IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

7/5/19

PRESENT:
MR. JUSTICE ASIF SAEED KHAN KHOSA, CJ
MR. JUSTICE FAISAL ARAB
MR. JUSTICE IJAZ UL AHSAN

CIVIL APPEALS NO. 1095-1097 and 1021-1026 OF 2018
(against the judgment dated 05.03.2018 passed in C.P. No. D-5812/2015, etc. by the High Court of Sindh, Karachi)

AND

CIVIL APPEAL NO. 134-L OF 2018 AND CIVIL PETITION NO. 1362 OF 2019
(against the judgments dated 05.04.2018 passed in W.P. No. 29724/2015, etc. and 30822/2015, respectively, by the Lahore High Court, Lahore)

AND

CIVIL APPEALS NO. 1138, 1154-1158, 1486 AND 1487 OF 2018
(against the judgment dated 03.09.2018 passed in C.P. No. D-6274/2017, etc. by the High Court of Sindh, Karachi)

AND

CIVIL PETITIONS NO. 4475 AND 4476 OF 2018
(against the order dated 19.11.2018 passed in C.M.A. No. 33322/2018 by the High Court of Sindh, Karachi

AND

CRIMINAL ORIGINAL PETITIONS NO. 14 AND 18 OF 2019
(Non-compliance of this Court's order dated 10.01.2019 passed in C.A. No. 1095/2018)

CRIMINAL ORIGINAL PETITIONS NO. 25 AND 26 OF 2019
(Non-compliance of this Court's order dated 01.10.2018 passed in C.P. No.3620 and 3623/2018)

AND

CIVIL REVIEW PETITIONS NO. 20, 37 TO 49 AND 77 OF 2019
(Review against this Court's order dated 13.12.2018 passed in C.A. No. 1023-1025, 1138, 1154-1158, 1486-1487, 134-L/2018 and C.P. No.4475 and 4476/2018)

CIVIL REVIEW PETITIONS NO. 16 AND 17 AND 127 TO 133 OF 2019
(Review against this Court's order dated 10.01.2019 passed in C.A. No. 1023-1025, 1095 and 1154-1155/2018 and C.P. No. 4475/2018)

AND

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CIVIL MISCELLANEOUS APPLICATIONS NO. 462, 465, 508, 686, 1085, 1970, 1974, 1976, 1982, 2050, 2619, 2623, 2659, 2660, 2664, 2875 AND 2880 OF 2019, AND 8466 AND 8806 OF 2018

Mohammad Imran	(in C.A. No.1095/18)
Rehan Ahmed	(in C.A. No.1096/18)
Kiran Nadeem	(in C.A. No.1097/18)
Govt. of the Punjab through its Minister of Education, Lahore, etc.	(in C.A.No.134-L/18)
BPS (Pvt.) Ltd. and others	(in C.A. No.1021/18)
Bay View Academy (Pvt.) Ltd., Karachi and others	(in C.A. No.1022/18)
Education Systems (Pvt.) Ltd., Karachi and others	(in C.A. No.1023/18)
City Schools (Pvt.) Ltd., Karachi	(in C.A. No.1024/18)
City Schools (Pvt.) Ltd., Karachi	(in C.A. No.1025/18)
Shahrukh Shakeel Khan and others	(in C.A. No.1026/18)
All Private Schools Management and others	(in C.M.A. No.8466/18)
Civilizations (Pvt.) Ltd., Karachi and others	(in C.A. No.1138/18)
City Schools (Pvt.) Ltd., Karachi	(in C.A. No.1154/18)
City Schools (Pvt.) Ltd., Karachi	(in C.A. No.1155/18)
Beacon house School System, Karachi	(in C.A. No.1156/18)
Beacon house School System, Karachi	(in C.A. No.1157/18)
Beacon house School System, Karachi	(in C.A. No.1058/18)
City Schools (Pvt.) Ltd. through its Regional Director, Karachi	(in C.P. No.4475/18)
Asim Iftikhar Yakub and another	(in C.P. No.4476/18)
Foundation Public School (Pvt.) Ltd. Karachi and another	(in C.A. No.1486/18)
Origins School through its Partner Nahid Japanwala, Karachi and others	(in C.A. No.1487/18)
Muhammad Umeran Khokhar and others	(in Crl.O.P. No.14/19)
Ali Abbas	(in Crl.O.P. No.18/19)
Muhammad Imran	(in Crl.O.P. No.25/19)
Muhammad Imran	(in Crl.O.P. No.26/19)
Lahore Grammar School (Pvt.) Ltd. and others	(in C.R.P. No.16/19)
LACAS (Pvt.) Ltd. and another	(in C.R.P. No.17/19)
Bay View Academy (Pvt.) Ltd. and others	(in C.R.P. No.20/19)
Educational Systems (Pvt.) Ltd. Karachi	(in C.R.P. No.37/19)
City Schools (Private) Ltd.	(in C.R.P. No.38/19)
City Schools (Private) Ltd.	(in C.R.P. No.39/19)
City Schools (Private) Ltd.	(in C.R.P. No.40/19)
City Schools (Private) Ltd.	(in C.R.P. No.41/19)
Beacon house School System, Karachi	(in C.R.P. No.42/19)
Beacon house School System, Karachi	(in C.R.P. No.43/19)
Beacon house School System, Karachi	(in C.R.P. No.44/19)
Foundation Public School (Pvt.) Ltd. Karachi and another	(in C.R.P. No.45/19)
City Schools (Private) Ltd.	(in C.R.P. No.46/19)
Mr. Asim Iftikhar Yakub and another	(in C.R.P. No.47/19)
City Schools (Private) Ltd.	(in C.R.P. No.48/19)
Education Services (Pvt.) Ltd., Lahore and others	(in C.R.P. No.49/19)
Origins School thr. its Partner and others	(in C.R.P. No.77/19)
Lahore Grammar School (Pvt.) Ltd. and others	(in C.M.A. No.462/19)
LACAS (Pvt.) Ltd. and others	(in C.M.A. No.465/19)
Alliance Resource (Pvt.) Ltd.	(in C.M.A. No.508/19)

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Salamat School System (Pvt.) Ltd., Lahore	(in C.M.A. No.686/19)
Lahore Grammar School (Pvt.) Ltd. and others	(in C.M.A. No.1085/19)
All Private Schools Management and others	(in C.M.A. No.8806/19)
City Schools (Private) Ltd.	(in C.R.P. No.127/19)
City Schools (Private) Ltd.	(in C.R.P. No.128/19)
Educational Systems (Pvt.) Ltd.	(in C.R.P. No.129/19)
City Schools (Private) Ltd.	(in C.R.P. No.130/19)
City Schools (Private) Ltd.	(in C.R.P. No.131/19)
City Schools (Private) Ltd.	(in C.R.P. No.132/19)
City Schools (Private) Ltd.	(in C.R.P. No.133/19)
Alliance Resources (Pvt.) Ltd.	(in C.M.A. No.1970/19)
Headstart School (Pvt.) Ltd.	(in C.M.A. No.1974/19)
Al-Huda International Welfare Foundation	(in C.M.A. No.1976/19)
EPIC Islamic School and others	(in C.M.A. No.1982/19)
Salamat School System (Pvt.) Ltd.	(in C.M.A. No.2050/19)
Origins School and others	(in C.M.A. No.2623/19)
Foundation Public School (Pvt.) Ltd. and another	(in C.M.A. No.2619/19)
Froebel's (Pvt.) Ltd. and another	(in C.P. No.1362/19)

...Appellant(s)/Applicant(s)/Petitioner(s)

versus

Province of Sindh through Chief Secretary and others	(in C.A. No.1095/18, etc.)
The City School (Pvt.) Ltd. etc.	(in C.A. No.134-L/18)
The Province of Sindh through Secretary Education/Law and Parliamentary Affairs, Sindh	(in C.A. No.1021/18)
The Province of Sindh through the Secretary, Education and Literacy, Karachi and others	(in C.A. No.1022/18, etc.)
Taymur Mirza	(in Crl.O.P. No.14/19)
Major Noman Khan	(in Crl.O.P. No.18/19)
Dr. Farzana Feroz	(in Crl.O.P. No.25/19)
Kasim Kasuri	(in Crl.O.P. No.26/19)
Govt. of the Punjab thr. its Minister of Education, Lahore and others	(in C.R.P. No.16/19, etc.)
Muhammad Imran and others	(in C.M.As. No.1974 & 1976/19)

...Respondent(s)

In attendance:
Mr. Shahid Hamid, Sr. ASC
Mr. Makhdoom Ali Khan, Sr. ASC
Mr. Faisal Siddiqui, ASC
Mr. Aftab Alam Yasir, ASC
Mr. Hassan Nawaz Makhdoom, ASC
Mr. Hamid Ali Shah, ASC
Mr. Muhammad Ali Raza, ASC
Ms. Ayesha Hamid, ASC
Ms. Shireen Imran, ASC
Mr. Rashid Mehmood Sindhu, ASC
Syed Faisal Hussain Naqvi, ASC
Mr. Shahzad Ata Elahi, ASC
Mr. Salim-ur-Rehman, ASC
Mr. Muhammad Ikram Ch., ASC

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Mr. Fauzi Zafar, ASC
Mr. Taffazul Haider Rizvi, ASC
Mr. Khurram Mumtaz, ASC
Sardar Muhammad Ajaz Khan, ASC
Mr. Zaheer Bashir Ansari, ASC
Mr. Sharjeel Adnan Sheikh, ASC
Mr. Abid Hussain Chatta, ASC
Barrister Haroon Mumtaz, ASC
Mr. Mudassar Khalid Abbasi, ASC
Khawaja Ahmad Hosain, ASC
Mr. Rashid Hanif, ASC
Mr. Muhammad Imtiaz Khan, ASC
Mr. Ejaz Mehmood Ch. ASC
Mr. Maqbool Ahmed Sheikh, ASC
Mr. Iqbal Javed Dhallon, ASC
Mr. Riasat Ali Gondal, ASC
Barrister Suleman Akram Raja, ASC
Mr. Muhammad Azhar Siddique, ASC
Ch. Hafeez Ullah Yaqoob, ASC
Mr. Mehr Khan Malik, AOR
Mr. Muhammad Sharif Janjua, AOR
Mr. Muhammad Kassim Mirjat, AOR
Mr. Ahmed Nawaz Ch., AOR
Mr. Aman Naseer, Advocate
Rana Shamshad Khan, Additional Advocate-General, Punjab
Abdul Latif Khan Yousafzai, Advocate-General, Khyber Pakhtunkhwa
Barrister Qasim Wadud, Additional Advocate-General, Khyber Pakhtunkhwa
Mr. Salman Talib-ud-Din, Advocate-General, Sindh
Barrister Shabbir Shah, Additional Advocate-General, Sindh
Mr. Sajid Ilyas Bhatti, Deputy Attorney-General for Pakistan
Mr. Arbab Tahir Kasi, Advocate-General, Balochistan
Mr. Muhammad Ayaz Khan Swati, Additional Advocate-General, Balochistan
Mr. Tariq Mehmood Jehangiri, Advocate-General, Islamabad
Barrister Qasim Chohan, Additional Advocate-General, Punjab
Mr. Zahid Yousaf Qureshi, Additional Advocate-General, Khyber Pakhtunkhwa
Mr. Ahmed Hussain Rana, in person
Mr. Jessam Ubaid, in person.
Mr. Muhammad Javed Chohan, Law Officer (ED), Government of Punjab
Qazi Shahid Pervez, Secretary Schools, Sindh
Mr. Humayun Akhtar Sahi, Law Officer, Punjab
Mr. Imtiaz Ali Qureshi, Chairman PEIRA
Mr. Zubair Khan Shahid, D.S. Education, Lahore
Mr. Muhammad Ikram Abbasi, L.O.

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Dr. Mansoob Hussain Siddiqui, D.G. Private Schools, Government of Sindh
M/s Muhammad Tajasib Minhas and Umair Ahmed, representative of parents of the students from Lahore
Mr. Athar Hussain, father of a student, Islamabad

Date of Hearing: 09.05.2019

...

JUDGMENT

IJAZ UL AHSAN, J.- The instant matters arise from judgments of the Lahore High Court, Lahore and the High Court of Sindh, Karachi before which various writ petitions were filed challenging the provisions of the law regulating schools fees of private educational institutions in the Provinces of Punjab and Sindh, respectively.

FACTUAL BACKGROUND – PROVINCE OF PUNJAB

2. Numerous private schools in Punjab filed writ petitions (W.P. No. 29724/2015, etc. listed in Appendix A to the impugned judgment dated 05.04.2018) before the Lahore High Court, Lahore challenging the *vires* of, *inter alia*, Section 7A of the Punjab Private Educational Institutions (Promotion and Regulation) Ordinance, 1984 ("Ordinance, 1984") as inserted by the Punjab Private Educational Institutions (Promotion and Regulation) (Amendment) Ordinance, 2015 ("Amendment Ordinance, 2015") and the Punjab Private Educational Institutions (Promotion and Regulation) (Amendment) Act, 2016 ("Amendment Act, 2016"). The writ petitions were amended from time to time to also challenge the amendments introduced by the Punjab Private Educational Institutions (Promotion and Regulation) (Amendment) Ordinance, 2017 ("Amendment Ordinance, 2017") and the Punjab Private Educational Institutions (Promotion and Regulation) (Amendment) Act, 2017 ("Amendment Act, 2017"). Some of the students through their parents also filed writ petitions praying that directions be issued to private schools to charge fee in terms of Section 7A *supra* (W.P. No. 97269/2017, etc. listed in Appendix B to the impugned judgment dated 05.04.2018). A full bench of the Lahore High Court

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decided the writ petitions *vide* impugned judgment dated 05.04.2018 [reported as *City School Private Limited v Government of the Punjab and others* (PLD 2018 Lahore 509)] as under ("LHC judgment"):-

> 85. For reasons recorded in the preceding paragraphs, these petitions are decided in following terms:-
>
> 1. The unaided private educational institutions can be regulated by State through licencing system under Article 18 of the Constitution.
>
> 2. The mechanism provided to determine reasonable fee of private educational institutions, through impugned section 7-A of the Ordinance 1984, is a valid legislation. However, the complete bar on increase of fee for academic year 2015-2016 at the rate higher than the fee charged for academic year 2014-2015 through original subsection (1) of section 7-A (through Ordinance 2015) and the maximum limit in increase of annual fee @ 5% under subsection (5) of section 7-A of the Ordinance 1984 (inserted through Ordinance 2015 and Act of 2016) and maximum limit of 8% under subsection (5) of section 7-A of the Ordinance 1984 (amended through Act of 2017) are found to be unreasonable and un-proportionate restrictions on petitioner schools fundamental rights, therefore ultra vires of the Constitution, hence struck down. The original subsection (7) of section 7-A (through Ordinance 2015) regarding refund of fee, is also read down accordingly.
>
> 3. For any increase already made in fee for academic year 2015-2016 at a rate higher than the fee charged for the class during academic year 2014-2015 or beyond 5% for next academic year i.e. 2016-2017 (after promulgation of Ordinance of 2015 and Act of 2016) and increase more than 8% for academic year 2017-2018 (after promulgation of Act of 2017), the relevant private schools shall submit supportive material etc., justifying the above said increases, with the authority within period of 30 days from the announcement of this judgment. In case, no such material is submitted within stipulated time or said increases are otherwise not found justified by the concerned authority, the amount received more than previous academic year for academic year 2015-2016 or beyond limit of 5% for academic year 2016-2017 or beyond limit of 8% for academic year 2017-2018, as the case may be, shall either immediately be refunded to the students/parents or adjusted in the next fee bill of the school of those students.
>
> 4. The Provincial Government is directed to notify within reasonable time "The Punjab Free and Compulsory Education Act, 2014 to ensure enforcement of fundamental rights of education under Article 25-A of the Constitution and also responsibility of private schools under section 13 of said Act.
>
> 5. The respondent Government shall frame uniform regulatory regime through rules under section 13 of the Ordinance of 1984, within 90 days of this judgment to determine the increase claimed by schools in fee by also considering the following factors:-
>
> i) The actual cost and expenses incurred and profits made by private educational institutions.
>
> ii) The quality of teachers, adequacy of building and other facilities available in the school.

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iii) The increase in the utility bills and other charges comparing to the previous years.

iv) Payment of rent etc. on actual basis and its increase.

v) The fixation and increase in fee should commensurate with the facilities being provided to students which must be examined before increase of any fee.

vi) The acceptance or rejection of any proposed increase must be done through a speaking and reasoned order.

vii) Time frame and deadline must be clearly spelt out in rules to file the proposed increased and its decision.

viii) Fee of each grade/class should be fixed to ensure that said fee is not different for same grade/class in same campus.

6. The registering authority shall also ensure that parents are not compelled to purchase text books, uniform or other material from a particular vendor or provider and schools do not charge any amount other than tuition fee, admission fee or prescribed security from the parents.

7. The registering authority shall give representation to parents of private school in the proceeding of increase in fee and such proceeding shall be done in open and transparent manner.

8. An effective parents/students complaint handling procedure be established by using modern information technology. Further the procedure shall also be laid down for expeditious disposal of those complaints.

9. A complete data of teachers and supporting staff being hired by private schools should be obtained by registering authority showing educational qualifications/experience and track record of teachers and supporting staff on annual basis.

10. A periodic inspection of private school be carried out to check the provision of facilities to students as undertook by private schools at the time of registration and thereafter from time to time.

86. The petitions in appendix A & B are disposed of in terms of Order of the Court including directions given in Para 85 above.

Aggrieved, the Government of Punjab filed C.A. No. 134-L/2018 with leave of this Court granted on 15.09.2018 in the following terms:-

After hearing learned counsel for the parties, leave to appeal is granted in this case to consider *inter alia* the following questions:

(i) Whether while passing impugned judgment the Hon'ble Lahore High Court has considered that a law should be interpreted in such a manner that it should be saved rather than destroyed.

(ii) The Court should lean in favour of upholding constitutionality of legislation and it is incumbent upon

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the courts to be extremely reluctant to strike down law as unconstitutional.

(iii) Where more than one interpretation is possible one which would make the law valid and the other void the Court must prefer the interpretation which favours validity.

(iv) There is a presumption in favour of constitutionality and a law must not be declared unconstitutional unless the statute is placed next to the Constitution and no way can be found in reconciling the two.

(v) A statute must never be declared unconstitutional unless its invalidity is beyond reasonable doubt.

(vi) If a case can be decided on other or narrower grounds, the Court will abstain from deciding the constitutional question.

(vii) Mala fides will not be attributed to the Legislature.

(viii) Amendments were made in The Punjab Private Education Institution (Promotion and Regulation) Ordinance, 1984 in light of Articles 3 and 18 of the Constitution to safeguard the community against arbitrarily increase in school fee and stopping profiteering and commercialization of education; the legislature through regulatory function can impose maximum limit of fee regarding the unaided schools.

(ix) Amendments were made after hectic exercise reviewing the trend of increase of fee by private schools from the years 2008 to 2015 and comparing it with the inflation rate during this period.

(x) The right of profession, occupation and trade under Article 18 of the Constitution is not an absolute right rather amenable to licensing system, therefore, the State could impose maximum cap regarding the fee enhancement.

(xi) The provisional legislature is within its rights to declare that increase of fee for more than 8% in a particular year is forbidden by law.

(xii) The right to trade is subject to qualification under Sections 3,5,7-A, 8,9 and 12 of the Ordinance, 1984 and Rules 11 and 12 of the Rules, 1984.

(xiii) Reasonable classification on the basis of intelligible differentia is permissible between Schools, who are charging less then Rs.4000/- and those are charging fee for more than Rs.4000/- for applicability of Section 7-A.

(xiv) Amendments made in September, 2015 through Ordinance with express provision of retrospective effect regarding the fee deposited in August, 2015, is permissible under the law.

2. Let the appeal be prepared on the available record with the liberty to the parties to add thereto.

3. On the oral request of the learned Additional Advocate Generals all petitioners who had approached the Lahore High Court (Listed in Appendix A and B of the impugned judgment are impleaded as parties). The office shall issue notices to them. They may filed their concise statements within two

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weeks. The learned Additional Advocate General shall file an amended memorandum of parties within one week.

FACTUAL BACKGROUND – PROVINCE OF SINDH

3. Several private schools in Sindh filed constitution petitions (C.P. No. D-813/2005, etc.) before the High Court of Sindh, Karachi challenging the *vires* of, *inter alia*, Section 6 of the Sindh Private Education Institutions (Regulation and Control) Ordinance, 2001 ("Ordinance, 2001") as amended by the Sindh Private Education Institutions (Regulation and Control) (Amendment) Act, 2003 ("Amendment Act, 2003"). On a statement of the learned Additional Advocate General Sindh made on 17.10.2014 that on the promulgation of the Sindh Right of Children to Free and Compulsory Education Act, 2013 ("Act, 2013") the Ordinance, 2001 stood repealed, the High Court of Sindh disposed of C.P. No. D-813/2005, etc. as being infructuous. Review applications against the said order were filed by, *inter alia*, the Government of Sindh on the ground that such assumption of repeal was factually incorrect as the Act, 2013 was enacted pursuant to Article 25-A of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution"). Be that as it may, in the meantime the parents of students filed various constitution petitions (C.P. No. D-5812/2015, etc.) before the High Court of Sindh, Karachi seeking implementation of the Ordinance, 2001 and the Sindh Private Education Institutions (Regulation and Control) Rules, 2002 ("Rules, 2002"). A division bench of the High Court of Sindh disposed of all the constitution petitions *vide* judgment dated 07.10.2016 [reported as *Shahrukh Shakeel Khan and 2 others v Province of Sindh through Chief Secretary and 4 others* (PLD 2017 Sindh 198)] as under:-

To conclude:

(a) With regards ultra vires of sub-rule 7(3) as stated in the foregoing, the grievance of the schools in not on the mechanism of such increase, rather it is on the quantum (5%) of such increase, thus the question is about the determination of this percentile which requires taking into consideration of many factors like cost of doing business, minimum salaries payable, taxes, cost of utilities etc., requiring consideration of facts and taking of evidence, which is beyond the scope of the writ jurisdiction as being agitated by the private schools in the present petitions and

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as such no illegality has been shown that above sub-rule is inherently violative of Article 25 of the Constitution, thus such petitions of schools are dismissed;

(b) With regards arbitrary increases in fees by private schools, it is evident from the forgoing discussion that the current mechanism provided for in the form of the said Ordinance and rules though looks glossy, however, the loggerhead position of parents against the schools and vice versa is a clear depiction of the fact that private schools are not following the said mechanism and there is no compulsion on these to do so from the Department. It is painful to note that no statement has been provided by the Department as to its receipt of each year's audited accounts report from private schools and its enforcement of the restricted 5% increase of the tuition fees. Department to strictly act in accordance with law and to ensure compliance of the rules and regulations and submit quarterly reports to this court in respect of such audit and 5% rule. Petitions filed by parents/students are thus allowed in the term that respondent schools shall only increase tuition fees no more than 5% per annum from the date of their registration for three years and in case there has been no re-registration after the said period of three years, fees shall not be increased unless school re-registers itself; and

(c) The respondent schools who have increased their tuition fees over 5% per annum for the last three years from the date of their respective registration/re-registration, no further enhancement be permitted until their re-registration whereupon enhancement be regulated in strict compliance of Sub-rule 7(3) of the Rules 2002.

Aggrieved, various schools filed appeals (C.A. No. 7 to 16-K/2017) with the leave of this Court dated 26.01.2017, which were ultimately disposed of by consent *vide* order dated 04.04.2017 in the following terms:-

4. Therefore, by consent of all present the order dated 17.10.2014, review whereof is pending in the referred to constitution petitions, in exercise of the powers conferred under Article 187(1) of the Constitution to do complete justice is set aside, consequently, the petitions which were disposed of as having become infructuous are resurrected to the same position as on 17.10.2014 and will be deemed to be pending adjudication. That since the said petitions are yet to be decided, therefore, without dilating upon the merits of the case these appeals are allowed by setting aside the impugned judgment and the matter is remanded to the Sindh High Court to be decided afresh...

4. Pursuant thereto, a designated division bench of the High Court of Sindh disposed of C.P. No. D-5812/2015, etc. and C.P. No. D-813/2005, etc. *vide* judgment dated 05.03.2018 [reported as *Shahrukh Shakeel Khan and 2 others v Province of Sindh through Chief Secretary and 4 others* (PLD 2018 Sindh 498)] as under ("SHC DB judgment"):-

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39. The foregoing analysis, discussion and conclusions may be summed as follows (and it must be kept in mind that this summation is for convenience only, and must be read in the light of the foregoing analysis and discussion):

a. Schools can be regulated in terms of the second condition of Article 18, and the 2001 Ordinance and the 2005 Rules set up a regulatory regime that is a licensing system within the meaning of the said condition.

b. The fees that the schools can charge and the salaries etc. payable by them to staff (i.e., their output and input prices), and any changes or increases therein, can be regulated in terms of the second condition.

c. There is however a distinction between what is a reasonable restriction in terms of the Indian provisions and a reasonable regulation for purposes of the second condition of Article 18. In particular, the latter must be regarded as moving within a narrower and more restricted locus than the former.

d. The initial "fee structure" determined under the regulatory scheme, in terms as set out in the statutory provisions noted above, is unobjectionable.

e. The manner in which any increase in school fees is to be treated, in terms of Rule 7(3), is ultra vires Article 18 of the Constitution. In particular, the one-stage procedure adopted is constitutionally impermissible. Rather, it is the two-stage procedure with reversal of onus that is compatible with what is permissible in terms of the second condition. Rule 7(3) is therefore hereby quashed and declared to be of no legal effect. Subject to what is stated below, the respondents are restrained from giving effect to this provision. If at all the Provincial Government wishes to regulate the increase in school fees it must do so in a constitutionally permissible manner. Again subject to what is stated below, unless proper rules are framed in this regard there is, with the quashing of Rule 7(3), no regulation for purposes of the increase in school fees.

f. Since it is clear that the Provincial Government does, in fact, wish to regulate the increase in school fees, it is directed to frame constitutionally permissible rules within 90 days of this judgment, whether by suitable amendments to the 2005 Rules or otherwise. In summary, the framework to be put in place must include the following elements: (i) the increase in school fees should apply the two-stage procedure outlined above or some permissible variant thereof; (ii) all stakeholders (including in particular parents and guardians) must be given proper notice of any application to increase school fees and an adequate opportunity of taking objections or making any suggestions in relation thereto; (iii) the acceptance or rejection of any proposed increase must be done by a reasoned order; (iv) a proper and detailed procedure for this purpose must be clearly articulated, and applicable timeframes and deadlines clearly set out; (v) since the number of schools that come within the scope of the 2001 Ordinance is very large and the administrative capacity of the concerned Department of the Provincial Government appears to be limited, there must be proper provision for dealing with a large number of applications, any delays and backlogs in processing the same and there should also be some provision for interim measures while the proposed increase is being considered and/or finalized.

g. Till such time as the proper regulatory framework is put in place in terms as above, Rule 7(3) shall continue to remain in force for the interim period. If the rules cannot be framed within

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the stipulated 90 days the Provincial Government or any *stakeholder (e.g., a parent) may file an application in the lead* petition (CP D-5812/2015), seeking a suitable extension in time. However, the Provincial Government shall have to properly explain and give reasons for the delay. The Court may make such orders and give such directions on the application as it deems appropriate, including extending the period for which Rule 7(3) is to continue. It is clarified that if no such application is filed, then the interim continuance of Rule 7(3) shall come to an end on the expiry of the 90 day period.

h. The regulation of the salaries and terms and conditions of the staff, including teachers, is permissible and no exception can be taken to the relevant provisions of the 2001 Ordinance and the 2005 Rules in this regard.

Aggrieved, some schools filed appeals (C.A. No. 1023/2018, etc.) with the leave of this Court granted on 02.08.2018 in the following terms:-

It has been argued, *inter alia,* that the provisions of Rule 10 of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005 are *ultra vires* of proviso (ii-b) to Section 6(1) of the Sindh Private Educational Institutions (Regulations and Control) Ordinance, 2001 *(the Ordinance)*; that the said Rule is absolutely unreasonable and travels beyond the scope of the said proviso, therefore the interpretation of the learned High Court regarding the said Rule on the touchstone of the words *"commensurate with its fee structure"* contained in proviso (ii-b) to Section 6(1) *supra* is not well-founded, rather is against the settled principles of interpretation enunciated by the Courts. Furthermore, Mr. Shahzad Ata Elahi, learned counsel *(for the petitioners in C.Ps No.2066, 2067 and 2529 of 2018)* argued that there can be no arbitrary cap in the Rules on the increase in fees which should be determined on a case to case basis. It is also argued that Rule 7(1) is *ultra vires* the Ordinance.

2. To consider, *inter alia,* the aforementioned submissions, leave to appeal is granted. The operation of paragraph 37 of the impugned judgment shall remain suspended till the disposal of this appeal.

Other schools filed appeals (C.A. No. 1095/2018, etc.) with the leave of this Court granted on 18.09.2018 in the following terms:-

After hearing the learned counsel for the petitioner, we are inclined to grant leave to appeal in these petitions *inter alia* on the following points:-

i. Whether Rule 7(3) of the Sindh Private Educational Institutions (Regulation & Control) Rules, 2005 (Rules), is violative of Article 18 of the Constitution of the Islamic Republic of Pakistan, 1973 (Constitution)?

ii. Whether the impugned judgment dated 5.3.2018, has erroneously declared Rule 7(3) of the Rules as violative of Article 18 of the Constitution, without examining the relationship and implications of Article 23 and 25A of the Constitution on Article 18 of thereof?

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iii. Whether the impugned judgment dated 5.3.2018, has failed to consider that the proposed regulatory framework in the impugned judgment of a two-stage procedure is completely impractical, non-implementable and leads to unfettered discretion?

The petitioners have provided a list of all the schools (marked as Annex-A) which have either been respondents or petitioners before the High Courts or this Court. These schools shall be deemed to have been arrayed as respondents in this case and notices be issued to them and to the existing respondents. Let these appeals be listed for hearing along with other connected appeals including the appeal arising out of C.P. No.1762-L/2018 on 04.10.2018.

5. In the meantime, the parents of students filed various new constitution petitions (C.P. No. D-6274 and D-6822/2017, etc.) before the High Court of Sindh, Karachi seeking similar relief as in C.P. No. D-5812/2015, etc. The new constitution petitions were heard by a different division bench of the High Court of Sindh which referred the matter to the Hon'ble Chief Justice of the High Court of Sindh for formation of a larger bench. A full bench was constituted which heard and allowed the new constitution petitions *vide* judgment dated 03.09.2018 [reported as *Bushra Jabeen and 367 others v Province of Sindh through Chief Secretary and others (2018 MLD 2007)*] ("SHC FB judgment") as under:-

28. To sum up hereinabove discussion, and while keeping in view the ratio of the judgments of the Hon'ble Supreme Court as referred to hereinabove, relating to subject controversy, we hereby declare as under:-

I) The right to carry on any lawful trade, business or profession as guaranteed under Article 18 of the Constitution of Islamic Republic of Pakistan, 1973, is a fundamental right of every citizen of Pakistan, however, is not absolute or unfettered right as it is subject to qualifications, regulations and reasonable restrictions, as may be prescribed by law.

II) The judgment of the learned Divisional Bench of this Court in the case of Shahrukh Shakeel Khan and others v. Province of Sindh and others (PLD 2018 Sindh 498), to the extent, whereby, it has been held that "provisions of Rule 7(3) of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005 are ultra vires to Article 18 of the Constitution, as it provides one-stage procedure, which is constitutionality impermissible, and further, that the right to carry on any lawful trade, business or profession as guaranteed under Article 18 of the Constitution of Islamic Republic of Pakistan, 1973, is not subject to reasonable restriction, as permissible under Article 19(1)(g)(6) of the Indian Constitution", is not in conformity with the judgments of the Hon'ble Supreme Court. In the case of East and West steamship C v. Pakistan (PLD 1958 SC (Pak) 41), Pakcom Limited v. Federation of Pakistan (PLD 2011 SC 44), Tariq Khan Mazari v. Government of Punjab (PLD 2016 SC 778) and 7 members judgment of Arshad Mehmood (PLD 2005 SC 193), Pakistan Broadcasters Association and 10 others v

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Pakistan Electronic Media Regulatory Authority through Chairman and another (PLD 2014 Sindh 630) and Pakistan Broadcasters Association and others v. Pakistan Electronic Media Regulatory Authority and others (PLD 2016 Supreme Court 692), therefore, does not lay correct law on the interpretation of Article 18 of the Constitution as well as on the vires of Rule 7(3) of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, hence of no legal effect.

III) Accordingly, it is declared that provisions of Section 6 of the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, and Rule 7 of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, particularly, sub-rule (3) of Rule 7, do no suffer from any constitutional defect or legal infirmity, hence the same are intra vires to the Constitution and Law. The plea raised on behalf of private institutions (schools), challenging the vires of aforesaid provisions of law and rule is hereby rejected.

IV) Consequently, the relief sought by the students in above Constitutional Petitions, seeking declaration to the effect that the impugned enhancement by the private institutions (schools) in the Annual tuition fee, without approval of the competent authority and in violation of the provisions of the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001 and Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, may be declared to be illegal, is hereby accepted, and it is declared that the impugned enhancement in the Annual tuition fee, over and above 5% from the last fee schedule, by the private institutions (schools) is illegal and without lawful authority, therefore, private institutions (schools) are directed to either to refund the amount of tuition fee collected in excess of 5% from the last fee schedule, to the petitioners within three months from the date of this order, or to adjust the said excess amount against future monthly fee of the students, however not beyond the period of three months.

The above petitions are allowed in the aforesaid terms along with listed applications.

Before parting with this judgment, we may clarify that the declaration as made hereinabove shall apply in rem to all the students, and the private institutions (schools) which are governed under the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, and the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, and have enhanced annual fee in excess of 5% of last schedule fee in violation of law and rule, for the reasons that through instant judgment, we have decided a legal controversy regarding constitutionality of above provisions of law and rule, and also the validity of the impugned enhancement of Annual tuition fee by private institutions (schools).

Aggrieved, various schools filed appeals (C.A. No. 1154/2018, etc.) with the leave of this Court dated 01.10.2018 granted in the following terms:-

Learned counsel for the petitioners have proposed, *inter alia*, the following main points involved in the present litigation and also in certain connected cases for the consideration of this Court:-

i. Private schools and their fee structure and increases can be regulated by the respective governments/legislatures;

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ii. Regulation is taking place through a licensing system in terms of the first proviso to Article 18 of the Constitution of the Islamic Republic of Pakistan, 1973 (the Constitution);

iii. All existing laws envisage permission being sought from the regulator for fee increase and justification be given for fee increase;

iv. Most of the laws provide basic or rudimentary guidelines/criteria while dealing with the application for fee increase. Detailed guidelines have been given on the criteria for fixation of fees in the judgment reported as City School Private Limited Vs. Government of the Punjab and others (PLD 2018 Lah 509);

v. Despite providing that fee increases can only take place with prior permission and on justification being provided, an arbitrary cap is provided in various laws, i.e. 5% in Sindh, 8% in Punjab and 10% in KPK;

vi. The arbitrary capping of fee through an act or rules is an unreasonable restriction in contravention of Article 18 of the Constitution;

vii. "Regulation" means "reasonable restriction" as per the judgment reported as Arshad Mehmood and others Vs. Government of Punjab through Secretary, Transport Civil Secretariat, Lahore and others (PLD 2005 SC 193);

viii. "The regulation of any trade or profession by a system of licensing empowers the Legislature as well as the Authority concerned to impose restrictions on the exercise of the right. They must however, be reasonable and bear true relation to the trade or profession and for purposes of promoting general welfare" as per the judgment reported as Pakcom Limited and others Vs. Federation of Pakistan and others (PLD 2011 SC 44);

ix. "Restriction on fundamental rights can only be upheld if it is established that it seeks to impose reasonable restriction in interest on public at large and a less drastic restriction will not have ensured the interest of general public. This is a principle of proportionality which if violated will be automatically render the condition as unreasonable restriction" according to the case of City School Private Limited (supra);

x. The case of City School Private Limited (supra) has not been appealed against by any school; and

xi. Rule 7(3) of the Sindh Private Educational Institutions (Regulation & Control) Rules, 2005 is also *ultra vires* Section 6 of the Sindh Private Educational Institutions (Regulation & Control) Ordinance, 2001 – there is no power to cap the fee.

2. In order to avoid any conflicting judgments and to comprehensively consider the questions involved in all these matters, it is deemed appropriate to grant leave to appeal in these petitions and to hear and decide them together along with the other cases pending before this Court. Furthermore, we direct that the cases pending before the learned High Courts be requisitioned and listed for hearing along with the matters pending before this Court and the parties in all the cases be issued notices to appear on the date fixed. Let all the cases

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contained in the list below (as provided by the learned counsel) be clubbed with the instant cases and be fixed for hearing on 16.10.2018.

Sr. No.	Case No.	Title	Court
1	WP 2093-P/2016	Peshawar Bar Association v/s Government of KPK etc.	Peshawar High Court
2	WP 1779-P/2017	District Bar Association v/s Government of KPK etc.	Peshawar High Court
3	WP 4632/2018	City Schools (Private) Limited v/s Province of KPK etc.	Peshawar High Court
4	Diary No. 26726/18 on Oct 1, 2018	ESL v/s Province of KPK etc.	Peshawar High Court
5	ICA No. 386/2016 and connected ICAs	City School (Private) Limited v/s ICT etc.	Islamabad High Court
6	ICA No. 104/2018 and connected ICAs	ICT PEIRA v/s ESL	Islamabad High Court
7	Cr. Appl 82-20/2016	Jamshed Khan v/s Read Education Limited	Islamabad High Court
8	CP No. 635/2017	Sher Ahmed v/s Province of Balochistan Etc.	Quetta High Court
9	C.A. No. 134L/2018	Government of Punjab v/s City Schools etc.	Supreme Court of Pakistan
10	C.A. No. 1021/2018 and connected CAs	BPS v/s Province of Sindh etc.	Supreme Court of Pakistan
11	CAs in CPLA No. 953-K and connected CPLAs	Mohammad Imran v/s Province of Sindh etc.	Supreme Court of Pakistan

3. As regards any amount which has been ordered by the High Court to be refunded by the schools to the parents of the students, it is directed that such amount be deposited by the respective schools with the Registrar of this Court within three months.

ARGUMENTS IN FAVOUR OF THE CAP

6. Mr. Faisal Siddiqui, learned ASC submitted that the SHC DB judgment is *per incurium* as it failed to examine the following:-

i. the Ordinance, 2001 and the Sindh Private Educational Institutions (Regulation & Control) Rules, 2005 ("Rules, 2005") contain five opportunities for schools to increase their fees: (a) first determination of fee structure during initial registration (Section 5 of the Ordinance, 2001 read with Rule 4 of the Rules, 2005); (b) fee structure can be changed every three

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years upon renewal [Rule 7(1) of the Rules, 2005]; (c) fee can be increased up to five percent with justification [Rule 7(2) of the Rules, 2005]; (d) fees other than tuition fee can be charged as long as no donations were accepted from students for development purposes [Section 6(i) of the Ordinance, 2001 read with Rule 7(4) of the Rules, 2005]; and (e) huge amounts of yearly admission fees;

ii. the right under Article 18 of the Constitution is competing and should not be read in isolation;

iii. the presence of other articles in the Constitution which may have bearing on Article 18 *supra*;

iv. judgments on the right to education recognized by this Court as a fundamental right under Article 9 of the Constitution;

v. the implications of Article 25A of the Constitution;

vi. Article 18 *supra* is similar to the corresponding article in the Constitution of Pakistan, 1956 ("1956 Constitution") and the superior Courts have consistently interpreted this right to encompass imposition of reasonable restrictions; and

vii. even if there is no concept of reasonable restrictions under Article 18 *supra*, the right to property and profits are subject to reasonable restrictions under Article 23 of the Constitution.

While referring to Article 18 *supra*, learned counsel argued that the right contained therein is neither unqualified nor unconditional rather can only be given effect to if certain qualifications prescribed by law are fulfilled. Furthermore, the profession or occupation must be lawful and it would be unlawful if the activity is a criminal offence or is conducted without fulfilling the statutory requirements of registration, etc. Only when the

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qualifications imposed by law are fulfilled can one enter the profession, occupation, trade or business and only then can one be engaged therein. According to him, the words 'profession' and 'occupation' on the one hand and 'trade' and 'business' on the other have been used interchangeably in the Constitution and by the Courts and that is how they ought to be understood. He submitted that while one may have fulfilled the qualifications and be engaged in a lawful profession or business, a positive power to regulate has been given to the State in provisos (a) and (b) which includes the power to restrict. He stated that the law in question about registration of schools and capping of fees is covered by Article 18(a) as the power of regulation contains the power of restriction and the word 'trade' is interchangeable with 'business'. He further argued that proviso (b) to Article 18 *supra* strengthens the interchangeability argument as the ambit is expanded by the use of the words 'commerce' and 'industry' even though the word 'business' has not been used.

Learned counsel submitted that the superior Courts have held that Article 18 envisages the power to impose reasonable restrictions. He relied on *Arshad Mehmood and others v Government of Punjab through Secretary, Transport Civil Secretariat, Lahore and others* (PLD 2005 SC 193), *Watan Party and another v Federation of Pakistan and others* (PLD 2011 SC 997), *PAKCOM Limited and others v Federation of Pakistan and others* (PLD 2011 SC 44), *WAPDA, Lahore and 2 others v Manzoor Ahmad Arif* (1994 SCMR 1042), *Abdullah v S.D.M., Sukkur and others* (PLD 1989 Karachi 219), *Farough Ahmed Siddiqi v The Province of Sindh and 4 others* (PLD 1996 Karachi 267), *Messrs Sapphire Textile Mills Limited v Pakistan through the Secretary, Ministry of Finance and 2 others* (2006 CLD 1523) and *Pakistan Broadcasters Association and 10 others v Pakistan Electronic Media Regulatory Authority through Chairman and another* (PLD 2014 Sindh 630). According to him, the cap is justiciable to the extent that if the percentage itself is violative of any provision of the Constitution or it is arbitrary or discriminatory, it can be struck down but the Court cannot itself suggest a particular percentage. The Ordinance, 2001 and Rules, 2005 contain provisions which

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substantiate the reasonability of the 5% cap. Though Article 18 does not use the word 'business', this Court in *Arshad Mehmood*'s case uses 'trade' and 'business' interchangeably in the context of Article 18, whereas *Fancy Foundation v Commissioner of Income Tax, Karachi* (2017 SCMR 1395) contains the definition of 'trade' and 'business' albeit in the context of income tax. He also referred to *Krishna Kumar Narula and others v The State of Jammu and Kashmir and others* (AIR 1967 SC 1368). Learned counsel submitted that schools and education fall within 'business' and since business and trade can be used interchangeably, the former can be regulated under Article 18(a). However, a different view has been taken by the Indian Supreme Court in *Modern Dental College and Research Centre and others v State of Madhya Pradesh and others* (2016 7 SCC 353) which has described education as an occupation. Furthermore, the right to education has been recognized as a fundamental right under Article 9 of the Constitution by the superior Courts in the cases of *Rana Aamer Raza Ashfaq and another v Dr. Minhaj Ahmad Khan and another* (2012 SCMR 6) and *Ahmad Abdullah and 62 others v Government of the Punjab and 3 others* (PLD 2003 Lahore 752). He stated that constitutional provisions are to be harmoniously interpreted particularly with regard to competing fundamental rights. He referred to *Messrs Shaheen Cotton Mills, Lahore and another v Federation of Pakistan, Ministry of Commerce through Secretary and another* (PLD 2011 Lahore 120) and *All Pakistan Muslim League through Chief Organizer Sindh v Government of Sindh through Home Secretary and 3 others* (2012 CLC 714). He mentioned that Article 25A, 37, 22(4), 25(3) and 11(3) of the Constitution emphasize the rights in terms of education which is an extension of the fundamental right to education already recognized under Article 9.

Learned counsel concedes that schools should be allowed to earn profit which is their right under Article 18 but there should be no profiteering, fleecing or exploitation. He stated that while he does not disagree with the argument that particular caps can be challenged as being unreasonable, capping per se is not unreasonable and is not a concept unknown to Pakistani law. While elaborating on the types of fee and the scheme of the law,

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learned counsel identified eight separate terms used – fee structure, fee schedule, tuition fee, fees (used independently), fee other than tuition fee, development activity/projects are prohibited, monthly fee, subscription charges (used in the Ordinance, 2001) and admission fee which are not defined in the Ordinance, 2001 or the Rules, 2005. He referred to Paragraph 21 and 22 of Form A of the Rules, 2005 to submit that there was an overall fee structure [Rule 7(1) of the Rules, 2005 and Section 6(1)(ii) and (ii-b) of the Rules, 2005] followed by a more detailed fee schedule [Rules 7(2) and (3) of the Rules, 2005], and the fee structure comprised of the fee schedule, registration fee, admission fee, tuition fee, fee other than tuition fee/funds/deposits, and teacher's remuneration. Rule 4(3)(f) of the Rules, 2005 contained the factors to be looked at while determining fee structure. The scheme of the law as per his understanding is that there is a registration fee paid by the school (Rule 5 of the Rules, 2005 and Form C), admission fee paid by the student [Rule 7(7) of the Rules, 2005], tuition fee [Rules 7(4) and (6), and Rule 4(3)(f) of the Rules, 2005] and fee other than tuition fee [Rule 7(4) of the Rules, 2005]. According to him, the cap in the Rule *ibid* would apply to all kinds of fee and not only tuition fee, however there is an exception in Rule 7(4) of the Rules, 2005 that contemplates for a new fee head which, once approved, will also be subject to the five percent cap.

7. The learned Advocate General of Punjab argued against the LHC judgment and in favour of the Punjab law. He stated that as per the Amendment Ordinance, 2015 and the Amendment Act, 2016, the existing fees of 2014-15 would be the base fee upon which the 2015-16 fee would be determined, and an increase of up to five percent is permitted subject to approval of the authority. Through the Amendment Act, 2017, the five percent increase was made automatic without permission, however any increase beyond five percent would be subject to justifications by the schools and approval of the authority but up to eight percent. Therefore, the cap was eight percent for one time increase in one year, applicable to schools charging fees of Rs.4,000/- or more. He submitted that when the cap was first introduced in 2015, the fee

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in the schools' best judgment was taken to be the base fee and it was not the case that the Government of Punjab had calculated and imposed its own fee. Therefore, the schools' argument that their rights have been infringed is misconceived. According to him, the foregoing were reasonable restrictions under Article 18. In Punjab *vide* notification dated 08.09.2018 the registration of private schools is for five years, after which extension may be granted for 10 years in the case of a self-owned building and five years in the case of a rented premises. The learned Advocate General referred to various paragraphs of the LHC judgment and to Judicial Review of Public Actions by Justice (Retd) Fazal Karim.

8. The learned Advocate General of Sindh explained the scheme of the Ordinance, 2001 and the Rules, 2005. According to him, a school applies for the very first time, and as is evident from Form A of the Rules, when it seeks registration and applies for renewal. He referred to Paragraph 18 of Form A of the Rules, 2005 to state that all this information permits the regulator to know the liabilities of each school. As far as the Government of Sindh is concerned, the document that is attached with the application for registration is the school's fee structure. The schools tell the Government the amounts to be charged subject to the regulator's approval. At that point in time, the regulator looks at three things: (i) admission fee to be charged at the time of granting admission; (ii) security deposit; and (iii) tuition fee. According to him, within 'tuition fee' falls every other fee that the school proposes to charge. Once it is approved, it becomes the fee schedule. In essence, the origin is the fee structure which upon approval becomes the fee schedule. To elaborate, the learned Advocate General stated that the tuition fee is all-inclusive and that each fee is a component of the tuition fee which includes sports, library and laboratory charges, etc. depending on the age of the child, and Form A lets the regulatory authority know how much the schools intend to charge from each child class-wise. Therefore, in essence, the mechanism in private schools is similar to that of public schools and the concept of regulation is similar. He submitted that the five percent cap subject to justification is based on a determination

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that circumstances will not change drastically in two years till the opportunity for renewal of fee structure after three years. The Government of Sindh also found it unreasonable that schools were charging fees from students, for the purposes of land purchase or development of new buildings, who were not going to be provided such service for extended periods of time and this explains the express prohibition in the Ordinance, 2001 and the Rules, 2005 on seeking development charges from students. The cap is also reasonable because schools make windfall gains twice a year in the form of non-refundable admission fee secured from each student applicant which is a sizeable amount, and security deposit kept up to 10 to 12 years which 40 to 45 percent of the parents often do not get back. These are the 'funds' referred to in Form A. According to him, millions of rupees are collected as admission fees, therefore, it is unreasonable to say that the five percent cap hurts schools or that the fees is their only source of income. The Government of Sindh was aware of the profits earned by private schools which explains the information sought in Paragraph 12(b) in Form A. It is appreciated that the schools are teaching the children but the Government is averse to profiteering. Moreover, the school's argument of inflation equally affects the parents who have to pay such fees, therefore there is no reason why schools should be allowed yearly increases with inflation when the common man's salary does not increase with inflation at the same rate. Additionally, school owners are moving into other businesses and the quantum of windfall funds increases every year. Hence, factually speaking the schools do not suffer an economic burden as a result of the cap. Rule 7(4) of the Rules, 2005 permits, after fee schedule approval, the schools to charge students for certain other fees, such as in the event of a security threat whereby the requirement was imposed by the Government.

9. The learned Advocate General for the Islamabad Capital Territory ("ICT") submitted that the law applicable in ICT is different regarding fee determination and fixation and is a lot clearer than in that of the Provinces. In this respect, he referred to various provisions of the ICT Private Educational Institutions Registration & Regulation Act, 2013 ("Act, 2013"), particularly the

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Preamble, and Sections 4 and 5(1)(b) and (c). According to him there is no cap in this law, in fact there is a 20% profit ratio. He stated that schools in ICT have not registered themselves under this law which has been challenged before the Islamabad High Court, the learned Single Bench whereof had declared it to be *ultra vires*. The order of this Court dated 01.10.2018 was passed calling all the matters pending before the Islamabad High Court to this Court to prevent conflicting judgments in the matter.

10. The learned counsel for ICT-Private Educational Institutions Regulatory Authority ("PEIRA") submitted that the ICT Private Educational Institutions (Registration & Fee Determination) Rules, 2016 ("Rules, 2016") framed under the Act, 2013 provide for a cost-plus formula to be applied yearly, whereby schools give PEIRA their audited accounts, stating their costs, salary amounts paid to teachers, etc. and keeping a minimum of 20 percent profit on that, the fee per child is calculated and the profit can be greater than 20 percent as long as schools are able to justify the same. He stated that the Rules, 2016 were challenged before the Islamabad High Court and the learned Single Bench has declared them to be *ultra vires* the law. He stated that schools have not registered themselves as a result of which PIERA has started imposing fines. The Chairman PIERA submitted that the judgment dated 30.05.2016 of the learned Islamabad High Court declared the Act, 2013 as *intra vires* whereafter the Rules, 2016 were notified on 20.06.2016. Subsequently, a restraining order was passed by the learned Islamabad High Court on 05.07.2016 preventing PEIRA from acting upon the Act, 2013 or the Rules, 2016. The matter remained pending for almost two years after which the Rules, 2016 were declared as *ultra vires* by a learned Single Bench of the Islamabad High Court and the Intra-Court Appeal against such judgment is pending. However, due to the non-availability of a learned Division Bench, the matter remains undecided and PEIRA continues to be non-functional in ICT, therefore he prayed for the stay order to be vacated.

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11. The learned Advocate General for Balochistan submitted that the law in Balochistan is similar to ICT's, however, the legislature is currently changing the law. In Balochistan too, the matter was pending before the learned High Court of Balochistan, however the files have been recalled to this Court to avoid conflicting judgments.

12. The learned Advocate General for KPK submitted that there is currently no direct case before this Court. However, an earlier case before this Court was remanded back to the learned Peshawar High Court which was recalled to this Court. In KPK, the law is different from the other Provinces. In this regard he referred to Section 8(2)(i) of the KPK Public Private School Regulatory Authority Act, 2017 which was challenged by the parents and the members of the bar on the ground that the cap was too high. However, the law has not been suspended and remains in force.

13. Mr. Umair Ahmed argued on behalf of the parents from Lahore. They sought enforcement of their fundamental rights. He pointed out that their children have been victimized and harassed in the form of illegal detentions in libraries, etc. in violation of the interim orders of this Court. The police refuse to lodge FIRs due to influence of the school owners. The cap under Section 7A of the Ordinance, 1984 is reasonable because it benefits the public at large, therefore should be upheld. Furthermore, the cap should be applied across the board and not just to schools charging fees of Rs.4,000 or more. Private schools ought to adhere to the rules of fairness in raising their school fees within the cap as envisaged by Section 7A *ibid* and must also justify any fee increase. According to him, parents must be represented in the Government's regulatory framework being major stakeholders. He requested that this Court direct the competent authorities to carry out an impartial and transparent fee audit of private schools as the Punjab Education Department lacks competency in this regard. Moreover, the Government should direct the owners of private schools to refund the illegal fee amounts from 2015-16 till date or it be adjusted in future fee bills,

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and that the withdrawal of awards/scholarships, sibling discounts and other incentives in violation of the interim orders of this Court be addressed as per law. Mr. Ahmed also urged that private schools be stopped from charging millions in extra fees over and above the regular fee schedule, including but not limited to, advance fee for educational services not discharged and summer vacation fee equivalent to regular tuition fee. He prayed that a judicial commission be constituted for the fair and impartial implementation of this Court's orders. Mr. Muhammad Tajasib Minhas, another parent also stated that the cap is reasonable. Referring to a letter of a Deputy Commissioner, he stated that the five percent increase is applied via a formula that results in a three-fold increase in fee, consequently, the parents end up with a collective increase of 30 percent. Finally, another parent, a chartered accountant residing in Islamabad, argued that schools are set up in residential areas and are charging exorbitant fees from the parents in Islamabad; parents are being exploited; and interim orders of this Court not being implemented; therefore PEIRA needs to be strengthened and the Securities and Exchange Commission of Pakistan be directed to conduct forensic audit of private schools.

ARGUMENTS AGAINST THE CAP

14. Mr. Makhdoom Ali Khan, learned Sr. ASC pointed out the differences between the laws in Sindh and Punjab. In Sindh, once a school is registered and a fee is approved, one has to wait for three years to apply for a reset, in the meantime, if a reset is needed, irrespective of any inflation the schools cannot do anything. Since the sole source of income of the schools is the fees, a question arises as to whether they can seek an increase in fee beyond five percent from the Government when there is an increase in input prices. The Sindh Government does not have the power to grant schools more than five percent increase and has fettered its discretion, whereas in Punjab, five percent is an automatic minimum. According to him, the key issue is the *vires* of the Rules, 2005 and whether capping is permissible or not.

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Learned counsel argued that the absence of 'reasonable restrictions' in the plenary part of Article 18 is conspicuous. The proviso is an exception thereto which lists three situations in which the State can intervene but such intervention would not be permissible otherwise. Under proviso (a), the State, for the purposes of regulating trade or profession may introduce a licensing system and may thereunder impose reasonable restrictions. According to him, setting up and conducting the business of an educational institute is lawful. Unlike other rights, Article 18 is a declaratory right, thus the Constitution merely recognizes a common law freedom. With respect to the word 'lawful', he referred to the judgment by Kakaus, J in *The Progress of Pakistan Co., Ltd. v Registrar, Joint Stock Companies, Karachi and another* [PLD 1958 (WP) Lahore 887] and *Arshad Mehmood*'s case *supra*.

Learned counsel submitted that the fetter imposed by the Sindh Government on its own authority irrespective of the objective realities is both contrary to the Constitution and the Statute. Rule 7(3) of the Rules, 2005 has a blanket application that makes no exceptions and is a one-size fits all solution. Therefore, in its application it is *ex-facie* irrational. It has been held by this Court that an authority vested with discretion to decide must structure the same and exercise it in a lawful manner and must not fetter its own discretion. Profiteering ought to be controlled, not legitimate profits or revenue. He argued that some of the expenses are beyond the schools' control, particularly the effect of inflation and devaluation of currency which are practical considerations that ought to be kept in mind while striking a balance.

Learned counsel assisted the Court on the meanings of various terms used in Article 18. By referring to Articles 25(3) and 27(2), he argued that the chapter on fundamental rights gives rights to the citizen and limits the State's authority which cannot, under the guise of regulation, prohibit things. If the State regulates, the Court will decide whether it conforms to the exception or makes an inroad into the plenary part of Article 18, and if it does, the Court will strike such regulation down as unconstitutional.

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In support of his arguments, learned counsel relied on *Messrs East and West Steamship Company v Pakistan, through the Secretary to Government of Pakistan, Ministry of Commerce, Karachi, and others* (PLD 1958 SC 41), *Jibendra Kishore Achharyya Chowdhury and 58 others v The Province of East Pakistan and Secretary, Finance and Revenue (Revenue) Department, Government of East Pakistan* (PLD 1957 SC 9), *Progress of Pakistan*'s case *supra* and *Arshad Mehmood*'s case *supra*. The principles that emerge from *Arshad Mehmood*'s case *supra* are: (i) Article 18 confers rights and any law inconsistent with such rights is void; (ii) an interpretation which suggests that Article 18 *ibid* confers no rights or that those rights can be taken away by the law cannot be correct; (iii) regulation does not mean prohibition or prevention; (iv) no qualification is required for a trade or business; (v) the court has to see whether the regulation is reasonable; (vi) the conditions imposed must not be contrary to the principles of natural justice and the person affected has a right to a fair hearing; (vii) where no right to appeal/review or revision is provided, courts may regard the law as unreasonable; and (viii) the Court has to determine whether the law is in the public interest.

With regard to the word 'qualification' appearing in Article 18, Mr. Khan stated that such word is used in the sense of a requirement for a person to enter into a profession or occupation or occupy an office as held in *Arshad Mahmood*'s case *supra*.

On reasonability of profitability, learned counsel cited *Messrs Elahi Cotton Mills Ltd. and others v Federation of Pakistan through Secretary M/o Finance, Islamabad and 6 others* (1997 PTD 1555), *Qamar Elahi v Government of Sind and another* (PLD 1977 Karachi 421) and *Syed Israr Hussain Shah v Deputy Commissioner, Lahore* (1983 CLC 26). He also referred to *The Registrar, University of the Punjab, Lahore and another v Rana Asghar Ali alias Muhammad Asghar, etc.* (1993 SCMR 1681) on the question of fettering of discretion. Furthermore, failure to differentiate between the various financial situations of the schools, the model on the basis of which they operate and whether they can survive up to year three or not brings in Article 25 of the Constitution. In this context, he referred to *Elahi Cotton*'s case. According to him, Rule

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7(3) of the Rules, 2005 as it exists in its present form is arbitrary and disproportionate and the doctrine of proportionality is to be applied by the Court. For the proposition that reasonableness is to be determined by the Court both in substance and procedure, learned counsel referred to *Arshad Mehmood*'s case *supra*, *Bazal Ahmad Ayyubi v The West Pakistan Province, etc.* (PLD 1957 Lahore 388), *Rao Mahroz Akhtar v The District Magistrate, Dera Ghazi Khan and another* (PLD 1957 Lahore 676) and *Saiyyid Abul A'la Maudoodi and others v The Government of West Pakistan and another* (PLD 1964 SC 673). He argued that when a citizen's fundamental right is infringed and the State takes refuge behind a reasonable restriction or regulation, the latter must show some material to justify the reasonableness thereof. He cited *Malik Ghulam Jilani v The Government of West Pakistan, through the Home Secretary, Lahore and another* (PLD 1967 SC 373), *Government of West Pakistan and another v Begum Agha Abdul Karim Shorish Kashmiri* (PLD 1969 SC 14) and *Mir Abdul Baqi Baloch v The Government of Pakistan through the Cabinet Secretary, Rawalpindi, and others* (PLD 1968 SC 313). His submission is that in this case, there was no material to support the Rules, 2005. He mentioned that there are numerous judgments of the Indian Supreme Court to this effect which date back to *Saghir Ahmad v The State of U.P. and others* (AIR 1954 SC 728), apart from the Pakistani case of *Miss Benazir Bhutto v Federation of Pakistan and another* (PLD 1988 SC 416). He referred to nine Indian judgments in his written submissions to argue that education is a lawful occupation but there is a right to a reasonable fee structure and the schools' autonomy should be preserved and the State can intervene only to prevent profiteering.

Finally, learned counsel referred to various provisions of the Ordinance, 2001 and the Rules, 2005 in support of his submissions. He highlighted that Section 2(ii) of the Ordinance, 2001 defines 'Government' while Section 2(vii) defines 'registering authority' and Section 6(ii) of the Ordinance, 2001 provides that the fee structure shall be fixed with prior approval of the Government. However, this is missing in the Rules, 2005 according to which approval is to be given by the registering authority. Since

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the Government does not feature in the scheme of Rule 7 of the Rules, 2005, therefore, to that extent Rule 7(3) of the Rules, 2005 is *ultra vires* the parent statute. According to him, the registering authority is not the same as the Government, particularly after the definition of the latter in the case of *Messrs Mustafa Impex, Karachi and others v The Government of Pakistan through Secretary Finance, Islamabad and others* (PLD 2016 SC 808).

15. Mr. Shahid Hamid, learned Sr. ASC stated that when the writ petitions were being heard, the Punjab Government conducted a census and identified 60,502 private schools in Punjab of which those charging less than Rs.4,000/- were 98 percent, so the affected schools were only two percent or 1,200 schools. Therefore 98 percent are outside the cap. Furthermore, the number of affected students is not two million, but 500,000 to 600,000 (assuming a higher average of 500 students per 1,200 schools). Referring to page 27 of his skeleton arguments, learned counsel stated that his client Beaconhouse School System is the largest school system in Asia and one of the three largest in the world. Its accounts are unquestionable, in that 25 percent of its equity is owned by an American company and one of the top audit firms of Pakistan, i.e. Ernst and Young, audits its accounts. In this regard he referred to pages 12 to 18 of the skeleton arguments. According to him, although the data about Beaconhouse's fees, composition of expenditures and built-in increases in expenditures was placed before the learned Full Bench of the High Court of Sindh and the Islamabad High Court which were accepted, it is for the Government to show, as argued by Mr. Makhdoom Ali Khan, that the restrictions imposed are reasonable. He argued that there is a better regulatory mechanism in Punjab where there are many regulatory authorities as opposed to Sindh where there is only one in Karachi. He referred to Section 7A of the Ordinance, 1984 and *Arshad Mehmood*'s case *supra* to submit that the cap is unreasonable. According to him in the last five years, Beaconhouse's fee increase was 12 to 13 percent in 2013-14 and 2014-15 as there was no cap, zero percent in 2015-16 due to the freeze, 10 percent in 2016-17 (five plus five percent due to the

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previous years' freeze), and eight percent in 2017-18 and 2018-19 due to the existing law. Mr. Hamid stated that he has no cavil with the proposition that fees can be regulated under Article 18, however the restrictions must be reasonable and according to him the eight percent cap is unreasonable. Referring to *Arshad Mehmood*'s case *supra* he argued that this Court can examine the reasonableness of the cap.

Mr. Hamid submitted that though schools were prevented from shutting down *vide* order of this Court dated 13.12.2018, no responsible school owner can think of closing down a school, at least in the middle of an academic year. Nonetheless, schools are trying to cope and in this regard he referred to page 38 of his skeleton arguments to state that schools including Beaconhouse were suffering a major decrease in revenues due to the said order and they have not been able to pay annual increments to their teaching staff, which account for about half the expenditure. In fact, in some of the schools' teachers have been asked to take voluntary cuts. Justifying generous salaries and perks of Directors he submitted that some of the schools expense out such salaries to avail the benefit of lower tax brackets. But the Auditor General's report has observed that this practice is perfectly legal. He referred to page 42 of the report to state that salaries of 30 to 40 lac are not out of the ordinary when the school makes billions, and to page 12 thereof to highlight that the profit of Beaconhouse was only Rs.1,240/- per student. Learned counsel submitted that any scheme for determination of the output price must have reference to the input prices and cannot be done in isolation. Out of the input prices, 50 percent are salaries, 20 percent are rent, 15 percent utilities, repair and maintenance, security related expenditure, and depreciation must also be taken into account when the buildings are owned by the schools. He stated that Beaconhouse is running at a loss as a result of this Court's order and while it is coping, closures are inevitable in the future. He also referred to extracts from the LHC judgment and the judgment of the learned Islamabad High Court. He also referred to paragraph eight at page 21 of his skeleton arguments to point out why in his opinion the cap is unreasonable and relied on *Arshad Mehmood*'s

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case *supra* and the *State of Madras and others v V.G. Row* (AIR 1952 SC 196) in this regard. According to him, yearly increases as opposed to the three year reset in Sindh is a workable solution. He relied on *de Freitas v The Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing and others (Antigua and Barbuda)* ([1998 UKPC 30) and *D.G. Khan Cement Company Ltd. through Chief Financial Officer v Federation of Pakistan through Secretary Ministry of Law and 3 others* (PLD 2013 LHC 693) to argue that the Court will not always abstain from interfering in a matter because it relates to policy, but will necessarily interfere when the law in question is clearly unreasonable. If the State which has the primary duty wishes to have the cooperation of the private sector to provide free or inexpensive education then private school fees should be subsidized as private schools cannot be run on losses. In fact, to an extent, BPS has anticipated the requirements of the free and compulsory education statutes and is providing scholarships/aid to disadvantaged students. With respect to Rule 10 of the Rules, 2005, he relied on *Karachi Building Control Authority and 3 others v Hashwani Sales and Services Limited and 3 others* (PLD 1993 SC 210) to argue that there is no rational nexus between the teaching staff's minimum salary and the fact that it should be four times the fee of the highest class.

As regards the contempt petition alleging that Beaconhouse had violated an interim order of this Court in which it was required to deposit certain amounts, the learned counsel stated that his client has deposited the full amount to the Registrar of this Court.

16. Mr. Shahzad Ata Elahi, learned ASC submitted that if Article 18 was not in the Constitution, anything could have been done in the education sector. However, with Article 18, the State steps in and requires schools to register and ensure that the fee charged must be reasonable, that fee is not increased within the academic year, that schools justify any increase, all of which requirements the schools he represents have complied with. He maintained that the schools have no qualms about justifying increases and being allowed to increase their fees to the extent they can justify. However, the Sindh and Punjab Rules provide that

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no matter how much the schools are able to justify, the executive's power to grant increases is fettered by a cap. He argued that regardless of the percentage of the restriction, the concept of fettering discretion itself is illegal. When there already exist numerous safeguards in the law for the benefit of the students, there was no need for the cap. The requirement to justify any increase without a cap is constitutional as it will be done on the basis of the material the schools produce before the regulatory authorities. He contended that schools cannot be made to suffer on account of the inability of the Government to regulate its own affairs and while the restriction was for the benefit of the parents, it does not benefit them as much as it exploits the schools. With regard to Article 25A, Mr. Elahi submitted that the duty to provide free and compulsory education is that of the State. However, private entrepreneurs cannot be forced to provide free or cheap education. Therefore, capping of fees is an attempt on the part of the State to shift its own responsibilities onto private entrepreneurs. He also discussed the legislative history of the fundamental rights and submitted that the use of the word 'regulate' as opposed to 'reasonable restrictions' has one of three implications: (i) to give more to the State and less to the citizen; (ii) to give more to the citizen and less to the State; or (iii) it had the same effect. He referred to the cases of *East and West Steamship Company*, *Arshad Mahmood* and *PAKCOM*. He submitted that considering the parliamentary debates, regulation is to be at a lower pedestal than reasonable restriction. Since private education falls within the definition of 'business' therefore, comparison with the Indian judgments is not appropriate as the schools there are not-for-profit and have been held to fall within the meaning of 'occupation'. He argued that this case also revolves around Article 3 of the Constitution thus schools should be allowed to receive fees/increases on the touchstone of justifiability. There is nothing on record to establish that parents cannot pay the fees and are being exploited. It does not constitute exploitation when they are getting a service worth the money they pay. The owners are dedicated educationists first and business persons second. Moreover, this is not about the poor man, rather a benefit that can

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be given to the middle/upper-middle class sections of the society who can afford to pay. The poor ought to be helped through subsidies as stated by Mr. Shahid Hamid.

17. Mr. Feisal Naqvi, learned ASC submitted that Article 18 guarantees the right to trade or business and that the State is entitled to impose reasonable regulations or restrictions. The judgments on this issue hold that schools cannot indulge in profiteering but have a right to operate as reasonable businesses with a reasonable rate of return. He relied upon nine Indian Supreme Court judgments to argue that schools are entitled to fix their own fee structure. He stated that this Court needs to see what is being capped but in the instant matter, revenue is being regulated rather than profit. He relied on *Elahi Cotton*'s case to state that when a business is regulated, room must be left for the businessman to operate at a reasonable profit. He also pointed out that at least the Sindh law has a reset button absent in the Punjab law which in any case is, according to him, entirely disconnected from the stated purpose. Mr. Naqvi pointed out that the Auditor General's report does not identify a single school as guilty of profiteering, in fact, barring two exceptions, each and every school's profit margin is less than 10% which is what the Auditor General has stated it should be. Learned counsel contended that in terms of price fixation statutes, it is settled law that while the Court cannot sit in appeal over the evidence, it can look at the relevance of the factors that have gone into the pricing statute and the process through which a particular pricing mechanism has been fixed. In this regard he referred to *The Panipat Co-operative Sugar Mills v The Union of India (UOI)* (1973 1 SCC 129). Therefore, this Court has to examine the process that the Government of Punjab followed, because none of the figures are justified. He relied upon the cases of *Qamar Elahi supra, Syed Israr Hussain Shah supra* and *All Pakistan Newspapers Society and others v Federation of Pakistan and others* (PLD 2012 SC 1).

18. Mr. Salman Akram Raja, learned ASC representing the schools in the Peshawar cases submitted that this matter fell within a larger framework of the meaning of fundamental rights

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and the extent of regulation which is permissible. There are two main arguments, that of Munir, CJ and Cornelius, J in the *East and West Steamship Company* case *supra*. He stated that Cornelius, J was of the view that the right to commerce is a common law right that pre-dates the regulatory framework that may be set up by the State, whereas Munir, CJ takes a different approach. According to the learned counsel, the concept that there might be some fundamental rights that are primordial and pre-exist the Constitution, for instance the right to human dignity and the right not to be enslaved, which cannot be curtailed by regulation. While nobody can claim a right greater than that given by the Constitution, there are certain rights within certain rights which are so inherent and fundamental that they are beyond the domain of regulation and the right enshrined in Article 18 is one such right.

19. Mr. Khawaja Ahmed Hosain, learned ASC made three submissions. First, that the regulation contemplated by Article 18(a) *supra* is a licensing system which implies that the regulation must be systematic and rational and it would be unconstitutional if its effect was to take away the right to do business or earn a reasonable return. The fee cap of eight percent is not rational. Therefore, the proviso does not apply and that part of the rule is unconstitutional. Unlike in Sindh, there is no reset button in Punjab which places school owners at the mercy of the regulators. He argued that the cap takes away the schools' fundamental right under Article 18 for the reasons that: (i) the Governments of neither Sindh nor Punjab have offered any explanation as to where the respective figures came from which are lower than the current inflation rate and interest rate and are therefore irrational; (ii) the cap does not take into account costs and increase should be calculated with reference to a formula which is rational and (iii) the caps do not regulate prices, but increases, which is not the traditional price ceiling and, therefore, is irrational and discriminatory. The reset argument is unsound because *de facto* it entails a suspension of the schools' fundamental rights and upholding it would set a dangerous precedent allowing the State to suspend fundamental rights. Secondly, Article 25A *supra* should

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not be used to impose an obligation on private businesses which would be tantamount to letting the State abdicate its responsibility under the said article if this Court holds that by regulating the fees of expensive schools, the State is fulfilling its duty to provide free education. There is no fundamental right to private education and there are no competing fundamental rights, although there are competing interests which must be balanced, including those of the parents, the stakeholders, the schools and the teachers. Thirdly, under the Punjab law, schools have to make an application for fixing of fee for the next year by 01.06.2019, therefore, it either be clarified or the interim order be withdrawn and schools be allowed to make the application for next year not on the basis of the 20 percent reduced fee but the fee previously approved by the registering authority.

20. Mr. Ali Reza, learned ASC submitted that his clients are charitable schools where it is up to the parents to donate or offer a fee. The regulator has considered such schools to fall within the ambit of the law just because the parents paid fees in excess of Rs.4,000 and are therefore being made subject to the cap. Neither the not-for-profit schools nor the majority of the private schools, which are in the lower bracket and cater to the lower or lower-middle classes with fees ranging from Rs.5,000 to 15,000, have challenged the laws in question. The matter before this Court is restricted to a handful of schools the reason whereof appears to be the quantum of business. Learned counsel argued that the first part of Article 18 and the proviso are two different things due to the different phraseology used. The Constitution as it existed in 1973 depicts socialist ideals which need to be kept in mind while interpreting Article 18. At that time, trade, commerce and business had different meanings which now need to be treated as interchangeable. The word 'occupation' is used in the first part of Article 18 but not in the proviso, therefore, it envisages regulation of occupation which has been excluded. He stated that the LHC judgment has cited an Indian Supreme Court judgment of 2009 wherein it has been held that education is an occupation. According to him, imparting of education cannot be treated as a

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business. There is no intent of earning profit in a not-for-profit school which falls within the definition of 'occupation' as consistently held by the Indian Courts. Should such schools start to function with the intent of making profit then they cross the line and consequently fall within proviso (a) or (b). The key question is whether the State is looking to regulate non-profit schools and in his view, even if there is capping, there should have been a reasonable classification of the types of schools and it is the failure to do so which has resulted in not-for-profit schools being subjected to the regulations which otherwise should not apply thereto.

21. Learned counsel representing All Management Associations of Schools argued that out of 12,000 private schools in Sindh only 300 charge more than Rs.5,000 and the fees of 97 percent of the schools range from Rs.300 to Rs.5,000. Due to the cap, schools will not be able to maintain or improve the quality of education, particularly considering the high inflation rate. He maintained that the cap should not apply to schools charging fee of Rs.5,000 to 6000.

22. Mr. Abid Hussain Chattha, learned ASC argued that the rate of profit can be capped but not gross income, otherwise the right conferred by Article 18 would be taken away. He submitted that any kind of cap, regulation, qualification, licensing system will always be subject to judicial review. He stated that while there are examples in the Pakistani jurisdiction where minimum and maximum caps with respect to profits have been imposed, the cost of input has always been taken into account and the reasonable rate of profit is factored in to determine the price. Hence, the cap is confiscatory and arbitrary and acts as a clog on entrepreneurship and business. Therefore, it is unreasonable. If the cap is struck down by this Court, Rule 12(ii) of the Rules, 1984 will come into play which provide that the fee will not be fixed beyond reasonable limits. About Rules 11 and 12 of the Rules, 1984, learned counsel mentioned that Section 7A of the Ordinance, 1984 was a standalone provision which was suddenly inserted and bore no nexus with the overall scheme of the law. He added that

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the failure of the Government cannot be made a basis to take away or deny a fundamental right to private citizens.

23. Learned counsel representing Roots Ivy submitted that Article 18 does not furnish any basis to the Legislature or the State to introduce a cap on the gross income of private educational institutions which is confiscatory in nature as it ignores the differing and ever increasing expenses of each school.

REBUTTAL IN FAVOUR OF THE CAP

24. In rebuttal, the learned Advocate General for Sindh submitted that devaluation of rupee would generally not affect the education industry. Under Rule 7 of the Rules, 2005, schools are registered for the first time and are aware that after a specified time they would be able to increase their fees, subject to the approval of the regulator. While the Government is cognizant of the yearly increases in costs, all the information pertaining to fee structure is disclosed to the regulator, therefore nothing prevents the schools from calculating their tuition fee based on all these considerations which they are already doing as they operate as businesses and have tax advisors and auditors. Furthermore, the law discourages profiteering and not revenue or gross income, because the schools' application for registration or renewal informs the regulator of the amounts required to cover costs and the fee from the students, thus the profit margin is evident. Therefore, it is not the regulator that determines profit in light of the law and the rules, rather the schools when they approach the regulator for registration, renewal or approval.

25. In rebuttal, Mr. Faisal Siddiqui, learned ASC submitted that the relationship between the first and second part of Article 18 needs to be understood and a balance struck between them. The former grants individuals rights while the latter gives the State the power to regulate. The question arises as to why 'reasonable restriction' disappears after Article 17 of the Constitution and reappears in Article 19 thereof, and is absent in

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Article 18 *supra*. Furthermore, why have the Courts introduced reasonable restrictions within the notion of regulations. According to him, the answer lies in the first line of the second part – while it is a proviso, it begins with "Nothing in this article shall prevent" which is not usually found in a proviso and is not found anywhere else in the Constitution, where a proviso is combined with a non-obstante clause, although they are found separately in the Constitution. He stated that this explains the relationship between citizen's rights in the first part and the State's regulatory power in the second. The proviso is read as a part of Article 18 and understood in the sense that it does not take away the individual rights given in the first part when interpreting the second part. But at the same time, the individual rights have to be understood in the context of the power of regulation which is given to the State. That is why in all the other articles which only deal with individual rights, the phrase 'reasonable restriction' is mentioned, whereas in Article 18 the word 'regulation' is used and within such word is the concept of restriction which has a built in notion of reasonableness as interpreted by superior Courts. This depicts the Legislature's intent that the State's power of reasonable restriction is an essential part of regulation. He argued that proviso (b) to Article 18 was introduced because of the socialistic nature of the Constitution which was not there in the 1956 Constitution, wherein only provisos (a) and (c) were present. Learned counsel stated that the issue boils down to the debate between Munir, CJ and Cornelius, J in the *East and West Steamship Company* case. All later judgments rely on the reasoning of Munir, CJ which emphasizes the expansive power and administrative reach of the State granted under Article 12 of the 1956 Constitution (the then Article 18 of the Constitution). Referring to *Malik Muhammad Usman v The State through E.A.C. and A.D.M., Quetta and another* (PLD 1965 Lahore 229), he submitted that the Ordinance, 2001 allows reasonable opportunities to increase the fee subject to approval of the regulator. With regard to Rule 10 of the Rules, 2005, Mr. Siddiqui contended that it is not only the salaries that are taken into account but also allowances, it only applies to full time teachers who have a 12 month contract, and trust and

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community schools are excluded therefrom under Rule 10(2) of the Rules, 2005, hence, Rule 10 *ibid* is reasonable.

OPINION

26. We have heard the learned counsel, learned law officers and the parents. The key question involved in this matter is whether the cap on increase in school fees contained in the Rules, 2005 and the Ordinance, 1984 is permissible under Article 18 of the Constitution. In order to resolve this question, the scheme of the relevant laws regarding private educational institutions in the Provinces of Sindh and Punjab and the scope of Article 18 need to be understood.

SCHEME OF PUNJAB LAW

27. In Punjab, initially there was the Punjab Education (Control of Unrecognized Private Institutions) Act, 1953 ("Act, 1953") which provided for Government control over unrecognized private educational institutions. The Act, 1953 was repealed by the Punjab Registration of Unrecognized Educational Institutions Ordinance, 1962 ("Punjab Ordinance, 1962") which had the same purpose as the former. The latter was repealed by the Ordinance, 1984, the purpose whereof was to promote and regulate the setting up and management of private educational institutions in Punjab. Pursuant to Sections 2(9) and 13 of the Ordinance, 1984, the Punjab Private Educational Institutions (Promotion and Regulation) Rules, 1984 ("Rules, 1984") were made. The Ordinance, 1984 was amended from time to time, first by the Amendment Ordinance, 2015 and the Amendment Act, 2016, for the effective management of privately managed educational institutions, for regulating the fee structure and other purposes. The purpose of the Amendment Ordinance, 2017 and the Amendment Act, 2017 was to allow reasonable increase of fee per annum and to deal with other matters related to private educational institutions.

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28. The overall scheme of registration under the Ordinance, 1984 and the Rules, 1984 is as follows:-

i. Institutions[1] register themselves with the Registering Authority[2] notified by the Government of Punjab[3];

ii. An application for registration contained in Form A of Schedule I to the Rules, 1984[4] is to be filed with the District Education Officer of the district in which the institution is or is proposed to be located[5];

iii. Institutions are to pay registration fees according to the institution classification,[6] to be deposited with the State Bank of Pakistan or the District Treasury and the paid Treasury Challan is required to be attached with the application for registration[7];

iv. The concerned District Education Officer forwards the application to the relevant District Committee[8] constituted by the Government of Punjab consisting of at least five members tasked with performing functions prescribed in the Rules, in relation to schools[9][10];

v. The District Committee forthwith determines the correctness of the facts mentioned in the application and after making enquiries about certain matters as prescribed in the Rules,[11] and verifications as it may deem necessary, submits its report (made and signed by not less than three Members of such Committee) with its recommendations to the Registering Authority within sixty days of receipt thereof[12];

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1 Defined in Section 2(4) of the Ordinance, 1984.
2 Defined in Section 2(8) of the Ordinance, 1984.
3 Section 6(5) of the Ordinance, 1984 read with Rule 3 of the Rules, 1984.
4 Section 6(1)of the Ordinance, 1984 read with Rules 4 and 2(a) of the Rules, 1984.
5 Section 6(1) of the Ordinance, 1984 read with Rule 9 of the Rules, 1984.
6 Rule 5 of the Rules, 1984.
7 Section 7 of the Ordinance, 1984 read with Rule 6 of the Rules, 1984.
8 Section 6(2) of the Ordinance, 1984.
9 Defined in Section 2(10) of the Ordinance, 1984.
10 Section 5 of the Ordinance, 1984.
11 Rule 11 of the Rules, 1984.
12 Section 6(2) of the Ordinance, 1984 read with Rule 10 of the Rules, 1984.

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vi. After considering the report of the District Committee and conducting such further enquiries as may be necessary, if satisfied that the conditions for registration prescribed in the Rules, 1984[13] are fulfilled,[14] the Registering Authority issues a Registration Certificate[15] contained in Form B of Schedule I to the Rules, 1984[16];

vii. No order refusing to grant a Registration Certificate is to be made without giving the applicant an opportunity of hearing and recording reasons in this regard[17]; and

viii. The Registering Authority is to decide the application for registration within sixty days from the date of filing thereof[18] and until such time, the institution is allowed to continue to function[19].

The Ordinance, 1984 also contains provision pertaining to inspection[20], cancellation of registration[21], appeal[22], penalties[23], cognizance and summary trial[24], compounding of offence[25], recovery of amounts due[26] and directions and instructions[27].

29. Within the foregoing scheme, Section 7A of the Ordinance, 1984 pertaining to school fees is relevant and is reproduced below for ease of reference:-

> 7A. Fees, etc.– (1) Subject to this section, a school charging fee at the rate of four thousand rupees per month or above shall not charge the fee at a rate higher than five percent of the fee charged for the class during the previous academic year but this limitation shall not apply to a school charging monthly fee from a class of students at the rate which is less than four thousand rupees per month inclusive of the increase in the fee.

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[13] Rule 12 of the Rules, 1984.
[14] Section 7 of the Ordinance, 1984.
[15] Section 6(3) of the Ordinance, 1984
[16] Rules 7 and 2(a) of the Rules, 1984.
[17] Section 6(4) of the Ordinance, 1984.
[18] Section 6(2) of the Ordinance, 1984.
[19] Section 6(3) of the Ordinance, 1984.
[20] Section 8 of the Ordinance, 1984.
[21] Section 9 of the Ordinance, 1984.
[22] Section 10 of the Ordinance, 1984.
[23] Section 11 of the Ordinance, 1984.
[24] Section 12 of the Ordinance, 1984.
[25] Section 12A of the Ordinance, 1984.
[26] Section 12B of the Ordinance, 1984.
[27] Section 12C of the Ordinance, 1984.

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(2) If there is reasonable justification for increase in the existing fee at a rate higher than five percent under subsection (1), the Incharge may, at least sixty days before the commencement of the next academic year, apply to the Registering Authority incorporating justification.

(3) The application shall contain reasons and justification for the proposed increase and all the requisite documents or evidence in support of the application shall be annexed with the application.

(4) The Incharge shall provide such other information or documents to the Registering Authority as may be necessary for the disposal of the application.

(5) The Registering Authority may, after affording an opportunity of hearing to the Incharge and after recording reasons, reject the application for increase in the fee of the school or allow reasonable increase in the fee not exceeding eight per cent of the fee charged for the class during the previous academic year.

(6) *[Omitted]*

(7) The Registering Authority shall, within thirty days from the receipt of the application for increase in the fee, take appropriate decision and inform the applicant of the decision taken.

(8) The admission fee or the security shall not exceed the amount equal to the tuition fee payable by the student for a month.

(9) The word 'fee' in this section means admission fee, tuition fee, security, laboratory fee, library fee or any other fee or amount charged by an institution from a student.

(10) An institution shall not require the parents to purchase textbooks, uniform or other material from a particular shop or provider.

According to the foregoing, schools charging a fee, which means admission fee, tuition fee, security, laboratory fee, library fee or any other fee or amount charged by an institution from a student, at the rate of four thousand rupees per month or above shall not charge fee at a rate higher than five percent of the fee charged for the class during the previous academic year. In other words, such schools are allowed to increase the fee charged for the class during the previous academic year by up to five percent. We do not agree with the argument of the learned counsel that the Ordinance, 1984 does and should not apply to not-for-profit schools for the reason that the said Ordinance does not contain any such distinction. Had the Legislature intended to create such distinction, it would have specifically mentioned so. Applying the settled rules of interpretation, we do not wish to read into the Ordinance, 1984

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something which is conspicuously absent. Therefore, the only schools exempt from such limitation are those charging monthly fees from a class of students at a rate which is less than four thousand rupees per month inclusive of the increase in fee. Should a school charging a monthly fee of more than four thousand rupees per student wish to increase its fee by more than five percent, the Incharge can file an application with the Registering Authority no later than sixty days prior to the commencement of the next academic year. Such application must contain reasonable justification for the proposed increase and all the requisite documents or supporting evidence must be annexed therewith. Should the Registering Authority so require, the Incharge of the schools is required by law to provide such other information or documents as may be necessary to dispose of the application. The Registering Authority can either reject the application or allow a reasonable increase which must not, in any case, exceed eight percent of the fee charged for the class during the previous academic year. However the Registering Authority must afford an opportunity of hearing to the Incharge, take an appropriate decision within thirty days from the receipt of the application, record its reasons in this regard and inform the applicant of the decision taken.

SCHEME OF SINDH LAW

30. The Sindh Registration of Un-Recognized Educational Institutions Ordinance, 1962 ("Sindh Ordinance, 1962") provided for Government control over unrecognized private educational institutions in Sindh. The Sindh Ordinance, 1962 was repealed by the Ordinance, 2001, the purpose whereof was to provide for regulation and control of private educational institutions in the Province. Pursuant to Sections 2(vi) and 15 of the Ordinance, 2001, the Rules, 2002 were made. The Ordinance, 2001 was amended by the Sindh Private Educational Institutions (Regulation and Control) (Amendment) Act, 2003 ("Amendment Act, 2003"). Subsequently, the Rules, 2002 were repealed by the Rules, 2005

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which, though issued on 20.09.2005, were finally gazetted on 29.06.2017 [with certain modification(s)].

31. The overall scheme of registration (and/or renewal) under the Ordinance, 2001 and the Rules, 2005 is as follows:-

i. In order to establish an institution[28] or continue an existing institution[29], it must be registered with the Registering Authority[30] by filing of an application for registration contained in Form A appended to the Rules, 2005 duly accompanied by the documents and registration fee mentioned in the schedule[31];

ii. The application for registration can be obtained from the Registering Authority upon payment of a non-refundable registration fee[32] fixed by the Registering Authority with the approval of the Government[33][34];

iii. Each institution or its branch running under the same management or name at a different premises must be registered separately;[35]

iv. Upon receipt of an application, the Registering Authority is to constitute an Inspection Committee comprising of at least three members (one each from the Education Department, Education Group of the Office of the District Government and the civil society, one of whom shall be nominated as the Chairman), which shall enquire into the matters prescribed Rule 4(3) of the Rules, 2005 and submit its detailed report/recommendations to the Registering Authority within thirty days of the receipt of the application[36];

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28 Defined in Section 2(iii) of the Ordinance, 2001.
29 Defined in Section 2(i) of the Ordinance, 2001.
30 Defined in Section 2(vii) of the Ordinance, 2001.
31 Sections 3 and 4(1) of the Ordinance, 2001 and Rule 3(1) of the Rules, 2005.
32 Rule 3(3) of the Rules, 2005.
33 Defined in Section 2(ii) of the Ordinance, 2001.
34 Rule 3(2) of the Rules, 2005.
35 Section 4(3) of the Ordinance, 2001.
36 Section 5(1) and (2) of the Ordinance, 2001 and Rule 4 of the Rules, 2005.

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v. After considering the report of the Inspection Committee and after conducting such further enquiries as it considers necessary, if satisfied, the Registering Authority is required to grant a Registration Certificate contained in Form B of the Rules, 2005 initially for a period of three years on the terms and conditions mentioned therein[37];

vi. The person to whom the certificate of registration is issued is responsible for due compliance of the provisions of the Ordinance, 2001, the Rules, 2005, the terms and conditions of the certificate and registration and any orders passed or instructions issued by the Registering Authority[38];

vii. The certificate of registration is to be displayed at a prominent place in the institution with open access to the general public[39];

viii. The Registering Authority is to maintain, as required by Form C of the Rules, 2005, a register of the certificates of registration[40];

ix. No order for refusing to grant a Registration Certificate is to be made without giving the applicant an opportunity of hearing and an order granting or refusing an application for registration must contain reasons[41];

x. An existing institution can continue to function for a period not exceeding ninety days from the commencement of the Ordinance, 2001 and where an application is made, until the application is rejected or if any appeal is preferred, until the decision of the appeal[42]; and

xi. The Registering Authority may grant renewal of the certificate of registration for a period of three years upon payment of the fee mentioned in the schedule, as long as

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37 Sections 5(3) and 6(1) of the Ordinance, 2001 and Rule 5(1) of the Rules, 2005.
38 Section 6(3) of the Ordinance, 2001.
39 Rule 5(4) of the Rules, 2005.
40 Section 6(2) of the Ordinance, 2001 and Rule 5(3) of the Rules, 2005.
41 Section 5(4) of the Ordinance, 2001 and Rule 5(2) of the Rules, 2005.
42 Section 4(2) of the Ordinance, 2001.

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it is satisfied with the working and curricular activities of the institution[43] and an order granting or refusing an application for renewal must contain reasons[44].

The Ordinance, 2001 also contains provisions regarding monitoring, inspection, etc.[45], cancellation or suspension of certificate of registration[46], appeal[47], annual reports[48], penalty[49], cognizance of offence[50], jurisdiction[51] and indemnity[52].

32. Within the foregoing scheme, the relevant provisions of the Ordinance, 2001 and the Rules, 2005 pertaining to school fees are reproduced below for ease of reference:-

Ordinance, 2001

6. Registration of an institute.- (1) .....

Provided that-

(i) No donation, from a student, voluntary or otherwise, for development projects of an institution shall be permissible;

(ii) the fee structure of an institution shall be fixed with prior approval of Government;

(ii-b) the pay scales, allowances, leave and other benefits to be admissible to the teachers and other staff of an institution shall be commensurate with its fee structure;

15. Rules.- (1) Government may make rules to carry out the purposes of this Ordinance.

(2) In particular and without prejudice to the generality of the foregoing powers such rules shall provide for-

(c) provision of facilities to students, fixation of tuition fees and other sums to be realized from the students of an institution;

Rules, 2005

4.(3) The committee shall, amongst others, enquire into the following [matters] and submit its detailed report to the Registering Authority:-

(f) suitability of tuition fees and any other subscription charged from students; and

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[43] Rule 6 of the Rules, 2005
[44] Rule 5(2) of the Rules, 2005.
[45] Section 7 of the Ordinance, 2001.
[46] Section 8 of the Ordinance, 2001.
[47] Section 9 of the Ordinance, 2001.
[48] Section 10 of the Ordinance, 2001.
[49] Section 11 of the Ordinance, 2001.
[50] Section 12 of the Ordinance, 2001.
[51] Section 13 of the Ordinance, 2001.
[52] Section 14 of the Ordinance, 2001.

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5.(1) After examination report of the committee, the Registration Authority subjects (sic) to its satisfaction, shall grant registration certificate to an institution, initially for a period for three years in Form 'B' on the terms and conditions mentioned therein.

7.(1) The **Inspection Committee shall recommend the fee structure** of an institution after a detailed inspection of the institution at the time of or renewal of registration of the institution **to the registering Authority**.

(2) The **fee schedule once approved**, shall not be increased, at any time during the academic year.

(3) The fee may be increased up to five percent only of last fees schedule subject to proper justification and approval of the Registration Authority.

(4) Any fee other than tuition fee shall be charged only after approval from the registration Authority subject to the condition that not (sic) fee, charges or voluntary donation would be charged by the institution on Account (sic) of any development activity.

(5) The institute shall ensure that all the conditions of admission along with **schedule of fees dully (sic) approved by the registering authority** shall be printed on the prospectus or on the admission for[m] and shall be provided to the parents or guardians at the time of the admission.

(6) Any complaint regarding the tuition fees in violation of the rules or charging of any fee other than tuition fees shall be liable to be punished under section 11 of the [O]rdinance.

(7) The institutes shall ensure that admission fee is charged from the student only at the time of his first admission in to the institution which shall not be more than three months tuition fees of the respective class in which the student is admitted.

10.(1) Minimum salary and allowances of a full time teacher with twelve months of continuous service shall not be less than four times the monthly fee of the single student [of] the highest class charged by the institution:

Provided that the institution running (sic) by the trust or communities, that the pay scale of teacher staff, of the institution shall be at least at par with the respective government pay scale.

Form A
Application for Registration/Renewal of Registration for Private Educational Institution

21. Schedule of Tuition Fees/Admission Fees charged from the students class/Section-wise. _____ attach separate sheet

22. Schedule of other Fees/Funds/Deposits charged under different head during the last and the current financial year. _____ attach separate sheet

[Emphasis supplied]

33. Before proceeding further, it is pertinent to mention that different terms have been used in the Ordinance, 2001 and the Rules, 2005, i.e. fee structure, fee schedule, tuition fee, fees

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(used independently), fee other than tuition fee, development projects and development activity, monthly fee, subscription charges and admission fee, none of which have been defined therein. Therefore, the entire scheme needs to be examined in order to understand the meaning of the terms in their respective contexts. According to the foregoing, an institution that files its application for registration (or renewal) with the Registering Authority is required to disclose as per Paragraphs 21 and 22 of Form A reproduced hereinabove the various fees it proposes to charge in the upcoming academic year. The Inspection Committee constituted by the Registering Authority carries out a detailed inspection of the institution for which it considers, *inter alia*, the suitability of tuition fees and any other subscription charged from students and recommends the fee structure to the Registering Authority to be fixed with the prior approval of the Government of Sindh, which is to remain for the period of validity of the registration certificate, i.e. three years, till renewal. To our understanding, fee structure is the whole regime of fees and comprises of various heads of fees including admission fee, tuition fee, fee other than tuition fee and subscription charges. Whereas the fee schedule contains details regarding the respective amounts and timelines.

34. We find that this interpretation captures the distinction which is reflected in Paragraphs 21 and 22 of Form A of the Rules, i.e. there is an overall fee structure and a detailed fee schedule. This distinction seems to be based on the fact that prior approval of the Government of Sindh is only required for fee structure, as it may not have the time or capacity to approve minute details contained in the fee schedule which are left to the Registering Authority for approval as is clear from a combined reading of Rules 7(2) and (5) of the Rules, 2005. Once the fee schedule is approved by the Registering Authority, it is not to be increased at any time during the academic year. However, the fee (comprising of various heads of fees) may be increased up to five percent of the last fee schedule, subject to proper justification and approval of the Registering Authority. We do not agree with the argument of the learned counsel that the five percent cap only

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applies to tuition fee for the reason that the lawmaker could have specifically used the term 'tuition fee' as opposed to 'fee' had it so wished, as it has done in Rule 7(4) of the Rules, 2005. Furthermore, interpreting 'fee' to mean 'tuition fee' only, would render the parts of the rule redundant as it would open the possibility of institutions misusing Rule 7(4) *ibid* to exorbitantly increase any fee other than tuition fee in order to compensate for the reduction in income as a result of the cap, thereby essentially extracting tuition fee under the garb of a new head under Rule 7(4) *ibid*. Whereas Rule 7(4) *ibid* seems to apply to situations where institutions wish to add any new fee head to their fee structure/schedule subject to the approval of the Registering Authority, however no fee, charges or voluntary donation would be charged by institutions on account of any development project/activity the costs of which are to be borne by the institution. Since the terms 'development project' and 'development activity' have not been defined either in the Ordinance, 2001 or the Rules, 2005, as per the settled canons of interpretation, they shall be construed in accordance with their ordinary meaning which are projects or activities pertaining to construction, redevelopment, reconstruction, or rehabilitation of an institution's facilities.

35. Be that as it may, it is pertinent to note that the term 'any fee outside the fee schedule' in Rule 7(4) *ibid* appears to fit more appropriately with the overall scheme of the law and which ought to have been used as opposed to 'tuition fee', because at this stage the heads in the fee schedule have already been approved and there is no question of fresh approval. Once a new head is added, it too, will be subject to the conditions that it shall not be increased at any time during the academic year and only up to five percent of the last fee schedule, subject to proper justification and approval of the Registering Authority. Institutions are to ensure that all the conditions of admission and the approved fee schedule are printed on the prospectus or on the admission form and provided to the parents or guardians of students at the time of the admission, and that admission fee is charged from the student only at the time of his first admission into the institution which shall not be more than three months' tuition fees of the respective

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class in which the student is admitted. Any complaint regarding the tuition fees in violation of the rules or charging of any fee other than tuition fees (not mentioned in the fee structure and without the approval of the Registering Authority as required under Rule 7(4) of the Rules, 2005) are liable to be punished under Section 11 of the Ordinance, 2001.

36. As regards the minimum salary of teachers under Rule 10 of the Rules, 2005, it is not a blanket rule as conditions have been provided in Rule 10 *ibid* itself. First, it is not only the salary but salary combined with allowances which must not be less than four times the monthly fee of a single student of the highest class charged by the institution. Secondly, this rule only applies to full time teachers with twelve months of continuous service. Thirdly, institutions run by trusts or communities are excluded from such requirement as they are only required to ensure that the pay scale of their teaching staff is at par with the respective Government pay scales.

SCOPE OF ARTICLE 18 OF THE CONSTITUTION

37. In order to answer the question as to whether the provisions in question offend Article 18 of the Constitution, the scope of the said Article needs to be examined. The provisions of Article 18 *ibid* are reproduced below for ease of reference:-

> 18. Freedom of trade, business or profession.
>
> Subject to such **qualifications**, if any, as may be **prescribed by law**, every citizen shall have the right to enter upon any **lawful** profession or occupation, and to conduct any **lawful** trade or business:
>
> **Provided that nothing in this Article shall prevent**:
> (a) the **regulation** of any trade or profession by a **licensing system**; or
> (b) the regulation of trade, commerce or industry in the interest of free competition therein; or
> (c) the carrying on, by the Federal Government or a Provincial Government, or by a corporation controlled by any such Government, of any trade, business, industry or service, to the exclusion, complete or partial, of other persons.
>
> [Emphasis supplied]

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Starting from the case of *Shahabuddin and another v Pakistan and another* [PLD 1957 (WP) Karachi 854] the High Court of Sindh, when faced with a petition questioning the legality of the restrictions imposed on the slaughter of cattle and sale of beef and mutton combined with the control of their prices, held with respect to Article 12 of the 1956 Constitution that:-

> With regard to the second argument, I agree with him that Indian rulings on constitutional questions cannot be referred to without due regard to the differences which exist between the Indian Constitution and our Constitution. There is considerable difference between Article 12 of our Constitution and Article 19 (6) of the Indian Constitution. The expression "reasonable restrictions" does not exist in our Article 12, but this does not mean that imposition of unreasonable restrictions on trade is permissible under our Constitution. The measure of reasonableness in our Constitution as indicated above, is provided by the concept of the expression "regulation" itself. The restrictions should be consistent with the purpose of "regulation" and not so unreasonable as to be in excess of it. The Chief Commissioner has ordered by Notification No. F. 1 (15)/53-L.S.G. dated 7th December 1955 read with Notification No. F.1 (15)/53-L.S.G. dated 20th October 1953 that Thursdays, Fridays and Tuesdays shall be meatless days, that is to say, no meat shall be bought, sold or procured on these days, and he also ordered that all slaughter-houses shall remain completely closed on Mondays, Thursdays and Wednesdays. The petitioners' objection is that these restrictions are in excess of the limits implied in the meaning of 'regulation' and amount to prohibition. This argument is also unhelpful because no factual basis for this contention has been disclosed and unless it is shown in a concrete manner as to how the restrictions imposed are in excess of the object or the actual limits of regulation for the purposes of this case, it is impossible to judge whether the restrictions are proper according to the circumstances or in excess of the need and, therefore, unreasonable.

38. In the *East and West Steamship* case *supra*, Munir, CJ. Who authored the majority opinion observed:-

> Mr. Brohi argues that Article 12 of our Constitution must be construed in the same manner as section 92 of the Constitution of Australia was construed by the Privy Council, but the fallacy underlying the argument is quite obvious. The Constitution of Australia had provided that trade, commerce and intercourse between the States "shall be absolutely free" and what the Privy Council ruled was that if a licensing law has the effect of prohibiting trade that law offends against section 92 of the Constitution. In the present case, the position is fundamentally different because our Constitution expressly provides that a trade may be regulated by a licensing system. Further, in the Australian Constitution there was no proviso like the one we have in Article 12 ; on the contrary section 92 had enjoined that trade and commerce shall be absolutely free. If, therefore, the licensing law had the effect of -prohibiting a trade, it clearly came into conflict with section 92 of the Australian Constitution. In our Constitution the right given by Article 12 has to be read subject to clause (a) of the proviso which expressly states that a trade may

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be regulated by a licensing system, and if the effect of a licensing system be prohibition as it was so held in Hughes's case, then it follows that prohibition of a trade by a licensing system was contemplated by the framers of the Constitution.

[Emphasis supplied]

Muhammad Yaqub Ali, J. in his concurring opinion in the case of *Government of Pakistan v Syed Akhlaque Hussain and another* (PLD 1965 SC 527) was of the view that:-

The first part of the right does not require our attention as the respondent was fully qualified to enter upon the profession of law and had actually entered it before he was elevated to the Bench. **We are, thus, concerned with clause (a) in the second part. The provisions in Fundamental Right VIII that a citizen "possessing such qualifications, if any, as may be provided by law" and "the regulation of any trade or profession by a system of licensing" empower the Legislature as well as the authorities concerned to impose restrictions on the exercise of the right. They must, however, be reasonable and bear true relation to 'trade' or 'profession' and for purposes of promoting general welfare.** Even in those countries where the right to enter upon a trade or profession is not expressly subjected to conditions similar to Fundamental Right VIII, it was eventually found that State has, in the exercise of its 'police power' the - authority to subject the right to a system of licensing, i.e., to permit a citizen to carry on the trade or profession only if he satisfies the terms and conditions imposed by the prescribed authority for the purpose of protecting and promoting general welfare, e.g., Nashville Co. v. Alabama ((1888) 128 U S 96), Carolene Products Co. v. U. S. ((1944) 323 U S 18), Corn Products v. Eddy ((1919) 249 U S 427), Booth v. Illinois ((1902) 184 U S 425 (429)) West Coast Hotel v. Parrish ((1937) 300 U S 379). **It may be added that as held in Eric R. Co. v. Williams ((1914) 233 U S 685), in the exercise of its police power the State cannot resort to arbitrary or oppressive means to pursue its ends or objectives, but anything that it may do should be shown to bear a real and substantial relation to the pursuit of general welfare. The right is, thus, not unfettered; but, as said a little while ago, the restrictions must be reasonable in that the qualifications must bear a true relation to trade and profession and for purposes of promoting general welfare.** In the instant case, the policy of law from the beginning has been that retired Judges should not practise before Courts over which they have presided or the Courts subordinate thereto. There are more than one reason mentioned in the judgment of the learned Chief Justice on which this policy of law is based. It is not necessary for me to repeat them here except to add that each one of them bears a real and substantial relation to the promotion of general welfare. Moreover, in the legal profession the system of licensing in the form of restricting the field of practice in case of different categories of lawyers has existed all along. Restricting the field in the case of retired Judges to Courts of jurisdiction higher than the Courts over which they have presided is, thus, not a new or unreasonable restrictions which may be struck down as opposed to Fundamental Right No. 8.

[Emphasis supplied]

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39. It has been held by this Court in the judgment reported as *Government of Pakistan through Secretary, Ministry of Commerce and another v Zamir Ahmad Khan* (PLD 1975 SC 667), as cited with approval by this Court in *Watan Party*'s case *supra*, that:-

> Article 18 of the Constitution, which relates to the freedom of trade, business or profession, which corresponds to Article 15 of the, Interim Constitution, and which incidentally held the field at the relevant time, assures the citizens the right to enter upon any "lawful profession or occupation" and "to conduct any lawful trade or business". **It is important to point out that the word "lawful" qualifies the right of the citizen in the relevant field. This clearly envisages that the State can by law ban a profession, occupation, trade or business by declaring it to be unlawful which in common parlance means anything forbidden by law**. Prostitution, trafficking in women, gambling, trade in narcotics or dangerous drugs are common place instances of unlawful profession or trade. These are inherently dangerous to public health or welfare. Therefore, on the wording of Article 18 of the Constitution, the right to enter upon a profession or occupation or to conduct trade or business can hardly be described to be a constitutional or fundamental right when such right may be denied by law. In this respect our Constitution stands in sharp contrast with the corresponding provision of the Indian Constitution which omits the use of word "lawful" in the relevant provision.
>
> [Emphasis supplied]

In *Administrator, Market Committee, Kasur and 3 others v Muhammad Sharif* (1994 SCMR 1048), this Court held as follows:-

> In the present proceedings the precise question for determination is whether the respondents can challenge the authority of the Government to establish a new market under the Ordinance or the respondents may use the old market for the purpose of purchase and sale of their goods. The learned counsel emphatically argued that the respondents cannot be denied their constitutional right to transact business in old market as it offends their vested Fundamental Right No. 18 incorporated in the Constitution. The respondents, according to their own statement, are doing business in the old market, and their main grievance is that they should not be compelled to do their business in the new market. F.R. No. 18 permits a citizen to conduct any lawful trade and business but the Government may regulate the trade by a licensing system. **Licensing system is itself a restraint on the trade, but the Constitution empowers the Government to impose reasonable restrictions. Reasonable restrictions authorised by the Constitution do not negate the Constitutional rights of a citizen to do business unhindered without any condition. A reasonable classification is always considered to be within the framework of the fundamental right.** Law may regulate the mode of carrying on business in a market place. There is no bar of exercise the lawful trade but the interest of residents of the city should be guarded as a public policy. A right to do business does not guarantee a trader an uncontrolled privilege. The law has been enacted for the benefit of growers who are engaged in the

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trade. It is a beneficial legislation. To establish a market it is necessary to regulate the business in orderly fashion. A market may be established at a suitable place. A law regulating the trade and making prohibitions of doing business outside the market area does not offend the constitutional guarantee of freedom of trade. The right to do business in old market is not absolute. It is not the privilege of the respondents to do business in old market.

[Emphasis supplied]

40. This Court in *Arshad Mehmood*'s case *supra* has held that:-

24. It is to be noted that our Constitution stands in sharp contrast to the corresponding provisions of Indian Constitution: A comparison of Article 18 of the Constitution and Article 19 (1)(g)(6) of the Indian Constitution manifestly makes it clear that in later Constitution, words "lawful" and "regulation" are conspicuously omitted but while defining the word "regulation" our Courts have followed the interpretation of Indian Supreme Court of expression "reasonable restriction", while dealing with the concept of "free trade/business etc." under Article 18 of the Constitution, despite the distinction noted herein above.

Whereas in Black's Law Dictionary the word 'regulation' has been defined as follows:-

> "Regulation.- The act of regulating; a rule of order prescribed for management or government; a regulating principle; a precept. Rule of order prescribed by superior or competent authority relating to action of those under its control. Regulation is rule or order having force of law issued by executive authority of government."

Perusal of above definition persuades us to hold that there cannot be denial of the Government's authority to regulate a lawful business or trade, but question would arise whether under the garb of such authority, the Government can prohibit or prevent running of such a business or trade...

25. It may be noted that broad principles laid down in the judgments of Indian jurisdiction, some of which have been noted herein above, interpreting the word "reasonable restriction", did not say that it would also mean "prohibition" or "prevention" completely, except under certain circumstances.

26. Now we have got before us the definition of the word "reasonable restriction" as defined by the Courts of Indian jurisdiction and the definition of the word "regulation" according to our own Court, and as per its dictionary meanings. Therefore, it would be seen that in order to resolve the controversy, which definition, out of two, is to be followed...

27. The edifice of the arguments of Syed Ali Zafar, learned ASC is based on premises that as appellants were not qualified to get franchise of specified routes, therefore, in terms of Article 18(a) of the Constitution, they were excluded from the business of transport as per the provisions of section 69-A of the Ordinance. **But in our opinion, in Article 18 of the Constitution, word "qualification" has been used to confer a right upon a citizen to enter upon any lawful profession or occupation and not to conduct any lawful trade or business.** Admittedly Section 69-A of the Ordinance had not prescribed a qualification for the transporters. As per ordinary meanings of, "qualification"

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quality, which is legally necessary to render a person eligible to fill an office or to perform any public duty or function like a qualified voter, who meets the residence, age and registration requirements etc. [Black's law Dictionary (page 1116)], therefore, it can be safely concluded that a person without having a qualification can run a business or trade of transport...

As observed herein above, Constitution is a living document which portrays the aspirations and genius of the people and aims at creating progress, peace, welfare, amity among the citizens, therefore, while interpreting its different Articles particularly relating to the fundamental rights of the citizens, approach of the Courts should be dynamic rather than static, pragmatic and not pedantic and elastic rather than rigid. As such, following this principle and also keeping in view other provisions of the Constitution, including Article 3, 9, 18 as well as Article 38 of the Constitution, which deals with the principles of State policy, **we are inclined to hold that if the definition of word "regulation" as laid down in the judgments cited herein above, is applied to hold that under licensing system, unless the business is unlawful or indecency is involved therein, the legislature can enact laws, which will promote a free competition in the fields of trade, commerce and industry. At any rate, if restrictions are to be imposed to regulate such trade or business, those should not be arbitrary or excessive in nature, barring a majority of persons to enjoy such trade.** In the instant case, as per the requirement of Section 69-A of the Ordinance, the appellants, who are the owners of the stage carriages as per the definition under section (2)37 of the Ordinance, would not be in a position to run the business on the specified routes, franchise of which has been offered to the respondents because it has been inferred from the facts of the case put forward by parties' counsel that for one route they have to arrange a fleet of stage carriages. Obviously the appellants are not in a position to arrange such fleet, on account of their financial position or being Un -influential person. They are also not in a position to obtain hefty loans from the financial institutions, as have been given to respondents at 70% and 30% ratio, and thus unable to compete with the respondents. Consequently, such conditions would appear to be not only arbitrary but oppressive in nature and tend to deprive them from enjoying the fundamental right of freedom of trade and business, as per Article 18 of the Constitution. **Therefore, in such situation it becomes duty of the Court to see the nature of the restrictions and procedure prescribed therein for regulating the trade and if it comes to the conclusion that the restrictions are not reasonable then the same are bound to be struck down.**

[Emphasis supplied]

41. In the case of *K.B. Threads (Pvt.) Limited through Chief Executive and others v Zila Nazim, Lahore (Amir Mehmood) and others* (PLD 2004 Lahore 376), while discussing the meaning of scope of Article 18, the learned Lahore High Court in its judgment authored by Saqib Nisar, J. (as he was then) held as follows:-

14. From a plain reading of the Article, it consists of two parts. The first, which confers upon a citizen a right to choose his profession and business, etc. and is objected towards enabling the citizen to explore and adopt the best for his future and the

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means of his living and earning; and the best for the expression and recognition of his skill and the ability. However, this right is not absolute and unqualified, rather the Article itself permits the State through proper legal means to impose certain qualifications for the exercise of the right, without possessing which, it cannot be so exercised. For example, a doctor or a lawyer for practicing in their relevant fields, essentially needs the degree of M.B.,B.S. or LL.B. Such qualification may also be prescribed for a person who intends to conduct a particular business or trade, which may involve some special skill and expertise. The second part of the Article, permits only such profession or the business, etc. which is "lawful". Meaning thereby that any unlawful profession, etc. shall not be protected under this. The expression "lawful" appearing in the Article has been used in contradistinction to the word "unlawful" and shall aptly mean according to the Black's Law Dictionary, 8th Edition, page 885, as follows:-

> "Legal; warranted or authorized by the law; having the qualifications prescribed by law; not contrary to nor forbidden by the law; not illegal.
>
> The principal distinction between the terms 'Lawful' is that the former contemplates the substance of law; the latter the form of law. To say of an act that it is 'lawful' implies that it is authorized, sanctioned, or at any rate not forbidden by law."

It is thus clear that every citizen shall have the right to choose and conduct any profession, occupation, trade or business, but subject to the requisite qualifications, if any, prescribed by the law in that behalf and that further such profession etc. has not been declared unlawful or forbidden by any law. It may however, be observed that the validity of such prescribed qualifications or the prohibition can still be examined by the superior Courts in exercise of the power of the judicial review, on the touchstone of other fundamental rights, including Article 18 and other provisions of the Constitution and the law.

15. Before examining the question, if the impugned ban has breached the rights of the petitioner, I may briefly like to deal with the proviso to Article 18, which creates an exception to the right and permits the State to enforce and regulate the trade or the profession by a licensing system; control the monopoly for a free competition and restricts any trade/business exclusively to be conducted by the State itself. Anyhow, it is not the case of either of the party that the present matter falls within the exception provided by the proviso.

While referring to *Zamir Ahmed Khan*'s case *supra* a five member bench of this Court in *Watan Party's* case observed as follows:-

> The same principle was enunciated by this Court in the case of Arshad Mehmood (supra). This Court observed that the Government has the authority to regulate a lawful business or trade. Reasonable restriction, however, does not mean prohibition or prevention completely. Article 24(1) of the Constitution envisages that no person shall be deprived of his property save in accordance with law.

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42. This Court in the *PAKCOM* case *supra* cited with approval the extract from *Akhlaque Hussain*'s case *supra* reproduced earlier in this opinion:-

> 52. The interpretation of Article 18 has been made variously and the judicial consensus seems to be that the "right of freedom of trade, business or professions guaranteed by Art. 18 of the Constitution is not absolute, as it can be subjected to reasonable restrictions and regulations as may be prescribed by law. Such right is therefore not unfettered. The regulation of any trade or profession by a system of licensing empowers the Legislature as well as the authorities concerned to impose restrictions on the exercise of the right. They must, however be reasonable and bear true relation to 'trade' or profession and for purposes of promoting general welfare. Even in those countries where the right to enter upon a trade or profession is not expressly subjected to conditions similar to this Article, it was eventually found that the State has, in the exercise of its police power, the authority to subject the right to a system of licensing, i.e., to permit a citizen to carry on the trade or profession only if he satisfies the terms and conditions imposed by the prescribed authority for the purposes of protecting and promoting general welfare" (PLD 1989 Kar. 219, Govt. of Pakistan v. Akhlaque Hussain PLD 1965 SC 527).

This Court in *Dossani Travels Pvt. Ltd and others v Messrs Travels Shop (Pvt) Ltd. and others (PLD 2014 SC 1)* held as follows:-

> 16. A bare perusal of Article 18 would show that the right of freedom of trade, business or profession is not an absolute right rather it is qualified by the expression, "subject to such qualifications, if any, as may be prescribed by law" and there are three exceptions which stipulate: (a) the regulation of any trade or profession by a licensing system; (b) the regulation of trade, commerce or industry in the interest of free competition therein; and (c) the carrying on, by the Federal Government or a Provincial Government, or by a corporation controlled by any such Government, of any trade, business, industry or service, to the exclusion, complete or partial, of other persons. These qualifications empower the government to lay down a policy and the Hajj Policy has been framed in terms of the power of the government stipulated in the foregoing exceptions...
>
> 17. The Constitution of a country is an organic whole and the import of a certain provision has to be construed in the context of the overall scheme of the Constitution. **By qualifying the right to business and trade, the Constitution makers wanted to create a balance between the societal needs and the rights of an individual.** In Pakistan Muslim League (N) through Khawaja Muhammad Asif M.N.A. and others v. Federation of Pakistan through Ministry of Interior and others (PLD 2007 SC 642), this Court had occasion to dilate upon this "balance" and observed as follows:-
>
> "28. The Fundamental Rights can neither be treated lightly nor interpreted in a casual or cursory manner but while "interpreting Fundamental rights guaranteed by the Constitution, a cardinal principle has always to be borne in mind that these guarantees to individuals are subject to the overriding necessity or interest of community. A balance has to be struck between these rights of individuals and the interests of the community. If in

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serving the interests of the community, an individual or number of individuals have to be put to some inconvenience and loss by placing restrictions on some of their rights guaranteed by the Constitution, the restrictions can never be considered to be unreasonable."

18. In Information Systems Associates Limited through (CEO) v. Federation of Pakistan through Secretary Information Technology and Telecommunication Division Ministry of Information Technology and another (2012 CLC 958), a Division Bench of the High Court of Sindh commented on the ambit and import of Article 18 of the Constitution and held as under:-

21. From the plain reading of the above Article, it consists of two parts. The first, which confers upon a citizen a right to choose his profession and business, etc. and is objected towards enabling the citizen to explore and adopt the best for his future and the means of his living and earning; and the best for his expression and recognition of his skill and the ability. However, this right is not absolute and unqualified, rather the Article itself permits the State through proper legal means to impose certain qualification for the exercise of the right, without possessing which, it cannot be so exercised. Such qualification may also be prescribed for a person who intends to conduct a particular business or trade, which may involve some special skill and the expertise. The second part of the Article, permits only such profession or the business, etc. which is "lawful". Meaning thereby that any unlawful profession, etc. shall not be protected under this Article. The expression "lawful" appearing in the Article has been used in contradistinction to the word "unlawful".

[Emphasis supplied]

43. In the case of *Haji Mullah Noor Ullah v Secretary Mines and Minerals and 3 others* (2015 YLR 2349), a learned Division Bench of the High Court of Balochistan held as under:-

22. Right to freedom of trade, business and profession as enshrined in Article 18 of the Constitution though fundamental, is not an absolute right and is always subject to reasonable restrictions, which may be imposed in the larger interests of the society. Freedom of profession, trade and business as contemplated by Article 18 are always subject to the limits as may be imposed by the State in the interest of public welfare. There is no cavil to the proposition that every citizen has a right to carry on any business of his choice; however, there is no right to carry on any business inherently dangerous or pernicious to the society. Under the Constitution, a proper balance is intended to be maintained between the exercise of the right conferred by Article 18 of the Constitution and the interests of the citizen in the exercise of his right to acquire, hold or dispose of his property to carry on occupation, trade or business. In striking that balance the danger which may be inherent in permitting unfettered exercise of right in a commodity must of necessity influence the determination of the restrictions which may be placed upon the right of the citizen to the commodity.

23. The rights of citizens as guaranteed under Articles 18 and 19 of the Constitution are not absolute or unfettered, but the same are subject to law and reasonable restrictions, which may be imposed by law...

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The learned High Court went on to refer to various paragraphs from the cases of PAKCOM *supra* and *Pakistan Muslim League (N) through Khawaja Muhammad Asif, M.N.A. and others v Federation of Pakistan through Secretary Ministry of Interior and others* (PLD 2007 SC 642). In the case of *Messrs D. S. Textile Mills Limited v Federation of Pakistan and others* (PLD 2016 Lahore 355), the learned Lahore High Court observed as follows:-

> 9. Every citizen has the right to enter into a lawful trade or business under Article 18 of the Constitution. However, this fundamental right does not prevent the regulation of any trade or profession by a licensing system. "Regulation" means "a rule, principle, or condition that governs procedure or behavior." Regulation is "sustained and focused control exercised by a public agency over activities that are valued by a community has been referred to as expressing a central meaning. Regulation is also used in the following senses: (a) where regulation involves the promulgation of a binding set of rules to be applied by a body devoted to this purpose. (b) where regulation covers all state actions that are designed to influence business or social behaviour. The concept of regulation is often thought to of as an activity that restricts behaviour and prevents the occurrence of certain undesirable activities (a "red light concept"). The broader view, is however, that the influence of regulation may also be enabling or facilitative ('green light' concept) or a mix of both. "License" means "official or legal permission to engage in a regulated activity."

In the judgment reported as *Tariq Khan Mazari and 3 others v Government of Punjab through Secretary Industries and 3 others* (PLD 2016 SC 778), this Court held as under:-

> 19. ...It has been contended that the impugned Notification violates the appellants' fundamental right contained in Article 18 of the Constitution to conduct the business of setting up sugar mills and manufacturing sugar therefore the said ban must yield to the Constitution. To appreciate the contention it would be appropriate to reproduce the said provision of the Constitution...
>
> The case of Government of Pakistan v. Zamir Ahmad Khan (PLD 1975 Supreme Court 667) considered the licensing regime enabling import of cinematograph films and the amendment made therein pursuant to which the respondents were disqualified from importing films. A three member bench of this Court considered the scope of Article 18 of the Constitution. It also considered whether the issuance of a license can be claimed as a right even if it was contrary to the policy objective of the Government and whether a writ can be issued which would defeat the policy that was competently made by the Federal Government. Muhammad Gul J, delivered the courts opinion, and it would be appropriate to reproduce the following extracts therefrom...
>
> The above judgment was referred to and approved (at page 223) in the seven member bench judgment of this Court in case of Arshad Mehmood v. Government of Punjab (PLD 2005 Supreme Court 193). However, the point for determination in Arshad

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> Mehmood's case was quite different, which was to consider the constitutionality of section 69-A introduced in the West Pakistan Motor Vehicles Ordinance, 1965 in pursuance whereof the appellants had been prevented from plying their transport vehicles despite holding valid route permits. This Court held that since the exclusion of the appellants by franchise holders pursuant to section 69-A was a 'classification' not permissible under Article 25 (the equality provision of the Constitution) section 69-A of the said Ordinance was "violative of Article 25 of the Constitution".
>
> 20. ...When the Government stopped the expansion of the sugar business it did not offend Article 18 of the Constitution since the rights guaranteed thereunder are "subject to such qualifications" that have been "prescribed by law". The Act starts with the position of not permitting the setting up of any industry except by the prior written permission of the Government and then proceeds to state that the applications seeking such permission shall not be rejected except for the reasons mentioned in the proviso to section 3. Regretfully the rules which were envisaged in the Act and were to be made by the Government have not materialized despite the Act being in the field for over 53 years. Consequently, anyone can submit an application wanting to set up any industry and each such application is to be dealt with on a case to case basis. This, to say the least, is a most unsatisfactory state of affairs. In this terrain unregulated by rules the Government may reject the applications received by it either under clause (a) or clause (b) of the Act. Under clause (a) the Government has to provide an opportunity to show cause against it. However, under clause (b) the Government may reject an application if it is satisfied, on the basis of information available to it and after making such inquiry as it may deem fit. **As noted above the Government had inquired into the matter and there was considerable information available with for it to conclude that permitting the establishment of new sugar mills or permitting the expansion of existing ones was prejudicial to the national interest. The Government therefore took the decision to prohibit both new sugar mills and the expansion of existing ones and issued the impugned Notification. The decision of the Government was/is in the public and national interest. Such decision was also not motivated by malice, mala fide nor taken for any ulterior reason. Therefore, it is unexceptionable**... In respect of such a decision a writ under Article 199 of the Constitution does not lie...

44. It may also be worthy to note certain cases in which the concept of 'reasonable restriction' was discussed, albeit in the context of fundamental rights other than Article 18 *supra* (or its earlier counterparts). In the case of *Saiyyid Abul A'la Maudoodi supra*, a five member bench of this Court held in the context of the freedom of association that:-

> With respect, the Constitution in question expressly gave the Courts power of judicial review of legislation, and reason in such affairs being peculiarly the province of the Judiciary, **it is surely within judicial review to examine both as to the reasonableness of the law itself, as well as the reasonableness of the mode of application, of the restriction, whether such mode be prescribed by the**

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> **statute or not**...I am, with respect, in full agreement with these decisions on this point...
>
> [Emphasis supplied]

In the case of *Miss Benazir Bhutto v Federation of Pakistan and another* (PLD 1988 SC 416) this Court in the context of Article 17 of the Constitution observed as follows:-

> The right to form or be a member of a political party is not an absolute right but is subject to reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan. The State can, therefore, by law impose reasonable restrictions in the exercise of this right in the interest of sovereignty or integrity of Pakistan. The Political Parties Act is the law falling in this category and the question for consideration is as to how far its provisions can be regarded as reasonable restrictions in the exercise of this right. Therefore, if the right is infringed the only thing which can save the impugned law from constitutional invalidity is its reasonable restrictions in the exercise of the right. Equally this law cannot curtail the exercise of the right on any ground outside the scope of reasonable restrictions. **This much is also clear that the presumption is always in favour of the constitutionality of an enactment and the burden is upon the person who attacks it to show that there has been a clear transgression of the constitutional principles.**
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> [Emphasis supplied]

In *Civil aviation authority, Islamabad and others v Union of Civil Aviation Employees and another* (PLD 1997 SC 781) a five member bench of this Court, after a detailed consideration of the definitions of 'reasonable' and 'restriction' in the context of Article 17 of the Constitution held as under:-

> A perusal of the above quoted definitions of the words "restrict" and "restriction" indicates that the predominant meanings of the said words do not admit total prohibition. They connote the imposition of limitations or the bounds within which one can act. It is, therefore, evident that under clause (1) of Article 17 of the Constitution, there cannot be total prohibition but the right can be regulated/restricted by law if any of the above four ingredients is present.

While referring to the *East and West Steamship* case *supra*, in *Pakistan Muslim League (N) supra*, a seven member bench of this Court opined, in the context of Article 15 of the Constitution which pertains to freedom of movement, that:-

> 28. The Fundamental Rights can neither be treated lightly nor interpreted in a casual or cursory manner but while "interpreting Fundamental rights guaranteed by the Constitution, a cardinal principle has always to be borne in mind that these guarantees to individuals are subject to the overriding necessity or interest of

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community. A balance has to be struck between these rights of individuals and the interests of the community. If in serving the interests of the community, an individual or number of individuals have to be put to some inconvenience and loss by placing restrictions on some of their rights guaranteed by the Constitution, the restrictions can never be considered to be unreasonable." (Nasirabad Properties Ltd. v. Chittagong Development Authority PLD 1966 Dacca 472).

29. No infringement or curtailment in any Fundamental Right can be made unless it is in the public interest and in accordance with valid law. No doubt that reasonable restriction can be imposed but it does not mean arbitrary exercise of power or unfettered or unbridled powers which surely would be outside the scope of "reasonable restriction" and it must be in the public interest.

34. It is, however, to be rioted that right conferred upon a citizen is neither absolute nor unlimited but subject to "reasonable restriction" imposed by law in the public interest which means that this right can be restricted by imposing "reasonable restriction of law" in the public interest.

45. Finally, in the judgment reported as *Pakistan Broadcasters Association and others v Pakistan Electronic Media Regulatory Authority and others* (PLD 2016 SC 692), this Court held, with regard to the freedom of speech under Article 19 of the Constitution, that:-

16. Undoubtedly no one can be deprived of his fundamental rights. Such rights being incapable of being divested or abridged. The legislative powers conferred on the State functionaries can be exercised only to regulate these rights through reasonable restrictions, and that too only as may be mandated by law and not otherwise. The authority wielding statutory powers conferred on it must act reasonably (emphasis supplied) and within the scope of the powers so conferred.

17. It is certainly not easy to define "reasonableness" with precision. It is neither possible nor advisable to prescribe any abstract standard of universal application of reasonableness. However, factors such as the nature of the right infringed, duration and extent of the restriction, the causes and circumstances prompting the restriction, and the manner as well as the purpose for which the restrictions are imposed are to be considered. The extent of the malice sought to be prevented and/or remedied, and the disproportion of the restriction may also be examined in the context of reasonableness or otherwise of the imposition. It needs to be kept in mind that "reasonable" implies intelligent care and deliberation, that is, the choice of course that reason dictates. For an action to be qualified as reasonable, it must also be just right and fair, and should neither be arbitrary nor fanciful or oppressive.

18. However, in examining the reasonableness of any restriction on the right to freedom of expression it also should essentially be kept in mind as to whether in purporting to exercise freedom of expression one is infringing upon the aforesaid right of others, and also violating their right to live a nuisance free life, as to whether one's right to time and space is being violated. It should also be kept in mind that none can be forced to listen or watch that he may not like to, and that one cannot be invaded with

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unsolicited interruptions while eagerly watching or listening to something of his interest. The State is not supposed to remain oblivious of such violation/invasions and cannot detract from its obligation to regulate the right to speech when it comes in conflict with the right of the viewers or listeners. It was perhaps keeping in view, inter alia, the foregoing that the framers of our Constitution, though secured the right to free speech, but have not left the same unchecked, and have provided for reasonable restriction as postulated under Article 19 of the Constitution. Indeed the State has a compelling interest in regulating the right to speech when it comes in conflict with the rights of other individuals, or other societal interests.

19. It is indeed true that freedom of expression being a natural fundamental right cannot be suppressed unless the same is being exploited and/or is causing danger to, or in it lies the imminent potential of hurting public interest, or putting it at stake directly, and also that the anticipated danger should not be remote, conjectural or far-fetched. It should rather have proximate and direct nexus with the expression.

20. However it may be kept in mind that in a civilized and democratic society, restrictions and duties co-exist in order to protect and preserve the right to speech, it is inevitable to maintain equilibrium, and for that to place reasonable restriction on this freedom in the maintenance of "public order" and unless the restriction strikes a proper balance between the freedom guaranteed by Article 19 of the Constitution and the social control permitted thereby, it must be held to lack the attributes of reasonableness. Government should therefore strike a just and reasonable balance between the need for ensuring the right of people of freedom of speech and expression on the one hand and the need to impose social control on the business of publication and broadcasting.

46. According to the aforementioned judgments, the scope of Article 18 of the Constitution (and its predecessors in the earlier Constitutions) as so far laid down by the superior Courts of Pakistan can be summed up as follows:-

i. Article 18 *supra* confers upon a citizen a right to freedom of trade, business or professions which is designed to enable the citizen to explore and adopt the best for his future, means of living and earning, and for the expression and recognition of his skills and abilities;

ii. However, this right is not absolute, unqualified or unfettered, but subject to regulation and reasonable restrictions which may be imposed by law in the larger interests of the society or for public welfare;

iii. The word 'qualification' has been used to confer a right upon a citizen to enter upon any lawful profession

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occupation and not, to conduct any lawful trade or business;

iv. The word 'lawful' qualifies the right of the citizen in the relevant field and envisages that the State can by law ban a profession, occupation, trade or business by declaring it to be unlawful which in common parlance means anything forbidden by law;

v. The provisions that a citizen 'possessing such qualifications, if any, as may be provided by law' and 'the regulation of any trade or profession by a system of licensing' empower the Legislature and the authorities concerned to impose restrictions on the exercise of the right;

vi. Although 'reasonable restrictions' does not feature in Article 18 *supra*, this does not mean that imposition of unreasonable restrictions is permissible under the Constitution;

vii. Licensing system is itself a restraint on trade, but the Constitution empowers the Government to impose reasonable restrictions. Reasonable restrictions authorized by the Constitution do not negate the Constitutional rights of a citizen to do business unhindered, without any condition;

viii. A reasonable classification is always considered to be within the framework of the fundamental right;

ix. The measure of reasonableness in the Constitution is provided by the concept of 'regulation', thus the restrictions should be consistent with the purpose of 'regulation' and not so unreasonable as to be in excess of it;

x. Reasonable restriction does not mean prohibition or prevention completely;

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xi. If restrictions are to be imposed to regulate such trade or business, those should not be arbitrary or excessive in nature, barring a majority of persons to enjoy such trade;

xii. The restriction must be reasonable and bear true relation to 'trade' or 'profession' and for the purposes of promoting general welfare;

xiii. By qualifying the right to business and trade, the Constitution makers wanted to create a balance between the societal needs and the rights of an individual;

xiv. Under the Constitution, a proper balance is intended to be maintained between the exercise of the right conferred by Article 18 of the Constitution and the interests of the citizen in the exercise of his right to acquire, hold or dispose of his property to carry on occupation, trade or business. In striking that balance the danger which may be inherent in permitting unfettered exercise of a right must of necessity influence the determination of the restrictions which may be placed upon the right of the citizen;

xv. The validity of the prescribed qualifications or restrictions can be examined by the superior Courts in exercise of the power of judicial review on the touchstone of other fundamental rights, including Article 18 *supra* and other provisions of the Constitution and the law;

xvi. It must be shown in a concrete manner as to how the restrictions imposed are in excess of the object or the actual limits of regulation; and

xvii. If the restrictions appear to be not only arbitrary but oppressive in nature and tend to deprive the citizens from enjoying the fundamental right of freedom of trade and business as per Article 18 of the Constitution, then it becomes the Court's duty to see the nature of the restrictions and procedure prescribed therein for

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regulating the trade and if it comes to the conclusion that the restrictions are not reasonable then the same are bound to be struck down.

47. It is pertinent to note that the private educational services industry constitutes 'business' under Article 18 of the Constitution which simply put is like any commercial activity for provision of services. However, as per the ordinary meaning of 'trade' which is basically the buying and selling of goods and services, the private educational services industry also constitutes 'trade' and therefore can be subject to regulation by a licensing system under proviso (a) to Article 18 *supra*. It is worthy to note that this Court in *Arshad Mehmood*'s case has used the terms 'business' and 'trade' interchangeably in terms of the private transport services industry. Be that as it may, applying the principles highlighted in paragraph 46 above we are of the opinion that while the citizens of Pakistan have the right to conduct business relating to the private educational services industry in order to earn money, such right is not absolute or unfettered. By virtue of a licensing system, the State is empowered to regulate the exercise of such right and hence, can impose certain restrictions. The power to regulate includes the power to regulate and control prices and matters related and incidental thereto. Such power has to be exercised fairly and reasonably and is justiciable on the touchstone inter alia of being unreasonable or arbitrary, the onus being on the person alleging un-reasonability or arbitrariness. It is clear from the discussion in paragraphs 27 to 32 that the laws in the Provinces of Punjab and Sindh both aim to give the Government control over unrecognized private educational institutions by providing for a system of registration and to regulate various matters relating to private educational institutions including, but not limited to, school fees and staff salaries by the respective Government or Registering Authorities. It appears that the Legislature thought that the supervision of private educational institutions was necessary and in public interest, particularly from the perspective of students and their parents considering the tendency of unregulated, unpredicted and exorbitant increases in

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school fees; hence the caps; and from the perspective of teachers when it came to their salaries. Furthermore, there is sufficient empirical evidence in the Auditor's General report that pointed towards profiteering. It cannot be said that these laws are akin to punishing the private sector for the delinquency of the State in providing education to the children of Pakistan, rather they have been put in place to curb the tendency on the part of private education sector to generate disproportionately large amounts of profit at the expense of students and their parents, as indicated by the Auditor General's report, through exploitation of the unfortunate situation where high quality education is scarce due to lack of resources or initiative on behalf of the State. Some feeble atmosphere made by some of the learned counsel representing private schools to justify or explain away the damning indictment spread over page upon page of the voluminous but laboriously and skillfully prepared report of the Auditor General of Pakistan, but such attempts had no substance. Further, no empirical data, figures or statistics worth any weight was presented on behalf of the private educational institutions to contest, dispute, explain or dilute the conclusions of the report of the Auditor General. As regards the lack of uniformity between the laws of both Provinces, it may be noted that this can be explained by the difference in the dynamics of the Provinces of Punjab and Sindh in terms of their respective private educational services industries particularly after the 18th Constitutional Amendment whereby education has become a provincial subject. These are policy decisions taken by the respective Legislature and/or Executive in exercise of its delegated authority which are ordinarily not to be questioned or interfered with lightly.

48. While we are cognizant of the hard work that many of the school owners have done, we do not in the facts and circumstances find the restrictions in question to be arbitrary or excessive in nature. Furthermore, we are of the view that the restrictions do not constitute complete prohibition or prevention. Revenue cap regulation is not a concept unknown to our legal system. The whole purpose of revenue cap regulation is to limit the

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total amount of revenue that a firm operating in a particular industry with no or very few competitors can earn. In economic theory, such regulation is employed as an incentive to reach a desired outcome for society which in this case is the provision of education that is accessible and does not become inaccessible by virtue of exorbitant and unreasonable increase in school fees. While such regulation can be adopted by governments and regulators in any industry, this is true more so for utilities and essential services that are intrinsically linked to fundamental rights in which the objective is availability and affordability of the utility or service while ensuring quality. In the instant case, it is the right to education which is in issue and which has been recognized as a fundamental right under Articles 9 and 25-A of the Constitution by this Court.[53] The State has a duty to guarantee such right which it is aiming to do through revenue cap regulation. With regard to the minimum salary of teachers in Sindh, the concept of a minimum wage which is, through a formula, linked to a source of revenue is also not an alien concept. This aims to deal with the issue of the right to earn a livelihood under Article 9 of the Constitution and the right to not be exploited under Article 3 of the Constitution which as per this Court's judgment is the duty of the State to ensure.[54] To this end, it was necessary that the Government or Registering Authority have sufficient discretion and the private educational institutions be subjected to such regulation, restriction or control in order to carry out the purposes and policy of the respective laws.

49. The aforementioned restrictions aim to strike a balance between the exercise of the right to conduct business in the educational services industry by citizens on the one hand and the interests of the community, i.e. the students enrolled in private educational institutions and their parents and teachers, on the other. As held by this Court in *Pakistan Muslim League*'s case

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[53] See *Muhammad Kowkab Iqbal and another v Government of Pakistan through Secretary Cabinet Division, Islamabad and others* (PLD 2015 SC 1210), *Petition regarding miserable condition of the schools: In the matter of* (2014 SCMR 396), *Rana Aamer Raza Ashfaq and another v Dr. Minhaj Ahmad Khan and another* (2012 SCMR 6) and *Fiaqat Hussain and others v Federation of Pakistan through Secretary, Planning and Development Division, Islamabad and others* (PLD 2012 SC 224).

[54] See *All Pakistan Newspapers Society and others v Federation of Pakistan and others* (PLD 2012 SC 1).

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supra albeit in the context of Article 15 of the Constitution, a balance has to be struck between the rights of individuals and the interests of the community and if in serving the interests of the community, an individual or a number of individuals have to be put to some inconvenience and loss by placing restrictions on some of their rights guaranteed by the Constitution, the restrictions can never be considered to be unreasonable. Furthermore, according to the judgment of this Court in *Benazir Bhutto*'s case *supra*, the presumption is always in favour of the constitutionality of an enactment and the burden is upon the person who attacks it to show that there has been a clear transgression of the constitutional principles; and once the person succeeds in showing that the impugned law *prima facie* violates the right being outside the scope of reasonable restrictions the onus shifts onto the State to show that the legislation comes within the permissible limits of reasonable restrictions. The learned counsel appearing on behalf of the schools have not been able to show in a concrete and material manner as to how the cap or the minimum salary for teachers has transgressed constitutional principles or is in excess of the object or the actual limits of the regulation. Since they failed to show that the impugned laws *prima facie* violate the right under Article 18 of the Constitution as being outside the scope of reasonable restrictions, the burden never shifted onto the State to show that the said laws came within the permissible limits of reasonable restrictions. This leads us to the irresistible conclusion that, in the facts and circumstances of the case, the restrictions in the form of caps and the minimum salary for teachers are not unreasonable.

50. We have been informed that since the beginning of June, 2017 a number of private educational institutions have been increasing their fee exorbitantly in violation of the relevant laws/rules. The regulatory authorities have turned a blind eye to the plight of students and their parents who have been hard pressed to meet the ever increasing demands of private educational institutions being faced with the prospect of either paying the increased fee by hook or by crock or to look for other alternative options which in the field of education are extremely limited. It was

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in order to cater for this situation that we had, through an interim order dated 30.12.2018 directed all educational institutions receiving fee in excess of Rs.5,000/- per month to reduce their fee by 20%. We have reason to believe that the said order was duly complied with. In furtherance thereof we direct as follows:-

(i) The said amounts equivalent to 20% of fee (reduced under our orders) or any other amount shall not be recovered as arrears for any reason or under any circumstances.

(ii) In view of our finding that schools have excessively increased fee since 2017 in violation of the law, all such increases are struck down. It will be deemed that there was no increase in fee since 2017 and fees were frozen at the rates prevailing in January, 2017.

(iii) Schools fee shall be recalculated using the fee prevailing in 2017 as the base fee in accordance with the provisions of Laws of Punjab and Sindh, respectively (adding annual increases permitted by the law/rules/regulations) till 2019 and onwards. The process of recalculation shall be supervised by the regulators and only the fee approved by them shall be treated as the chargeable fee.

(iv) Any excess fee found to have been charged shall be adjusted in the future fee.

(v) The Regulators shall closely monitor the fee being charged by private schools to ensure strict compliance with the law and the rules/regulations. Complaint cells shall be set up to deal with complaints arising out of increase in fee in violation of the law/rules/regulations.

51. The foregoing are the detailed reasons for our short order of even date which reads as under:-

> For the reasons to be recorded later, the instant matters are decided as follows:-
>
> i. Civil Appeal No. 134-L/2018 is allowed and the judgment of the learned Division Bench of the Lahore High Court, Lahore in Writ Petition No. 29724/2015 delivered on 05.04.2018 titled *City School Private Limited v Government of the Punjab and others* (PLD 2018 Lahore 509) is set aside;

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ii. Civil Appeals No.1021 to 1026 and 1095 to 1097/2018 are allowed and the judgment of the learned Division Bench of the High Court of Sindh, Karachi in Constitution Petition No. D-5812/2015, etc. delivered on 05.03.2018 titled *Shahrukh Shakeel Khan and 2 others v Province of Sindh through Chief Secretary, Government of Sindh and 4 others* (PLD 2018 Sindh 498) to the extent of declaring Rule 7(3) of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005 ("Rules of 2005") is set aside. The said judgment in so far as it declares Rule 10 of the Rules of 2005 as *intra vires* is upheld;

iii. Civil Miscellaneous Application No. 8466/2018 and Civil Appeals No. 1138, 1154 to 1158, 1486 and 1487/2018 are dismissed and the judgment of the learned Full Bench of the High Court of Sindh, Karachi in Constitution Petition No. D-6274/2017 etc., delivered on 03.09.2018 titled *Bushra Jabeen and 367 others v Province of Sindh through Chief Secretary and others* (2018 MLD 2007) is affirmed and upheld; and

iv. Civil Petitions No. 4475 and 4476/2018 filed against the order dated 19.11.2018 passed in Civil Miscellaneous Application No. 33322/2018 in Constitution Petition No. D-6274/2017, etc. are dismissed as having been rendered infructuous.

2. It is unanimously held and declared that Section 7-A of the Punjab Private Educational Institutions (Promotion and Regulation) Ordinance, 1984, as amended by the Punjab Private Educational Institutions (Promotion and Regulation) (Amendment) Act, 2017 is *intra vires* the Constitution of the Islamic Republic of Pakistan, 1973 ("the Constitution") and does not violate Articles 18, 23, 24 or 25-A thereof.

3. It is unanimously held and declared that Rule 10 of the Rules of 2005 is *intra vires* the statute, i.e. Sindh Private Education Institutions (Regulation and Control) Ordinance, 2001, and the Constitution.

4. With a majority of two against one, we are not persuaded to interfere with Rule 7(3) of the Rules of 2005, with Faisal Arab, J. expressing the view that the restriction imposed by Rule 7(3) *ibid* is unreasonable and hence invalid.

5. Upon decision of the main appeals in the terms noted above, all interim orders passed during the pendency of the appeals (including the order dated 13.12.2018 passed in Civil Appeal No. 1095/2018 regarding reduction of fees by 20% as an interim measure) have ceased to be effective, subject to recalculation of fee by using the fee prevailing in 2017 as the base fee, in accordance with the provision(s) of the Punjab Private Educational Institutions (Promotion and Regulation) (Amendment) Act, 2017 and onwards, for the Province of Punjab. For the Province of Sindh, fees may be recalculated using the fee prevailing on 29.06.2017 as the base fee and onwards, in accordance with the Rules of 2005 (gazetted on 29.06.2017). Provided that the schools shall not recover any arrears on account of the reduction in fee by reason of the interim order of this Court dated

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13.12.2018 till the date of this judgment. Therefore, all the review petitions filed against the said interim order are disposed of in these terms. In view of the fact that these appeals/petitions are being finally decided, all criminal original petitions and civil miscellaneous applications are disposed of.

6. It is further directed that all schools shall collect the fee, strictly in accordance with the procedure and timeframe provided by the law, the rules and regulations including, but not limited to the Punjab Private Educational Institutions (Promotion and Regulation) Ordinance, 1984, as amended by the Punjab Private Educational Institutions (Promotion and Regulation) (Amendment) Act, 2017 and the Rules of 2005.

Sd= Asif Saeed Khan Khosa, CJ

*[I agree except that I consider Rule 7(3) of Sindh Private Educational Institutions (Regulations and Control) Rules, 2005 to be unreasonable. (Note appended) ——— **Sd= Faisal Arab, J]***

Sd= Ijaz ul Ahsan, J

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Faisal Arab, J.- I entirely agree with the reasoning contained in the detailed judgment authored by my learned brother Ijaz ul Ahsan, J except that Rule 7(3) of Sindh Private Educational Institutions (Regulations and Control) Rules, 2005, which allows schools in Sindh to increase tuition fee only to the extent of 5% in an academic year is unreasonable and on that I wish to record my own opinion.

2. The parents of students coming from the whole range of middle class families approached the Courts, not because they wanted to challenge the tuition fee which the schools charged at the time of taking admissions but what agitated them was the periodical increases made in the tuition fees which proved to be an enormous burden on their purses. Hence a substantial raise in fees in comparison to the existing fees stirred agitation amongst the parents who invoked Rule 7(3) of the Sindh Private Educational Institutions (Regulations and Control) Rules, 2005 in Sindh and Section 7A of the Punjab Private Educational Institutions (Promotion and Regulation) Ordinance, 1984 in Punjab in order to seek reduction.

3. Section 15 of the Sindh Private Educational Institutions (Regulations and Control) Ordinance, 2001 gives rule making power to the provincial government, which *inter alia* states that rules shall provide for fixation of tuition fees and other sums to be realized from the students. Pursuant to this rule making power, the Sindh Private Educational Institutions (Regulations and Control) Rules, 2005 were framed. Rule 7 (2) and (3) provides that fee in an academic year can be increased only upto 5% subject to establishing proper justification before the Registering Authority. Hence while providing room for periodical increases, a cap of 5% was imposed which was given primacy over any reason that may justify raise in the tuition fees beyond such limit. It is because of this primacy that the private schools felt that this rule imposes unreasonable restriction as schools with such limited room for seeking increase in fees would not be able to cope with the corresponding increase in the cost of running of the schools which in turn would eventually put them out of business. Thus the case

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of the Schools is that the cap of 5% was arbitrarily determined by the functionaries of the government which militates against the freedom of doing business guaranteed under Article 18 of the Constitution.

4. In the last thirty years or so we have witnessed mushroom growth of educational institutions in the private sector as dependence of parents for educating their children in such institutions has grown phenomenally. This dependence is on account of pathetic quality of education in the government education system. Many government schools do not have proper buildings. Where there was once a proper running school building now it is in shambles. Most of the schools are without teachers and where there are any, they don't take classes, remain mostly absent yet get paid from the exchequer. Most of the teachers do not even have requisite skills in the subjects which they teach though they on paper can demonstrate to be qualified teachers. Even where these teachers attend schools there is either no or little furniture and that too appears to be falling apart what to speak of other necessary facilities which the government has prescribed in the rules for private educational institutions. Thus on account of lack of capable and efficient teachers as well as lack of necessary facilities, many middle and lower middle class families, who a few decades ago used to send their children only to government schools, have utterly lost faith in the public education system. These families in their desire for better education for their children, have started seeking admissions in private schools where not very long ago only upper middle and rich class families used to send their children. This has resulted in prenominal growth of private schools. Now more than 50% of students as per some statistics study in private schools where the level of education as compared to government schools is quite high. The students qualified from private schools have qualitative edge over the students who pass out from government schools. An overwhelming number of teachers who teach in private school have themselves studied in private schools. They by far excel in their teaching skills than most of the teachers of government schools. Today one can notice the difference between those students who have studied in private

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schools and those in the government schools. That is the reason the students who complete their education from private education institutions get admissions in renowned universities abroad and capture a very big chunk of the job market and easily secure higher executive positions than those who are being churned out from government schools. It is for this reason that regardless of the cost, parents from the middle and lower middle class families are sending their children to private schools even though it has impacted their budget severely. Much of the blame for such burden is attributable to the government which has failed in running public education system successfully. This is also one of the reasons that the literacy rate of the country, which was 60% a few years ago, has now declined to 58% and is likely to decline further thanks to the government's education policies which have proved to be worthless.

5. In the past few decades, we have seen that quite a few private school systems have earned a name, goodwill and reputation of imparting good quality education. The only alternative to such schools is to send children abroad for education, which costs much more than what these schools charge. Some of these schools with the quality of teaching faculty and facilities at their campuses charge handsome fees which only the affluent class can afford. These private schools can be classified as first tier schools. Application of Rule 7(3) on such schools would certainly have the effect of subsidizing the rich of the society. As for the children of upper middle and middle class families there are private schools which can be classified as second tier schools. Many of these schools also impart good quality education. Their tuition fees are comparatively affordable, however, for middle class families who send their children to these schools, their budget gets affected when the tuition fee is raised phenomenally in an academic year. Then there are private schools that can be classified as third tier schools where only lower middle class families send their children. The education level of these schools is much better than most of the present day government schools. Hence private schools can be classified in three tiers that

charge tuition fee ranging from Rs.1,000 to Rs.60,000 per month or thereabouts.

6. The value of professional service in a particular field cannot be measured and priced in the same manner as the value of an essential edible item such as milk and flour are measured while fixing their prices under price control laws. The worth and value of any essential food item remains the same regardless of the fact as to who is selling or buying it. In contrast to this, there is a whole spectrum in which worth of professional service in a particular field can be evaluated and priced. It varies from person to person or institution to institution which dispenses it. It would be very harsh to evaluate professional services through a mechanism that does not fully take into consideration ground realities. The only object of the laws in question should be to check profiteering after students are admitted in schools. But when the fee of any particular service is regulated in a manner that has the potential of gradually eating-up legitimate margin of profit, it makes businesses compromise on their quality lest they would run into losses which in turn lead to layoffs or their eventual closure. For businesses such a regulation can prove to be worse than imposing heavy tax on income as atleast in that eventuality the burden of tax would be conditional upon making profits not otherwise. In the past we have experienced the negative impact of regulating the industrial sector of our country as the Board of Investment retained unbridled power to decide which industrial unit in private sector should be allowed to be set-up and which not. Such strict regulation had proved to be a discouragement to investment that retarded the industrial growth of the country. Any regulation that acts as a discouragement in making investment in any trade, business or industry, which is otherwise permissible in law, violates the freedom guaranteed under Article 18 of the Constitution.

7. The justification to raise school fee mainly depends upon two key factors i.e. rise in the cost of running a school on account of diminution in the value of Rupee and additional facilities made available by schools to the students as compared to

the last academic year. There is a strong possibility that on account of 5% cap arbitrarily determined, many of the private schools in Sindh at a certain point in time may not be able to fully absorb the increase in the cost of running a school or the cost of the facilities provided to the students. As a consequence thereof the much needed growth of private schools is certainly going to be retarded. If that happens then it is very likely that private sector would be discouraged to fill the vacuum in Sindh left by government educational institutions. The existing private schools may start closing down or the number of their branches may dwindle which in turn would make it very difficult to cope with the ever increasing demand for good quality educational institutions, the only alternative to government's dismal education system in the present times. Encouragement of investment in private sector has its own positive effects as it induces competition that in turn reduces margin of profit. Through growth of private schools, quality education has become more accessible. In the present case no one has argued that any cartel exists that does not leave much choice with the parents but to admit their children in a particular set of school systems only. So there exists no monopoly in the fixation of tuition fees, except that based on reputation and goodwill some of the schools charge hefty fees.

8. On one of the dates of hearing of this case Mr. Muhammad Tajassir Minhas and Mr. Umair Ahmad who sent their children to private schools of Punjab were present in court. At their request this court allowed them to place their point of view in their capacity as representatives of parents. They expressed their full satisfaction on the increase in the tuition fee in an academic year to the extent of 8% as provided in Section 7A of Punjab Private Educational Institutions (Promotion and Regulation) Ordinance, 1984. So let's apply the 8% increase formula as an example in a given case. When tuition fee of a student is taken to be Rs.15,000/- per month at the time of admission, the total increase at a compound rate 8% for a five year period would result in an overall increase of Rs.5,308/- only i.e. from Rs.15,000/- per month fee payable in the first year the increase in the fifth year would

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take the fee to Rs.20,308/- per month. This 8% raise in every academic year is atleast much closer to setting-off the diminution in the purchasing power of Rupee that normally takes place in a span of five year period. Limiting the raise to 5% only under Rule 7(3) would be too harsh a financial restriction as it does not fully take care of the cost of running a school in comparison to the cost of its previous academic year. This is evident from the value which the Rupee has consistently been shedding in any five year period. Looking from that angle too, the arbitrarily determined cap of 5% imposed under Rule 7 (3) would certainly act as an unreasonable restriction on carrying on a lawful business.

9. The negative impact of Rule 7(3) does not stop here as it further requires that no raise in fee can be made unless Registering Authority first grants its approval. In this context it is important to note that there are said to be 17,000 private schools in Sindh and in order to seek any increase in tuition fee, each school has to apply to the Registering Authority which may take considerable period of time to process thousands of applications, that may leave a huge number of applications pending to be processed in the next academic year. Notwithstanding such pendency thousands of fresh applications in the next academic year are bound to pour in making it further difficult to timely process all applications. This inbuilt cumbersome process to seek increase in tuition fee under Rule 7(3) also amounts to unreasonable restriction.

10. No one can claim any right in any concession or exemption that is often granted in a statute like tax laws. But to allow increase in tuition fee is not something that is to be equated with some concession or benefit granted by the state as it is mainly intended to compensate for the diminution in the purchasing power of Rupee. In other words, revision in tuition fee should be solely intended to meet the ever increasing cost of running of a school and at the same time persevering reasonable margin of profit. Parents send their children to a particular school with the intention that they would complete their studies in a period which

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span over a number of years and it is neither convenient nor good for the student to change schools after every year or two. So once a student after his admission is committed to study for several years in a particular school, the only consideration for incorporating Rule 7(3) in Sindh Private Educational Institutions (Regulations and Control) Rules, 2005 ought to have been to compensate for diminution in the value of Rupee, provision of additional facilities for the students and to prevent profiteering while preserving reasonable margin of profit. However, where this rule, which is a product of delegated legislation, fails in fully taking into account these factors and is also cumbersome in its application, as it requires processing of thousands of applications each year by the Registering Authority in order to allow any increase in tuition fee in any academic year, no matter how insignificant it may be then it can be termed as unreasonable restriction being a discouragement to run a lawful business. In connected cases coming from the Province of Punjab, 8% increase in an academic year has already been validated. In my view that limit too should be made enforceable without recourse to Registering Authority. Raising the cap under Rule 7(3) to 8% would also create uniformity in its application in the provinces of Sindh and Punjab where overwhelming majority of children of this country get education. This uniformity is also a necessity as the private schools, whether in Punjab or Sindh, are subject to income tax on their profits at the same rate and the diminution in the value of Rupee affects the entire country equally being the common legal tender. Keeping all these considerations in mind, arbitrary cap of 5% can be raised to the level of 8% which looks much closer to ground reality i.e. having the effect of offsetting the depreciation in the value of Rupee to a greater extent which was also acceptable to the parents of the children of Punjab. In this regard reliance is placed on the case of Ahmed Hassan Vs. Government of Punjab (PLD 2004 SC 694) where it has been held that where a Rule has the effect of being an unreasonable restriction, it can be struck down. Raising the cap of 5% provided in Rule 7(3) to an automatic increase upto 8% in an academic year would bring it within the limits of reasonableness

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and should be so read with effect from the year in which the controversy in the present proceedings first started.

11. In view of what has been discussed above the arbitrarily determined cap of 5% imposed under Rule 7 (3) and the manner by which it is to be enforced is an unreasonable restriction on carrying on a lawful business. Increase upto 8% in an academic year without recourse to Registering Authority would be closer to the ground realities and at the same time save the department and the schools much of the inconvenience in the periodical revision of tuition fees. The Government of Sindh is directed to amend Rule 7(3) accordingly within a period of two months.

12. Civil Appeal Nos. 1095 to 1097, 1021 to 1026, 1138, 1154 to 1158, 1486, 1487 of 2018, Civil Petition Nos. 4475 & 4476 of 2018 stand disposed of in the above terms along with all pending Review Petitions/CMAs.

Sd= Faisal Arab, J

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