceded that the guidelines for the Vice Chancellor can also be given by the HEC and section 10 (q) of the HEC Ordinance, 2002 would include criteria with regard to the Vice Chancellor as well. Once the guidelines were issued by the HEC, the individual university may proceed for the appointment of a Vice Chancellor in terms of the guidelines given by the HEC. The learned counsel further acceded to the proposition that HEC guidelines had necessarily to be followed and must be read into the notification of the Search Committee.

Determination:

20. As adumbrated, there are two questions which will engage this Court while determining the issues involved.

Firstly, the issue regarding Item No.12 in Part II of the Fourth Schedule which is the Federal Legislative List. The precise question is whether the entry No.12 encompasses within it the criteria standards for appointment of Vice Chancellors in institutions for higher education and research, scientific and technical institutions. Secondly, whether in terms of sub-section (3) of section 14 of the Act, 1973, (and similar provisions in the Statutes of other universities) would mean a search committee to be constituted for each public sector university separately in compliance with the statute which governs that public sector university. Any determination must begin with the guidelines for selection of Vice Chancellor/Rector laid down by the HEC and which read as under:

> *"Guidelines for Selection of the Rector/Vice Chancellor*
>
> *Introduction: Rector or Vice Chancellor is fundamentally a leadership position that largely determines destiny of University or a Degree Awarding Institute. Conceiving a vision and a mission statement and, then leading university functions of achieving excellence and international compatibilities in academic learning, research, technology applications, social harmony and development and transparent governor through guiding, motivating and inspiring faculty and administration are a few of the core tasks associated with the position of a Rector or a Vice Chancellor. The Guidelines for Selection of the Rector/ Vice Chancellor are aimed at identifying crucial aspects that need to be valued by the Research*

Committee while processing selection of a Rector or a Vice Chancellor.

Research Committee is encouraged to invite and or nominate potential candidates for the position of Vice Chancellor/ Rector, in writing, explaining the basis of recommendation and having been availed willingness of the nominee to assume the responsibility and honor of governing a public sector university.

Should preferably have earned doctorate degree in an academic discipline and an outstanding academician of international stature.

Should have attained a distinguished leadership preferably in education and academic administration and financial management with proven track record of extensive experience and skills in initiating and managing change strategic planning and everseeing the implementation of plans through to outcomes.

In-depth knowledge of the major issues affecting learning and teaching in higher education, funding and technological developments.

Thorough understanding of the scholarly purposes of a university, and of the economic, social and political issues faced by the higher education sector nationally and internationally.

An understanding of the diverse needs of and issues pertaining different disciplines in higher education and the ability to form and balance priorities relevant to national socio-economic needs and growth.

Ability to represent the university effectively, nationally and internationally especially with government, business and wider community.

In-depth knowledge of the major development in higher education learning and teaching with ability to create linkage and networks.

Excellent entrepreneurial, negotiating, interpersonal and communication skills with strong ability to work collaboratively and inspire staff and teams to achieve organization tasks and goals.

Commitment and equal opportunity principles, transparent governance and swift response."

21. These guidelines were determined in the 12th meeting of the Commission held on 24.12.2007. It can be argued that the guidelines predated the 18th amendment by which the devolution of the subject of education took place on the Provinces. The controversy would turn upon the real sweep of Entry No.12 in Part II of the Federal Legislative List, which is within the domain of the Parliament. However, the observations regarding the true nature of the office of a Vice Chancellor are instructive and aptly apply to the facts and circumstances of these cases. There can be no better expression of the elaboration of the office of a Vice Chancellor than by the specialized persons tasked with regulating and administering education and who are persons well-versed in their areas of specialization. The members of the Commission had no doubt that the position of a Vice Chancellor largely determines the destiny of a university or a degree awarding institution. He is the person who conceives a vision and issues a mission statement and leads the university in academic lane, research, social harmony, development and technical obligations through inspirational skills. He also assumes the responsibility of motivating the faculty and administration of the university. Thereafter, the

Commission delineated some of the crucial aspects that needed to be valued by the search committees while processing the selection of a Vice Chancellor. Thus, the Commission and its members did not harbour any doubt that the role of the Vice Chancellor was pivotal and he was the fulcrum around which the whole academic and administrative matters relating to a university revolved. His assigned role to conceive a vision and a mission statement is necessarily relatable to the standards in institution for higher education and research. For, it would be *naive* to divorce and separate the leadership position conceived by the HEC from the entire concept underlying standards in institution for higher education and research. Such a contention in my opinion is indefensible and runs counter to the broader construction which ought to be put on Entry No.12.

22. *Rana Amir Raza Ashfaque and another v. Minhaj Ahmad Khan and another* (2012 SCMR 6) is a paradigm case and the Supreme Court of Pakistan was invited to determine the issue whether the chancellor of the university/ Governor was bound by the advice tendered by the Chief Minister for reconsideration in view of section 11(8) of the Act of 1973 read with

proviso to Article 105 of the Constitution. For our purposes, the observations of the Supreme Court of Pakistan with regard to the universities in general and the role of the Vice Chancellor in particular, are pertinent and will exercise a gravitational pull on the decision made in these petition. It was held that:--

> *"34. Universities are seats of learning and centres of excellence. They not only enable the future generations to equip themselves with degrees/practical tools to earn livelihood, but also enrich them with learning, with wisdom and with visions for practical lives. To achieve its objects, the University functions besides the Chancellor and Vice Chancellor through its various institutions i.e. the faculty, the Senate, the Syndicate and Board of Studies. The Vice Chancellor is its institutional head and enjoys a pivotal position. Being the executive and academic head of the University, it is for him to ensure that the University's Statute, Regulations and Rules are faithfully observed. He presides over the meetings of various bodies of the University and affiliated colleges. In matters of urgent nature, it is he who takes remedial steps; it is he who creates temporary posts when the urgency requires; he sanctions expenditures provided for in the approved budget, re-appropriates amounts not exceeding a certain amount; he convenes meetings of the Senate and the Syndicate. He is the bridge between the executive and academic wings of the University. It is this multidimensional role of the Vice Chancellor which requires that the person who occupies this office should be imbued with values and character traits of integrity, of academic excellence and administrative ability. It is because of this that the search for Vice Chancellor the world over has been an exercise driven by higher principles. In our own country, the University Grants Commission has laid down a procedure for appointment of Vice Chancellor which inter alia requires the constitution of a Search Committee. The said Search Committee comprises of eminent individuals having distinction in various disciplines.*

> *The Search Committee is to recommend a panel of three candidates out of which the competent authority has to appoint one as Vice Chancellor.*
>
> *35. The afore-referred description of the role of the Vice Chancellor under the Act would show how the delay in appointment of such an important functionary would adversely affect the working of the University and would make the institution almost dysfunctional and would thereby adversely affect inter alia the quality of education."*

23. Although the observations of the Supreme Court of Pakistan were made in a different context, they have relevance in the setting of the instant petitions as well. The role of the Vice Chancellor, which has been accentuated and dilated upon by the Supreme Court of Pakistan in the paragraph, reproduced above, places a heavy and onerous responsibility on the office of the Vice Chancellor. These observations, it may be borne in mind, were made in the context of the University of the Punjab Act, 1973 and assumes greater importance by virtue of this fact. The Vice Chancellor is described as a bridge between academic and executive wings of the university. The multi-dimensional role of the Vice Chancellor has been held to require that the person who occupies the office should be imbued with values and character of academic excellence and administrative affiliation. More importantly, in its holding, the Supreme Court of Pakistan specifically states that

because of the importance attached to the office of Vice Chancellor, the search for Vice Chancellor over the world has been driven by higher principles. It went on to hold that in Pakistan the erstwhile University Grant Commission had laid down a procedure for the appointment of a Vice Chancellor which amongst others required the constitution of a search committee. Once again, the observations of the Supreme Court of Pakistan establish an essential linkage between the appointment of a Vice Chancellor and the concept underlying Entry No.12 of the Constitution. In my opinion, the observations of the Supreme Court of Pakistan with regard to the procedure to be regulated by the University Grant Commission (the predecessor of the HEC) are equally applicable in the legal framework in which these petitions are being argued. Although, the subject of education has been devolved on the Provinces, that subject was in the concurrent legislative list prior to the 18th amendment. Therefore, no substantial bearing will come about on account of the fact that the subject of education has devolved on the Provinces. The distinction is inconsequential and if the standards and criteria with regard to the appointment of Vice Chancellors was being laid by the University Grant

Commission (prior to the 18th amendment), that power is still retained by the HEC. If the case of the respondents has its genesis in the post-18th amendment position, then the whole premise of the respondents is misconceived. If there is no dispute regarding the fact that prior to 18th amendment, the HEC did have the power to lay down a criteria to be followed by all public sector universities without demur, then the position, in my opinion, remains largely unchanged since even now the HEC derives the same powers conferred upon it by the HEC Ordinance, 2002. Those powers had their provenance in Entry No.38 of the Concurrent Legislative List.

24. Entry No.12 relates to the fixing of standards in institution for higher education and research, scientific and technical institutions. The law with regard to the construction of Entries in Legislative Lists is well entrenched. Thus, in *South Carolina v. United States, 199 U.S 437 (1905) (at p.450)* the principle was stated as under:

> *"To determine the extent of the grants of power, we must, therefore, place ourselves in the position of the men who framed and adopted the Constitution, and inquire what they must have understood to be the meaning and scope of those grants."*

25. In *Grossman, ex p 267 US 87 the* U.S. Supreme Court observed that the language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. In Croft v. Dunphy,, it was held as under :

> (1932) All ER 154 (PC)
>
> *"When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the State which has conferred the power. Thus in considering what might be appropriately and legitimately enacted by the Dominion Parliament under its power to legislate in relation to "bankruptcy and insolvency" it was considered relevant to discuss the usual contents of bankruptcy statutes."*

26. Similarly, in *Wallace Bros. and Co. Ltd. v. CIT* (AIR 1948 PC 118) the Judicial Committee observed that where Parliament has conferred a power to legislate on a particular topic it is permissible and important in determining the scope and meaning of the power to have regard to what is ordinarily treated as embraced within the topic in the legislative practice of the United Kingdom. The object is to ascertain the general conception involved in the words in the enabling Act.

27. In *Corpus Juris Secundum, Volume 81A*, the interplay of the powers granted to the Federal Government and the reserved powers of the states (provinces in our case) and the supremacy of federal power in this regard is stated thus:

> *"As a general rule, the sovereign powers of the states are diminished to the extent of the grant of power to the federal government in the Federal Constitution. Therefore, the federal government acting within the limits of the power conferred by the Constitution is supreme as against the reserved powers of the states, as is specifically recognized by the provision that the Constitution and laws and treaties of the United States will be the supreme law of the land.*
>
> *In view of the supremacy of the United States within its proper sphere, the states cannot interfere with the government of the United States in the exercise of its constitutional powers, or assume the exercise of functions exclusively entrusted to that government…"*

28. The concept was eruditely brought forth in *Messrs Elahi Cotton Mills Ltd. and others v. Federation of Pakistan* (PLD 1997 SC 582) in the following words:

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

> *entry so long as it does not transgress or encroach upon the power of the other Legislature and also does not violate any fundamental right as the Legislative power is subject to constraints contained in the Constitution itself. It is also a well-settled proposition of law that an entry in a legislative list cannot be construed narrowly or in a pedantic manner but it is to be given liberal construction."*

29. Therefore, the basic concept that has to be kept in mind while construing a Legislative Entry is that the Entries delineate the subjects on which a particular Legislature is competent to legislate but do not circumscribe any restriction as to the power of the Legislature concerned. The same concept was elaborated upon in *ICC Textile Ltd. and other v. Federation of Pakistan and others* (2001 PTD 1557) by this Court and reliance was placed upon a plethora of Supreme Court judgments. It was concluded that while interpreting Entries or Items in the Federal Legislative List, the rule of law is well settled that the Entries are to be interpreted in the broadest possible sense and should not be given any restrictive, narrow or pedantic meaning.

30. The Entry No.12 has necessarily to be read with Entry No.18, which reads as under:

> *"18. Matters incidental or ancillary to any matter enumerated in this Part".*

32. Entry No.18 is a general entry which broadens the scope of legislation with regard to the specific entries mentioned in the Federal Legislative List. As interpreted by the superior courts, the entries in the Federal Legislative List are broad areas defining the subjects of legislation to be done and must be interpreted liberally. Entry No.18 widens the periphery of the areas of legislation so that the power to legislate in a particular area is complete and is not shackled by the narrow confines of the words used in a particular entry. There is no question that Entry No.12 has to be construed as encompassing all that can conceivably be included in the words "standards in institution for higher education and research." What is comprised in the term 'standards' is not to be lent a narrow and austere interpretation. It has to be fluid and plastic. There is no conceivable formula by which to determine the different aspects of standards in institutions for higher education and research which would be included in the Entry No.12 and ones which would not be so included and will have to be excluded. This is too subjective a criteria to be left to the whims of a person before whom the question would arise. It is bound to create an anomalous situation. Clearly, the HEC for the purposes of Federal Government lays down

a criteria for the appointment of Vice Chancellors to public sector universities. By the interpretation which is sought to be put by the learned counsel for the respondents, the province will also have a concurrent power to lay down the criteria for the Vice Chancellors to be appointed to the provincial public sector universities. If the power to lay down a criteria is derived by the HEC from Entry No.12, that power should apply across the board and *en banc* to federal as well as provincial public sector universities and no bifurcation can be countenanced. This is based on the concept that different federating units will derive their powers from the primary source which is the Constitution. If the only power to lay down a criteria for the appointment of a Vice Chancellor is culled out from Entry No.12, there is no other power which can be inferred from another source and all power regarding the laying down of criteria must have its source in Entry No.12 and none else. It cannot be argued that the Federal Government and HEC draws the power to do so from Entry 12 while the provinces consider the power to reside in them by the devolution of the general subject of education on the provinces. If there are enumerated powers specifically recognized by the Constitution, the power of the

provinces stands diminished to that extent. Therefore, by the mere fact that the subject of education has devolved on the provinces does not confer on the provinces the power to legislate with regard to the standards in institution for higher education and research which includes the criteria regarding appointment of Vice Chancellors as in my opinion it is a concomitant part of the whole process of determining standards. It was said by *Justice Jackson, in 336 US 525 at 535*, that:

> *"Reading implications into the constitution or imputing meaning to the great silences of the constitution is a necessary part of the court's method of constitutional interpretation."*

33. A constitutional provision is not made on the principle that a painter paints a picture viz. to be looked at. As *Chief Justice Marshall* put it in the famous case of *Gibbons v. Ogden (1824) 6 LED 23, 76*:

> *"Powerful and ingenious minds, taking, as postulates, that the power expressly granted to the Government of the union are to be contracted, by construction, into the narrowest possible compass, and the original powers of the States are retained, if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the constitution of our country and leave it a magnificent structure indeed, to look at, but totally unfit for use."*

34. In the same vein, *Justice Holmes said in Gompers v. United States (233 U.S 604, 610)*:

> *The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions.....Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary but by considering their origin and the line of their growth."*

35. The words used in Entry No.12 cannot be used as a term of math or logic. It has to be read flexibly and not strictly, practically not mathematically. This begs the question; where should we draw a line which circumscribes the limits of the standards under Entry No.12. How can the court sit on the appropriateness of those standards and rule that one is included and the other is not. Can the courts lay down judicially manageable standards for bifurcating Entry No.12 into compartments and assigning them to the legislative domain of federal and provincial legislatures respectively. There is no doubt in my mind that such an inquiry is not fit for this Court to adjudicate and the broad sweep of Entry No.12 can neither be curtailed nor abridged. If it falls within the enumerate power of the Parliament, that power must be complete and unrestricted.

36. Entry No.18, in my opinion, signifies and associates the same matters as the necessary and proper clause in Article 1, section 8 of the U.S Constitution.

Doctrinically and pragmatically, matters incidental and ancillary to another matter enumerated in this part are in the same mould as the powers under the necessary and proper clause and grant to the Parliament the same powers as were conceived by Chief Justice Marshall in *McCulloch v. Maryland* for the U.S Congress. A broad rather than restrictive construction of those powers will be pragmatic and practical so that provinces may not obstruct those powers.

37. Article I, section 8 of the US Constitution which embodies what is commonly known as the necessary and proper clause, has a similar feature to our Entry 18 of part II of fourth schedule of our Constitution. This feature gives us yet another set of clues as we search for constitutional meaning and gives rise to another technique of constitutional interpretation. In the famous case of *McCulloch v Maryland 17 US (4 wheat) 316,* while construing the necessary and proper clause, Chief Justice John Marshall placed primary reliance on the clause I of section 8 to uphold a broad view of federal legislative authority. *Akhil Reed Amar* in his book *'American's Constitution', A Biography*, described the technique employed by Marshall as "Reading document

through a geostrategic prism." In his article, *Intratextualism, 112 Harv. L. Rev. 747 (1999), Akhil Amar* said that *"Stingy construction of the Constitution, Marshall argued, would offend the nature of the Constitution not merely as a suitably nationalist and populist document, but also as an inherently practical document. The Constitution was meant to work—and to work over long stretches of time, and vast reaches of space*." Akhil Amar considers attention to institutional architecture and its plain aim to make good sense in the real world as one of the techniques interpreters use to squeeze meaning from the Constitution. According to him":

> *"Maryland apparently claimed that the Necessary and Proper Clause, "though in terms a grant of power, is not so in effect; but is really restrictive," requiring the Court to construe the various enumerated powers in Article I more strictly than it otherwise would in the absence of this clause. In response to this claim, Marshall trumpets the text. Had the clause been designed to restrict rather than to enlarge or to confirm the broad construction otherwise appropriate for enumerated powers, its text would have been worded differently. Instead of affirmatively declaring that "Congress shall have the power . . .to make all laws which shall be necessary and proper," the clause would have been negatively written "in terms resembling these[:] . . . 'no laws shall be passed but such as are necessary and proper.' Had the intention been to make this clause restrictive, it would unquestionably have been so in [grammatical and syntactical] form as well as in effect."*

38. In the classic words of *Chief Justice Marshall*:

> *"[A] constitution [is] intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur... [The restrictive approach is] so pernicious in its operation that we shall be compelled to discard it . . .*
>
> ...
>
> *The baneful influence of this narrow construction on all the operations of the government, and the absolute impracticability of maintaining it without rendering the government incompetent to its great objects, might be illustrated by numerous examples . . ."*

39. It is this technique that I seek to put to use in construing Entry 12 and 18 and which must be read together and a broad and expansive meaning must be put on these entries to uphold 'Federal legislative authority. It would be a fallacy to give HEC authority over some aspects of standards of higher institutions and not all. The sweep of the power must be complete and untrammeled. If this is the technique to be employed then it does not matter whether the term 'Vice Chancellor' is included in the term 'faculty' or not, for the power flows from the constitution and if it vests in

the Parliament, the legislative authority of the provincial assemblies stands ousted. In my opinion the criteria for appointment of a Vice Chancellor is an important plank of the standards of higher education for the post of a Vice Chancellor is of pivotal standing and is at the forefront of those standards. He guides the way and his vision shapes the future of not only the academia but the students too and in turn of the nation as a whole. It is his leadership role that determines and ensures the sustenance of those standards. To what avail is the laying of standards of lofty and brilliant proportions if they are placed in the hands of lesser mortals who lack the capacity to embody then or to instill them in the future generations. At most times, students are swayed by men of inspirational qualities who light the path to greater horizons and dizzying heights.

40. I will now advert to the historical perspective of Entry No.12 in Part II of the Federal Legislative List. As adumbrated, by way of 18th amendment, a sea-change occurred in the basic fabric of the Constitution and a spate of devolved functions took place in respect of the provinces. The only entry prior to the 18th amendment was Entry No.38 in the concurrent legislative list. It will

be recalled that the concurrent legislative list empowered the Parliament as well as the provincial assemblies to legislate on a subject, subject to the provisions of Article 143 as regards inconsistency and the primacy attached to any federal law made by the Parliament. The Entry No.38 read as under:--

> *"38. Curriculum, syllabus, planning, policy, centers of excellence and standards of education."*

41. This Entry, it can be seen, relates to different facets of education and gives the power to legislate with regard to the curriculum, syllabus, policy as well as standards of education. The HEC Ordinance, 2002 has been enacted under the powers conferred by Entry No.38 in the concurrent legislative list. Therefore, any power to lay down standards of education for which the HEC is tasked to undertake measures is culled out from Entry No.38 and none else. This can also be substantiated by reference to the preamble of the HEC Ordinance, 2002, which reads as follows:--

> *"Whereas in the interest of improvement and promotion of higher education, research and development it is acceding to provide for the establishment of a Higher Education Commission and for matters connected therewith or incidental thereto."*

42. Thus, HEC was set up to improve and promote standards of education. By the 18th amendment, Entry No.38 was bifurcated and the devolution of certain aspects covered by Entry No.38 took place and was handed over to the provinces. The only power retained by the Parliament was given in Entry No.12 in Part II of the Fourth Schedule. Therefore, the portions relating to standards of education in Entry No.38 were further divided into portions of higher education and education at secondary and intermediate levels. The former was covered by Entry No.12 and is now the domain of Parliament whereas the latter can be legislated upon by the provincial assemblies. This, in my opinion, is the scheme underlying Entry No.12 and the policy enunciated by it in the current constitutional disposition. This begs the question; if the HEC under the HEC Ordinance, 2002 was empowered to lay down criteria for appointment of Vice Chancellors to be followed by all public sector universities under the pre-18th amendment regime and in terms of the standards of education given in Entry No.38, would it be lawful to suggest that that same power is now devolved on the provincial assemblies to the exclusion of the Parliament although those very powers are now enshrined in Entry

No.12. The answer to this question is clearly in the negative. In fact, post-18th amendment, the position and the legislative intent is much clearer. The purpose of inserting Entry No.12 and a clear delineation of the particular subject covered by the Entry No.12 on the Parliament leaves it in no manner of doubt that the Constitution intends that the standards in institution for higher education and research in all its ramifications should be legislated upon by the Parliament. While greater leeway has been given to the provincial assemblies on all aspects of education including curriculum, syllabus, planning with regard to the primary, secondary and intermediate education, the matter relating to the standards in institution for higher education, research, scientific and technical education has been left to the Parliament. This comports with the constitutional structure and federalism on which our Constitution is based. It was thought imperative by the framers of 18th amendment that matters relating to higher education and research be resided in the Parliament to enable the Parliament to enact on such matters so that uniformity and consistency in such standards of higher education may be attained on a federal level so as to trickle down to the provinces. It was not left to the provinces in the

wisdom of the farmers of the 18th amendment as this was a matter considered appropriate to be dealt with under the concept of federalism and to be applied across the board. Certainly, the standards in institution for higher education and research have international connotation as well. Entry No.12 embodies the principle of public policy relevant for promotion and advancement of higher education.

Provisions in Constitution of India, 1956:

43. It will be useful to make a reference to the provisions of comparable nature on the subject of education in the Constitution of India, 1956 (**"the Indian Constitution"**) to juxtapose them with Entry No.12 of Part II of Fourth Schedule in our Constitution. Entry No.12 is similar in language and semantics to the Entry No.66 of the List-I (Union List) of Seventh Schedule to the Indian Constitution. The relevant entries of the Indian Constitution are as under:

> *"List I –Union List*
>
> *63. The institutions known at the commencement of this Constitution as the Benares Hindu University, the Aligarh Muslim University and the Delhi University; the University established in pursuance of article 371E; any other institution declared by Parliament by law to be an institution of national importance.*

64. Institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament by law to be institut ions of national importance.

65. Union agencies and institutions for__

(a) professional, vocational or technical training, inclu ding the training of police officers; or

(b) the promotion of special studies or research; or

(c) scientific or technical assistance in the investigation or detection of crime.

66. Coordination and determination of standards in institutions for higher education or research and scientific and technical education."

LIST II STATE LIST
11. Education including universities, subject to the provisi ons of Entries 63, 64 and 65 of List I and Entry 25 of List III.
(This Entry was deleted by Fortysecond Amendment Act)

32. Incorporation, regulation and winding up of corporations, other than those specified in List I, and universities; unincorporated trading, literary, scientific, religious and other societies and associations; cooperative societies.

LIST III CONCURRENT LIST

25. Education, including technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I; voca tional and technical training of labour."

44. Entry No.25 in the concurrent list was previously Entry No.11 in the State List but by the Constitution (40th Amendment) 1976, the Entry was omitted from List-II (State List) and transferred the subject with Entry No.25 of List III (concurrent list). It will be seen from a reading of the relevant entries of the Indian Constitution, reproduced above, that Entry No.12 of

our Constitution is more in consonance with the scheme of the Indian Constitution and perhaps a leaf has been taken out of the Indian Constitution while enacting Entry No.12. The language of Entry No.66 is almost *in pari materia* with Entry No.12. It will be interesting to note that the University Grants Commission set up in terms of Entry No.66 of the Union List, has formulated regulations in 2010 laying down the criteria and qualifications for the appointment of Vice Chancellors to universities. The University Grants Commission has been set up under the University Grants Commission Act, 1956. This aspect will be further elaborated upon while dealing with an Indian judgment on which much reliance was placed by Punjab as well as the University of the Punjab. Thus, in the Indian Constitution, there is a clear demarcation of the subject of education and its division in aspects relating to determination of standards in institution for higher education and research and other aspects relating to education including technical education, medical education and universities. Entry No.25 in the concurrent list has been made subject to the provisions of Entries No.63, 64, 65 and 66 of the Union List. Thus, although the States can legislate on matters of technical education, medical education and

universities which is always subject to any legislation made in terms of Entry No.66 by the Indian Parliament relating to determination of standards in institution for higher education and research. Although, our Constitution does not have a clear expression of an intent that the subject of education is subservient to the subject covered by Entry No.12, there is no cavil with the proposition that the subject covered by Entry No.12 is within the domain of Parliament and the provincial assemblies cannot legislate upon it. The rest is for the provincial assemblies to legislate upon and this is in consonance with the true construction to be put on the scheme and as expressed in Article 142 by which the Parliament shall have exclusive power to make laws with respect to any matters in the Federal Legislative List. In my opinion, the position in our Constitution is not dissimilar to the Indian Constitution. Although, the formation of a university and the setting up of institutions of higher education is within the domain of the provinces, it lies within the powers of the Parliament to lay down standards for such higher education institutions. This proposition is also not disputed that the appointment of the Vice Chancellor is to be made by the provinces but the criteria and the qualifications of

the Vice Chancellors to be appointed is covered by the subject of Entry No.12 and has to be laid down by the HEC. The interpretation of Entry No.66 has been made by the Supreme Court of India in a cluster of cases. In, *Gujrat University v. Krishna Ranga Nath Mudholkar* (AIR 1963 SC 703) the effect of Item No.66 was considered in the following words:

> *"…Item 66 is a legislative head and in interpreting it, unless it is expressly or of necessity found conditioned by the words used therein, a narrow or restricted interpretation will not be put upon the generality of the words. Power to legislate on a subject should normally be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in that subject. Again there is nothing either in item 66 or elsewhere in the Constitution which supports the submission that the expression 'coordination' must mean in the context in which it is used merely evaluation, coordination in its normal connotation means harmonizing or bringing into proper relation in which all the things coordinated participate in a common pattern of action. The power to coordinate, therefore, is not merely power to evaluate, it is a power to harmonise or secure relationship for concerted action. The power conferred by Item 66 List I is not conditioned by the existence of a state of emergency or unequal standards calling for the exercise of the power."*

45. The same question was also examined in *State of T.N Adhiyaman Educational and Research Institute (1995) 4 Supreme Court cases 104*, where it was held that:

> *"41. (i) The expression 'coordination' used in Entry 66 of the Union List of the Seventh Schedule to the Constitution does not merely mean evaluation. It*

> *means harmonization with a view to forge a uniform pattern for a concreted action according to a certain design, scheme or plan of development. It, therefore, includes action not only for removal of disparities in standards but also for preventing the occurrence of such disparities. It would, therefore, also include power to do all things which are necessary to prevent what would make 'coordination' either impossible or difficult. This power is absolute and unconditional and in the absence of the valid compelling reasons, it must be given its full effect according to its plain and express intention.*
>
> *(ii) To the extent that the State legislation is in conflict with the Central legislation though the former is purported to have been made under Entry 25 of the Concurrent List but in effect encroaches upon legislation including subordinate legislation made by the Centre under Entry 25 of the Concurrent List or to give effect to Entry 66 of the Union List, it would be void and inoperative."*

46. This principle was reiterated in *Osmania University Teachers Association v. State of A.P (1987) 4 Supreme Court cases 671*.

47. These cases were considered and approved in the judgment of the Supreme Court of India cited by HEC and reported as *Professor Yashpal and another v. State of Chhattisgarh and others (2005) 5 Supreme Court cases 420*. The case of Prof. Yashpal and another will be considered in greater detail in the proceeding paragraphs.

48. A careful threading of the constitutional needle would bring forth ineluctably that the framers of eighteenth amendment did not deem it wise and prudent

to leave it in the hands of the provinces to determine the standards of higher education and to let them thwart the Federation's efforts to regulate those standards in the interest of those who labor to sustain them. This clearly had a meaning and a purpose. If the country was to attain its true place in the comity of nations, the standards of education in higher institutions of learning had to act as the bulwark. No compromise could be countenanced on that account. It could not be left to the wavering and disparate whims of provinces to determine those standards. It may be that that autonomy is conferred at a future time, but given the dismal state of affairs of higher education in the country at present, it was thought necessary to confer the power on the Federation (through HEC) to lay down those standards so as to progress in tendem. The institutions of higher education provide the last platform from which the students are propelled to the practical world which will, in all probability, treat them harshly and without remorse. They will be competing with the whole world and not just nationally and the State cannot, for a moment, leave any stone unturned to prepare him for that challenge and more importantly, it must be done

without discrimination to all students of all races, ethnicity and federating units.

49. Here, in my opinion, the framers had in mind the concept of federalism and invoked the structural arguments in retaining this power in the hands of the Federation. It was simply that the framers conceived that students from all provinces and all other areas comprised in the Federation ought to be imparted higher education based on uniform standards of education and learning. The position was indefensible in the paradigm of federalism that the students within the area governed by the Federal Government or its institutions end up being regulated by standards much higher in content and quality in comparison to the provinces or more dangerously, that one province is governed by standards which are materially different and abysmally lower than other provinces. This will not only create disparity but will also not bode well for students seeking to apply for employment in either that other province or in any organization in the Federal Government. This may lead to dangerous trends in society.

50. I may reiterate an argument discussed in preceding paragraphs. It is common ground and Punjab agrees that

prior to eighteenth amendment, the standards of universities in Punjab were regulated by HEC under the HEC Ordinance, 2002, including criteria as to appointment of Vice Chancellor. The entry 12, more or less, confers the same power. What has changed now? No amendment has been made in the HEC Ordinance, 2002 and it continues to be applicable to public sector universities of both the Federal Government as well as the Provinces. Simply because the provinces have enacted their own statutes does not take that power away. If the HEC Ordinance, 2002 remains unamended and intact, there are no reasonable grounds to perceive that change has occurred. Isn't that a clear intent of the legislature that in all matters governed by HEC Ordinance, 2002 pre-eighteenth amendment paradigm continue to be in force after eighteenth amendment too and to that extent, it is otiose to assert otherwise. The provinces cannot read anything into the HEC Ordinance, 2002 so as to confine the scope of HEC Ordinance, 2002 to Federal Government public sector universities only. Or in such a manner so as to carve out for themselves the power to prescribe criteria for appointment of Vice Chancellor and leave the rest in the hands of HEC. Punjab concedes that HEC may exercise

all powers under section 10 of HEC Ordinance, 2002 and Punjab will be bound by those decisions yet not in respect of Vice Chancellor. That is a specious argument. Punjab cannot cherry-pick powers of its own liking. If HEC does not have the power to do so now, it did not have that power from the beginning and Punjab ought to have objected to it even then, for things have not changed. Entry 38 was in the concurrent legislative list and thus provinces had equal power to legislate on the subject unless upended by a federal law. The only difference now is that the power is exclusively with the Parliament so that the provinces may not enter that area of legislation. To put it another way! Previously, the Parliament enacted HEC Ordinance, 2002 and the provinces were debarred from legislating. Currently, by Entry 12, that purpose has been achieved permanently and as a constitutional policy.

51. We will recall Chief Justice Marshall's (of the US Supreme Court) reminder that "*the Constitution is more than just another law, more even than the supreme law, for it is in a way the whole American fabric." Marbury v. Madison, 5 U.S (1 Cranch) 137, 176 (1803)* Interpreting the Constitution's text requires attention to

linguistic context and structural analysis. This was the theme of *American Constitution Law by Lawrence H. Tribe (Ch. I : Approaches to Constitutional Analysis)*. He said that:

> *Then-Justice Rehnquist, for example, employed structural analysis in his dissent from the Supreme Court's holding, in Nevada v. Hall, that citizens may sue a state without its consent in the courts of another state. He reasoned that a constitution is necessarily "built on certain postulates or assumptions," drawing "on shared experience and common understanding." Thus, "when the Constitution is ambiguous or silent on a particular issue"—by which the Justice meant when the text is silent or ambiguous— the Court has often had to rely "on notions of a constitutional plan—the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers. The tacit postulates yielded by that ordering are as much engrained in the fabric of the document as its express provisions, because without them the Constitution is denied force and often meaning." Acknowledging that the Eleventh Amendment's text does not itself assure the sort of state sovereignty for which he was arguing in Nevada v. Hall, Justice Rehnquist noted how prior cases had protected principles beyond the Constitution's "literal terms" and concluded that the Court should get beyond literalism and protect "important concepts of sovereignty . . . which are of constitutional dimension because their derogation would undermine the logic of the constitutional scheme." It is not essential to agree with the Justice Rehnquist's specific conclusion about state sovereign immunity in order to appreciate the force of his structural analysis.*
>
> *Structural analysis is appropriate not only in order to flash out the contours and content of federalism-based limits on the national government or to fill in the elements of the separation of powers, but also in order to give shape and substance to "unenumerated" rights. . . . Supreme Court opinions both past and present . . . reveal persuasive uses of rights structuralism. The Court's use of provisions of the*

> *Bill of Rights to give substantive content to the Fourteenth Amendment Due Process Clause, as well as its use of the Fourteenth Amendment Equal Protection Clause in reading the Fifth Amendment Due Process Clause, are obvious examples. Justice Harlan's oft-quoted observation that the rights identified in the Bill of Rights are not isolated points but form part of a "rational continuum"—and that it is the duty of courts in essence to connect the dots when deciding cases about aspects of liberty that do not fit precisely on the existing "chart" of freedoms—became the platform on which Justice Souter proposed, in his separate concurring opinion in Washington v. Glucksberg, to construct an approach to substantive due process. In essence, Harlan and Souter were suggesting that the Constitution's structure (as well as its history)—the way it was put together—reveal that the gaps between the rights-defining provisions enumerated in the Bill of Rights are only apparent and do not represent substantively empty space but instead serve to juxtapose, in an almost Impressionist fashion, individual commitments in combinations also showing additional guarantees. . . . To see the matter otherwise is to see government power everywhere except in those finite and isolated recesses where the rights of individuals have been expressly recognized. And that in turn is to assume a structure in which government has all power unless specifically told otherwise, a structure as alien to the logic of limited government as its counterpart on the federal-state stage would be alien to the logic of limited national power.*

52. In similar vein was an article, *Intratextualism, by Akhil Reed Amar, 112 Harv. L. R W. 747 (1999)* where he expressed the concept in this way:

> *Intertwined with Marshall's appeals to text and history are sturdy structural arguments rooted in federalism and populism. Because the Constitution is not merely a league or treaty between sovereign states, federal powers should not be grudgingly construed, as were the powers conferred by the earlier Articles of Confederation. (Here we see the relevance of Marshall's broad-brush narrative of the Founding*

> *process, aimed at disproving the notion that the Constitution was in effect a mere compact created by sovereign governments.) Because the Constitution derives directly from the people, in whose name it speaks ("We, the People") and to whom it speaks, it must speak in broad terms. By its very nature as a populist document, a constitution cannot "partake of the prolixity of a legal code"—for such a code "would probably never be understood by the public" whose assent makes a constitution the supreme law. Thus Marshall argues that the nature of the document repels the idea that every conceivable federal power—such as the power to create a bank—must be spelled out in minute detail rather than implied by and subsumed within the general structure of broadly crafted enumerated powers. Perhaps certain treaties should be strictly construed in a manner leaving nothing to implication—and so too perhaps for some legal codes. But for reasons of federalism and populism, Marshall is emphatic that the document at hand is inherently different from a treaty or a code: "we must never forget, that it is a constitution we are expounding." Structural arguments also loom large in the second half of McCulloch, in which Marshall proclaims that Maryland may not tax the charter of a lawfully established federal bank. Where, a critic might ask, does the Constitution say that? Nowhere in so many words, Marshall cheerfully admits, but as a matter of general structural logic, surely the part cannot control the whole. Surely Maryland may not tax those whom Maryland does not represent. If Maryland may lawfully tax the federal bank a little, surely she may lawfully tax the federal bank a lot; if she may tax a federal bank, surely she may tax all other federal instrumentalities; if she may pass tax laws, surely she may pass other obstructing laws.*

53. He went on to say that "Text, history, structure, prudence, and doctrine—these are the basic building blocks of conventional constitutional argument". It is these building blocks that I have made use of while attempting to put a construction on Entry 12 of Part II of fourth schedule of the Constitution. Textually,

historically and structurally, the power of legislating on all facets of standards of higher education resides in the Parliament and delegated to HEC by the HEC Ordinance, 2002. Prudence demands that it should be exercised by the HEC in order to instill the same standard in all public sector universities across Pakistan, whether federal or provincial. This will help to attain the objects of federalism and harmony. As a matter of general structural logic, surely the fixing of criteria of appointment of a Vice Chancellor is included in the standards of higher education, for, "the part cannot control the whole."

Case Law:

54. The parties referred to a cluster of cases and placed reliance on these precedents for the support of their respective arguments. In the peculiar context and setting of the controversy involved, and the constitutional question to which I have chosen to confine myself, two judgments are of particular importance and I shall deal with these judgments in some detail. These judgments are from the Indian jurisdiction where the constitutional provisions as also the statutory framework is similar to the one that we are concerned

with in Pakistan. *Professor Yashpal and another* was cited by the learned counsel for HEC. It brings forth elaborately the interpretation of Entry 66 of List I of the Indian Constitution relating to coordination and determination of standards in institution for higher education and research and which Entry is *in pari materia* with the Entry 12 of Part II of the fourth Schedule of our Constitution. The judgment also dilated upon the concept of education and the university as an institution and the necessary ingredients that make up the institution of university and the entire concept as understood worldwide by quoting from the English and American jurisprudence. Professor Yashpal, an eminent scientist and former Chairman of University Grants Commission (India) filed a social action petition under Article 32 of the Constitution of India. It asserted the quashment of notification issued by the State of Chhattisgarh in the exercise of powers conferred by a statute for establishing various universities. The precise question before the Supreme Court of India was that notwithstanding the fact that the state could make enactment providing for incorporation of universities under Entry 32 of List II, the University Grants Commission Act had been promulgated with reference to

Entry 66 of List I which deals with coordination and determination of standards in institution for higher education and research. But Supreme Court of India was called upon to determine that the subject of education as given in Items 63 to 66 of List I, were within the power of the Parliament to legislate exclusively. It was thus the exclusive responsibility of the Central Government to determine the standards for higher education and same could not be lowered at the hands of any particular State as it was of great importance to national progress. The Supreme Court of India by taking into consideration the constitutional setting held that the whole gamut of the concept of a university which will include teaching, quality of education being imparted, curriculum, standards of examination and evaluation and also research activity being carried on will not come within the purview of the State Legislature on account of a specific entry i.e. Entry 66 being in the union list for which the Parliament alone was competent. It was thus concluded that it was the responsibility of the Parliament to ensure that proper standards were maintained in institutions for higher education or research throughout the country and also uniformity in standards was

maintained. Some relevant extracts from the judgment are reproduced herein below:

> *"28. Though incorporation of a university as a legislative head is a State subject (Entry 32 List II) but basically a university is an institution for higher education and research. Entry 66 of List I is coordination and determination of standards in institutions for higher education or research and scientific and technical institutions. There can thus be a clash between the powers of the State and that of the Union."*
>
> *"32. The interplay of Entry 66 List I and Entry 25 List III was again examined by a Constitution Bench in Preeti Srivastava (Dr.) v. State of M.P. in the context of lowering of standards by the State for admission to a postgraduate course in a medical college and it was held that the State cannot while controlling education in the State impinge on standards in institutions for higher education because this is exclusively within the purview of the Union Government. While considering the question whether norms for admission have any connection with the standards of education and that they are only covered by Entry 25 of List III, it was observed that any lowering of the norms of admission does have an adverse effect on the standards of education in the institutions of higher education. The standards of education in an institution depends on various factors like (i) the caliber of teaching staff; (ii) a proper syllabus designed to achieve a high level of education in a given span of time; (iii) the student-teacher ratio; (iv) equipment and laboratory facilities; (v) caliber of the students admitted; (vi) adequate accommodation in the institution; (vii) the standard of examinations held including the manner in which the papers are set and examined; and (viii) the evaluation of practical examinations done. It was pointed out that education involves a continuous interaction between the teachers and the students. The base of teaching, the level to which teaching can rise and the benefit which the students ultimately receive depends as much on the caliber of the students as on the caliber of the teachers and the availability of adequate infrastructural facilities.*

> *33. The consistent and settled view of this Court, therefore, is that in spite of incorporation of universities as a legislative head being in the State List, the whole gamut of the university which will include teaching, quality of education being imparted, curriculum, standard of examination and evaluation and also research activity being carried on will not come within the purview of the State Legislature on account of a specific entry on coordination and determination of standards in institutions for higher education or research and scientific and technical education being in the Union List for which Parliament alone is competent. It is the responsibility of Parliament to ensure that proper standards are maintained in institutions for higher education or research throughout the country and also uniformity in standards is maintained.*
>
> *"46. Entry 66 which deals with coordination and determination of standard in institutions for higher education or research and scientific and technical institutions is in the Union List and Parliament alone has the legislative competence to legislate on the said topic. The University Grants Commission Act has been made with reference to Entry 66 (see Prem Chand Jain v. R.K. Chhabra and Osmania University Teachers' assn. v. State of A.P.). The Act has been enacted to ensure that there is coordination and determination of standards in universities, which are institutions of higher learning, by a body created by the Central Government. It is the duty and responsibility of the University Grants Commission, which is established by Section 4 of the UGC Act, to determine and coordinate the standard of teaching curriculum and also level of examination in various universities in the country."*

55. It is evident from a reading of the extract reproduced above that the Supreme Court of India was cognizant of the distinction and the respective legislative fields of a State and of the Central Government. The Supreme Court of India also clearly dealt with the precise scope of Entry 66 of union list which related to

coordination and determination of standards in institution for higher education etc. It was noticed that the standards of education in an institution were dependent on various factors like the caliber of teaching staff, a proper syllabus designed to achieve a high level of education, student and teacher ratio, the standard of education and the evaluation of practical exemptions done. The various definitions of the term 'university' were also referred in order to bring home the proposition that a university is a whole body of teachers and scholars engaged at a particular place in giving and receiving instructions in higher branches of learning and together form an institution for promotion of education in higher or more important branches of learning. Other necessary attributes of a university were held to be of teachers body more than one higher faculty and other facilities for imparting instructions and research as also that a university must have standard of instructions providing graduate and post graduate levels of study. More pertinently, it was held that the Parliament alone had the legislative competent to legislate on the subject of standards in institution for higher education and research and for the purpose the University Grants Commission Act had been promulgated (HEC Ordinance, 2002). It

was also concluded that the University Grants Commission Act had been enacted to ensure that there was coordination and determination of standards in universities which were institutions of higher learning by a body created by the Central Government. At the heart of the findings rendered by the Supreme Court of India were that it was the duty and the responsibility of the University Grants Commission to determine the standards of teaching, curriculum and also level of examination for various universities in the country. And that any State legislation which stultifies or sets at naught an enactment validly made by the Parliament would be wholly *ultra vires*. These findings were rendered upon a notice of the various precedents handed down by the Supreme Court of India on previous occasions.

56. *Professor Yashpal and another* lays down in its proper perspective the contours of Entry 66 of the union list in the Indian Constitution and the conclusions drawn can be compared favourably with the facts of the petitions in hand. Since the composition of Entry 12 of part II of the fourth Schedule of our Constitution is in similar language to Entry 66 of the Indian Constitution,

the consistent view of the Supreme Court of India analysed and brought forth in *Professor Yashpal and another* would apply on all fours to these petitions as well and any construction to be put on Entry 12 of part II of fourth Schedule of our Constitution.

57. *Kalyani Mathivanan v. K.V. Jeyaraj (2015) 6 Supreme Court Cases 363*, has been relied upon by the Punjab as also by the other respondents including the learned counsel for Punjab University as laying down the correct position of law. Although this is an Indian judgment but since the statutory provisions as also the entry in the Constitution are similar, the ruling in this judgment has been invoked to aid by the respondents and heavy reliance has been placed on it. The judgment arose out of a decision by the Madras High Court, India. Petition were filed by certain persons for issuance of a writ of *quo warranto* directing the appellant Dr. Kalyani Mathivanan to show cause under what authority she continued to hold the office of the Vice Chancellor, Madurai Kamaraj University. The Madras High Court had accepted the petition and had held that the Vice Chancellor so appointed did not satisfy the eligibility criteria stipulated by the University Grants Commission,

as Regulations for Minimum Qualifications for Appointment of Teachers and Other Academic Staff in Universities and Colleges and measures for the Maintenance of Standards in Higher Education, 2010 (**"the UGC Regulations, 2010"**). These Regulations also laid down criteria for appointment as Vice Chancellors of the universities. The challenge was mainly on the ground of contravention to the UGC Regulations, 2010. The Madras High Court framed two questions for determination. For our purposes, the question No.II is pertinent and which was to the following effect:

> *"Whether the prescriptions contained in Para 7.3.0 of the Annexure to the UGC Regulations, 2010 is mandatory or directory and whether the UGC Regulations, 2010 would override the provisions of the University Act, 1965 and the Statute framed thereunder."*

58. For the determination of the above question, the Madras High Court formulated three further questions and described them as facets of the second question. They were:

a) *Whether the post of Vice Chancellor is not to be considered as part of teaching staff;*

b) *Whether the Madurai Kamaraj University Act and the Statutes issued thereunder prescribe a different set of qualifications for the post of Vice Chancellor than those prescribed by the University Grants*

Commission Regulations, 2010 leading to a conflict; and

c) *Whether in the event of a conflict between the State enactment and the University Grants Commission Regulations, 2010, the provisions of the State enactment would prevail."*

59. The Supreme Court of India held the UGC Regulations, 2010 to be binding on the universities to which it applies. This holding was encapsulated in the following words in the judgment:

> *"Thus, we hold that UGC Regulations though a subordinate legislation has binding effect on the universities to which it applies; and consequence of failure of the university to comply with the recommendations of the Commission. UGC may withhold the grants to the university made out of the fund of the Commission."*

60. This was reinforced in paragraph 61 of the judgment where the findings by the Bombay High Court on the issue were *set at naught* and in which the Bombay High Court had held UGC Regulations, 2010 to be recommendatory in nature. It was further held that to the extent that the State legislation was in conflict with the Central legislation including subordinate legislation made by the Parliament under Entry 25 of the Concurrent List, shall be repugnant to the Central legislation and would be inoperative. Thereafter, by a strange set of reason and ratiocination, the Supreme Court of India held the UGC Regulations, 2010 to be

partly mandatory and partly directory for the universities, colleges and other higher educational institutions under the purview of the State legislation. It was thus held in paragraph 62.4 that:

> *"The UGC Regulations, 2010 are directory for the universities, colleges and other higher educational institutions under the purview of the State legislation as the matter has been left to the State Government to adopt and implement the Scheme. Thus, the UGC Regulations, 2010 are partly mandatory and partly directory."*

61. With due deference, I do not subscribe to the views taken by the Supreme Court of India which are contradictory and run counter to the facts of the case. The decision rendered by the Supreme Court of India is clearly erroneous and no reliance, in my opinion, can be placed on it.

62. It is evident that the matter was clearly confined to the applicability of UGC Regulations, 2010 to all universities whether under the Central Government or whether they happened to have been set up by different States and under the statutory regime of those States.

63. As a prefatory, it may be stated that UGC has been set up under the UGC Act, 1956. It has the same functions as the HEC in Pakistan and by section 26 has the power to make regulations consistent with the Act.

Under those powers, the UGC enacted the UGC Regulations, 2010. By Regulation 7.3.0, the criteria for selection of Pro-Vice-Chancellor/Vice Chancellor of universities were prescribed. The question squarely before the Madras High Court and in appeal before the Supreme Court of India was whether these Regulations were mandatory and had to be followed by the State universities or not. In this regard, clause 7.4.0 of the UGC Regulations, 2010 is important and is reproduced as under:

> *"The universities/State shall modify or amend the relevant Act/Statutes of the universities concerned within 6 months of adoption of these Regulations."*

64. The Scheme is also followed in the United Kingdom. The subject of higher education is dealt with by the Higher Education Act, 1992. A body by the name of Quality Assurance Agency for Higher Education has been set up and its purpose has been described in the following words in *Halsbury's Laws of England, fifth edition, vol. 36; Para 886*:

> *"…The Quality Assurance Agency for Higher Education is an independent, non-statutory body established to provide an integrated quality assurance service for the higher education sector. The Agency's principal role is to review the quality and standards of higher education by auditing the way in which each higher educational provision and by reviewing academic standards and the quality of teaching and*

> *learning. It also audits academic partnerships with institutions outside the United Kingdom offering teaching leading to the award of United Kingdom degrees and advises her Majesty's government on applications from higher education institutions for the grant of degree-awarding powers or university status. The Agency publishes the results of its audits and reviews and also publishes a code of practice setting out guidelines on good practice relating to the management of academic quality and standards."*

65. Thus the Agency's primary role is to provide an integrated quality assurance service for the higher education sector. It reviews academic standards and the quality of teaching and learning. Then there is a Higher Education Funding Council for England, which is a body corporate and exercises functions principally to administer funds for the purpose of providing financial support in connection with the provision of higher education or carrying out of research by higher education institutions. A national framework for higher education qualifications has been developed and maintained by the Quality Assurance Agency for Higher Education. The FHEQ is an important reference point for higher education providers. According to such a framework issued in August 2008, the framework has been written to assist higher education providers to maintain academic standards; to inform international compatibility of academic standards, especially in the European context;

to ensure international competitiveness and to facilitate student and graduate mobility. FHEQ also serves as a reference point for QAA auditors and reviewers as well when assessing the establishment and management of academic standards by higher education providers and in particular, auditors and reviewers look at how institutions align the academic standards of their awards with the levels referred to in the FHEQ. (Section 3 of report). It follows that a national framework for higher education has been developed and maintained by countries such as England for the purpose brought forth above and primarily to evolve uniform and integrated minimum standards of higher education. It is done to support a consistent approach to academic standards across the higher education sector. This is to ensure that each higher education provider identifies and demonstrates key matters that it is addressing effectively.

66. During the course of the decision by the Supreme Court of India a Scheme was referred to and thereafter the ruling of the Supreme Court of India entirely turned on the effect and tenor of the Scheme and the contents of the Scheme got so inextricably linked with the UGC Regulations, 2010 that in the ultimate analysis the

Supreme Court of India returned its findings on the basis of the contents of the Scheme and not the UGC Regulations, 2010. The Scheme related to the revision of pay of teachers and equivalent cadres in universities and colleges following the revision to pay scales to Central Government employees on the recommendations of the Sixth Central Pay Commission. This Scheme was introduced by a letter issued by the Government of India, Ministry of Human Resource Development, Department of Higher Education, New Delhi. The confusion arose out of the fact that the Scheme was appended as Appendix-I to the UGC Regulations, 2010. The Supreme Court of India relied upon clause 8 of the Scheme to hold that:

> *"35. From Paras 8(p)(i) and (v) of Appendix I dated 31.12.2008 read with Regulation 7.4.0 we find that the Scheme of regulation is applicable to teaching staffs of all the Central universities and colleges thereunder and the institutions deemed to be universities whose maintenance expenditure is met by the UGC. However, the Scheme under the UGC Regulations, 2010 is not applicable to the teaching staffs of the universities, colleges and other higher educational institutions coming under the purview of the State legislature, unless the State Government wish to adopt and implement the Scheme subject to terms and conditions mentioned therein."*

67. It is not clear that as to how the Supreme Court of India construed the question of interpretation of UGC Regulations, 2010 by placing reliance on the terms of a

Scheme which merely related to pay scales. The finding of the Supreme Court of India reproduced above is not borne out from a reading of the Regulation 7.4.0 which too has been brought forth above. Regulation 7.4.0 clearly and unequivocally obliged all universities/ State Governments to modify and amend the relevant Act/ Statutes of the universities concerned within six months of the adoption of these Regulations. This was not a matter of choice nor were the Regulations leaving it to the whims of the universities or States not to adopt the Regulations. It was mandatory for the universities to undertake the process of amendment so that the relevant Statutes should conform with the UGC Regulations, 2010.

68. The only difference between the framework in India and in Pakistan is that the UGC in India has framed Regulations laying down criteria and minimum qualifications for appointment of *inter alia* Vice Chancellors. The HEC in Pakistan has not prescribed any such criteria and, therefore, the doubt as to whether the criteria has to be prescribed by HEC was raised by the Provinces. The Punjab has, by taking advantage of inaction on the part of the HEC in accepting full

responsibility in this regard, proceeded to take upon itself the dual role of prescribing the criteria as well as appointing the Vice Chancellor. This, it is stated, does not comport with the constitutional scheme which is currently in vogue and is applicable as supreme law of the land. I would rather substantiate the views of the Madras High Court which, in my opinion, were correct and truly bring forth the exposition of the law on the subject. Some of the extracts of Madras High Court would be worth consideration and are reproduced below:

> *"40. A careful look at Sections 11 and 12 of the Act would show the following:-*
>
> *I. that though they prescribe several things such as the method of appointment of the Vice Chancellor, the authority competent to appoint the Vice Chancellor as well as the tenure of the Vice Chancellor, they do not prescribe qualifications or eligibility criteria for appointment to the post;*
>
> *II. that the Vice Chancellor under section 12(1), is not merely the Principal Executive Officer of the University, but he is also the Academic Head;*
>
> *III. that the Vice Chancellor is the Chairman of the Syndicate as well as Academic Council;"*
>
> *66. But the answer to this issue is too obvious to state. Neither the Madurai Kamaraj University Act, 1965 nor the Statutes issued thereunder contain any prescription either with regard to the educational qualifications or with regard to the eligibility criteria for appointment to the post of Vice Chancellor. This particular field is completely left unoccupied by the State enactment. Repugnancy in terms of Article 254 of the Constitution would arise only when there is inconsistency between the laws made by the Parliament and the laws made by the Legislatures of States. Once*

it is admitted that the matter is covered by Entry 25 in List III of the 7th Schedule to the Constitution, it would be clear that Article 254 of the Constitution could be invoked only when the provision contained in the said legislation is repugnant to the law made by the Parliament or the State Legislature as the case may be. If it seeks to fill up a vacuum or when it covers an unoccupied field, the question of repugnancy does not arise. As a matter of fact, there is a repugnancy between Statutes 14 and 14-A of Chapter V of the Madurai Kamaraj University Act and the UGC Regulations, insofar as the pay and allowances of the Vice Chancellors are concerned. This is the only area in respect of which there is a repugnancy. Therefore, it is clear that the contention as thou there was repugnancy and that therefore, the prescription contained in the State enactment has to prevail over the University Grants Commission Regulations, 2010 is thoroughly misconceived."

"66. In Visveswaraiah Technological University Vs. Krishnendu halder and others, 2011 4 SCC 606, the Supreme Court consider3ed the question whether the eligibility criteria for admission to engineering courses stipulated by the State Government/ University could be relaxed for candidates meeting minimum eligibility criteria of AICTE on the ground that a large number of seats have remained unfilled. After pointing out that the main object of prescribing the eligibility criteria is not to ensure that all seats in colleges are filled, but to ensure that excellence in standards of education is maintained, the Supreme Court held that while the State or University cannot lower the standards laid down by the Central body, it can always prescribe higher standards, consistent with the object of promoting excellence in higher education. Therefore, even in case where there is a conflict, the Court is bound to uphold a prescription which sets higher standards and which seeks to promote excellence in higher education. When such is the case even in cases where there is a conflict, the case on hand where there is no conflict, cannot support the contention of the respondents."

69. The Madras High Court also makes a reference to a study conducted by two researchers analyzing different methods adopted for appointment of Vice Chancellors

in Indian universities in comparison to those adopted by foreign universities. Some of the extracts of the report could usefully be reproduced which shed light on the office of the Vice Chancellor and the importance in both academic and administrative terms that is attached to the office:

> *"Generally the Vice Chancellor should be a distinguished educationist or eminent scholar in any of the disciplines or professions, with a high standing in his/her field and adequate administrative experience. We are not generally in favour of appointment of persons who have retired from other fields. An exception to this general recommendations should be made only in the case of very outstanding persons whose association with the universities would be desirable from every point of view and should not be made an excuse for 'accommodating' or 'rewarding' individuals who do not fulfill the conditions laid down. A Vice Chancellor is one who stands for the commitment of the university to scholarship and pursuit of truth. (Kothari Commission 1964-66: 334) A Vice Chancellor should be a person with vision and (have) qualities of academic leadership with ability for administration. He should command high respect among all sections of the society. The Vice Chancellor should be a distinguished academic…(who) has commitment to the values for which the universities stand…he must have the ability to provide leadership to the university by his academic worth, administrative competence and moral stature. (Kothari Commission 1964-66: 334) Parikh Committee was not in favour of appointing government officials as VC's. Quoting the Kothari Commission Report, the Parikh Committee mentions that the Vice Chancellor is the most important functionary in a university not only on the administrative side but is also charged with the responsibility of creating the right atmosphere for teachers and students.*
>
> *Universities need distinguished and dignified persons as VCs and it is necessary to ensure that they are treated with dignity and regard, which the office*

merits. (Ramlal Parikh Committee 1993: 15). The Vice Chancellor is the most important functionary in a university, not only on the administrative side but also for securing the right atmosphere for the teachers and the students to do their work effectively and in the right spirit. (Report of the Committee on Model Act for Universities 1964: 11). The Vice Chancellor being the principal executive and academic officer of the university should exercise general supervision and control over the affairs of the university and give effect to the decision to all its authorities. He shall be the ex-officio Chairman of the Court, Executive Council, Academic Council, Finance Committee and Selection Committees and shall, in the absence of the Chancellor preside at any convocation of the university for conferring degrees. It shall be the duty of the Vice Chancellor to see that the provisions of the Act, Statutes and Ordinances and Regulations are fully observed and he should have the power necessary for the discharge of this duty. (Gagendragadkr Committee on the Governance of the University, 1971: 60).

In accordance with Regulation 1 for the office of Vice Chancellor (Statutes and Ordinances of Cambridge University, June 2002: 655)….the Vice Chancellor is of a stature and his/ her presence commensurate to lead a distinguished academic institution. The stated mission of the university is to contribute to society through the pursuit of education, learning, and research at the highest international levels of excellence. The Vice Chancellor must be of exceptional caliber with academic credibility, clear strategic vision, and outstanding leadership qualities. He/ she should have strong management skills and senior level experience gained in a complex institution and the ability to bring them to bear in a democratic, self-governing university. The ability to promote the university in a regional, national and international context, and to increase the financial resources available to the university, should be key, particularly in order to realize the full potential of the university."

70. Reference was also made to an Article published in 2010 by *Amanda H. Goodall*, of the *Warwick Business School* which was written after analyzing the statistics

from about hundred universities throughout the world and the conclusions drawn were summarized as follows:

I. *That the best Universities in the world are led by more established scholars;*

II. *That scholar-leaders are considered to be more credible leaders in Universities, commanding greater respect from their academic peers.*

III. *That setting an organisation's academic standards is a significant part of the function of the Vice Chancellor and hence one should expect the standard bearer to first bear that standard.*

IV. *That a leader, who is an established scholar, signals the institution's priorities, internally to its faculties and externally to potential new academic recruits, students, alumni, donors and the media.*

V. *That since scholarship cannot be viewed as a proxy for either management experience or leadership skills, an expert leader must also have expertise in areas other than scholarship."*

71. In the judgment of the Indian Supreme Court, cited above, reference was made to the definitions of the term 'University' as explained in the *Halsbury's Laws of England, Fourth Edition* (Vol.15) in the following words:

> *"University" is not a word of art and, although the institutions to which it refers are readily identifiable precise and accurate definition is difficult. The essential feature of a university seems to be that it was incorporated as such by the sovereign power.*
>
> *Other attributes of a university appear to be the admission of students from all parts of the world, a plurality of masters, the teaching of one at least of the higher faculties, namely theology, law or philosophy (which in some definitions are regarded as identical) and medicine, provision for residence and the right to confer degrees, but possession of these attributes will*

not make an institution a university in the absence of any express intention of the sovereign power to make it one. A university involves the relation of tutor and pupil; it is charged with supervision and upbringing of the pupil under tuition. Incorporation was anciently effected by papal grant or charter, and later by royal character or Act of Parliament.

The practice adopted in the case of the most recent foundations is to incorporate the university by royal charter, to which there is annexed a schedule containing the original statutes of the university, and thereafter to obtain the passing of a local Act of Parliament vesting in the university the property and liabilities of any institution which it replaces and making other necessary provisions.

A copy of any application for a charter for the foundation of any college or university which is referred by the Queen in Council for the report of a committee of the Privy Council must be laid before Parliament, together with a copy of the draft charter, for not less than thirty days before the committee reports upon it."

"The constitution, functions and privileges of universities are governed by the terms of their instruments of foundation or by Acts of Parliament. Insofar as there can be said to be any general law relating to universities or their colleges, it belongs, strictly speaking, either to the law of corporations or to that of charities. The statutes and instruments of foundation relating to individual universities do in fact, however, result in producing characteristics capable to some extent of classification.

A university usually consists of a chancellor, a vice chancellor, a body of graduates and students. Its government is usually provided for by the creation of a council or senate, which acts as the executive, and has an initiative in such legislation as the university is empowered to carry out, sometimes subject to the Queen in Council, sometimes with the further assent of Parliament.

Notwithstanding anything in the statutes or charter of any university the authorities may admit women to membership and other privileges.

72. In *American Jurisprudence, 2d, 15A*, the term 'university' has been referred to as:

> *"A "university" is an aggregation or union of colleges. The word "college" indicates an institution of learning, having corporate powers, and possessing the right to confer degrees. The term "college" may also be used to indicate a building, or group of buildings, in which scholars are housed, fed, instructed, and governed while qualifying for university degrees, whether the university includes a number of colleges or a single college. In a broad sense, the terms "college" and "university" convey the same idea, differing only in grade, with each indicating an institution of learning consisting of trustees, teachers, and scholars as making up its membership and representing its active work, or an institution engaged in imparting knowledge to resident students and possessing the right to confer degrees."*

73. Punjab relied upon two other judgments of this Court to bolster its case. Both these judgments are inapplicable and irrelevant in the context of the present petitions. In *Hassan Aamer Shah v. Province of Punjab through Chief Secretary and 5 others* (2012 PLC (C.S) 290) the issue related to filling the post of Vice Chancellor in six universities. The Secretary, Higher Education Department, Government of the Punjab issued a public notice in the newspapers inviting applications from prospective candidates. The eligibility/ evaluation criteria was fixed by a Search Committee which was set up for the purpose. The Search Committee was constituted by the Chancellor of

the universities. It is important to note that the process of appointment of Vice Chancellors in *Hassan Aamer Shah* pre-dated the amendments brought about in the law on 14.11.2012. This should be sufficient to hold that the precedent is inapplicable to the facts of the present cases. However, the entire basis of the judgment was the guidelines for selection of Vice Chancellors laid down by the HEC and which guidelines were reproduced in the notification dated 7.1.2005 by which the Search Committee for selection of suitable persons was constituted. Another distinguishing factor is that the evaluation criteria was determined by the Search Committee itself and not by the Government in terms of the Act of 2012. Therefore, there is no similarity of facts in the precedent cited by Punjab and the present petitions.

74. The second judgment of *Shahid Mehboob Rana v. Province of Punjab through Secretary and 2 others* (2010 PLC (S.C) 769) also has no applicability to the facts of the present cases. In fact, the HEC guidelines were once again at the heart of the decision made by the Single Bench of this Court. Upon a juxtaposition of the criteria issued by the Province to the HEC, it was held

that the eligibility as advertised in the advertisement was not in violation of the guidelines of the HEC. On the contrary, this judgment accepted that the guidelines by the HEC must form the basis for any appointment of Vice Chancellors to the public sector universities. This judgment, in fact, supports the proposition which is sought to be established by this judgment.

75. Extensive arguments were addressed by the learned counsels for the parties with regard to the powers of the HEC delineated in section 10 of the HEC Ordinance, 2002. It is otiose to dilate upon the true scope of those powers and in particular the power conferred by clause (q) of sub-section (1) of section 10, which is to the following effect:

> *"(q) provides guidelines as regards minimum criteria and qualifications for appointment, promotion, salary structure in consultation with the Finance Division and other terms and conditions of service of faculty for adoption by individual Institutions and review its implementation."*

76. The learned counsels expended much energy on whether the office of the Vice Chancellor was included in the term 'faculty' or not. In my opinion, the question is moot and I shall not proceed to determine whether the Vice Chancellor is included in the term 'faculty' as used in section 10 or not. This is in view of my holding that

the Constitution requires the criteria to be determined by the HEC and thus it makes little or no difference whether the Vice Chancellor is part of the faculty or not. The crucial question is that the criteria has to be laid down by HEC and the power vests in the HEC by law and can be culled out of the reading of the various provisions of the HEC Ordinance, 2002. A reference by way of illustration may be made to clause (v) of sub-section 91) of section 10 of the HEC Ordinance, 2002, which relates to empowering the HEC to establish minimum standards for good governance and management of institutions. Be that as it may, the qualifications and other relevant requirements laid down in the notification of 7.4.2015, in most part, relate to the academic qualifications and experience gained in that capacity. In the law itself, there is nothing to prohibit a Vice Chancellor from being part of the faculty. This, in my opinion, is a forlorn debate. Would it be prudent to deny a body of students from the immeasurable experience and competence of a Vice Chancellor of exceptional academic standing? Certainly not. He can be part of the faculty if he wanted to and the law places no bar on this.

Findings:

77. In view of the discussion in the preceding paragraphs, it indubitably follows that by Entry 12 of part II of Fourth Schedule to the Constitution, the power to determine standards in institutions of higher education and research, scientific and technical institutions lies with the Parliament to the exclusion of the Provincial Assemblies. This power to determine standards is all-encompassing and includes the laying down of eligibility criteria for appoint of Vice Chancellors in the public sector universities. Mr. Saad Rasool, Advocate, counsel for petitioners in this petition (W.P No.37411 of 2015), invited this Court to read down the provisions of the Statutes which were amended by Public Sector Universities (Amendments) Act, 2012 so as to confer on the Government the power to determine the qualifications, experience and other relevant requirements for the post of Vice Chancellor. Mr. Azhar Siddique, Advocate, on the other hand, pleaded for striking down the provisions by which such power was conferred. Since the provisions of the relevant Statutes are *ultra vires* the Constitution, and beyond the legislative domain of the Provincial Assembly, Punjab, it would not be proper to read down

the said provisions and if a provision in a Statute is unconstitutional, it must be struck down and erased from the Statute without more.

Process Challenge:

78. The essence of the challenge is that the committee notification must tailor its constitution to the specific need of each university. This is based on the consideration that out of the 11 universities, at least 3 are women universities and two are engineering universities. There may be other universities which are specialized in their fields and deal with a specific area of learning. It is thus imperative that the expertise of the Committee members will differ for each of these different genre of universities. It does not appeal to reason that one Search Committee should be formed or constituted to undertake the search of a Vice Chancellor for all the public sector universities with one stroke of pen. If this were the intention of the legislature, the legislature would have enacted one law for the constitution of such a Search Committee to deal with the appointments of Vice Chancellors to all public sector universities. The mere fact that the law itself provides such a Search Committee in each individual law goes to

demonstrate the clear intent of the legislature and the purpose underlying a separate provision of a Search Committee for each university. It is not in dispute that the provision for the constitution and setting up of a Search Committee has been brought forth in the Statute governing each university separately. More importantly, the Search Committee has been constituted for a term of two years and this has a purpose in law. The purpose clearly seems to be to enable the Search Committee to search for a suitable candidate for the project of higher education in the public sector university for which the Search Committee is constituted. The process is expected to span a period of at least two years during which the Search Committee will have sufficient time on its hands to look for a most appropriate candidate to take the reigns of vice-chancellorship and to fulfill the purpose permeating the concept of higher education. The members of the Search Committee constituted by the Notification on 03.03.2015 and their general competence and credibility is not in question here. What is in question is the mandate of law which cannot be circumvented by the executive at its whims. Also it is imperative that the Committee should be more broad-based and should not be comprised predominantly of the

members who are part of the Government. Out of the five members, which comprise the Committee, at least three are part of the Government and thus can easily sway the process for the search to be undertaken for appointment of a Vice Chancellor to a public sector university. Therefore, it is the requirement of law that there should be a separate Search Committee for each public sector university constituted under the law of that public sector university. The Search Committee should conform to the requirements of the particular university and the nature of academic activity that that university is required to impart under the Statute. It is also imperative that while constituting a Committee the majority of the members ought to have no connection with the Government so as to keep the process free of taint and nepotism. The notification of 03.03.2015 is clearly *non est* and unlawful.

79. In view of the above finding, these petitions are ***allowed*** and it is declared that:

A. The following provisions are unconstitutional and liable to be struck down:

I. Sub-section (2) of section 14 of the University of the Punjab Act, 1973. In Sub-section (4), the

words "and criteria" shall also be struck down on the same analogy.

II. *Sub-section (2) of section 13 of the University of Engineering & Technology Act, 1974. In Sub-section (4), the words "and criteria" shall also be struck down on the same analogy.*

III. *Sub-section (2) of section 14 of the Bahauddin Zakariya University Act, 1975. In Sub-section (4), the words "and criteria" shall also be struck down on the same analogy.*

IV. *Sub-section (2) of section 14 of the Islamiya University Bahawalpur Act, 1975. In Sub-section (4), the words "and criteria" shall also be struck down on the same analogy.*

V. *Sub-section (2) of section 12 of the University of Engineering & Technology Act, 1994. In Sub-section (4), the words "and criteria" shall also be struck down on the same analogy.*

VI. *Sub-section (2) of section 11 of Fatima Jinnah Women University, Rawalpindi Ordinance, 1999. In Sub-section (4), the words "and criteria" shall also be struck down on the same analogy.*

VII. *Sub-section (2) of section 12 of the Government College University, Lahore Ordinance, 2002. In Sub-section (4), the words "and criteria" shall also be struck down on the same analogy.*

VIII. *Sub-section (2) of section 12 of the Lahore College for Women University, Lahore,*

Ordinance, 2002. In Sub-section (4), the words "and criteria" shall also be struck down on the same analogy.

IX. *Sub-section (2) of section 13 of the University of Education, Lahore Ordinance, 2002. In Sub-section (4), the words "and criteria" shall also be struck down on the same analogy.*

X. *Sub-section (2) of section 12 of the Government College University, Faisalabad Ordinance, 2002. In Sub-section (4), the words "and criteria" shall also be struck down on the same analogy.*

XI. *Sub-section (2) of section 12 of the University of Sargodha Ordinance, 2002. In Sub-section (4), the words "and criteria" shall also be struck down on the same analogy.*

XII. *Sub-section (2) of section 13 of the University of Gujrat Act, 2004. In Sub-section (4), the words "and criteria" shall also be struck down on the same analogy.*

XIII. *Sub-section (2) of section 11 of the Women University, Multan Act, 2010. In Sub-section (4), the words "and criteria" shall also be struck down on the same analogy.*

XIV. *Sub-section (2) of section 11 of Ghazi University, Dera Ghazi Khan, Act, 2011. In Sub-section (4), the words "and criteria" shall also be struck down on the same analogy.*

B. As a consequence of the above, the Notification dated 07.04.2015 issued by the Higher Education Department laying down the qualifications, experience and other requirements for the post of Vice Chancellors of public sector universities is an action extra jus and is also struck down as beyond the power conferred on the HEC Department by the Constitution.

C. The entire process which was set into motion on the basis of the Notification dated 07.04.2015 and that of 03.03.2015 (relating to the constitution of the Search Committee) is also liable to be set at naught and is held to be void ab initio. The HEC is directed to lay down criteria for appointment of Vice Chancellors to the public sector universities by specifying concrete and clear terms of the said criteria. It would be a preferred mode of undertaking such an exercise that the criteria be set down through rules in terms of section 21 of the HEC Ordinance, 2002. However, if this is not possible for the HEC to do so, the eligibility criteria ought to be laid down under the current dispensation and the procedure prescribed by the HEC Ordinance, 2002 within a period of one month from the receipt of the order of this Court. The HEC shall take care to issue the eligibility

criteria as elaborately and extensively as possible by taking into account such criteria which is prevalent internationally and the standards which the universities all of the world are obliged to follow.

D. During the interregnum while the process for the appointment of the Vice Chancellors is being undertaken, the most senior professor in terms of length of service shall be appointed by the Government of the Punjab as Vice Chancellor for the public sector universities in respect of whom the appointments have to be made. The Notification to this effect shall be issued within a period of seven days from the receipt of the order of this Court. This shall apply to the Universities in which the tenure of the Vice Chancellors has come to an end and the Vice Chancellors are continuing in office on an acting-charge basis under the directives of the Chancellor. This is necessitated on a combined reading of sub-section (8) & (9) of section 14 of the Act, 1973 according to which the incumbent Vice Chancellor shall not be allowed any extension in his tennre. The Pro-Vice Chancellor was to assume those functions but, it is informed, a Pro-Vice Chancellor has not been appointed. To allow the incumbent Vice Chancellors to

continue will effectively negate the intent of sub-section 7 of the Act, 1973 (and similar provisions in other statutes).

E. The Notification by the Higher Education Department dated 03.03.2015 setting up a Search Committee for the appoint of Vice Chancellors of public sector universities offends the clear provisions of the various Statutes relating to those public sector universities and is, therefore, set aside. The search committees shall be reconstituted within a period of one month from the receipt of the order of this Court in terms of the observations made hereinabove.

F. The Government of Punjab shall, after the criteria has been settled by the HEC and search committees constituted, initiate fresh process for appointment of Vice Chancellor for the Public Sector Universities in issue.

(SHAHID KARIM)
JUDGE

Announced in open Court on 01-12-2016:

Approved for reporting

JUDGE

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Rafaqat Ali