IN THE HIGH COURT OF SINDH, KARACHI
CP D-5812 of 2015
and connected petitions

Date Order with signature of Judge

Present: **Munib Akhtar and Arshad Hussain Khan, JJ.**

For hearing of main case

Dates of hearing: 09, 10, 11, 16, 17,
18, 23, 24, 25, 26, 27, 30 and 31.05 and
01, 02 and 03.06 and 28.08.20117

Counsel for respective parties:

Mr. Kamal Azfar, Ms. Asma Jahangir,
Dr. Farogh Naseem, Mr. Faisal Naqvi,
Mr. Kazim Hasan, Mr. Asad Shakeel,
Mr. Dhani Bux Malik, Mr. Khalid Mehmood
Siddiqui, Mr. Sardar Azmat Hussain,
Ms. Pooja Kalpana, Mr. Shahan Karami
Jam Asif Mehmood, Saim Hashmi,
Bahzad Haider, Abid Naseem,
Omar Pirzada, Mr. Abdur Rehman,
Mr. Noman Jamali, Mr. Khalid Mehmood Siddiqui,
Mr. Ghulam Rasool Korai, Mr. Saadat Yar Khan,
Mr. Jahanzeb Mari and Mr. Musadic Liskani,
Advocates

Counsel for official respondents:

Mr. Miran Muhammad Shah,
Mr. Mustafa Mahesar and
Mr. Shabbir Hussain Shah, Additional Advocates
General Sindh

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Munib Akhtar, J.: At the heart of this litigation, at the very center of the controversy, lies simply this question: how much is too much? The disputants are schools on the one hand and on the other the students at these institutions, represented in the main by their parents and guardians. The essential point in issue is increase in school fees. The schools contend that this ought to be a matter left essentially to them and they strongly deny all allegations of unfair and unreasonable increases in fees. They claim that they are required to increase the school fees from time to time on account of various factors including capital outlays and increases in overheads and expenses and yes, also to earn a proper return on their investments as is only to be expected of any business. Even the parents and guardians do not deny that the schools are entitled to increase the school fees from time to time. However, it is the frequency and magnitude of the increases that incenses them. Their grievance

is that not merely do the schools charge exorbitant fees to begin with they also seek, unendingly, wholly unjustified, arbitrary and indeed illegal increases. This rapidly intensifies the burden on parents and guardians who feel that if anything at all is inevitable other than taxes and death, it is an increase in the school fees. Indeed, they accuse the schools of price gouging, if not in so many words then certainly in terms that leave little to the imagination. The schools strongly deny any such conduct, strongly refuting the contentions of the parents and the guardians. In particular, they stoutly defend themselves against all charges of profiteering.

2. In legal terms, the parents and guardians seek strict enforcement of the Sindh Private Educational Institutions (Regulation and Control) Ordinance 2001 ("2001 Ordinance"), and the Sindh Private Educational Institutions (Regulation & Control) Rules 2005 ("2005 Rules") framed under s. 15. In terms of the core dispute, they pray for enforcement of those provisions that regulate and control the school fees that can be charged and their enhancement. The Rules, *inter alia*, impose a specific ceiling and periodicity in respect of the school fees. The Provincial Government acts simply as the regulator and enforcer of the law, and since the *vires* and applicability of the Ordinance and the Rules are challenged, defends the same. The schools mount a multi-front challenge to the 2001 Ordinance and the 2005 Rules. At the core of their case lies an attack on the *vires* and constitutionality of the provisions that seek to regulate school fees and their increase. This they do by invoking Article 18 of the Constitution, their case being that the fixation of ceilings and periods denies the schools, as lawful businesses, their right to conduct their affairs as guaranteed under this Article. They also attack the 2001 Ordinance and the 2005 Rules on other grounds, but the core dispute is as outlined above.

3. Before proceeding further, two points may be noted. Some of these petitions had an earlier round of litigation. They were heard and decided against the schools by a learned Division Bench by judgment dated 07.10.2016, which is reported as *Shahrukh Shakeel v. Province of Sindh and others* PLD 2017 Sindh 198. Appeals were preferred against this decision, which were disposed off by consent by order dated 04.04.2017. The judgment appealed against was set aside and the matter remanded for decision afresh "without in any manner being influenced by the impugned judgment". It was in such terms that these petitions, along with some newly filed, came up before us and were heard. Secondly, during the course of their submissions learned counsel referred to a very large number of decisions, the case law being not only from our own but a number of other jurisdictions. It will unduly burden and certainly increase manifold the length of this judgment if each of those cases were to be referred and considered individually. We intend

no disrespect to the assistance provided by learned counsel in not doing so. We have certainly considered the case law cited but will only refer to those select cases which, in our respectful view, are particularly germane to a resolution of the issues before us.

4. Dr. Farogh Nasim, learned counsel who appeared for some of the schools said that they challenged the 2001 Ordinance and the 2005 Rules including in particular Rules 7(3) and 10(2). Referring to s. 6 of the 2001 Ordinance, learned counsel submitted that the cap imposed by Rule 7(3) was *ultra vires* the parent statute but that if such cap were removed, then the said sub-rule would be *intra vires*. Rule 10, to the extent challenged, was in any case beyond the parent statute. Learned counsel submitted that the cap imposed on any increase in school fees, and the very fixation of such fees, could only be done by statute and not otherwise since this was but a particular instance of price fixation and prices could only be fixed by legislation. Learned counsel submitted that all policy had to be properly translated into law and while it was sometimes permissible for the policy to be reflected in subordinate legislation (i.e. rules or regulations) this was not always so and price fixation was an example of the latter category. Learned counsel submitted, referring to various provisions of both the 2001 Ordinance and the 2005 Rules that they were, to the extent challenged, either *ultra vires* the Constitution or the parent statute (as the case may be) but the focus of attention was very much on the fixation of school fees and in particular the limitation imposed on the increase thereof. Learned counsel submitted that the 5% cap was artificial and unreasonable and would force schools into either making a loss or being unable to make the investments and capital outlays that were necessary to provide the sort of facilities that would be commensurate with quality education. Learned counsel submitted that some schools may even have to close down. Furthermore, learned counsel contended that even if a power could be conferred to regulate school fees and any increase therein, proper guidelines had to be provided in the parent statute. Absent such guidelines the relevant provisions would have to be struck down as *ultra vires*. Learned counsel submitted that there were no such guidelines provided and that cap had been simply imposed without any factual basis or support or any inquiry as to whether it was appropriate or not. It was submitted that in such circumstances it was entirely unreasonable. Referring to Article 18 of the Constitution learned counsel submitted that the fixation of fees and the cap imposed on the increase therein was an *ultra vires* restriction on the right of the schools to conduct their affairs. Learned counsel also provided a list of the cases that had considered the fundamental right of freedom of trade, starting with cases decided under the 1956 Constitution (where Article 12 was the relevant provision) and proceeding to Article 18 of the present Constitution.

Learned counsel submitted that Rule 7(3) also violated Article 25 inasmuch as it placed all schools in the same category whereas the schools could not be regarded in such manner. In constitutional terms they had to be properly divided into appropriate classes and if at all fees could be regulated, each class so established had to be dealt with on its own. In particular, it was contended that proviso (ii) of s. 6(1) of the 2001 Ordinance as well as s. 15(2)(c) were violative of Articles 18 and 25 of the Constitution. Insofar as price fixation was concerned it was also submitted that the schools did not come within the scope of the legislation relating to essential commodities. Learned counsel submitted in the alternative that even if school fees could at all be regulated, such regulation and any restriction imposed in terms thereof had to be reasonable which, according to learned counsel, in the present context meant it had to be fair. However, the cap imposed was patently unfair and hence unreasonable and, therefore, ought to be struck down. Learned counsel submitted that schools were treated as commercial establishments and they had to pay utilities and other such charges at commercial rates. There was also no income tax exemption with regard to their operations. Thus, they came squarely within the four corners of Article 18 and hence there was an illegal restraint on their right to do business in terms of the capping of increase in school fees. In support of his submissions learned counsel referred to several cases including those from the Indian jurisdiction. As regards the Indian Constitution, learned counsel submitted that the relevant provision was Article 19(1)(g) read with clause (6) of the said Article. Learned counsel submitted that the Indian case law (which included several decisions of the Indian Supreme Court) established that the autonomy of the schools had to be respected but there could be no profiteering by the schools nor could any capitation fee be charged. It was only to this extent that schools could be regulated, as held by the Indian case law. It was submitted that Article 18 of our Constitution differed in certain respects from the Indian equivalent. It was, therefore, prayed that the relevant provisions regarding school fees and the imposition of the cap in respect thereof should be struck down as *ultra vires*.

5. Mr. Kamal Azfar, learned counsel who appeared for some of the schools, drew attention to the legislative history and explained that the 2001 Ordinance was the successor to (and in fact repealed) an earlier Ordinance of 1962. Referring to the 2001 Ordinance as originally promulgated and the rules framed thereunder in 2002, learned counsel submitted that at that time there had been no provision with regard to determining the school fees or any increase therein. It was only when the parent statute was amended in 2003 and the 2005 Rules framed that for the first time such a power was granted and sought to be exercised. Referring to the registration authority to be appointed under the 2001 Ordinance, learned counsel submitted that the regime currently

set up, especially with reference to the 2005 Rules, was such that the powers of the Provincial Government had effectively been usurped by the said authority. Referring to s. 6 on the one hand and Rule 7 on the other learned counsel submitted that the former entrusted the matter of the fee structure to the Provincial Government whereas the latter purported to confer it upon the registration authority, which was a patent contradiction. Learned counsel submitted that the Provincial Government acted on the recommendations made by the registration authority and by placing the power of increase in the hands of the latter, the role of the Provincial Government had been effectively curtailed. Insofar as the power to regulate school fees was concerned, learned counsel submitted that this could be done but only if regulated in a proper manner, with functions being conferred upon a duly constituted authority acting under a properly prescribed procedure. Nothing of that sort was to be found in terms of the present regime. Effectively, learned counsel submitted, an unfettered discretion had purportedly been conferred with regard to school fees and it was submitted that the law did not recognize any such thing. It was submitted that the restrictions imposed were patently unreasonable, vague and unconstitutional and ought to be struck down. It was prayed accordingly.

6. Mr. Faisal Naqvi, learned counsel who appeared for some of the schools, submitted that he would make his case in terms of six grounds. Firstly, it was contended that the 2001 Ordinance stood impliedly repealed by reason of the Sindh Right of Children to Free and Compulsory Education Act, 2013 ("2013 Act"). Secondly, learned counsel submitted that Rule 7(3) was *ultra vires* the parent statute. Thirdly, it was contended that Rule 7(3) was not consistent with Article 18 of the Constitution since: (i) teaching was a trade protected by the said Article and the Government could not fix an upper limit and could only act to counter profiteering; (ii) there was an illegal fettering of the discretion that had to vest in the schools and this was especially so with regard to the cap imposed on increase in fees; and (iii) the limitations imposed were unreasonable because they would force the schools to operate only at loss. Fourthly, it was submitted that Rule 7(3) was in violation of Article 25. Fifthly, it was submitted that Rule 7(3) was in violation of Article 10A of the Constitution. Finally, it was submitted that Rule 13 of the 2005 Rules required that 10% of the total student body should comprise of needy and deserving students from whom no fee could be charged. It was submitted that this was a violation of Articles 23 and 24 of the Constitution. Learned counsel submitted that schools set fees keeping in mind a number of factors (which included capital outlays and running expenses) and this was central to any understanding and proper resolution of the issues involved. Expanding on the grounds set out above, insofar as the submission of implied repeal was concerned, learned counsel closely compared the 2001 Ordinance and the

2013 Act and submitted that the entire subject matter of the former stood subsumed in the latter. It was submitted that the laws provided for separate and incompatible regulatory frameworks including, inter alia, providing different punishment for the same acts. Learned counsel referred to various cases in support of his submission that there had been an implied repeal. As regards the second ground taken, learned counsel submitted, referring to proviso (ii) of s. 6(1) of the 2001 Ordinance, that this provided for the Provincial Government to establish the fee structure, whereas Rule 7(3) entrusted this power to the registration authority insofar as the increase in school fees was concerned. In this context reference was also made to the seminal judgment of the Supreme Court in *Mustafa Impex and others v. Government of Pakistan and others* PLD 2016 SC 808.

7. Continuing with his submissions, as regards the third ground learned counsel referred to the Indian jurisdiction and several cases from there showing how the matter had been dealt with by the Indian Supreme Court. The relevant cases from our own jurisdiction was also cited and relied upon. Learned counsel submitted that there could be no doubt that the schools were carrying on a lawful trade within the meaning of Article 18. It was submitted that the restriction imposed in terms of Rules 7(1) and 7(3) were patently contrary to Article 18 and unreasonable. Learned counsel submitted that the proper procedure and approach would be for the fee structure to be prepared by the school itself and it was only if the relevant authority found it to be unreasonable on any material basis that it could be rejected and something else substituted. However, the present regulatory regime placed the matter entirely in the hands of the authority and this was contrary to Article 18. It was further submitted that school fees had to be fixed on a case to case basis and a proper right of hearing had to be provided. By imposing an artificial cap in terms of Rule 7(3) the present regulatory regime was in violation of Article 18. As regards the fourth ground, learned counsel submitted that by lumping all schools together there had been discrimination since the schools could not be treated on a "one size fits all" approach. It was emphasized that schools had to be treated on an individualized and case to case basis. That which was unequal could not be treated as equal, which was, practically, the result of the present regime. As regards the fifth ground, learned counsel submitted that the schools had been denied the right of due process. There had to be some evidence or factual inquiry or material to justify the cap of 5% whereas there was nothing of this sort insofar as Rule 7(3) was conferred. Learned counsel strongly denied that there had been any profiteering by schools. It was contended that while regulations could be reasonably imposed to prevent such conduct, the imposition of a cap in the shape of Rule 7(3) could not be used or treated as a proxy for controlling profiteering. Making reasonable profits and

profiteering was not at all the same thing and learned counsel submitted there had been a fundamental failure to recognize this distinction. As already noted, learned counsel placed reliance on a large number of decisions, both from our own jurisdiction as well as others.

8. Mr. Kazim Hasan, learned counsel, submitted that the school for which he appeared operated on a non-profit basis. He otherwise adopted the submissions made by Mr. Faisal Naqvi, emphasizing the point that there had been a violation of Article 25 inasmuch as that which was unequal was being treated as equal.

9. Ms. Asma Jahangir, learned counsel who appeared for the schools in some of the petitions presented her case in terms of the following propositions. Firstly, it was submitted that the 2005 Rules were excessive and arbitrary and purported to confer a discretion that had not been properly structured as required by law. Secondly, that the regulatory regime set up by the impugned provisions was discriminatory. Thirdly, that there was a clear violation of Article 18. Learned counsel submitted that education was both a business and an occupation. It could be subjected to proper qualifications as to its latter aspect and regulated in a lawful manner as regards the former. Learned counsel submitted that in India education was essentially regarded as an occupation. It was, according to learned counsel, the business aspect of education that came within the scope of Article 18 insofar as presently relevant, and the rights of the schools in this regard had been clearly violated. Learned counsel submitted that there was a distinction that had always to be maintained between on the one hand properly lawful regulation and on the other a purportedly regulatory regime that was so intrusive that it essentially amounted to a takeover. It was contended that the latter situation prevailed on account of the impugned provisions and thus there was a violation of Article 18. Expanding on these points learned counsel also drew attention to the history of the legislation as regards school regulation, referring to the predecessor laws including the period in which the schools stood nationalized. Learned counsel took issue with several provisions of the 2001 Ordinance especially as amended in 2003. It was submitted that there was no objection to the proper exercise of the power conferred by proviso (ii) to s. 6(1) but that the cap placed on the increase in school fees was in violation of constitutional rights. Various other provisions were also challenged. With specific reference to the cap of 5% learned counsel submitted that this figure had been put in place in a manner and for reasons that had never been revealed and were certainly not apparent on the face of the record. It was submitted that this was not commensurate with the rate at which the cost of operating the schools was rising and this clearly affected their right to be operated as profit-making

institutions. Learned counsel submitted that while it was part of the corporate responsibility of any school to ensure that a certain part of the student body was enrolled on free or concessional basis, the fixation of a rigid quota in this regard was objectionable. (We may note that during the course of her submissions later, learned counsel appeared to withdraw this objection.) With regard to the 2005 Rules, the provisions of sub-rules (1) and (3) of Rule 7 were challenged as being unreasonable and in violation of Article 18. The provisions contained in Rule 10 with regard to salary of staff was also challenged although learned counsel took a nuanced approach and submitted that in general the fixation of a minimum wage was acceptable. It was simply that the manner in which Rule 10 was structured that was objectionable as it could not work in practice. It was submitted that schools ought to be allowed proper autonomy in this regard. Rule 13 and certain other aspects of the 2005 Rules were also challenged. Learned counsel, in support of her contentions, referred to the case law, including several decisions of the Indian Supreme Court. It was submitted on the basis of the Indian case law that the autonomy of the educational institutions had to be respected and could not be affected. Yet this was precisely the effect of fixation of school fees and imposition of caps with regard to the increase therein. This was clearly unconstitutional and illegal. Learned counsel prayed accordingly.

10. Mr. Abdur Rahman, learned counsel who appeared for the parents/ guardians, submitted that their grievance was that the 2001 Ordinance was not being properly complied with and enforced. In particular the cap placed on the increase of school fees was not being regulated and enforced by either the Provincial Government or the Registration Authority which, according to learned counsel, meant that in practice the schools were being able to get away with essentially whatever increase they deemed appropriate. Learned counsel strongly contested the submission that there had been any implied repealed of the 2001 Ordinance or any provision thereof as presently relevant. Referring to the statutory provisions of both the 2001 Ordinance and the 2013 Act and relying on several cases learned counsel submitted that the well-established conditions that had to be found for there to be an implied repeal certainly did not exist in the present circumstances. With regard to the fixation of school fees, learned counsel drew a distinction between the “fee structure” on the one hand and the fixation of the “fee schedule” on the other. It was submitted that it was only in respect of the former that power vested in the Provincial Government and other than that the power could be exercised by the Registration Authority where it had been properly conferred. Learned counsel submitted that the provisions of the 2001 Ordinance and the 2005 Rules regarding fixation of fees and the imposition of a cap on the increase therein was reasonable and did not at all violate any constitutional rights

including in particular those conferred by Article 18. It was submitted that the "base rate" was set when the fee structure was initially approved at the time of registration of the school. Thereafter the school had to obtain re-registration every three years and if at all any increase was warranted within the prescribed maximum limit, the school could apply accordingly. If a proper justification was given the Registration Authority would increase the school fees by an adequate amount. According to learned counsel this would in effect become the "base rate" for the next time that an application could be made for increase in the fees. That would be after the three year period, when the registration had to be renewed. Thus, according to learned counsel, the system set up under the 2001 Ordinance and 2005 Rules, when properly understood, did envisage a periodic increase in the school fees in a systematic and structured manner. It was strongly contested that the discretion conferred upon the Registration Authority was in any manner defective or in violation of the law. Learned counsel submitted that the cap that had been imposed was proportionate and could not be regarded as being in violation of law. Learned counsel also referred to various cases, both from our own jurisdiction as also the Indian jurisdiction with regard to the fundamental right of freedom of trade.

11. Mr. Muhammad Noman Jamali, learned counsel who appeared for parents and guardians adopted the submissions made by Mr. Abdur Rahman and also expanded on the same. Reference was made to the past history of the legislation in respect of school regulation. It was submitted that the present regulatory regime set up a proper structure for the due determination of fees and any increase therein subject to the maximum limitation and there could be no cavil with the same. In particular it was denied that any of the provisions challenged were *ultra vires*, either with regard to any constitutional provision or with reference to the parent statute, as the case may be. Learned counsel also placed reliance on various decisions.

12. Mr. Miran Muhammad Shah, learned AAG, submitted that the 2001 Ordinance and the 2005 Rules as well as the 2013 Act had been made in the public interest. The purpose was to safeguard the interests of students who were enrolled in private sector schools and to properly regulate a sector which had seen a mushroom growth in the past decades. Education, as imparted by private institutions, had become a business and industry which had to be properly regulated. The learned AAG submitted that the Government fully supported the case of the parents and the guardians and that, therefore, the petitions ought to be disposed off appropriately.

13. At the conclusion of the hearing, we granted permission for written synopses to be filed. Most of the learned counsel did so and we are grateful for the assistance so provided. However, along with the synopses an important development also took place. Mr. Miran Muhammad Shah, learned AAG, under statement dated 06.07.2017 filed a copy of the 2005 Rules as gazetted in the Sindh Gazette on 29.06.2017. While the Rules so gazetted were virtually identical to the ones copies of which were provided to us and on the basis of which learned counsel made their submissions, there was one important difference. This was in Rule 7(1). For convenience, the version as provided to us during the course of the hearing and the one gazetted, are set out below (emphasis supplied):

As provided during the hearing	As subsequently gazetted
The Inspection Committee shall recommend the fee structure of an institution after a detailed inspection of the institution at the time of registration of the institution to the registering Authority.	The Inspection Committee shall recommend the fee structure of an institution after a detailed inspection of the institution at the time of *or renewal of* registration of the institution to the registering Authority.

It is to be emphasized that although the hearing proceeded on a day to day basis and lasted for several weeks, at no time did the learned AAG inform either the Court or the parties that the correct version of Rule 7(1) was other than that which had been provided. The entire hearing proceeded on that basis. It was only at the tail end, when the learned AAG made submissions that for the first time it was indicated that the copy in the official record had the additional words which have been emphasized above. (This appears to be the only difference between the two versions.) Furthermore, prior to 2017 the 2005 Rules appear never to have been gazetted. The copy filed on 06.07.2017 seemed to us to have a bearing on the petitions and so, after summer vacations, we directed that they be listed for re-hearing on this particular point. The petitions were so listed on 28.08.2017 and it was directed that learned counsel may file additional arguments with regard to the 2005 Rules as gazetted, in the context of Rule 7(1). The petitions were again reserved on such basis. Additional arguments were subsequently also filed.

14. We have heard learned counsel as above, considered the case law and the record and material filed and/or relied upon. We begin by noting that in 2003, by an Act of the Provincial Assembly, the 2001 Ordinance was amended fairly extensively. Certain rules had been framed in 2002; these were repealed and replaced by the 2005 Rules. The relevant provisions of the 2001 Ordinance, as amended, and the 2005 Rules (as per the version in terms of which the hearing took place) are set out below:

2001 Ordinance

"**2. Definitions**. - In this Ordinance, unless there is anything repugnant in the subject or context - …

(iii) "institution" means a private managed University, College, School, technical, professional vocational or commercial institution imparting any type of education by any system of education or medium of instruction;

(v) "private managed" means not owned or managed by Government or by anybody or authority set up or controlled by Government.

(vii) "Registering Authority" means an officer or authority notified as such by Government.

6. Registration of an institute. - (1) Where the Registering Authority grants the application, it shall register the institution and issue a certificate of registration to the applicant in such form and containing such terms and conditions as may be prescribed:

Provided that - …

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

(ii-a) the institution shall provide and maintain required infrastructure including building, class rooms, laboratory, library, play ground, canteen and safe-drinking water facilities;

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

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

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

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

2005 Rules (certain typographical errors in original removed)

"**7. Fee structure**- (1) The Inspection Committee shall recommend the fee structure of an institution after a detailed inspection of the institution at the time of registration of the institution to the Registering Authority.

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

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

(4) Any fee other than tuition fee shall be charged only after approval from the Registration Authority subject to the condition that no fee, charges or voluntary donation would be charged by the institution on account of any development activity.

(5) The institute shall ensure that all the conditions of admission along with schedule of fees duly approved by the Registering Authority shall be printed on the prospectus or on the admission for and shall be provided to the parents or guardians at the time of the admission.

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

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

15. The first point that requires consideration is the submission on behalf of the schools that the 2001 Ordinance stands impliedly repealed by reason of the Sindh Right of Free and Compulsory Education Act, 2013 ("2013 Act"). It was submitted that the two statutes were mutually irreconcilable and could not exist simultaneously or stand together. In support of this submission learned counsel referred to various sections from the two statutes, including those relating to registration of the schools, the establishment of separate authorities under each, the fact that both laws require terms and conditions to be prescribed for registration, penalties are provided for in both statutes in many instances for essentially the same acts or omissions, provision is made in both for prescribing the curriculum, there are monitoring and inspection powers and many other provisions. It was submitted that the overlap was so extensive that it rendered the prior law repealed by implication. Thus, it was contended, the power to determine the fee structure and impose limitations on any increase therein had been swept away. In particular, nothing now remained of Rule 7 of the 2005 Rules. Learned counsel for the parents/guardians on the other hand submitted that there had been no implied repeal. Reliance was placed, *inter alia*, on s. 29 of the 2013 Act. Much case law was also referred to by learned counsel for both sides. Having considered the matter we are, with respect, unable to agree that there has been an implied repeal.

16. The first point to note is that the 2013 Act is concerned solely with "schools", which are defined in s. 2(m) as meaning "any recognized school imparting primary, elementary and secondary education" and including both private and public (i.e., Government and local authority) schools. The 2001 Ordinance on the other hand is concerned with "privately managed institutions", which include not only schools but also universities, colleges, technical and vocational institutes and the like. Therefore, even if there is any implied repeal of the 2001 Ordinance it would only be limited to the extent of

schools and not otherwise. Secondly, even with respect to schools, the implied repeal would only apply in respect of private schools and not public schools, since the overlap, if any, in the two statutes is only as regards the former and not the latter. This is important because in the 2013 Act there are provisions (indeed, whole parts) that apply separately to public schools and to private schools, while some provisions appear to be common to both.

17. The principles that apply and the conditions that must exist before the Court will conclude that there has been an implied repeal are well known. There is however no need to rehearse them here because in our view, the matter stands concluded in terms of s. 29 of the 2013 Act. This provides as follows: "Notwithstanding anything contained in any other law, for the time being in force, the provisions of this Act shall have over-riding effect". A provision such as this is fairly common in statutes and varies in form. A more typical example is where the statute provides that: "In case of inconsistency between the provisions of this Act and any other law for the time being in force, the provisions of this Act shall prevail". The 2013 Act does not of course use the word "inconsistent" or any variation thereof, and we will in a moment consider this aspect as well. But the thrust, in general, of provisions such as these is clear: the legislature is expressly setting out what is to happen if there is a conflict between the statute and existing legislation. Does such a provision result in an implied repeal? To this the Supreme Court of India gave an answer in the negative in *Harishankar Bagla and another v. State of Madhya Pradesh* AIR 1954 SC 465. The Court was there concerned with the Essential Supplies (Temporary) Powers Act, 1946, s. 6 of which provided as follows: "Any order made under section 3 shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act …". It was sought to be argued that an order made under s. 3 had, by reason of s. 6, the effect of impliedly repealing certain provisions of the Indian Railway Act, 1890. This contention was repelled and the true import of s. 6 was explained in the following terms (emphasis supplied):

> "*Section 6 does not either expressly or by implication repeal any of the provisions of pre-existing laws; neither does it abrogate them. Those laws remain untouched and unaffected so far as the statute book is concerned*. The repeal of a statue means as if the repealed statute was never on the statute book. It is wiped out from the statute book. *The effect of section 6 certainly is not to repeal any one of those laws or abrogate them. Its object is simply to by-pass them where they are inconsistent* with the provisions of the Essential Supplies (Temporary Powers) Act, 1946, or the orders made thereunder… *By-passing a certain law does not necessarily amount to repeal or abrogation of that law. That law remains unrepealed but during the continuance of the order made under section 3 it does not operate in that field for the time being*. The ambit of its operation is thus limited without there being any repeal of any one of its provisions. …"

18. The principle of implied repeal recognizes that while it is to be presumed that when enacting a law the legislature was aware of the existing state of the statute book, it may yet make a law that comes in conflict with earlier legislation. Of course, there is a presumption against an implied repeal, and the burden of establishing that this has indeed come about lies on the party asserting such repeal. It is a burden not lightly discharged. In our view, where the legislature is aware that there may be some such possibility and expressly caters for the same by including in the later statute a provision such as s. 29 or some variant thereof, then that makes the burden all the more heavier. The expressed intention of the legislature, set out as such, must be applied. Now, as noted, this section does not use the word "inconsistent" or any variation thereof. It is at least arguable that it is worded, and hence intended to operate, more broadly than the more typical example that was before the Indian Supreme Court. Be that as it may, in our view if there is any conflict between on the one hand a provision of the 2013 Act and on the other of the 2001 Ordinance then a very strong case would have to be made out that there has been an implied repeal.

19. Furthermore, with respect, the principle of implied repeal, or even the principle enunciated by the Indian Supreme Court cannot generally be applied in the broad brush manner suggested by learned counsel for the schools. In the ordinary course, it is for the party claiming that the prior law has been impliedly repealed or overridden to show one or more particular provisions of the earlier legislation that is said to conflict with specific provisions of the later. Here the essence of the controversy is as regards the school fees and the enhancement thereof. There are express provisions with regard thereto in the 2001 Ordinance, both in terms of s. 6 and the rule making power conferred by s. 15. In the 2013 Act there does not however appear to be any specific provision. Even the rule making power (s. 30) does not contain any specific reference in this regard. In any case, it appears that no rules have at all been framed under the 2013 Act. Indeed, learned counsel for the schools candidly and quite properly accepted that there was no specific provision in the 2013 Act that could be shown to be in conflict with the foregoing provisions of the 2001 Ordinance. In our view, there can be no implied repeal in such circumstances, nor an occasion for s. 29 to apply in terms as stated above. It is true that in one of the cases relied upon by learned counsel for the schools, *Muhammad Arif v. Muhammad Kawshar Ali* PLD 1969 SC 435, there was an implied repeal of the whole of the earlier enactment. The Bengal Muhammadan Marriages and Divorces Registration Act, 1876 was held impliedly repealed by provisions of the later statute (being ss. 3 and 5 of the Muslim Family Laws Ordinance, 1961). Section 3(1) provides as follows (emphasis supplied): "The provisions of this Ordinance shall have effect

notwithstanding any law, custom or usage, *and the registration of Muslim marriages shall take place only in accordance with those provisions*". Furthermore, s. 5(1) of the Ordinance provides as follows: "Every marriage solemnized under Muslim Law shall be registered in accordance with the provisions of this Ordinance". These provisions were expressly referred to by the Supreme Court, and it was held as follows (pg. 442; emphasis supplied):

> "It is true that Act I of 1876 was not expressly repealed but since the provisions of the Ordinance of 1961 applied by reason of the provisions of section 3 thereof notwithstanding any law, custom or usage and under section 5 thereof all marriages had to be registered by persons licensed to act as Nikah Registrars under the Ordinance, it cannot be said that they [i.e., the appellants] continued either to act as Marriage Registrars or to retain their status of a Marriage Registrar under the Act of 1876. The provisions of the Ordinance prevailed notwithstanding the provisions of the Act of 1876 and to that extent the provisions of the Act stood impliedly repealed. *An intention to repeal the previous law may well be gathered from the repugnancy of its provisions with the general course of the subsequent legislation or from the incongruity of keeping both the enactments in force*. This is further confirmed by the fact that both the appellants also took the same view of their legal position, for they actually applied for and obtained licences under the Ordinance of 1961."

In our view, the situation in the cited decision, especially with reference to s. 3(1) was materially different from the case at hand, and it was the portion emphasized above that, for present purposes, made all the difference. It was this, reinforced as it was by s. 5(1) that robbed the earlier enactment of its efficacy and, in our respectful view, led the Supreme Court to conclude that the intention to impliedly repeal the whole of the earlier legislation was manifested. It may be noted that the Act of 1876, as its preamble testified, provided for the "voluntary registration" of marriages and divorces. The Ordinance of 1961 of course sets up a compulsory and mandatory regime. The later statute thus displaced the whole of the earlier law and, in practical terms, reduced it to a superfluity. Even if the schools' case is stated at its broadest, this is certainly not how the 2013 Act affects the 2001 Ordinance. With respect therefore, the cited decision does not advance the submissions made by learned counsel.

20. It follows that we are, with respect, of the view that the ground taken, of the implied repeal of the 2001 Ordinance (even if only in material part) by the 2013 Act, is without force and must be rejected.

21. This brings us to the core dispute, namely the schools' contention that the provisions imposing limitations on their power to increase the fees charged are *ultra vires* Article 18 of the Constitution. The key provision here is Rule 7 of the 2005 Rules and in particular its sub-rules (1) and (3) and

especially the latter, which imposes a maximum five percent limitation on any increase. And even here the decision does not lie with the schools. Any proposed increase has to be properly justified and approval obtained from the Registration Authority. (As already noted, for the time being we are considering Rule 7 in terms of the version that was used when the petitions were being heard.)

22. It will be convenient to first set out Article 18 and also Article 12 of the 1956 Constitution as well as the relevant provisions of Article 19 of the Indian Constitution. These are as follows:

Constitution	1956 Constitution	Indian Constitution
18. Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business: **Provided** that nothing in this Article shall prevent:- (a) the regulation of any trade or profession by a licensing system; or (b) the regulation of trade, commerce or industry in the interest of free competition therein; or (c) the carrying on, by the Federal Government or a Provincial Government, or by a corporation controlled by any such Government, of any trade, business, industry or service, to the exclusion, complete or partial, of other persons.	**12.** Every citizen, possessing such qualifications, if any, as may be prescribed by law in relation to his profession or occupation, 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 carrying on, by the Federal 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.	**19.** (1) All citizens shall have the right— … (g) to practise any profession, or to carry on any occupation, trade or business. … (6) Nothing in sub-clause (g) of the said clause [(1)] shall … prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall … prevent the State from making any law relating to,— (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion,

		complete or partial, of citizens or otherwise.

23. When Article 18 is considered, it will be seen that it allows the State to subject the right of a citizen to enter upon a lawful occupation or profession or conduct a lawful trade or business to any one of four conditions. Firstly, the State may, by law, prescribe qualifications. Secondly, the trade (which includes business) or profession (which includes occupation) may be regulated by a licensing system. Thirdly, trade, commerce or industry may be regulated in the interest of free competition therein. Lastly, the State may exclude, either wholly or partially, citizens from any trade, business, industry or service and carry on the same itself. There can be no doubt that the State has to act reasonably in exercising any of these powers, a point to which we will return. However, unlike the Indian provision, there is no generally stated right of the State to impose "reasonable restrictions", whether in the interests of the general public or on some other stated basis (such as are, e.g., to be found in some of the other Articles relating to fundamental rights). Now, of the four conditions found in Article 18 two are also specifically listed in the Indian provision (being the first and the fourth). However, there these are but particular instances of the more general power to impose reasonable restrictions on the stated basis. Furthermore, the cases decided in relation to Article 19(1)(g) show that the power to regulate a trade or profession under a licensing system has been upheld as imposing a reasonable restriction in the interests of the general public. Therefore, the second condition is also to be found in Article 19(1)(g) read with clause (6). Although not expressly stated, it would again be but a particular instance of the more generally stated power. In our view, the absence of any expressly stated power under Article 18 to impose "reasonable restrictions" presents a fundamental difficulty. It appears to suggest that unless a restriction can be brought within the fold of any of the four stated conditions it cannot be imposed at all and would be *ultra vires* the Article. Now, this conclusion, if correct, has profound implications as to how Article 18 is to be understood and applied. There can be—indeed are—any number of restrictions that could not be easily (if at all) slotted into one of the four stated conditions. The Indian cases are replete with examples of restrictions upheld as reasonable impositions in the interests of the general public, which one would be hard pressed to slot into any of the four conditions. Many would simply fall outside of them. Take the very restriction with which we are concerned. The fixation of the fee structure and imposition of a cap on increases therein are but specific instances of price fixation. In India, many different types of price fixation have been upheld as reasonable restrictions in the public interest. (Reference may be made to the cases

gathered in Durga Das Basu's *Commentary on the Constitution of India*, 9th ed. (2015), Vol. 4, pp. 4363-65.) Many of these instances may not be relatable to any of the four conditions set out in Article 18. Does that therefore mean that unless price fixation, and in particular the limitations imposed on school fees by the 2001 Ordinance and the 2005 Rules, can be brought within the scope of any of the stated conditions it cannot be done at all and would have to be struck down as *ultra vires* of Article 18? In our respectful view this, and the whole host of equivalent or similar questions that can be easily conceived of as arising, represent profound difficulties as regards Article 18 at the conceptual level. As will become clear, we do not need to address them here but certainly the existence of such issues must inform any consideration of Article 18. (We may note that the discussion that follows is without prejudice to the questions raised in this para.)

24. There is another aspect which has relevance for the cases at hand. When a restriction is challenged under Article 19(1)(g) and the defence is that it is a reasonable restriction within the meaning of clause (6), then the restriction is so considered even though it may relate to the particular instances specifically set out therein. This is so because those instances are subsumed into the general power to impose reasonable restrictions. This seems not possible under Article 18 since, as noted, it has no such general power expressly stated. Here, if a restriction is challenged as being in violation of Article 18 then, it seems, it must be shown to fall into one of the four specifically stated conditions. From this an important distinction emerges. It could be that a restriction may pass muster if considered on the basis of the more generally stated power to impose reasonable restrictions in the interests of the public and yet fail to cross the hurdle when considered only in the light of a condition that is specifically set out on its own and is not a particular instance of a more general power. The distinction may appear to be slight and even subtle. Yet it may make all the difference. As will become clear, it has an important bearing on the resolution of the core controversy.

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

registering authority is not complied with. Reports have to be submitted annually. These and a host of other provisions easily establish that the schools are being regulated under a licensing system.

26. The crucial aspect is of course that the regime (i.e., licensing system) that has been set up also requires the fee structure to be approved and places a cap on any increase, which is also subject to proper justification and approval. Can regulation of a business or trade under a licensing system in terms of the second condition include fixing the prices at which the business is to operate and also regulate the manner and extent of any increase therein? In general, but subject to what is said below, the answer ought to be in the affirmative. In *East and West Steamship Company v. Pakistan and others* PLD 1958 SC 41, the Control of Shipping Act, 1947 was challenged as being, *inter alia*, in violation of Article 12 of the 1956 Constitution. As is clear from the table above, it was in terms very similar to Article 18. The impugned Act sought to minutely control and regulate the merchant shipping trade, and its various sections are set out at pp. 47 to 49. Section 6 allowed the Central Government to fix "in the prescribed manner" the rates at which a ship could be hired and the rates that could be charged for the carriage of passengers and cargo. In other words, it allowed for price fixation. The Supreme Court, by majority, held that the impugned Act was not in violation of Article 12. Certain other grounds taken were also rejected and the petition (filed under Article 22) was dismissed. (Cornelius, J., in an insightful judgment that repays close study, differed from the majority as to the nature and scope of Article 12 although he concurred in the result.) Thus, it would seem, price fixation can come within the ambit of a regulatory regime set up in terms of the second condition. It may be noted here that in the cited decision it does appear to be the case that certain special circumstances existed that justified the impugned Act. Thus, it was observed by the learned Chief Justice at the end of his judgment as follows (pg. 62):

> "The only question then left is whether the requirement that the ships can carry goods or passengers only under a licence amounts to a reasonable restriction in the public interest. The answer to this question must be in the affirmative because the special conditions in which the Control of Shipping Act was passed still exist, and it is necessary in the public interest to impose restrictions on the free use of the ships in order to provide for national needs which cannot otherwise be met."

In the present case of course, the 2001 Ordinance and the 2005 Rules have been enacted not on account of any special conditions but in the ordinary course and simply as a regulatory regime set up for purposes of educational institutions. We may also note that in the 7-member Bench judgment reported as *Arshad Mehmood v. Government of Punjab and others* PLD 2005 SC 193,

certain observations have been made (at pp. 229-30) that, in our respectful view, may require a reappraisal of the view that found favor with the majority in the decision cited above.

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

28. Since the fixation of fees and placing limitations on any increase therein can be brought within the ambit of the second condition, it is necessary to take a closer look at it. The most crucial aspect is obviously the power to regulate. When making regulations that can permissibly come within its scope, what must the State keep in mind and take into consideration? First and foremost, the regulation must be reasonable. In *Pakistan Broadcasters Association v. Pakistan Electronic Media Regulatory Authority and others* PLD 2016 SC 692, which was on appeal against a Division Bench decision of this Court reported at PLD 2014 Sindh 630, certain provisions of the PEMRA Ordinance and the licenses issued thereunder were challenged as being in violation of Articles 18 and 19. In the Supreme Court, the matter was in our respectful view decided essentially on the basis of Article 19. Article 18 does find mention but the challenge in this respect was not accepted: see at pg. 708. Now Article 19, which contains the freedom of speech and expression, can be subjected by the State to "reasonable restrictions" on the bases that are expressly stated in the Article. With reference to the reasonableness of the specific restrictions that can be imposed under Article 19, the Supreme Court

made observations at pg. 706 (paras 18-20). However, it also made certain observations with regard to “reasonableness” in general. These were as follows (pp. 705-6):

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

In our respectful view, these observations can be adopted for purposes of determining whether the regulation of a trade or business in terms of the second condition is reasonable or not.

29. With regard to the matter of fixation of school fees and/or any increase therein in the constitutional context learned counsel for the schools referred to several judgments of the Indian Supreme Court. It was submitted that in India the right of increase school fees was recognized but was balanced against the interests of the public which, especially, had to be guarded against the menace of profiteering. It was contended that even under the Indian provisions the autonomy of the schools was recognized and respected. The judgments include the following: *T.M.A. Pai Foundation v. State of Karnataka* (2002) 8 SCC 481, *Islamic Academy of Education v. State of Karnataka* (2003) 6 SCC 697, *Modern School v. Union of India* AIR 2004 SC 2236, *P.A. Inamdar v. Maharashtra* (2005) 6 SCC 537, *Action Committee Un-Aided Private Schools and others v. Director of Delhi Eduction and others* (2009) 10 SCC 1, *Modern Dental College v. State of Madhya Pradesh* (2010) 14 SCC 186 and *Modern Dental College v. State of Madhya Pradesh* (2016) 7 SCC 353. Several passages from these judgments were referred to and a host of submissions made on the basis thereof. It is however not necessary for us to reproduce those passages or undertake a detailed examination and analysis of the cited cases. The reason is that in a very recent decision dated 27.12.2017 (*Atulkumar Niranjanbhai Dave v. State of Gujarat*), the Gujarat High Court in a 200 plus page judgment has undertaken a review of the case law, including not just the Supreme Court cases but also certain decisions of other High Courts as well. The Gujarat High Court has summarized the state of the law on the basis of its review in the following terms (emphasis supplied):

> "[30] From the aforesaid decisions rendered by the Hon'ble Supreme Court and various High Courts, *it can be said that the State is authorized to regulate the fee structure of a self financed school while maintaining delicate balance between the permissible regulation to verify and prevent profiteering and collection of capitation fee by the management of all the private unaided educational institutions in whatsoever form, garb, guise or camouflage, on one hand and avoidance of undue intrusion into the operational, managerial and academic autonomy of the institution on the other. It is further clear that though autonomy of self financed school is required to be respected, commercialization of education cannot be permitted under the garb of autonomy*. We are of the view that the provisions of the Act is in tune with the legal principles laid down by the Hon'ble Supreme Court in various decisions with reference to the autonomy to the schools to fix their fee on the one hand and conferring power to regulate the quantum of fee with limited purpose to ensure that the schools are not indulging in profiteering on the other hand. As pointed out herein-above, in the present batch of petition, we have to determine the question as to whether the provisions relating to fixation of fee are violative of Article 19(1)(g) of the Constitution or they are regulatory in nature, which is permissible in view of Article 19(6) of the Constitution, keeping in mind that the Government has the power to regulate the fixation of fee in the interest of preventing profiteering and further that fixation of fee has to be regulated and controlled at the initial stage itself. If the provisions of the impugned Act are carefully examined in light of observations made by the Hon'ble Supreme Court as well as different High Courts referred herein-above, we are of the view that while enacting the impugned Act and the Rules made thereunder, fundamental right of the petitioners guaranteed under Article 19(1)(g) of the Constitution has not been violated and the restrictions imposed by the respondent State can be said to be reasonable restriction within the meaning of Article 19(6) of the Constitution." (pp. 150-2)

We are in respectful agreement that the foregoing accurately reflects what has been held by the Indian Supreme Court in the cases cited before us. We may note that the law in question was the Gujarat Self Financed Schools (Regulation of Fees) Act, 2017 and rules framed in terms thereof. It appears that the statute allowed, and the rules provided for, specific fee amounts to be set for the schools, which were placed in three categories. If a school wants any increase over and above this, then that has to be applied for. This regime was upheld by the Gujarat High Court.

30. We have carefully considered the rival submissions and the case law. In our view, two points are of importance. Firstly, the Indian cases were decided in a framework that allows for "reasonable restrictions" to be imposed in the interests of the public. The school fee cases referred to above are but particular instances of this general power of the State, expressly conferred by the Indian Constitution. The power is omnibus and it has been said that "interests of the general public" is a "comprehensive expression comprising of any matter which affects the public welfare, or public convenience" (Durga Das Basu, *op. cit.*, pp. 4362-3). In other words, when considering whether a

constitutionally permissible restriction has been imposed, the Indian Court can take a broad approach. The restriction need not be compartmentalized or slotted into any particular instance, even if the latter is expressly set out in clause (6) itself. Indeed, even if no specific particular instance can be found that would be of no moment if the restriction comes within the scope of the clause. One question alone need be asked even though it will, given the very comprehensiveness of the power, yield a wide range of answers. The position under Article 18 is different. As noted, there is no expressly stated general power to impose "reasonable restrictions". The four conditions to be found in Article 18 are thus not particular instances of some generality. Rather, they are separately articulated powers, conferred as such on the State. Of course, they are not watertight compartments; there can be interplay between them. But even then the four conditions are not subsumed into some overall expressly conferred power. A restriction therefore, so it would seem, has to be slotted into a particular condition, and it is then with reference to that condition that its constitutionality or otherwise has to be determined. (Even if two conditions are engaged, that does not affect the analysis.) Now clearly any restriction imposed in terms of any of the conditions has to be reasonable and there will invariably be an element of public interest involved. So the question may well be asked: is there really any difference between the Indian position and ours? In our view there is. As noted in para 24 above, the distinction may appear to be slight and even subtle but it exists and can have important consequences. In particular, a restriction that is found to be reasonable in the Indian context under the general power may fail to pass muster when considered in the light of a specific and separately articulated condition under Article 18. As will be seen shortly this has important consequences for determining the reasonableness of regulating school fees.

31. Secondly, it must be kept in mind that price fixation can manifest itself in many different ways. Thus, prices, and any increases therein, can be fixed with reference to a floor or a ceiling or some minimum or maximum or even some such standard as "fair" or "reasonable". Furthermore, it may make a difference whether it is the selling price or the buying price that is involved. Of course, the selling price for one may be the buying price for another especially if there is a chain of supply involved. There may even be differences between different trades and businesses, and professions and occupations. In general terms for any supplier of goods or provider of services the key prices are those of the output and the inputs. What does it cost to produce or provide the goods or service, and at what price can they be offered? An obvious response to this question is of course that the supplier or provider would want to minimize the one and maximize the other. In the

context of the regulation of a trade or business by a licensing system, the power to regulate may be exercised at either end, or in relation to both.

32. When the regulation of schools under Article 18, and in particular the fees that they can charge, is considered in light of the foregoing discussion, the following points emerge. Firstly, in our view the regulation in terms of the second condition of Article 18 must move within a narrower locus as compared with the reasonable restrictions imposable under clause (6) of Article 19 of the Indian Constitution. The power conferred on the State under the latter is both broader and more flexible. Put differently, it allows for a greater range of restrictions to be imposed as compared with the regulation permissible in terms of the second condition. For this reason, in our view, the Indian case law referred to in para 29 above cannot be regarded as determinative for present purposes. It allows for a greater range of control or regulation of school fees than would be permissible under Article 18. This difference follows directly from what has been said in para 24 above, i.e., that the Indian provision is a generally stated power allowing reasonable restrictions to be imposed whereas Article 18 seems only to allow for such restrictions as fall within the scope of specific and separately articulated conditions. Secondly, it would seem that in general a supplier of goods or provider of services would be more concerned with the price he can obtain as compared with the price of his inputs. We recognize that this statement may well be regarded as overbroad. The factors involved which determine the price of an input or of the output will inevitably be varied, myriad and even disparate. However, our point here is something different. It seems to us that when it is the output price (here the fees that the schools can charge) is being regulated and restricted, the reasonableness of the restriction sought to be imposed ought to be subjected to greater and closer scrutiny than when it is the price of the inputs that is being subjected to regulation. In other words, the State would, in general, have greater latitude with regard to the latter than the former.

33. Applying all of the foregoing to the 2001 Ordinance and the 2005 Rules, it is our conclusion that Rule 7(3) is *ultra vires* Article 18 of the Constitution. The fixing of a cap on the increase of the school fees up to a stated maximum and no more may well be a reasonable restriction within the meaning of clause (6) of Article 19, but it cannot be so when considered in the context of a separately articulated condition, such as the one with which we are concerned. The business of running a school cannot be regulated so as to impose such a restraint on an increase in the fees that can be charged, i.e., on the output price. This is not to say that school fees cannot be regulated at all. Far from it. However, in our view a constitutionally permissible regulation

would have to recognize that schools do have a right to some periodic increase in the fees that they can charge. Therefore, rather than placing a cap as the maximum permissible limit, in our view the proper regulatory regime would allow for a minimum periodic increase to which the schools would be entitled plus a right to obtain an increase greater than the minimum if a case for this can be properly made out and justified. Even here, the maximum permissible increase may be subjected to a cap. Furthermore, the "right" to have a minimum increase need not necessarily mean that it is to be automatic. The school may be required to put forward a proposal up to the permissible limit. The difference being this and the regime currently in place would be that when the "cap" is regarded as a minimum it would be for the authority or any objecting stakeholder (e.g., parents) to justify why the school should not be given the increase. If no such justification is shown, then the school would be entitled to an increase up to the minimum. To put the matter differently, a constitutionally permissible regulatory regime would have not a "cap" but a "cut off" point. For an increase up to the cut off point the onus would lie on an objector to show why the school should not be allowed the same. For an increase beyond that point (which could be up to some stated permissible maximum) the onus would lie on the school to show why it should be allowed the same. Furthermore, the exercise need not necessarily be carried out on an annualized basis. Rule 7(3) as it exists is of course structured in a manner different to what has just been said. It simply imposes a cap on the maximum permissible increase and the onus lies entirely on the school to justify its proposal howsoever small the proposed increase may be. Instead of a two-stage procedure with reversal of onus as just outlined, Rule 7(3) imposes simply a one-step system with the onus always lying on the school. It is in our view for that reason constitutionally impermissible and outside the scope of the second condition of Article 18. The variance between the two approaches may appear to be slight, but it makes all the difference. Both approaches would pass muster in terms of the Indian provisions on the basis of the more widely stated and general power to impose a reasonable restriction. However, it is only the two-stage procedure that is permissible in terms of the separately articulated, and hence more narrowly drawn, second condition unsupported as it is by any general power.

34. As regards the initial setting of the school fees, that matter is covered by proviso (ii) to s. 6(1). The "fee structure" referred to therein, to be approved by the Provincial Government, is the initial fixation. The manner in which this is to be done is spelt out by a joint reading of ss. 4, 5 and 6(1) and Rules 4 and 5. In our view, there is no contradiction or conflict between the powers of the Provincial Government and the Registration Authority. The latter is empowered to grant or refuse registration to a school on the basis of

the report of the Inspection Committee. Here, the Registration Authority is empowered to act on his own. However, in one respect his power remains subject to the approval of the Provincial Government and that is in relation to the fee structure. The Inspection Committee's report would invariably contain a recommendation with regard to the fee structure. As part of granting approval to the school for its registration, the Registration Authority would signal his satisfaction with the same. However, that would not suffice. In law this satisfaction would not be decisive. The fee structure would require the approval of the Provincial Government. Here it must be remembered that as explained by the Supreme Court in *Mustafa Impex and others v. Government of Pakistan and others* PLD 2016 SC 808, a statutory power conferred on the Federal Government has to be exercised by the Federal Cabinet itself. In *Karamat Ali and others v. Federation of Pakistan and others* PLD 2018 Sindh 8 the principles enunciated in *Mustafa Impex* have been applied in the provincial context. Thus, the statutory power conferred by the proviso would have to be exercised by the Provincial Cabinet itself. It must also be kept in mind that the power to make rules under s. 15 also vests in the Provincial Government. The same principles therefore apply there as well.

35. Since "fee structure" means only the fees to be fixed on initial registration, it does not include any increase as made permissible by Rule 7(3). This brings us to the variant version of Rule 7(1) as contained in the 2005 Rules that were gazetted after the conclusion of the hearing (see para 13 above). Rule 7(1) relates to the "fee structure". The additional words that appear in the gazetted version seek to apply this expression also to the increase that a school can seek on renewal of the registration. In our view, the gazetted version cannot be accepted. It may be noted that s. 15 does not, as such, require the rules to be published in the Gazette. Therefore, such publication of the 2005 Rules in 2017 is of no moment. More pertinently, as already noted, the matter was heard at length over several weeks on a day to day basis. Rule 7 was subjected to close, detailed and repeated scrutiny. At no stage did the Law Officers point out that the version that was being read was incorrect. The version now put forward at such a belated stage cannot be accepted. Therefore, Rule 7(1) is to be read as presented during the hearing, and "fee structure" accordingly means only the fees to be fixed on initial registration. What of any subsequent increase? Sub-rules (2) and (3) refer to "fee schedule". In our view, this is different from "fee structure" although of course at the stage of initial registration the two would be the same. Sub-rule (2) provides that a fee schedule, once approved, cannot be changed during the course of the academic year. Sub-rule (3) allows for a maximum increase of five percent subject to proper justification and on approval being obtained from the Registration Authority. In our view, if any applied for increase is

approved, then it is the fee schedule that would stand altered. Thus, sub-rules (2) and (3) operate with reference to each other and it is these provisions that relate to subsequent increases in the fees. They do not (other than at the initial stage) relate to the "fee structure".

36. The submission by learned counsel for the schools that there are no guidelines provided as to how fees are to be fixed, whether at the initial stage or subsequently, cannot be accepted. At the initial stage the guidelines are laid out both in proviso (ii-a) to s. 6(1) and Rule 5(3). As regards the justification that is to be provided for any increase in school fees, that is left not to the volition of the Registration Authority but with the school, i.e., it may place reliance on such factors as would be objectively considered relevant, which would then be adjudged by the Registration Authority, again in a transparent and objective manner. All of this follows from well established—indeed trite—principles of administrative law. If these aspects are not as such spelt out in the 2005 Rules that does not mean that they do not apply. As rightly pointed out by learned counsel for the schools there is no such thing as unstructured discretion. But the required structure can also be discerned by applying the well known principles to the regulatory regime.

37. Insofar as the staff salaries are concerned, that represents, from the schools' perspective, the input price. We have already set out our view that here greater latitude is available to the State as compared to regulating the output price. At the initial stage, i.e., when the school is being registered, the pay scales, allowances etc are to "commensurate with its fee structure" (see proviso (ii-b) to s. 6(1)). Thereafter, the matter is regulated by Rule 10. In our view, these provisions are well within the power of the State to impose a regulatory regime in terms of the second condition of Article 18. No exception can therefore be taken and, with respect, the objections raised by learned counsel in this regard cannot be accepted.

38. In addition to the core dispute and the issues taken up above, learned counsel for the schools have challenged certain other provisions of the 2001 Ordinance and/or 2005 Rules. These have, *inter alia*, been noted above. We do not however consider it necessary to consider these issues here since the heart of the dispute was always the increase in the school fees. The other issues raised but not considered here are not, in this sense, directly and substantially in issue. They are therefore left open for proper consideration in litigation (if at all any) where they do so arise.

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

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

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

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

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

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

f. Since it is clear that the Provincial Government does, in fact, wish to regulate the increase in school fees, it is directed to frame constitutionally permissible rules within 90 days of this

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

g. Till such time as the proper regulatory framework is put in place in terms as above, Rule 7(3) shall continue to remain in force for the interim period. If the rules cannot be framed within the stipulated 90 days the Provincial Government or any stakeholder (e.g., a parent) may file an application in the lead petition (CP D-5812/2015), seeking a suitable extension in time. However, the Provincial Government shall have to properly explain and give reasons for the delay. The Court may make such orders and give such directions on the application as it deems appropriate, including extending the period for which Rule 7(3) is to continue. It is clarified that if no such application is filed, then the interim continuance of Rule 7(3) shall come to an end on the expiry of the 90 day period.

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

40. Before concluding we would like to pay tribute to Ms. Asma Jahangir who is no more amongst us, having passed away on 11.02.2018. She was an indomitable spirit and an indefatigable defender and champion of the rule of law. Her absence will be long felt in the public arena and in courts all over the country, including this Court.

41. This judgment applies to the following petitions: CP Nos. D-5812/2015, 6171/2015, 6219/2015, 6383/2015, 5651/2015, 5867/2015, 7390/2015, 6943/2015, 7901/2015, 813/2005, 1704/2006, 375/2005, 2723/2017 and 6375/2017.

42. These petitions are disposed off in the foregoing terms, including in particular (but not limited to) para 39 above. There will be no order as to costs.

JUDGE

JUDGE