

**IN THE SUPREME COURT OF PAKISTAN**  
**(CONSTITUTIONAL JURISDICTION)**

**PRESENT:**

**Mr. Justice Iftikhar Muhammad Chaudhry, CJ.**  
**Mr. Justice Khilji Arif Hussain**  
**Mr. Justice Tariq Parvez**

**Const. Petition No.50 and 69 of 2011**

Fiaqat Hussain and others (Const. P.50/2011)  
Iqbal-ur-Rehman Sharif and others (Const. P.69/2011)  
...Petitioners

**Versus**

The Federation of Pakistan thr. Secretary Planning and Development  
Division, Islamabad and others  
...Respondents

For the petitioners: Agha Muhammad Ali Khan, ASC  
Mr. Ejaz Muhammad Khan, AOR(absent)  
(in Const. P.50/2011)

Syed Ali Zafar, ASC  
Raja Abdul Ghafoor, AOR  
(in Const. P.69/2011)

Amicus Curiae Mr. Makhdoom Ali Khan, Sr. ASC

On Court Notice: Maulvi Anwar-ul-Haq,  
Attorney General for Pakistan  
Mr. Dil Muhammad Alizai, Dy. A.G  
Mr. Sulman Siddique, Chairman, FBR  
Mr. Waqar Masood, Secy. Finance

For respondent No.1: Ch. Muhammad Azam, Secy. P & D  
Mr. Muhammad Asif Sheikh (Advisor)  
Mr. Saif-ur-Rehman (Asstt. Chief)  
Mr. Manzoor Ahmad Lucky, SO

Respondent No.2: Nemo

Respondents No.3-4: Mr. Khalid Mehmood SO

Respondent No.5: Nemo

Respondent No.6: Mr. Jawad Hassan, Addl. A.G. Pb.

Respondent No.7: Mr. Muhammad Qasim Jat, ASC  
a/w Muhammad Sajan,  
Director, Non-Formal, Education  
(On behalf of A.G. Sindh)

Respondent No.8: Mr. Amanullah Kanrani, A.G. Balochistan

Respondent No.9: Mr. Naveed Akhtar, Addl. A.G. KPK

Mr. Hadayatullah Khan, Dy. Secy.  
Mr. Amanatullah, SO  
Ms. Saadia Atta Ghuman, Director, NEF

Respondent No.10: Mr. Kamal Azfar, Sr. ASC  
Mr. Mehmood A. Sheikh, AOR

Dates of hearing: 20 & 21.10.2011

### **JUDGMENT**

**Iftikhar Muhammad Chaudhry, CJ.**— In the Devine Holy Book, the Quran, Allah Almighty has declared the superiority of Adam over the angles because of knowledge and emphasized as under:

*“And He taught Adam the nature of all things; then He placed them Before the angels, and said: “Tell Me The nature of these if ye are right”.*

*They said: “Glory to Thee: of knowledge We have none, save what Thou Hast taught us: in truth it is Thou Who art perfect in knowledge and wisdom. [2:31-32]”*

Thus, in *Surah Taha* the Prophet (P.B.U.H) has been asked to pray in the following words:

*“Lord increase my knowledge. [20: 114] ”*

The Quran says that We send the Prophets to teach people wisdom. In *Surah Baqra* (Heifer) it is ordained:

*“But the best of provisions is right conduct so fear me, O ye that are wise”. (2:197).*

2. Similarly, the Holy Prophet (Peace be upon him) has emphasized on acquiring knowledge in the following words:

*“Seek knowledge from the cradle to grave.”*

In another Hadith, it has been said:-

*“Seek knowledge even as far as China.”*

While comparing an *“Alam”* with a martyr, the Holy Prophet (P.B.U.H.) has said:

*“A drop of sweat of the brow of thinker is better than the thousand blood drops of the martyr”*

On another occasion it has been said:

***“Whoever seeks a way to acquire knowledge Allah will make easy his way to Paradise” [Sahih Muslim]***

Stressing on the need of knowledge, the Holy Prophet (P.B.U.H.) has said:

***“Seeking knowledge is obligatory upon every Muslim”. [Sunan Ibn Majah]***

Dr. Maurice Bucaille in a book titled, ***“The Bible, The Quran and Science”*** has proved that Islam is a scientific religion emphasizing on the need of scientific inquiry.

3. The education for the development of society/nation had also not escaped from the vision of Quaid-e-Azam, the founder of Pakistan. In the Presidential Address at All India Muslim League, Lahore on March 23, 1940, he said:

***“Come forward as servants of Islam, organise the people economically, socially, educationally and politically and I am sure that you will be a power that will be accepted by everybody.”***

He also said: -

***“You must concentrate on gaining knowledge and education. It is your foremost responsibility. Political awareness of the era is also part of your education. You must be aware of international events and environment. Education is a matter of life and death for our country”.***

4. In the successful life of an individual, the education plays an important role. Generally, it is considered to be the foundation of society which brings economic wealth, social prosperity, political stability and maintaining healthy population. In case of deficit of educated people, the further progress of the society is stopped. Educated individuals enjoy respect among their colleagues and can effectively contribute to the development of their country and society by inventing new devices and discoveries.

5. Main purpose of education is to educate individuals so that they get prepared to form the next generation of leaders. It will yield

strong families and strong communities. Education plays an important role to promote knowledge and understanding of rural communities. In almost all societies, receiving education and attending school is necessary to achieve success. It is the key to move forward and ultimately succeed in life. For preparing the children and young people to effectively participate in the development of the society, the schools play a vital role. The knowledge and wisdom can only be gained through the experience of learning. It is important to note that the teachers are the most important factors for an innovative society because teachers' knowledge and skills not only enhance the quality and efficiency of education, but also improve the prerequisites of research and innovation.

6. In the Constitution of Islamic Republic of Pakistan, through the 18<sup>th</sup> Constitutional Amendment Article 25A has been added which identifies the education as one of the fundamental rights of the people. The said Article reads as under:

“The State shall provide free and compulsory education to all children of the age of five to sixteen years in such manner as may be determined by law.”

7. Generally, the education is either formal or informal. Formal education is imparted through the medium of educational institutions, e.g. school, colleges, etc., set up in the public and the private sectors. Informal education is a general term for education outside of standard school set up. It refers to various forms of alternative education, such as non-schooling or house-schooling, etc. In Athenian society, some countries had schools having teachers and pedagogues. Pedagogues shared some qualities with specialist informal educators. They were family attendants (often slaves) whose duties were to supervise, and be with young sons of master. They used to take the boys to school and sat with them in the classroom. The teacher only taught boys their letters, the pedagogue taught them how to behave. It is argued that in Britain, the first adult educators were the missionaries who came from Ireland or from continental Europe. For many centuries, the church remained the greatest educational force in the country [Kelly 1970: 1]. The Clergy, the formal religious leadership, had a duty to teach which they did through

preaching, talking with people and through more specialized means such as schooling. From the late 1370s, Preachers started to spread the gospel around Britain. By the middle of the fifteenth century parish libraries were established. In the seventeenth century, the academies and charity schools were also established. In the nineteenth century, there was great increase in informal educators, particularly associated with the emergence of philanthropic organizations, such as, YMCA (founded in 1844).

8. In the late 1960s and early 1970s, non-formal education became part of the international discourse on education policy. It was related to the concepts of recurrent and lifelong learning. Tight (1996: 68) suggested that the latter concepts had to do with the extension of education and learning throughout life. Non-formal education is about acknowledging the importance of education, learning and training which takes place outside recognized educational institutions. Fordham (1993) suggested that in the 1970s, four characteristics were associated with non-formal education, namely, relevance to the needs of disadvantaged groups; concern with specific categories of persons; a focus on clearly defined purposes; and flexibility in organization and methods. In Pakistan, like so many other countries, there are formal and informal types of education.

9. In most of the countries, the education is free of cost from primary to post graduate level. In the Nordic countries, education is mostly free. In Norway and Finland no fee is charged even from foreign students enrolled at a university. Greece and Argentina provide free education at all levels including college and university. In Brazil, free education is offered by the Ministry of Education. In Sri Lanka free education is provided at different levels, where government funded schools, such as national schools, provincial schools and privaten provide free education at primary and secondary level, while assisted schools and semi governmental schools provide the same at subsidized rates.

10. It is interesting to note that free education has long been identified with 'sponsored education'. During Renaissance, it was common practice among rich dignitaries to sponsor for a young man as his patron. In the late 18<sup>th</sup> Century, Thomas Paine was amongst the earlier proponents of universal free public education, which was

considered to be radical idea at that time. In United States the idea of responsibility of government to provide compulsory education as free of cost, was adopted during the late 19<sup>th</sup> Century.

11. It is an established fact that Human Resources Development is a key to all successes. Unfortunately, Pakistan even at present is amongst the countries which have the lowest literacy rate. In order to keep pace with the developed nations of the world increase in literacy rate is one of the essential requirement. Even otherwise Pakistan was committed to increase its literacy rate to 70% by the year 2000. An overview of efforts in this regard is given below:

i. Village Aid Programme: This programme was launched in collaboration with UNESCO in 1953. It was basically a community development programme and basic education was its one component. Under this programme about 800 Village Literacy Centres were established. It, however, was discontinued.

ii. Adult Functional Literacy Project (AFL) – (Television Literacy Programme 1975-1981):

The First literacy programme through distance learning jointly run by the Allama Iqbal Open University and Pakistan Television Corporation was launched at national level in 1975. Beneficiaries of the project were 109100 persons at the cost of Rs.11.914 million and cost per literate was Rs.11.3.

iii. Literacy Programme of LAMEC/NETCOM (1981-1991):

The most effective literacy programme launched in 1981 was the Programme of "Literacy and Mass Education Commission (LAMEC) known as NETCOM afterward. The Commission was establishment in 1981 with the following objectives: -

- Identification of needs and specific areas of education and training to raise.
- To evolve strategies for launching formal and non-formal programmes.
- For the promotion of skills of the masses for self-employability.
- Resource mobilization.

12. The Commission planned and implemented following very useful projects: -

(A) 100% Literacy Islamabad Project 1983-84:

Through this Programme 2060 persons were made literate on experimental basis.

(B) The National Literacy Plan (1983-88):

The Plan aimed to make 15.0 million persons, aged 10 plus, literate in a period of five years (1983-88) at a cost of Rs.750.0 million. Only two components of the Plan could be implemented i.e. (i) Community viewing Centres (Television Literacy Centres) and (ii) Adult Literacy Centres (face to face teaching). The project was modified and re-designed in 1984 as National Literacy Project (NLP). Under the Project 4712 Literacy Centres with enrolment of 99,955 students were established by June 1986 when the Project was stopped abruptly. Under this programme about 96,115 illiterates were made literate at a cost of Rs.67.526 million.

(C) Television Literacy Centres:

Under this programme nine literacy lessons were telecasted from November, 1983 till May, 1984 and about 20480 learners were made literate.

(D) President's Ten Points Programme for the Promotion of literacy:

A nation wide literacy campaign was launched in Summer 1984 and under this programme total 1,63,233 persons were made literate.

(E) Iqra Pilot Project (IPP) 1987:

Under this programme 60,095 adults were registered out of which 18,842 persons qualified the examination. Total cost incurred on the Project was Rs.21.677 million (Rs.1000 per literate).

(F) Nai Roshni Schools Project (1987-89):

The NRSP was launched in 1987 at a cost of Rs.3153.215 million and against 44000 Nai Roshni Schools Planned, only 13,688 Schools could be established up to 30<sup>th</sup> April, 1988 having 3,49,767 learners. The project was stopped w.e.f. 30.06.1989 due to change in the Government. Apart from the above mentioned facts, some NGOs have played very positive role in the promotion of literacy rate.

(G) 10,000 Non-Formal Basic Education Centres & School:

Under this Plan the literacy level was targeted to rise from 35% to 70% by the Year 2003. It was estimated that under the project, 25 million illiterate persons would be made literate within a period of 4 to 5 years. The project was approved at a cost of Rs.12.6337 billion with FEC Rs.3.1 million. Under this Plan 7,117 Non-formal Basic Education Schools/Centres have already been established against the target of establishing 10,000 such schools. It was to cover school age population of 5-9 years and schools drop outs of age 10-14 years. It was envisaged under the programme that about 8,75,000 learner would complete primary level courses and 3,25,000 would acquire basic literacy skills in a period of 4 to 5 years. NGOs were also involved in this effort to improve literacy rate.

13. The Ministry of Education, Government of Pakistan in order to raise literacy level in Pakistan launched a Nationwide Project for establishment of 10000 Non-formal Basic Education Schools (NFBE) in April 1996. The project was approved by Executive Committee of the National Economic Council (ECNEC) at a cost of Rs.1263 million for a period of 5 years. In July 1998, the project was revised and renamed as 'Establishment of 82000 Basic Education community Schools' and was approved by ECNEC at a cost of Rs.11214.896 million for a period of five years i.e. 1998 to 2003, which was later extended up to 2007-08 or till the whole cost was utilized, whichever was earlier. In 2006 the Federal Government decided to merge the schools and staff of this project into another project and renamed it as 'Establishment and Operation of Basic Education Community Schools' (the Project) in the Country (Punjab, Sindh, Balochistan, Khyber Pukhtoonkhwa, Gilgit-Baltistan, FATA, AJK and Islamabad Capital Territory. PC-1 was approved with a total cost of Rs.7000 million for a period of four years. The Project was running all over Pakistan and its implementation was handed over to National Education Foundation by Ministry of Education vide notification No.F.1-1/2006-Acctts(BECS) dated 14<sup>th</sup> June, 2007. The Project was to achieve its targets by the year 2010, however, the life of the project was extended up to 30<sup>th</sup> June, 2012 by the Ministry of Education vide letter No.F.1-118/06-EFA dated 12<sup>th</sup> December, 2009. The major objectives of the project are:



1. Establishment and operation of 20.000 Basic Education Community (BEC) Schools in the country.
2. Establishment of 25000 Literacy and Skill Development Centres.
3. Schools will be established on need basis while focusing on disadvantaged segments of society.
4. Conversion of 400 efficient BECS into formal 5 room primary schools.

By the year 2010 the project has established schools all over the country as per details given below:

	Schools	Under NGOs	Direct	Teachers Male	Teachers Female	enrolment
Punjab	6465	3498	2967	209	6256	262744
Sindh	2195	1072	1003	757	1438	78522
NWFP+	1764	1305	459	61	1703	72441
FATA	1166	833	333	945	221	48572
Balochistan	1389	424	860	543	846	41109
Gilgit-Baltistan	1576	77	1499	409	864	55741
AJ&K	223		223	34	189	10214
ICT	323	161	162	6	317	12129
TOTAL	15101	7370	6233	2964	12137	581442

The prescribed curriculum for the Basic Education Community Schools, which reads as follows: -

*"Students of 02 age groups are admitted in Basic Education Community Schools:*

- (A) 5-9 years
- (B) 9-15 years

*Group A students complete 05 years Cycle of Primary Education whereas those belonging to Group B complete their Primary Level Education (Courses of classes 1 – 5) in 40 months.*

*2. Upon completion of Primary Education cycle, all such students appear in the Annual Primary Standard examination conducted by the Provincial/Area Government Education Department. Consequent upon passing of Primary Standard Examination these students can get admission in Formal Educational institutions.*

3. *In Basic Education Community Schools (BECS), the National Curriculum/Textbooks of formal schools are adopted for teaching purposes."*

14. Through 18<sup>th</sup> Constitutional Amendment, by virtue of Article 270AA(8) and (9) of the Constitution, the Concurrent Legislative List was omitted in pursuance whereof some projects being run by the Federal Government in the Provinces, including the Basic Education Community Schools, were decided to be closed down by the 30<sup>th</sup> June, 2011. Being aggrieved of the said decision, the petitioners invoked the jurisdiction of this court under Article 184(3) of the Constitution.

15. In Constitution Petition No.50/2011, the petitioner No.1 is father of three students who have been benefitted from Basic Education Community Schools Project, now renamed as 'Establishment and Operation of Basic Education Community Schools', whereas the other petitioners are employees of the projects. Similarly, all the petitioners in Constitution Petition No.69/2011 are the employees of the projects. In these matters, we have been called upon to dispose of the petitions in terms of prayers in respect of the nature of informal system of education prevailing in the country, wherein, *inter-alia*, it has been prayed that the proposed action on part of respondents No.1 to 4 of closing down 'Establishment and Operation of Basic Education Community Schools' may kindly be declared to be without lawful authority and of no legal effect and be also declared to be in violation of article 25-A of the Constitution of Islamic Republic of Pakistan, 1973; the proposed act of winding up of the Commission may be held to be entirely unconstitutional and of no legal effect so as to allow the Commission to continue to perform the positive duty of providing basic human rights to the citizens of Pakistan.

16. It is to be noted that the National Education Foundation Ordinance, (Ordinance XX), 2002, as per section 3(1), provides for establishment of a Foundation to be known as the National Education Foundation. Section 3(2) of the Ordinance provides that the Foundation shall be a body corporate having perpetual succession and

a common seal with power to acquire, hold and dispose of property, both movable and immovable, and shall by the said name sue and be sued. The terms beneficiaries and educationist have been defined in Section 2(b) and (h) as, "beneficiaries" means teachers, educationists and students; "educationist" means a person engaged in educational research, planning, management or promotion in the Federal Ministry of Education or an organization set up or established by the Federal Government or in any organization as may be recognized by the Committee for the purposes of this scheme, and shall include a person who has so retired. As per section 4(1) of the Ordinance the objectives of the Foundation are to promote quality and gender sensitive education in the territories of Federal Administered Areas. Section 4(2) *ibid* provides that the three major categories of objectives are the promotion of education; capacity building; and research and development. The functions of the Foundation are enumerated in section 5 *ibid*.

17. It is the case of the petitioners that despite devolution of the subject of education to the provinces after 18<sup>th</sup> Constitutional Amendment, the Federal Government is not absolved of its duty to ensure improvement/development of the formal and informal education in the country. It is to be noted that before passing of 18<sup>th</sup> Constitutional Amendment there was Entry 38 in the Concurrent Legislative List, which provided for curriculum, syllabus, planning and standards of educations. Similarly, there was Entry 39, which conferred the jurisdiction upon the Federal and Provincial Legislation regarding the Islamic Education. As in the 18<sup>th</sup> Constitutional Amendment all the subjects noted in the Concurrent Legislative List have been devolved upon the Provinces, therefore, it is now left for the Federation to legislate only in respect of the items mentioned in Part-I and Part-II of the Federal Legislative List.

18. It is pertinent to mention here that the government after passing of 18<sup>th</sup> Constitutional Amendment, in order to regularize the functions of some of the subjects, which have been devolved upon the Federal Government created a new Division vide notification No. 4-10/2011-Min-I dated 29<sup>th</sup> July, 2011. For convenience relevant para from the notification is reproduced hereinbelow: -

*“In terms of Rule 3(2) of the rules of the Business, 1973, the Prime Minister has been pleased to constitute with immediate effect, the following new Ministries with the Divisions as shown against these Ministries:-*

... ..

2. *the distribution of functions among the new divisions shall be as under:-*

... ..

<i>Professional and Technical Training Division</i>	
1.	<i>National Vocational and Technical Education Commission (NAVTEC)</i>
2.	<i>Academy of Education Planning and Management (AEPAM), Islamabad</i>
3.	<i>Federal Board of Intermediate and Secondary Education (FBISE), Islamabad</i>
4.	<i>National Education Assessment Centre, Islamabad.</i>
5.	<i>National Training Bureau, Islamabad.</i>
6.	<i>Pakistan Manpower Institution.</i>
7.	<i>National Internship Programme (NIP).</i>
8.	<i>Akhtar Hameed Khan National Centre for Rural Development, Islamabad.</i>
9.	<i>National Talent Pool, Islamabad.</i>
10.	<i>Youth Centres and Hostels.</i>
11.	<b><i>All matters relating to National Commission for Human Development (NCHD) and National Education Foundation (NEF).</i></b>

3. *Amendments in the Rules of Business, 1973, wherever necessary will be issued in due course.”*

19. At this juncture it is to be kept in mind that the National Education Foundation and National Commission of Human Resources have been established in terms of the National Education Fund Ordinance, (Ordinance No.XX) 2002 and the National Commission for Human Development Ordinance, (Ordinance No.XXIX) 2002. Later on, these Ordinances have been protected by the Parliament by means of 17<sup>th</sup> Constitutional Amendment and since then these forums have continuously been discharging their functions.

20. It is important to note that in the 18<sup>th</sup> Constitutional Amendment both these Ordinances along with other legal instruments, issued between the period starting from 12<sup>th</sup> October, 1999 to 31<sup>st</sup> December, 2003, have been protected under Article 270AA of

Constitution. Thus, despite of 18<sup>th</sup> Constitutional Amendment both these laws, under the protection of Article 270AA, are fully operational and functional.

21. Learned counsel for the petitioner in Constitution Petition No.50 of 2011 has submitted that official respondents/government authorities are not interpreting constitutional provisions properly, without realizing that in the garb of devolution of powers the control of Basic Education Community Schools in the country has been handed over to the provinces which are not ready and willing to accept the same, therefore, consequently it would be tantamount to denial of Fundamental Rights regarding education of about 550,000 students belonging to the poorest families of the country by closing down about 15000 schools all over Pakistan as a result whereof 15000 teachers and 10000 staff members have been left without protection of Article 9 of the Constitution. He has made reference to the impugned letter dated 10<sup>th</sup> May, 2011 issued by the Government of Pakistan, Planning Commission under the subject. Along with it a list of the projects, likely to be closed down, has been appended, which includes the project known as "Establishment and Operation of Basic Education Community Schools in the Country."

22. It is to be seen that vide letter No.F.1-18/06-EFA/Government of Pakistan, Ministry of Education (P&P Wing) dated 9<sup>th</sup> June, 2008, addressed to the Accountant General of Pakistan on the subject "Establishment and Operation of Basic Education Community Schools in the Country", administrative approval of was granted by the Government of Pakistan, to execute the subject scheme at a capital costs of Rs.7000 million with nil FEC. The Execution period of the scheme was fixed to be 48 months and break up of the costs was also stated therein. Therefore, without prejudice to the case of either of the parties, the project of the Basic Education Community Schools suppose to continue functioning up to June, 2012.

23. Mr. Ali Zafar, learned ASC appearing in petition No.69/2011, in his arguments has raised following constitutional issues:-

- i. Whether there is a positive duty upon the State (which includes the Federal and the Provincial Governments as

well as the Parliament and the Provincial Assemblies) to fulfill this "minimum core obligations" to the citizens of Pakistan and provide them the minimum standards of basic amenities of life like fulfillment of the requirements of minimum access to education and health and to at least give the opportunity of human development to its citizens. In this case the Commission, which is an instrument of the State involved in fulfilling the role of providing some of the 'minimum core obligations' to the citizens of Pakistan is being wound up, Neither the Centre nor the Provinces are willing to continue with the Commission. It is submitted that since the 'State' is duty bound under the Constitution to provide these basic fundamental rights to its citizens, the 'State' is liable to be issues directions by this Hon'ble Court in exercise of its jurisdiction for enforcement of fundamental rights under Article 184 (3) to continue to provide such services to the people of Pakistan and on the same basis the action of the State in winding up the Commission, which is in negation of the fundamental rights of the citizens of Pakistan, is liable to be declared as void.

- ii. That the process of devolution as a result of the 18<sup>th</sup> Amendment does not mean that the Federal Government is absolved from its obligation to provide fundamental rights and to that extend the reasons for winding up the Commission is unlawful and;
- iii. That the Commission was incorporated under an Act of Parliament and is being wound up under an Executive Order. It is submitted that an Executive Order cannot overrule an Act of Parliament.

He has also highlighted the importance of the education while making reference to the judgments in the cases of Jamia Karachi v. Registrar of Trade Union, Sindh (1981 PLC 403), Ghulam Mustaf v. Province of Sindh (2010 CLC 1383), Brown v. Board of Education [873 US 483 (1954)] and University of Delhi v. Ram Nath (AIR 1963 SC 1873).

24. Learned Attorney General for Pakistan, however, contended that 18<sup>th</sup> Constitutional Amendment has abolished the Concurrent Legislative List as a result whereof the subject of education

has been transferred to the Provinces, therefore, in view of the decision of implementation committee, the Council of the Common Interest vide its decision dated 4<sup>th</sup> June, 2011 has decided that the Commission, meant to promote Human Development by providing support to the government organizations, etc., either be adopted by the Provinces or these projects be wound up after 30<sup>th</sup> June, 2011. Thus, the Basic Education Community Schools and the Commission now have become the subjects of the Provinces, after 30<sup>th</sup> June, 2011. He further submitted that the Federal Government has already released the salaries for the teachers of the schools as well as staff of the Commission up to 30<sup>th</sup> June, 2011 and now the Provinces are responsible to allow them to continue into the service.

25. The representatives of governments of Balochistan, KPK and Sindh adopted the arguments of learned Attorney General, however, Mr. Jawwad Hassan, Addl. Advocate General, Punjab contended that the Government of Punjab had adopted a policy and decided to accommodate the students of Basic Education Community Schools in regular schooling set up.

26. Mr. Makhdoom Ali Khan, Sr. ASC (Amicus Curiae) has submitted that there appears to be a presumption that after the 18<sup>th</sup> Constitutional Amendment these institutions, which were initially within the domain of the Federation, have now been transferred to the Provinces. It has been presumed that there were some entries in the Concurrent Legislative List which no longer are their, therefore, this has become a residuary subject all together. The Concurrent Legislative List had three entries which could be said to be related to education. There was Entry 38 which provided for curriculum, syllabus, planning and standards of educations; next was Entry 39 which provided for Islamic Education; and Entry 47 which though was not a direct entry but it provided for incidental matters. With the abolition of the Current Legislative List, only these two Entries i.e. 38 and 39 have ceased to remain within the domain of the Federation; there is no other entry with respect to education which has been impacted by the 18<sup>th</sup> Amendment at all. The Federal Legislative List, on the other hand, has a number of entries which can be said to relate to Education and those entries remain. The entry 38 is no longer there but with some changes it has found a place in Entry 12 of Part-II of the Federal

Legislative List. It provides for standards in institutions for higher education and research, scientific and technical institutions. So it is a composite entry and entire issue relating to standard has also not gone to Provinces. Entry 15 of Part-I provides that libraries, museum and similar Institutional controlled or financed by the Federation. Entry 16 provides that Federal agencies and institutes for the purposes of research, professional or technical training, or the promotion of special studies; that entry still exists. There is another interesting entry, which is Entry No. 31, which ostensibly deals with corporations but it has very interesting exception at the end of it. It says cooperation, that is to say the incorporation regulation and winding of trading corporations including Banking Insurance and finance corporations but not including corporations owned and controlled by a Province and carrying on business only within that Province or cooperative societies and of corporations whether trading or not trading with objects not confined to a Province but not including Universities; so corporations generally are within the Federal domain; Provincial corporations are out; and with regard to Universities, there is a specific exclusion. Therefore, generally a corporate body, unless it falls within one of the exceptions over here, like Universities, would fall within the domain of Federation. Justification of the above would have to be found from another Entry 16 whereby the Federation has the power to set up Federal agencies and institutes for the purposes of research, professional and technical training for the promotion of special studies. Both the Commission and the Foundation, under the respective statutes, have been created as a corporate body. They are juristic persons with the right to sue and be sued and they are creation of statutes. Entry 32 that has been removed from the Federal Legislative List, is now in Part-II of Federal Legislative List in Entry 7 i.e. National Planning and National Economic Coordination including Planning and Coordination of Scientific and Technological research. So all the legislation, which has been made in the year 2002 and has continued till 2011, after the 18<sup>th</sup> Constitutional Amendment, could be validated.

27. As it is evident from the above noted paras that importance of the formal or informal system of education has always been considered to educate the nation following the teachings of Islam, embodied in the divine book "The Quran" and Sunnah of Holy



Prophet Muhammad (Peace Be Upon Him). Allah Almighty in different verses of Holy Quran has emphasized for education amongst the mankind. Thus no further reference in this behalf is required to be made, in presence of Ordains of Allah Almighty and the sayings of Holy Prophet (Peace Be Upon Him), references of few of them have been made hereinabove. A careful study of the Holy Quran with reference to significance of acquiring knowledge by the mankind, one can well imagine the importance of the education.

28. It may not be out of place to note that Allah Almighty in first revelation has ordained to the Holy Prophet (Peace Be Upon Him) as follows: -

***“Read in the name of your Lord, Who created, man from a clot. Read, for your Lord is most Generous, Who teaches by means of the pen, teaches man what he does not know. [96:1-5]***

The Intellectuals, may be Muslims or non-Muslims, have always considered, and rightly so, the Holy Quran as guide for them. Similarly, the Prophet (Peace Be Upon Him) has been admitted, even by the Non-Muslims, to be a great jurist. Not only this but in a good number of books, while discussing the *Serah* of Hazrat Muhammad (Peace Be Upon Him), he has been found to be the embodiment of knowledge and wisdom. Thus, it is an accepted norm that education plays an important role in the successful life of individuals and for development of the nation and the country. Therefore, if regular system of parting education to the children for want of infrastructure, is not possible then by adopting informal system of education the States had been fulfilling their duties.

29. Not only in Pakistan, from 1951 onward under different programs the system of informal education had been introduced as it has been pointed hereinabove but in so many other countries like Greece, Britain and Ireland informal education system has been adopted. Besides, the system of free education has been invoked not only in the developed but also in developing countries. In view of such background, our State, by means of 18<sup>th</sup> Constitutional Amendment has incorporated Article 25A, which has been reproduced hereinabove, whereby Fundamental Right have been conferred upon all the children

of the age of 5 to 16 years to receive free and compulsory education. Wisdom behind incorporating the said Article could be nothing except teaching of Islam, the vision of the father of nation as well as the importance of education discussed hereinabove. Under Article 7 of the Constitution, the State includes the Federal and the Provincial Governments, therefore, while inserting Article 25A in the Constitution the Parliament, in view of the definition of the State had not absolved the Federal Government from conferring the Fundamental Rights upon the children. It has been emphasized before us on behalf of learned Attorney General that after 18<sup>th</sup> Constitutional Amendment as concurrent list has been abolished, therefore, except Provincial Governments, the Federal Government has no responsibility for enforcing the Fundamental Rights of the education to its subjects, particularly to the citizens who were receiving education in informal system of education. In this context, it is to be noted that in terms of Article 37(a) of the Constitution, the State shall form such policies on the basis of which it shall promote, with special care, the educational and economic interest of backward classes or areas. We are conscious of our jurisdiction regarding the Principles of Policy of the State but at the same time we are not oblivious of our duties to enforce Fundamental Rights with regard to free education to the children as now has been guaranteed under Article 25A of the Constitution. This Court has already seized with the matter with regard to imparting higher education, which is to be regularized by the Higher Education Commission and order has been passed in this regard in the case of Prof. G.A. Miana and others Vs. Federation of Pakistan (Constitution Petition No.33 and 34 of 20011). However, in the instant case we would confine ourselves to the extent of controversy, which has been brought before us. But we are also conscious of the principle pronounced in the case of Benazir Bhutto v. Federation of Pakistan (PLD 1988 SC 416), namely, the Directive Principles of State Policy have to conform to and to operate as subsidiary to the Fundamental Rights guaranteed in Chapter 1, otherwise the protective provisions of the Chapter will be a mere rope of sand; and the Law, in the achievement of this ideal, has to play a major role, i.e., it has to serve as a vehicle of social and economic justice, which this Court is required to interpret. Similarly, the Indian Supreme Court in the case of Mohini Jain v. State of Karnatka (AIR 1992 SC 1858) has held that the

Fundamental Rights and the Directive Principles, which are found in the governance of the country cannot be isolated from the Fundamental Rights guaranteed under Part III. These principles have to be read into the Fundamental Rights. Both are supplementary to each other. The State is under the Constitutional mandate to create conditions in which the Fundamental Rights guaranteed to the individuals under Part-III could be enjoyed by all. Without making 'right to education' under Article 41 of the Constitution a reality the Fundamental Rights under Chapter-III shall remain beyond the reach of large majority, which is illiterate. The fundamental rights guaranteed under Part-III of the Constitution of India including the rights to freedom of speech and expression and other rights under Article 19 cannot be appreciated and fully enjoyed unless a citizen is educated and is conscious of his individualistic dignity. The "right to education", therefore, is concomitant to the Fundamental Rights enshrined under Part III of the Constitution. The State is under a constitutional mandate to provide educational institutions at all levels for the benefit of the citizens. The educational institutions must function to the best advantage of the citizens. Opportunity to acquire education cannot be confined to the richer section of the society. In the case of Unni Krishnan J.P. v. State of A.P. (AIR 1993 SC 2178), it has been held that the Fundamental Rights and Directive Principles are supplementary and complementary to each other and that the provisions in Part III should be interpreted having regard to the Preamble and the Directive Principles of the State policy. The initial hesitation to recognise the profound significance of Part IV has been given up long ago.

30. Following the principles highlighted hereinabove showing status of Directive Principles of the State Policy and the Fundamental Rights and also in view of the dictum laid down by the superior Courts in the cases of Mian Muhammad Nawaz Sharif v. President of Pakistan (PLD 1993 SC 473), Shehla Zia v. WAPDA (PLD 1994 SC 693), Ahmad Abdullah v. Government of the Punjab (PLD 2003 Lahore 752), Imdad Hussain v. Province of Sindh (PLD 2007 Karachi 116) and Suo Motu Case No.13 of 2009 (PLD 2011 SC 619), it is concluded that under Article 9 read with Article 25A of the Constitution of Islamic Republic of Pakistan the Fundamental Rights are required to be enforced by the

State. Especially, in view of newly added Article 25A of the Constitution, it has been made mandatory upon the State to provide the education to the children of the age of 5 to 16 years.

31. Having declared so, now next question for consideration would be as to whether or not after abolishing the Concurrent Legislative List, the Federation is empowered to make legislation relating to the matters directly, indirectly or ancillary to the subject of education, particularly by introducing informal education, as presently being imparted through Basic Education Community Schools in the country established under the Ordinances XX and XXIX of 2002. First of all it is to be noted that both these Ordinances were promulgated much prior to the introduction of 18<sup>th</sup> Constitutional Amendment. Initially, 17<sup>th</sup> Constitutional Amendment was introduced whereby Article 270AA was added in the Constitution which provided protection to the said Ordinances for the reason that these Ordinances were issued during the era when there was no constitutional dispensation and the country was being run under the Provisional Constitutional Order, 1999. As it has been noted hereinabove, the Basic Education Community Schools have been established from time to time and as per the details, reference of which has already been made, about 581442 children, through out the country, are getting education and about 6233 schools are established by the government agencies whereas about 7370 schools are being run by the NGOs.

32. The Parliament introduced 18<sup>th</sup> Constitutional Amendment in pursuance whereof the Concurrent Legislative List containing Entries No.38 and 39 relating to education was abolished but despite that both the Ordinances were protected as is evident from the above paras. We may mention here that according to section 5(8) of the Ordinance, XX of 2002 it is one of the functions of the National Education Foundation to ensure that equal opportunities for education are provided to boys and girls of whatever social, class, colour, race or creed to promote equality, development, human rights and peace for all, and under such provision the schools are functioning and imparting education to the children. Similarly, under the Ordinance XXIX of 2002, National Commission for Human Development was established, with the objective to promote human development by supporting government-line departments, non-governmental organizations and elected official

at the district level in primary education, literacy, income generating activities and basic health care services, etc.

33. As it has been held in the judgments of this Court as well as judgment of the foreign countries, highlighted hereinabove, that the education is Fundamental Right of an individual, therefore, the Directive Principles of State Policy being subsidiary to the Fundamental Rights guaranteed under the Constitution are required to be protected under the law, which are holding the field. In presence of these two laws, and for the reasons that the Basic Education Community Schools are functioning under the control of government agencies and by the NGOs, detail of which has already been given hereinabove, despite of repealing of Concurrent Legislative List, the government of Pakistan through Prime Minister has created a Division known as Professional and Technical Training Division, which has been authorized to deal with all the matters relating to NCHD and NEF. The provision, which has brought protection to both the Ordinances, can only be repealed by the repealing Statute and merely by issuing any letter or the order, as in the instant case vide letter dated 10.5.2011, to close down the project of Establishment and Operation of Basic Education Community Schools, is contrary to law.

34. Now we revert towards the question, which we have posed hereinabove, namely, competency of the Legislature to promulgate such laws. Mr. Makhdoom Ali Khan, learned Amicus Curiae has referred to Entry 12 of Part II of the Federal Legislative List, which empowers the Federal Government to legislate with regard to the standards in institutions for Higher Education and research, scientific and technical institutions. Similarly, Entry 15 of Part I is relating to libraries, museum and similar Institutional controlled or financed by the Federation. He has also made reference to Entry 16, according to which, with regard to the Federal agencies and institutes for the purposes of research, professional or technical training, or the promotion of special studies, the Federal Government is empowered to legislate. Undoubtedly, the education, may be informal, falls within this Entry as it deals with the professional and technical training and the promotion of special studies. The word "special studies" is capable as per its meanings to cover the informal education as well. We have explained hereinabove that informal education is nothing but a mode

of imparting education in the less developed areas where facilities to provide education by opening regular schools are not possible, therefore, by means of adopting informal system a special study is imparted to the children of the areas, who as a matter of right, under Article 25A of the Constitution as well as in terms of the Injunction of Islam, are entitled to get the education. As discussed above, although presently there is no necessity for the legislature to cover the system of informal education but if need be, such case can be covered under Entry 16 of Part I of the Concurrent Legislative List. At the cost of repetition, it is mentioned that Legislature was fully aware of the necessity of Ordinances XX and XXIX of 2002, therefore, instead of repealing the same, by means of 18<sup>th</sup> Constitutional Amendment, the same were protected for the reasons discussed hereinabove as well in discharge of their functions to provide a law which can promote Directive Principles of State Policy relating to education and economic interests of backward class or areas.

35. Thus, we are of the considered opinion that under Article 70 read with Entry 16 of Part I of the Federal Legislative List and the Constitutional Amendments, both the Ordinances are fully protected and shall remain operative unless repealed in accordance with the Constitution and so long both the Ordinances are holding the field, the Basic Education Community Schools providing informal education to the backward classes or the areas shall continue to function. It may also to be noted that the competent authority vide letter dated 9<sup>th</sup> June, 2008 has approved PC-I with a total cost of Rs.7000 million for a period of four years and due to slow releases of fund the project could have not be completed, thus it has been extended up to 30<sup>th</sup> June, 2012, therefore, without prejudice to the discussion made hereinabove the project of Basic Education Community Schools cannot be closed down.

36. Learned counsel for the petitioners have also raised arguments that the government is bound to allow functioning of the Community Schools on account of its commitments, for the reason that the Planning Commission in its report pertaining to Pakistan Millennium Development Goals Report, 2005 has appraised that without community participation in education, the literacy level could not be achieved. It was further stated that the major reason for

children either not attending schools or dropping out of primary schools are high cost of education, inadequacies in the quality and relevance of education particularly at primary level, parental attitude especially in the case of girls and distance from schools. Undoubtedly it is the duty of the State to provide sufficient resources for education and health by allocating considerable amount in annual budget. Although in past, the government had imposed a tax in the name of *Iqra* Surcharge on import of goods. Reference may be made to the case of *Suhail Jute Mills v. Federation of Pakistan* (PLD 1991 SC 329). On our query, Chairman FBR placed on record a statement, perusal whereof shows that Rs.65.796 billions was received under this Head. Thus, the State, i.e. both Federal and Provincial Governments in view of Quranic Injunction and sayings of Holy Prophet (Peace Be Upon Him) and in pursuance of constitutional provisions, is duty bound to provide social justice and education in the country.

37. Thus, for the foregoing reasons, petitions No.50 and 69 of 2011 are accepted holding that:

- (A) the proposed action on part of respondents No.1 to 4 of closing down 'Establishment and Operation of Basic Education Community Schools' is without lawful authority and of no legal effect and is in violation of article 25-A of the Constitution of Islamic Republic of Pakistan, 1973;
- (B) the proposed act of winding up of the Commission is unconstitutional and of no legal effect and the Commission is allowed to continue to perform the positive duty of providing basic human rights to the citizens of Pakistan.

Parties are left to bear their own costs.

38. Before parting with the judgment, it is important to observe that vide order dated 21<sup>st</sup> October, 2011, respondent government was directed to pay the salaries of the teachers/staff but compliance report so far has not been received. The Secretary Finance is directed to comply with the direction in letter and spirit and submit

report not later than a period of seven days, to the Registrar for our perusal in chambers.

Chief Justice

Judge

Judge

Announced in Open Court on \_\_\_\_\_ at Islamabad

Chief Justice

Approved For Reporting