

JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT

Writ Petition No.799-P/2014

JUDGMENT

Date of hearing...17-11-2016.....

Petitioner(s).....Shaibar Khan, Advocate.....

Respondent(s) ...Mansoor Tariq , Waseem ud Din Khattak
& Khalid Rehman Advocates.....

YAHYA AFRIDI,J.- Through this single judgment, this Court shall dispose of two writ petitions, as common questions of law and facts are involved therein. The particulars of the said petitions are;-

1. W.P.No.799-P/2014.

(Hafeez Institute of Medical Sciences –Vs- VC Khyber Medical University)

2. W.P.No.3635-P/2015.

(Dr.Anwaruddin –Vs- Bacha Khan University).

2. Brief and essential facts leading to the two petitions in chronological order are as under;-

09.11.2008	<u>Hafeez Institute of Medical Sciences</u> (“ Hafeez Institute ”) is registered and granted provisional affiliation in Medical Technology (HSSC level) by the Board of Intermediate and Secondary Education, Peshawar (“ Board ”)
03.05.2009	<u>Health Care Organization</u> was registered as a Welfare Agency under the Act XLVI of 1961.

15.01.2011	Hafeez Institute sponsored by Dr.Anwaruddin was granted provisional certificate of registration by the Higher Education Regularity Authority (“ HERA ”) in four academic disciplines.
06.06.2011	Hafeez Institute enters into a Memorandum of Understanding (“ MOU ”) with Government District City Hospital Kohat Road, Peshawar. The said instrument bears the signatures and seal of the Medical Superintendent of the Hospital and the Director Health Services, Khyber Pakhtunkhwa, Peshawar.
12.05.2012	The Khyber Medical University Act, 2006 (“ Act of 2006 ”) was repealed by the Khyber Pakhtunkhwa University Act, 2012 (“ Act of 2012 ”)
05.07.2012	Hafeez Institute was granted provisional affiliation of one year by Khyber Medical University (“ KMU ”) in Medical lab Technology for 25 students.
17.08.2012	Notification issued by the Provincial Government under section 48 of the Act of 2012 preserving sections 5 and 30 of the Act of 2006.
19.12.2012	Hafeez Institute applies to Bacha Khan University for affiliation in the discipline of BSc (Hons), BSc Medical Laboratory Technology, BSc Dental Technology, BSc Emergency and Intensive Care Health Technology and Doctor of Physical Therapy.
21.12.2012	The Health Department informs the Registrar of KMU that the MOU was void.
01.02.2013	KMU regrets to affiliate Hafeez Institute with KMU in the discipline of Doctor of Physical Therapy and BSc of Dental Technology. It further restrains Hafeez Institute from taking any fresh students in courses of Bachelor of Sciences of Medical Lab Technology till fresh MOU is executed. It was also stated therein that failing to obtain the fresh MOU disaffiliation process will be initiated.

08.03.2013	Bacha Khan University grants provisional approval to Hafeez Institute in anticipation of approval of the Affiliation Committee and the Syndicate in the four disciplines. BSc Medical Laboratory Technology, BSc Dental Technology, BSc Emergency and Intensive Care Health Technology and Doctor of Physical Therapy.
30.04.2013	Hafeez Institute is granted provisional affiliation in eight more additional disciplines by Bacha Khan University in anticipation of approval by the Affiliation Committee and the Syndicate.
25.02.2014	W.P.No.130-P of 2013 filed by the Hafeez Institute against the purported inaction of KMU to grant affiliation is withdrawn with permission to file a fresh petition as KMU had rejected its request for affiliation.
11.03.2014	<p>Hafeez Institute filed writ petition No.799-P/2014 seeking</p> <p>“A. That the impugned order of Government of Khyber Pakhtunkhwa Health Department Order No.786-27/HSRU/Health dated December, 21, 2012 respondents No.4 to 6 may be declared illegal without jurisdiction and without lawful authority. Please may be directed respondents 4 to 6 the Memorandum of Understanding (MOU with the Government Naseer Ullah Khan Babar Memorial (Old City Hospital) Hospital for the Practical/ Clinical Training for the students of HIMS is valid.</p> <p>B. That respondents No.1 to 3 may be directed to treat the petitioner according to the affiliation statute of Khyber Medical University 2008 and the impugned order No.406/Dir/AA&QA/KMU dated 01/02/2013 without lawful and no legal effect. Please may be directed respondents No.1 to 3 to restore the affiliation of petitioner in the Discipline of B.Sc Medical Laboratory Technology and also to grant affiliation in the additional Discipline of BSc Dental Technology and BS Physiotherapy (Doctor of Physical Therapy DPT).</p> <p style="text-align: center;">OR</p> <p>That the respondents 1 to 4 may be</p>

	<p>further directed to grant No Objection Certificate (NOC) to the petitioner institute if they are reluctant to found to be in granting affiliation to the petitioner for the affiliation with the other Universities in the Khyber Pakhtunkhwa Province or other Province/ Federal Universities.</p>
08.10.2014	<p>Bacha Khan University in pursuance of the Governor's Directive dated 12.09.2014 restrains Hafeez Institute to admit any fresh students in the disciplines allowed by the Bacha Khan University in the twelve disciplines for the falls Semester of 2014.</p>
12.03.2015	<p>Bacha Khan University de-affiliates Hafeez Institute. However, students already enrolled with the University can proceed with their education till the award of their Degrees or the affiliation of Hafeez Institute with any other relevant University, whichever was earlier.</p>
21.10.2015	<p>Dr.Anwaruddin filed writ petition No.3635-P of 2015 seeking “It is, therefore, humbly prayed that on acceptance of the instant Writ Petition, the impugned Notification No.80/BKUC/ Reg/ 2005 dated 12.03.2015 and letter No.599/ Reg/BKUC/2015 dated 11.08.2015 may graciously be declared ultra vires the law and statute. The Respondents No.2 to 4 may be directed to restore the affiliation of the petitioner's institute.”</p>

3. The precise facts narrated, herein above, give rise to three crucial issues for determination, which are as follows:-

- i. Whether the MOU was legally competent or void.**
- ii. Whether the action of Khyber Medical University in refusing affiliation to Hafeez Institute was lawful or otherwise.**
- iii. Whether the action of Bacha Khan University to pass the order of de-**

affiliation in respect of Hafeez Institute was lawful or otherwise.

4. Let us take each of the above issues in *seriatim*;-

Whether the MOU was legally competent or void.

5. The stance of the Provincial Government is that the MOU was neither developed nor approved by the Health Department, Government of Khyber Pakhtunkhwa (“**Health Department**”). In fact, it was asserted that Khyber Pakhtunkhwa Medical Faculty had developed a tripartite model MOU (“**Model MOU**”), which was approved by the Health Department and then duly circulated amongst private paramedical institutes vide letter dated 23.08.2013 to revise and follow the terms of their MOU in consonance with the Model MOU.

6. In order to verify the veracity of the MOU executed with Hafeez Institute, Mr.Tariq Iqbal, Legal Officer, Health Department was put to notice and directed to apprise the Court regarding the signatures of the then Superintendent of the Hospital and Director Health Services *inked* on the MOU. After seeking necessary verification, he submitted that the MOU executed in favour of Hafeez Institute and in particular, the signatures thereon by the Medical Superintendent and that of the Director Health are **not** fake. However,

he insisted that the objection of the Health Department was only to the extent that the MOU did not incorporate terms duly approved by the Health Department, as reflected in the Model MOU.

7. In view of the above clarification, it can safely be concluded that the MOU executed in favour of Hafeez Institute was a valid instrument. It was also brought to the attention of the Court that the MOU executed in favour of Hafeez Institute was duly referred to the Health Department after its execution but they remained silent and did not object to the same at the appropriate time. This belated action of the Health Department does not reflect positively on their *bonafide* and is thus hit by the *principle of estoppel*. More importantly, declaring the MOU dated 06.06.2012 void, and that too, without providing any opportunity of hearing to its *beneficiary*; Hafeez Institute, is surely in violation of the *Principle of Natural Justice*. Hence, the decision of the Health Department to declare the MOU *void* is, hereby, declared illegal.

Whether the action of Khyber Medical University in refusing affiliation to Hafeez Institute was lawful or otherwise.

8. The Khyber Medical University (“KMU”) is a creation of the Khyber Medical University Act, 2006 (“Act of 2006”). The main function of KMU, as provided under the Act of 2006 is to provide, *inter alia*,

education in medical and allied health sciences. In order to do so, it may, *inter alia*, affiliate institutions imparting such education.

9. The authority of KMU to affiliate educational institutions has been provided under section 30, *ibid*, which provides that;-

“30. Affiliation.

(1) *Subject to this Act, -*

- (a) *all Medical and Dental Colleges and all Institutions of Medical and allied health sciences in Public Sector in the North-West Frontier Province, shall be affiliated to the Khyber Medical University: and*
 - (b) *All private Medical and Dental Colleges and Institutions of Medical and allied Health Sciences in the Province, whether affiliated with or constituent of any other University, Examination Board or a Medical Faculty, notwithstanding anything contained in any other law for the time being in force, shall affiliate with the University through a process prescribed hereinafter;*
- (2) *An institution applying for affiliation to the University shall make an application to the University and shall satisfy that, -*
- (a) *the institution is under the management of Government or a regularly constituted governing body.*
 - (b) *that the financial resources of the institution are sufficient to enable it to make due provision for its continued maintenance and efficient working;*
 - (c) *the strength and qualifications of the teaching staff and the other staff, and the terms and condition of their service, are adequate to make due provision for the course of instruction, teaching or training to be undertaken by the institution according to the Rules and Regulations of Pakistan Medical and Dental Council and other related accrediting bodies;*
 - (d) -----
 - (e) *that the institution has a teaching hospital with stall equipments, bed strength and other facilities according to the requirements of Pakistan Medical and Dental Council and other related accrediting bodies;*
 - (f) *the building in which the institution is to be located is suitable, and purpose built, and*

that provision will be made in conformity with the statutes and the Regulations for-

- (i) the residence of students, not residing with their parents or guardians, or lodging approved by it; and
- (ii) the supervision and physical and general welfare of students;

- (g) -----
- (h) where affiliation is sought in any branch of experimental sciences, due arrangements have been made for imparting instruction in that branch of science in properly equipped laboratory museum and he places or practical work;

(3) The application shall further contain an undertaking that after the institution is affiliated, any change in the management and in the teaching staff, shall be forthwith reported to the University, and that the teaching staff shall possess such qualifications as are or may be prescribed.

- (4) -----
- (5) The Syndicate may, on the recommendation of the Affiliation Committee grant or refuse affiliation to institution.

Provided that affiliation shall not be refused, unless the institution has been given an opportunity of making a representation against the proposed decision.

(emphasis provided)

10. The authority of KMU to grant affiliation has been further regulated by the **Khyber Medical University Affiliation of Colleges/ Institutions Statues, 2008** (“Statutes of 2008”). The essential conditions for applying for the grant of affiliation and the process thereof has been provided under clauses 7, 8 and 9 *ibid*, which provide that;-

7. Conditions Governing the Grant of Affiliation: *The provisions for affiliation of institution shall be governed by the following conditions:*

- (1) *Institutional and Academic:*
 - (i) *The ownership of the institution shall vest in a body corporate and not in individual(s) or family, registered under the relevant laws of The Companies’ Ordinance/The Societies Registration Act/ The Trust Act as a foundation /*

society / trust. This shall not be required in case the institution is in the public sector;

- (ii) -----
- (iii) -----
- (iv) *Institution situated within the territorial limits of another university or province or affiliated with federal university shall have consent of that university and sanction of the concerned provincial or federal Health Department.”*

8.Application and Procedure for Affiliation:

- i. *An institution applying for affiliation to university shall make an application to Registrar or university on prescribed form (Annex-I) at least 6 months prior to the commencement of the academic programmes;*
- iv. *no application for affiliation shall be entertained;*
 - a. *Unless fees as prescribed in clause ii and iii above are credited to the University.*
 - b. *If the education institution applying for affiliation against an approved Khyber Medical University Degree Programme(s) has already started the programme(s) without prior approval of the University.*
 - c. *If institution has not fulfilled the prescribed requirements.*
- v. *the Registrar, after satisfying himself with regard to the completeness of the application in all respects shall, in consultation with the Vice-Chancellor, forward the application to Affiliation Committee;*
- vii. *if the Inspection Committee is satisfied that the prescribed requirements have been fulfilled, it may recommend the affiliation of the institution.*
Provided that in case of deficiencies, which in the view of the Inspection Committee do not impede the academic progress of the Institution, the Committee may recommend conditional affiliation;
- viii. *the report of the Inspection Committee shall be placed before the Affiliation Committee which may accept the recommendations or refer the case back to the Inspection Committee with certain queries, if any;*
- ix. *the Affiliation Committee after such further inquiry, if any, as it might consider necessary, forward its recommendation to the Syndicate;*
- x. *the Syndicate may, on the recommendation of the Affiliation Committee, grant or refuse affiliation to the institution.*
Provided that refusal of application shall be subject to an opportunity of making presentation by the institution against the proposed decision.
- xii. *no educational institution, desirous of seeking affiliation, shall conduct admission to any course of study and impart instruction in any subject,*

unless it has been granted affiliation; nor will it be permissible to start any class in any subject in anticipation of the acceptance of application for the affiliation.

9. Conditions and Procedure for De-affiliation:

If an institution fails to observe any of the conditions of affiliation as provided in Section 3 of the Statutes, or its affairs are conducted in a manner which is prejudicial to the interest of education or the university, the rights conferred as a result of affiliation may, on an inquiry made by the Affiliation Committee, and after giving an opportunity of hearing to the Principal/ Head of the affiliated institution and with the approval of Syndicate, be withdrawn. However, the Vice-Chancellor may, on a report of the Affiliation Committee, and after considering such representation as the institution may wish to make, restore its rights either in whole or in parts. The procedure to be followed for the withdrawal of affiliation shall be on case to case basis.

The appeal against refusal or withdrawal of affiliation shall lie to the Chancellor against the decision of Syndicate refusing to affiliate an educational institution or withdrawing the rights conferred on such institution by affiliation or against modification of such rights. If the Chancellor feels necessary he may refer the case back to the Syndicate for review. The decision of the Syndicate shall be final.

(emphasis provided)

11. The Act of 2006 was repealed by the **Khyber Pakhtunkhwa University Act, 2012** (“Act of 2012”), wherein, the legislature in its wisdom not only save the Regulation of 2008 but delegated to the Provincial Government, the authority to preserve provisions provided in the Act of 2006. The repealing provision, as provided under section 48 *ibid* reads as;-

“48. Repeal and Savings.---

(1) *The Acts, Ordinances or other legislative instruments constituting the universities listed in the Schedule-I shall stand repealed from such dates as may be notified by the government in the official Gazette:*

Provided that Government may save, through appropriate provision in the

repealing notifications, such parts of the Acts, Ordinances or other legislative instruments constituting the universities listed in the Schedule-I as are necessary for preservation of such specific features that are essential given the nature of the University and are not in conflict with the management and governance structure laid down by this Act or for continuation of the legal status of an institute, college or other constituent unit of the University as on the date of the notification in the official Gazette.

(2) Notwithstanding the repeal-envisaged by sub-section (1), -

(a) everything done, action taken, obligations or liabilities incurred, rights and assets acquired, persons appointed or authorized, jurisdiction or powers conferred, endowments, bequests, funds or trusts created, donations or grants made, scholarships, studentship, or exhibitions instituted, affiliations or privileges granted and orders issued under any of the provisions of the repealed Acts, Ordinances, other legislative instruments or the Statutes, the Regulations and the Rules made or deemed to have been made there under, shall, if not inconsistent with the provisions of the Act or the Statutes, the Regulations or the Rules made under this Act, be continued and, so far as may be, be deemed to have been respectively done, taken, incurred, acquired, appointed, authorized, conferred, created, made, instituted, granted and issued under this Act, and any documents referring to any of the provisions of the repealed Acts, Ordinances, other legislative instruments or the Statutes, the Regulations and the Rules first referred shall, so far as may be, be considered to refer to the corresponding provisions of the Ordinance or the Statutes, the Regulations and the Rules made under this Act;

(b) all institutes, colleges or other constituent units of the University functioning in terms of the provisions of the repealed Acts, Ordinances or other legislative instruments shall continue to function in terms of the relevant repealed provisions till such time that the Senate through Statutes have prescribed otherwise; and

- (c) any Statutes, Regulations, or Rules made or deemed to have been made under the repealed Acts, Ordinances or other legislative instruments shall, if not inconsistent with the provisions of this Act, be deemed to be Statutes, Regulations or Rules made under the Act having regard to the various matters which by this Act have to be regulated or prescribed by Statutes, Regulations and Rules respectively and shall continue to be in force until they are repealed, rescinded or modified in accordance with the provisions of this Act.”

(emphasis provided)

12. As far as the Provincial Government preserving the provisions of the Act of 2006 is concerned, it is noted that vide Notification dated 17.08.2012, Sections 5 and 30 of the Act of 2006 were protected in terms that;-

**“GOVERNMENT OF THE KHYBER
PAKHTUNKHWA, HEALTH DEPARTMENT
NOTIFICATION**

Dated: 17th August, 2012

No.E&A (Health)/2-279/2012/Vol-V (II).

In exercise of the powers conferred by sub-section (1) of Section 48 of the Khyber Pakhtunkhwa Universities Act, 2012, (Khyber Pakhtunkhwa Act No.X of 2012), the Government of the Khyber Pakhtunkhwa is pleased to repeal the Khyber Medical University Act, 2006 (Khyber Pakhtunkhwa Act No.1 of 2007) constituting the Khyber Medical University specified in the Schedule to the Khyber Pakhtunkhwa Universities Act, 2012 (Khyber Pakhtunkhwa Act No.X of 2012) with immediate effect.

In pursuance of the proviso of sub-section (1) of section 48 of the Khyber Pakhtunkhwa Universities Act, 2012 (Khyber Pakhtunkhwa Act No.X of 2012), the Government of the Khyber Pakhtunkhwa is pleased to save section 5 and sub-section (1) of section 30 of the Khyber Medical University Act, 2006 (Khyber Pakhtunkhwa Act No.1 of 2007), relating to jurisdiction of the Khyber Medical University and affiliation with the Khyber Medical University respectively.

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Secretary to
Government of the Khyber Pakhtunkhwa,
Health Department”

(emphasis provided)

13. The impugned action of KMU refusing to grant affiliation to Hafeez Institute took place on 01.02.2013, when the Act of 2006 had already been repealed by the Act of 2012, thus the repealing enactment would govern the refusal of granting affiliation to Hafeez Institute by KMU. Accordingly, the relevant provisions of Act of 2012 would require to be examined more carefully, and the same provides;-

Khyber Pakhtunkhwa Universities Act, 2012.

33. **Extension of Affiliation.**---*When an affiliated educational institution desires to alter or expand the courses of studies, number of seats and fee structure in respect of which it is granted affiliation, the procedure prescribed for affiliation of college shall, as far as possible, be followed.*
34. **Inspection and Reports.**---(1) *Every affiliated educational institution shall furnish such reports, returns and other information as the University may require to enable it to judge the efficiency of the educational institution.*
(2) *The University may call upon any affiliated educational institution to take within a specified period, such action in respect of any matter mentioned in sub-section (1) as the University may deem fit.*
35. **Disaffiliation.**---(1) *If an educational institution affiliated to the University has failed to fulfill any requirement of this Act or has failed to observe any of the conditions of affiliation or its affairs are conducted in a manner prejudicial to the interest of education, the Syndicate may, in the prescribed manner, and after considering any representation that the educational institution may wish to make, modify or withdraw all or any of the privileges conferred on the educational institution by the affiliation.*
(2) *Where any educational institution has been refused affiliation or all or any of the privileges conferred on any educational institution by affiliation have been modified or withdrawn under sub-section (1), it may, within the prescribed period, apply for review to the Syndicate against such refusal and the application shall be disposed of in such manner as may be prescribed.*

(emphasis provided)

14. Now let us retrace the events, which led to the present petition. At the first instance, it is noted that Hafeez Institute is **not** a ‘*competent person*’ entitled under clause 7 of the Regulation of 2008 to apply for affiliation with KMU. Hafeez Institute purports to be a *Social Welfare Agency* seeking its legal sanction under the **Voluntary Social Welfare Agency (Registration and Control) Ordinance, 1961**. The said enactment does **not** provide for the *Social Welfare Agency* registered thereunder to be a *legal person*. In contrast, any *person* registered under the Company Ordinance, 1984, Societies Registration Act, 1860 or the Trust Act, 1882 by clear provisions provided therein grants the said registered *person*, the status of a *legal person; to sue and be sued in its own name*. This being the position, Hafeez Institute under the garb of “*Health Care Organization*” could **not** legally apply for affiliation with KMC, as they did not fulfill the mandatory condition precedent for the said purpose, as provided under clause 7 of the Regulation of 2008.

15. Similarly, when this Court reviewed the conduct of KMU in relation to the application for affiliation of Hafeez Institute, the following striking features emerged;-

- (I) KMU entertained and accepted the application of Hafeez Institute, despite its clear inability to do so under clause 7 of the Regulation of 2008.
- (II) After refusing to grant the affiliation in the discipline of Doctor of Physical Therapy and BSc of Dental Technology, and restraining it from admitting fresh students in the courses of Bachelor of Sciences of Medical Lab Technology, vide letter dated 01.02.2013, **no** opportunity of hearing was rendered to Hafeez Institute to explain its position. Thus, the impugned action of KMU, was against the clear mandate provided under section 35 of the Act of 2012 read with the enabling provisions of Regulation of 2008.

16. It would also be pertinent to note that during the proceedings of the present petitions and on the instance of the sponsor of Hafeez Institute, namely Dr.Anwar-ud-Din, who claimed that all the prescribed requirements provided under the law for the grant of affiliation were fulfilled by Hafeez Institute, this Court directed KMU to carry out a *fresh* inspection vide order dated 12.05.2015, which provided that;-

The matter was argued at some length. It is noted that there are certain issues, which require clarification qua the number of students admitted by the petitioner-Institute on the basis of provisional affiliation granted by Khyber Medical University and the present capacity and capability of the Institute to carry on imparting the education to the

already admitted students. To come up on 04.06.2015.

This Court direct that the inspecting team of Khyber Medical University to visit the Institution on 18.05.2015 at 10:00 A.M. Mr.Anwaruddin, representative of the Institution present in Court, is to receive them and provide them all the possible facility to carry out the inspection. The inspection report should be placed on record five days before the date fixed”

17. What transpired from the said ordered inspection, totally belied the claim of Dr.Anwar-ud-Din, as reflected in the *Inspection Report* dated 18.05.2015 which was submitted in Court, and it concluded in terms that;-

“12. CONSENSUS REPORT:

Detailed inspection of Hafeez Institute of Medical Sciences (HIMS) Peshawar was carried on the directives of Peshawar High Court on 18.05.2015 to ascertain the present capacity and capability of the institute to carry on imparting education to already admitted students. The committee observed the following deficiencies:

1. *Faculty: One Assistant Professor and four Lecturers were required for BS (MLT) program. Only two Lecturers were available.*
2. *Endowment fund account was not available.*
3. *Clinical training facilities in the form of MoU with a teaching hospital are not available.*
4. *Reference books, text books and journals were not sufficient and up to date.*
5. *Equipment and space in Labs were not sufficient.*
6. *As per statement of the owner, eight thousand students are enrolled with HIMS, registered in Bacha Khan University + Medical Faculty BISE Peshawar. Hence circulation space for such a huge number of students is not sufficient.*

Keeping in view the above facts, the institute has neither the capability nor the capacity to continue with imparting education for BS MLT.

<i>Sr No.</i>	<i>Department</i>	<i>Name of Member of Inspection Committee</i>	<i>Signature</i>
1.	<i>BS Pathology / (Lab Technology) MLT</i>	<i>Mr. Jaseem Khan Lecturer IPMS, KMU</i>	

<u>PERMANENT / REGULAR MEMBERS</u>			
<i>Sr No.</i>	<i>Name</i>	<i>Designation</i>	<i>Signature</i>
1	<i>Prof. Dr. Jawad Ahmad Director, IBMS, KMU</i>	<i>Prof / Director Convener</i>	<i>-sd-</i>
2	<i>Prof. Dr. bid Hussain Principal, Khyber Girls Medical College, Peshawar</i>	<i>AP Pharma</i>	<i>-sd-</i>
3	<i>Prof. Dr. Ghulam Sarwar Vice Principal, Pak International Medical College, Peshawar</i>	<i>Prof & VP PIMC</i>	<i>-sd-</i>
4	<i>Syed Hafeez Ahmad Deputy Registrar (SA&A), KMU</i>		
5	<i>Mr. Amjad Hussain Deputy Director (Academics), KMU</i>		
6	<i>Mr. Arshad Ali Khan Internal Audit Office, KMU</i>	<i>Audi Officer</i>	<i>-sd-</i>
7			

Sd/-xxxx

Convener Inspection Committee Date: 18/05/15"
(emphasis provided)

18. What is also important to note is that there is yet another regulative regime, which mandates all education institutions in Khyber Pakhtunkhwa to comply with **The Khyber Pakhtunkhwa Registration and Function of Private Educational Institutions Ordinance, 2001** (“Ordinance of 2001”) and the Regulations framed thereunder, namely, **Khyber Pakhtunkhwa Higher Education Regulatory Authority Functions, Rules and Regulations, 2006**, (“Regulation of 2006”). The relevant provisions relating to registration and

affiliation of educational institution in the Khyber
Pakhtunkhwa under the Registration of 2006 are that:-

- “1-2. -----
3. *The Certificate of Registration will only be issued after the institutions fulfill the academic, administrative and other institutional requirements prescribed by the Authority in accordance with the guidelines issued by Higher Education Commission from time to time.*
4. *All institutions/colleges imparting higher education in private sector are required to get registration with the Authority prior to affiliation with public sector universities in NWFP of their respective jurisdiction.*
- 5-6. -----
7. *Registration issued to all private sector colleges/institutions prior to affiliating with public universities of their respective jurisdiction will be provisional.*
8. -----
9. *Institutes/colleges imparting Higher Education established in the private sector shall not start functioning as such unless and until they are first registered with Higher Education Regulatory Authority (HERA) and affiliated with the Public Sector University of their Jurisdiction.*
10. *Withdrawal of affiliation by the public universities under their affiliation rules will automatically result in withdrawal of Registration with Authority.*
11. -----
12. *Periodic visitation to the registered institution and inspection of their performance in accordance with guidelines of HEC/HERA by the Scrutiny Committee or Chairman of he Authority is also obligatory under the law.*
- 13 to 24. -----
25. *If a university de-affiliates any private educational college/institution, the registrar shall inform the Authority for initiating proceeding against it under rule No.22.*
- 26-31. -----

32. *All private sector educational institutions/colleges registered (or applying for registration) with Higher Education Regulatory Authority (HERA) shall be required to obtain and furnish to the Authority a “No Objection Certificate (NOC)” pertaining to land use/building from the respective/relevant authorities such as Town Municipal Administration, City Development & Municipal Department (CD&MD) or Tehsil Municipal Administration in whose jurisdiction these institutions/colleges are situated/functioning.*

(emphasis provided)

19. This Court was *irked* by the response of HERA to the repeated requests of Hafeez Institute for the renewal of its registration under the Ordinance of 2001. It was noted that Hafeez Institute was first granted its registration by HERA on 15.01.2011, and thereafter, on every annual renewal with inclusion of additional subjects, Hafeez Institute was granted the same, despite failing to fulfill the requirements stipulated by HERA in its previous renewal order. This *action* on the part of the HERA, is *alien* to the provisions of the Ordinance of 2001 read with Regulation of 2006, and does not reflect positively on the *bona fide* of the officials of HERA rendering the renewal thereof.

20. Another disturbing feature, which caught the attention of the Court was that the proposals for amendments approved by the HERA in its meeting held on 11.09.2007, and submitted for approval to Higher Education Department, Government of Khyber

Pakhtunkhwa (“**Higher Education Department**”) vide its letter dated 15.09.2007 under sub-section (2) of Section 26 of the Ordinance of 2001 have till date **not** been responded to by the Provincial Government. This *inaction* on the part of the Higher Education Department also does **not** reflect positively upon the *bone fide* of the then concerned officials of the said department.

21. Keeping in view the above provisions of the relevant law, the legal mandate provided to KMU and the manner and mode for granting affiliation or refusing the same to an educational institution in the discipline of medicine and allied health sciences, can be summarized as under;

- (i) All educational institutions seeking affiliation in Khyber Pakhtunkhwa have to first apply to the Higher Education Regularity Authority (“**HERA**”) under the Ordinance of 2001 read with the enabling provisions of Regulations of 2006.
- (ii) In case, the educational institution fulfills the conditions provided under the enabling provisions of the Ordinance of 2001 and the Regulation of 2006, only then it shall be granted a *provisional registration* for it to be eligible to apply for its affiliation with a public University.

- (iii) That sections 5 and 30 of Act of 2006 and Regulation of 2008, preserved under Section-48 of the Act of 2012, maintains the exclusives authority of KMU to grant affiliation to educational institutions in the discipline of medicine and allied health sciences.
- (iv) Any Educational Institution applying for affiliation with KMU has to be a *Company* registered under the Companies Ordinance, 1984, a *Trust* registered under the Trust Act, 1882 or a *Society* under Societies Registration Act, 1860, as per Regulation-7 of Regulation of 2008.
- (v) Any Institution seeking affiliation with KMU, would pass through the following stages;

Stage-I.

The application has to be filed before the Registrar of KMU, who shall after ensuring the completeness thereof, and with the consultation of the Vice Chancellor of KMU, place the same before the *Affiliation Committee* of KMU to adjudge the applicant institution's capacity to impart education keeping in view its financial, human resources, infrastructure facilities and teaching faculty.

Stage-II

The *Affiliation Committee* may refer the application to the *Inspection Committee*,

which will satisfy that the requirements for affiliation provided under the law have been fulfilled or otherwise and recommend to the *Affiliation Committee*, accordingly. In case the said deficiency, in the opinion of the *Inspection Committee*, does not impede the academic progress of the students enrolled therein, then it may recommend conditional affiliation.

Stage-III

The recommendation of the *Affiliation Committee* is then to be placed before the *Syndicate* of KMU, which is the final authority to decide the application of the applicant Institution seeking affiliation with KMU.

Stage-IV

In case the *Syndicate* refuses to grant the affiliation or adversely effects the affiliation already granted to any institution it has to first provide to the said institution, an opportunity of hearing. Still aggrieved, the applicant Institute may file a review before the *Syndicate* for redressal.

22. Keeping in view the above, it can safely be stated that though the action of KMU disaffiliating and refusing to grant further affiliation to Hafeez Institute was without providing an opportunity of hearing, yet the

very fact that Hafeez Institute was not competent to apply for an affiliation, as per the condition prescribed under clause 7 of the Regulation of 2008, restoring affiliation to Hafeez Institute would **not** be legally appropriate.

Whether the action of Bacha Khan University de-affiliating Hafeez Institute was legal or otherwise.

23. The Bacha Khan University is a creation of the Bacha Khan University Charsadda Ordinance, 2012 (“**Ordinance of 2012**”), which on 18.05.2012 was repealed by the Act of 2012. As Hafeez Institute had applied for affiliation with Bacha Khan University on 19.12.2012, the provisions relating to grant affiliation contained in Act of 2012 and **not** those of Ordinance of 2012 would be applicable.

24. The extent of the jurisdiction of a University provided under section 4 the Act of 2012, clearly expresses that:-

“4. Jurisdiction of the University.--- The University shall exercise the powers conferred on it by or under the Act within the territorial limits or technical limits, as the case may be, shall be notified by Government from time to time.

Provided that Government may, by general or special order, modify scope of the aforesaid powers of the University with regards to the territorial limits or technical limits;

Provided further that the University may admit to its privileges, under prescribed conditions colleges or postgraduate institutions, within the territorial limits of other University, whether inside or outside Pakistan; provided that the consent of such other University is first obtained.”

(emphasis provided)

25. The Provincial Government in pursuance of section 4 *ibid* vide Notification dated 03.07.2012, specified the *territorial* or *technical* limits of the Bacha Khan University to the extent of District Charsadda. What is important to note is that, the Provincial Government, at the time of repealing Ordinance of 2012 did **not** preserve any of its provisions, as was carried out in the case of KMU, where sections 5 and 30 of the Act of 2006 were protected vide notification dated 17.08.2012. The provision of section 5 of the Act of 2006, so preserved provides that:-

“ 5. Jurisdiction of the University.

(1) *The University shall exercise the powers conferred on it by or under this Act within the territorial limits of the whole of the North-West Frontier Province and in respect of such medical colleges and institutions in Federally Administered Tribal Areas as may apply to the University for exercise of its process;*

Provided that Government may in consultation with the University, by general or special orders, modify the extent and scope of foresaid powers of the University with regard to the territorial limits, colleges and institutions.

(2) *Notwithstanding anything to the contrary contained in any other enactment for the time being in force, no college of medical and health sciences and postgraduate institutes in health sciences, within the territorial limits of the University shall, save with the consent of the University and the sanction of Government, be associated in any way with or seek admission to the privileges of any other university.*

(emphasis provided)

26. So what we have are the *general* provisions provided under section 4 of the Act of 2012, which deals with the jurisdiction of **all** universities

notified in the *schedule* thereof, and on the other hand, the *special* status rendered to KMU under section 5 of the Act of 2006, as preserved by the Provincial Government under section 48 of the Act of 2012, to grant affiliation to education institutions imparting post graduate medical and allied health sciences.

27. It is by now a settled principle of interpretation of statutes that, where there are both *general* and *special* enactments for meeting a particular situation, then the provisions of the *special* enactment would always prevail over the *general* enactment, and be applied thereto. Thus, it can safely be stated that, while interpreting section 4 of the Act of 2012, it has to be taken into account that the said provision is *general* in nature and relates to the jurisdiction of **all** Universities in Khyber Pakhtunkhwa imparting education in **all** subjects. Whereas, section 5 of the Act of 2006, duly preserved under the law, is a *special* provision relating to KMU, specifically relating to post graduate education in the fields of medical and allied health sciences. Accordingly, KMU the creation of the *special* enactment, and the provisions thereof would prevail and be applicable to the educational institution seeking affiliation in the said fields of education.

28. This crucial issue, when looked at from another perspective, would reveal that the very intent

and spirit of section 4 of the Act of 2012, expressly restricts the authority of Bacha Khan University to grant affiliation to only those educational institutions, which are based within the territorial limits of District Charsadda. For any educational institution based outside the territorial limits of District Charsadda, the *consent* of the University having the territorial jurisdiction would have to be obtained prior to allowing the sought affiliation.

29. Based on the above legal discussion, it can be safely stated that Hafeez Institution seeking affiliation for imparting post graduate education at Peshawar in the field of allied medical health sciences, it could only seek affiliation with KMU and **not** Bacha Khan University.

30. An argument was advanced by the worthy counsel for Bacha Khan University that the word “*technical*” in section 4 of the Act of 2012, has been deleted vide **Khyber Pakhtunkhwa Universities (Amendment) Act, 2015** (“Act of 2015”) and thus Bacha Khan University would be competent to allow affiliation to any institution imparting medical or allied health sciences, which were based in Charsadda. This Court is **not** in consonance with the said submission of the worthy counsel. The mandate of KMU to grant affiliation, as vested under section 5 of the Act of 2006

and protected under section 48 of the Act of 2012, is very clear and it extends exclusively to all medical colleges and institutes imparting post graduate medical or allied health sciences in the whole of Khyber Pakhtunkhwa.

31. Moving on to the last leg of the submissions of the worthy counsel for the petitioners that the order of Bacha Khan University dated 12.03.2015 recalling the affiliation granted to Hafeez Institute is illegal for it had violated the cardinal principle of *natural justice*. No doubt, Hafeez Institute was not rendered a hearing before the impugned order was passed, but in view of the aforementioned legal discussion; it is but clear that Bacha Khan University did not have the authority to grant the affiliation to Hafeez Institute without the approval of KMU. Thus, when the very *foundation* of the claim of the petitioners is without legal basis, then it *cannot* legally protest on the removal of the *superstructure* built thereon, even if it is without the opportunity of being heard.

32. Before parting with this judgment, it would be pertinent to note that officials, including the then worthy Vice Chancellor of Bacha Khan University are being proceeded against, *inter alia*, for granting affiliation to Hafeez Institute, without the requisite due diligence and approval of KMU, hence any further

finding on the said matter would *prejudice* the ongoing enquiries, and thus not legally appropriate. However, the competent authorities are directed to conclude all the inquires within sixty days, if not earlier, from the date of receipt of this decision.

33. This Court is conscious of the educational career and future prospect of all those students who are enrolled in post graduate courses in medical or allied health sciences at Hafeez Institute. Hence, assuming parental jurisdiction, this Court would direct KMU to ensure that the said students complete their courses for which they have already paid. Hafeez Institute shall pay for the expenses incurred in their completing the said courses arranged by KMU.

34. Accordingly, for the reasons stated above, this Court holds and directs that;-

- I. The MOU dated 06.06.2012 executed between Hafeez Institute and Government City Hospital, Kohat Road, Peshawar was valid and **not** void. Hence, the decision of the Health Department to declare the MOU *void* is, hereby, declared illegal.
- II. All post graduate educational institutions seeking affiliation in Khyber Pakhtunkhwa have to first apply to the Higher Education Regularity

Authority (“HERA”) under the Ordinance of 2001 read with the enabling provisions of Regulations of 2006.

- III. In case, the educational institution fulfills the conditions provided under the enabling provisions of the Ordinance of 2001 and the Regulation of 2006, it shall be granted a provisional registration for it to be eligible to apply for its affiliation with the Public Universities in Khyber Pakhtunkhwa.
- IV. That sections 5 and 30 of Act of 2006 and Regulation of 2008, preserved under Section-48 of the Act of 2012, vests KMU the exclusive authority to grant affiliation to post graduate education institutions in the discipline of medicine and allied health sciences.
- V. Any Educational Institution applying for affiliation with KMU has to be a *Company* registered under the Companies Ordinance, 1984, a *Trust* registered under the Trust Act, 1882 or a *Society* under Societies Registration Act, 1860, as per Regulation-7 of Regulation of 2008.
- VI. Hafeez Institute could **not** legally apply for affiliation with KMC, as it did not fulfill the

mandatory condition provided under clause 7 of the Regulation of 2008.

- VII. The impugned action of KMU vide letter dated 01.02.2013 is against the principle of *natural justice* and the clear mandate of law as provided under section 35 of the Act of 2012 read with the enabling provisions of Regulation of 2008.
- VIII. The authority of Bacha Khan Universities is to the extent of granting affiliation to educational institutions in subject, others than medical or allied health sciences, and that too, based within the territorial limits of District Charsadda. For any educational institution based outside the territorial limits of District Charsadda, the *consent* of the University having the territorial jurisdiction would have to be obtained prior to allowing affiliation.
- IX. Bacha Khan University did not have the authority to grant the affiliation to Hafeez Institute without the approval of KMU.
- X. The worthy Chancellor is directed to ensure that the final enquiry reports of all officials of Bacha Khan University proceeded against in regard to affiliation to Hafeez Institute are submitted to Additional Registrar (Judicial) of this Court, within the stipulated period of sixty days for the

perusal of the Chief Justice of Peshawar High Court, Peshawar.

- XI. The Higher Education Department of Government of Khyber Pakhtunkhwa is directed to respond within sixty days to the proposed amendments to Ordinance of 2001 formulated by HERA vide its letter dated 15.09.2007. The final response of the Government be submitted to Additional Registrar (Judicial) of this Court, within the stipulated period of sixty days for the perusal of the Chief Justice of Peshawar High Court, Peshawar.
- XII. Dr.Anwar-ud-Din may take appropriate steps and re-apply to KMU afresh for affiliation of the Hafeez Institute for post graduate courses in medical or allied health sciences in terms of the enabling provisions of the Act of 2006 and Regulation of 2008, and in particular clause 7 thereof . And till the grant of the affiliation by KMU, no fresh student in the said subjects/ courses be enrolled by Hafeez Institute.
- XIII. This Court direct KMU to ensure that all students who had paid for their courses in medical or allied health sciences at Hafeez Institute complete their said courses and are awarded degrees for the same. Hafeez Institute shall pay

expenses incurred in their completing the said
courses arranged by KMU.

Announced.
Dt. 14 Feb, 2017

J U D G E

J U D G E

F.Jan/*

JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT

Writ Petition No.2930-P/2016
With Interim Relief.

JUDGMENT

Date of hearing.....17-11-2016.....

Petitioner(s).....Pakistan Education Foundation.....) By: Faza Dillani Advocate

Respondent(s).....B.A.U. University.....) By: Haseemuddin Advocate

YAHYA AFRIDI, J.- Pakistan Education Foundation,
Post Graduate College Abdara Road, Peshawar, through
its Director, Hidayatullah Khan, petitioner, seeks the
constitutional jurisdiction of this Court, praying that;-

“It is, therefore, humbly prayed that by accepting this petition, this Hon`ble Court may graciously declare that the impugned Notification No.110/BKUC/Reg/2015 dated 12.03.2015 is without lawful authority and of no legal effect.

Further it may also be declared that Notification No.110/BKUC/Reg/BKU/2015 dated 12.03.2015 de-affiliating the petitioner’s institution is in utter disregard of the constitution and other relating laws and rules and is therefore, ineffective upon the rights of the petitioner as enshrined in the constitution of 1973 or any other appropriate orders which are deemed just and proper in the circumstances of the case may also be passed or any other relief specifically not asked for, may also be granted.”

2. Similar matter has already been decided by
this Court vide judgment of today’s date in

W.P.No.799-P/2014 titled '*Hafeez Institute of Medical Sciences –Vs- Vice Chancellor Khyber Medical University*', wherein this Court has held as under;-

- I. *The MOU dated 06.06.2012 executed between Hafeez Institute and Government City Hospital, Kohat Road, Peshawar was valid and not void. Hence, the decision of the Health Department to declare the MOU void is, hereby, declared illegal.*
- II. *All post graduate educational institutions seeking affiliation in Khyber Pakhtunkhwa have to first apply to the Higher Education Regularity Authority ("HERA") under the Ordinance of 2001 read with the enabling provisions of Regulations of 2006.*
- III. *In case, the educational institution fulfills the conditions provided under the enabling provisions of the Ordinance of 2001 and the Regulation of 2006, it shall be granted a provisional registration for it to be eligible to apply for its affiliation with the Public Universities in Khyber Pakhtunkhwa.*
- IV. *That sections 5 and 30 of Act of 2006 and Regulation of 2008, preserved under Section-48 of the Act of 2012, vests KMU the exclusive authority to grant affiliation to post graduate education institutions in the discipline of medicine and allied health sciences.*
- V. *Any Educational Institution applying for affiliation with KMU has to be a Company registered under the Companies Ordinance, 1984, a Trust registered under the Trust Act, 1882 or a Society under Societies Registration Act, 1860, as per Regulation-7 of Regulation of 2008.*
- VI. *Hafeez Institute could not legally apply for affiliation with KMC, as it did not fulfill the mandatory condition provided under clause 7 of the Regulation of 2008.*
- VII. *The impugned action of KMU vide letter dated 01.02.2013 is against the principle of natural justice and the clear mandate of law as provided under section 35 of the Act of 2012 read with the enabling provisions of Regulation of 2008.*

- VIII.** *The authority of Bacha Khan Universities is to the extent of granting affiliation to educational institutions in subject, others than medical or allied health sciences, and that too, based within the territorial limits of District Charsadda. For any educational institution based outside the territorial limits of District Charsadda, the consent of the University having the territorial jurisdiction would have to be obtained prior to allowing affiliation.*
- IX.** *Bacha Khan University did not have the authority to grant the affiliation to Hafeez Institute without the approval of KMU.*
- X.** *The worthy Chancellor is directed to ensure that the final enquiry reports of all officials of Bacha Khan University proceeded against in regard to affiliation to Hafeez Institute are submitted to Additional Registrar (Judicial) of this Court, within the stipulated period of sixty days for the perusal of the Chief Justice of Peshawar High Court, Peshawar.*
- XI.** *The Higher Education Department of Government of Khyber Pakhtunkhwa is directed to respond within sixty days to the proposed amendments to Ordinance of 2001 formulated by HERA vide its letter dated 15.09.2007. The final response of the Government be submitted to Additional Registrar (Judicial) of this Court, within the stipulated period of sixty days for the perusal of the Chief Justice of Peshawar High Court, Peshawar.*
- XII.** *Dr.Anwar-ud-Din may take appropriate steps and re-apply to KMU afresh for affiliation of the Hafeez Institute for post graduate courses in medical or allied health sciences in terms of the enabling provisions of the Act of 2006 and Regulation of 2008, and in particular clause 7 thereof . And till the grant of the affiliation by KMU, no fresh student in the said subjects/ courses be enrolled by Hafeez Institute.*
- XIII.** *This Court direct KMU to ensure that all students who had paid for their courses in medical or allied health sciences at Hafeez Institute complete their said courses and are awarded degrees for the same. Hafeez Institute shall pay expenses incurred in their completing the said courses arranged by KMU.”*

3. In view of the above findings of this Court, this Court directs that;-

- I. **Pakistan Education Foundation Post Graduate College may take appropriate steps and re-apply to KMU afresh for affiliation for post graduate courses in medical or allied health sciences in terms of the enabling provisions of the Act of 2006 and Regulation of 2008, and in particular clause 7 thereof. And till the grant of the affiliation by KMU, no fresh student in the said subjects/ courses be enrolled by Pakistan Education Foundation Post Graduate College.**

- II. **KMU to ensure that all students who had paid for their courses in medical or allied health sciences at Pakistan Education Foundation Post Graduate College complete their said courses and are awarded degrees for the same. Pakistan Education Foundation Post Graduate College shall pay expenses incurred in their completing the said courses arranged by KMU.**

This writ petition is disposed of, in the above terms.

Announced,

DA

14th Feb. 2017.

F.Jan/*

JUDGE

JUDGE

