

HCJD/C-121  
**JUDGMENT SHEET**

**ISLAMABAD HIGH COURT**  
**ISLAMABAD**

**WRIT PETITION NO.3061/2014**

**Dr. Mumtaz Ahmed, etc.**  
*VERSUS*  
**Federation of Pakistan, ETC.**

Petitioners by : **Raja Saif-ur-Rehman, Advocate.**  
**Mr. Adnan Saboor Rohila, Advocate in W.P. No.2156/14.**

Respondents by : **Malik Qamar Afzal Advocate for respondent No.4.**  
**Malik Faisal Rafiq, Deputy Attorney General.**

Date of Hearing : **16-12-2014.**

**ATHAR MINALLAH, J.-** Through this consolidated judgment  
I shall decide the instant petition along with W.P. No.2156/2014.

2. The petitioners are bright young citizens of Pakistan. They hold qualifications in the field of medicine, after graduating from medical institutions in the Republic of Cuba. Their claim is that after the earthquake of 2005, the Government of the Republic of Cuba offered scholarships to the citizens of Pakistan for the study of medicine. Pursuant to the offer, the Higher Education Commission of Pakistan undertook a transparent process for selection of students desiring to pursue their medical education in Cuba. Applications for 1000 (one thousand) scholarships were invited through advertisement, dated 25-08-2006, published in various daily newspapers. The embassy of the Republic of Cuba in Islamabad informed the Higher Education Commission (hereinafter referred to as the “Commission”) through a letter dated 12-11-2007 , that the curriculum for studies of the medical program will be the same as the Latin American School of Medicine (hereinafter referred to as the “ELAM”). It was further informed that the medical degree will be issued after completion of the studies/course. The

Commission, after undertaking an extensive exercise, selected the petitioners for the award of scholarships to pursue their studies in the field of medicine in Cuba. The petitioners were informed vide letter dated 26-07-2008 regarding the details of the scholarship, along with the terms and conditions for the award. As a requirement, the petitioners executed respective agreements and undertakings. The petitioners, after complying with the requirements of the Commission, proceeded to Cuba and completed their five years studies, culminating in the award of a qualification granted by the Medical Institution in Cuba. It is pertinent to mention that while they were pursuing their studies in Cuba, the Commission, vide letter dated 20-04-2012, requested the Ministry of Foreign Affairs to convey to the petitioners that after their return, their registration under the Pakistan Medical and Dental Council Ordinance, 1962 (hereinafter referred to as the "Ordinance") shall be subject to qualifying the examination held by the National Examination Board (hereinafter referred to as the "NEB examination"). It was further communicated that on account of completing their house job in Cuba, they shall be exempt from the requirement of completing the house job in Pakistan.

3. The petitioners have invoked the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the "Constitution"), aggrieved by the requirement of taking the NEB examination as a condition for their registration under the Ordinance.

4. Raja Saif-ur-Rehman, learned Advocate High Court, contended that the offer of sending the petitioners on scholarship was a representation made by the Government of Pakistan and, therefore, the requirement of taking the NEB examination is not justified; the scholarship was announced and the selection made by the Commission after an extensive exercise undertaken for selecting the students on merit; the Commission is the competent authority, particularly in the field of Higher Education to grant equivalence; the provisions of the Higher

Education Commission Ordinance, 2002 (hereinafter referred to as the “HEC Ordinance, 2002”), shall prevail over the provisions of the PMDC Ordinance; the Commission which had the power under the HEC Ordinance, and in exercise of the said powers representations were made to the petitioners that they shall be treated at par with students pursuing their medical education in Pakistan; the petitioners for the first time were informed regarding the requirement of taking the NEB examination vide the Commission’s letter dated 20-4-2012. The petitioners were never informed by the Commission that they were required to take the N.E.B examination. The learned counsel placing reliance on *PLD 2010 SC 1089*, contends that the Commission and its status places it in a position where the provisions of the PMDC Ordinance, shall give way to the provisions of the HEC Ordinance, 2002.

5. Mr. Adnan Saboor Rohaila, learned Advocate High Court, appeared for the petitioners in W.P. No.2156/2014. In addition to adopting the above arguments of the learned counsel, contends that; the petitioners have spent more than five years pursuing their studies and requiring them to take the N.E.B examination will further delay their registration for another two years; the HEC Ordinance 2002 shall prevail over the PMDC Ordinance and the selection made by the HEC on merit and sending the petitioners for education to Cuba is a sufficient ground to exempt them from taking the examination; the fundamental rights of the petitioners are being violated, inter alia, by delaying the registration under the Ordinance; PMDC has extended exemption from taking the examination to others while the same is being denied to the petitioners and, therefore, it is a case of discrimination; the respondents particularly the PMDC could not have changed its policy by requiring the petitioners to take the N.E.B examination; the Registrar of the PMDC vide letter dated 08-11-2011, addressed to a medical institution in the Republic of China had communicated a decision of the PMDC, exempting such students from taking the NEB examination who had

been admitted in a medical institution abroad, prior to the amendment made in the PMDC Ordinance; the principles of *locus poenitentiae* and promissory estoppel are attracted in case of the petitioners.

6. Malik Qammar Afzal, ASC, appearing on behalf of the PMDC has relied on the judgment of this Court, passed in W.P. No. 3944/2013; it is contended that the petitioners graduated in 2014 and, therefore, are required to take the NEB examination pursuant to Section 15 of the PMDC Ordinance; HEC Ordinance 2002, and the PMDC Ordinance have distinct objects and purposes and the question as to which statute would prevail is neither relevant nor arises in the present petitions; under Section 15 of the PMDC Ordinance, the petitioners are required to take the N.E.B examination; even before the insertion of Section 15 in the PMDC Ordinance, all graduates from medical institutions abroad, which were not notified in the 2<sup>nd</sup> Schedule were required to take the N.E.B examination.

7. The learned counsels were heard at length, and after perusing the relevant record with their able assistance, the opinion of this Court is as follows.-

8. Based on the propositions formulated by the learned counsels, the questions which require consideration by this Court are, firstly, whether any representation made by the HEC had induced the petitioners to study in Cuba, and if so, then whether the HEC Ordinance 2002 will prevail over or supersede the provisions of the PMDC Ordinance; secondly, whether the No Objection Certificate (hereinafter referred to as the 'NOC') and the letter dated 08-10-2011, addressed to the President of the University in China by the Registrar, had created a right in favour of the beneficiaries including the petitioners to be registered as medical practitioners without qualifying the N.E.B examination, and whether the same can be extended to the petitioners; thirdly, whether a right had been created in favour of the petitioners to be registered under the PMDC Ordinance on the basis of their selection by the HEC, and the qualifications and the nature of the

course offered by the medical institution in Cuba; fourthly, whether the principles of *locus poenitentiae* and promissory estoppel are relevant and applicable in the present case ; fifth, whether the Amendment Act, particularly Section 15 as inserted in the Ordinance, will have a prospective or retrospective effect; and lastly, whether this court, exercising jurisdiction under Article 199 of the Constitution, may refuse or withhold the relief, if granting it will cause injustice or is likely to cause loss or damage to the public, who would be reposing their trust in these young medical graduates?.

9. In order to dilate on the above propositions, it is important to examine the scheme of the PMDC Ordinance, before and after the amendments through the Amendment Act. It is noted that the object and purpose of the PMDC Ordinance in regulating the medical profession is to promote public good, obviously the object of the regulation is to protect and safeguard those who would be reposing and relying on the knowledge and skill of medical practitioners, and thereby placing their health and lives in their hands. The public good is, therefore, of paramount consideration while interpreting the provisions of the Ordinance.

**The Ordinance before the amendments;**

As is evident from the preamble, the Ordinance was promulgated and notified on 5th June, 1962, to consolidate the law relating to the registration of medical practitioners and dentists, and to reconstitute the Council in order to establish a uniform minimum standard of basic and higher qualifications in medicine and dentistry. The constitution of the Council was, and continues to be provided under section 3 of the Ordinance. Before the Amendment Act, there were five Schedules of the Ordinance. The recognized medical qualifications granted by medical institutions in Pakistan were notified under the First Schedule, the institutions outside Pakistan in the Second Schedule. The Third Schedule related to the recognized additional medical qualifications; the Fourth Schedule for registerable

medical licences and diplomas, while the Fifth Schedule dealt with the recognized dental qualifications.

Section 11 governed the recognition of medical institutions and the medical qualifications granted by medical institutions in Pakistan, while Section 12, 13 and 14 dealt with recognition of medical qualifications granted by institutions outside Pakistan. It is also important to note that Section 15 provided for the powers of the Council, and the Federal Government, in case of qualifications granted by medical institutions outside Pakistan, other than those notified in the Second Schedule. Section 23 provided for the qualifications, conditions and procedure for registration of medical practitioners possessing qualifications which were recognised medical qualifications for the purposes of the Ordinance.

The three provisos to section 23 laid down the conditions for registration. The registration was envisaged in two stages; initially, a person holding qualifications from a recognised medical institution was granted 'provisional registration', and after fulfilling certain conditions, was entitled to get 'full registration'. Section 2 (i) defined "recognized medical qualification" as meaning any of the medical qualifications included in the First and Second Schedule or recognized under Sections 14 or 15, while Section 2 (l) defined "registered medical practitioner" as meaning a medical practitioner registered or provisionally registered under the Ordinance.

It was not enough to hold a recognised medical qualification to be entitled to full registration under the Ordinance. Section 23 further provided that the Council may, by Regulations, direct the necessary particulars to be entered in the register. Pursuant to its powers, particularly under Section 33 of the Ordinance, the Council framed Regulations titled 'The Pakistan Registration of Medical and Dental Practitioners Regulations, 2008' (*hereinafter referred to as the 'Practitioners Regulations'*). The Practitioners Regulations were notified in the

official gazette on 26-01-2009. These Regulations provide for an elaborate and comprehensive procedure for registration under the PMDC Ordinance. Part VII deals with foreign qualifications and the National Examination Board. The NEB examinations are prescribed to determine the professional competence, or otherwise, of a Pakistani citizen, holding basic medical qualifications from a foreign medical institution. The NEB examination was, therefore, introduced for the first time through the Practitioner Regulations in January, 2009.

The plain reading of the language of Regulation 40 makes it obvious that merely graduating or holding medical qualifications from a foreign medical institution was not enough to be entitled as of right to registration. The Regulations further provide that every student obtaining admission in a foreign medical institution was required to get a No Objection Certificate before joining the medical institution outside Pakistan. The object and purpose of the NEB examination was to determine the competence, or otherwise, of a candidate for registration and equivalence of the foreign basic or postgraduate medical or dental qualification, as defined in Regulations 2 (iv) and (xvii) respectively. It may be pointed out that Sub Regulation 1, of Regulation 59, related to those persons who had 'acquired' a foreign basic medical or dental qualification from such medical institutions as were included in the Second Schedule or Fifth Schedule of the Ordinance. It is emphasised that the entitlement was on the basis of 'acquiring' a medical qualification and not 'admission' or enrolment. The said Regulation provided that they were not required to qualify the NEB examination for being provisionally registered under section 23 of the Ordinance. However, for applicants who had obtained qualifications from a medical institution abroad other than those notified under the Second or Fifth Schedule, NEB examination was mandatory.

A combined reading of the provisions of the Ordinance, as they existed prior to the Amendment Act, read with the Practitioners Regulations, makes it obvious that the requirement to qualify the NEB examination, so as to be entitled to a

provisional or full registration under the PMDC Ordinance was mandatory, for those who held medical qualifications from a foreign medical institution other than those notified under the Second Schedule. In case of institutions included in the Second Schedule, pre requisite for being entitled to be provisionally registered was on the basis of 'acquiring' the medical qualification. Mere admission or enrolment in a recognised foreign medical institution never created a vested right to provisional or full registration as a medical practitioner under the PMDC Ordinance.

**After the Amendment Act**

The Amendment Act, which received the assent of the President on 10-08-2012, and was notified in the official gazette on 13-08-2012, made fundamental changes in the law. Sections 11 to Section 15 were omitted/substituted and instead new provisions were inserted, which incorporated in the statute the concept and procedure for registration of students qualifying from educational institutions outside Pakistan, hitherto provided in the Practitioners Regulations. The Second Schedule of the Ordinance was omitted and instead Section 15 has been inserted, which deals with the registration and recognition of qualifications granted by medical institutions outside Pakistan. Section 15 as inserted through the Amendment Act is as follows:-

**“15. Power of the Council to certify certain persons to be possessed of sufficient medical qualifications.—***(1) If, after an examination by a board constituted by the Council, the Council is satisfied that a person holding a qualification granted by a medical institution outside Pakistan, is possessed of sufficient knowledge and skill to be registered as a practitioner for the purpose of this Ordinance, it may recommend to the Federal Government to issue a notification in favour of such person to register him and his qualification. Upon such notification, the Council shall register the qualification possessed by the person without it being entered*



*in any of the Schedules of this Ordinance.*

*(2) The Council shall register the qualification granted by a medical institution outside Pakistan, possessed by the person by maintaining a separate list in the Register.”*

10. It is obvious from the above provision that the legislative intent is to ensure that a person, holding medical qualifications from a foreign institution, registered under the Ordinance, must possess sufficient "knowledge and skill", to the satisfaction of the Council. As discussed earlier, the position which existed prior to the Amendment Act also did not give any right for registration on the basis of enrolment or admission. Whether a person, holding a qualification granted by a medical institution outside Pakistan, possesses sufficient knowledge and skill to be registered as a medical practitioner for the purposes of the Ordinance, is assessed pursuant to an examination by a Board constituted by the Council. Based on the performance of such a person in the examinations, the Council makes recommendations to the Federal Government to issue a notification in favour of such person to be registered under the Ordinance. After the issuance of the notification, the Council registers the qualification possessed by entering the name of the notified person and his qualifications, in a register maintained in case of qualifications granted by a medical institution outside Pakistan.

11. Holding a qualification from a medical institution outside Pakistan, qualifying the NEB examination so that the Council is satisfied that the person possesses sufficient "knowledge and skill" and issuance of a notification by the Federal Government are the mandatory pre requisites to be registered under the Ordinance.

12. In the light of the above, the argument raised by the learned counsel for the petitioners that the provisions of Section 15, as inserted by the

Amendment Act, are prospective and cannot have a retrospective operation in case of the petitioners is without any force nor of any relevance. It is an admitted fact that at the time when the amendments came into effect through the Amendment Act, the petitioners had not acquired and did not hold or possess the qualifications granted by the foreign medical institution and merely on the basis of enrolment or admission, no right had accrued. The petitioners graduated and were granted qualifications by the medical institution in Cuba after the Amendment Act had come into force. Section 15 of the Ordinance, as it stands today, makes it mandatory for every person holding a qualification granted by a medical institution outside Pakistan to take the examination by a Board constituted by the Council, so that the latter is satisfied that he or she possesses sufficient knowledge and skill to be registered as a practitioner for the purposes of the Ordinance. The petitioners, therefore, cannot claim registration under the Ordinance as no right was created either prior or after the promulgation of the Amendment Act.

13. The next issue to consider is the effect of the NOC and the letter addressed by the Registrar of the Council to the President of the University in China, dated 08-10-2011, which purportedly was issued in the light of the decision taken by the Council in its 118<sup>th</sup> Meeting held on 03-04-2011. Firstly, it is pertinent to note that this meeting was held prior to the promulgation of the Amendment Act, and after the framing of the Practitioners Regulations, and secondly, it approved the minutes of the National Examination Board Committee meeting held on 14-03-2011, recorded as Item No.22 of the Minutes. The learned counsel for the petitioners have not been able to point out any decision taken by the NEB, or the Council, which approved the Minutes of the NEB in the 118<sup>th</sup> Meeting dated 03-04-2011, that the students enrolled or who had sought admission prior to 03-04-2011 in an institution outside Pakistan and notified under the Second Schedule, were exempt from taking the NEB examination.

Moreover, in the 135<sup>th</sup> Session held on 11-09-2013, the Council approved the recommendations of the Executive Committee to the effect that all graduates, or persons having obtained medical qualifications from a medical institution outside Pakistan after July-2011, shall be required to take the NEB examinations. The letter, dated 08-10-2011, addressed by the Registrar to the President of the medical institution in China, was also withdrawn as not being in consonance with the decision taken by the Council in its 118<sup>th</sup> Meeting dated 03-04-2011.

14. It may be noted that the Registrar, who is appointed under Section 9 of the Ordinance, is not vested with any power of the Council or the Executive Committee, nor can he exercise such powers. The Registrar had acted on his own as there is no decision of the Council, let alone in the 118<sup>th</sup> Meeting dated 03-04-2011, to grant exemption to students enrolled in a medical institution abroad from taking the NEB examinations. The Registrar's letter, dated 08-10-2011 was, therefore, not a letter of the Council, and was issued by the Registrar without having authority or jurisdiction. Moreover, assuming that the Council had taken such a decision, it would have been in violation of the provisions of the Ordinance as admission or enrolment did not create any right. The letter, being void and without jurisdiction, cannot give rise to any right, nor could it have been relied upon by the petitioners for building a case on the principles of promissory estoppel or *locus poenitentiae*. As far as the NOC obtained by some students is concerned, as already noted, that was a requirement under the Practitioners Regulations for students desiring to seek admission in a medical institution other than included in the Second Schedule and regulation 46, particularly provided that issuance of such NOC did not create any right. As far as the petitioners are concerned, mere issuance of NOC in case of some other students did not give rise to a right to be registered. It, however, is observed that the Council was negligent in allowing its Registrar to write a letter to the medical institution in China by communicating a purported decision which was never taken in the 118<sup>th</sup> Meeting

of the Council held on 03-04-2011. There is nothing on record to show that the PMDC has granted exemption to any person or class of person from taking the NEB examination.

15. This Court has not been able to persuade itself with the proposition raised by the learned counsels for the petitioners that the HEC Ordinance 2002 has an overriding effect, or will prevail over the provisions of the PMDC Ordinance. The object and purpose of the two statutes are distinct and separate, having no nexus with each other. Both are special laws dealing with different subjects altogether. The preamble of the HEC Ordinance, 2002, declares the object and purpose as 'improvement and promotion of higher education, research and development and for providing for the establishment of the Higher Education Commission and matters connected therewith or incidental thereto'. Section 10 provides for the powers and functions of the Higher Education Commission. The powers and functions of the Commission, nor the object and purpose of the statute, includes regulation of the medical institutions for the purposes of its recognition or the registration of medical practitioners. As already noted, the Ordinance was promulgated and notified on 5th June, 1962, to consolidate the law relating to the registration of medical practitioners and dentists, and to reconstitute the Council i.e the PMDC, in order to establish a uniform minimum standard of basic and higher qualifications in medicine and dentistry. It is, therefore, obvious that as far as the regulation of recognition of medical intuitions and registration of medical practitioners is concerned, the PMDC Ordinance will have an overriding effect over any other law, including the HEC Ordinance, 2002. Needless to mention that none of the provisions of the two statutes overlaps, contradicts each other or gives rise to any ambiguity or inconsistency. Even otherwise, there is nothing on record to even remotely suggest that the Higher Education Commission had made any representation or commitment that the petitioners, by availing the scholarship to study in Cuba, will

be exempt from registration under the PMDC Ordinance. The Commission had no power or jurisdiction under the HEC Ordinance 2002 to make such a representation. Assuming that the petitioners understood that their selection for grant of a scholarship to study for a medical degree in Cuba was in the nature of a representation, it would still not have created a right to be exempted from taking the NEB examination, as that would have been illegal and ultra vires the provisions of the PMDC Ordinance, 1962. It is also not the case of the petitioners that the medical institution, from which they have obtained their respective qualifications, was at any time notified under the Second or Fifth Schedule of the PMDC Ordinance. The role of the Higher Education Commission was to the extent of facilitating the petitioners in selection on merit for the scholarships offered by the Government of the Republic of Cuba to study in a medical institution. Such facilitation, by no stretch of the imagination, can create a right to be granted exemption from the NEB examination or to ignore section 15 of the PMDC Ordinance.

16. The reliance of the learned counsels on the principle of promissory estoppel is also misplaced and not relevant to the facts and circumstances of the present case. The reliance being placed on the purported representations made by the Council through the letter dated 08-10-2011, issued by the Registrar, has no force. As already held above, the letter of the Registrar was without lawful authority and jurisdiction. It was not a representation made by the Council, rather the Registrar had acted on his own, and without having jurisdiction, approached the medical institution in China and communicated a purported decision of the Council, which the latter had not taken. In any case, the said letter cannot be treated as a representation made to the petitioners.

17. Promissory estoppel is an equitable doctrine with the object of preempting the suffering of any loss arising out of a promise made, and is invoked so as to prevent violation of and to safeguard rights accrued pursuant to such a

promise. It is essential that the promise be made by a person competent to represent the authority, on behalf of which a promise is being made, and the person to whom the representation has been made changes his position to his detriment, takes a decisive step and enters into a binding contract or incurs a liability. Simultaneously, it is settled law that there can be no estoppel against a Statute. In the present case, the Registrar, who had addressed the letter dated 08-10-2011, had no authority or jurisdiction to make a representation on behalf of the Council, or to communicate a decision never taken. It was, therefore, neither a representation for the purposes of raising the plea of promissory estoppel, nor could it give rise to a claim to any right. There is nothing on record to suggest that the letter had induced the petitioners to seek admissions in the medical institution in Cuba. In any case, after the insertion of Section 15, through the Amendment Act, the plea of promissory estoppel lost its validity, even if it is assumed that the Registrar had communicated a lawfully taken decision of the Council, as there can be no estoppel against the Statute. Reference in this regard may be made to cases titled '*Messrs Gadoon Textile Mills and 814 others Vs. WAPDA and others*' [1997 S.C.M.R. 641], '*Secretary Economic Affairs Division, Islamabad and others Vs. Anwarul Haq Ahmed and others*' [2013 S.C.M.R. 1687], '*Dr. Muhammad Munir-Ul-Haq and others Vs. Dr. Muhammad Latif Chaudhry and others*' [1992 S.C.M.R. 2135], '*West Punjab Government Vs. Messers Pindi-Jhelum Valley Transport Ltd. Rawalpind and others*' [P.L.D. 1960 S.C. 88], '*Naseer Ahmed and another Vs. Asghar Ali*' [1992 S.C.M.R. 2300], '*Jam Pari Vs. Muhammad Abdullah*' [1992 S.C.M.R. 786], '*Mst. Sharif Bibi and another Vs. Syed Muhammad Nawaz Shah and others*' [2008 S.C.M.R. 1702], '*Syed Muhammad Hussain Shah Vs. Abdul Qayyum and others*' [2011 S.C.M.R. 743], '*Mrs. Zohra Begum Vs. Pakistan Burmah Shell*' [1988 S.C.M.R. 756], '*Ikram Bus Service and others Vs. Board of Revenue, West Pakistan*' [P.L.D. 1963 S.C. 564], '*Islamic Republic of Pakistan Vs. Israrul Haq and 23 others*' [P.L.D. 1981 S.C. 531], '*Pir Sabir Shah Vs. Shad Muhammad Khan, Member Provincial Assembly,*

*N.W.F.P. and another*’ [P.L.D. 1995 S.C. 66], *‘Pakistan through Ministry of Finance, Economic Affairs and others Vs. Fecto Belarus Tractors Limited’* [P.L.D. 2002 S.C. 208], *‘Messrs Army Welfare Sugar Mills Ltd. and others Vs. Federation of Pakistan and others’* [1992 S.C.M.R. 1652], *‘Messrs M.Y. Electronics Industries (Pvt.) Ltd. through Manager and others Vs. Government of Pakistan through Secretary Finance, Islamabad and others’* [1998 S.C.M.R.1404]. It may also be noted that the Practitioners Regulations are unambiguous and clear. Obtaining a NOC and an eligibility certificate for taking the NEB examination was a requirement even before the insertion of section 15 through the Amendment Act and did not create a right to be registered under the Ordinance. Moreover, petitioners had ‘acquired’ their respective medical qualifications after Section 15 came into force, pursuant to the Amendment Act. The Higher Education Commission also did not make any representation which may have induced the petitioners to apply for the scholarship, nor any assurance was given that they will be exempt from taking the NEB examination.

18. I now take up the next argument raised by the counsels for the petitioners i.e. placing reliance on the principle of *locus poenitentiae*. According to the principle of *locus poenitentiae*, once an order has taken effect, and in pursuance thereof, certain rights have been created in favour of a person, then such an order cannot be withdrawn or rescinded to the detriment of the rights created.

19. It is settled law and consistently held by the august Supreme Court that the principle of *locus poenitentiae* is not a principle of law, according to which an order once passed becomes irrevocable, and a past and closed transaction. An illegal order does not create a right, nor can perpetual rights be gained or claimed on the basis of such an illegal order. The principle of *locus poenitentiae* would be invoked only in respect of an order which is legal, and not in any respect an order which is contrary to and in contravention of any provision

of law, or the rules made there under. Similarly, the principle is applicable only in respect of an order passed by an authority which was competent and in accordance with law. When the basic order is without lawful authority, then no superstructure can be built thereon, and if that is the case, then such structure will also fall on the ground automatically. Reference in this regard may be made to cases titled '*Muhammad Nadeem Arif and others Vs. Inspector-General of Police, Punjab, Lahore and others*' [2011 S.C.M.R. 408], '*Executive District Officer (Edu). Rawalpindi Vs. Mst. Rizwana Kausar and 4 others*' [2011 S.C.M.R. 1581], '*Nazir Ahmed Panhwar Vs. Government of Sindh through Chief Secretary, Sindh and others*' [2005 S.C.M.R. 1814], '*Executive District Officer (Education), Rawalpindi Vs. Muhammad Younas*' [2007 S.C.M.R. 1835] and '*The Engineer-In-Chief Branch through Ministry of Defence, Rawalpindi and another Vs. Jalaluddin*' [P.L.D. 1992 S.C. 207]. In the present case the principle is neither relevant nor attracted.

20. In the present case the learned counsels for the petitioners have built the edifice of their arguments on the selection made by the Higher Education Commission for scholarships offered by the Government of the Republic of Cuba, the nature of courses offered by the medical institution in Cuba, letter dated 08-10-2011, addressed by the Registrar of the Council to the a University in China. None of these grounds have any force. Moreover, after the insertion of Section 15 in the Ordinance, through the Amendment Act, reliance on the principle of *locus poenitentiae* in any case is neither relevant nor of any effect.

21. Lastly, there is another important aspect of the present case which cannot be ignored. The petitioners have indeed graduated from the medical institution in Cuba, and this is not disputed. They are seeking registration under the PMDC Ordinance so as to enter the noble profession of medicine, to become medical practitioners, and as a consequence be allowed to handle and treat members of the general public. The petitioners are not the sole stakeholders in



being registered under the Ordinance, as the rights of others are also involved. Equally, if not more important, are those members of the general public who would be relying on the knowledge and skill of the petitioners. The Supreme Court of Illinois, in *Witherell v Weimer*, 421 N.E.2d 869, has quoted section 95 from 61 Am.Jur.2d Physicians and Surgeons, which aptly describes the nature of the relationship between a medical practitioner and a patient as follows;

*"The relation of physician and patient has its foundation on the theory that the former is learned, skilled, and experienced in those subjects about which the latter ordinarily knows little or nothing, but which are of the most vital importance and interest to him, since upon them may depend the health, or even life, of himself or his family; therefore the patient must necessarily place great reliance, faith and confidence in the professional advice, and acts of the physician"*

22. This relationship, which involves reposing trust, makes it one involving a duty of care, known as "fiduciary". The patient is vulnerable and dependent on the advice of the medical practitioner, in whose skill and knowledge the former has reposed trust. The interest, therefore, of the person who reposes trust and who is vulnerable, ought to be protected as well. On the one hand the petitioners are claiming a personal right, while on the other are those members of the public, not before this Court, whose welfare and rights are also at stake. Though in the present case, the petitioners have not been able to make out a case for the grant of relief, nor that a right had accrued in their favour to be exempt from the NEB registration, but assuming that they were able to make out a case, would this Court have exercised its jurisdiction by allowing the relief? Would it have been just and equitable to turn a blind eye and ignore the welfare and interests of the patients? The medical profession is committed to preserve and protect the most precious creation, Life. A person may be holding qualifications from the most prestigious medical institution in the world, and yet not possess sufficient knowledge and skill to be trusted, by giving in his hands the lives of

members of the public who would be exposed to him/her in his capacity as a medical practitioner.

23. This Court has been informed that the NEB examination is basic and merely tests the skill and knowledge expected from a person holding qualifications from a medical institution. Such basic tests/examinations for assessing the knowledge and skill of persons holding qualifications from foreign institutions are taken in almost every country. In the United States it is known as USMLE or ECFMG certification, in the United Kingdom it is known as the Professional Linguistic and Assessment Board ("PLAB") and in India as the Foreign Medical Graduate Examination ("FMGE"). A medical practitioner, without having sufficient knowledge and skill, can play havoc with the lives of those who would repose their trust and confidence in him/her.

24. The PMDC is a regulatory authority, consisting of medical professionals of repute, and it has the powers to regulate and check the standards of the medical institutions within Pakistan. The Council has no such powers as far as medical institutions outside Pakistan are concerned, particularly in a country where the language is also different. The legislature, while inserting Section 15 and omitting the Second Schedule through the Amendment Act, most obviously intended to safeguard the rights and interests of the general public by requiring that the persons holding qualifications from medical institutions abroad, possess the necessary knowledge and skill so as to be eligible to be registered under the Ordinance. It may be noted that in such matters, which may have a bearing on or affect the welfare and rights of the general public, the Court, in appropriate cases, may withhold or refuse to grant relief if it would be inequitable or cause injustice, or the effect would be disastrous or have an adverse impact on the rights of the general public. As an illustration, reference may be made to the facts of "Ram Sukh and others versus State of Rajasthan and others (*AIR 1990 SC 592*), the concern for the 'tiny tots', not before the Court, was of paramount consideration

rather than the untrained teachers. In the present case, even if the petitioners had succeeded to make out a case in favour of exemption from taking the NEB examination, this Court may have with held or refused to exercise its extraordinary equitable jurisdiction under Article 199 of the Constitution. The hesitation on the part of the petitioners to take the examinations and expecting the Court to rescue them raises concerns. While this Court may sympathise with them, it cannot allow even a single holder of medical qualifications obtained from a medical institution, who does not possess sufficient knowledge and skill, to be able to offer himself to be trusted by a vulnerable patient.

25. It is high time that the Council takes measures and discharge its regulatory obligations so as to ensure acceptable standards in the medical profession, and to safeguard the interests and rights of the general public. Determining the competence, knowledge and skill of even those who have already been registered as medical practitioners, ought to be a continuous process. The learned counsels have raised the argument of discrimination but have failed to place any material on record to show that others have been treated differently. Would it create a right in favour of the petitioners if registrations were made prior to the promulgation of the Amendment Act, without taking the NEB examination?. This argument is also misplaced. An illegality cannot be made a ground for perpetuating the same. Moreover, learned counsel for the Council has assured this Court that all others will be treated alike. Accepting the argument and allowing the petitioners to be registered under the Ordinance would amount to bypassing, and making statutory provisions, particularly section 15, redundant. No case of discrimination is made out. If there are such persons, the Council may take appropriate measures in ensuring that they possess sufficient knowledge and skill to be able to offer their services as medical practitioners.

26. This Court expects that the petitioners will have no hesitation in taking the NEB examinations and demonstrating their knowledge and skill. Had

the petitioners not waited for the outcome of this petition, they would have completed the stages of the NEB examination by now, and could have been notified under section 15 as registered medical practitioners.

27. This Court, in the light of the above discussion, holds that there is no merit in the petitions and, therefore, they are dismissed. However, the Council may consider arranging refresher courses for the petitioners and to facilitate the petitioners in taking the NEB examination. Pursuant to the statement of the learned counsel, made on behalf of the Council, half the fee prescribed for the NEB examination shall be charged in case of the Petitioners. This Court is confident that the petitioners will burn midnight oil and after qualifying the NEB examination, serve humanity besides earning a livelihood for themselves.

**(ATHAR MINALLAH)**  
**JUDGE**

Announced in the open Court on 16-01-2015.

**JUDGE**

Approved for reporting.

*Asif Mughal/\**