Form No: HCJD/C.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Case No: Writ Petition No. 3178 of 2015

Educational Services (Pvt.) Limited and 4 others
Vs.
Federation of Pakistan and another

Petitioners by:	**Mr. Shahid Hamid ASC, Mrs. Ayesha Hamid, Mrs. Asma Jahangir ASC, Syed Naeem Bukhari ASC, Syed Hamid Ali Shah ASC, Ch. Mazhar Ali ASC, Syed Ahmed Hassan Shah, Mr. Ammar Seri, Mr. Waseem Abid, Mr. Tariq Saleem Sheikh, Mian Muhammad Zafar Iqbal, Syed Ishfaq Hussain Naqvi, Mr. Khurram M. Hashmi, Mr. Muhammad Shoaib Razzaq, Malik Imran Safdar, Mr. Jawad Hassan, Barrister Umar Azad Malik, Advocates.**
Applicants By:	**Mr. Waheed Iqbal, Barrister Qasim Wadood, Ms. Saadia Noreen, Mr. Iftikhar Ahmed Bashir & Mr. Jahangir Jadoon, Advocates.**
Respondents by:	**Mr. Aftab Alam Rana, Advocate.** **Syed Hasnain Ibrahim Kazmi, Deputy Attorney-General.** **Imtiaz Ali Qureshi, Member PEIRA.** **Javed Iqbal, Secretary, PEIRA.**

Date of Hearing: 03.03.2016

AAMER FAROOQ, J.- This judgement shall decide the instant petition as well as the petitions mentioned in the schedule attached herewith as common questions of law and facts are involved.

2. In all the petitions (except Writ Petition No.3715/2012 and Writ Petition No.3272/2015) the petitioners have assailed notification dated 23.09.2015 issued by respondent No.2 whereby the petitioners were directed not to increase any fee/charges/funds in 2015 and also to refund/adjust any increase in fee/fund/charges already charged. The impugned notification further provided that in case of default, proceedings under section 16 Islamabad Capital Territory, Private Educational Institutions (Registration and Regulation) Act, 2013 (hereinafter the Act) shall be initiated. In the petitions vires of section 4 (c) and 5 (1) (b) and 5 (1)(h) of the Act have also been challenged.

3. The facts, in brief, are that all the petitioners (except for petitioners in W.P. No.3715/2012 and W.P. No.3272/2015) are Private Educational Institutions. The legal status of the petitioners varies from sole proprietorship/firm or partnership to a private limited company, however, all of them are running Institutions, *inter alia*, all over Islamabad Capital Territory and disseminating education against payment of fee by the students. In order to regulate the Private Educational Institutions in Islamabad the Act was passed by virtue of which Private Educational Institutions Regulatory Authority (PEIRA) was created. Section 4 of the Act provides for the aims and objectives of the PEIRA. In this behalf one of the objectives of the Authority is to determine and fix rate of fee charged by the Institutions. Similarly, section 5 of the Act prescribes functions and powers of PEIRA. Under section 5 (1)(b) *ibid* the Authority is to register and regulate Private Educational Institutions in Islamabad Capital Territory including fixation of grade-wise rate of admission fee, security

fee, monthly tuition fee and other fees being charged by Private Educational Institutions. Similarly, under section 5 (1)(h) it is the function of PEIRA to ensure that the service i.e. quality of education being provided and salary paid to the teachers commensurate with the fee being charged. Admittedly, PEIRA never fixed the fee (Admission Fee, Tuition Fee and other Charges) being charged by the petitioners, however, through impugned notification it restrained the Private Educational Institutions from raising the fee/charges in the year 2015 and also to refund/return the enhanced fee/charges for the year 2015.

4. Mr. Shahid Hamid & Ms. Ayesha Hamid, ASC/ learned counsels for the petitioners in the instant petition *inter alia* submitted that since under sections 4 & 5 of the Act no fee was ever fixed by respondent No.2, therefore, through impugned notification the referred respondent cannot restrain the petitioners from enhancing fee in 2015; that the impugned notification is retrospective in operation inasmuch as it also covers the fees already received by the petitioners. Learned counsels pointed out that the petitioner is an Educational Institution having branches all over Pakistan; the petitioner also awards merit based scholarships and concession to staff children, therefore, in such like circumstances restraining the petitioner from enhancing the fee is without any justification or basis. Learned counsels further submitted that the impugned notification is without jurisdiction and lawful authority; that under Article 25-A of the Constitution it is the responsibility of the State to provide free education to the children in Pakistan and the petitioners by running Educational Institutions do not step into the

shoes of the State whereas are running the Institutions on commercial basis; that there is no restriction under the Constitution of the Islamic Republic of Pakistan or any other law for running Educational Institutions on commercial basis. It was further submitted that freezing the fee of the Educational Institutions including the petitioner is unreasonable. Learned counsels also made a challenge to the vires of sections 4 (c) & 5(1)(b) and 5(1)(h) of the Act. In this behalf it was contended that the referred provisions are in violation of Article 18 of the Constitution inasmuch as it is the fundamental right of the petitioner to conduct business, however, the same is subject to reasonable restrictions imposed by the law whereas the restrictions imposed under sections 4 & 5 *ibid* are unreasonable. In this behalf reliance was placed on the case titled *P.A. INAMDAR & ORS V. STATE OF MAHARASHTRA & ORS* (AIR 2005 S.C. 3226). It was further contended that the respondents by a blanket order cannot fix the fee for all the Educational Institutions; infact the requirements and fee structure of every Educational Institution is different, therefore, in order to fix the fee as required under the law each Educational Institution has to be given an opportunity to justify and explain its expenses and revenue required for running the Institution and providing the facilities. Reliance was placed on the case titled *ARSHAD MEHYMOOD V. GOVERNMENT OF PUNJAB THROUGH SECRETARY (*PLD 2005 SC 193). Learned counsel also by way of comparison submitted that in England there is an authority referred to as Independent Schools Inspectorate and under the same there is no restriction on the fee to be charged by the schools. With respect to retrospectivity of the notification reliance was placed on *IMTIAZ AHMED AND OTHERS V. PUNJAB PUBLIC SERVICE*

COMMISSION THROUGH SECRETARY, LAHORE AND OTHERS (PLD 2006 SC 472), *SHEIKH FAZAL AHMED V. RAJA ZIAULLAH KHAN AND ANOTHER* (PLD 1964 SC 494), *ISLAMIC REPUBLIC OF PAKISTAN THROUGH THE SECRETARY M/O COMMERCE AND LOCAL GOVERNMENT (COMMERCE DIVISION), ISLAMABAD V. MAZHAR UL HAQ AND 2 OTHERS* (1977 SCMR 509) AND *TRUSTEES OF PORT OF KARACHI AND ANOTHER V. ZAFFAR ZAID AHMED* (1988 SCMR 810).

5. In W.P. No.3181/2015, Mrs. Asma Jahangir, ASC on behalf of the petitioner, adopted the arguments of the learned counsel for the petitioners in W.P. No.3178/2015. Initially in Writ Petition No.3181/2015 no challenge to the vires of the Act was made, however, subsequently an application was moved by virtue of which permission was sought to challenge the vires as well which was allowed by this Court and amended petition was filed accordingly. It was contended that under Article 18 of the Constitution of Pakistan a guarantee has been made to every citizen of Pakistan to enter into any lawful profession and occupation and to conduct any lawful business or trade subject to such qualifications as prescribed by the law. It was contended that qualifications as prescribed in Article 18 pertains to regulation of any trade or profession by a licensing system or regulation of trade, commerce or industry in the interest of free competition, however, it was contended that no restriction regarding the charging of fee or making profit can be imposed by law. Reliance was placed on the case titled *KHAWAJA IMRAN AHMED V. NOOR AHMED AND ANOTHER* (1992 SCMR 1152), *SHAHABUDDIN AND ANOTHER V. PAKISTAN, ETC.* (PLD 1957 West Pakistan Karachi 854) and *MURREE BREWERY COMPANY LTD. VERSUS DIRECTOR-GENERAL, EXCISE AND TAXATION (*1991 MLD 267).

Learned counsel also submitted that unreasonable restrictions as imposed in the case of the petitioner which effect the autonomy and freedom to carry out business and profession are ultra vires Article 18 of the Constitution. Reliance in this regard was placed on the case titled *ARSHAD MEHMOOD AND OTHERS V. GOVERNMENT OF PUNJAB THROUGH SECRETARY, TRANSPORT CIVIL SECRETARIAT, LAHORE AND OTHERS* (PLD 2005 SC 193), *MESSRS ELAHI COTTON MILLS LTD AND OTHERS V. FEDERATION OF PAKISTAN THROUGH SECRETARY M/O FINANCE, ISLAMABAD AND 6 OTHERS* (PLD 1997 SC 582), *K.B. THREADS (PVT.) LIMITED THROUGH CHIEF EXECUTIVE AND OTHERS V. ZILA NAZIM, LAHORE (AMIR MEHMOOD) AND OTHERS* (PLD 2004 Lahore 376), *ABDUL HAKIM QURESHI V. STATE OF BIHAR* (AIR 1961 SC 448) and *MUHAMMAD YASEEN V. TOWN COMMITTEE JALALABAD AND OTHERS* (AIR 1952 SC 115). It was also contended that the Government has miserably failed to adhere to its Constitutional obligation to provide free education to the children whereas by promulgation of the impugned notification the Federal Government is trying to transfer the burden of its failure on the shoulders of non-funded private Educational Institutions. Learned counsel also contended that in opening the education sector for private participation, the Government walks a fine line when deciding whether to let market forces prevail or to make an effort to regulate the sector. In the normal case the private sector can charge any price for its education and in the latter case the Government regulates the market which is a difficult and cumbersome task. Learned counsel by way of comparison submitted that experience in India shows that the Courts have made a full circle and have allowed unfunded private Educational Institutions to regulate their affairs.

Reliance was placed on the cases titled as *MISS MOHINI JAIN V. STATE OF KARNATAKA* (1992 3 SCC 666), *A P.A. INAMDAR V. STATE OF MAHARASHTARA* (2005 6 SCC 537) and *UNAIDED PRIVATE SCHOOLS OF RAJESTHAN V. UNION OF INDIA AND ANR* (2012 6 SCC 1). Learned counsel also contended that no notice was issued to the petitioner before issuing the impugned notification, therefore, the petitioner has been condemned unheard. It was also contended that the principle of natural justice shall have to be read into sections 4(c) and 5 (1) (b)(h) of the Act.

6. Syed Naeem Bukhari, learned counsel for the petitioners in W.P. No.3598/2015 adopted the arguments of the learned counsel for the petitioners in W.P. No.3178/2015, however, submitted that the provisions of the Act and the impugned notification are not applicable to the Institutions offering A & O Levels.

7. Syed Hamid Ali Shah & Barrister Hasnain Ali Ramzan ASCs in W.P. No.3301/2015 and Mr. Tariq Saleem Sheikh in W.P. 3241/2015 & 3240/2015 on behalf of the petitioners pointed out that the petitioners are companies registered under the Company Laws of Pakistan and run and manage various Educational Institutions all over the Pakistan under the name and style "***Headstart School", Lahore Grammar School, and Roots Millennium Schools.*** At the outset learned counsel submitted that the petitioners run and manage Institutions solely upon the fees that are generated from the students and in this regard no subsidy/special exemption or grant from the Government is enjoyed by the petitioners; that the petitioners pay all the taxes that are levied and applicable. Learned counsel further pointed out that the submissions are twofold i.e. firstly, declaration to the effect that notification dated

23.09.2015 be declared illegal and without lawful authority and secondly, that various provisions of the Act be declared as ultra vires the Constitution. With regard to the first submission learned counsel contended that the Act does not prescribe any prior permission to be sought before enhancing fee, therefore, the impugned notification whereby it provides that prior permission was to be sought is confiscatory in nature and also cannot have any retrospective effect. It was further contended that all the directions contained in the impugned notification are in excess of the powers conferred by section 4 of the Act. Learned counsel read out sections 4 & 5 and pointed out that under section 4(c) as well as 5 (1)(b)&(h) fee of a Private Institution is to be fixed and determined by PEIRA and in this regard it was contended that nowhere it is provided that prior permission is to be obtained before fixing the fee. Secondly, it was contended that sections 4(c), 5(1)(b)&(h) are ultra vires the Constitution. In this behalf it was contended that the Government is under Constitutional duty to enact laws in conformity with Article 25 of the Constitution. Reliance was placed on the case reported as (1999 SCMR 1012). In this behalf it was pointed out that if the laws are not in conformity with the fundamental rights as guaranteed in the Constitution, the same can be struck down by invoking the jurisdiction of High Court. Reliance was placed on *SH. LIAQUAT HUSSAIN AND OTHERS. V. FEDERATION OF PAKISTAN THROUGH M/O LAW , JUSTICE AND PARLIAMENTARY AFFAIRS, ISLAMABAD AND OTHERS* (PLD 1999 SC 504). Learned counsel also placed reliance on case titled *BAZ MUHAMMAD KAKAR AND OTHERS V. FEDERATION OF PAKISTAN THROUGH MINISTRY OF LAW AND JUSTICE AND OTHERS* (PLD 2012 SC 923) to

substantiate his argument that any legislation where due process of law and right of access to justice is denied the same can be struck down. Learned counsel contended that where the price of service or a good is fixed without providing any opportunity of hearing the same is liable to be struck down. In this behalf reliance was placed on the case titled *PACIFIC PHARMACEUTICALS LTD. V. GOVERNMENT OF PAKISTAN AND ANOTHER* (2002 YLR 3125) and *MESSRS ELAHI COTTON MILLS LTD. AND OTHERS V. FEDERATION OF PAKISTAN THROUGH SECRETARY M/O FINANCE, ISLAMABBAD AND 6 OTHER* (1997 PTD 1555). Learned counsel further contended that where inflated and arbitrary powers are given to any authority that tantamount to excess delegation and the same is not sustainable. Reliance was placed on the case titled *SHAUKAT ALI MIAN AND ANOTHER V. THE FEDERATION OF PAKISTAN* (1999 CLC 607) and *MEHRAM ALI AND OTHERS V. FEDERATION OF PAKISTAN AND OTHERS* (1998 SCMR 1156). Learned counsel also submitted that under Article 25-A of the Constitution it is the responsibility of the State to provide free and compulsory education to all the children between the ages of 5 to 16 years in such manner as may be determined by the law, therefore, it is the responsibility of the Government to do the needful and that responsibility cannot be delegated to the private non-funded Educational Institutions. Learned counsel also pointed out that when the children are admitted in Educational Institutions a legally enforceable contract comes into existence. In this behalf it was contended that when an application for admission is made it is an offer on part of the student and when the admission is granted that amounts to acceptance of the offer whereupon a contract subject to payment of fee/consideration comes in existence. It was further

contended that in case anyone wants to get out of the contract, the same can be done accordingly. Reliance was placed on case titled *AKHTAR ALI JAVED V. PRINCIPAL, QUAID-I-AZAM MEDICAL COLLEGE, BAHAWALPUR* (1994 SCMR 532).

8. Syed Ahmed Hassan Shah, Advocate for the petitioners in W.P. No.3137/2015 & 3278/2015 also adopted the arguments addressed by the learned counsel for the petitioner in W.P. No.3178/2015. It was further contended that the Act does not empower the respondents to issue the impugned notification and the impugned office order; that the impugned notification was issued in disregard to the provisions of the Act; that the Act does not require the petitioners to obtain prior approval or permission of the respondents, particularly respondent No.2 before enhancing the school fee/charges, therefore, the impugned notification is misconceived and liable to be struck down. Learned counsel further submitted that the exercise of powers and authority by the respondents is dependent upon framing of rules by respondents No.1 under section 22 of the Act and also framing of regulations under section 23 *ibid*. It was further contended that till todate no rules and regulations have been framed. Learned counsel contended that no fee can be fixed retrospectively. The academic year commenced in August 2015, however, the impugned notification was issued in September, 2015 pertaining to academic year, 2015; that the impugned notification has been issued without lawful authority inasmuch as PEIRA has not been properly constituted and no Chairman or Member of respondent No.2 has been appointed as required under section 6 of the Act. It was also contended that

the impugned notification is ultra vires Article 18 of the Constitution. The vires of sections 4 (c), 5(1)(b) & (1)(h) were also assailed on the touchstone of Article 18 *ibid.* Learned counsel also pointed out that respondent No.2 cannot fix the fee of all the Educational Institutions in a uniform way inasmuch as under the Act it has to take into account the standard of services, quality of education, range of elective subjects offered by the Institution, extracurricular activities, salaries to teachers and other staff members as well as ancillary services and facilities provided by Private Educational Institutions. In support of his contention reliance was placed on the case titled *D.G. KHAN CEMENT COMPANIES LIMITED THROUGH COMPANY SECRETARY/THROUGH CHAIRPERSON v. MONOPOLY CONTROL AUTHORITY* (PLD 2007 Lahore 1), *PACIFIC PHARMACEUTICALS LTD V. GOVERNMENT OF PAKISTAN AND ANOTHER* (2002 YLR 3125) and *MUHAMMAD AMIN MUHAMMAD BASHIR LIMITED v. GOVERNMENT OF PAKISTAN THROUGH SECRETARY MINISTRY OF FINANCE, CENTRAL SECRETARIAT, ISLAMABAD AND OTHERS* (2015 SCMR 630).

9. Mr. Shoaib Razzaq, Advocate for the petitioner in W.P. No.3312/2015 adopted the arguments of the learned counsel for the petitioner in W.P. No.3178/2015.

10. Mr. Khurram Hashmi, Advocate for the petitioner in W.P. No.3374/2015 adopted the arguments of the learned counsel for the petitioner in W.P. No.3178/2015.

11. Malik Imran Safdar, Advocate for the petitioner in W.P. No.3376/2015 adopted the arguments of the learned counsel for the petitioner in W.P. No.3178/2015.

12. Mr. Mazhar Ali, Advocate for the petitioner in W.P. No.3507/2015 adopted the arguments of the learned

counsel for the petitioner in W.P. No.3178/2015. Similarly, learned counsel for the petitioner in W.P. No.3215/2015 adopted the arguments of the learned counsel for the petitioners in W.P. No.3178/2015.

13. Mr. Jawad Hassan, Advocate in W.P. No.3483/2015 *inter alia* submitted that through the impugned notification the respondents have placed an unreasonable restriction upon the petitioners' right to conduct its lawful trade or business, therefore, the same is ultra vires the Constitution; that the impugned notification is in violation of Article 18 of the Constitution. It was further contended that impugned notification is retrospective in its applicability, hence is not enforceable; that the respondents have not fixed rates of fee nor have issued any direction in this behalf, therefore, no permission can be sought for increase in the fee from the respondents. Learned counsel also contended that under sections 4(c), 5(1)(b)&(1)(h) an objective determination of the expenses incurred by the petitioner is required whereas no such inquiry has been held by respondent No.3; that the impugned notification has been issued in violation of principles of natural justice; that the impugned notification is in violation of Articles 23 and 24 of the Constitution; that the scheme of law i.e. the Act is to be implemented through rules and regulations and till such time the same is done no restriction can be imposed on the petitioners. It was further submitted that under Article 25-A of the Constitution it is the duty of the Federal Government to provide free education to all the children till the age of 16 and this duty cannot be delegated to the petitioners. In support of his contentions learned counsel placed reliance on the c asset titled *ARIF MAJEED MALIK and others V. BOARD*

OF GOVERNORS KARACHI, GRAMMER SCHOOL (2004 CLC 1029) and *PETITION REGARDING MISERABLE CONDITION OF THE SCHOOLS: IN RE CONSTITUTION PETITION NO.37 OF 2012, DECIDED ON 11TH FEBRUARY, 2013*, (2013 SCMR 764).

14. During the course of proceedings applications were made by some of the parents to be impleaded as respondents. The applications were allowed. However, after the conclusion of arguments another application was moved for impleadment (C.M. No.910/2016 in W.P. No.3598/2015) on behalf of one of the parents in which notice was not issued as allowing every such application would result in a never ending series of applications and that would have delayed the adjudication of the matter. Counsels for the parents in some of the cases were duly heard and their arguments are noted below. Mian Muhammad Zafar Iqbal, Advocate filed W.P. No.3272/2015 on behalf of the parents seeking direction and declaration to the effect that enhancement in fee every year without permission of PEIRA is without lawful Authority and the same be done in accordance with law. Similarly, in W.P. No.3715/2012 filed by Mr. Ammar A. Sehri, Advocate, the petitioner sought direction against Federal Government and PEIRA to register all the Private Educational Institutions and take steps to control excessive charge of fee by them.

15. Mr. Qasim Wadood, Advocate (appearing for parents) in W.P. No.3178/2015 submitted that in India under section 3 of Haryana Schools Education Act, 1995 there is a power of Government to regulate the education in schools. In this behalf it was contended that under section 167 of the same at the start of the academic year the manager of every school has to file details of fee to be charged in the said year and no increase is to be made in that respective year. It was also submitted that similar

provisions exist in Tamal Nado Schools Regulations on Collection of Fee Act, 2009.

16. The learned counsel for PEIRA *inter alia* submitted that the fundamental right as provided in Article 18 is not absolute and is subject to reasonable restrictions as provided under the law and the provisions of Act do provide reasonable restrictions in this behalf. Learned counsel also contended that the charge of the exorbitant fee by the private Educational Institutions tantamount to extortion which is not sustainable under the law. In this behalf it was contended that the private Educational Institutions by imparting education are carrying out the constitutional duty as provided in Article 25-A of the Constitution, hence no excessive or exorbitant fee can be charged by them. Learned counsel took the Court through various provisions of the Act to show that the scheme of the Act is clear and provides a regulatory framework whereby the charging of fee by private Educational Institutions is regulated. In support of his contentions learned counsel placed reliance on the case titled SALFI TEXTILE MILLS LTD AND ANOTHER V. FEDERATION OF PAKISTAN AND 2 OTHERS (PLD 1995 Karachi 132), *MESSRS KHAWER PAPER MART THROUGH PROPRIETOR V. NATIONAL TARIFF COMMISSION THROUGH CHAIRMAN AND ANOTHER* (2011 PTD 2243), *LT. GEN. (RETD.) JAMSHAID GULZAR AND ANOTHER V. FEDERATION OF PAKISTAN AND OTHERS* (2014 SCMR 1504), *DELHI ABIBHARAKA MAHSANGH V. UNION OF INDIA AND OTHERS* (AIR 1999 Delhi 124), *MESSRS SHAHEEN COTTON MILLS, LAHORE AND ANOTHER V. FEDERATION OF PAKISTAN, MINISTRY OF COMMERCE THROUGH SECRETARY AND ANOTHER* (PLD 2011 Lahore 120) and *MULTILINE ASSOCIATES V. ARDESHIR COWASJEE AND 2 OTHERS* (PLD 1995 SC 423) and (AIR 2004 SC 2236).

17. Learned Deputy Attorney-General on behalf of Federal Government contended that PEIRA issued the impugned notification in exercise of powers conferred under section 5 (1)(b) of the Act after receiving complaints from the parents. In this behalf it was contended that the referred Authority has explicit powers to regulate the fee under sections 4 & 5 of the Act. It was further submitted that fixation and regulation of the fee was the sole prerogative of the PEIRA. Learned Deputy Attorney-General candidly admitted that there is no bar on commercialization of education, however, it was contended that the same does not mean absolute freedom. It was contended that where an authority has the power to pass an order then it is not liable to be interfered with by any Court unless it is *mala fide* or based on wrong principles. Reliance was placed on *PAKCOM LIMITED AND OTHERS V. FEDERATION OF PAKISTAN AND OTHERS* (PLD 2011 SC 44). It was also contended that a writ cannot be filed to establish rights rather, it is for the enforcement of the rights. It was also asserted that where the legislature specifically gave any enactment retrospective effect the same should not be interfered with. Reliance was placed on the case titled *IRSHAD AHMED SHEIKH V. NATIONAL ACCOUNTABILITY BUREAU AND OTHERS* (2015 SCMR 588). It was further maintained that the relevant provisions of the Act are intra vires and in this behalf under Article 18 of the Constitution the Government has the authority to impose reasonable restrictions which do not mean prohibition or prevention completely. Reliance was placed on the case titled *ARSHAD MEHMOOD AND OTHERS V. GOVERNMENT OF PUNJAB THROUGH SECRETARY, TRANSPORT CIVIL SECRETARIAT, LAHORE AND OTHERS* (PLD 2005 SC 193). Learned Deputy Attorney-General also placed reliance on various

pronouncements from the Indian jurisdiction reported as (AIR 2003 SC 353), *P.A. INAMDAR & ORS V. STATE OF MAHARASHTRA & ORS* (AIR 2005 SC 3226) and (AIR 1999 Delhi 124).

18. As mentioned above in all the petitions except the aforenoted two petitions, the petitioners have assailed; firstly, notification dated 23.09.2015 issued by respondent No.2 and secondly, vires of sections 4(c) and 5(1)(b) and 5(1)(h) of the Act. The impugned notification reads as follows:

TO BE PUBLISHED IN THE NEXT ISSUE OF THE GAZETTE OF PAKISTAN PART-I

Government of Pakistan
(Cabinet Secretariat)
Capital Administration & Development Division
ICT-PEIRA
*****

Islamabad the 23rd September, 2015

NOTIFICATION

No.GF.IV/PEIRA/CA&DD/PEIs/2015: In exercise of powers conferred by Section 4(c) read with Section 5(b) & (h) of Islamabad Capital Territory Private Educational Institutions (Registration and Regulation) Act 2013, the determination and fixation of rate of fee charged by Private Educational Institutions shall be regulated by PEIRA. The Private Educational Institutions enhanced the fee without the permission of the Authority, which is not permissible under the law.

2. All Private Educational Institutions are directed not to increase any fee/charges/funds in 2015. Any increase in fee/fund/charges, already charged by Private Educational Institutions shall be refunded/adjusted in the subsequent challans/bills.

3. In case of default, the Authority would be constrained to act in pursuance of Section 16 of PEIRA Act, 2013, against the non-observing institutions.

4. This issue with the approval of competent authority.

(**Javed Iqbal**)
Secretary (PEIRA)

The Manager
Printing Corporation of Pakistan Press,
Karachi.

Copy for information:

i. PS to Minister of State for CA&DD
ii. PS to Minister of State for M/o Federal Education & Professional Training
iii. PS to Secretary CA&DD
iv. PS to Additional Secretary, CA&DD
v. Notification File.

The notification has been assailed primarily on the grounds that there is no provision of law under which respondent No.2 is empowered to restrict the Private Educational Institutions vis-à-vis charging of the fee and that the same is retrospective in operation inasmuch as it directs the Private Educational Institutions to refund/return the fee charged at enhanced rate from the last year i.e. 2015 and there is no requirement under the Act that prior permission is to be obtained before enhancing the fee. Respondent No.2 is the creation of the Act. In this behalf section 3 of the Act *ibid* provides for the establishment of the Authority i.e. Pakistan Educational Institutions Regulatory Authority (PEIRA). Sections 4 & 5 laid down the aims and objectives of PEIRA and its functions and powers, respectively. Similarly, sections 6 & 7 provide for composition of the Authority and appointment, functions and powers of the Chairman. In this regard for the sake of convenience the relevant provisions of the Act are reproduced below and are as follows:

> *"3. **Establishment of the Authority**.---(1) There shall be established an Authority to be known as the Islamabad Capital Territory Private Educational Institutions Regulatory Authority (ICT-PEIRA).*
>
> *(2) The Authority shall be a body corporate, having perpetual succession and a common seal, with power, subject to the provisions of this Act to enter into contracts, acquire and hold property, both movable and immovable, and shall by the said name sue and be sued.*
>
> *4. **Aims and objectives of Authority**.---The aims and objectives of the Authority shall be to register and regulate privately managed educational institutions in the Islamabad Capital Territory to ensure that such institutions follow a uniform policy that includes,-*
> *(a) curricula according to Federal scheme of studies;*

(b) duration of academic session and holidays or vacations;
(c) determination and fixation of rate of fee being charged by the institutions, qualifications of teaching staff, their terms and conditions of service including salaries and mode of payment of their salaries;
(d) promotion of curricular and co-curricular activities on inter-institutional basis;
(e) achievement of fair measure of uniformity of academic standards and evaluation among the institutions;
(f) capacity building of teachers; and
(g) performance of such other functions as may be incidental or conducive, to the attainment of the aforementioned objectives.

*5. **Functions and power of the Authority**.---(1) The functions and powers of the Authority shall be,-*

(a) to regulate, determine and administer all matters and do all such acts and things as are necessary for the achieving of aims and objectives of this Act;

(b) to register and regulate, private educational institutions in Islamabad Capital Territory including fixation of grade-wise rate of admission fee, security fee, monthly tuition fee and other fees being charged by private educational institutions;

(c) to cause inspections to be made by such persons as the Authority may nominate of institutions applying for registration or of registered institutions;

(d) to withdraw registration if it is satisfied after the inspection that the management and instructions in an institution are not of prescribed standard and are in violation of the provisions of this Act;

(e) to check qualifications of teaching staff and their terms and conditions of service;

(f) to fix, demand and receive such fee for registration and inspection of the institution as may be prescribed;

(g) to adopt measures to promote physical and moral well-being of students including sports facilities;

(h) to ensure that the services, quality of education being provided and salary paid to the teachers commensurate with the fee being

charged;

(i) to ensure that the building of the institution is adequate and its structure is sound to house the students;

(j) to arrange for the annual audit of the accounts of the Authority;

(k) to execute any other important matter concerning its functions as may be incidental or conducive to the exercise of aforesaid powers and performance of functions; and

(l) to make rules, regulations and policy and to execute the same; and

(m) to prescribe fines to be imposed for, violation of any of the provisions conferred upon the Authority under this section.

(2) The Authority shall perform such other functions as may be assigned to it by the Government including the appointment of staff and determination of their terms and conditions of service for proper execution of the functions assigned to the Authority under this Act.

(3) In discharge of its functions the Authority shall be guided on questions of policy given to it from time to time by the Government.

(4) All the law enforcement agencies shall come in aid of the Authority in exercise of its powers and performance of its functions.

6. ***Composition of the Authority****.---The Authority shall consist of a Chairman, two Members possessing qualifications and experience as may be prescribed:*

Provided that the Government may at any time increase the number of members and by notification in the official Gazette, prescribed the qualifications and mode of their appointment.

7. ***Appointment, functions and powers of Chairman****.---(1) The Chairman and the members shall be appointed by the Government on such terms and conditions as it may determine.*

(2) The Chairman shall be the chief executive officer of the Authority, who shall ensure the observance of the provisions of this Act and the rules, regulations and policy made thereunder.

(3) The Chairman shall take all possible steps to ensure that the funds of the Authority are spent

judiciously and properly."

19. The bare reading of sections 6 & 7 shows that the Authority comprises of a Chairman and two Members possessing qualification and experience as may be prescribed. In this behalf the qualifications and mode of appointment and the number of Members may be increased by notification in the official gazette by the Federal Government. The appointment of the Chairman and the Members, under section 7, is to be made by the Government on the terms and conditions as it may determine. The Chairman is to be the Chief Executive of the Authority under subsection (2) to section 7 of the Act. On 23.09.2015 when the impugned notification was issued admittedly no permanent Chairman had been appointed by the Federal Government and all the powers of the Chairman were being exercised by Acting Chairman. In the scheme of law there is no provision for an Acting Chairman, rather permanent Chairman was appointed by the Government after issuance of the notification, therefore, respondent No.2 i.e. PEIRA had not been properly constituted at the time of issuance of the impugned notification, hence the impugned notification had not been issued in accordance with law. In this behalf reliance is placed on the case *FEDERATION OF PAKISTAN AND OTHERS V. SAEED AHMED KHAN ETC*. (ICA No.156/2015) wherein Division Bench of this Court held as follows:

> *"In so far as the appointment of any person on acting charge basis is concerned, there is no provision either in section 3 ibid or OGRA Ordinance, 2002 to the effect. Learned Additional Attorney-General submitted that this power can be inferred from subsection (10) of section 3 which provides that in case of vacancies occurring due to death, resignation, retirement or removal of any Member, the Federal Government shall appoint another person within a time not exceeding three months from the date of vacancies. Learned*

Additional Attorney-General emphasized that since the appointment is to be made within three months, therefore, by implication the Federal Government has the power to appoint any person to fill any vacancies for the said period of three months and that can be done on acting charge basis as is the practice with the other departments. We are unable to agree with the referred argument by learned Additional Attorney-General inasmuch as the Authority is an independent body exercising the powers and performing functions independent of any control on part of the Federal Government. In case such power albeit by implication is given to the Federal Government then the very purpose for creation of such like bodies whose main function is to act as regulator shall be defeated. The legislature if, it so desired that casual vacancies could be filled by appointment made on acting charge basis it could have specially provided such power to the Federal Government. As in the case of suspension there is no ancillary provision of law which provides for exercising the power to appoint any Member/Chairman on acting charge basis, by implication. Even in the case of Chairman under subsection (13) to section 3 ibid the Federal Government is to appoint from the Members a Vice Chairman who is to exercise the powers of Chairman in case the latter is unavailable or is incapable of exercising the powers of Chairman. The fact that no Vice Chairman has been appointed by the Federal Government the scheme of law does not envisage such a situation and therefore, does not provide for the same. It is reiterated that since the Authority is an independent body and is a regulator, therefore, the sanctity of its independence has to be kept in view, therefore, in law there is no provision for appointing any person on acting or current charge basis except as provided in subsection (13) of section 3 ibid."

Even otherwise, the examination of Sections 4 & 5 shows that the aims and objectives of respondent No.2 and its functions and powers *inter alia* include determination and fixation of the rate of fee charged by the Private Educational Institutions. In this behalf the power of PEIRA is to register a Private Educational Institution and fix rate of admission fee, security fee, monthly tuition fee and other fee being charged by the Institution; also to ensure that the services, quality of education being provided and salary paid to the teachers commensurate

with the fee being charged. The conjunctive reading of sections 4(c) and 5(1)(b) & (h) shows that the aim of PEIRA is to fix and regulate the rate of fee being charged by Private Educational Institutions and ensure that the quality of services being provided commensurate with the fee that has been charged. The impugned notification expressly mentions that no permission from the Department/PEIRA has been sought prior to raising the fee in the year 2014-2015 and this excess fee already charged has to be returned or/and adjusted. The Act nowhere provides for prior permission to be sought in case the increase in the fee structure. Under section 5(1)(b) of the Act, PEIRA is required to fix the tuition fee of a Private Educational Institution registered with it and till todate the same has not been done. The tuition fee of all the Private Educational Institutions cannot be fixed by a single notification without taking into consideration the expenses, standards and other factors of such Institution.

20. It is an admitted position that all Private Educational Institutions are not providing services of equal standard and therefore, same fee is not being charged by them accordingly. Infact some of the Private Educational Institutions have branches all over Islamabad Capital Territory and the standard varies from branch to branch. In this view of the matter, a uniform fee structure cannot be imposed on such Institutions. Likewise, the requirements in keeping up with the services being provided by the Institution varies, therefore, the need to enhance the fee accordingly varies. Respondent No.2, in the above backdrop, has issued notification putting restriction on all Private Educational Institutions not to increase the fee under section 5(1)(b) and 5(1)(h) of the

Act. This is not the mandate of the aforementioned provisions of law. Infact the objective of the law is that each school is to be registered, its fee is to be determined and then the same is to be regulated to ensure that it commensurates with the requirements and services being provided. The impugned notification does not take into account the above factors. In this behalf the case law relied upon by the learned counsels for the petitioners to substantiate their arguments that fixation of price cannot be done in a uniform manner unilaterally, is instructive. In this behalf reliance is placed on the case titled *Pacific Pharmaceutical Ltd. v. Govt. of Pakistan* (2002 YLR 3125) wherein the Hon'ble Lahore High Court held that right of personal hearing was sacrosanct and it had to be provided to all the affected persons before passing order or determining a right. It was also observed that a petitioner who was likely to be adversely affected, by fixing retail price of his product, was entitled to be heard in the matter, so that he could show and satisfy the Authority that price so fixed was not profitable for him. The Hon'ble Lahore High Court held that notification issued by Authority with regard to fixation of product without affording hearing was declared to be without lawful authority. Similar view was taken by the Hon'ble Supreme Court of Pakistan in case titled *ELLAHI COTTON MILLS LTD. V. FEDERATION OF PAKISTAN ETC.* (1997 PTD 1555 Supreme Court). It was observed as follows:

> *"Any legislation whereby either the prices of market able 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 tax fell, then such legislation would be violative of the fundamental rights to carry on business and to hold property as guaranteed in the Constitution."*

None of the Private Educational Institutions were taken on board or given a right of hearing before issuance of the impugned notification. The impugned notification also provides that fee already charged in the academic year 2015-2016 at enhanced rate shall be refunded/returned. It has been argued by the petitioners that this tantamount to giving a retrospective effect to the impugned notification which is not sustainable. The said argument of the petitioners has substance inasmuch as the notification speaks about the adjustment of the fees already charged and recovered which is not legally permissible. In *IMTIAZ AHMED AND OTHERS V. PUNJAB PUBLIC SERVICE COMMISSION* (PLD 2006 SC 472) it was held that notification issued in exercise of executive powers or in the shape of subordinate legislation should not be retrospective in operation. In *SHEIKH FAZAL AHMED V. RAJA ZIAULLAH KHAN AND ANOTHER* (PLD 1964 SC 494) it was observed by the Apex Court that power to issue notification does not include the power to give notification retrospective effect. Similar view was expressed in *ISLAMIC REPUBLIC OF PAKISTAN V. MAZHAR UR HAQ (*1977 SCMR 509*)* and *TRUSTEES OF PORT OF KARACHI V. ZAFAR ZAID AHMED* (1988 SCMR 810). It was also argued that the impugned notification is confiscatory in nature inasmuch as it does not taken into account needs and requirements of the individual Institution and simply puts a restriction on the Institutions to increase the fee. Instrument/legislation which is confiscatory is not sustainable. Reliance is placed of *Ellahi Cotton Mills Ltd. supra.*

21. In view of above, since the impugned notification has been issued by respondent No.2 which was not properly constituted; is ultra vires the provisions of the

Act; has been issued in violation of principles of natural justice and is also retrospective to the extent of refunding/returning the fee charged, therefore, is without lawful Authority.

22. The petitioners have also challenged the vires of the provisions of the Act mentioned hereinabove. The Hon'ble Supreme Court of Pakistan in case titled *Lahore Development Authoirty through D.G. and others v. Ms. Imrana Tiwana and others* (2015 SCMR 1739) laid down the principles/guidelines to be applied and considered by the Courts when striking down or declaring a legislative enactment as void or unconstitutional. In this behalf the following principles were laid down:

> *"(i) There was a presumption in favour of constitutionality and a law must not be declared unconstitutional unless the statute was placed next to the Constitution and no way could be found in reconciling the two;*
>
> *(ii) Where more than one interpretation was possible, one of which would make the law valid and the other void, the Court must prefer the interpretation which favoured validity;*
>
> *(iii) A statute must never be declared unconstitutional unless its invalidity was beyond reasonable doubt. A reasonable doubt must be resolved in favour of the statute being valid;*
>
> *(iv) Court should abstain from deciding a Constitutional question, if a case could be decided on other or narrower grounds;*
>
> *(v) Court should not decide a larger Constitutional question than was necessary for the determination of the case;*
>
> *(vi) Court should not declare a statute unconstitutional on the ground that it violated the spirit of the Constitution unless it also violated the letter of the Constitution;*
>
> *(vii) Court was not concerned with the wisdom or prudence of the legislation but only with its Constitutionality;*
>
> *(viii) Court should not strike down statutes on*

> *principles of republican or democratic government unless those principles were placed beyond legislative encroachment by the Constitution; and*
>
> *(ix) Mala fides should not be attributed to the Legislature."*

23. The basic thrust of the arguments by the petitioners in challenging the vires of Sections 4(c), 5(1)(b) and 5(1)(h) of the Act is on the touchstone of Article 18 of the Constitution of the Islamic Republic of Pakistan, 1973. The referred Article guarantees freedom of trade, business or profession. For the sake of convenience the referred Article is reproduced below and is as follows:

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

24. The bare reading of the Article shows that every citizen has the right to enter upon any lawful profession or occupation and to conduct any lawful trade or business, however, this is subject to qualifications as prescribed by law and regulation of trade or profession by a licensing system, regulation of trade or industry in the interest of free competition, the carrying on, of any trade, business, industry or service, to the exclusion, complete or partial of other person. In this behalf it was elaborated by the petitioners that restrictions/qualifications imposed under Article 18 do not envisage the price control i.e. restriction on the

petitioners to fix the fee and/or enhance the same. In support of their contentions learned counsels placed reliance on the case titled *ARSHAD MEHMOOD AND OTHERS V. GOVERNMENT OF PUNJAB THROUGH SECRETARY, TRANSPORT CIVIL SECRETARIAT, LAHORE AND OTHERS* (PLD 2005 Supreme Court 193), CONTEMPT PROCEEDINGS AGAINST CHIEF SECRETARY, SINDH AND OTHERS (2013SCMR 1752), SHEIKH LIAQAT HUSSAIN V. FEDERATION OF PAKISTAN AND OTHERS (PLD 1999 SC 504), RANA AAMER RAZA ASHFAQ AND ANOTHER V. DR. MINHAJ AHMED KHAN AND ANOTHER (2013 SCMR 6), DR. MOBASHIR HASSAN AND OTHERS V. FEDERATION OF PAKISTAN AND OTHERS (PLD 2010 SUPREME Court 265), PROVINCE OF THE PUNJAB THROUGH SECRETARY, LOCAL GOVERNMENT AND RURAL DEVELOPMENT DEPARTMENT, CIVIL SECRETARIAT, LAHORE AND ANOTHER V. MIAN MANZOOR AHMED WATTOO (1998 CLC 1585), SHAUKAT ALI MIAN AND ANOTHER V. THE FEDERATION OF PAKISTAN (1999 CLC 607), BAZ MUHAMMAD KAKAR AND OTHERS V. FEDERATION OF PAKISTAN THROUGH MINISTRY OF LAW AND JUSTICE AND OTHERS (PLD 2012 SUPREME COURT 923), WATTAN PARTY THROUGH PRESIDENT V. FEDERATION OF PAKISTAN THROUGH CABINET COMMITTEE OF PRIVATIZATION, ISLAMABAD AND OTHERS (PLD 2006 SUPREME COURT 697) AND WARIS MEAN V. THE STATE ETC. (PLD 1957 SUPREME COURT (PAK.)157).

25. In *ARSHAD MEHMOOD AND OTHERS V. GOVERNMENT OF PUNJAB THROUGH SECRETARY, TRANSPORT CIVIL SECRETARIAT, LAHORE AND OTHERS* (PLD 2005 SUPREME COURT 193) the Hon'ble Supreme Court of Pakistan observed that the word regulation as used in Article 18 of the 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 was further observed as follows:

> *"It may be noted that word "reasonable" was inserted in Article 19 of the Indian Constitution, vide Constitution (First Amendment Act 1951), but it has not defined the expression "reasonable restriction" itself. However, from different judicial pronouncements following definitions can be considered for purpose of ascertaining the meaning*

of, "reasonableness of restriction" on the fundamental rights of the citizens; to conduct any lawful trade or business:-

(i) The limitation imposed upon a person in enjoyment of a right should not be arbitrary or of an excessive nature beyond what is required in the interest of the public. M/s Dwarka Prasad v. State of U.P. (AIR 1954 SC 224), P.P. Enterprises v. Union of India (AIR 1982 SC 1016)].

(ii) The Court would see both to the nature of the restriction and procedure prescribed by the statute for enforcing the restriction on the individual freedom. Not only substantive but procedural provisions of statute also enter into the verdict of its reasonableness Kishan Chand v. Commissioner of Police (AIR 1961 SC 705).

(iii) The principles of natural justice are an element in considering reasonableness of a restriction but the elaborate rules of natural justice may be excluded expressly or by necessary implication where procedural provisions are made in the statute. Haradhan Saha v. State of W.B. [(1975) 3 SCC 198]

(iv) Absence of provision for review makes the provisions unreasonable. K.T. Moopil Nair v. State of Kerala (AIR 1961 1 SC 552).

(v) Retrospectivity of a law may also be the relevant factor of law, although a retrospectivity of law does not make it automatically unreasonable. Narottamdas v. State of Maddhya Pradesh and others (AIR 1964 SC 1667).

(vi) Reasonable restriction also includes cases of total prohibition of a particular trade or business which deprive a person of his fundamental right under certain circumstances. Narindra Kumar Vs. Union of India (AIR 1960SC 430).

It was further observed at Page-223 as follows:

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

In CONTEMPT PROCEEDINGS AGAINST CHIEF SECRETARY,

SINDH AND OTHERS (2013SCMR 1752) the august Apex Court held as follows:

> *"We have considered the arguments of the learned counsel for the respondents and found them without force for more than one reason. In the first place, if this Court is of the view that impugned enactment is violative of fundamental rights guaranteed under the Constitution, it can examine the vires of such an enactment either on its own or on an application/petition filed by any party. The petitioners have challenged the vires of the impugned enactments which raise questions of public importance relating to the rights of the Civil Servants in Sindh. This Court in the case of Watan Party and others v. Federation of Pakistan and others (PLD 2012 SC 292) has held that term "public importance" is one of the components to attract the jurisdiction of Supreme Court under Article 184(3) of the Constitution coupled with the facts that three elements i.e. question of public importance; question of enforcement of fundamental rights and fundamental rights sought to be enforced as conferred by Chapter-I, Part-II of the Constitution are required to be satisfied. In the case in hand the issues raised in the Petition cover parameters, which attract the jurisdiction of this Court under Article 184(3) of the Constitution. Moreover, this Court in the case of Tariq Aziz-ud-Din reported in (2010 SCMR 1301) while interpreting Article 184 (3) of the Constitution has held that it can examine the exercise of discretion of competent authority whereby it has upset the settled principle of service law adversely affecting upon the structure of civil servants. For the aforesaid reasons, we hold that these Petitions are maintainable under Article 184(3) of the Constitution."*

Similarly in case titled SHEIKH LIAQAT HUSSAIN V. FEDERATION OF PAKISTAN AND OTHERS (PLD 1999 SC 504) it was observed as follows:

> *"The Court cannot strike down a statute on the ground of mala fide, but the same can be struck down on the ground that it is violative of a Constitutional provision: In this respect reference may be made to the case of Mehr Zulfiqar Ali Babu and others v. Government of the Punjab and others (PLD 1997 SC 11). In the present case I have already held hereinabove that neither Article 245 of the Constitution nor Entry No. 1 of the Federal Legislative List read with Entry No.59 empowers the Legislature to legislate a statute which may establish or convene Military Courts in substitution of the ordinary Criminal and Civil Courts. In this view of the matter, the above contention of the learned Attorney-General is not germane to the controversy at issue."*

In RANA AAMER RAZA ASHFAQ AND ANOTHER V. DR. MINHAJ AHMED KHAN AND ANOTHER (2013 SCMR 6) it was observed as follows:

> *"Right to education is a fundamental right as it ultimately affects the quality of life which has nexus with other Fundamental Rights guaranteed by the Constitution under Articles 4 and 9 of the Constitution of Islamic Republic of Pakistan. Awareness of rights and duties, growth of civic consciousness in a society, enjoyment of Fundamental Rights guaranteed under the Constitution and legal empowerment of people depend to a great extent on the quality of education. People cannot be free in the real sense unless they are properly educated. In Ahmed Abdullah v. Government of the Punjab (PLD 2003 Lahore 752 at 791), a case decided by a Full Bench of the Lahore High Court and wherein one of us (Tassaduq Hussain Jillani, J.) authored the judgment, it had been held as under:--*
>
> *26. The fundamental right of "right to life" recognized in the entire civilized world and enshrined in Article 9 of our Constitution has been given expanded meaning over the years. With the passage of time the role of the State has become more pervasive. Its actions, policies and laws affect the individuals in a variety of ways and the Courts have accordingly given a more comprehensive and dynamic interpretation of the fundamental rights including the right to life. Right to life is no longer considered as merely a right to physical existence or a right not to be deprived of life without due process of law. It means a sum total of rights which an individual in a State may require to enjoy a dignified existence. In modern age a dignified existence may not be possible without a certain level of education and the State has to play a role in ensuring by positive action that the citizens enjoy this right. In Brown v. Board of Education (1953) 98 Law Ed. 873, the US Supreme Court acknowledged this right and held as under:--*
>
> *"Today, education is perhaps the most important function of State and Local Governments ... ... it is required in the performance of our most basic responsibilities, even service in the Armed Forces, it is the very foundation of good citizenship. Today, it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment'. In these days, it is doubtful and*

> *child may reasonably be expected to succeed in life if he is denied the opportunity of an education."*

In DR. MOBASHIR HASSAN AND OTHERS V. FEDERATION OF PAKISTAN AND OTHERS (PLD 2010 SUPREME COURT 265) it was observed as follows:

> *"As far as jurisdiction of this Court to examine the constitutionality of a law is concerned, there is no dispute either. Sub-Article (1) of Article 8 of the Constitution uses the word `inconsistent' purposely, regarding any law which was promulgated in the past or is in existence presently. Whereas, sub-Article 2 of Article 8 of the Constitution debars the State not to make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void. Same is the position in the Indian Constitution, as it has been noted hereinabove. So, inconsistency or contravention of a law passed, or the existing law, shall be examined to the extent of violation of fundamental rights and such laws are not void for other purposes."*

In PROVINCE OF THE PUNJAB THROUGH SECRETARY, LOCAL GOVERNMENT AND RURAL DEVELOPMENT DEPARTMENT, CIVIL SECRETARIAT, LAHORE AND ANOTHER V. MIAN MANZOOR AHMED WATTOO (1998 CLC 1585) the Hon'ble Division Bench of Hon'ble Lahore High Court held as follows:

> *"It is clear that no guidelines or parameters have been provided for the Government in making the nomination of the Sarpanch of the Panchayat. The Government is free to pick and choose any person of its choice without any qualifications. The discretion of the Government has not been structured which is absolute and arbitrary. The impugned Ordinance is ex facie discriminatory. It is also capable of being administered in a discriminatory and arbitrary manner in violation of Article 25 of the Constitution of Pakistan which guarantees the equality before law and equal protection of laws. In the case of Waris Meah v. The State and another (PLD 1957 SC (Pak.) 157), the provisions of the Foreign Exchange Regulation Act, 1947, as amended by the Foreign Exchange Regulation (Amendment) Act, 1956, were examined.*

The Central Government or the State Bank was empowered to determine whether an offender under the said Act was to be tried under the ordinary law or by an Adjudication Officer Pr by a Tribunal constituted under the said Act. It was held as follows:

"The amending Act makes the principal Act ex facie discriminatory and infringes the subjects' fundamental right to equal protection of the law guaranteed by Article 5 of the Constitution of Pakistan.

The Act confers discretion of a very wide character upon stated authorities, to act in relation to subjects falling within the same class in three different modes varying greatly in severity. By furnishing no guidance whatsoever in regard to the exercise of this discretion, the Act, on the one hand, leaves the subject, falling within its provisions, at the mercy of the arbitrary will of such authority, and on the other, prevents him from, invoking his fundamental right to equality of treatment under the Constitution.

Held, further, that the scope of the unguided discretion was too great to permit of application of the principle that equality was not infringed by the mere conferment of unguided power, but only by its arbitrary exercise. For, in the absence of any discernible principle guiding the choice must always be, in the judicial view-point, arbitrary to a greater or less degree. The Act, as it is framed, makes provision for discrimination between persons falling, qua its terms, in the same class, and it does so in such manner as to render it impossible for the Courts to determine, in a particular case, whether it is being applied with strict regard to the requirements of Article 5(1) of the Constitution."

Similarly, in *SHAUKAT ALI MIAN AND ANOTHER V. THE FEDERATION OF PAKISTAN* (1999 CLC 607) The Hon'ble Full Bench of Hon'ble Lahore High Court held as follows:

"I, therefore, conclude that section 2 of the 1998 Act is a case of excessive delegation and, therefore, violative of our Constitution, and therefore, of no legal effect. The principles of law laid down in cases Waris Meah, Kh. Muhammad Safdar, Ch. Manzoor Elahi and Miss Benazir Bhutto (supra) are clearly attracted."

In BAZ MUHAMMAD KAKAR AND OTHERS V. FEDERATION OF PAKISTAN THROUGH MINISTRY OF LAW AND JUSTICE AND OTHERS (PLD 2012 SUPREME COURT 923) the Hon'ble

Supreme Court of Pakistan held as follows:

> *"Under the constitutional scheme, the constitutionality of legislation is examined by the Superior Courts in exercise of power of judicial review. Judicial review is a manifestation of the principle of trichotomy of powers, which envisages that the three organs of the State, namely, the legislature, the executive and the judiciary work within their respective domains in a system of checks and balances. The doctrine of judicial review postulates that the legislative and executive actions are subject to scrutiny by the superior courts to determine their compatibility) or otherwise with the terms of a written Constitution. The idea that courts could nullify statutes originated in England with Chief Justice Edward Coke's opinion given in the year 1610 in Dr. Bonham's Case [8 Co. Rep. 107a]. Under a statute of Parliament, the London College of Physicians was enabled to levy fines against anyone who violated their rules. The College accused a doctor of practicing without a license and fined him accordingly. Coke J: found that the statutory powers of the College violated "common right or reason" because "no person should be a judge in his own cause". The idea that Courts could declare statutes void was defeated in England with the Glorious Revolution of 1688, when King James II was removed and the elected Parliament declared itself supreme. However, with the passage of time, the concept of supremacy of Parliament has undergone change even in England as noted by one of us, Mr. Justice Jawwad S. Khawaja in a recent case titled as Muhammad Azhar Siddique v. Federation of Pakistan (Constitution Petition No. 40 of 2012 (PLD 2012 SC 774)) decided on 19-6-2012 wherein he has observed that in Jackson v. Her Majesty's Attorney. General [(2005) UKHL 560], Lord Steyn writing in the House of Lords, the highest Court of England, has held that the classic account given by Dicey of the doctrine of supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom.*
>
> *58. The United States Supreme Court for the first time, in the ease of Calder. v. Bull [3 U.S. 386 (1798)J, exercised power to review state legislature decisions. In that case, the Connecticut legislature ordered a new trial in a court case about the contents of a will, overruling an earlier court decision challenged before the Court. The US Supreme Court, vide unanimous decision, held that the actions of the legislature did not violate the ex post facto law in Article 1, section 10 of the Constitution. Justice James Iredell, in his opinion,*

though stated that courts cannot strike down statutes based only upon principles of natural justice, but affirmed the ability of the Supreme Court to review legislative acts, based on something more than principles of natural justice. Relevant portion of the judgment is reproduced here in-below: --

> *If any act of Congress, or of the Legislature of a State, violates those constitutional provisions, it is unquestionably void ... If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice ...*
>
> *There are then but two lights,: in which the subject can be viewed:*
>
> *1st. If the Legislature pursue the authority delegated to them, their acts are valid ... they exercise the discretion vested in them by the people, to whom alone they are responsible for the faithful discharge of their trust.*

2nd. If they transgress the boundaries of that authority, their acts are invalid ... they violate a fundamental law, which must be our guide, whenever we are called upon as judges to 'determine the validity of a legislative Act.

59. Five years later, the US Supreme Court for the first time declared a legislative action as "unconstitutional" in the landmark case of Murbury v. Madison [5•U.S. (1 Cranch) 137 (1803)], which formed the basis for the exercise of judicial review in the United States under Article III of 'the American Constitution. In the said case, William Marbury was appointed by President John Adams as Justice of the Peace in the District of Columbia, but commission was not subsequently delivered to him, as such, he filed a petition before the Supreme Court of America. It was prayed that Secretary of State James Madison be forced to deliver the document, but the court, with John Marshall as Chief Justice, declined Marbury's petition, holding that the part of the Judiciary Act of 1789 upon which he had based his claim was unconstitutional.

…….

61. The Supreme Court of India, in the case of Kesavananda Bahrain v. The State of Kerala (AIR

1973 SC 1461) while exercising the power of judicial review to consider the validity of the Twenty- fourth,-Twenty-fifth and Twenty-ninth Amendments of the Constitution held that the basic structure of the Constitution was outside the competence of the amendatory power of Parliament. In the case of Smt. Indira Gandhi v. Shri Raj Narain (AIR 1975 SC 2299) while considering the constitutionality of Thirty-ninth Amendment of the Constitution it was held that by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic Government to which were pledged. In the case of Minerva Mills Ltd v. Union of India (AIR 1980 SC 1789) while considering the constitutionality of Forty-second Amendment of the Constitution it was held that the judiciary was the interpreter of the Constitution and was assigned the delicate task of determining the extent of the power conferred on each branch of the government, its limits and whether any action of that branch transgressed such limits. In the case of A.K. Kaul v. Union of India (AIR 1995 SC 1403), the court discussed the justiciability of an action of an authority functioning under the Indian Constitution. In .the case of Raja Ram Pal v. Speaker, Lok Sabha [(2007) 3 SCC 184] it was held that it was the solemn duty of the Court to protect the fundamental rights guaranteed by the Constitution zealously and vigilantly. In the case of I.R. Coelho v. State of Tamil Nadu (AIR 2007 SC 861), while considering the validity of amendments to the Constitution made on or after 24th April, 1973, after referring to the cases of L. Chandra Kumar v. Union of India [(1997) 3 SCC 261] and S.R. Bommai v. Union of India [(1994) 3 SCC 1], it was held that the judicial review was a basic feature of the Constitution and such constituent power could not be abrogated by judicial process of interpretation. It was further held that it was a cardinal principle of the Constitution that no one could claim to be the sole judge of the power given under the Constitution and that its actions were within the confines of the powers given by the Constitution."

In WATTAN PARTY THROUGH PRESIDENT V. FEDERATION OF PAKISTAN THROUGH CABINET COMMITTEE OF PRIVATIZATION, ISLAMABAD AND OTHERS (PLD 2006 SUPREME COURT 697) the Hon'ble Supreme Court of Pakistan observed as follows:

"This is not for the first time that a law like Ordinance, 2000 has come for examination before the Court as in the past a number of laws were examined and when found against the Constitution the same were declared void and of no legal effect.

> *Reference may be made to the case of Syed Zafar Ali Shah v. Gen. Pervez Musharaf, Chief Executive of Pakistan (PLD 2000 SC 869) wherein it was held that judicial power means that the superior courts can strike down a law on the touchstone of the Constitution. The nature of judicial power and its relation to jurisdiction are all allied concepts and the same cannot be taken away. It is inherent in the nature of judicial power that the Constitution is regarded as a supreme law and any law contrary to it or its provisions is to be struck down by the Court, as the duty and the function of the Court is to enforce the Constitution. Prior to the case of Zafar Ali Shah, this Court had examined different laws and declared that provisions of some of them were contrary to the provisions of the Constitution.*

The upshot of the above case law is as under:

i. This Court under Article 199 of the Constitution has the jurisdiction to examine the validity of any Act of Parliament and/or delegated legislation including Notification.
ii. In case any law/Act of Parliament violates any provision of the Constitution including fundamental rights the same can be struck down by a High Court in exercise of powers under Article 199 of the Constitution.
iii. The law can also be struck down if it provides unfettered powers/discretion to be exercised in a discriminatory manner.

26. The learned Deputy Attorney-General submitted that the provisions are intra vires the Constitution and the petitioners cannot be allowed to charge any fee or enhance the same as they are rendering services to public guaranteed under the Constitution.

27. Under Article 25-A of the Constitution it is the duty of the State to provide free and compulsory education to all children of the age of 5 to 16 years in such manner as may be determined by the law. The Federal Government/State by enacting the Act is not discharging its obligations/functions as provided in Article 25-A. The petitioners are all private persons either Companies incorporated under the Companies Ordinance, 1984 or are partnership firms/sole

proprietorship and are rendering services by providing education for gain/profits. The State/Federation of Pakistan by regulating the affairs of the petitioners do not in any way has delegated its functions/obligations under Article 25-A. Infact the state of affairs which has arisen all over the country by mushroom growth of Private Educational Institutions especially at primary and secondary level and also even at higher level is failure on behalf of the Government to discharge its functions as enshrined in the Constitution. The state of affairs in public sector Educational Institutions is dismal and as a result thereof it led to demand for better facilities and higher standards which resulted in increasing number of Private Educational Institutions.

28. The question whether the provisions of sections 4(c), 5 (1)(b) and 5 (1)(h) of the Act are ultra vires Article 18 of the Constitution of the Islamic Republic of Pakistan, 1973 is to be examined in light of principles enunciated by Hon'ble Supreme Court of Pakistan in *2015 SCMR 1739 supra*. In this behalf the august Apex Court lucidly held that there is presumption in favour of the Constitutionality and law must not be declared unconstitutional unless the statute was placed to the Constitution and no way could be found in reconciling the two and also whether there are two interpretations, one in favour of constitutionality must be adopted. In the instant case section 4 of the Act provides for the aims and objectives of the Authority and one of the objects is to fix the fee. Likewise, under section 5 PEIRA derives its powers and *inter alia* has the power to register a Private Educational Institution and fix the fee and ensure that the fee that has been charged corresponding to the services that are being provided. The bare reading of the

provisions shows that the Authority cannot arbitrarily fix and regulate the fee charged by an Educational Institution. Infact it has to register the Institution and then fix and regulate the fee vis-à-vis the same. There is no intention on the part of the legislature that PEIRA by a blanket order or notification can fix the fee for all the Private Educational Institutions. Similarly, the fee cannot be fixed arbitrarily and has to be fixed and regulated by respondent No.2 keeping in view the standard of education and facilities provided by each Educational Institution or even a Branch of that Institution. The yardstick for determination of fee has to be subjective i.e. the fixation of fee has to vary in every case and dependent upon various factors including the Campus/Class Rooms; proportion of the Class size to the Faculty and other allied services and facilities. In this behalf under the Act there are provisions for making Rules and Regulations which despite lapse of considerable time have not been framed. The Authority/respondent No.2 in this behalf needs to act to do the needful. The sole purpose for fixation the fee and regulation of the same under the Act is to prevent the public from extortion or unreasonable profiteering on part of the Private Educational Institutions. The purpose is not to deprive the Private Educational Institutions from gains out of their businesses. In fact the above fact can be discerned from the bare perusal of the preamble to the Act which reads as follows:

> "*WHEREAS, it is expedient to regulate the functioning of private educational institutions in the Islamabad Capital territory and to provide for the registration of such institutions ensuring adequate transparency and proper discipline and for matters connected therewith or incidental thereto:*

Under similarly facts and circumstances the matter came up before the Supreme Court of India in many cases. The two judgements from Indian jurisdiction which are relevant for present controversy are *T.M.A. PAI FOUNDATION V. STATE OF KARNATAKA (2002) 8 Supreme Court Cases 481)* and *P.A. INAMDAAR AND OTHERS V. STATE OF MAHARASHTRA* (AIR 2005 SC 3226). In the former case the Supreme Court of India framed a number of questions and answered them accordingly. The relevant part of judgement is as follows:

> ***1. Is there a fundamental right to set up educational institution and if so, under which provision?***
>
> *19. We will first consider the right to establish and administer an educational institution under Article 19(1)(g) of the Constitution and deal with the right to establish educational institutions under Article 26 and 30 in the next part of the judgment while considering the rights of the minorities.*
>
> *20. Article 19(1)(g) employs four expressions, viz., profession, occupation, trade and business. Their fields may overlap, but each of them does have a content of its own. Education is per se regarded as an activity that is charitable in nature [See The State of Bombay v. R.M.D. Chamarbaugwala,. Education has so far not been regarded as a trade or business where profit is the motive. Even if there is any doubt about whether education is a profession or not, it does appear that education will fall within the meaning of the expression "occupation". Article 19(1)(g) uses the four expressions so as to cover all activities of a citizen in respect of which income or profit is generated, and which can consequently be regulated under Article 19(6). In Webster's Third New International Dictionary at page 1650, "occupation" is,*

inter alia , defined as "an activity in which one engages" or "a craft, trade, profession or other means of earning a living".

21. In Corpus Juris Secundum, Volume LXVII, the word "occupation" is defined as under:-

"The word 'occupation' also is employed as referring to that which occupies time and attention; a calling; or a trade; and it is only as employed in this sense that the word is discussed in the following paragraphs.

There is nothing ambiguous about the word "occupation" as it is used in the sense of employing one's time. It is a relative term, in common use with a well-understand meaning, and very broad in its scope and significance. It is described as a generic and very comprehensive term, which includes every species of the genus, and compasses the incidental, as well as the main, requirements of one's vocation., calling, or business. The word "occupation" is variously defined as meaning the principal business of one's life; the principal or usual business in which a man engages; that which principally takes up one's time, thought, and energies; that which occupies or engages the time and attention; that particular business, profession, trade, or calling which engages the time and efforts of an individual; the employment in which one engages, or the vocation of one's life; the state of being occupied or employed in any way; that activity in which a person, natural or artificial, is engaged with the element of a degree of permanency attached."

22. A Five-Judge Bench in Sodan Singh and Ors. v. New Delhi Municipal Committee and Ors. at page 174, para 28, observed as follows:

"The word 'occupation' has a wide meaning such as any regular work, profession, job, principal activity, employment, business or a calling in which an individual is engaged.....The object of using four

analogous and overlapping words in Article 19(1)(g) is to make the guaranteed right as comprehensive as possible to include all the avenues and modes through which a man may earn his livelihood. In a nutshell the guarantee takes into its fold any activity carried on by a citizen of India to earn his living".

23. In Unni Krishnan's case, at page 687, para 63, while referring to education, it was observed as follows:-

"It may perhaps fall under the category of occupation provided no recognition is sought from the State or affiliation from the University is asked on the basis that it is a fundamental right"

24. While the conclusion that "occupation" comprehends the establishment of educational institutions is correct, the proviso in the aforesaid observation to the effect that this is so provided no recognition is sought from the state or affiliation from the concerned university is, with the utmost respect, erroneous. The fundamental right to establish an educational institution cannot be confused with the right to ask for recognition of affiliation. The exercise of a fundamental right may be controlled in a variety of ways. For example, the right to carry on a business does not entail the right to carry on a business at a particular place. The right to carry on a business may be subject to licensing laws so that a denial of the licence presents a person from carrying on that particular business. The question of whether there is a fundamental right or not cannot be dependent upon whether it can be made the subject matter of controls.

25. The establishment and running of an educational institution where a large number of persons are employed as teachers or administrative staff, and an activity is carried on that results in the imparting of knowledge to the students, must necessarily be regarded as an occupation, even if there is no element of profit generation. It is

difficult to comprehended that education, per se, will not fall under any of the four expressions in Article 19(1)(g). "Occupation" would be an activity of a person undertaken as a means of livelihood or a mission in life. The above quoted observations in Sodan Singh's case correctly interpret the expression "occupation" in Article 19(1)(g).

26. The right to establish and maintain educational institutions may also be sourced to Article 26(a), which grants, in positive terms, the right to every religious denomination or any section thereof to establish and maintain institutions for religious and charitable purposes, subject to public order, morality and health. Education is a recognized head of charity. Therefore, religious denominations or sections thereof, which do not fall within the special categories carved out inArticle 29(1) and 30(1), have the right to establish and maintain religious and educational institutions. This would allow members belonging to any religious denomination, including the majority religious community, to set up an educational institution. Given this, the phrase "private educational institution" as used in this judgment would include not only those educational institutions set up by the secular persons or bodies, but also educational institutions set up by religious denominations; the word "private" is used in contradistinction to government institutions.

2. Does Unni Krishnan case require reconsideration?

37. Unni Krishnan judgment has created certain problems, and raised thorny issues. In its anxiety to check the commercialization of education, a scheme of "free" and "payment" seats was evolved on the assumption that the economic capacity of first 50% of admitted students would be greater than the remaining 50%, whereas the converse has proved to be the reality. In this scheme, the "payment seat" student

would not only pay for his own seat, but also finance the cost of a "free seat" classmate. When one considers the Constitution Bench's earlier statement that higher education is not a fundamental right, it seems unreasonable to compel a citizen to pay for the education of another, more so in the unrealistic world of competitive examinations which assess the merit for the purpose of admission solely on the basis of the marks obtained, where the urban students always have an edge over the rural students. In practice, it has been the case of the marginally less merited rural or poor student bearing the burden of a rich and well-exposed urban student.

38. The scheme in Unni Krishnan's case has the effect of nationalizing education in respect of important features, viz., the right of a private unaided institution to give admission and to fix the fee. By framing this scheme, which has led to the State Governments legislating in conformity with the scheme the private institutions are undistinguishable from the government institutions; curtailing all the essential features of the right of administration of a private unaided educational institution can neither be called fair or reasonable. Even in the decision in Unni Krishnan's case, it has been observed by Jeevan Reddy, J., at page 749, para 194, as follows:

"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 Governments are in no position to meet the demand - particularly in the sector of medical and technical education which call for substantial outlays. While education is one of the most important functions of the Indian State it has no monopoly therein. Private educational institutions - including minority educational institutions - too have a role to play."

39. That private educational instructions are a necessity becomes evident from the fact

that the number of government-maintained professional colleges has more or less remained stationary, while more private institutions have been established. For example, in the State of Karnataka there are 19 medical colleges out of which there are only 4 government- maintained medical colleges. Similarly, out of 14 Dental Colleges in Karnataka, only one has been established by the government, while in the same State, out of 51 Engineering Colleges, only 12 have been established by the government. The aforesaid figures clearly indicate the important role played by private unaided educational institutions, both minority and non-minority, which cater to the needs of students seeking professional education.

40. Any system of student selection would be unreasonable if it deprives the private unaided institution of the right of rational selection, which it devised for itself, subject to the minimum qualification that may be prescribed and to some system of computing the equivalence between different kinds of qualifications, like a common entrance test. Such a system of selection can involve both written and oral tests for selection, based on principle of fairness.

41. Surrendering the total process of selection to the state is unreasonable, as was sought to be done in the Unni Krishnan scheme. Apart from the decision in St. Stephen's College v. University of Delhi, which recognized and upheld the right of a minority aided institution to have a rational admission procedure of its own, earlier Constitution Bench decision of this Court have, in effect, upheld such a right of an institution devising a rational manner of selecting and admitting students.

42. In R. Chitralekha and Anr. v. State of Mysore and Ors., while considering the validity of a viva-voce test for admission to a government medical college, it was observed at page 380 that colleges run by the Government, having regard to financial

commitments and other relevant considerations, would only admit a specific number of students. It had devised a method for screening the applicants for admission. While upholding the order so issued, it was observed that

"once it is conceded, and it is not disputed before us, that the State Government can run medical and engineering colleges, it cannot be denied the power to admit such qualified students as pass the reasonable tests laid down by it. This is a power which every private owner of a College will have, and the Government which runs its own Colleges cannot be denied that power."

(emphasis added).

43. Again, in Minor P. Rajendran v. State of Madras and Ors., it was observed at page 795 that (AIR p. 1017,para 17)

"so far as admission is concerned, it has to be made by those who are in control of the Colleges, and in this case the Government, because the medical colleges are Government colleges affiliated to the University. In these circumstances, the Government was entitled to frame rules for admission to medical colleges controlled by it subject to the rules of the university as to eligibility and qualifications."

The aforesaid observations clearly underscore the right of the colleges to frame rules for admission and to admit students. The only requirement or control is that the rules for admission must be subject to the rules of the university as to eligibility and qualifications. The Court did not say that the university could provide the manner in which the students were to be selected.

44. In Kumari Chitra Ghosh and Anr. v. Union of India and Ors., dealing with a government run medical college at pages 232-33, para 9, it was observed as follows:

"9. It is the Central Government which bears the financial burden of running the

medical college. It is for it to lay down the criteria for eligibility."

45. In view of the discussion hereinabove, we hold that the decision in Unni Krishnan's case, insofar as it framed the scheme relating to the grant of admission and the fixing of the fee, was not correct, and to that extent, the said decision and the consequent direction given to UGC, AICTE, Medical Council of India, Central and State Government, etc., are overruled.

3. ***In case of private institutions, can there be government regulations and, if so, to what extent?***

46. We will now examine the nature and extent of the regulations that can be framed by the State, University or any affiliating body, while granting recognition or affiliation to a private educational institution.

Private Unaided Non-Minority Educational Institutions

48. Private education is one of the most dynamic and fastest growing segments of post-secondary education at the turn of the twenty-first century. A combination of unprecedented demand for access to higher education and the inability or unwillingness of government to provide the necessary support has brought private higher education to the forefront. Private institutions, with a long history in many countries, are expanding in scope and number, and are becoming increasingly important in parts of the world that relied almost entirely on the public sector.

49. Not only has demand overwhelmed the ability of the governments to provide education, there has also been a significant change in the way that higher education is perceived. The idea of an academic degree as a "private good" that benefits the individual rather than a "public good" for society is now widely accepted. The logic of

today's economics and an ideology of privatization have contributed to the resurgence of private higher education, and the establishing of private institutions where none or very few existed before.

50. The right to establish and administer broadly comprises of the following rights:-

(a) to admit students;

(b) to set up a reasonable fee structure;

(c) to constitute a governing body;

(d) to appoint staff (teaching and non-teaching); and

(e) to take action if there is dereliction of duty on the part of any employees.

51. A University Education Commission was appointed on 4th November, 1948, having Dr. S. Radhakrishnan as its Chairman and nine other renowned educationists as its members. The terms of reference, inter alia, included matters relating to means and objects of university education and research in India and maintenance of higher standards of teaching and examining in universities and colleges under their control. In the report submitted by this Commission, in paras 29 and 31, it referred to autonomy in education which reads as follows:-

"University Autonomy. -- Freedom of individual development is the basis of democracy. Exclusive control of education by the State has been an important factor in facilitating the maintenance of totalitarian tyrannies. In such States institutions of higher learning controlled and managed by governmental agencies act like mercenaries, promote the political purposes of the State, make them acceptable to an increasing number of their populations and supply then with the weapons they need. We must resist, in the interests of our own democracy, the trend towards the governmental domination of the educational process.

Higher educational is, undoubtedly, an obligation of the State but State aid is not to be confused with State control over academic policies and practices. Intellectual progress demands the maintenance of the spirit of free inquiry. The pursuit and practice of truth regardless of consequences has been the ambition of universities. Their prayer is that of the dying Goethe: "More light," or that Ajax in the mist "Light, though I perish in the light.

* * *

The respect in which the universities of Great Britain are held is due to the freedom from governmental interference which they enjoy constitutionally and actually. Our universities should be released from the control of politics.

Liberal Education. -- All education is expected to be liberal. It should free us from the shackles of ignorance, prejudice and unfounded belief. If we are incapable of achieving the good life, it is due to faults in our inward being, to the darkness in us. The process of education is the slow conquering of this darkness. To lead us from darkness to light, to free us from every kind of domination except that of reason, is the aim of education."

52. There cannot be a better exposition than what has been observed by these renowned educationists with regard to autonomy in education. The aforesaid passage clearly shows that the governmental domination of the educational process must be resisted. Another pithy observation of the Commission was that state aid was not to be confused with state control over academic policies and practices. The observations referred to hereinabove clearly contemplate educational institutions soaring to great heights in pursuit of intellectual excellence and being free from unnecessary governmental controls.

61. In the case of unaided private schools, maximum autonomy has to be with the management with regard to administration, including the right of appointment, disciplinary powers, admission of students and the fees to be charged. At the school level, it is not possible to grant admission on the basis of merit. It is no secret that the examination results at all levels of unaided private schools, notwithstanding the stringent regulations of the governmental authorities, are far superior to the results of the government-maintained schools. There is no compulsion on students to attend private schools. The rush for admission is occasioned by the standards maintained in such schools, and recognition of the fact that state-run schools do not provide the same standards of education. The State says that it has no funds to establish institutions at the same level of excellence as private schools. But by curtaining the income of such private schools, it disables those schools from affording the best facilities because of a lack of funds. If this lowering of standards from excellence to a level of mediocrity is to be avoided, the state has to provide the difference which, therefore, brings us back in a vicious circle to the original problem, viz., the lack of state funds. The solution would appear to lie in the States not using their scanty resources to prop up institutions that are able to otherwise maintain themselves out of the fees charged, but in improving the facilities and infrastructure of state-run schools and in subsidizing the fees payable by the students there. It is in the interest of the general public that more good quality schools are established; autonomy and non-regulation of the school administration in the right of appointment, admission of the students and the fee to be charged will ensure that more such institutions are established. The fear that if a private school is allowed to charge fees commensurate with the fees affordable, the degrees would be "purchasable" is an unfounded one since the standards of education can be and are controllable through the regulations relating to

recognition, affiliation and common final examinations.

64. An educational institution is established only for the purpose of imparting education to the students. In such an institution, it is necessary for all to maintain discipline and abide by the rules and regulations that have been lawfully framed. The teachers are like foster- parents who are required to look after, cultivate and guide the students in their pursuit of education. The teachers and the institution exist for the students and not vice versa. Once this principle is kept in mind, it must follow that it becomes imperative for the teaching and other staff of an educational institution to perform their duties properly, and for the benefit of the students. Where allegations of misconduct are made, it is imperative that a disciplinary enquiry is conducted, and that a decision is taken. In the case of a private institution, the relationship between the Management and the employees is contractual in nature. A teacher, if the contract so provides, can be proceeded against, and appropriate disciplinary action can be taken if the misconduct of the teacher is proved. Considering the nature of the duties and keeping the principle of natural justice in mind for the purposes of establishing misconduct and taking action thereon, it is imperative that a fair domestic enquiry is conducted. It is only on the basis of the result of the disciplinary enquiry that the management will be entitled to take appropriate action. We see no reason why the Management of a private unaided educational should seek the consent or approval of any governmental authority before taking any such action. In the ordinary relationship of master and servant, governed by the terms of a contract of employment, anyone who is guilty of breach of the terms can be proceeded against and appropriately relief can be sought. Normally, the aggrieved party would approach a court of law and seek redress. In the case of educational institutions, however, we are of the opinion that

requiring a teacher or a member of the staff to go to a civil court for the purpose of seeking redress is not in the interest of general education. Disputes between the management and the staff of educational institutions must be decided speedily, and without the excessive incurring of costs. It would, therefore, be appropriate that an educational Tribunal be set up in each district in a State, to enable the aggrieved teacher to file an appeal, unless there already exists such an educational tribunal in a State -- the object being that the teacher should not suffer through the substantial costs that arise because of the location of the tribunal; if the tribunals are limited in number, they can hold circuit/camp sittings in different districts to achieve this objective. Till a specialized tribunal is set up, the right of filing the appeal would lie before the District Judge or Additional District Judge as notified by the government. It will not be necessary for the institution to get prior permission or ex post facto approval of a governmental authority while taking disciplinary action against a teacher or any other employee. The State Government shall determine, in consultation with the High Court, the judicial forum in which an aggrieved teacher can file an appeal against the decision of the management concerning disciplinary action or termination of service.

66. In the case of private unaided educational institution, the authority granting recognition or affiliation can certainly lay down conditions for the grant of recognition or affiliation; these conditions must pertain broadly to academic and educational matters and welfare of students and teachers - but how the private unaided institutions are to run is a matter of administration to be taken care of by the Management of those institutions."

In P.A. Inamdaar and others v. State of Maharashtra (AIR 2005 SC 3226) it was observed as follows:

"Q. 3 Fee, regulation of 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) of the Constitution, as per the law declared in Pai Foundation. Every 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 (Paras 56 to 58 and 161 [Answer to Q.5(c)] of Pai Foundation are relevant in this regard).

Capitation Fees Capitation fee cannot be permitted to be charged 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 a 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 the 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.

Our answer to Question-3 is that every institution is free to devise its own fee structure but the same can be regulated in the interest of preventing profiteering. No

capitation fee can be charged."

29. In light of the above judgements 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.

30. 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.

31. As mentioned above two petitions have been filed seeking direction to PEIRA for performance of its statutory duties. In Writ Petition No.3715/2012 the following prayer has been made:

> "*In the light of the foregoing facts and averments mentioned in the instant petition it is therefore, humbly prayed that this Honourable Bench may kindly accept this petition by;*
>
> 1. *Directing the respondent No.1 to 3 to take drastic measures immediately to ensure registration of all the Private Educational Institutions working/running in and under Federal Capital Territory as per criteria laid down in PEIRA, Ordinance, 2009.*
> 2. *Directing the Respondent No.2 to take immediate steps to curtail & control the excessive, unprecedented & unlawful fee and other charges imposed/demanded by these private institutions and that too without the prior sanction of Respondent No.2 (PEIRA).*
> 3. *Directing the Respondents No.1, 2 & 3 to narrate as under what authority more than 400 private institutions are running in the ICT without prior approval, registration & certification?*
> 4. *Directing the Respondent No.4 to show cause as under what permission and by what procedure these Plots/land worth billions of Rupees are allotted to these private businesses (educational institutions) in the name of promotion of education?*

32. The petition is in the nature of *mandamus* as it seeks direction to respondents mentioned therein for

performance of its duties under the Act. The petition is in the nature of public interest litigation. It is a *sine qua non* for filing writ of *mandamus* that the petitioner should have an interest in performance of duty and must have approached the Authorities for it. Reliance is placed on the case titled *ISLAMIC REPUBLIC OF PAKISTAN V. MUHAMMAD SAEED (*PLD 1961 Supreme Court 192).

33. In view of above position of law, the petitioner has no *locus standi* as he is not an aggrieved person therefore, the petition is without merit and is dismissed.

34. Writ Petition No.3272/2015 has been filed by a parent whose children are students in a Private Educational Institution. In the referred petition the following prayer has been made:

> "***In these circumstances,*** *it is, therefore, respectfully prayed that the petition may kindly be accepted and it be declared and directed the respondents that:-*
>
> *i. The Government of Pakistan failed to regulate the private schools and took the concrete measure to keep a check ridiculous fee structures prior to Notification dated 23.09.2015 and no step was taken against the private institution according to the Islamabad Capital Territory Private Institution Education (registration and Regulations) Act, 2013.*
>
> *ii. It be declared that without the permission of the respondent No.2 every year enhancement of monthly fee including annual charges and other multiple charges is against law, unfair, unjustified and not sustainable in the eye of law.*
>
> *iii. The respondent No.1 & 2 are directed to regulate the private schools on ordinary bases and took the tangible steps to keep a check ridiculous fee structures and took*

the legal action against the respondent No.3 for not respecting the law and on their refusal of decreasing the unreasonable monthly fee, annual fund and other charges.

iv. *Further directed to the respondent No.3 not to blackmail and prevent the petitioner and his sons for entering into school/classers without depositing the illegal increase fee and Annual funds.*

v. *The respondent No.3 is directed to receive the monthly fee to the petitioner's kids as received previous year on the direction of the competent Authority. The petitioner is entitled to be dealt in accordance with law and Constitution of the land.*

vi. *Any other relief which this Hon'ble Court deems fit and proper may also be granted.*

35. The petitioner seeks direction to respondents, mentioned in the petition, for regulating the affairs of schools especially enhancement of annual fee in accordance with the provisions of the Act. In light of the above discussion PEIRA has the power to fix the fee and for the same Rules and Regulations are to be framed which it is expected that Federation shall do expeditiously and in accordance with the mandate of the Act. Therefore, W.P. No.3272/2015 is disposed of in light of the observations made above.

36. For the foregoing reasons, the instant petition as well as petitions mentioned in the schedule, except W.P. No.3272/2015 and W.P. No.3715/2012, are allowed to the extent that notification dated 23.09.2015 is declared to be illegal and without lawful authority; however, sections 4(c), 5(1)(b) and 5 (1)(c) are declared not to be ultra vires the Act, therefore, the petitions to the extent

of challenge to the vires of the Act are dismissed. Writ Petition No.3272/2015 is disposed of in light of observations made above and Writ Petition No.3715/2012 is dismissed. All the pending applications are disposed of accordingly.

(AAMER FAROO)
JUDGE

Announced in open Court on the *30th* day of May 2016.

JUDGE

M.Naveed