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Judgment Sheet

**IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT**

Case No: W.P. No.28028/2011.

Miss Syeda Anam Ilyas

Versus

Dr. Haroon Rashid

Director, etc.

JUDGMENT

Dates of hearing:	23.01.2014
Petitioner by:	Mr. Talaat Farooq Shaikh, Advocate for the petitioner.
Respondents by:	Mr. Anwar Kamal, Advocate for respondents No.1, 2 and 5. Mr. Sajid Ijaz Hotiana, Advocate for the Higher Education Commission, Islamabad. Dr. Osama Siddique, Ms. Misha Rehman and Mr. Salman Akram Raja, Advocates/Amicus Curiae. Syed Sajjad Hussain Shah, Advocate/Legal Advisor, UET, Lahore. Mr. Muhammad Qamar-uz-Zaman, Advocate/Legal Advisor, Nest. Mr. Imran Alvi, Advocate for Preston University. Mr. Ijaz Farrukh, Senior Law Officer, King Edward Medical University. Mr. Riffat Hussain Malik, Advocate for Shifa Tameer-e-Millat University, Islamabad. Mr. M. Asad Manzoor Butt, Advocate for Registrar of Lahore Leads University, Lahore. Mr. M. Shafiq-ur-Rehman Dab, Advocate, Legal Advisor, Bahria University, Islamabad. Barrister Shahzad Shabbir, Advocate for the Registrar, University of Gujrat. Rana Muhammad Asif, Advocate for Kinnaird College for Women, Lahore. Barrister Ali Parvez Malik, Advocate for Institute of Management Science. Mr. Zia Ullah Niazi, Advocate for Minhaj University, Lahore. Ch. Sultan Mahmood, Advocate for Iqra University, Peshawar.

	<p>Mr. Ali Masood Hayat, Advocate for Lahore College University.</p> <p>Mian Shahid Nazeer, Advocate/ Legal Advisor, University of Sargodha.</p> <p>Muhammad Hussain, Acting Registrar, Pakistan Institute of Development Economics.</p> <p>Dr. Shaukat Ali, Director Academics, University of Sargodha.</p> <p>Professor Dr. Habib-ur-Rehman, Chairman, Department of Physiology, University of Veterinary and Animal Sciences, Lahore.</p> <p>Dr. Tahira Aziz Mughal, Lahore Collector for Women University Lahore.</p> <p>Dr. Haq Nawaz, Director Graduate Studies, University of Agricultural, Faisalabad.</p> <p>Dr. Asad Zaheer, Acting Registrar, University of Health Sciences, Lahore.</p> <p>Dr. Hamid Saeed, Registrar, F.C. College, Lahore.</p> <p>Air Cdre (Ret) Ghulam Mujaddid, Registrar, Air University, Islamabad.</p> <p>Dr. Tariq Jadooni, LUMS, Lahore.</p> <p>Muhammad Asif Lateef, Additional Registrar, Government College University, Faisalabad and Govt. College for Women University, Faisalabad.</p> <p>Rana Hamayun Ihsan, Deputy Registrar, Pakistan Institute of Development Economics, Islamabad.</p> <p>Syed Hassan Aftab, Additional Director (Academics), International Islamic University, Islamabad.</p> <p>Tauqir Ahmed, Controller of Exams, National Defence University, E-9, Islamabad.</p> <p>Mohsin Ijaz Malik, Senior Deputy Registrar, Lahore School of Economics.</p> <p>Saboor Ahmed Khan, Additional Registrar, G.C. University, Lahore.</p> <p>Muhammad Farhan Sadiq, Assistant Professor, Virtual University of Pakistan, Lahore.</p> <p>Engr. Nasrullah Khan Babar, Registrar, NFC Institute of Engineering & Technology, Multan.</p> <p>Mr. Zahid Mahmood, Planning Officer, P&D, Department University of Health</p>
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	<p>Sciences, Lahore.</p> <p>Mr. Nadeem Hassan, Registrar NUST.</p> <p>Muhammad Aslam Malik, Controller of Exams, The University of Lahore.</p> <p>Ahmed Murad, Deputy Registrar (R), University of Engineering & Technology, Peshawar.</p> <p>Syed Shujaat Hussain Shah, Registrar, Ahasyn University, Peshawar.</p> <p>Dr. Ashiq Hussain Doger, Controller of Examinations, University of Education, Lahore.</p> <p>Syed Mabood Kakkhail, Institute of Management Science Peshawar.</p> <p>Muhammad Zabih Ullah Khan, Director, Admission, National Textile University, Faisalabad.</p> <p>Syed Iftikhar Hussain, Manager Karahoran Institute University of Islamabad.</p> <p>Shakeel Ahmad, Academic Coordinator, Mohi-ud-Din Islamic University Nerian Sharif, AJ&K.</p> <p>M. Awais Yaqoob, Mgr. Academics, Pipah International University, Islamabad.</p> <p>Iqbal Muhammad, Registrar, Qarshi University.</p> <p>Fayyaz Hussain, Additional Registrar, COMSATS Institute of Information Technology, Islamabad.</p> <p>Professor Dr. Shaukat Ali, University of Sargodha.</p> <p>Dr. Abdullah, Registrar, Kohat University.</p> <p>Ch. Bashir Ahmad, Registrar, University of Central Punjab, Lahore.</p> <p>Ahmed Jawed Turk, Controller of Examinations on behalf of Vice Chancellor University of Gujrat.</p> <p>Prof. Dr. M. Ibrahim Khalid, Dean, Ali Institute of Engineering, Lahore.</p> <p>Eng. Imran Rahman, Vice Chancellor, Institute of Space Technology, Islamabad.</p> <p>Waqar Sami Khan, Secretary, NTS.</p> <p>Col. Maqsood Ali Khan, Advocate NTS.</p> <p>Fahad Ahmed Ali, Regional Marketing Officer, NTS.</p> <p>Awais Ahmed, Director General, Nazeer Hussain, RD, HEC, Nazeer Hussain, R. Director, HEC.</p>
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Syed Mansoor Ali Shah, J:- Brief facts of the case are that the petitioner is a student who has passed her M.Phil (Chemistry) in the academic session 2009 - 2011 from Government College University, Lahore. In order to pursue her Ph.D in Chemistry she applied for admission and was required to pass Graduate Assessment Test (“GAT – Subject”) conducted by the National Testing Service, (“NTS”) apparently working under the authority of the Higher Education Commission (“HEC”). The grievance of the petitioner was restricted to the marks awarded to her in the GAT by NTS and during the course of hearing this grievance was redressed.

2. Prior to the redressal of this grievance, an important legal question surfaced during the course of the proceedings regarding the legal status and authority of NTS under the law.
3. Vide order dated 11.10.2013 the following questions of public importance were identified in this case:-

- i. What is the nature and scope of a “testing body” envisaged in Section 10 (1) (n) of the Higher Education Commission Ordinance, 2002 (“Ordinance”)?
- ii. What is the nature and scope of service to be rendered by the said testing body?
- iii. What is the scholastic capacity required of such a testing body?
- iv. Can HEC regulate any such body under the Ordinance?
- v. Should there be one testing body or more?
- vi. What should be the legal status of the entity constituting the testing body?

4. Through the same order notices were issued to all the Universities in Pakistan recognized by HEC with the direction to respond to the above questions in writing. The said order also records that the representatives of the HEC (Awais Ahmad, Director General and Nazir Hussain, Resident Director HEC) categorically submitted that no formal approval from the Board of HEC has been granted to NTS to act as national testing body in terms of section 10 (1) (n) of the Higher Education Commission Ordinance, 2002 (“Ordinance”). The documents placed on the record by HEC and NTS

failed to show that NTS was a duly approved and recognized testing service under the Ordinance.

5. Thereafter, 43 Universities from all over Pakistan filed their written submissions regarding questions posed by this Court, while the submissions of the representatives of the under-mentioned Universities made in Court were recorded in order dated 25.10.2013 are reproduced hereunder:-

- i. Dr. Shaukat Ali, Director Academics, University of Sargodha.
- ii. Professor Dr. Habib-ur-Rehman, Chairman, Department of Physiology, University of Veterinary and Animal Sciences, Lahore.
- iii. Dr. Tahira Aziz Mughal, Lahore College for Women University Lahore.
- iv. Dr. Haq Nawaz, Director Graduate Studies, University of Agriculture, Faisalabad.
- v. Dr. Asad Zaheer, Acting Registrar, University of Health Sciences, Lahore.
- vi. Dr. Hamid Saeed, Registrar, F.C. College, Lahore.
- vii. Air Commodore (Retd.) Ghulam Mujaddid, Registrar, Air University, Islamabad.
- viii. Dr. Tariq Jadooni, LUMS, Lahore.
- ix. Muhammad Asif Lateef, Additional Registrar, Government College University, Faisalabad and Govt. College for Women University, Faisalabad.
- x. Rana Hamayun Ihsan, Deputy Registrar, Pakistan Institute of Development Economics, Islamabad.
- xi. Syed Hassan Aftab, Additional Director (Academics), International Islamic University, Islamabad.
- xii. Tauqir Ahmed, Controller of Exams, National Defence University, E-9, Islamabad.
- xiii. Mohsin Ijaz Malik, Senior Deputy Registrar, Lahore School of Economics.
- xiv. Saboor Ahmed Khan, Additional Registrar, G.C. University, Lahore.

- xv. Muhammad Farhan Sadiq, Assistant Professor, Virtual University of Pakistan, Lahore.
- xvi. Engr. Nasrullah Khan Babar, Registrar, NFC Institute of Engineering & Technology, Multan.

Summary of the submissions made by the above representatives:-

- a) That “Testing Body” at a national level is required but any such body must be a part of or backed by a collegium of the recognized Universities in the country.
- b) That the Testing Body should not be a private organization without any ownership of the Centres of academic excellence in the country i.e., recognized universities.
- c) That the Vice Chancellor’s Committee constituted by the HEC can easily set the standard of entrance examinations/tests and, therefore, HEC can also act as a testing body.
- d) Once the Testing Body is constituted in the above manner, there should be a proper regulatory framework for monitoring and auditing its performance.
- e) That the Universities are fully capable of carrying out in house entrance tests and are carrying out such entrance tests in parallel with the test prescribed by NTS i.e., GAT.
- f) GAT does not cover all the disciplines and, therefore, in many cases their entrance test is not relevant, as a result, the universities by and large place reliance on their own entrance tests.
- g) A minority of the above representatives submitted that NTS is a good service, however, they admitted that they are not aware whether NTS is being regulated and monitored by HEC under the law and whether regular audit of the services rendered by NTS takes place.
- h) Syed Hassan Aftab, Additional Director (Academics), International Islamic University, Islamabad, one of the above representatives, submitted that tests conducted by NTS are also

used for the purpose of awarding national and international scholarships. He submitted that in the absence of regulatory framework monitoring and overseeing the services of NTS, award of millions of rupees in scholarships is highly risky. He submitted that this aspect of the matter requires serious consideration as huge funds from national exchequer are dependent on the services rendered by the NTS.

- j) That GAT administered by NTS has been made mandatory for entrance to their Universities due to a direction issued by the HEC in this regard.

6. The general summary of the submissions made by 43 Universities is as follows:-

- i. Inferring form a majority of responses (32), Universities are of the opinion that an independent testing body should be established to develop and administer admission tests, and can legally be done under the clause (n) of subsection (1) of Section 10 of the Higher Education Commission Ordinance, 2002, so that candidates are admitted on the basis of merit, free of political interventions, working towards the development of international standards in education (7 of these respondents believe that NTS is providing a great education service and hence should be brought under the legal cover, for some, especially till the time a legally constituted testing body is not established); albeit, a few of these respondents are of the opinion that the services of such a testing body should not be made compulsory for the Universities (4 responses). However, a minority of Universities / Institutions (8 responses) have explicitly stated that the Universities should conduct their own admission tests, some suggesting that they are better equipped to judge their academic needs and standards, and hence, have developed their own tests (one stating that its system is based on rote learning whereas NTS is based on a mathematical model).
- ii. Amongst the former group, there are two considerations; firstly, regarding the legal status and regulation of the testing body and secondly, regarding the number of testing bodies needed. A majority of

Universities emphasize that the testing body should be a public-entity, government owned, or owned / controlled by /formed with the assistance of Universities in some manner (for instance, through a collegium of Universities), whereas a few respondents have stated that it should be a non-profit entity. Universities are of the view that either the testing body should be set up by HEC or be a part of HEC (10 responses) or be constituted through an Act of the Parliament (3 responses). A dominant position is that a testing body should be regulated by HEC (17 responses), either through Rules made under the governing Ordinance or through international standard SOPs developed by HEC or through the VC Committee. However, some respondents have also stated that HEC cannot regulate such a testing body (10 responses), as HEC is a facilitating body, or because HEC will itself have set up the testing body under the governing Ordinance.

- iii. About one half of 30 Universities have expressed the view that there should be multiple testing bodies, a couple of these having expressed that a testing body should be present in every major city or one in every Province, whereas the other half have stated that there should be one testing body operating at the national level for the sake of uniformity.
- iv. Regarding NTS, as aforementioned, only a few Universities have stated that it is providing a great service, some adding that it should be given a legal cover, possibly by HEC signing a Memorandum of Understanding with NTS. However, an equal number of Universities have stated that NTS is working without HEC approval or legal backing hence its exam or service cannot be imposed on the Universities.

7. The question wise summary of the submissions made by the Universities is as follows:-

- A. What is the nature & scope of a “testing body” envisaged in S. 10(1)(n) of the HEC Ordinance, 2002?

Question 1 largely elucidates interpretations of the legal provision as that the HEC is empowered to set up and/or appoint a Testing Body, in accordance with its purpose. Many

respondents have interpreted the provision to establish HEC's role as facilitative rather than regulatory (see Question 5 below). A small number of replies stated that the NTS as it stands is not approved by the HEC and therefore is illegal, whilst others (two replies) emphasized the HEC's position that a Testing Body does not require HEC approval. A significant number of replies (ten) suggested that this was a question for the HEC to respond to.

- B. What is the nature & scope of service to be rendered by the said testing body?

Responses to Question 2 focused on the need for such a testing service that is for both admissions and for scholarships in Higher Education. A small number of respondents added that it would be useful for recruitment and promotion. This testing service body must be autonomous. A number of key features regarding the nature of these tests were emphasized: that they be based upon a uniform and high standard, be fair and equitable, bias free, transparent, provide standardized formulations and taxonomies of evaluatory tools, be credible, seek national and international acceptance, accommodate local socio-cultural difference and the indigenous context.

- C. What is the scholastic capacity required of such a testing body?

A number of key feature emerge from responses to Question 3: that currently the NTS provides a more general service rather than specialist subject based service; that there is a requirement to have qualified academics at the helm of the design of questions, as reviewers and as paper-setters; that particular skills need to be evaluated as part of any national testing service, these include general aptitude and cognitive testing, analytical ability, reading, writing and comprehension skills; that minimum standards need to be adhered to and perhaps a Board of Academics or a Panel of Experts would be constituted to ensure these.

D. Can HEC regulate any such body under the Ordinance?

Question 4 elucidates four categories of responses: eight respondents stated that the HEC cannot regulate the Testing Body, a further ten believe that the HEC can regulate a Testing Body, three respondents believe that the HEC regulates indirectly either through the National Curriculum Review Committees or the Vice Chancellors Committee, and six respondents were unclear as to the regulatory role of the HEC under the Ordinance.

E. Should there be one testing body or more?

In response to Question 5 fifteen respondents stated that multiple testing bodies were preferable, while twelve were of the opinion that a singular body was preferable. Eight made no comment regarding a preference. A number of reasons were posited for each position, for the former to ensure flexibility and specialization in testing services with multiple Testing Bodies as well as avoiding a monopolistic situation and for the latter to develop uniformity in testing across the country.

F. What should be the legal status of the entity constituting the testing body?

Question 6 elicits a number of variable responses. A number of respondents (six) asserted the need for the legal status of a Testing Body to be that of a Public Sector Body, with a number of additional respondents (three) emphasizing that whether private or public, it must be a not-for-profit entity. A number of replies (ten) stated that the HEC should establish/ constitute and regulate this body in whatever form. Five respondents stated that there is a need for clarity on this either by the HEC and/or by legislative provisions.

8. Order dated 26.12.2013 records that the following legal issues required to be answered:-

- i. That NTS does not have any approval under the Higher Education Commission Ordinance, 2002 (“Ordinance”) to hold itself to be as National Testing Body in terms of section 10(1)(n) of the Ordinance.
- ii. That NTS or any other private or public sector entity can act as a testing body without the approval of the HEC and on the basis of its own strength and capacity. In such a situation, the HEC cannot support or sponsor any such testing body and it will not be binding on any University or Educational Institution in the country to be obligated to conduct a testing service from such entities except through a contract arrived at between the concerned institution and NTS.
- iii. The directions issued in favour of NTS by HEC is without lawful authority and any such notification or letter issued by HEC shall be immediately withdrawn. NTS may continue as an entity and act as a testing body but it has no support or blessing of the government and it is voluntary on the Universities and Educational Institutions to engage or not to engage the services of NTS.

9. Considering the importance of the legal questions involved, Professor Dr. Osama Siddique, Mr. Salman Akram Raja and Ms. Misha Rehman Advocates were called as Amici Curiae, who rendered valuable assistance.

10. In the light of the above background, HEC and NTS have arrived at the following consensus:-

- (i) that HEC will not sponsor or extend any patronage to NTS, as NTS is not an officially approved national testing service under the Ordinance;
- (ii) the Universities and other academic institutions recognized by HEC are not under any lawful obligation to conduct tests organized by NTS or be bound by the results of NTS in the matter of admissions or grant of scholarships;

- (iii) HEC through proper channel, will propose an amendment in the Ordinance/Rules in order to provide a proper regulatory statutory framework for establishing, monitoring and supervising a “national testing service” Till such time that proper legislation is put in place, HEC will not initiate the process of selecting and appointing a national testing body under the Ordinance;
- (iv) NTS shall not hold itself out as an HEC approved “national testing service”. It may, however, continue operating as a private entity under the law, but shall not in any manner be taken to be an HEC approved entity.
- (v) HEC will not enter into any fresh contract with NTS or any other entity unless and until NTS or any such entity has been duly approved by HEC under the Ordinance and in the manner described above;
- (vi) the existing contract/arrangement entered between NTS and the Universities / academic institutions may continue or may be reviewed by the respective Universities / academic institutions, as the case may be, in the light of this order;
- (vii) the existing arrangement between HEC and NTS shall only continue till 30.05.2014 (cut off date). HEC shall not enter into any arrangement/contract with NTS after the said cut off date.

11. Order accordingly./

12. HEC shall also ensure that the gist of this order is publically advertised so as to dispel the impression that NTS is a duly approved national testing body of HEC and will also duly intimate all the recognized Universities and academic institutions that admissions/scholarships will not be dependent on the test conducted by NTS after 30.05.2014. It will be the option of the University/academic institution to enter into an arrangement with NTS which will be no more than a private contractual arrangement

under the law governing the said University/academic institution. HEC will also display this order on its website for the facilitation of the public.

13. It is observed that this order does not touch upon past and closed transactions, therefore admissions and scholarships already granted or refused on the basis of the tests conducted by NTS in the past will not be reopened by virtue of this order. It is once again reiterated that the existing arrangement between NTS and HEC shall continue till **30.05.2014**. This order shall, therefore, have a prospective effect only.

13. The consensual arrangement arrived at between NTS and HEC and so recorded in this order has been duly witnessed and signed by the nominees of NTS and HEC hereunder:-

1. _____

Mr. Nazeer Hussain,
Regional Director, HEC.

2. _____

Mr. Waqar Sami Khan,
Secretary NTS.

(Syed Mansoor Ali Shah)
Judge

Iqbal/*

APPROVED FOR REPORTING