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Judgment Sheet

IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT.

Case No. W.P.No.29724/2015.

City School Private Limited

Versus

Government of the Punjab etc.

JUDGMENT

Dates of hearing	**14.03.2016, 15.06.2016, 26.02.2018, 27.02.2018, 28.02.2018, 05.03.2018, 06.03.2018, 07.03.2018, 12.03.2018, 13.03.2018, 14.03.2018 and 15.03.2018.**
Petitioner Schools by:	**Mrs. Asma Jahangir Advocate, M/S Shahid Hamid Advocate, Miss Aysha Hamid Advocate, Khawaja Haris Advocate, Faisal Hussain Naqvi Advocate, Khawaja Ahmad Hosain Advocate, Shezad Atta Elahi Advocate, Dr. Khalid Ranjha Advocate, Asad Ullah Saddiqui Advocate, Muhammad Haroon Mumtaz Advocate, Hassan Makhdoom, Advocate, Tafazzul Rizvi Advocate, Raza Kazim Advocate, Zaki Rehman Advocate, Ch. Muhammad Usman Advocate, Shezada Mazher Advocate, Ali Raza Advocate, Ijaz Mehmood Ch. Advocate, Mian Muhammad Kashif Advocate, Ch. Hassan Murtaza Mann Advocate, Azam Nazeer Tarar Advocate, Hassan Nawaz Makhdoom Advocate, Hasnain Ali Ramzan Advocate, Fawad Malik Awan Advocate, Syed Anwar ul Haq Gillani Advocate, Miss Asma Inam Advocate, Asim Hafeez Advocate, Rana Nadeem Sabir Advocate, Syed Ahmad Hassan Shah Advocate, Barrister Muhammad Umar Riaz Advocate, Mashhood Hussain Advocate, Moazzam Salim Advocate, M. Anwar Ch. Advocate and Hashim Raza Shamsi Advocate.**

Petitioner students/parents by:	**M/S A. K. Dogar Advocate, Syed Shahab Qutab Advocate, Waqas Meer Advocate, Muhammad Javed Arshad Advocate, Muhammad Azhar Siddique Advocate, Liaqat Ali Butt Advocate, Muhammad Zaheer Butt Advocate, Fayyaz Ahmad Mehr Advocate and Zubair Ahmad Chaudhry Advocate**
Respondent Government by:	**Mr. Muhammad Shan Gull, Additional Advocate General assisted by Mr. Obaid Ullah Advocate and Rai Ashfaq Ahmad Kharal, Assistant Advocate General.**

Abid Aziz Sheikh, J.- This judgment will decide instant writ petition as well as writ petitions detail of which is given in appendix-A and appendix-B. In all these writ petitions, there is communality of issue relating to school fee being charged by unaided private educational institutions in Province of Punjab. The issue involved is right of private educational institutions to increase school fee from time to time and nature of control which government can exercise in regulating such fee structure. In some of the writ petitions, (petitions in **appendix A**), petitioners are private schools and have challenged the vires of certain sub-clauses of section 7-A of the Punjab Private Educational Institutions (Promotion and Regulation) Ordinance, 1984 **(Ordinance 1984)** inserted on 19.09.2015 through section 4 of Punjab Private Educational Institutions (Promotion and Regulation) Amendment Ordinance, 2015 **(Ordinance of 2015).** Subsequently on 04.03.2016, the Ordinance 2015 was converted into Act through the Punjab Private Educational Institutions (Promotion

and Regulations) (Amendment) Act, 2016 **(Act of 2016).** Section 7-A of the Ordinance 1984 was further amended through Punjab Private Educational Institutions (Promotion and Regulations) (Amendment) Act, 2017 **(Act of 2017)**. Accordingly these petitions were amended from time to time, also to challenge the amendments made in section 7-A of the Ordinance 1984 through Act of 2016 and Act of 2017.

2. Brief facts are that in Province of Punjab, Private educational institutions are regulated through Ordinance 1984 and Punjab Private Educational Institutions (Promotion and Regulation) Rules, 1984 **(Rules of 1984)**. The said Ordinance 1984 was amended and section 7-A was inserted. Under section 7-A of the Ordinance 1984, certain restrictions are imposed on private educational institutions including capping of increase in fee for any academic year for not more than 5% (under Ordinance 2015 and Act of 2016) and finally 8% (under Act of 2017), charged in preceding academic year. Some of the private schools being aggrieved of section 7-A of the Ordinance 1984 have filed these constitutional petitions, whereas some of the students through their parents also filed petitions for directing the private schools to charge the fee in terms of section 7-A of the Ordinance 1984 (detail of petitions by students/parents are **appendix B**).

3. Ms. Asma Jahangir, Advocate for private schools argued that section 7-A of the Ordinance 1984 is violative of Article 18 of the

Constitution of Islamic Republic of Pakistan, 1973 **(Constitution)**. Submits that the petitioners have right to carry out their business of private schools and the State at best in order to promote free competition could regulate business through licence in a reasonable manner. She submits that section 7-A of the Ordinance 1984 has gone beyond the licensing system and is actually controlling the business of the petitioner in arbitrary manner. Submits that under article 18 of the Constitution, only reasonable restrictions can be imposed but impugned legislation is not only unreasonable but also amounts to deprive the petitioners of their business. She placed reliance on *Arshad Mahmood v. Government of Punjab* **(PLD 2005 SC 193),** *Pakcom v. Federation of Pakistan* **(PLD 2011 SC 44),** *Khawaja Imran Ahmed vs. Noor Ahmed* **(1992 SCMR 1152),** *Messrs Murree Brewerey Company Limited D.G (Excise and Taxation)* **(1991 MLD 267),** *Landirenozo vs. Federation of Pakistan* **(2013 PTD 658),** *Al Raham Travels and Tours v. Ministry of Religious Affairs* **(2011 SCMR 1621),** *Elahi Cotton Mills vs. Federation of Pakistan* **(PLD 1997 SC 582),** *Administrator, Market Committee vs Muhammad Sharif etc* **(1994 SCMR 1048),** *Northern Bottling vs. Federation of Pakistan* **(2015 PTD 231),** *K.B. Threads vs. Zila Nazim Lahore* **(PLD 2004 Lah. 376),** *Shahabuddin vs. Pakistan etc* **(PLD 1957 Kar. 854).** Further submitted that through impugned amendment, private business of the petitioner schools have virtually been nationalized, as

now the regulator will make policy and business decisions regarding educational institutions of the petitioners. She submitted that impugned legislation has also been given retrospective effect which is not permissible under law. Learned counsel submitted that provision of section 7-A of the Ordinance particularly its subsection 1, 5, 6, 7 and 8 being *ultra vires* of the constitution and violation of fundamental rights of petitioners are liable to be declared unconstitutional. Learned counsel further argued that under Article 25-A of the Constitution, it is the duty of State to provide free and compulsory education to all children of age 5 to 16 and unaided private educational institutions are not obliged to provide free education. Submits that imparting quality education is like trade and business which is not only protected under article 18 of the Constitution but private institutions also have right to give excellent education to children between age of 5 to 16 year against reasonable fee. Reliance is placed on *Petition regarding miserable conditions of schools* **(2014 SCMR 396),** *Human Rights Case No.19360-P/2012* **(2013 SCMR 54),** *Fiaquat Hussain vs. Federation of Pakistan* **(PLD 2012 SC 224),** *Syed Nazeer Agha vs. Government of Balochistan* **(PLD 2014 Bal. 86).** She further submitted that private schools have raised fee in proportionate to inflation and increase of salaries and there is no exploitation or forming of cartel. Submitted that parents of students have no locus standi against increase of fee because

providing quality education against reasonable fee does not violates fundamental rights, if there is no profiteering or exploitation on part of the petitioners. Submitted that in any other case, the respondents have remedy before Competition Commission of Pakistan or Consumer Courts. She further submitted that parents have also right to seek free education for their children from Government schools if so desired.

4. Mrs. Asma Jahangir Advocate unfortunately passed away during course of these proceedings. Her above arguments are adopted by her co-counsel Mr. Shezad Atta Elahi Advocate who in addition submitted that under Article 18 of the Constitution, the condition can be imposed only in the interest of free competition or through licensing system and finally it must be reasonable. He submits that through impugned legislation, the discretion of the regulatory authority has been fettered to allow increase in fee more than 8%, even if educational institution duly justify such increase. He, therefore, concluded that impugned legislation is not sustainable and further it is also violative of Article 3 of the Constitution, as it exploits the educational institutions.

5. Mr. Shahid Hamid Advocate for private schools argued that the impugned provisions of section 7-A of Ordinance 1984, are prima facie violative of fundamental rights guaranteed to the petitioners under Article 23 and 24 of the Constitution as the petitioners are being compulsorily restrained/deprived of their right to

income/property through charging fees for services provided by them, without any compensation on account of such compulsory restraint/deprivation. Submitted that the parents who place their children in schools operated by petitioners, do so knowing fully well two things: first, the level of fees at the time of entry and second, that these fees will, on average increase by 12 to 14% each year based on the historical pattern of the previous years. Further submitted that they willingly entered into this contractual relationship and respondents cannot lawfully interfere in this contractual relationship. Argued that under section 7A(1) of the Ordinance, all private schools charging fees of less than Rs.4,000/- per month per student have been exempted from the maximum cap on fees. Submits that these schools are almost 96-98% of all private schools. Argued that the petitioners do not grudge the exemption given to these schools but it bears mention that the parents of students studying in such schools are self-evidently much less well-off than parents of students studying in petitioners' schools. Submits that in other words the well-to-do parents are sought to be protected as against those much less well-off parents. Argued that this is not only discriminatory in violation of Article 25 of the Constitution, as there is no perceivable logic to the cut-off of Rs.4,000/- but it also reflects social priorities. Argued that why protection for the well-to-do and not for the less well-off when the Secretary Schools (respondent), in written statement describe them, as

'teaching shops'. Added that petitioners had already collected fees for the months of August and September 2015, before the respondents notified/enacted Ordinance of 2015, which prescribed that for academic year 2015-16, the petitioners could not charge any fee higher than the fees charged for that class during the academic year 2014-15. Argued that neither the Ordinance 2015 nor the Act 2016 had any provision giving them retrospective effect. Argued that consequently the petitioners are entitled to retain the fees already realized by them prior to the notification/enactment of the aforesaid Ordinance of 2015 and Act of 2016. Reliance is placed on *Zila Council Jhang vs. Daewoo Corporation* **(2001 SCMR 1012)** and *Chief Land Commissioner vs. Ghulam Hyder Shah* **(1988 SCMR 715)**.

6. Mr. Faisal Hussain Naqvi, Advocate for the petitioner schools argued that impugned provisions of section 7-A of the Ordinance are unreasonable, unconstitutional and against the fundamental rights of the petitioner. He stressed four grounds to assail the impugned provision. Firstly that the provision is violative of Article 18 of the Constitution, secondly the provision amounts to legislative judgment and also violative of separation of power and right of fair trial under Article 10-A of the Constitution, thirdly the provision is violative of Article 25 of the Constitution, not because it is discriminatory but because the legislature has failed to discriminate

the petitioner and fourthly, that it is violative of Articles 23 and 24 of the Constitution, which is not only confined to right of property but where by imposing conditions, the value and utility of property is reduced, it also amounts to violation of right of property. Regarding first ground, he submits that the word "lawful trade" used in Article 18 has been discussed in various judgments of Indian Supreme Court, in *State of Bombay vs. RMD Chamarbaugwala* (**AIR 1957 SC 699),** it was held that gambling is not a lawful trade. Similarly in *Khoday Distilleries Ltd. vs. State of Karnataka* **(1995) 1 SC 574,** it was held that the right to practice a profession or trade does not mean a practice of profession or carrying out trade which is inherently vicious, pernicious and is condemned by all civil societies, however, in *Action Committee, Un-Aided Private Schools vs. Director of Education, Delhi and others* **(2009) 10 SCC 1),** it was held that education is a lawful trade. He submits that once it is established that education is a lawful trade, the next question is whether any capping can be done on the fee structure as was done in the impugned provision. He referred the various judgments of Indian Supreme Court including *Monini Jai vs. State of Karnataka* **(1992) 3 SCC 666**, *Unni Krishnan, J.P. vs. State of A.P.* **(1993) 1 SCC 645**, *TMA Pai Foundation vs. State of Karnataka* **(2002) 8 SCC 481**, *Islamic Academy of Education vs. State of Karnataka* **(2003) 6 SCC 697**, *Modern School vs. Union of Indian* **(AIR 2004 SC 2236)** and *P.A. Inamdar vs. State of Maharashtra*

(2005) 6 SCC 537, to argue that the question whether school fee can be regulated by Government institutions was subject matter of various petitions before Supreme Court in India and after chequered history of judgments, the final consensus reached in *P.A. Inamdar vs. State of Maharashtra* supra that there can be no profiteering and capitation of fee but reasonable fee can be charged and there will be minimal regulatory control and autonomy be given to unaided schools. He submits that applying the same principle, the capping of fee amounts to violative of fundamental rights of the petitioner under Article 18 of the Constitution. On the issue of legislative judgment, he referred the reply filed by the respondents where it was stated that impugned legislation was passed because petitioners were engaged in profiteering and capitation. He submits that the profiteering as defined in various dictionaries is a crime and without giving any opportunity to the petitioners to explain their position, the legislature could not issue the impugned provision, which amounts to legislative judgment against the petitioners. He submits that even the opportunity of ex-post-facto hearing is not brought in the impugned provision. He placed reliance on judgments *Dr. Mubshar Hassan vs. Federation of Pakistan* **(PLD 2010 SC 265, 370)**, *Naseer Ahmed Khan vs. Government of Punjab* **(PLD 1980 Lahore 684, 694)**, *Government of Punjab vs. Naseer Ahmed Khan* **(2001 CLC 1422, 1426)**, *Government of Punjab vs. Naseer Ahmed Khan* **(2010 SCMR 431)**, *National*

Industrial Co-operative Credit Corporation vs. Province of Punjab **(PLD 1992 Lah. 462, 491-92)** and *Province of Punjab vs. National Industrial Co-operation Credit Corporation* **(2000 SCMR 567, 598)** to argue that judicial functions are to be performed by judiciary and not by the legislation and therefore, the impugned provision being legislative judgment is not sustainable under law. Finally be concluded that impugned legislation is discriminatory and also violate right of property.

7. Khawaja Ahmad Hosain, Advocate for private schools argued that impugned provisions are *ultra vires* of the Constitution as Government has no jurisdiction to interfere in the business of the petitioner in a free market. Submits that Government can only interfere if schools have created monopoly or there are allegations of collusion or cartel. Submits that in absence of any such allegation, provisions are not sustainable being violative of Article 18 and 25 of the Constitution. He adds that impugned provision of section 7-A of the Ordinance 1984 is only regarding increase of fee of existing schools but there is no restriction of fixation of fee by a new school, therefore, this provision being irrational is not sustainable.

8. Khawaja Haris Advocate for private schools argued that education is an occupation, therefore, no doubt it is subject to qualification under Article 18 of the Constitution. He however submits that such qualification or restrictions can only be reasonable.

Submits that restriction of capping the increase in fee through impugned legislation is un-reasonable restriction, therefore, violative of Article 18 of the Constitution. He submits that in imposing restriction on increase of fee, the balance must be drawn between right of the educational institution on increase of fee and right of the students and their parents against exploitation or profiteering of fee. He placed reliance on judgment passed by the Islamabad High Court in *Educational Services (Pvt.) Limited and 4 others vs. Federation of Pakistan and another* **(PLD 2016 Islamabad 141)**.

9. Dr. Khalid Ranjha Advocate argued that impugned section 7-A of Ordinance of 1984 was inserted through Ordinance of 2015 which is not a valid legislation and amendment could only be made through Act of the Parliament.

10. Mr. Asad Ullah Saddiqui, Advocate for the petitioner schools argued that impugned legislation amounts to exercise the delegation of power by authority without giving procedure, yard stick and parameters for such delegated power. Submits that such un-explained and un-structural powers are not sustainable. Reliance is placed on *Khawaja Muhammad Safdar, M.P.A, Lahore vs. Province of West Pakistan etc.* **(PLD 1964 (W.P.) Lahore 718)**. He further submits that main purpose of impugned legislation is to put the petitioners out of business, hence violation of article 18 of the Constitution. Adds that impugned legislation has not only denied

livelihood of the petitioner but also its employees because their salaries and other benefits cannot be increased due to unreasonable restrictions, therefore, impugned legislation is violation of article 9 of the Constitution. He submits that legislation is discriminatory because in none of the other private professions including hospitals, private tuition centers etc., such restriction has not been imposed. He submits that under Article 4 of the Constitution, every citizen has the right to be dealt in accordance with law whereas impugned legislation is clearly discriminatory which is against the fundamental rights of the petitioners.

11. Mr. Muhammad Haroon Mumtaz, Advocate for schools argued that no doubt the provincial legislation can regulate the fee structure, however, it cannot impose maximum limit on the increase of fee as said power falls within the exclusive jurisdiction of the Parliament under Article 253(1-A) of the Constitution. He submits that increase of fee falls within the definition of property which is not confined to immovable property but also the right to enjoy the benefit of said property. In this regard he also referred to the definition of property in Article 260 of the Constitution and also "property" definition in Black's Law Dictionary. Argued that impugned section 7-A infringes right of property of petitioners. He placed reliance on *Messrs X.E.N. Shahpur Division (LJC) Quarry Sub-Division Sargodha vs. The Collector Sales Tax (Appeals) Collectorate of*

Customs Federal Excise and Sales Tax Faisalabad and others (**2016 SCMR 1030),** *Malik Gul Hassan and Co. vs. Federation of Pakistan through the Secretary, Ministry of Health, Islamabad and 9 others* **(1995 CLC 1662),** *Federation of Pakistan and others vs. Shaukat Ali Mian and others* **(PLD 1999 SC 1026)** and *Tilla Muhammad and another vs. Government of North-West Frontier Province through Secretary, Law Department and another* **(1986 CLD 1429)**.

12. Mr. Hassan Makhdoom, Advocate for private schools argued that the impugned levy is discriminatory and violative of Article 25 of the Constitution because schools who are charging fee less than Rs.4,000/- have been totally excluded from the purview of the impugned legislation. He adds that impugned legislation is violative of Article 18 of the Constitution and placed reliance on *Arshad Mehmood and others v. Government of Punjab through Secretary Transport Civil Secretariat, Lahore and others* **(PLD 2005 SC 193)**.

13. Mr. Tafazzul Rizvi Advocate argued that impugned section 7-A of the Ordinance of 1984 amounts to unreasonable restriction on fundamental rights of the private schools, therefore, not sustainable under Article 18 of the Constitution. Mr. Zubair Ahmad Chaudhry, Advocate adopted the aforesaid arguments of the petitioner schools.

14. Mr. A. K. Dogar, Advocate (in C.M. No.10/2015 in W.P. No.29724/2015) argued that under Article 25-A of the Constitution,

all children in age of 5-15 years have fundamental right to get free education. Submits that this fundamental right is not only enforceable against Government Institutions but also against Private Parties and Institutions. Reliance is placed on *Human Rights Commission of Pakistan and 2 others vs. Government of Pakistan and others* **(PLD 2009 SC 507)**. He further submits that education in Islam is a religious duty, therefore enforceable against all Muslims including the private schools. Reliance is placed on *Fiaqat Hussain and others vs. Federation of Pakistan through Secretary, Planning and Development Division, Islamabad and others* **(PLD 2012 SC 224)**. He next argued that afore-noted judgments of august Supreme Court are binding on all Courts and institutions and must be complied with in letter and spirit. Reliance is placed on *Al-Jehad Trust through Raees ul Mujahidin Habib Al-Wahabul Khairi, Advocate Supreme Court and another vs. Federation of Pakistan and others* **(PLD 1997 SC 84)**. Based on above submission, he concluded that all constitutional petitions are liable to be dismissed and no fee whatsoever can be charged by any Private or Government Institution.

15. Syed Shahab Qutab, Advocate appearing on behalf of respondent parents (in W.P. No.830822/2015), defended the impugned legislation. He submits that running of educational institution being a “trade” can be regulated by the State through a licensing system under Article 18 of the Constitution. He referred to

the definition of "trade" explained in *K.G. Old, Principal, Christian Technical Training Centre Gujranwala vs. Presiding Officer, Punjab Labour Court, Northern Zone and 6 others* **(PLD 1976 Lahore 1097)** and also referred to various clauses of Ordinance 1984, where conditions for registration have been prescribed. He argued that the requirement of registration of school under the Ordinance amounts to issuance of licence, therefore, the State could regulate the private institutions as well as their registration. He submits that the impugned legislation is not a legislative judgment as it does not interfere in the quasi-judicial power of the executive who will determine whether increase in fee is justified or not. He further argued that the impugned legislation is neither discriminatory nor it amounts to deprive the petitioner from their right of property. Submits that Article 25-A of the Constitution regarding State obligation does not entitle the petitioner's to charge the excess fee for failure on part of State to perform its obligations. He argued that impugned legislation is permissible under Article 18 of the Constitution. He elaborates that under first part of Article 18, qualification can be prescribed for occupation and profession whereas under second part of Article 18, regulation can be framed under licensing system. He submits that running of education institution being an occupation, conditions for registration under the Ordinance 1984 and Rules of 1984 are qualifications as held by august Supreme Court in *Arshad Mahmood*

case supra. He submits that the running of education institution being also a trade and business and requirements u/s 3, 7, 8 and 9 of the Ordinance for the registration of schools and their monitoring amounts to licensing system, therefore, regulations in form of impugned legislation is also permissible under second part of Article 18 of the Constitution. In this regard reliance is placed on *Messrs D.S. Textile Mills Limited vs. Federation of Pakistan and others* **(PLD 2016 Lahore 355),** *Messrs East West Steam Shipping Company vs. Pakistan etc.* **(PLD 1958 SC 41)** and Judgment passed by Sindh High Court in case titled *"Beacons House School System vs. Province of Sindh"*, C.P. D. No.5812/2015. He finally concluded that these conditions/restrictions being reasonable are valid and legal.

16. Mr. Waqas Meer, Advocate while appearing on behalf of respondents/parents argued that fundamental right under Article 18 of the Constitution is not an absolute right but subject to qualifications and regulations being relating to economics of the State. He submits that heavy burden lies on part of the petitioner to establish that regulations under Article 18 destroy their other fundamental rights including right of property. He submits that there are many laws which provide controlling of prices including prices of commodities but same were never declared unconstitutional merely because it regulates the right of occupation or trade. He submits that law can only be struck down if it is unconstitutional and not merely because it

regulates profession and trade which amount to imposing certain restrictions on the business. He placed reliance on *Pakcom Limited and others vs. Federation of Pakistan and others* **(PLD 2011 SC 44)** and *All Pakistan Newspapers Society and others vs. Federation of Pakistan and others* **(PLD 2012 SC 1)**.

17. Mr. Muhammad Javed Arshad, Advocate also appearing for parents (in W.P. No.29724/2015) argued that the regulation can be prescribed to control working of private schools including their fee structure. He placed reliance on *International College of Commerce vs. University of Punjab* **(PLD 2004 Lahore 335)** and *Rahim Yar Khan College of Education through Principal and another vs. Islamia University of Bahawalpur through Vice-Chancellor and 3 others* **(1996 SCMR 341)**.

18. Mr. Azhar Siddique Advocate on behalf of respondent parents argued that maximum fee was lawfully capped to restrain private schools from profiteering and exploiting the parents. He further argued that in order to declare the impugned provision confiscatory, the petitioners are bound to show that they have actually suffered loss due to capping of fee.

19. Mr. Shan Gull, Additional Advocate General while appearing on behalf of respondent Provincial Government argued that in September 2015, lot of hue and cry was made by the parents through demonstrations and media publications against the exorbitant

increases of fee by private schools. Submits that number of complaints were also filed by these parents and matter was also taken up by this Court in W.P. No.14965/2014. Submits that in consequence of these agitations and complaints by parents, the issue regarding increase of fee by private educational institutions was taken up by the provincial legislation and Ordinance of 2015 was passed, where beside regulating the fee increase, the maximum limit of 5% was also added through section 7-A in the Ordinance of 1984, which was ultimately converted into Act of 2016. Submits that subsequently section 7-A of Ordinance 1984, was further amended through Act of 2017 where private schools were allowed to increase fee up to 5%, however maximum limit was prescribed at 8%. Submits that in addition, the private schools were also bifurcated in two categories i.e. schools charging fee less than Rs.4000/- and the other charging more than Rs.4,000/- and section 7-A was only made applicable to schools charging fee more than Rs.4,000/- per month. Submits that this exercise was done after reviewing the increase of fee by private schools from year 2008-2015 and comparing it with the inflation rate during this period which proved that most of the schools were involved in profiteering. The learned counsel argued that right of profession, occupation and trade under Article 18 of the Constitution is neither an absolute right nor same is fundamental right, therefore, the State could impose total prohibition on this right in view of law

laid down by august Supreme Court in *Government of Pakistan vs. Zameer Ahmad Khan* **(PLD 1975 SC 667)**. Submits that in the light of law settled by august Supreme Court in *Zameer Ahmad Khan case* supra, the provincial legislation was within its right to declare that increase of fee for more than 8% in a particular year is forbidden by law. Submits that Article 18 of the Constitution, only protects lawful trade and occupation and once the charging of fee more than 8% is declared unlawful, there is no protection to said increase under Article 18 of the Constitution. He submits that *Arshad Mahmood case* supra where it is held that there can be no absolute prohibition or ban in any field is distinguishable.

20. Learned Additional Advocate General refer to provision of sections, 3, 5, 7-A, 8, 9 and 11 of the Ordinance 1984 and rules 11 and 12 of the Rules of 1984 to submit that the registration requirements are not only qualifications under Article 18 of the Constitution but the schools are also governed under the licensing system through the above provisions, therefore, the qualifications and conditions can be prescribed under Article 18 for fixation of fee by the un-aided private educational institutions. He further argued that the impugned legislation provided a two tear system of price fixation which is permissible under the law as already held by the Sindh High Court in case titled *"Beacons House School System vs. Province of Sindh"* C.P. D. No.5812/2015 supra. He next argued that the Ordinance of

2015 was promulgated in September 2015 and had expressly given it retrospective effect regarding the fee deposited in August 2015 which is permissible under the law. He submits that normally the legislative provisions are to be applied prospectively, however, there is no bar on the legislation to pass law with retrospective effect expressly. He placed reliance on *Messrs Haider Automobile Ltd. vs. Pakistan* **(PLD 1969 SC 623)** and *Molasses Trading & Export (Pvt.) Limited vs. Federation of Pakistan and others* **(1993 SCMR 1905)**.

21. He next argued that there is no discrimination between petitioner schools and the schools which are charging fee less than Rs.4,000/- as well as Aitchison College Lahore. He submits that these schools are not equal to petitioner schools, therefore, there is no question of discrimination. Adds that legislation in its wisdom can make reasonable classification. Learned Additional Advocate General submits that on number of occasions, the maximum limit imposed by the legislation has been upheld by this Court. He in this regard has placed reliance on *Messrs Shaheen Cotton Mills, Lahore and another vs. Federation of Pakistan, Ministry of Commerce through Secretary and another* **(PLD 2011 Lahore 120)**. Learned counsel further submits that right through capping of fee can be restricted where it has adverse impact on the welfare of public at large. He next argued that price fixation is a legislative function and can be imposed to save the public interest. He argued that the impugned legislation does not

affect the right of property of the petitioner and in any case, the petitioners have to prove that the impugned legislation is confiscatory or expropriatory. He next argued that the impugned levy is neither legislative judgment nor on this ground, impugned levy can be struck down. He finally argued that detailed mechanism is available with the department to fix fee beyond 5%, therefore, impugned levy is reasonable and justified.

22. We have heard learned counsel for the parties and perused the record within their able assistance.

23. In present time while parents increasingly sending their children to private schools for better education but they are also simultaneously affected by the increasing cost of living and education fee every year. Private schools charge fees based on demand and increasing it regularly for multiple reasons. This has created a situation whereby parents want their children to be educated in a private school, but cannot afford it, hence have sought the help of the government to control the price of the services offered by private schools. It is in this context, that Government has started promulgating and implementing laws to fix the maximum tuition fees that can be charged by private schools. Impugned law can be understood as a reaction from the provincial legislation to public demand, complaints from parents and the media publicity about some private schools charging exorbitant fees.

24. The right to education is concomitant to the fundamental rights enshrined under Part II, Chapter 1 of the Constitution. The right to education flows directly from right to life. The right to life and dignity of an individual under Articles 9 and 14 of the Constitution cannot be assured unless it is accompanied by the right to education. The right to education is also guaranteed under Article 37(b) and 38(d) which though principle of policy and not justiciable but cannot be isolated from fundamental rights guaranteed under the Constitution. After 18th Amendment in the Constitution, the right of education has been made an independent fundamental right under Article 25-A of the Constitution. Without right of education under Articles 9, 14, 25-A, 37(b) and 38(d) of the Constitution, in reality the fundamental rights under the Constitution shall remain beyond reach of large majority which will be illiterate. Thus every citizen has a right to education and State is under an obligation to establish educational institutions to enable the citizens to enjoy the said right. The State may discharge its obligation through State owned or State recognized private educational institutions. However, when the State grants recognition to the private institution, it creates an agency through these institutions to fulfill its obligations under the Constitution. Therefore, it is the State responsibility to see that any private educational institutions which have been set up with Government permission are not involved in profiteering, capitation or

exploiting the parents. The State has also a responsibility to ensure that these educational institutions must function to the best advantage of all the citizens and not confine to only richer section of the society by increasing fees exorbitantly. This State responsibility can be fulfilled by providing registration requirements or through regulations under law.

25. Apparently with this back ground, the Ordinance of 1984 and Rules of 1984 were promulgated to register and regulate private educational institutions. The Ordinance of 1984 was amended through Ordinance 2015 whereby the impugned section 7-A was inserted in Ordinance of 1984 and inter alia maximum limit of 5% for increase in fee was prescribed. The said Ordinance of 2015 was converted into Act of 2016. The provision of section 7-A of Ordinance 1984 was further amended through Act of 2017 and maximum limit was increased to 8%. The current provision of section 7-A of the Ordinance 1984 as amended through Act of 2017 is reproduced hereunder:-

> ***"7-A. 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.*
> *(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 three months 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) 13[* * ** * * * * * * *]*
(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.

26. The question require determination is that whether the above enactment in issue regarding fixation or determination of fees of private educational institutions which as claimed by Government is to ensure not to allow commercialization, profiteering and exploitation, does run foul of any provision of the Constitution. In this regard with undisputed right of State to regulate lawful trade and lawful

professions or occupations, the moot issue is whether impugned enactment is permissible under Article 18 of the Constitution.

Scope of Article 18 of the Constitution.

27. For convenience, Article 18 of the Constitution is reproduced hereunder:-

> *"18. 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."*

Plain reading of Article 18 of the Constitution shows that citizen has right to enter upon lawful occupation or profession or conduct a lawful trade or business subject to qualifications or conditions through regulations. These restrictions under Article 18 are of four kinds. Firstly the State can through law prescribe qualifications; secondly the trade or profession may be regulated by a licensing system; thirdly trade, commerce or industry may be regulated in the interest of free competition therein and fourthly, a citizen may be excluded

completely or partially from carrying out a trade, business, industry or services, where State wants to carry it out itself. The question whether running of educational institution is a profession, occupation or trade, came up for discussion in number of cases. The Indian Supreme Court in cases reported as *P.A. Inamdar vs. State of Mahrashtra* **(2005 (5) SCC 537)** and *Model Dental College vs. State of Madhya Pradesh* **(AIR 2009 SC 2432)** held that running of an educational institution for charity or for profit fall within the definition of "occupation". This position is also not disputed by learned counsel for the petitioner schools.

28. The honourable Supreme Court in *Arshad Mahmood case* supra **(PLD 2005 SC 193),** while interpreting first part of Article 18 of the Constitution held that word "qualification" used in Article 18 relates to lawful profession or "occupation" and not to conduct any lawful trade or business. The relevant extract from the Judgment is reproduced here under:-

> *"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."*

The educational institutions being admittedly an "occupation", the "qualifications" under Article 18 can indeed be prescribed for these institutions by the State. In *Arshad Mahmood case* supra, honourable Supreme Court while defining "qualification" held that *"as per*

ordinary meaning of "qualification", a 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." Plain reading of impugned section 7-A of the Ordinance 1984 ibid shows that a mechanism has been provided for fixation of the fee by educational institution including maximum limit to which fee can be increased. Charging of reasonable fee being already a condition for registration u/s 7 of the Ordinance 1984 read with Rule 12(ii) of the Rules of 1984, the mechanism of fixation of reasonable fee through impugned section 7-A of the Ordinance 1984 is also a part of registration requirements prescribed u/s 7 of the Ordinance of 1984 and Rule 12 of the Rules of 1984. Indeed certain registration requirements may also amount to "qualifications", however, we need not to dilate upon this question any further because it is respondent Government's own case that impugned section 7-A of Ordinance 1984, is to regulate trade under the licensing system.

29. We have considered this stance of the respondent Government and have noted that under Article 18 of the Constitution, the State can regulate trade or profession by a licensing system. The ordinary meaning of word "licence" as contained in Black's Law Dictionary is "permit from Government to carry on some trade etc." The definition and general nature of licence as stated in 33rd Volume of

American Jurisprudence is "to confer on a person the right to do something which otherwise he would not have the right to do". In *Ghulam Zameer vs. Khondar* **(PLD 1965 Dacca 156)** the Court held that uniformity of rules and norms of conditions applicable to every case is the gist of the implication of expression "licence". Further held that those who answer the conditions so laid down are entitled to obtain the said licence.

30. Justice Cornelius in *East and West Steam Shipping Company* case **(PLD 1958 SC 41)** held that licence in the relevant aspect mean an arrangement by way of regulation, applicable to a complex whole. It was held that it would provide for rules applicable uniformly. The relevant observation by honourable Supreme Court in *M/s East and West Steam Shipping Company* case supra is reproduced hereunder:-

> *"A system, in my opinion, would in the relevant respect mean an arrangement by way of regulation, applicable to a complex whole namely the trade of shipping in general. It would provide for rules applicable uniformly, subject to suitable classification, in relation to the entire trade of shipping. Again, it is inherent in the use of the expression "licensing system" that the actions of the State in respect of the trade should be in the nature of permissions granted to do certain acts provided certain conditions are satisfied; it goes entirely beyond the meaning of the expression "licensing" to interpret it as a check upon even the primary processes involved in the trade which is being licenced. A simple meaning of the expression "licence" in the sense relevant to this discussion is that contained in the Concise Oxford Dictionary reading as under :-*

> *" permit from Government etc., to marry, print something, preach, carry on some trade (especially that in alcoholic liquor), etc."*
>
> *While it is true that upon this interpretation, no person can enter a trade, which is subject to licensing, unless he possesses a licence, yet it seems to me, speaking with respect, that there is a danger of fallacy involved in treating a licence as if it were a reversed prohibition. For the grant of the Fundamental Right of freedom to conduct lawful trades in itself connotes that there is advantage to be gained by granting such a liberty to individual citizens, not only because it tends to produce profit and a livelihood for such citizens, but also because it is to the advantage of the community in general. Therefore, I feel no hesitation in expressing the opinion that the power given to the State to regulate a trade by a licensing system is one which is to be exercised, not for the curtailment of trade or for restricting the initiative and liberty of action which persons engaged in trade must necessarily be allowed, if they are too make their livelihood under conditions of free enterprise, but for the advancement of the trade and its better organization, for the mutual benefit of those engaged in it as well as the community at large, I decline to allow that the systematic domination by the State of every action which a ship owner might wish to take in relation to his ship for the purpose of its profitable employment, can possibly fall within the meaning of the expression "regulation by a licensing system" occurring in the first proviso to Article 12."*

31. The perusal of sections 3, 4, 6, 7 and 9 of Ordinance 1984 shows that no educational institution shall run unless it is registered under Ordinance 1984. Under section 6 of the Ordinance 1984, application for registration is to be filed by the institution whereas section 7 of the Ordinance requires that conditions of registration are to be complied with, as prescribed under the Rules of 1984. Under section 9 of the Ordinance 1984, registration can be cancelled for

failure to comply with the provision of Ordinance 1984 or Rules 1984. The above provision of Ordinance 1984 and Rules 1984 show that an arrangement has been made for running of private schools by way of an Ordinance and Rules applicable uniformly. Therefore, in view of definition of license discussed above, law settled in *Ghulam Zameer* and *East and West Steam Shipping Company* case ibid, it can safely be concluded that private schools are being regulated under licensing system.

32. The Division Bench of Sindh High Court in case titled *"Beacons House School System vs. Province of Sindh",* (C.P. D. No.5812/2015) also in similar circumstances held that private schools are regulated under a licensing system. The relevant observation is reproduced hereunder:-

> *"In our view, when the 2001 Ordinance and the 2005 Rules are considered, they set up a regulatory regime for schools (and of course other educational institutions as well) that is in the nature of a licensing system within the meaning of the second condition imposable under Article 18. The schools are required to be registered under the 2001 Ordinance, which is subject to periodic renewal. No school can function as such unless registered. The statute imposes a monitoring and inspection regime. The registration can be cancelled (or not renewed) if the school contravenes any of the provisions of the statute or rules made thereunder, or any term or condition of the registration is violated, or any order passed or instruction given by the registering authority is not complied with. Reports have to be submitted annually. These and a host of other provisions easily establish that the schools are being regulated under a licensing system."*

33. The Sindh High Court in Judgment referred above also held that running of educational institution falls within the definition

of "trade" which includes business. The relevant observations are re-produced hereunder:-

> *"Before proceeding further, we pause to make a general point. Schools obviously impart education and a teacher at a school is clearly undertaking a vocation or profession. The institutionalized provision of schooling is an important and indeed a noble endeavor. Teachers are highly revered in most cultures, and rightly so. But the school itself, at least to the extent here relevant, can also be a business. We must emphasize that there is no opprobrium to a school being run as a business. There should be no stigma if an educational institution is so organized or operated. It is perfectly lawful to do so. Furthermore, the running of a school as a business should not be confused with the making of profits. Many schools that are run on a non-profit basis do make a profit, i.e., their receipts exceed the expenses. It is simply that such profits are not distributed but are (usually as a mandatory condition of the school's constitutive documents) ploughed back into the institution. However, there is nothing wrong with running a school with the intent of making (i.e., distributing) a profit. It must be remembered that we are here concerned with the Constitution and the law. While the State, in setting up a regulatory regime under a licensing system in terms of the second condition is entitled to take into account a host of factors and tailor its system accordingly, it must be recognized that we are concerned with a fundamental right that is being subjected to a restriction. We proceed accordingly."*

34. The running of educational institution being a business which is covered under definition of "trade" can indeed be regulated by a licensing system. The host of provisions of the Ordinance of 1984 and Rules of 1984, discussed above leave no manner of doubt that schools are being regulated under licensing system.

Regulations to be Reasonable.

35. No doubt the State can regulate the trade or profession by a licensing system, however, honourable Supreme Court repeatedly held that these regulations must be reasonable. There is distinction between Article 18 of Pakistani Constitution and Article 19(6) of the Indian Constitution. In Article 18, the word "reasonable restriction" is not specifically mentioned as in Article 19(6) of the Indian Constitution. However, word "regulation" in Article 18 has been construed that regulation shall be reasonable. In this regard the august Supreme Court in *Arshad Mahmood* case **(PLD 2005 SC 193),** held as under:-

> *"It is well settled that the right of trade/business or profession under Article 18 of the Constitution is not an absolute right but so long a trade or business is lawful a citizen who is eligible to conduct the same cannot be deprived from undertaking the same, subject to law which regulates it accordingly. The word "regulation", as used in Article 18 of Constitution has been interpreted by the Courts of our country keeping in view the provisions of Article 19(1)(g)(6) of the Indian Constitution.*
>
> *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. In this behalf, reference may be made to Administrator Market Committee, Kasur, etc. vs. Muhammad Sharif (1994 SCMR 1048).*

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. To find out the answer to this question, reference may be made to the case of Municipal Corporation of the City of Toranto vs. Virgo (1896 AC 88, 93), where Lord Davey while discussing a statutory power conferred on a Municipal Council to make bye-laws for regulating and governing a trade made the following observation;--

"No doubt the regulation and governance of a trade may involve the imposition of restrictions on this exercise……..Where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order. But their lordships think that there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or government of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed."

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.

Argument of learned counsel for respondents is that competent authority can regulate any trade or profession by a licensing system. There may be no cavil but this clause has to be read conjunctively with proviso (b) of Article 18 of the Constitution, according to which an element of free competition to regulate a trade, commerce or industry has been introduced because if competition in the trade is discouraged, it would negate

> *the provisions of Article 3 of the Constitution, which deals with the elimination of all forms of exploitation and if due to non-competition, franchise is granted on specified routes, it would tantamount to monopolize the trade/business of transport, as held in the case of Harman Singh v. R.T.A. Calcutta Region. (AIR 1954 SC 190).*

> *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, 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 those should not be arbitrary or excessive in nature, barring a majority of persons to enjoy such trade."*

36. Same view was expressed by the august Supreme Court in *Pakcom Limited and others v. Federation of Pakistan and others* **(PLD 2011 SC 44)** where while examining the scope of Article 18 of the Constitution, it was held as under:-

> *"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 promoting general welfare."*
>
> (emphasis supplied).

37. In *Al-Reham Travels and Tours (Pvt.) Ltd. v. Ministry of Religious, Hajj, Zakat and Ushr through Secretary and others* **(2011 SCMR 1621)**, honourable Supreme Court held that Constitution protects the fundamental rights of every citizen to join any lawful profession or occupation and to conduct any lawful business. Further held that in the proviso of said Article, the Federal Government or a Provincial Government, or by a corporation controlled by any Government, can carry out any trade, business, industry or service, to the exclusion complete or partial of other persons. In the case of *Farooq Ahmad Khan Leghari v. Federation of Pakistan* **(PLD 1999 SC 57)**, it was held that "the general words cannot be construed in isolation, but the same are to be construed in the context in which they are employed. Therefore, held that exclusion provided in clause (c) of Article 18 of the Constitution is only to the extent of trade, business, industry or service controlled by the Federal Government or Provincial Government or by a corporation, controlled by any such Government.

38. In *Messrs Elahi Cotton Mills Ltd. and others vs. Federation of Pakistan through Secretary M/o Finance, Islamabad and others* **(PLD 1997 SC 582)**, it is held that any legislation whereby either the prices of marketable commodities are fixed in such a way as to bring them below the cost of production and thereby make it impossible for a citizen to carry on his business or tax is imposed in such a way so as to result in acquiring property of those on whom the incidence of taxation fell, then such legislation would be violative of the fundamental rights to carry on business and to hold property as guaranteed in the Constitution. In *Administrator, Market Committee Kasur and 3 others vs. Muhammad Sharif and others* **(1994 SCMR 1048)**, it is held that Licensing System is itself a restrain on the trade, but the Constitution empowers the Government to impose reasonable restrictions.

39. In *Watan Party and another vs. Federation of Pakistan* **(PLD 2011 SC 997)**, honourable Supreme Court held as under:-

> *"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 provisions of the Indian Constitution which omits the use of word "lawful" in the relevant provision.*
>
> *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."*

In *Shahabuddin and another vs. Pakistan* **(PLD 1957 (W.P.) Kar. 854)**, Sindh High Court held that:-

> *The first part of the Article relations to prescription of qualifications to enter upon a profession or occupation and has no application to this case because no qualifications have been prescribed for entering upon the occupation of the petitioners. The petitioners therefore, have a right under the Constitution to conduct their trade freely, subject to the regulation of their trade, if any by a licensing system. There must be a licensing system for regulating their trade.*
>
> *Regulation is different from control. The word 'control' only means dominance of a superior authority. The meaning of the word does not necessarily imply a purpose other than the subjection of the subordinate. It is not so with the expression 'regulation' because regulation is not a antithesis orderliness with an objection in view."*

40. The crux of the above judgments is that right of profession and trade under Article 18 of the Constitution is not an absolute right and is always subject to reasonable restrictions prescribed by law in a system of licensing. The competent authority is at liberty to regulate profession and trade and said form of regulation shall only be unconstitutional if it is arbitrary, discriminatory, or demonstrably irrelevant to the policy, hence an unnecessary and unwarranted

interference with individual liberty and right of property. Reasonable restrictions authorized by the Constitution do not negate the Constitutional rights of a citizen to do business unhindered without any condition. A reasonable restriction is always considered to be within the frame work of the fundamental right. Law may regulate the mode of carrying on business, there is no bar to exercise the lawful trade but the interest of community should be guarded as a public policy. A right to do business does not guarantee a trader an uncontrolled privilege. There should be no doubt that requirement of registration/licence from person desiring to carry on any occupation, trade or business is a restriction on the right to carry on the occupation, trade or business and its validity is liable to be questioned and tested. Therefore the requiring of registration/licence would be valid only if it reasonable in the interest of the general public.

Test of Reasonableness.

41. Now the next question is that what is the test of reasonableness to determine if any particular restriction such as impugned section 7-A of the Ordinance 1984 is reasonable or not. The august Supreme Court in *Pakistan Broadcasters Association vs. Pakistan Media Regulatory Authority* **(PLD 2016 SC 692)** defined the expression "reasonable restriction" as under:-

> *"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 promoting 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."*

42. The august Supreme Court in *Arshad Mahmood case* supra observed that our Courts followed the interpretation of expression "reasonable restriction" form Indian case law, therefore, it will be useful to also examine the test of reasonableness discussed in following Indian judgments:-

(i). In *Papnasam Labour Union vs. Madura Coats Ltd.* **(AIR 1952 SC 196)**, the Court held as under:-

> *"That both the substantive and the procedural aspects of the impugned restrictive law should be examined from the point of view of reasonableness; that is to say, the Court should consider not only factors such as the duration and the extent of the restrictions, but also the circumstances under which and the manner in which their imposition has to bear in mind that the test of reasonableness, individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the*

judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the Judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have in authorizing the imposition of the restrictions, considered them to be reasonable."

(ii). In *Mohammad Faruk v. State of Madhya Pradesh* **(1970 AIR SC 93)**, the Court held that:-

"The impugned notification-, though technically within the competence of the State Government, directly infringes the fundamental right of the petitioner guaranteed by Art. 19(1)(g), and may be upheld only if it be established that it seeks to impose reasonable restrictions in the interests of the general public and a less drastic restriction will not be ensure the interest of the general public. The Court must in considering the validity of the impugned law imposing a prohibition on the carrying on of a business or profession, attempt an evaluation of its direct and immediate impact upon the fundamental rights of the citizens affected thereby and the larger public interest sought to be ensured in the light of the object sought to be achieved, the necessity to restrict in the citizen's freedom, the inherent pernicious nature of the act prohibited or its capacity or tendency to be harmful to the general public, the possibility of achieving the object by imposing a less drastic restraint, and in the absence of exceptional situations such as the prevalence of a state of emergency-national or local- or the necessity to maintain essential supplies, or the necessity to stop activities inherently dangerous, the existence of a

machinery to satisfy the administrative authority that no case for imposing the restriction is made out or that a less drastic restriction may ensure the object intended to be achieved. The sentiments of a section of the people may be hurt by permitting slaughter of bulls and bullocks in premises maintained by a local authority. But a prohibition imposed on the exercise of a fundamental right to carry on an occupation, trade or business will not be regarded as reasonable, if is imposed not in (1)[160]2 S.C.R. 375, the interest of the general public, but merely to respect the susceptibilities and sentiments of a section of the people whose way of life, belief or thought is not the same as that of the claimant."

(iii). In *Narendra Kumar v. Union of India* **(AIR 1960 SC 430),** the Court held that**:-**

"It is reasonable to think that the makers of the Constitution considered the word "restriction" to be sufficiently wide to save laws "inconsistent" with Article 19(1), or "taking away the rights" conferred by the Article, provided this inconsistency or taking away was reasonable in the interests of the different matters mentioned in the clause. There can be no doubt therefore that they intended the word "restriction" to include cases of "prohibition" also. The contention that a law prohibiting the exercise of a fundamental right is in no case saved, cannot therefore be accepted. It is undoubtedly correct, however, that when, as in the present case, the restriction reaches the stage of prohibition special care has to be taken by the Court to see that the test of reasonableness is satisfied. The greater the restriction, the more the need for strict scrutiny by the Court.

In applying the test of reasonableness, the Court has to consider the question in the background of the facts and circumstances under which the order was made, taking into account the nature of the evil that was sought to be remedied by such law, the ratio of the harm caused to individual citizens by the proposed remedy, to the

beneficial effect reasonably expected to result to the general public. It will also be necessary to consider in that connection whether the restraint caused by the law is more than was necessary in the interests of the general public."

(iv). In *Bannari Amman Sugars Ltd. Commercial Tax Officer* **(2005 1 SC 625)**, the Court held that:-

"Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interest of the general public and not from the stand point of the interests of persons upon whom the restrictions have been imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. In determining whether there is any unfairness involved the nature of the right alleged to have taken infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing condition at the relevant time enter into judicial verdict, the reasonableness of the legitimate expectation has to be determined with the respect to the circumstances relating to the trade or business in question. Canalisation of a particular business in favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country."

(v). In *Bishambhar Dayal Chandra Mohan v. State of Uttar Pradesh* (**1982 AIR (SC) 33),** the Court held that:-

"The real, question at issue is whether or not the seizure of wheat was with the authority of law. The fundamental right to carry on trade or business guaranteed under Article 19(1)(g) or the freedom of inter-State trade, commerce and intercourse under Article 301 of the Constitution, has its own limitations. The liberty of an individual to do as he pleases is not absolute. It must yield to the common good. Absolute or unrestricted individual

rights do not and cannot exist in any modern State. There is no protection of the rights themselves unless there is a measure of control and regulation of the rights of each individual in the interests of all. Whenever such a conflict comes before the Court, it is its duty to harmonise the exercise of the competing rights. The Court must balance the individual's rights of freedom of trade under Article 19 (1) (g) and the freedom, of inter-State trade and commerce under Article 301 as against the national interest. Such a limitation is inherent in the exercise of those rights."

(vi). In *Cooverjee B. Bharucha v. Excise Commissioner* (**1954 AIR (SC) 220)**, the Court held that:-

"It was not disputed that in order to determine the reasonableness of the restriction regard must be had to the nature of the business and the conditions prevailing in that trade. It is obvious that these factors must differ from trade to trade and no hard and fast rules concerning all trades can be laid down. It can also not be denied that the State has the power to prohibit trades which are illegal or immoral or injurious to the health and welfare of the public.

Laws prohibiting trades in noxious or dangerous goods or trafficking in women cannot beheld to be illegal as enacting a prohibition and not a mere regulation. The nature of the business is, therefore, an important element in deciding the reasonableness of the restrictions. The right of every citizen to pursue any lawful trade or business is obviously subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, order and morals of the community. Some occupations by the noise made in their pursuit, some by the odours they engender, and some by the dangers accompanying them, require regulations as to the locality in which they may be conducted. Some, by the dangerous character of the articles used, manufactured or sold, Require also special qualifications in the parties permitted to use, manufacture or sell them."

(vii). In *Municipal Corporation of the City of Ahmedabad vs. Jan Mohammed Usmanbhai* **(1986) 3 SCC 20**, the Court held that:-

> *"When the validity of a law placing restriction on the exercise of a fundamental right in Article 19(1)(g) is challenged, the onus of proving to the satisfaction of the Court that the restriction is reasonable lies upon the State. If the law requires that an act which is inherently dangerous, noxious or injurious to the public interest, health or safety or is likely to prove a nuisance to the community shall be done under a permit or a licence of an executive authority, it is not per se unreasonable and no person may claim a licence or a permit to do that act as of right. Where the law providing for grant of a licence or permit confers a discretion upon an administrative authority regulated by permit confers a discretion upon an administrative authority regulated by rules or principles, express or implied, and exercisable in consonance with the rules of natural justice, it will be presumed to impose a reasonable restriction. Where, however, power is entrusted to an administrative agency to grant or withhold a permit or licence in its uncontrolled discretion the law ex facie infringes the fundamental right under Article 19(1)(g). Imposition of restriction on the exercise of a fundamental right may be in the form of control or prohibition. But when the exercise of a fundamental right is prohibited, the burden of proving that a total ban on the exercise of the right alone may ensure the maintenance of the interest of general public lies heavily upon the State. In this background of legal position the appellants have to establish that the restriction put on the fundamental right of the respondents to carry on their trade or business in beef was a reasonable one. The Court must in considering the validity of the impugned law imposing prohibition on the carrying on of a business or a profession attempt an evaluation of its direct and immediate impact upon the fundamental rights of the citizens affected*

thereby an the larger public interest sought to be achieved, the necessity to restrict the citizen's freedom, the inherent pernicious nature of the act prohibited or its capacity or tendency to be harmful to the general public, the possibility of achieving the object by imposing a less drastic restraint, and in the absence of exceptional situations such as the prevalence of a state of emergency, national or local, or the necessity to maintain necessary supplies or the necessity to stop activities inherently dangerous, the existence of a machinery to satisfy the administrative authority that a case for imposing restriction is made out or a less drastic restriction may ensure the objection intended to be achieved."

(viii). In *Abdul Hakim Quraishi and others vs. State of Bihar* **(AIR 1961 SC 448)**, the Court held that:-

"The phrase 'reasonable restriction' connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word 'reasonable' implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(g) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in that quality."

(ix). In *Mohammad Yasin vs. Town Area Committee, Jalalabad and another* **(AIR 1952 SC 115)**, the Court held that:-

"Under Article 19(1)(g) the citizen has the right to carry on any occupation, trade or business which right under that clause is apparently to be unfettered. The only restriction to this unfettered

> *right is the authority of the State to make a law relating to the carrying on of such occupation, trade or business as mentioned in Clause (6) of that article as amended by the constitution (First Amendment) Act, 1951, If, therefore, the licence fee cannot be justified on the basis of any valid law no question of its reasonableness can arise, for, an illegal impost must at all times be an unreasonable restriction and will necessarily infringe the right of the citizen to carry on his occupation, trade or business under Article 19(1)(g) and such infringement can properly be made the subject-matter of a challenge under art 32 of the Constitution."*

43. The test of reasonableness settled in above case law is that Court should consider not only factors such as the duration and the extent of the restrictions but also the circumstances and the manner in which they are imposed. There are no abstract standard or general pattern of reasonableness, Court has to bear in mind that the nature of the rights infringed through such restriction should be proportionate to the urgency of the evil sought to be remedied by said restriction. The restriction on fundamental right can only be upheld if it is established that it seeks to impose reasonable restriction in the interest of general public and a less drastic restriction will not have ensured the interest of the general public.

44. Under Article 18 of the Constitution, the restrictions imposed are not only required to be imposed by law but the said restrictions must also be reasonable as held in *Arshad Mahmood* case supra. Generally speaking the validity of primarily legislation such as

Act of the Parliament is not open to challenge on the grounds of reasonableness and reasonableness is available to challenge the validity of subordinate legislation such as rules or regulation or act of the executive but this general rule does not apply where under the Constitution, a right conferred is subject to reasonableness restriction imposed by law in the public interest etc. Indeed under Article 18 of the Constitution, a restriction can be imposed through a licensing system on profession and trade in the collective interest of society and general public.

45. No doubt the fundamental rights are sacred and cannot be transgressed, however, fundamental rights have no real meaning if the State itself has in danger or disorganized, because a disorganized State will not be in a position to guarantee the rights of citizens. Therefore, the State has to maintain equilibrium between interest of the individual and the need to impose reasonable limits on the enjoyment of those rights in the interest of collective good of the society. It is here that Court is called upon to hold the balance between public interest and reasonableness of restriction imposed by law which encroached upon the right and in case the Court finds that legislation has transgressed reasonable limits envisaged by the Constitution, it will not hesitate to strike it down as *ultra vires*.

46. We now apply the above test of reasonableness to the impugned section 7-A of the Ordinance 1984 which regulate fee

structure of unaided private schools, to examine if this enactment infringes any of the fundamental rights. In Pakistan, the registration and regulation of private educational institutions including their fee structure, is not a new phenomenon. Previously the Punjab Educational (Control of unrecognized Private Institutions) Act, 1953 **(Act of 1953)** was promulgated on 25.01.1954, which inter alia provided that all unrecognized private institutions shall apply for registration in prescribed manner under the Act. The said law further provided that if any person runs an unrecognized private educational institution without its registration under the Act of 1953, he will be guilty of an offence punishable on conviction with fine. The Act of 1953 was repealed and through the West Pakistan Registration of un-recognized Educational Institutions Ordinance, 1962 **(Ordinance of 1962)**, the registering authority was required to ensure that unrecognized private educational institution, fulfilled the conditions specified in the schedule to the Ordinance of 1962. Clause (v) of the Schedule to the Ordinance of 1962 relates to the rates of tuition fee and subscription which is reproduced hereunder:-

> *"(v). that the rates of tuition fees and subscriptions charged are not in excess of the scales prescribed or approved by the Department; and"*

The Ordinance of 1962 was also repealed and finally the Ordinance of 1984 was promulgated. The said Ordinance of 1984 was applicable to all privately managed colleges, schools or institutions notified as such

by Government. Section 7 of the Ordinance 1984 relates to conditions of registration including payment of fee. For convenience, said section 7 is reproduced hereunder:-

> *"**7. Conditions of Registration**.– An institution shall comply with such conditions of registration including payment of fees as may be prescribed."*

Under section 13 of Ordinance of 1984, the Rules of 1984 were framed. Rule 12 deals with the conditions for registration including charging of fees and other charges by the institutions. Sub rule (ii) of rule 12 provides that fees and other charges shall not be fixed or raised beyond reasonable limits. For ready reference, sub-rule (ii) of rule 12 is reproduced hereunder:-

> *"(ii) The fees and other charges levied, shall not be fixed or raised beyond reasonable limits."*

47. The perusal of clause (v) of repealed Ordinance 1962, section 7 of the Ordinance 1984 and rule 12(ii) of Rules of 1984 shows that fees to be charged by educational institutions was always regulated by the authority even prior to impugned section 7-A of Ordinance 1984. It is also admitted position that section 7 of the Ordinance 1984 and rule 12(ii) of the Rules of 1984 are not under challenge. Therefore, it cannot be argued that under Article 18 of the Constitution, the fixation of reasonable fee by educational institutions cannot be regulated through section 7-A of the Ordinance of 1984. The Article 18 of the Constitution is in many ways unique. It boxed in

simultaneously fundamental rights and also authorizes State to prescribe qualifications and conditions for exercise of those fundamental rights. The right of profession, occupation, trade and business relates to economy of the country, therefore, through this Article, state retained powers to regulate economic matters. The regulation of fee structure of un-aided schools fall within exceptions provided for under Article 18 of the Constitution.

48. However, while imposing fee regulation, balance must be drawn between cost of fee and quality of education. While consumers are always seeking lower costs in any economy and the welfare state in its attempts to help the consumer reduces costs at the expense of the producers. This reduction of price may be seen as a positive impact by the consumers in the short-term but in the long-run the effects may be disastrous. Because when producers see no chance of increasing prices they end up cutting costs, hence unable to function efficiently and also lose incentive to perform better. The regulation of fees therefore if applied arbitrary will have the unintended consequence of lowering the standards of private schools.

49. The hard reality that emerges is that private educational institutions are a necessity in the present day context. It is not possible to do without them because the Government is in no position to meet the demand which call for substantial outlays. While education is one of the most important functions of the State it has no monopoly

therein and therefore, private educational institutions have a role to play. No doubt, we have entered into an era of liberalization of economy and in such an economy, private players are undoubtedly given much more freedom in economic activities including profession, business, occupation etc. as these are not normal forte of the State and the State should have minimal role therein. However, it is to be borne in mind that the occupation of education cannot be treated at par with other economic activities. In this field, State cannot remain a mute spectator and has to necessarily step in to prevent possible exploitation, profiteering and commercialization by the private sector through regulatory regime as well by providing Regulations under the relevant statutes.

Judicial Precedents from Pakistan and Indian Jurisdiction on Regulatory Mechanism by State on un-aided Private Schools and Law settled therein.

50. The regulatory mechanism by State of un-aided private schools remained a subject of discussion in various judgments before Indian and Pakistani Courts. Some of these cases and law settled in these judgments which will be beneficial for matter under discussion are as under:-

(i). In *Mohni Jain v. State of Karnataka & others* **(1992 3 SCC 666)**, the Court held that:-

> *"The "right to education" is concomitant to the fundamental rights enshrined under Part III of the Constitution. The State is under a constitutional mandate to provide educational institutions at all levels for the*

benefit of the citizens. The educational institutions must function to the best advantage of the citizens. Opportunity to acquire education cannot be confined to the richer section of the society."

(ii). In *Unni Krishnan vs. State of A.P.* **(1993) 1 Supreme Court cases 645)**, Court held that:-

"So far as unaided institutions are concerned, it is obvious that they cannot be compelled to charge the same fee as is charged in Government institutions. If they do so voluntarily, it is perfectly welcome but they cannot be compelled to do so, for the simple reason that they have to meet the cost of imparting education from their own resources—and the main source, apart from donations/charities, if any, can only be the fees collected from the students. It is here that the concepts of 'self-financing educational institutions' and 'cost based educational institutions' come in. This situation presents several difficult problems. How does one determine the 'cost of education' and how and by whom can it be regulated? The cost of education may vary, even within the same faculty, from institution to institution. The facilities provided, equipment, infrastructure, standard and quality of education obtaining may vary from institution to institution.

The obligations created by Article 41, 45 and 46 of the Constitution can be discharged by the State either by establishing institutions of its own or by aiding, recognizing and/or granting affiliation to private educational institutions and merely recognition or affiliation is granted it may not be insisted that the private educational institution shall charge only that fee as is charged for similar courses in governmental institutions. The private educational institutions have to and are entitled to charge a higher fee, not exceeding the ceiling fixed in that behalf. The admission of students and the charging of fee in these private educational institutions shall be governed by the scheme evolved herein."

(iii). In *T.M.A. Pai Foundation & Ors vs. State of Karnatake & others* **(2002) 8 SCC 481),** it was held that:-

"An educational institution is established for the purpose of imparting education of the type made available by the institution. Different courses of study are usually taught by teachers who have to be recruited as per qualifications that may be prescribed. It is no secret that better working conditions will attract better teachers. More amenities will ensure that better students seek admission to that institution. One cannot lose sight of the fact that providing good amenities to the students in the form of competent teaching faculty and other infrastructure costs money. It has, therefore, to be left to the institution, if it chooses not to seek any aid from the government, to determine the scale of fee that it can charge from the students. One also cannot lose sight of the fact that we live in a competitive world today, where professional education is in demand. We have been given to understand that a large number of professional and other institutions have been started by private parties who do not seek any government aid. In a sense, a prospective student has various options open to him/her where, therefore, normally economic forces have a role to play. The decision on the fee to be charged must necessarily be left to the private educational institution that does not seek or is not dependent upon any funds from the government.

We, however, wish to emphasize one point, and that is that inasmuch as the occupation of education is, in a sense, regarded as charitable, the government can provide regulations that will ensure excellence in education, while forbidding the charging of capitation fee and profiteering by the institution. Since the object of setting up an educational institution is not required for the purpose of fulfilling that object. To put it differently, in the establishment of an educational institution, the object should not be to make a profit, inasmuch as education is essentially charitable in nature. There can, however, be a reasonable revenue surplus, which may be generated by the educational institution for the purpose of development of education and expansion of the institution."

(iv). In *Islamic Academy of Education And… vs. State of Karnataka And others*, ***(2003) 6 SCC 697)***, Supreme Court of India held that:-

> *"So far as the first question is concerned, in our view the majority judgment is very clear. There can be no fixing of a rigid fee structure by the government. Each institute must have the freedom to fix its own free structure taking into consideration the need to generate funds to run the institution and to provide facilities necessary for the benefit of the students. They must also be able to generate surplus which must be used for the betterment and growth of that educational institution.* In paragraph 56 of the judgment, it has been categorically laid down that *the decision on the fees to be charged must necessarily be left to the private educational institutions that do not seek and which are not dependent upon any funds from the Government. Each institute will be entitled to have its own fee structure. The fee structure for each institute must be fixed keeping in mind the infrastructure and facilities available, the investments made, salaries paid to the teachers and staff, future plans for expansion and/or betterment of the institution etc. Of course there can be no profiteering and capitation fees cannot be charged. It thus needs to be emphasized that as per the majority judgment imparting of education is essentially charitable in nature. Thus the surplus/profit that can be generated must be only for the benefit/use of that educational institution, profits/surplus cannot be diverted for any other use or purpose and cannot be used for personal gain or for any other business or enterprise."*

(v). In *P.A. Inamdar vs. State of Maharashtra*, ***(2005) 6 SCC 537)***, *it was held that:-*

> *"To set up a reasonable fee structure is also a component of "the right to establish and administer an institution" within the meaning of Article 30(1) institution is free to devise its own fee structure subject to the limitation that there can be no profiteering and no*

capitation fee can be charged directly or indirectly, or in any form……..

Capitation fee cannot be permitted to be charge and no seat can be permitted to be appropriated by payment of capitation fee. "Profession" has to be distinguished from "business" or a mere "occupation". While in business, and to a certain extent in occupation, there is also profit motive, profession is primarily a service to society wherein earning is secondary or incidental. A student who gets a professional degree by payment of capitation fee, once qualified as a professional, is likely to aim more at earning rather than serving and that becomes a bane to society. The charging of capitation fee by unaided minority and non-minority institutions for professional courses is just not permissible. Similarly, profiteering is also not permissible. Despite the legal position, this Court cannot shut its eyes to the hard realities of commercialization of education and evil practices being adopted by many institutions to earn large amounts for their private or selfish ends. If capitation fee and profiteering is to be checked, the method of admission has to be regulated so that the admissions are based on merit and transparency and the students are not exploited. It is permissible to regulate admission and fee structure for achieving the purpose just stated.

(vi). In case of *Society for Unaided Private School of Rajasthan vs. Union of India* ***(2012 AIR SC 3445)***, *Court held that:-*

"Indeed by, virtue of Section 12(2) read with Section 2(n)(iv), private unaided school would be entitled to be reimbursed with the expenditure incurred by it in providing free expenditure incurred by it in providing free and compulsory education to children belonging to the above category to the extent of per child expenditure incurred by the State in a school specified in Section 2(n)(i) or the actual amount charged from the child, whichever is less. Such a restriction is in the interest of the general public. It is also a reasonable restriction. Such measures address two aspects, viz., upholding the

fundamental right of the private management to establish an unaided educational institution of their choice and, at the same time, securing the interests of the children in the locality, in particular, those who may not be able to pursue education due to inability to pay fees or charges of the private unaided schools.

Primarily responsibility for children's rights, therefore, lies with the State and the State has to be respect, protect State and the State has to respect, protect and fulfill children's rights and has also got a duty to regulate the private institutions that care for children, to protect children from economic exploitation, hazardous work and to ensure human treatment of children. Non-State actors exercising the State functions like establishing and running private educational institutions are also expected to respect and protect the rights of the child, but they are, not expected to surrender their rights constitutionally guaranteed.

(vii). In *Modern School vs. Union of India* ***(AIR 2004 SC 2236)****, held that:-*

"The first point for determination is—whether the Director of Education has the authority to regulate the fees of unaided schools?

At the outset, before analyzing the provisions of 1973 Act, we may state that it is now well settled by catena of decisions of this Court that in the matter of determination of the fee structure the unaided educational institutions exercises a great autonomy as, they, like any other citizen carrying on an occupation are entitled to a reasonable surplus for development of education and expansion of the institution. Such institutions, it has been held, have to plan their investment and expenditure so as to generate profit. What is, however, prohibited is commercialization of education. However, in none of the earlier cases, this Court has defined the concept of reasonable surplus, profit, income and yield, which are the terms used in the various provisions of 1973 Act."

(viii). In *Anti-Corruption and Crime Investigation Cell vs. State of Punjab & others* **(2013 (2) CLT 488),** the Court held that:-

> *"Fee charges should be commensurate with the facilities provided by the institution. Fees should normally be charged under the heads prescribed by the Department of Education of the State/U.T. for schools for different categories. No capitation fee or voluntary donations for gaining admission in the school or for any other purpose should be charged/collected in the name of the school. In case of such malpractices, the Board may take drastic action leading to disaffiliation of the school."*

(ix). In *Modern Dental College and Research Centre and another vs. Madhya Pradesh and others* **(2016 AIR (SC) 2601)**, Court held that:-

> *"In modern times, all over the world, education is big business. On account of consumerism, the students all over the world are restless. That schools in private sector which charge fees may be charitable provided they are not run as profit-making ventures. That educational charity must be established for the benefit of the public rather than for the benefit of the individuals. That while individuals may derive benefits from an educational charity, the main purpose of the charity must be for the benefit of the public."*

(x). In *Modern Dental College v. State of Madhya Pradesh* **(AIR 2009 SC 2432)**, it was held that:-

> *"In para 91 of Inamdar's case (supra), it has been observed:*
>
> > *"The right to establish an educational institution, for charity or for profit, being an occupation, is protected by Articles 19(1)(g) of the Constitution...."*
>
> *Thus, it is clear that the right to establish and run an educational institution is a fundamental right guaranteed under Article 19(1)(g) of the Constitution. Of course under Article 19(6) of the Constitution, reasonable restrictions can be placed on such a fundamental right, and hence we have to examine whether such restriction are reasonable or not."*

(xi). In *Father Thomas Shingare Vs. State of Maharashtra* ***(AIR 2002 SC 463)****, the Court held that:-*

> *"It is a question of fact in each case whether the limit imposed by the Government regarding approved fees would hamper the right under Article 30(1) of the Constitution in so far as they apply to any unaided educational institution established and administered by the minorities. If the legislature feels that the nefarious practice of misusing school administration for making huge profit by collecting exorbitant sums from parents by calling such sums either as fees or donations, should be curbed, the legislature would be within its powers to enact measures for that purpose. Similarly, if the management of an educational institution collects money from persons as quid pro quo for giving them appointments on the teaching or non- teaching staff of such institution, the legislature would be acting within the ambit of its authority by bringing measures to arrest such unethical practices. Such pursuits are detestable whether done by minorities or majorities. No minority can legitimately claim immunity to carry on such practices under the cover of Article 30(1) of the Constitution. The protection envisaged therein is not for shielding such commercialized activities intended to reap rich dividends by holding education as a facade."*

(xii). In *India Medical Association vs. Union of India and others* **(AIR 2011 SC 2365),** the Court held that:-

> *"The Delhi Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-Exploitative Fee And Other Measures to Ensure Equity And Excellence) Act, 2007 (Delhi Act 80 of 2007) or any provisions thereof do not suffer from any constitutional infirmities. The validity of the Delhi Act 80 of 2007, and its provisions, are accordingly upheld."*

(xii). In *Charutar Arogya Mandal v. State of Gujarat* **(AIR 2011 (SCW) 2475)**, the Court while discussing case law on the subject held that:-

> *"In **T.M.A. Pai Foundation v. State of Karnataka, 2002 (8) SCC 481,** this court declared that every institution is free to devise its own fee structure subject to the limitations that there can be no capitation fee or profiteering, directly or indirectly. This court also clarified that charging of fees in a manner that a reasonable surplus is left to meet the cost of expansion and augmentation of facilitates, would not amount to profiteering. In **Islamic Academy of Education v. State of Karnataka, 2003 (6) SCC 697,** this court directed the state Governments to set up two committees - one to regulate admissions and the other to regulate the fee structure. The fee structure committee was authorized to decide whether the fees proposed by a college were justified or whether they amounted to profiteering or charging capitation fee; and if necessary to prescribe a fee structure different from what was proposed by the institutions. In **P.A. Inamdar v. State of Maharashtra, 2005 (6) SCC 537,** this Court reiterated that while every institution is free to devise its own fee structure, the same can be regulated to prevent profiteering and to ensure that no capitation fee is charged, either directly or indirectly, or in any form; that if capitation fee and profiteering are to be checked, the method of admission has to be regulated so that the admissions are based on merit and are transparent and the students are not exploited; and that it is, therefore, permissible to regulate admissions and fee structure for achieving the same."*

(xiv). In *Rohilkhand Medical College and Hospital, Bareilly v. Medical Council of India* **(2013 (15) SCC 516)**, Court observed as under:-

> *"We think, this is an apt occasion to ponder over whether we have achieved the desired goals, eloquently highlighted by the Constitution Bench judgments of this Court in **T.M.A. Pai Foundation and others v. State of***

> ***Karnataka and others 2003(2) S.C.T. 385 : (2002) 8 SCC 481*** *and* ***P.A. Inamdar and others v. State of Maharashtra and others, 2005(3) S.C.T. 697 : (2005) 6 SCC 537****. TMA Pai Foundation case (supra) has stated that there is nothing wrong if the entrance test being held by self-financial institutions or by a group of institutions but the entrance test they conduct should satisfy the triple test of being fair, transparent and not exploitative. TMA Pai Foundation (supra) and Inamdar (supra) repeatedly stated that the object of establishing an educational institution is not to make profit and imparting education is charitable in nature. Court has repeatedly said that the common entrance test conducted by private educational institutions must be one enjoined to ensure the fulfillment of twin object of transparency and merits and no capitation fee be charged and there should not be profiteering. Facts, however, give contrary picture. In Inamdar, this Court, in categorical terms, has declared that no capitation fee be permitted to be charged and no seat can be permitted to be appropriated by payment of capitation fee."*

(xv). In *Modern Dental College and Research Centre v. State of Madhya Pradesh* **(2016 AIR (SC) 2601)**, Court held that for fixing the fee structure, following considerations are to be kept in mind:-

> *(a) the infrastructure and facilities available;*
> *(b) investment made, salaries paid to teachers and staff;*
> *(c) future plans for expansion and/or betterment of institution subject to two restrictions, viz. non-profiteering and non-charging of capitation fees."*

(xvi). In *M/s Pushpagiri Medical Society vs. State of Kerala and other* **(2004 AIR (SCW) 7491)**, it was held that:-

> *"The other question is regarding the fee structure. In terms of the decision in Islamic Academy's case, the Government of Kerala appointed a Committee headed by Justice R. T. Thomas, a former Judge of this Court. The*

said Committee has fixed the fee at Rs.1.13 lakh as the maximum annual fee to be collected from each student of the private self-financing medical colleges."

51. In Pakistan, Courts have also discussed the extent of authority of State to regulate private institutions as under:-

(I). In *EDUCATIONAL SERVICES (PVT.) LIMITED and 4 others vs. FEDERATION OF PAKISTAN and another* **(PLD 2016 Islamabad 141),** Islamabad High Court after discussing Indian case law held as under:-

"In light of the above judgments and relevant provisions of the Act, the following principles are deduced:

i. PEIRA has the authority to fix the fee but the same cannot be done in arbitrary manner without calling for record of expenses and examination of requirements of individual Private Educational Institution.

ii. The factors which the PEIRA has to take into consideration in fixation of the fee should be formulated in the Rules which it has the power to frame under the Act.

iii. The broad guidelines which PEIRA has to keep in consideration before fixation of the price and/or formulation of Rules and Regulations are as follows:

a) The privately managed Educational Institutions can only maintain high standards of education if they hire highly qualified teachers;

b) Provide adequate buildings comprising all the facilities;

c) Escalation in utility bills and other charges;

d) Payment of rents on commercial rates.

iv. The Private Educational Institutions should not make windfall profits, however, are entitled to return for services rendered.

In view of above discussion, sections 4(c), 5(1)(b) & 5(1)(h) are not ultra vires Article 18. Under the referred Article freedom of Trade, Occupation or Profession is subject to such qualification as may be prescribed by law, however, there can be no arbitrary fixation of the fee by the Authority or even clog on enhancement of the same rather it has to be done after taking into consideration the expenses/costs of the petitioners and naturally the profit on the services provided. In this behalf the principles of natural justice are to be complied with. The Authority needs to frame rules/regulations keeping in view the above observations; also the Authority while making or framing such Rules/Regulations can invite suggestions from Private Educational Institutions to make them comprehensive and in line with the above provisions of law.

(II). In *Shahrukh Shakeel Khan and 2 others vs. Province of Sindh through Chief Secretary and 4 others* **(PLD 2017 Sindh 198),** learned Division Bench of Sindh High Court held that:-

"*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"

(III). In *Arif Yousif Chohan and 9 others vs. Province of Sindh through Secretary Education, Government of Sindh, Karachi and 5 others* **(2017 YLR Note 385)** Court held as under:-

"It has been further emphasized by the respondents that neither the administration nor teachers are causing any kind of harassment to the students for recovery of fee and they are only maintaining a note for the parents in the dairy of students for payment of fee in time, which otherwise is a general practice and procedure in vogue in all educational institutions and it cannot be counted as harassment or de-moralization by the administration to the students. Moreover, the issue of calling the record and audit reports from the year 2009 and onwards for scrutiny i.e. income and expenditure of the School, which absolutely involves factual controversy as such same is beyond the ambit of this Court."

(IV). In *Pir Liaqat Ali Shah vs. Government of N.W.F.P. through Secretary and 7 others* **(PLD 2011 Peshawar 143)**:-

"Yes education has become an industry and an enterprise but it should not be shorn of humanistic and philanthropic considerations, otherwise the very purpose of education which could be none else but character-building and something more than memorizing a few useful lessons, shall stand defeated. The private sector of education cannot be taken away from the umbrella of the Code so as to allow it to grow into a wild forest of money yielding trees: We, therefore, do not feel inclined to declare the Code ineffective or ultra vires. The argument that such questions can be raised before the Regulatory Authority in view of section 13-A of the N.-W.F.P. Registration and Functioning of Private Educational Institutions Ordinance, 2001 is not without substance.

We have been told that many of the petitioners have already filed complaints before the Regulatory Authority but they have not been decided so far. We, therefore, direct the Regulatory Authority to dispose of the complaints, thus, filed. Those who have not filed may, if so advised, file the same, which, too, are directed to be disposed of as early as possible."

(V). In *Beacons House School System vs. Province of Sindh* **(C.P.D. No.5812/2015)**, Court held that school fee can be regulated through licencing system.

52. The above case law from Indian and Pakistani jurisdiction on educational institutions shows that in *T.M.A. Pai Foundation case* supra, the question of regulation and fees and admission to provide professional engineering and medical colleges was in issue. In said judgments (in Para 57), the Supreme Court held that education by its very nature is a charitable occupation and the State can provide regulation that are necessary to ensure excellence in education and profiteering is not done by private educational institutions. However, the Court held that reasonable revenue surplus which may be generated by the educational institution for the purpose of development of education and expansion of institution is permissible. The *T.M.A. Pai case* supra caused much confusion amongst the State Government in India and private educational institutions, as they both interpreted the said judgments for their own benefit. On one hand the educational institution thought that they have complete autonomy with regard to their own fee structure and on the other hand, the State

interpreted it as the educational institutions are subject to reasonable restriction including fixation of their fees. This confusion was highlighted in *Islamic Academy of Education and others case* supra where (in Para 7) the Supreme Court while interpreting the *T.M.A. Pai case* held that although there can be no fixation of rigid fee structure by the Government and that each institute must have the freedom to fix its own fee structure taking into consideration the need to generate funds to run the institution and to provide facilities necessary for the benefit of students, however, the Supreme Court constituted a committee that was to regulate fee charged by private educational institutions. The Court further held that there can be no profiteering and capitation fee and the surplus/profit must be for the benefit/use of that educational institution and cannot be diverted for any other purpose or for personal gain or any other business or enterprise.

53. Subsequently in *P.A. Inamdar case* supra, the ratio settled in *Islamic Academy case* was sought to be reviewed. However, the Supreme Court upheld the mechanism brought in for determination of school fees and admission process and held that committees constituted for monitoring admission and determining fee structure in Islamic Academy case was regulatory measure aimed at protecting the interest of the students' community as a whole. The Supreme Court (in Para 20 of the judgment) also held that scheme evolved for monitoring admission and fee fixation are reasonable restrictions and

not violative of fundamental right of the private educational institutions under Article 19(1)(g) of the Indian Constitution. Finally in *Tamil Nadu Nursery Matriculation case* **(2010 (4) CTC 353)** after discussing entire case law including *T.M.A. Pai case*, *Islamic Academy case* and *P.A. Inamdar case*, the Court held that State has the right to regulate the school fee charged by private schools so far as it strikes a balance between autonomy of institutions and measures to be taken to prevent commercialization of education.

54. In the light of aforesaid judgments, the present position and jurisdiction developed in India regarding regulation of fees charged by private educational institutions is that Government has power to regulate school fees charged by private educational institutions but it must draw a balance to let institutions to fix its fee taking into consideration the need to generate funds to run the institutions and ensure excellence in education.

55. The recent cases regarding educational institutions in Pakistani Courts show that Islamabad High Court in the case of *Educational Services Private Limited* **(PLD 2016 Islamabad 141)** held that regulatory authority has the power to fix the fee but same cannot be done in arbitrary manner without calling for record of expenses and examination requirement of individual private educational institution. It was further held that the factors which are to be considered in fixation of fee should be formulated in the rules

which rule making authority has power to do so under the relevant Act. The Peshawar High Court in case titled *Peshawar Bar Association vs. Government of K.P.K.* (W.P. No.2093-P/2016) vide judgment dated 08.11.2017 held that schools are charging fees which does not commensurate with the facilities they are providing, therefore, the authority should device a policy in order to regulate the tuition fee and the minimum standards in which the school is to operate. The Sindh High Court in case of *Beacons House School System vs. Province of Sindh* (CP D No.5812/2015) held that Article 18 of the Constitution postulates that through a licensing system, reasonable restrictions can be imposed upon a lawful profession or trade. Further held that running of a school being a trade or business, it is well within the authority of the State to regulate this business through a licensing system. However, the regulations/restrictions must be reasonable.

56. The close scrutiny of above case law by Pakistani Courts shows that there is a consensus that fee structure can be regulated through a licensing system under Article 18 of the Constitution, however the said restrictions/regulations must be reasonable and should not impinge upon the fundamental rights of the private educational institutions. In other words, the ratio settled by Indian Courts to draw a balance between regulating the fee structure and to

maintain minimum autonomy of the schools for quality of service and excellence of education was also maintained by Pakistani Courts.

57. The petitioner schools are mainly aggrieved of sub-section (1), (5), (6), (7) and (8) of section 7-A of the Ordinance 1984. We have already found that regulation regarding private schools fee is not a new phenomenon and State can regulate it through licencing system. However, we now examine the above impugned sub-sections of section 7-A, separately on the touchstone of test of reasonableness and balancing as elucidated by Pakistani and Indian Courts. Learned counsel for the private schools argued that impugned sub-section (1) of section 7-A substituted through Act of 2017 is discriminatory, as under said sub-clause, section 7-A has not been made applicable to schools charging fee less than Rs.4,000/-. This argument has no substance. The equal protection of law under Article 25 of the Constitution does not envisage that every citizen is to be treated alike in all circumstances, but it contemplates that persons similarly stated or similarly placed are to be treated alike. Reasonable classification is permissible on the basis of intelligible differentia which distinguishes persons or things that are group together from those who have been left out. The classification between schools who are charging less than Rs.4,000/- fee and schools which are charging fee more than Rs.4,000/- is a reasonable classification for applicability of section 7-A between schools who are already charging less fee and schools

which are charging higher fee. Therefore, this classification is neither unreasonable nor violative of doctrine of equality as settled by august Supreme Court in *I.A. Sharwani and others vs. Government of Pakistan through Secretary, Finance Division, Islamabad and others* **(1991 SCMR 1041)**. The question of discrimination with certain other Government aided and controlled educational institutions is a subject matter of separate writ petition, therefore, we need not to discuss it at this stage in these petitions.

58. The remaining provisions of sub-section (2), (3), (7), (8), (9) and (10) of impugned section 7-A of the Ordinance 1984 as amended through Act of 2017 shows that these sub-clauses merely provide a mechanism to regulate the increase in fee structure. These requirements through licensing system are not only permissible under law but are also reasonable and justified as it does not imbalance the equilibrium between right of the State to regulate the fee structure and the autonomy of the private educational institutions to justify the increase in fees in order to ensure quality and excellence in education. Therefore, these conditions undertaken by section 7-A of the Ordinance 1984, does not run afoul to the fundamental rights of petitioner schools managements.

59. However, original sub-clause (1) of section 7-A (which impose complete bar on increase of fee for academic year 2015-2016 at the rate higher than the fee charged for academic year 2014-2015),

sub-clause (5) of section 7-A of the Ordinance 1984, which imposes a maximum limit of 5% (under Ordinance of 2015 and Act of 2016) and 8% (amended through Act of 2017), is the root cause of controversy between the parties. These particular provisions need closer analysis to determine if these particular sub-clauses amount to unreasonable restriction on the fundamental right of the private educational institutions, therefore, not sustainable or otherwise.

60. One of the contention of learned Additional Advocate General to justify the complete bar under sub-clause (1) and maximum cap of 5% and 8% under sub-clause (5) is that under Article 18 of the Constitution, only lawful trade or business can be entered upon and that also subject to qualifications and regulations under the licensing system, therefore, Article 18 is not a fundamental right, hence State can ban a profession, occupation, trade or business by declaring it unlawful and forbidden by law. He in the circumstances submitted that legislation could legally declare charging of fee more than 5% and 8% or higher than previous academic year unlawful and forbidden by law. We have carefully considered this argument. No doubt Article 18 prescribed that every citizen shall have the right to enter upon lawful profession, occupation, trade or business. However, the word lawful intends to exclude profession, trade and business which is inherently vicious, pernicious and is condemned by all civilized societies. The word lawful intend to exclude *res extra*

commercium (outside commerce). This expression does not entitle citizens to carry out business in activities which are immoral, criminal and trade in any article or goods which are obnoxious and injurious to health, safety and welfare of general public. There cannot be business in crime. This maxim was also recognized by honourable Supreme Court in *Watan Party case* **(PLD 2011 SC 997)**. No doubt the august Supreme Court in case of *Zameer Ahmad Khan* (**PLD 1975 SC 667**) (relied upon by learned Additional Advocate General himself) held that State under Article 18 can ban unlawful profession or trade, for instance, prostitution, trafficking in women, gambling, trade in narcotics, or dangerous drugs etc. However, in our view it will be fallacy to hold that education or running of educational institution is inherently vicious or pernicious or condemned by civilized society. In case of *Navendra Kumar* supra, Court held that the word restriction to include cases of "prohibition" also, however, when the restriction reaches the stage of prohibition special care has to be taken by the Court to see that the test of reasonableness is satisfied. The greater the restriction, the more the need for strict scrutiny by the Court.

61. The Supreme Court of India in the case of *Action Committee, Unaided Private Schools* **(2009) 10 SCC 1**, held that doctrine of *res extra commercium* being not applicable in relation to imparting of education for profit by unaided institution or even aided private institutions, it is difficult to conceive that how restrictions

relating on this doctrine which is wholly inapplicable could be extended. The august Supreme Court in *Arshad Mahmood case* and *East West Steam Shipping Company case* held that restrictions under Article 18 must be reasonable and should bear true relation to trade or profession for the purpose of permitting general welfare. Therefore, we are not convinced with the argument of learned Additional Advocate General that State could ban or declare unlawful the increase more than 5% or 8% higher than the previous academic year by declaring such increase as unlawful trade or business. This would otherwise lead to an absurd result.

62. To justify reasonableness of 5% and 8% capping or not more than the previous academic year, under above sub-clauses, the learned Additional Advocate General also vehemently argued that cap of 5% and 8% and complete restriction on increase not more than previous academic year, is in the interest of the public at large in the present case. No doubt whenever the interest of community collides with the fundamental rights of individual, the interest of the community will have over-riding effect over such rights. However, in the present case, it is admitted by respondents Government itself that impugned section 7-A of the Ordinance of 1984 has not been made applicable to almost 98% of the unaided private schools who are charging monthly fee less than Rs.4,000/-. Further it is not disputed that out of remaining 2% of private schools to whom impugned

section 7-A of the Ordinance of 1984 is made applicable, only few parents filed complaints before the promulgation of the Ordinance 2015 and Acts of 2016 and 2017. Once almost 98% of students and parents are not benefitting out of the impugned section 7-A of the Ordinance 1984, it cannot be said that petitioners' fundamental rights should be denied to give way to the interest of community.

63. The restriction on fundamental rights can only be upheld if it is established that it seeks to impose reasonable restriction in the interest of public at large and a less drastic restriction will not have ensued the interest of general public. This is a principle of proportionality which if violated will automatically render the condition as unreasonable restriction. Aharan Barak (a renowned jurist and visiting Professor of Yale Law School, U.S.A.) in his book "Proportionality" quoted requirement of proportionality by As Professor Grimm as under:-

> *"Laws could restrict human rights, but only in order to make conflicting rights compatible or to protect the rights of other persons or important community interests… Any restriction of human rights not only needs a constitutionally valid reason but also to be proportional to the rank and importance of the right at stake."*

D Smith in his Book Judicial Review (7th Edition) reproduced the view of House of lords on proportionality in following terms:-

> "*In Daly…the House of Lords adopted a test of proportionality adopted by the Privy Council in de Freitas vs. Permanent Secretary of Ministry of Agriculture,*

Fisheries, Land and Housing. Drawing on South African, Canadian and Zimbabwean authority, it was said that:

> *"When determining whether a limitation (by an act, rule or decision) is arbitrary or excessive, the Court should ask itself: 'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental rights; (ii) the measures designed to meet the legislative object are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective".*

When above principle of proportionality is applied in present case, we have noted that the rationale for capping of fee to 5% and 8% and not more than previous academic year, is to prevent profiteering by the educational institutions. This extreme restriction across the board on every educational institution, regardless of its costs, expense and actual profit, is absolutely un-proportionate and unreasonable as profiteering could be stopped through less restrictive alternatives, including assessment of increase of fee on case to case basis after analyzing the actual costs and income of the institution on the basis of relevant data.

64. In the *East and West Steam Shipping Company case* supra, section 6 of the Control of Ship Act, 1947 was challenged being violative of Article 12 of 1956 Constitution (almost same as Article 18 of the Constitution), as it allowed the Central Government to fix the rate at which a ship could be hired or rate that could be charged for carriage of passenger and cargo. The august Supreme Court with majority view held that impugned Act was not violative of Article 12

of 1956 Constitution, because certain special circumstances exist that justified the impugned Act. While discussing whether impugned Act amounts to reasonable restriction in the public interest, the Hon'ble Supreme Court (at page 62) observed that "because special conditions exist in which Control of Shipping imposes restriction on free use of ships in order to provide for national needs which cannot otherwise be made". We have noted that in instant matters original sub-clause (1) and sub-clause 5 of section 7-A of Ordinance of 1984, for capping the maximum limit for increase in private schools fee has not been enacted on account of any special circumstances and conditions but in the ordinary course as a simple regulatory regime under the licensing system in the educational institutions. Further admittedly the impugned provision of section 7-A of Ordinance 1984 not made applicable to almost 98% of private educational institutions and parents in those schools, who are charging fee less than Rs.4,000/-. Therefore, it cannot be said that fixation of limit is for the collective good of the society. The test of reasonable restriction to fix the upper limit laid down in *East West Shipping Company* case, hence is not applicable in the present case.

65. Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interest of the general public and not from the stand point of the interest of the persons upon whom the restrictions have been imposed. Canalisation of a particular

business of even a specified individual is reasonable where the interests and economy of the country demand. Indeed absolute or unrestricted individual rights do not and cannot exist in any modern state and it must yield to the common good. However, the Court must balance the individual right of trade and business against national interest. In present case, when 98% students and parents of unaided private schools are not benefiting from this restriction, then this restriction of 5% and 8% maximum limit or complete ban on increase more than previous academic year, on private schools is un-proportionate to welfare of public and consequently unreasonable restriction on fundamental rights.

66. No doubt the profiteering and capitation of fee is not permitted, however, it cannot be presumed that any fee beyond maximum limit of 5% and 8% or more than previous academic year will be profiteering. Whether increase more than 5% or 8% or more than previous academic year is justified or amounts to profiteering can only be determined after the factual assessment is made by the Executives. Fixing the cap of 5% or 8% or not more than previous academic year, by presuming that any increase before this cap will always be illegal and profiteering, is not a reasonable restriction on fundamental right of petitioners on trade, business and occupation. When the validity of a law placing restriction on the exercise of a fundamental right in Article 18 of the Constitution is challenged, the

onus of proving to the satisfaction of the Court that the restriction is reasonable lies upon the State. Further where legislative enactment abridges any of the fundamental right enumerated in the Constitution, it could be struck down by Courts.

67. There is no cavil that like any other industry or business, the private schools are also to be regulated, however, it is not reasonable to impose cap of 5% or 8% or total bar on increase more than previous academic year across the board, on all private educational institutions by simply disregarding inflation and costs incurred by those institutions. Indeed to control profiteering, a cap can be imposed on the profits but cap on gross income, without taking into account the inflation and actual cost will amount to take away the right of property under Articles 23 and 24 of the Constitution.

68. Right to property under Article 23 and 24 of the Constitution including right to possess, use and dispose of the property. Although deprivation of the right to use and obtain a profit from the property is not in every case independently sufficient to establish a taking of property, however, it is clearly relevant factor when a particular legislation is examined on the touchstone of reasonableness of a restriction on fundamental right. The restriction which is expropriatory and confiscatory in nature should not be imposed in such a way as to deprive a person of his right to property.

69. The cap of 5% or 8% or not more than previous academic year without considering the actual costs will not only be confiscatory or expropriatory and would amount to taking away the property without compensation but this cap can actually be counterproductive and in the long term may work against the interest of students as it will affect the quality education and standards of private schools, hence would actually amount to violation of right to quality education of students.

70. Though minimum standard of schools are required to be maintained, in order to impart better and quality education, however, many schools are having much better facilities, are known for their high standards. Since such schools are unaided, the main source of generating the funds to cater to the aforesaid is the tuition fees to be charged from the students. Therefore, some amount of autonomy has to be conferred upon these institutions. But at the same time, these education institutions cannot be allowed to use the education as business ventures indulging in profiteering. It is also to be borne in mind that under the garb of increasing fee, these schools should not indulge in commercialization.

71. This was conceded by learned counsel for the schools themselves that commercialization and exploitation is not permissible. Private schools may fix the fees and charges payable by the students, however increase cannot be such which is exploitative in nature and

travels into the arena of commercialization. In such situation, the Government is equipped with necessary powers to take regulatory measures and check commercialization. The Government under Ordinance 1984 has requisite power to resort to regulatory measures and control the activities of such institutions to ensure that these education institutions keep playing vital and pivotal role to spread education but at same time not indulge in profiteering.

72. Under Article 25-A of the Constitution, it is the responsibility of the State to provide free of cost education to students between age 5-16 year, which the State has admittedly failed to do so. In the circumstances, the State cannot pass on its responsibility to private schools regarding quality education and then insist that these schools must freeze fees and can only increase by 5% or 8% or cannot more than previous academic year. The sole purpose for fixation of the fee and regulation of the same under the Ordinance 1984 and Rules of 1984 is to prevent public from extortion, exploitation or unreasonable profiteering on the part of educational institutions. The purpose of law is not to deprive private educational institutions from reasonable justified gains out of their business.

73. Ordinarily any restriction so imposed which has the effect of permitting or effectuating the fundamental rights and principle of policy can be presumed to be reasonable restriction in public interest. The reasonableness has to be decided both from the procedural and

substantive aspect. It is imperative that for the consideration of reasonableness of restriction imposed by a statute, the Court should examine whether the restriction is not arbitrary and has achieved the purpose as envisaged in Article 18 of the Constitution by imposing restrictions on fundamental rights. Sindh High Court in (**PLD 1957 (W.P.) Karachi 854**) titled *Salah ud Din vs. Pakistan* regarding restriction on the maximum price of beef held that fixing at will of maximum price of mutton and beef without reference to quality and without control of the price at source may be a character of scheme of permits but does not a system of licensing. The above observation is squarely applicable in the present case where without controlling the source of increase in costs including security, electricity, rent etc. incurred by private educational institutions, the State has caped the upper limit of the tuition fee. In this way, the idea of quality education will be eradicated which is not only against the fundamental rights of trade and business of the petitioners but also fundamental rights of students to have quality education.

74. We have also noted that under impugned sub-clauses (1) and (5) of section 7-A of the Ordinance of 1984, while imposing cap, no distinction has been made between categories of schools which are charging high fee but providing quality education, facilities and services and the educational institutions which are relatively mediocre but charging high fee. The cap of maximum limit has been imposed

on both these categories of schools, which is violative of Article 25 of the Constitution, for failure to discriminate between two different categories of schools.

75. Mr. Justice Fazal Karim (renowned Jurist and former Judge of Supreme Court) in his book ("Judicial Review of Public Actions, Second Edition), discussed this facet of discrimination under Article 25 of the Constitution as under:-

> *"Though the right governed by this Article is violated when the State, through its legislative and executive organs, treats differently persons in analogous situations, without providing an objective and reasonable justification, yet, this is not the only facet of the prohibition of discrimination. The right not to be discriminated against is, it has been held by the European Court of Human Rights, "also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."*

The Indian Supreme Court in *K.T. Moopil Nair v. State of Kerala*, **(AIR 1961 SC 552)** held that lack of classification amongst unequal creates inequality. Similarly in *State of Kerala v. Haji K. Kutty*, **(AIR 1969 SC 378)** Court held that where persons essentially dissimilar are treated by imposition of uniform tax, it amounts to denial of equality. The august Supreme Court in *Elahi Cotton* **(PLD 1997 SC 582)** held that Article 25 including obligation of the State to differentiate. The same view was also expressed by this Court in *Ghulam Mustafa Insari v. Government of Punjab* **(2005 SCJ 158)** and *Ahmad Yar Chohan v. Federal Public Service Commission* **(1998 MLD 1832)**.

76. Further under Article 25-A of the Constitution, it is the responsibility of the State to provide free and compulsory education to all children of the age of 5-16 years. Beside Article 25-A, the State is also obliged under Articles 9, 37(b) and 38(d) to ensure education to its citizens. The State has also to ensure that no exploitation has been made by any one including educational institution in violation of Article 3 of the Constitution. We have noted that in pursuance to Article 25-A of the Constitution, "The Punjab Free and Compulsory Education Act, 2014" **(Act of 2014)** was promulgated on 10.11.2014. However, we have been informed by the learned Additional Advocate General that till date, this law has not been notified by the Government, hence has not been enforced. This shows the slackness and apathy on the part of Government itself to enforce the fundamental right of education guaranteed under Article 25-A of the Constitution on one hand and then fix maximum limit on private educational institutions in garb of public interest. The Government is expected to immediately notify the Act of 2014 which also inter alia deals with the responsibility of private schools for free education to certain number of students. No doubt under Article 25-A, it is the responsibility of the State to provide free education to children between age 5-16 but unaided private educational institutions are not bound to provide completely free education to all students under Article 25-A of the Constitution. On question regarding applicability

of Article 25-A on other semi aided Government controlled educational institutions, separate writ petition is pending, therefore, we do not feel appropriate to decide this issue in these petitions.

77. One of the arguments of petitioner private schools is that impugned freezing of maximum fee amounts to legislative judgment which is not permissible under the principle of separation of power. We have considered this argument. As already discussed above, the reasonable restrictions can be imposed on professions and trade through licencing system under Article 18 of the Constitution in the public interest. The august Supreme Court in *East West Steam Shipping Company case* supra held that even rates can be fixed if special conditions and circumstances exist in the public interest for imposing these restrictions which however is lacking in present case as already discussed above. The impugned restriction of maximum limit may be unreasonable, un-proportionate and therefore, impinge upon fundamental rights but it is not encroachment on judicial functions in violation of separation of power. It is not out of place to note that there are number of statutes for the fixation of prices in Pakistan including section 12 of the Drugs Act, 1976, section 3 of the Punjab Essential Articles (Control) Act, 1973, section 26 of the Punjab Cotton Control Ordinance, 1966, section 3 of the Punjab Foodstuffs (Control) Act, 1958 and section 16 of the Sugar Factories Control Act, 1950. The price control itself is not unconstitutional but

it should not be unreasonable and unnecessary and unwarranted interference with individual fundamental rights.

78. The concept of "legislative judgment" is that where enactment by the legislature is of such a nature, which impinge upon judicial power of the judiciary, by either taking away the power of judiciary to decide a particular case through a judicial process or nullifies a judgment of the Court without adverting to any flaw on the basis of which the judgment was passed. The fixation of maximum limit of fee by private educational institutions is not an enactment of the legislature in the domain of the judiciary, because no judgment render or to be rendered by any Court is under dispute and no presumption of criminality is associated with the petitioner. Further no power of any Court has been usurped by impugned legislation and petitioner's right to have recourse to Court of law remains available.

79. The case law relied upon by the petitioners in this regard i.e. *Mobashir Hassan v. Federation of Pakistan* **(PLD 2010 SC 265)**, *Naseer Ahmed Khan v. GOP* **(PLD 1980 Lahore 684)**, *Government of Punjab vs. Naseer Ahmad Khan* **(2001 CLC 1422)**, *Government of Punjab v. Naseer Ahmed Khan* **(2010 SCMR 431)** and *Nat. Industrial Coop Credit Corp. v. Province of Punjab* **(PLD 1992 Lahore 462),** are also distinguishable and not applicable to the facts and circumstances of this case. In case of *Mobashir Hasan* supra, the Hon'ble Supreme Court held that legislation is not empowered to

declare a judgment or order of conviction by Court void except in civil cases. In case of *Naseer Ahmad Khan* supra, the house was rented to Military Secretary of Governor which was required back by the landlord or to pay the rent. But instead of paying rent, the MLR was issued to acquire the said house for Rs.86,000/- which according to the petitioner was worth Rs.16,00,000/-. In these circumstances, the Court held that law regarding taking away of property must be rationale and reasonable and Division Bench of this Court in appeal upheld this judgment and also declared impugned law a "legislative judgment" which was further upheld by august Supreme Court. In case of *National Industrial Corporation* supra, 102 societies were declared undesirable through an Ordinance and Court held that this amounts to exercise of judicial power which is not permissible. In all the above cases, the principle of separation of power was found to be violated, as legislature tried to encroach upon the judicial powers of the judiciary. This situation is not prevalent in the present case, where no judicial functions have been encroached upon and at best this is an unreasonable restriction on the fundamental rights of the petitioner or the discretion of the Executive to determine whether fee increased beyond 5% and 8% or more than previous academic year is justified or not.

80. One of the arguments of petitioner schools is that impugned legislation amounts to a "Bill of Attainder", which is prohibited under

law. The above argument is also misconceived. The bill of attainder is a legislative act directed against a designated person pronouncing him guilty of a crime without trial or conviction without recognized due process of law. The said concept is a criminal law doctrine which is not applicable in present case as no punitive measure of any kind has been taken against private educational institutions.

81. The next argument of the petitioner schools is that legislature was required to follow due process of law including hearing to the petitioners before imposing maximum limit on increase of fee. We have carefully considered this argument. The Hon'ble Supreme Court in *Fauji Foundation and another vs. Shamim ur Rehman* **(PLD 1983 SC 457)** (para 158 of the judgment) held that procedural aspect of the due process is not a limitation on the legislative power. However in *Province of Punjab vs. National Industrial Co-operation Credit Corporation* **(2000 SCMR 567)** (page 598), the august Supreme Court held that there can be exceptional cases requiring immediate legislation but in such situation, *ex post facto* hearing can be provided to the party effected by such emergent legislation. The relevant observations are reproduced as under:-

> *"However, there can be exceptional situations or circumstances in which action may have to be taken without prior notice in public interest or for the larger good and benefit of the community but in such cases also the law should provide for an ex post facto hearing so that in case it is later on found that in a particular case adverse action was not warranted, such adverse action be withdraw. Principle of trichotomy of powers does not require that in every case without exception*

> *the law should always provide for a prior hearing before a judicial or quasi-judicial form. As observed, there can be exceptional cases requiring immediate legislation in which situations ex post facto hearing can be provided to the party affected by such emergent legislation."*

In the light of above discussion, we are of the view that though legislation was not required to give hearing to the petitioners before passing of the impugned provision of section 7-A, however, the ex post facto hearing mechanism should have been provided to determine if fee beyond 5% or 8% is justified or not. This requirement is further entrenched in law after insertion of Article 10-A of the Constitution, which makes the due process as fundamental right.

82. The impugned provision of sub-section (7) of section 7-A (introduced through Ordinance of 2015) provided that the Incharge shall either refund to the students within seven days from the commencement of the Ordinance 2015, the additional fee already charged or adjust it with the fee immediately payable by students. The petitioner school argument is that this provision cannot be applied retrospectively. Though it is well settled law that even vested rights can be taken away by express words and necessary intendment by legislature. In this regard reliance is placed on *Messrs Haider Automobile Ltd. vs. Pakistan* **(PLD 1969 SC 623)** and *Molasses Trading & Export (Pvt.) Limited vs. Federation of Pakistan and others* **(1993 SCMR 1905)**. However, when we already found that the complete bar through original sub-clause (1) of section 7-A (introduced by Ordinance 2015) on increase of fee for

academic year 2015-2016 not more than fee charged in previous academic year to be unreasonable restriction on fundamental rights, then this subsection (7) of section 7-A has to be read down also. According to literal approach of reading statute, the statute has to be read literally by giving the words used therein, ordinary natural and grammatical meaning. Any addition and subtraction of words in statute are not justified except where for the interpretation thereof, the principle of reading in and reading down may be pressed into service in certain cases.

83. The argument of Dr. Khalid Ranjha Advocate was that impugned section 7-A of Ordinance of 1984 could only be amended through Act of the Parliament and not through Ordinance, has no basis: Firstly for the reason that after Ordinance 2015, the impugned section 7-A was inserted through Act of 2016 and finally through Act of 2017 and secondly under Article 128, the Governor exercises legislative power and not merely executive power as held by Hon'ble Supreme Court in *Fauji Foundation and another vs. Shamim ur Rehman* **(PLD 1983 SC 457)**.

84. Learned counsel for one of the petitioner schools also challenged the validity of 5% and 8% cap on the touchstone of Article 253 of the Constitution, which permits Parliament to prescribe the maximum limit as to the property which may be owned, held, possessed or controlled by any person. The argument of the

petitioners' counsel is that the power to prescribe the maximum limit being of the Parliament, the Provincial Legislation has no jurisdiction to impose this limit. No rebuttal argument has been addressed by respondents on this legal question. However, as we have already found the cap of 5% and 8% or complete bar on increase more than previous academic year to be unreasonable restriction on fundamental rights and not sustainable under Article 18 of the Constitution, therefore, we need not dilate upon this particular legal question which may be decided in some other appropriate proceedings.

ORDER OF THE COURT.

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 sub-section (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.

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 fix 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.

87. Before parting with this judgment, we must place on record our appreciation for the hard work undertaken and the valuable assistance rendered by learned counsel namely Mr. Shahid Hamid Advocate, Khawaja Haris Advocate, Mr. Faisal Hussain Naqvi Advocate, Khawaja Ahmad Hosain Advocate, Mr. Shan Gull Additional Advocate General, Mr. Shezad Atta Elahi Advocate, Dr. Khalid Ranjha Advocate, Mr. Asad Ullah Saddiqui Advocate, Mr. Muhammad Haroon Mumtaz Advocate, Mr. Hassan Makhdoom Advocate, Mr. Tafazzul Rizvi Advocate, Mr. A. K. Dogar Advocate, Syed Shahab Qutab Advocate, Mr. Waqas Meer Advocate, Mr. Muhammad Javed Arshad Advocate and Mr. Muhammad Azhar Siddique Advocate.

88. We would also like to pay our tribute to Mrs. Asma Jahangir Advocate, a staunch human rights activist, a leading lawyer and fearless supporter of democracy and rule of law in Pakistan. Mrs. Asma Jahangir Advocate is no more amongst us but she will always be beacon of light

and a source of inspiration for all Pakistanis who strongly believe in a democracy and rule of law in Pakistan.

(ABID AZIZ SHEIKH)
JUDGE

(SHAHID KARIM) **(SHAMS MEHMOOD MIRZA)**
JUDGE ***JUDGE***

Riaz Ahmad

Shahid Karim, J.:-- I have read in draft the opinion of my learned brother **Abid Aziz Sheikh, J**. and concur in it. Owing to the importance of the issue involved, I have added a note of my own.

(SHAHID KARIM)
JUDGE

Announced in open Court on 05.04.2018.

(ABID AZIZ SHEIKH)
JUDGE

(SHAHID KARIM) **(SHAMS MEHMOOD MIRZA)**
JUDGE ***JUDGE***

Judgment approved for reporting.

(ABID AZIZ SHEIKH)
JUDGE

Shahid Karim J:--

At the centre of the controversy is a challenge to section 7A of the Punjab Private Educational Institutions (Promotion and Regulation) Ordinance, 1984 which was inserted by the Punjab Private Educational Institutions (Promotion and Regulation) (Amendment) Act, 2017 (**Section 7A**). The constitutional and legal landscape as well as the able oral arguments of the counsels has been admirably set out in the proposed judgment of my learned brother Abid Aziz Sheikh, J., which I gratefully adopt.

Article 18:

2. In the beginning, some general observations regarding the fundamental right enshrined in Article 18 of the Constitution may be made. This fundamental right is at the forefront of the arguments addressed by the learned counsel for the petitioners and the precise scope of this right was at the heart of the arguments addressed by counsels of both the sides of the aisle.

3. Let us begin by some observations by Lord Parker in *Adelaide Steamship Co. (1913) AC 718 (PC)*, as regards the right to carry on trade or business which is inherent in every member of the community at common law:

> *"At common law every member of the community is entitled to carry on any trade or business he chooses and in such manner as he thinks most desirable in his own interest and inasmuch as every right connotes an obligation, no one can lawfully interfere with another in the free exercise of his*

> *trade or business, unless there exists some just cause or excuse for such interference…Speaking generally, it is in the interest of every individual member of the community that he should be free to earn his livelihood in any lawful manner and in the interest of the community that every individual should have this freedom.'*

4. The above observations were quoted by Cornelius J. in *East and West Steamship Co. v. Pakistan* (**PLD 1958 SC (Pak) 41**, **68**). While dilating upon the reasons underlying the grant of fundamental right by Article 18, Cornelius J. went on to say that:

> *"We may, therefore, safely conclude that among the considerations which guided the Constitution makers in the drafting of Article 12 (the present Article 18), so as to secure freedom to the citizens of Pakistan to conduct any lawful trade, the place of greatest importance must be given, firstly, to the necessity of ensuring to every individual member of the community, a right to engage in lawful trade according to his choice and to exercise that trade in a mode settled - by him at his own discretion and choice, within the legal requirements, and secondly that the interests of the community should be advanced, by the grant of such liberty to individual citizens, and that every action which tends to interfere with that liberty should be repressed, since it would be injurious to the interests of the State."*

5. There is no doubt that the right concerns and protects an economic life of a citizen and the right to engage in any profession or occupation or trade or business. These are different forms and sources of livelihood and thus this right is inextricably linked with the right of life and liberty guaranteed by Article 9 of the Constitution. This right will also have to be read with Article 38 of the Constitution (one of the principles of policy) which enjoins on the State amongst others to

"*provide for all citizens, within the available resources of the country, facilities for work and adequate livelihood with reasonable rest and leisure*". It is in this sense that the reasonable restrictions imposed by the State may also be construed by the courts so that a regulation which is confiscatory in nature may not impinge upon the positive obligation cast under Article 38 on the State. It was reiterated in *Muhammad Yasin v. Federation of Pakistan through Secretary, Establish Division, Islamabad and others* (**PLD 2012 SC 132**) that:

> *"Article 18 and the rights guaranteed by it are concerned with the economic life of the nation and its citizens".*

6. To quote Cornelius J., once again in *East and West Steamship Co*. case:

> *"in unequivocal terms that every citizen shall have the right to conduct any lawful trade or business. In so doing, the Article merely furnishes a fresh and authoritative declaration of a pre-existing right under the common law."*

7. In granting the right, Article 18 uses different expressions such as profession, occupation, trade or business but does not define them. However, these are all general terms and as will be seen they run into each other. It will not be required in this case to engage in the nuanced debate as whether the petitioners conduct trade or business or carry on an occupation. For, the petitioners do not quarrel that they run the schools as an occupation and while doing so conduct a business too.

Article 25A:

8. As a prefatory, Article 25A is addressed to the State and is concerned with positive or affirmative obligation on the State to take positive measures to protect the fundamental rights. Such a positive obligation having been cast by a certain fundamental right on the State has received judicial recognition. In *A v UK (1999) 27 EHRR 611*, the European Court of Human Rights was considering the case of a child who had petitioned to the Court on the basis that the State had failed to protect him from the ill-treatment of his stepfather. It was held that:

> *"…the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires states to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals … Children and other vulnerable individuals, in particular, are entitled to state protection in the form of effective deterrence against such serious breaches of personal integrity."*

9. The positive state obligation has been recognized in Pakistan too. Thus, in *Ms. Shehla Zia and others v. WAPDA* (**PLD 1994 SC 693**) effective measures were directed to be taken to prevent serious damage to life and violation of other fundamental rights. Similarly, in *Suo Motu Case No.16 of 2011* (**PLD 2011 SC 997**) relating to law and order situation in Karachi it was held that:

> *"It is the duty of the state to protect and safeguard these fundamental rights including right to life and liberty envisaged by Article 9."*

10. Article 25A has brought a paradigm shift in the concept of right to education. It is a fundamental right now and casts an obligation on the state. It says that :-

> *"**25A.** The State shall provide free and compulsory education to all children of the age of five to sixteen years in such manner as may be determined by law."*

11. Thus the parents can invoke the court's jurisdiction to enforce the right and a corresponding duty on the state. But the parents in these petitions have not chosen to do that. They have made a value choice to send their children to private schools and to pay a fee being charged by those schools. It can be argued that the choice that they had was a limited choice and was compelled on account of state's failure to fulfill its duty. That argument cannot be brushed under the carpet and which leads to the further argument that fees ought to be regulated and cannot be left at the whim of schools. However for other compelling reasons too, regulation can be teased out of Article 18 and so the question remains merely of how much? Other factors like quality and standard of education, by itself, would be sufficient to make out a strong case for regulation. Peripherally, therefore the regulation of fee would be covered by the broader concept of an overarching need for regulation of the education sector by the Government of Punjab (GOP). Article 25A encapsulates the right of education as a fundamental right to inhere

in every child between the ages five and sixteen. It the duty of the state to ensure that the right is guaranteed to every child of that age. In fact, it is more in the nature of a duty than a right which the state is required to fulfill. And for the accomplishment of the purpose, the State must enact laws laying down the manner in which this is to be achieved. Thus the provision is not merely a painting to be looked at without more. Included in the concept of free and compulsory education is the right to receive education of high quality and this is a penumbra of the right to education. It would be naïve to detach the two from each other and if the child has a right to free education, he also has a right to good education in a Rights-based democracy. The two are enmeshed to form one whole right. In most cases the parents have had to fall back on private schools for lack of qualitative element in the available sources of education though free education was available. Thus the two elements must exist *in tandem* with each other. But the GOP cannot shirk its duty by firstly permitting private schools to commence their business and then to regulate them so oppressively that they virtually end up imparting free education. The State cannot be permitted to fulfill its duty under Article 25A by the machination of placing a cap on the fee structure, and thereby to achieve the object of Article 25A in that garb.

Free Market:

12. Mr. Ahmad Hasan, Advocate argued that government has no role in the determination of fees in a free market economy. This argument is not only presumptuous but also does not chime with the

structure of our Constitution. The term 'free market economy' and 'capitalist system of economy' are relative terms and vary in their sweep from one economist to another. Also this argument runs counter to the right under Article 18 which is hedged in by the concept of regulation. But a reading of the constitution would show that the framers have punctuated our Constitution with Islamic social welfare values and which does not leave it entirely to free market forces to determine the course of an economic activity. Justice Oliver Wendell Holmes wrote that the "Constitution is not intended to embody a particular economic theory", *(Lochner v New York, 198 US 45, 75 (1905)*) while rejecting the tenets of Laissez-faire capitalism.

13. Adam Smith once said:

> *"Merchants seldom meet together, even for merriment or diversion, but the conversation often ends in a conspiracy against the public".*

14. The intention and purpose of a ceiling seems to present to GOP a "conspiracy against the public". It is a different question whether that purpose comports with the Constitution or not. The purpose, though laudable, must be constitutional as "*there is but one step from the sublime to the ridiculous*".

(Napoleon Bonaparte).

15. Article 3 of the Constitution embodies a quintessentially Islamic concept of elimination of Exploitation:

> ***3.*** *The State shall ensure the elimination of all forms of exploitation and the gradual fulfillment of*

> *the fundamental principle, from each according to his ability to each according to his work.*

16. Justice Saqib Nisar in *Rawalpindi Bar Association v. Federation*, (**PLD 2015 SC 401**) addressed the question thus:

> *"The principles, 'from each according to his ability, to each according to his work' is of course a fundamental principle of Marxism-Leninism. (In fact this language has been copies out from Article 12 of the Constitution of USSR, as it then was which is of course based on the writings of Karl Marx)."*

17. Article 3, thus, enjoins upon the State the duty to eliminate exploitation and this also provides a *raison d'etre* for regulation of the Education Sector and puts paid to the argument that GOP must not intervene in the regulatory measure of fixing fees on this basis. It is the constitutional duty of GOP to balance the mandate of Article 3 with the rights of the petitioners to conduct an economic activity.

18. But in this case, in our opinion, the petitioners have a better reading of the Constitution whey they say that capping impinges upon their rights guaranteed by the constitution and does little to ameliorate the plight of the public who opt for private schools as means of education for their children. As explicated, the purpose maybe based on good faith, yet the purpose will be best served by fulfilling the duties by the state enumerated in the Constitution and which, if done faithfully, will enlarge the choice of schools for parents so that they are not driven by circumstances to send their children to private schools.

19. The purpose of providing a qualification and limitation on the right is to serve a public purpose. But if the law serves the economic object of causing any harm, that made the law in pith and substance oppressive and unreasonable in relation to property and civil rights of the persons affected. This begs the question: What were typically the public purposes which would qualify as such? To quote from the Supreme Court of Canada:

> "*Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by the law*". *(1949 SC R1, 50).*

20. Doubtless, legislation on food and drugs standards have been upheld on the basis that the legislation satisfied the requirements of a typically criminal public purpose. Thus, there is a secure criminal law foundation for the legislation. The criminal quality of an act will arm the legislature to provide for regulation permitted by Article 18. Inherent in the concept of regulation is the need felt by the legislature to do so for fear that if not regulated, the trade or profession will run against the public interest and will cause harm. Courts have permitted, and examples abound, the regulation of prices of essential commodities and food stuff but not by prejudging the price as the chancellor's foot, but rather based on empirical data and other economic factors which impact the question of such determination. "It is well established that food and drug legislation making illegal the manufacture or sale of dangerous products, adulterated products or misbranded products is

within the criminal law power". *(R. v Wetmore (1983) 2 SCR 284-Supreme Court of Canada*.)

21. Similarly in *RJR-McDonald v. Canada (1995) 3 SCR 199*, the Supreme Court of Canada had to review the validity of the Federal Tobacco Products Control Act, which prohibited the advertising of cigarettes and other tobacco products. The Supreme Court viewed the controversy on the touchstone of the criminal law power of the parliament and the court was unanimous that the protection of public health supplied the required purpose, to support the exercise of criminal-law power. Thus, an underlying criminal law power has typically been used by the parliaments to enact laws for the protection of health etc. There are reasons which compel a legislature to declare a profession as lawful or unlawful. GOP cited Drugs Act, 1976 (**Act of 1976**) and The Punjab Marriage Functions Act, 2016 (**Act of 2016**) as instances of laws which have fixed prices. These laws are materially different and do not by way of legislation impose a price leaving nothing in the hands of the administrative authorities to determine in each case. The Act of 2016 in any case does not fix prices but merely regulates the quantity of food to be served which has little or no impact on the economic activity being generated. In case of Act of 1976, the fixation of prices is done by the Registration Board and any decision taken is subject to appeal. Thus comparisons between the two are odious and unnecessary. However, the

question still remains whether the fees of educational institutions can be fixed on the same analogy.

***Fixing of Prices and Article 18*:**

22. Plainly and clearly, the power to regulate is a legislative power and the executive cannot exercise it unless granted by law made by the competent legislature. Now what is the power to regulate? It is assumed and Article 18 makes it clear that regulation may be done by a licensing system. The system of regulation has been given a wide sweep in our jurisdiction and a legislature possesses the power to regulate trade or intercourse in order to protect the public welfare. This is the common thread which runs through all regulation by license and public welfare provides the justification for doing so. The following observations of Ruth Bader Ginsberg, J. made in *NFIB v Sebalius, 132 S. Ct. 2566 (2012)* resonate in our minds while determining the issue:

> *"Our precedent has recognized Congress' large authority to set the Nations' course in the economic and social welfare realm".*

23. In *Gibbons v Ogden (1924) 22 US1*, Chief Justice Marshall while describing the power of the Congress to regulate inter-state commerce said:-

> *"It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all other vested in Congress, is complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than as prescribed in the Constitution"*

24. Similarly, in *National Labour Relations Board v Jones (301) US1, 37,* Chief Justice Charles Evans Hughes observed that power to regulate implies a power to foster, protect, control and restrain.

25. Does the power to regulate include the power to prohibit? The cases of *East and West Steamship Co.* (**PLD 1958 SC (Pak) 41**) and *Government of Pakistan v Akhlaque Hosain* (**PLD 1965 SC 527**) can be cited from our jurisdiction which espouse this view. However, in *East and West Steamship*, Justice Cornelius seems to have taken a different view of the meaning of power to regulate. I shall revert to this aspect in the later part of this opinion. At the other end of the spectrum is the case of *Sardaran v Municipality* (**PLD 1964 SC 397**), which holds that any attempt to squeeze out a lawful profession or to render it extinct is inconsistent with the right under Article 18. But here we are not considering the effect of a prohibition in respect of a trade or profession but, in essence, a prohibition to charge fee beyond a certain limit and so whether it is unreasonable regulation or not. Thus the question at the heart of it is that of regulation and not of prohibition. Be that as it may, it would suffice to refer to *Arshad Mahmood and others v. Government of Punjab through Secretary and others* (**PLD 2005 SC 193**) which is the current view on the subject of whether regulation would include a complete prohibition. This is a seven-members Bench judgment and has watered down the holding in East and West Steamship Co.. The view that by the act of regulation a complete prohibition may be put in place

did not find favour in *Arshad Mahmood* with the Supreme Court. It was held that:

> *"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. To find out the answer to this question, reference may be made to the case of Municipal Corporation of the City of Toranto v. Virgo (1896 AC 88, 93), where Lord Davey while discussing a statutory power conferred on a Municipal Council to make bye-laws for regulating and governing a trade made the following observation:--*
>
> > *"No doubt the regulation and governance of a trade may involve the imposition of restrictions on this exercise ……Where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order. But their Lordships think that there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed."*
>
> *"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 licencing 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."*

26. In this context Mr. Shan argued that by so providing it was unlawful to charge any fee in excess of the cap and so the protection of Article 18 was not available. His argument runs an ingenious course. In '*On Reading the Constitution'*, *Laurence H. Tribe* and *Michael C. Dorf* had this to say about such an interpretative method:-

> *"In beginning to sort out good and bad ways of arguing about what this Constitution means, we can make considerable headway by inquiring what it is about some modes of discourse, some modes of conversation that are put forth as "constitutional argument," that makes them suspect from the start. What is it about some purported modes of constitutional analysis that makes them implausible*

> *candidates for ways of reading the Constitution we actually have?*

27. Mr. Shan says he is entitled to this view on the strength of *Government of Pakistan v Zameer Ahmad* (**PLD 1975 SC 667**). But the crux of the holding in *Zameer Ahmad* are the following observations:-

> *"Prostitution, trafficking in women, gambling, trade in narcotics or dangerous drugs, are commonplace instances of unlawful profession or trade. These are inherently dangerous to public health or welfare".*

28. It was further held that:

> *"…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."*

29. The above two observations will have to be read in conjunction with each other and in a continuum. It refers to the declaration of a trade or business as unlawful and not a part of it. The former is prohibition and the latter regulation.

30. In contrast, Justice Kaikaus in *Progress of Pakistan Company Ltd. v Registrar Joint Stock Companies* (**PLD 1958 (WP) Lahore 887, 910**) explicated the true nature of the right under Article 18 and the concept of 'lawful' as used in the following words:-

> *"The Article entitles the citizens of Pakistan to carry on any business, trade, or profession with this condition only that the individual acts involved*

in it are not unlawful. If an act involved in a business, trade, profession, or occupation, is such that if performed otherwise than as a part of a business, trade, profession or occupation, it is unlawful, then it cannot become lawful just because it is performed as a part of a business, trade or profession, that is, as a part of activity indulged in for the purpose of profit or income. That is the only limitation placed on the right to carry on a business etc. The object of the Article was to grant the citizen the fullest right to carry on any business etc., but the word "lawful" had to be put in because if it did not exist the citizen may have claimed to make a business of an act that is an offence or is prohibited. Theft is unlawful and, therefore, no person can make a business of it. Blackmail is an offence and no citizen can claim that as it is his occupation, he is entitled to blackmail people. It is on account of the word "lawful" in this Article that the thief the black-mailer and others whose business involves unlawful acts are prevented from putting forward an argument which may have been open to them if this word did not occur in Article 12. But the Article debars the legislature from making a business as such unlawful the individual act involved in which is not unlawful. It can make any act involved in a business unlawful and the citizen would be debarred from doing that act but the legislature cannot say that while the act involved in a profession will be lawful if not performed as a part of business etc., the doing of the same act as a part of a business will be unlawful. There is no bar to the legislature providing that sale of tobacco shall be an offence. But it cannot say that while the sale of tobacco will not be an offence, no person shall carry a business of sale of tobacco. As I have already stated it is not a possible interpretation of this Article that the legislature can prohibit any business etc. If an act when done not for the purpose of business, trade, or profession, is not unlawful, the legislature is debarred from saying that when done as a part of business, trade it profession, it shall be lawful. That is the meaning of saying that the citizens can carry on any lawful business etc. It is lawful if the activity involved in

it, is not, apart from its being carried on as a profession, unlawful.

If the intention of the Constituent Assembly was absolutely to guarantee to the citizens of Pakistan the right to carry on any business, trade, whatsoever and not to subject the right even to reasonable restrictions as is provided with respect to some other fundamental rights, the only qualification of its exercise being that it could be subject to a licensing system and to an exception of monopoly in favour of the State, what would be the wording of the Article ? The wording would be exactly as Article 12 now stands. The word "lawful" would have to be put in because if it did not exist, the citizen could claim, as already observed, that he had the right to commit. theft, dacoity, blackmail or any other offence, because he had adopted it as a means of income. This plea would be open to him because, as will be abundantly clear from commentaries on the Income Tax Act, the view that even an unlawful business is a business has been taken in a number of cases. The absence of the word "lawful" in the corresponding Article 19 (9) of the Indian Constitution had created a difficulty. It had been argued that a business, trade, etc., included even an unlawful trade. Indian Courts had been forced to hold that business etc., in Article 19 (9) could only refer to lawful business for otherwise even offences when committed as part of business could be subjected to only reasonable restrictions in the public interest. This was a forced construction, for on being pronounced unlawful a business does not cease to be business, and Article 12 has recognised this. The absence in this Article of the words "subject to reasonable restriction" as it exists in some other Articles relating to fundamental rights is by itself proof of the fact that the intention was to give a right of business unhampered in any way by legislation. I would hold that Article 12 guarantees to the citizen the right to carry on any business, occupation, trade, or profession (subject to a licensing system and a monopoly of the State) with this limitation only that the citizen is not entitled by virtue of the Article to do an act which, when done otherwise

> *than as part of a business etc., was unlawful. There is no other limitation of this fundamental right."*

These rules were reiterated by Justice Kaikaus in Akhlaque Hussain's case.

31. We must also bear in mind a primary rule of interpretation regarding the use of the term 'reasonable restriction' in some of the fundamental rights. As a general rule, primary legislation is not open to challenge on the ground of reasonableness but this rule is inapplicable where, under the Constitution, a right is subject to reasonable restriction imposed by law in the public interest. And this is precisely the *raison d'etre* for 7A to be challenged. The discussion regarding fundamental rights is incomplete without quoting the deathless lines of Muhammad Munir CJ in *Jibendra Kishore* case (**PLD 1957 SC (Pak) 9**):

> *"The very conception of a fundamental right is that it being a right guaranteed by the Constitution cannot be taken away by the law and it is not only technically inartistic but a fraud on the citizens for the makers of a Constitution to say that a right is fundamental but that it may be taken away by the law."*

32. Thus it will be a fraud on the Constitution to say that a fundamental right may be taken away by law. To reiterate, the only limitation is "that the citizen is not entitled by virtue of the Article to do an act, which, when done otherwise than as part of a business etc. was unlawful". The charging of fee beyond 8% is not unlawful otherwise than as part of a business and thus no limitation can be placed so as to declare it unlawful as an act.

33. Mr. Shaan's premise is that since there is a ceiling imposed by law, the right, if any, vesting in the petitioners has been taken away and thus seeking its protection is not permissible. Therefore, a part of the right is protected by Article 18 but beyond a certain ceiling, it is not. In short, the petitioners will be deemed to carry on a lawful trade or business as long as they do not raise the fee beyond 8%. The argument is nuanced and too tenuous to be sustained. If accepted, it will lead to dangerous results. It is merely a matter of semantics to reach such a result. Doubtless, the legislature can declare a trade or profession as unlawful and which will mean that that business, trade or profession, as a whole has been declared as unlawful and it will not be lawful to enter upon it. In that sense any act ancillary to that trade or profession will be unlawful too. But if a profession, business or occupation is lawful and there is no prohibition on its activity then that profession or occupation can only be regulated by a licensing system or otherwise within the enumerations of Article 18. Price fixation is a facet of regulation as we believe it is and so by so fixing a price (or placing a cap as in the present case) the legislature is merely imposing a regulation and no more. The distinction, though subtle, is of crucial importance. If it is deemed unlawful, the petitioners lose their right to invoke Article 18 to their aid, but if it is merely a regulatory measure the petitioners can invoke the vice of unreasonableness to have the measure struck down. For regulation can only be to the extent of being reasonable as was held by

Justice Cornelius in *East and West Steamship Co*. case and *Arshad Mahmood*. As adumbrated, regulation might include prohibition as well (East and West Steamship Co. case) but again, if a prohibition is placed by exercise of licensing powers, that is being done within the regulatory enterprise which governs that trade or occupation. Thus the only limitation on a lawful trade or business is regulation by licensing system or in the interest of free competition. If this were not the case, it would effectively give power in the hands of GOP to wield it at will who may also one day choose to impose a complete ban on charging of fee by the petitioners. Will that serve the public interest? The answer is undoubtedly in the negative. Will it not be a contradiction in terms to say that though the petitioners may carry on the business of running a private school but they cannot charge a fee for it. This will be tantamount to saying that private schools cannot conduct that business, in fact. To put it in other words, though the business is lawful, no one can conduct that business because of an unsavory and grossly stringent regulation. The effect of regulation cannot be to make the conduct of business or profession as unlawful. Hence the adage; what cannot be done directly, cannot be achieved indirectly, too.

34. This brings us to the inherent fallacy of the GOP's arguments. If by raising the fee beyond 8% makes the act unlawful and unpalatable and hence not protected as a fundamental right under Article 18, can it be argued that the petitioners are stripped of the protection of

all other fundamental rights such as right to property, liberty and due process. Surely if the right guaranteed by Article 18 is taken away, the act can be challenged on the touchstone of those rights and the tests laid therein will have to be satisfied. The petitioners can indeed plead property rights and due process to block any attempt to cap fees.

***Licensing System*:**

35. The question, in the context of Article 18, which engaged this Court was the true nature of the prohibition in section 7A. Whether it was by way of a qualification or a condition of regulation? This question need not detain us for long. The conditions imposed on the private schools are an amalgam of both qualifications and conditions of a license. The law and the rules provide certain qualifications for the schools to have themselves registered and to enter the gate. The GOP, however, continues to keep a watchful eye by way of regulations while the school operates and such regulation can only be undertaken by a licensing system. That is the mandate of Constitution and so the GOP and the petitioners must resign to this legal proposition. Otherwise, the whole edifice must fall. If this were not the case, the GOP will scramble to find a legal basis for the entire structure which has all the contours of a regulatory regime. Thus in our opinion, the regulation by GOP has all the trappings of a licensing system and we harbour no qualms on that account.

36. License is a "permit from government etc. to marry, print something, preach, carry on some trade etc." (Concise Oxford

Dictionary). Also in American Jurisprudence, (33rd vol.) the definition is thus stated:-

> *"In its specific sense, to license means to confer on a person the right to do something which otherwise he would not have the right to do. A license is in the nature of special privilege rather than a right common to all and is often required as a condition precedent to the right to carry on business or to hold certain classes of property within the jurisdiction."*

37. A system, in the opinion of Justice Cornelius in East and West Steamship case:

> *"would in the relevant respect mean an arrangement by way of regulation, applicable to a complex whole namely the trade of shipping in general. It would provide for rules applicable uniformly, subject to suitable classification in relation to the entire trade of shipping. Again, it is inherent in the use of the expression licensing system that the actions of the State in respect of the trade should be in the nature of permissions granted to do certain acts provided certain conditions are satisfied; it goes entirely beyond the meaning of the expression 'licensing' to interpret it as a check upon even the primary process involved in the trade which is being licensed."*

38. Thus the system of licensing does not confer a license on the GOP to place "*a check upon even the primary process involved in the trade which is being licensed*". It is nobody's case that the petitioner do not conduct a business or even trade; that they do so for profit, though the primary purpose of imparting quality education is not lost sight of upon them; that high quality education is not inexpensive. All of these are lawful acts and the business and trade being conducted is lawful too.

What circumstances would then compel the GOP to impose a condition which is not only imprudent but is pernicious and virtually takes away the imprimatur? The petitioners contend that they can certainly make out a case for increase of fee beyond 8% upon cogent and rational grounds. But to what avail would that be since the legislature has tied the hands of the authorities to grant such a permission and hence the petitioners shall have to either shut down or scale down their expenses to manageable levels. The petitioners may carry on with their business but the standard and quality of education will have to be reconfigured to comport to the ceiling imposed by GOP. A spiral effect will set in and one can imagine the rest.

39. However we agree with the Sindh High Court judgment (CPD-5812 of 2015) that the regulation of privately managed schools is by a licensing system and ought to be treated as such. In this case, Rule 7(3) of the Sindh Private Educational Institutions (Regulation and Control) Rules 2002 was challenged.

40. At the same time, the words of Lord Woolf *(R v. Secretary of State ex p. Fayed (1997) 1 All ER 228, 240)* must resonate emphatically in all such cases which lay down a duty to act fairly in granting and regulating license:

> *"But even if what a person applying for a license docs is to seek a privilege, the days when it used to be said that a person seeking a privilege is not entitled to be heard are long gone. The granting authority has in the case of a license also a duty to act fairly".*

41. The above statement applies, a *fortiori*, to the regulatory authorities after a license is granted and must be taken to have been embedded in the procedural formalities to be followed. Section 7A, in my opinion, takes away that right to be treated fairly and a corresponding duty to act with fairness.

42. Chief Justice Marshall (of US Supreme Court) said:

> *The power to tax involves the power to destroy"*
>
> Many years later, Justice Holmes completed the phrase by inserting an important rider:
>
> *"The power to tax is not the power to destroy while this court sits"*
>
> (277 US 218, 222)

43. By analogy, the business of the petitioners cannot be allowed to be destroyed in the guise of regulation, while this Court sits, by providing a cap. The argument of the GoP in support of such a cap runs on a slender margin. The petitioners do not dispute that fixing of fees is part of regulation. But the subtle distinction has to be borne in mind here. Regulation would involve the process of considering the request of a school to increase fees to a certain level and to permit or refuse that increase. It may also include permission to increase to a certain extent on the basis of data before the authority. However, on the contrary, this does not include the power to fix fees without regard to attending circumstances and in oblivion of the good faith underpinning the request

for a reasonable increase. That would constitute an unreasonable restraint on the rights.

44. In most part, the petitioners argue that the fixation of a ceiling is expropriatory and confiscatory. It impacts the schools in such a way as to render them uncompetitive and has the effect of driving them out of business. Any law which has that egregious effect triggers a challenge on the basis of Article 18 and an inevitable intervention by the court. Section 7A is peremptory in nature and forecloses any right of the petitioners to put forth their valid claim for an increase. In a nub, section 7A has stonewalled any investigation into an increase beyond 8%. GoP contends that the figure of 8% was arrived at upon empirical data regarding inflationary trends etc. If such is the basis, can the petitioners not raise a countervailing argument that those factors are fickle and plastic in nature and are prone to changes which are rapid and uncertain. The data is, at best, unilateral and one-sided and perhaps compiled to suit the GOP's purpose and may be upended by competing and more reliable data. More importantly, is there a mechanism in place to guide the legislature to bring changes in law on regular intervals in this respect? In the enactment of laws, no such rule can be relied upon and it is naïve to expect the legislature to undertake that exercise periodically or for the petitioners to reach out to the legislature with a plea that an amendment is necessitated by the legislature. And what if only a couple of schools seek an increase beyond 8%. Will the

legislature change the law for those couple of schools? Certainly not. It was said in *Gadoon Textile Mills v WAPDA* (**1997 SCMR 641, 835**) that:

> *"There is therefore no room here for the philosophy that the end justifies the means; the end, however, laudable, cannot be justified, if it is violative of the right guaranteed by Article 18".*

45. And in *Government of Pakistan v Muhammad Ashraf* (**PLD 1993 SC 176, 185**), the following observations aptly apply to the instant case:

> *"Any legislation whereby either the prices of marketable commodities are fixed in such a way as to bring them below the cost of production and thereby make it impossible for a citizen to carry on his business or whereby taxes are imposed in such a way as to result in acquiring property of those on whom the incidence of taxation falls, would be violative of the fundamental right to carry on business or to hold property as guaranteed by the Constitution."*

Other Rights

46. The arguments of GOP stir a debate about "how not to read the Constitution". (The chapter in a book by Laurence H. Tribe and Michael C. Dorf titled *On Reading the Constitution*). The authors began by the notion that:

> *"Those who wrote the document, and those who voted to ratify it, were undoubtedly projecting their wishes into an indefinite future. If writing is wish-projection, is reading merely an exercise in wish-fulfillment — not fulfillment of the wishes of the authors, who couldn't begin to have foreseen the way things would unfold, but fulfillment of the wishes of readers, who perhaps use the language of the Constitution simply as a mirror to dress up*

> *their own political or moral preferences in the hallowed language of our most fundamental document? Justice Joseph Story feared that that might happen when he wrote in 1845: "How easily men satisfy themselves that the Constitution is exactly what they wish it to be."*

47. Moving on, the authors identified two ways not to read the Constitution which have an important bearing on these cases and in particular in the context of GoP's argument that Article 18 cannot be invoked beyond a certain ceiling imposed by law. It was said that:

> "*Two additional ways not to read the Constitution are readily apparent; we will call them reading by dis-integration and reading by hyper-integration.*
>
> *When we say reading by "dis-integration," we mean approaching the Constitution in ways that ignore the salient fact that its parts are linked into a whole — that it is a constitution, and not merely an unconnected bunch of separate clauses and provisions with separate histories, that must be interpreted. When we say reading by "hyper-integration," we mean approaching the Constitution in ways that ignore the no less important fact that the whole contains distinct parts — parts that were, in some instances, added at widely separated points in American history; parts that were favored and opposed by greatly disparate groups; parts that reflect quite distinct, and often radically incompatible, premises."*

48. Thus different provisions are woven into a tapestry and form a whole. But it is important not to fall prey to these two methods of interpretation and to maintain a balance which shuns either dis-integration or hyper-integration. When GOP argues that it is unlawful to conduct the business by the petitioners beyond 8% it is being guilty of disintegration. Even the very imposition of a ceiling on the ground that

Article 18 permits GOP to do so would mean "*approaching the Constitution in ways that ignore the salient fact that its parts are linked with a whole—that it is a Constitution and not merely an unconnected bunch of separate clauses*". So constitutional concepts like "due process of law" (Article 10A) and "right to property" (Articles 23 and 24) and right to life and liberty (Article 9) cannot be ignored while interpreting section 7A which must accord with the method which shuns dis-integration. The concept of dis-integration and its vices is further illustrated in the following words:

> *"Consider more closely, then, the first fallacy — that of disintegration. Let me begin with a straightforward example, one which was a favorite of Chief Justice Warren E. Burger. The Fifth Amendment says that "no person . . . shall be deprived of life, liberty, or property, without due process of law." Chief Justice Burger used to argue, as have others, that the authors of that language obviously must have contemplated that, with "due process of law," a person may be deprived of life. Therefore, the argument goes, capital punishment is constitutional. It's very simple; why should the Court struggle over it? The conclusion may or may not be right; I find the question whether the death penalty is constitutional to be among the most perplexing. But the proposed method of resolving that question is profoundly disintegrated and is not really a way of interpreting this Constitution, because the Fifth Amendment is only part of the document. There is also the Eighth Amendment, ratified as a separate part of the Constitution. It says that "cruel and unusual punishments" shall not be imposed. Is the death penalty, then, cruel and unusual? The answer must be: it depends. Quite clearly, it was not considered cruel and unusual in 1791, when both the Fifth Amendment and the Eighth Amendment were ratified. But it might be so*

today? That another constitutional clause evidently contemplates that death might be inflicted by government without offense to that part of the Constitution doesn't answer the question. Indeed, if the Fifth Amendment did answer it, we would be left with another dilemma, since it also seems to sanction hacking off people's limbs — by its command that no person shall be "twice put in jeopardy of life or limb." Yet no one would seriously argue today that bodily mutilation, employed on occasion as a punishment during colonial times, could withstand scrutiny under the Eighth Amendment. Again, it seems to be that what the Fifth Amendment suggests as an answer becomes only a question once the Eighth Amendment is consulted. Consider another example. It has been urged by some, including Mark Tushnet of Georgetown University, that we ought to read the Constitution as requiring socialism — as obliterating the institution of private property. How else, he asks, can we make sense of the ideal of equality which underlies the constitutional mandate of the equal protection of the laws?32 If all the Constitution contained was an equal protection clause, I suppose something might be said for that view. But the view becomes untenable if we also remember that, in various of its parts, the Constitution expressly affirms, sanctifies, and protects the institution of private property. It says that neither the state nor the federal government may deprive anyone of property without "due process of law," and that "private property [shall not] be taken for public use without just compensation."33 It is a disintegrated "reading" of the Constitution to lift one provision out, hold it up to the light, see how far you can run with it, and forget that it is immersed in a larger whole."

49. Article 10A of the Constitution reads thus:

*"**10A.** For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process."*

50. Also we may allude to Article 23 which guarantees rights to property and is couched as under:

> *"**23.** Every citizen shall have the right to acquire, hold and dispose of property in any part of Pakistan, subject to the Constitution and any reasonable restrictions imposed by law in the public interest."*

51. Are the petitioners not entitled to due process of law in the determination of these rights? Due process (substantive as well as procedural) in this case would involve a right to present the case of the petitioners for an increase in fee which strikes a balance between the regulatory purpose and public interest on one hand and the right of the petitioners to acquire and hold property on the other. By providing a cap, that due process is being denied to them. Thus even if the charging of fee beyond a ceiling is unlawful, it is a matter of due process that any such declaration must be preceded by a process based on fairness and proportionality. The exercise of a regulatory power in such a way cannot be countenanced and in our opinion not only that section 7A is an unreasonable exercise of regulatory authority, it also offends the due process clause and right to hold property. After all, the petitioners conduct a business and trade and it is not the GoP's case that beyond a certain level, the property or profit earned shall vest in GOP. Thus the countervailing argument of profiteering can only succeed if due process is followed to objectively analyse when the profits morph into profiteering so as to sully the stream of a noble profession like

education. Here, the case of the petitioners is not that they are not being allowed to profiteer but that they are not allowed to meet their basic expenses which on account of inflation etc. have increased manifold.

Life and Liberty:

52. At core, this case is mainly about protecting individual liberty to make basic economic decisions. At the same time it is true that right to education brings forth a progressive account of liberty that creates the opportunity for the people to have the freedom to have a happier life and to have the liberty to pursue their own happiness. In "*Uncertain Justice, The Roberts Court and the Constitution*" by Lawrence Tribe and Joshua Matz, the authors quoted the *1944 State of the Union Address of FDR* while proposing a Second Bill of Rights:

> "*Arguing that familiar "political rights" had "proved inadequate," he explained that "true individual freedom cannot exist without economic security and independence." After all, he said, "necessitous men are not fee men." FDR's remarkable list included the right "to a good education", the right "to earn enough to provide adequate food and clothing and recreation," and the right to "adequate protection from the economic fears of old age, sickness, accident, and unemployment." It also included "the right to adequate medical care and the opportunity to achieve and enjoy good health.*"

53. Some of the political rights proposed by FDR are already part of our fundamental rights including right to education. I would however describe the right, in essence, as the right "to a good education." Good education can only be achieved by granting the liberty and freedom to private schools to increase fees which commensurate with their need for

providing "good education" and not "any education." Thus a balance ought to be struck between the petitioners' liberty to make basic economic decisions and the right to a good education which inheres in the people. One cannot be curtailed at the cost of the other. We realise that the Act is a social legislation and is concerned with welfare rights. But if this case is about the petitioners' liberty to make economic choices, does it not also concern itself with the liberty of the students to have the freedom to receive good education. Does this corresponding right to good education not oblige the Government to give certain leeway to the private schools in settling and fixing fees so that the requirements of good education are met. This is the crucial reason why Section 7A places an unreasonable restriction on the rights of not only the petitioners but also the students. In my opinion it denies the blessings of liberty to both. As historian Eric Foner writes, "to traditional notions of individualism and autonomy, Progressives wedded the idea that such freedom required the conscious creation of the social conditions for full human development". (*The story of American Freedom, 139-62)*

54. In one of the cases, U.S Supreme Court has stated that the term liberty:

> *"Denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry establish a home and bring up children, to worship God according to the dictates of his own conscience and generally to enjoy those privileges long*

> *recognized… as essential to the orderly pursuit of happiness by free men."*
> *(Board of Regents v. Roth, 408 U.S. 564, 572)*

55. Thus to engage in any of the common occupations of life is an aspect of liberty. Its deprivation and linkage to procedural due process has been brought forth in "*Treatise on Constitutional Law, Substance and Procedure (Fifth Edition) by Ronald D. Rotunda John E. Nowak* in the following words:

> *"It would appear that whenever the government takes an action that is designed to deprive an individual, or a limited group of individuals, of the freedom to engage in some significant area of human activity, some procedure to determine the factual basis and legality for such action being taken is required by the due process clause. The primary issues have arisen in terms of restrictions on employment, the granting or withholding of important occupational licenses, and injury to the reputation of an individual."*

56. Thus, Section 7A, by its term, impinges upon the rights of the petitioners' to life and liberty which, inevitably, include a right to carry on and engage in any occupation and business. Further, in the same treatise the government's ability to regulate an area of human activity and the treatment of individuals for special limitations of freedom was alluded to in the following pertinent observations:

> *"The government's ability to regulate or eliminate an area of activity for a general class does not mean that it should be able to single out individuals for special limitations of freedom of action without granting them some process to determine the basis for such an action. One may sometimes see statements that the scope of individual liberty is to be defined solely by state*

> *law, but such a position seems clearly erroneous. For example, while the state need not let anyone purchase alcohol, it cannot single out a specific individual for a denial of the right to purchase alcohol without giving that individual a hearing to determine whether such an action is proper. This does not amount to a restriction on the substantive powers of the state to regulate activities within its jurisdiction, but only a recognition that when the state acts against a specific individual, it must do so in a procedurally fair manner."*

Public Interest:

57. Price fixation has its provenance in the element of public interest. This is conceded by both the parties. In all matters which affect the public in general, private interest must be subordinated to public interested and education and its dissemination is one such matter. Thus fixation of fees and its charging cannot be left to the private enterprises to the utter detriment of the students and their parents. Its regulation must be conceded to the executive as forming an important plank of our national life. But this Court is prepared to more closely scrutinize economic regulation with an eye towards protecting a wide range of related individual rights. Regulation of economic activity impacts whole swaths of financial corporate, and consumer sectors and invokes an expanded judicial role in shaping rules for these vital segments of economy. The plea of public interest must be objective and not subjective. GoP says only 2% or less of the population comprises the student body actually affected by the 8% ceiling. This begs the question: how does this serve the public interest to impose that ceiling since the increase in fee does not affect a large number of students

generally. How can a law have an element of public interest if it does not affect an overwhelming majority of students? This begs another question? Why have the parents of the small minority of students chosen to admit their children to these schools knowing fully well the scale of their fee? Obviously they harbour the notion that these schools impart education of a higher quality as compared to the others. Doubtless, they would want that quality education to be continued to be instilled in their children. Is it not a contradiction in terms to seek to restrain the schools from their *bona fide* efforts in maintaining the standard of education which is their hallmark. Thus restraining a school from increasing fee to a reasonable level in order to maintain a threshold standard is contrary to public interest in itself. For public interest would be best served in enhancing the standards rather than lowering them. If a school seeks an increase in fee in order to bring a qualitative change in the standard of education based on objective criteria, then we are convinced that any ceiling is anathema to public interest.

> *"If we want things to stay as they are, things will have to change.*
>
> (Italian Novel, *The Leopard*)

58. These petitions are partly ***allowed*** in terms of **Order of the Court.**

(SHAHID KARIM)
JUDGE

Rafaqat Ali