

P L D 2020 Sindh 42**Before Muhammad Ali Mazhar and Agha Faisal, JJ****HAJJ ORGANIZERS ASSOCIATION OF PAKISTAN through Authorised Officer and 11 others---Petitioners****Versus****FEDERATION OF PAKISTAN through Secretary Ministry of Religious Affairs and Interfaith Harmony, Islamabad and 2 others---Respondents**

Constitutional Petitions Nos.D-2477 and D-2936 of 2019, decided on 26th June, 2019.

(a) Interpretation of Constitution---

---Trichotomy of Powers---Object, purpose and scope--- One of seminal principles of Constitution is concept of trichotomy of powers between Legislature, Executive and Judiciary---Such principle underpins rationale that framing of a government policy is to be undertaken by Executive which is in a better position to decide on account of its mandate, experience, wisdom and sagacity which are acquired through diverse skills---Judiciary is entrusted with interpreting of law and to play role of an arbiter in cases of disputes between individuals inter se and between individual and the State---Significant growth has been noticed in judicial review of administrative actions and grounds on which courts interfere have been expanded--- Such expansion has taken place in shadow of competing concerns of vigilance and restraint and it is faithfulness to these dual concerns of vigilance and restraint which produces unique supervisory jurisdiction which is hallmark of judicial review---If courts fail to maintain such delicate balance none else but confidence of people in judiciary would be worst victim.

(b) Constitution of Pakistan---

---Art. 199---Judicial review---Principles---Grounds upon which an administrative action is subject to control by judicial review can be classified as illegality--- Decision maker must understand correctly the law that regulates his decision making power and must give effect to it; irrationality, namely Wednesbury, unreasonableness and procedural impropriety---Judicial review is regimen and command of court to review legislative and executive actions to maintain and sustain rule of law---High Courts by means of writ of habeas corpus, mandamus, certiorari, prohibition and quo warranto control administrative actions---Under dominion of judicial review, court reviews lawfulness of a decision or action made by a public body and is a process under which executive or legislative actions may be subject to review by judiciary---Court may invalidate laws, acts and governmental actions that are incompatible with a higher authority more so an executive decision may be invalidated for being unlawful and also maintains check and balance---Judicial review is an audit and taking stock of legality of decisions made by public bodies likewise all corpuses exercising functions of a public law nature are susceptible to challenge---Judicial review can be sought on grounds that

a decision arises when a decision maker misdirects itself in law, exercises a power wrongly or improperly purports to exercise a power that it does not have---Such is known as acting ultra vires and a decision may be challenged as unreasonable if it is so unreasonable that no reasonable authority could ever have come to it---Judicial review can also be taken in failure to observe statutory procedures or natural justice or in breach of legitimate expectation, either procedural or substantive.

Tata Cellular v. Union of India (36(1994) 6 SCC 651; <[https:// www.out-law.com/judicial-review](https://www.out-law.com/judicial-review)> by Justice (R) Fazal Karim and <<http://www.supremecourt.gov.pk/ijc/Articles/pdf>> by James Madison rel.

(c) Constitution of Pakistan---

---Arts. 199---Hajj Policy, 2019, Para. 16 & Clause 18(vii)---Constitutional petition---Allocation of Hajj Quota, reduction in--- Fair competition---Scope---Petitioners were private Hajj Group Organizers who were aggrieved of introduction of quota to accommodate 5% pilgrims at government rate package---Validity---Hajj Formulation Committee imposed an unreasonable, disproportionate and inconsistent condition which was not only beyond framework and constituents of Hajj Policy, 2019 but tantamount to an indirect reduction in quota of Hajj Group Organizers---Competition Commission regarding condition for booking 5% Hujjaj at government Hajj package had not expressed any opinion in its report or otherwise that same would ensure economy of financial packages; they further figured out that under spirit of competition law condition of booking 5% Hujjaj at Government Hajj Package by Hajj Group Organizers could lead to price discrimination by charging different prices for same goods or services from different customers in absence of objective justifications that might justify different prices---High Court endorsed viewpoint of the Competition Commission as being logical and commonsensical---High Court set aside condition inflicted by the authorities---Constitutional petition was allowed accordingly.

Dossani Travels Pvt. Ltd. and others v. Messrs. Travels Shop (Pvt.) Ltd. and others PLD 2014 SC 1; Delhi Transport Corporation v. D.T.C. Mazdoor Congress AIR 1991 SC 101; Mansukhlal Vithaldas Chauhan v. State of Gujarat 1997 (7) SCC 622; Ms. Saba v. Province of Sindh and others C.P. No.D-2650 of 2019); <<https://uk.practicallaw>>. Thomsonreuters. Com); Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation (1948) 1 KB 223; Chairman, All India

Railway Rec. Board v. K. Shyam Kumar and others in Civil Appeals Nos.5675-5677/2007 and Sabir Iqbal v. Cantonment Board, Peshawar PLD 2019 SC 189 ref.

Abid S. Zuberi, Ayan Mustafa Memon and Ms. Shereen Chughtai for Petitioners.

Kafeel Ahmed Abbasi, DAG.

Amjad Ahmed, Joint Secretary (Litigation) MORA, Islamabad.

Qazi Sami ur Rehman, Director (Hajj) Camp Office, Karachi.

Ghulam Mustafa, Deputy Director (Hajj), Camp Office, Karachi.

Iqrar Ahmed, A.D. (Hajj), Camp Office, Karachi.

Dates of hearing: 14th, 28th May and 19th June, 2019.

ORDER

MUHAMMAD ALI MAZHAR, J.---The aforementioned petitions have been brought to challenge a letter dated 09.04.2019, issued by respondent No.1, whereby a precondition for allocation of quota to private sector for Hajj 2019, has been imposed that each private Hajj Group Organizer ('HGO') in its allocated quota shall accommodate 5% of pilgrims at Government Rate Package.

2. The transitory facts of the case are that the petitioner No. 1 is a representative body of private Hajj Group Organizers ('HGOs') (Sindh Zone) while other petitioners are its members and also reregistered quota holders recognized by the Government of Pakistan. The respondent No.1 is relevant Ministry of the Government of Pakistan that receives a quota from Kingdom of Saudi Arabia ('KSA') and required to facilitate the implementation of Hajj Policy formulated each year by the Hajj Formulation Committee constituted in terms of directions contained in the judgment of Supreme Court. (Ref: PLD 2014 SC 1) In January, 2019, Hajj Formulation Committee formulated the Hajj Policy, 2019. According to the said policy, 60% quota retained for Government Hajj Scheme and for the rest, it was decided that 40% quota shall be allocated to the private sector/HGOs in a transparent manner and considering the HGOs good performance and satisfactory arrangements during Hajj, 2018. The Hajj Policy, 2019 formulated by the Hajj Formulation Committee was subsequently approved by the Federal Cabinet. Afterwards, 12 hajj packages for private sector were approved by the Hajj Formulation Committee for Hajj, 2019. A meeting was convened on 11.02.2019 in absence of representatives of HOAP, the respondent No 3 misinformed the committee that HOAP has agreed to provide 5% of quota at government hajj package and said offer was also appreciated by the committee. According to the petitioners no such offer was ever made by HOAP hence the communication of alleged offer by the respondent No.3 to the committee was based on misrepresentation and has no legal effect. The respondent No.1 issued a letter on 21.03.2019 with the directions that all quota holder HGOs should submit documents for issuance of Recognition Letters. However, the respondent No.1 vide its letter dated 09.04.2019, sought input from Chairman, HOAP on the said condition of 5% and has further directed that each HGO must submit an affidavit that each petitioner (HGO) will accept booking of 5% Hujjaj at Government Hajj Package as approved by the Hajj Formulation Committee for Hajj 2019 and

subsequently the terms and conditions of Service Provider Agreement (SPA) issued by the Ministry of Hajj 2019 failing which no Recognition Letter for Hajj 2019 will be issued. The Association of HGO raised objections to the impugned letter vide its reply dated 10.04.2019.

3. The respondents in their reply averred that to implement the judgment of Supreme Court in Dossani Travels case, the Hajj Organizers Association of Pakistan, a representative body of private sector agreed to book 5% pilgrims at Government Hajj Package. The tacit consent of HOAP, representative of all zones of Pakistan was put up to Hajj Policy Formulation Committee in its meeting on 11.02.2019. The Hajj Policy Formulation Committee appreciated the offer of HOAP. The mechanism of booking 5% hujjaj by private sector at Government Hajj Package was under discussion with HOAP. According to clause 18 (vii) of the Hajj Policy, 2019 each HGO is required to abide by the instructions/guidelines/SOPs/SPA issued by the Ministry of Religious Affairs and Interfaith Harmony, Government of Pakistan. The petitioners have no vested right for allocation of hajj quota. The Hajj quota of private sector as per Hajj Policy 2019 is intact. It was further contended that the petitioners case is not based on merit as majority of members of HOAP have already agreed and submitted affidavit for booking of 5% of their hujjaj at the rate of Government Hajj Package.

4. The learned counsel for the petitioners argued that the impugned condition of booking is illegal and without jurisdiction. No such provision is embodied in the Hajj Policy, 2019. Moreover, no such condition was imposed by the Hajj Formulation Committee hence such condition is without jurisdiction and in violation of the Judgment of the apex Court reported as PLD 2014 SC 1. The private sector and petitioners (HGOs) have been granted 40% of quota after detailed deliberations. The imposition of impugned condition tantamount an indirect reduction in the private sector quota. The packages to be offered by the HGOs for Hajj 2019 have been prepared with the consensus and have been approved by the Hajj Formulation Committee which do not contain any mandatory package at Government package rate. The approved packages of HGOs are more expensive than the government package as the HGOs are providing better facilities and do not benefit from economies of government rates of airline fares and all staff despite that the HGOs are being forced to pay the difference in respect of these 5% Hujjaj. The impugned condition is unreasonable and most HGOs will be unable to comply with the same as they will be unable to bear the difference. This unreasonable restriction is violation of Article 18 of the Constitution, 1973. The low-cost private sector package approved by the Hajj Formulation Committee is Rs.500,000/- which is higher than the Government package rate of Rs.427,975/-. This necessarily involves payment of a subsidy to be paid by the respective HGO itself.

5. The learned DAG argued that the Hajj Policy has been framed in view of the directions contained in the judgment of apex court in Dossani case reported in PLD 2014 SC 1. The Hajj Formulation Committee convened various meetings and it was jointly agreed with HOAP that the private sector will accommodate 5% hujjaj at Government Hajj Package to ensure compliance of recommendations of Competition Commission of Pakistan. This agreement with HOAP was in tacit form

and not in writing. To devise a mechanism, the feedback of HOAP was requested vide letters dated 29.3.2019 and 5.4.2019 but meanwhile, HOAP was advised to instruct its members to provide affidavit to accommodate 5% Hujjaj at Government rate. The HOAP refused to submit the method for selection of 5% Hujjaj at the rate of Government Hajj Scheme. Since no input was received from HOAP, that's why the ministry finalized the service provider agreement with 5% booking condition of Hujjaj by private sector at Government Hajj Package. The learned DAG further argued that no such condition was imposed on HOAP in Hajj Policy but it was agreed and approved by Hajj policy formulation committee.

6. Mr. Amjad Ahmed, Joint Secretary (Litigation), Ministry of Religious Affairs and Interfaith Harmony, Islamabad was also allowed to address on special permission. He argued that the petitioners have no vested rights to invoke the jurisdiction of this court under Article 199 of the Constitution. Only HGOs of Sindh Zone are opposing this condition. The stipulation for 5% Hujjaj on Government rates was made on the request of Hajj Organizers Association of Pakistan (HOAP) but subsequently they back out from this promise. He further stated that no change has been made in the Hajj Policy which was only prerogative of Federal Cabinet. He reiterated that the impugned benchmark of 5% Hujjaj on Government rates was worked out on tacit approval of HOAP in the public interest.

7. Heard the arguments. In terms of the judgment rendered by the hon'ble Supreme Court in the case of Dossani Travels Pvt. Ltd and others v. Messrs Travels Shop (Pvt) Ltd. and others (PLD 2014 Supreme Court 1), Hajj Policy Formulation Committee was constituted to frame Hajj Policy-2019 headed by its Chairman i.e. Secretary, Ministry of Religious Affairs and Interfaith Harmony and the Members comprising representative of Attorney General of Pakistan, representative of Ministry of Foreign Affairs, representative of Ministry of Law and Justice and representative of Competition Commission of Pakistan. The manuscript of Hajj Policy-2019 delineated and jot down by the said Committee was also approved by Federal Cabinet. According to paragraph No.07, nomenclature, "Hajj Scheme 2019", it is self-confessed that for Hajj 2019, there shall be two schemes i.e. "Government Hajj Scheme" for those applicants who intend to perform Hajj under Government arrangements and "Private Hajj Scheme" for those who want to make their Hajj arrangements through Hajj Group Organizers (HGOs), in accordance with Service Provider Agreement between Ministry and HGOs and individual agreement of the intending Haji with the HGO. It is further enumerated in the same paragraph that Hajj quota of 179,210, 60% (107,526) would be allocated to Government Hajj Scheme while 40% (71,684) would be allocated to Private Hajj Scheme i.e. Hajj Group Organizers (HGOs). It is also reckoned auxiliary that the additional quota of 5000 pilgrims will be allocated to private sector i.e. enrolled non-quota holder companies with the undertaking that in case the same is withdrawn by the Saudi Government at any stage they will not claim it as their right at any legal or other forums. In the congruent semblance, Part-III of the Hajj Policy-2019, paragraph 16 is germane to Private Hajj Scheme which expounds that the Government of Pakistan's policy of engaging private sector covers various areas including management, logistics and welfare services of Hujjaj. The policy aims to supplement the efforts of the Government by involving private sector. As a matter

of policy, Ministry of Religious Affairs and Interfaith Harmony has proactively encouraged the private sector for Hajj Management since 2005. Whereas Paragraph No.17 of Part-III, tackles and embarks upon the allocation of quota in which the analogous proportion and fraction of 60% quota for Government Hajj Scheme and 40% quota to the private sector is recapitulated with the qualification that allocation of Hajj quota to the private sector shall be made in a transparent manner in accordance with Supreme Court's judgment in Dossani case, whereas Paragraph No. 18 is relatable to general conditions for HGOs such as compulsory Hajj dues including transportation charges, Maktab fee, Mina charges etc. and performance guarantee for new HGOs of the packages including a provision of Service Provider Agreement with HGOs and separate agreement with individual Haji as per previous practice. According to Paragraph No.13 (Hajj Dues), the Hajj package of Government Hajj Scheme for Hajj 2019 is Rs.436,975/- without Qurbani for North Region and Rs.426,975/- for South Region, whereas Hajj Package including Qurbani for North Region is Rs.456,426/- and for South Region Rs.446,426/-. After formulation of Hajj Policy and its approval by the Cabinet, the Hajj Organizers Association of Pakistan (petitioner No.1 in C.P. No.D-2477/2019) submitted different categories of packages for Private Hajj Scheme for the approval of Ministry of Religious Affairs and Interfaith Harmony, Government of Pakistan, Islamabad and at present, the minimum Haj package in the private sector in Maktab "D" Category starts from Rs.500,000/- per pilgrim.

8. It is an admitted position by both the parties that after the judgment in Dossani Travels Pvt. Ltd. and others v. M/s Travels Shop (Pvt) Ltd. and others [PLD 2014 Supreme Court 1], the Hajj Policy is framed in view of the directions contained in the aforementioned judgment of apex court. For the ease of reference, the directions encompasses in paragraph 51 of the judgment are reproduced as under:

51. Before we part with the judgment, we may add that the performance of Hajj is a sacred duty for Muslims. But the quota allocated to Government of Pakistan by the Saudi Government is limited and within that limited quota, it allocates a certain portion to private HGOs. Since several hundred HGOs apply for allocation of quota from the Private Hajj Scheme share as worked out by the MORA, all applicants HGOs cannot be accommodated and the dismay of those who are left out is understandable. We are conscious that the MORA has to take several steps to ensure that travel, accommodation and other arrangements are made to the satisfaction of Hujjaj. It requires a couple, of weeks to complete the exercise. However since Hajj operation is a time bound exercise, arrangements have to be made within that limited time. It is therefore, imperative that the Hajj Policy be framed well in time in such a manner which is fair, just, inspires confidence and evokes minimum criticism. It is also imperative that the Hajj Policy for the next year should be announced at the earliest after the conclusion of Hajj. In these circumstances, we are persuaded to direct as under:

(i) The Hajj Policy should be framed, announced and placed on the website of MORA preferably within six weeks of the arrival of last flight of Hajjis from KSA under intimation to the Registrar of this Court. This of course would be

subject to any policy decision of the Saudi Government regarding allocation of Hajj quota for Pakistan;

- (ii) The Hajj Policy should be framed by a Committee headed by the Secretary, Ministry of Religious Affairs (MORA); a nominee of the Competition Commission of Pakistan; a nominee of the Secretary, Ministry of Foreign Affairs, Government of Pakistan; a nominee of the Secretary Ministry of Law and Justice Division and Parliamentary Affairs; and a nominee of the Attorney General for Pakistan;
- (iii) The credentials of each applicant/HGO should be examined and decision taken on merit;
- (iv) While framing the Hajj Policy, the MORA should be guided, inter alia, by the recommendations made by the Competition Commission of Pakistan to which reference has been made in Para 8 above; and
- (v) The MORA should constantly monitor the working and performance of each HGO during Hajj and this assessment should form basis for further improvements in Hajj Policy for next year's Hajj.

9. The record reflects that a notice was issued on 07.02.2019 to convene seventh meeting of Hajj Policy Formulation Committee on 11.02.2019. The agenda was circulated for discussion i.e. compliance of decisions made in the previous meeting held on 29.01.2019; fixation of percentage of private Hujjaj on the rates equivalent to public sector rates; publishing advertisement for calling applications for new enrollment in compliance of decision of Islamabad High Court and any other item with the permission of the Chair. According to the minutes of seventh meeting of the Hajj Policy Formulation Committee dated 11.02.2019, the meeting was attended by Deputy Attorney General, Islamabad, Director General (Cartel and Trade Abuses). Competition Commission of Pakistan, Islamabad, Deputy Legislative Advisor, Ministry of Law and Justice, Islamabad, Director (GR), Ministry of Foreign Affairs, Islamabad and Secretary, Ministry of Foreign Affairs and Interfaith Harmony (Chairman). The alleged decision on Agenda 1, Clause (iii) is reproduced as under:

"The Ministry may finalize Hajj Packages of private sector in consultation with HOAP for Hajj 2019 for consideration of the committee. The CCP recommendations inter alia include connotation of economy of financial package offered for consideration at the time of allocation of Hajj quota was discussed by the committee. The representative of CCP was of the view that it stands for ensuring value for money which is not possible to determine at the time of allocation of Hajj quota. However, the committee was informed that as a result of series of meetings with HOAP, finally they agreed to provide hajj package @ Government Hajj package to 5% of their Hujjaj which is equivalent to 3584 hujjaj. The committee appreciated it. However, the DAG emphasized that the HGOs may further be persuaded to increase it to at least 10%. [emphasis applied]

10. The above minutes unambiguously put on view that in the meeting no representative of the Private Hajj Sector or their association was present but one-

sidedly it was declared that as a result of series of meetings with HOAP, finally they agreed to provide hajj package @ Government Hajj package to 5% of their Hujjaj from their quota and keeping in mind the alleged agreement a letter was also sent to the Chairman of the petitioner No.1 (C.P. No.D-2477/2019) on 09.04.2019 to submit affidavit by each member of HOAP that each HGO accepts booking of 5% Hujjaj at Government Hajj Package as approved by the Hajj Formulation Committee failing which no recognition for Hajj 2019 letter will be issued to the company concerned. Moreover, on 29.04.2019, another letter was issued to all Chief Executives of Hajj Group Organizers (HGOs) by Section Officer (HGO), Ministry of Religious Affairs and Interfaith Harmony, Government of Pakistan with reference to the earlier letter dated 09.04.2019 for making a provision for 5% Hujjaj at Government Hajj Package by the Private Hajj Organizers for the Hajj-2019. A draft of agreement was also attached with the letter that was to be signed by each HGO as service provider for Hajj-2019. In Clause C (I), a precondition was set down which reads as under:

"The Service Provider shall book Pakistani citizens only having valid machine readable Pakistani passport. Further to ensure economy of financial package as per recommendations of competition commission of Pakistan in Dossani case, each service provider shall book 5% of Hujjaj @ Government Hajj package excluding the ten (10) approved packages failing which hajj quota of the service provider shall be cancelled." [Emphasis applied]

11. On 02.05.2019, the Hajj Organizers Association of Pakistan (HOAP) communicated their objections, distress and discontentment to the Chairman, Competition Commission of Pakistan, Islamabad. On 13.05.2019, the Competition Commission of Pakistan, responded to the Coordinator HOAP. For the ease of reference, the CCP response is reproduced as under:

"Most immediate

13th May, 2019

Coordinator HOAP,
Hajj Organizers Association of Pakistan
Office A2, Block-21, Near
Railway Reservation Office
G-6,
Islamabad.

SUBJECT: Seeking Opinion/Point of view of CCP in light of Certain clauses of SPA.

Dear Sir,

1. I am directed to refer to your letter dated 10th May 2019 on the above mentioned subject wherein comments have been sought from the

Competition Commission of Pakistan ("CCP") on Clause C(I) of the Service Provider Agreement (SPA) which is reproduced hereunder:

- 'Clause C(I) The Service Provider shall book Pakistani citizens only having valid machine readable Pakistani passport. Further to ensure economy of Financial Package as per recommendations of Competition Commission of Pakistan in Dossani Case, each Service Provider shall book 5% Hujjaj @ Government Hajj Package excluding the 10 approved packages failing which Hajj Quota of the Service Provider shall be cancelled'.
2. CCP in its report referred in the Dossani Case had noted economy of financial packages as one of the criteria for allocation of Hajj Quota among Hajj Group Organizers (HGOs). However, as regards the condition for booking 5% Hujjaj at Government Hajj Package, CCP has not expressed any opinion in its abovementioned report or otherwise that this would ensure economy of financial packages.
 3. It is pertinent to mention that under the spirit of competition law the condition of booking 5% Hujjaj at Government Hajj Package by HGOs may lead to price discrimination by charging different prices for the same goods or services from different customers in the absence of objective justifications that may justify different prices. [emphasis applied]

Sincerely,

Sd/-

Muhammad Qasim Khan

Joint Director (Cartels and Trade Abuse)"

12. The Joint Secretary (Litigation) Ministry of Religious Affairs and Interfaith Harmony, Islamabad addressed us that except Hajj Organizers Association of Pakistan (Sindh Zone), no other Hajj Organizers Association of Pakistan for other provinces raised any issue. Quite the opposite, the learned counsel for the petitioners pointed out us a letter of Hajj Organizers Association of Pakistan (HOAP), Punjab dated 03.05.2019 penned down to the Vice Chairman, HOAP Sindh Zone in which HOAP Punjab Zone shown serious reservation to the condition in issue and fully supported these petitions being stakeholder and waiting for the decision of the aforesaid petitions. Similarly Hajj Organizers Association of Pakistan (HOAP) Khyber Pakhtunkhwa (KPK) vide letter dated 03.05.2019 to the Vice Chairman, HOAP, Sindh Zone also communicated their reservation on the condition of 5% booking of Hujjaj at Government package by the private sector and they also communicated their disagreement to the above condition and also supported the case of the present petitioners. So in our considerate view the position taken by the respondents that except HOAP Sindh Zone, other HOAP Zones are comfortable and agreeable to the impugned condition is misconceived and misguided on the contrary, they have vigorously and robustly opposed the impugned condition like HOAP Sindh Zone.

13. It is also inexplicable to note that two minutes of tenth meeting of Hajj Policy Formulation Committee convened on 26.04.2019 are accessible on record. In one minute signed by Masood Gul, Director (GR), Ministry of Foreign Affairs,

Islamabad in paragraph (5) only three Clauses (i), (ii) and (iii) are available without any condition of reserving 5% quota in the private Hajj sector quota equivalent to Government Hajj Package, whereas in another minutes of meeting signed by some members in the same paragraph (5) the condition (iv) was added that 5% Hujjaj to be accompanied against the Government rate with the same facility should be applied on all the private companies including whom additional quota would be allotted.

14. In the Dossani case judgment, the apex court in paragraph No.52, held that it is not the function of High Court exercising jurisdiction under Article 199 of the Constitution to interfere in the policy making domain of the executive but in the same paragraph it was further held that the High Court can under Article 199 of the Constitution annul an order or a Policy framed by the Executive, if it is violative of the Constitution, law or is product of mala fides. In both the petitions it is translucent that the petitioners have not invoked and entreated the jurisdiction of this court to challenge the Hajj Policy-2019 rather they profusely accepted it in letter and spirit and also assented to the allocation of quota granted to Private Hajj Sector according to Hajj Policy with 60:40 ratio. The bone of contention is an impugned condition imposed by the Hajj Formulation Committee on the alleged tacit approval/acceptance of Hajj Organizers Association of Pakistan (HOAP) whereby the Hajj Formulation Committee is compelling and forcing all Private Hajj Operators to accept the impugned condition which is absolutely foreign and distant to the Hajj Policy-2019. In reality or as a matter of fact the impugned condition tantamounts to an indirect curtailment and reduction in Private Hajj Operators' quota from 40% to 35% which the Hajj Formulation Committee has no jurisdiction after approval of Federal Cabinet. Had the Hajj Formulation Committee any intention to curtail the quota, they could have reviewed at the time of formulation of Hajj Policy-2019 subject to the approval of Federal Cabinet. Nothing has been placed on record to decipher that anything was submitted by the Hajj Organizers Association of Pakistan (HOAP) in writing showing their agreement with the impugned provision. Despite providing ample opportunity on the request of learned D.A.G., nothing was produced to show any agreement of HOAP in writing, however, in the counter affidavit it is stated by the respondents that agreement of Hajj Organizers Association of Pakistan (HOAP) in this regard in the meeting held on 02.02.2019 was in tacit form and not in writing which is self-explanatory that nothing was documented to show the consensus of Hajj Organizers Association of Pakistan (HOAP). Rather the minutes of meetings dated 15.04.2019 and 19.04.2019 signed by Section Officer (HGO), Ministry of Religious Affairs and Interfaith Harmony, Government of Pakistan demonstrate that the representative of HOAP expressed reservations regarding the booking of 5% Hujjaj by private sector at Government Hajj packages. At this juncture, we would like to survey the word "tacit" actually meant for:

Tacit. Understood or implied without being stated, (tacit consent), tacitly adverb (Latin tacitus "silent" from tacere "be silent"). The Concise Oxford Dictionary. Ninth Edition.

Tacit. Unspoken; understood or implied without being expressed directly: silent. (L tacitus silent, unspoken, unspeakable, from tacere to be spoken to be

silent). The Chambers Dictionary, 10th Edition

If you refer to someone's tacit agreement or approval, you mean they are agreeing to something or approving it without actually saying so, often because they are unwilling to admit to doing so. <<https://www.collinsdictionary.com/dictionary/english/tacit.>>

Adjective allusive, assumed, connoted, implicit, implied, indicated, inferential, inferred, not openly expressed, silent, suggested, symbolized, tacitus, taken for granted, undeclared, understood, unexpressed, unpronounced, unsaid, unspoken, unstated, untold, unvoiced, wordless. Associated concepts: tacit approval, tacit consent Implied, inferred, understood without being expressly stated. Tacit refers to something done or made in silence, as in a tacit agreement. A tacit understanding is manifested by the fact that no contradiction or objection is made and is thus inferred from the situation and the circumstances.<<https://legal-dictionary.thefreedictionary.com/tacit>>

Expressed or carried on without words or speech the blush was a tacit answer. implied or indicated (as by an act or by silence) but not actually expressed tacit consent tacit admission of guilt. <https://www.merriam-webster.com/dictionary/tacit>

15. To repudiate and controvert the plea of tacit approval, the Chairman, Hajj Organizers' Association of Pakistan (Central) submitted his personal affidavit in this court which reads as under:-

"AFFIDAVIT FOR SUBMISSION BEFORE HONORABLE HIGH COURT OF SINDH AT KARACHI IN C.Ps. Nos.D-2477/2019 AND 2936/2019

I, Muhammad Waheed Iqbal Butt Muslim, Adult, Resident of Islamabad hereby state on solemn oath as under:

1. I was elected as Chairman, Hajj Organizers' Association of Pakistan (Central) for 1 year and am serving the Association from September, 2018 till September, 2019.
2. I hereby state that HOAP (Central) never agreed to the condition regarding booking of 5% Hujjaj at government Hajj Package Rate. As a matter of fact, HOAP (Central) has raised its objections to the said condition in its meeting with the representatives of Ministry of Religious Affairs and Interfaith Harmony conducted on 15.04.2019 and 19.04.2019 as duly reflected in the Minutes of Meeting prepared by MORA itself. (Copy of Minutes enclosed)
3. Furthermore, HOAP (Central) communicated its objections to the said condition vide its Letter dated 29.04.2019 addressed to Ministry of Religious Affairs and Interfaith Harmony. (Copy of Letter dated 29.04.2019 enclosed).
4. Moreover, HOAP (Central) also communicated its objections to Competition Commission of Pakistan and sought its opinion vide Letter dated 02.05.2019

and the CCP responded to such letter vide its Reply dated 13.05.2019. (Copies of Letter dated 02.05.2019 and Reply of CCP enclosed)

5. It would also be pertinent to mention here that the HOAP (Central) cannot accept such a condition in isolation and the approval and consent of all 5 zones is required for taking any decision. It is clear that apart from the objections of HOAP (Central) the respective zones have also raised their objections to such a condition and HOAP (Sindh Zone) and its members have already filed the instant Petition which is fully supported by HOAP (Central) and other zones.

Sd/-

Muhammad Waheed Iqbal Butt"

16. In our understanding, after approval of Hajj Policy-2019 by the Federal Cabinet, the Hajj Formulation Committee may implement and execute the policy but they cannot make additions or alterations which is only the prerogative of the Federal Cabinet. In view of the well-written circulated Hajj Policy-2019, there is no room or space for the Hajj Formulation Committee to take any departure. Rather their function is to implement the Hajj Policy in its letter and spirit. The learned D.A.G. referred to Clause (VII) of paragraph 18 of Hajj Policy-2019 which germane to general conditions for HGOs which is reproduced as under:

"Each HGO will strictly abide by the instructions/ guidelines/SOPs/SPA issued by the Ministry of Religious Affairs and Interfaith Harmony, Government of Pakistan and Ministry of Hajj, KSA, from time to time."

An austere analysis of the above clause makes it obvious that the intention of integrating this clause in general conditions to be followed by HGOs is to ensure the terms and conditions of Hajj Policy but this does not mean in its resonant interpretation that under the garb of this general clause, the impugned condition can be imposed beyond the circumference of Hajj Policy-2019. All the more so, the Competition Commission of Pakistan also in the letter noticeably avowed that under the spirit of competition law the condition of booking 5% Hujjaj at Government Hajj Package by HGOs may lead to price discrimination by charging different prices for the same goods or services from different customers in the absence of objective justifications that may justify different prices.

17. In the Dossani Travels case (supra), the apex court held that by qualifying the right to business and trade, the Constitution makers wanted to create a balance between the societal needs and the rights of an individual. One of the seminal principles of the Constitution of Islamic Republic of Pakistan is the concept of trichotomy of powers between the Legislature, Executive and the Judiciary. This principle underpins the rationale that framing of a government policy is to be undertaken by the Executive which is in a better position to decide on account of its mandate, experience, wisdom and sagacity which are acquired through diverse skills. The judiciary on the other hand, is entrusted with the task of interpreting the law and to play the role of an arbiter in cases of disputes between the individuals inter se and between individual and the State. In contemporary age, there has been a significant growth in the judicial review of administrative actions and the grounds

on which the Courts interfere have been expanded. This expansion, however, has taken place in the shadow of competing concerns of 'vigilance' and , 'restraint' and it is faithfulness to these dual concerns of vigilance and restraint which produces the unique supervisory jurisdiction which is the hallmark of judicial review. If the Courts fail to maintain this delicate balance, none else but people's confidence in the judiciary would be the worst victim. As aptly observed by Radford. One of the principal aims of a system of judicial review must be to maintain a high level of public confidence in the administrative decision making process and this must also be borne in mind in assessing the level of judicial intervention which is desirable. With reference to the case of Dr. Akhtar Hassan Khan, the apex court reiterated the parameters of judicial review with another reference of Tata Cellular v. Union of India (36(1994) 6 SCC 651) in which the Supreme Court of India while dilating the parameters of judicial review in matters of awarding of contract by the Government candidly laid down that the duty of the court is to confine itself to the question of legality. Its concern should be, whether a decision-making authority exceeded its powers; committed an error of law; committed a breach of the rules of natural justice; reached a decision which no reasonable tribunal would have reached or abused its powers. The grounds upon which an administrative action is subject to control by judicial review can be classified as illegality, this means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it; irrationality, namely, Wednesbury unreasonableness and procedural impropriety.

18. Fundamentally the Judicial review is a court's regimen and command to review the legislative and executive actions to maintain and sustain the rule of law. High Courts by means of writs of habeas corpus, mandamus, certiorari, prohibition and quo warranto control the administrative actions. Under the dominion of Judicial review, the court reviews the lawfulness of a decision or action made by a public body. In fact this is a process under which executive or legislative actions may be subject to review by the judiciary. The court may invalidate laws, acts and governmental actions that are incompatible with a higher authority more so, an executive decision may be invalidated for being unlawful and also maintains check and balance. Judicial review is an audit and taking stock of legality of decision made by public bodies likewise all corpuses exercising functions of a public law nature are susceptible to challenge. Judicial review can be sought on the grounds that a decision arises when a decision-maker misdirects itself in law, exercises a power wrongly, or improperly purports to exercise a power that it does not have, which is known as acting ultra vires; a decision may be challenged as unreasonable if it is so unreasonable that no reasonable authority could ever have come to it; a failure to observe statutory procedures or natural justice; or in breach of legitimate expectation, either procedural or substantive. <<https://www.out-law.com/judicial-review/>>. Justice Fazal Karim, former judge, Supreme Court of Pakistan in his paper on "judicial review of administrative action" <<http://www.supremecourt.gov.pk/jc/Articles/pdf.>> referred to James Madison, as father of the American Constitution, who identified the dilemma of constitutionalism, how to empower the government sufficiently for its tasks and at the same time, how to limit it from overreaching the individual. He described this most elegantly in Federal Paper No. 51. After observing that the partition of power among the several

departments of the government was necessary as a means of keeping each other in proper places, Madison observed it may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal control on government would be necessary. In framing a government which is to be administered by men over men, the greatest difficulty lies in this, you must first enable the government to control the governed and in the next place oblige it to control itself. The learned author also referred to case of *Marbury v. Madison*, the Chief Justice John Marshall first asserted the power of Judicial Review, and thereby as Earl Warren Chief Justice has put it, rooted this fundamental principle in American constitutional law. Ever since *Marbury v. Madison*, this principle of Judicial Review has become part and parcel of all constitutional systems, having written constitutions, including those on the Westminster model, such as Pakistan, Australia, Jamaica and Srilanka. Judicial Review has been described as judicial power in action; it has also been described as the practical aspect of the rule of law; Judicial power is the power of courts to administer justice in accordance with the law. Justice means many things; it is a single spectrum comprised to many colors, but its best definition, for our purposes is that provided by the Greek philosophers, including Plato and Aristotle. They thought-originally on grounds derived from religion that each thing or person has its proper sphere to overstep which is unjust. This is precisely what the power of Judicial Review is. The court's function, in exercising that power, is to ensure that the public authorities do not act unjustly by overstepping their proper sphere. Thus when an administrative authority takes an action under a law, the question can be whether he has exceeded or abused the power conferred by the law and has therefore acted *ultra vires*; the question can also be whether the law giving him the power to act is constitutionally valid. In the field of Judicial Review, the word "lawful" has acquired a technical meaning; when it is said that a person has acted unlawfully, it means that he has acted outside the powers conferred on him by law; and when the question is of the validity of an administrative action, the only question the court asks is: Has the decision maker exceeded his statutory powers, thus acting *ultra vires* and therefore unlawfully. In the case of *Tariq Aziz-ud-Din, Human Rights Cases Nos. 8340, 9504-G, 13936-G, 13635-P and 14306-G to 14309-G of 2009*, decided on 28th April, 2010. (2011 PLC (C.S.) 1130), the apex court held that action must be based on fair, open and just consideration to decide matters more particularly when such powers are to be exercised on discretion. Discretion is to be exercised according to rational reasons which means that, there be finding of primary facts based on good evidence; and decisions about facts be made for reasons which serve the purpose of statute in an intelligible and reasonable manner. All judicial, quasi-judicial and administrative authorities must exercise power in reasonable manner and also must ensure justice as per spirit of law and instruments regarding exercise of discretion. Ref: *Delhi Transport Corporation v. D.T.C. Mazdoor Congress* AIR 1991 SC 101 and *Mansukhlal Vithaldas Chauhan v. State of Gujarat* 1997(7) SCC 622. Object of good governance cannot be achieved by exercising discretionary powers unreasonably or arbitrarily and without application, of mind. Such objective can be achieved by following rules of justness, fairness and openness in consonance with command of

Constitution enshrined in different Articles including Articles 4 and 25 of the Constitution.

19. A short time ago in the case of Ms. Saba v. Province of Sindh and others (C.P.No.D-2650/2019), (authored by one of us Muhammad Ali Mazhar), the same bench while dilating "Wednesbury" case principle, held that a standard of unreasonableness used in assessing an application for judicial review means a reasoning or decision so unreasonable that no reasonable person acting reasonably could have made it. (<https://uk.practicallaw.thomsonreuters.com>.) In the test of proportionality, the courts may quash exercise of discretionary powers in which there is no reasonable relation between the objective which is sought to be achieved and the means used to that end, or where punishments imposed by administrative bodies or inferior courts are wholly out of proportion to the relevant misconduct. So the administrative action which arbitrarily discriminates will be quashed by the court. The implication of the principle of proportionality is that the court will weigh for itself the advantages and disadvantages of an administrative action and such an action will be upheld as valid if and only if the balance is advantageous. If this action is disproportionate to the mischief then it will be quashed. The source and origin of "Wednesbury" principle is a judicial verdict in the case of Associated Provincial Picture Houses Ltd v. Wednesbury Corporation (1948) 1 KB 223 that was also discussed by the Supreme Court of India in Civil Appeals Nos. 5675-5677/2007, Chairman, All India Railway Rec. Board v. K. Shyam Kumar and others in the following terms:

"Wednesbury and Proportionality.

36. Wednesbury applies to a decision which is so reprehensible in its defiance of logic or of accepted moral or ethical standards that no sensible person who had applied his mind to the issue to be decided could have arrived at it. Proportionality as a legal test is capable of being more precise and fastidious than a reasonableness test as well as requiring a more intrusive review of a decision made by a public authority which requires the courts to 'assess the balance or equation' struck by the decision maker. Proportionality test in some jurisdictions is also described as the "least injurious means" or "minimal impairment" test so as to safeguard fundamental rights of citizens and to ensure a fair balance between individual rights and public interest. Suffice it to say that there has been an overlapping of all these tests in its content and structure, it is difficult to compartmentalize or lay down a straight jacket formula and to say that Wednesbury has met with its death knell is too tall a statement. Let us, however, recognize the fact that the current trend seems to favour proportionality test but Wednesbury has not met with its judicial burial and a state burial, with full honours is surely not to happen in the near future.
37. Proportionality, requires the Court to judge whether action taken was really needed as well as whether it was within the range of courses of action which could reasonably be followed. Proportionality is more concerned with the aims and intention of the decision-maker and whether the decision-maker has achieved more or less the correct balance or equilibrium. The Court

entrusted with the task of judicial review has to examine whether decision taken by the authority is proportionate, i.e. well balanced and harmonious, to this extent court may indulge in a merit review and if the court finds that the decision is proportionate, it seldom interferes with the decision taken and if it finds that the decision is disproportionate i.e. if the court feels that it is not well balanced or harmonious and does not stand to reason it may tend to interfere".

20. Recently, our Supreme Court in the case of Sabir Iqbal v. Cantonment Board, Peshawar [PLD 2019 Supreme Court 189] held as under:

"5. There is yet another dimension of the case. The court can examine and judicially review the executive discretion exercised by the authorized officer on the ground of proportionality. Alongside reasonableness, proportionality is now a central standard directing the action of the executive branch. The point of departure is that a disproportionate act that infringes upon a human right is an illegal act. The court, which guards the legality of the acts of the executive branch, performs judicial review over these acts and examines whether they fulfill the tests of proportionality. Proportionality is a standard that examines the relationship between the objective the executive branch wishes to achieve, which has the potential of infringing upon a human right, and the means it has chosen in order to achieve that infringing objective. The fiduciary duty, from which the administrative duty of fairness and administrative reasonableness are derived, demands administrative proportionality as well.² "The courts will quash exercises of discretionary powers in which there is not a reasonable relationship between the objective which is sought to be achieved and the means used to that end, or where punishments imposed by administrative bodies or inferior courts are wholly out of proportion to the relevant misconduct³. An administrative measure must not be more drastic than necessary or to sum up in a phrase - not taking a sledgehammer to crack a nut⁴. According to De Smith's Judicial Review⁵, the standards of proportionality and unreasonableness are inextricably intertwined. Unreasonableness contains two elements of proportionality when it requires the weight of relevant considerations to be fairly balanced and when it forbids unduly oppressive decisions. Under the first element, proportionality is a test requiring the decision-maker to maintain a fair balance. Under this category the courts evaluate whether manifestly disproportionate weight has been attached to one or other considerations relevant to the decision. The second element is that the courts consider whether there has been a disproportionate interference with the claimants rights or interests. A more sophisticated version of proportionality provides for a structured test. Here the courts ask first whether the measure, which is being challenged, is suitable to attaining the identified ends (the test of suitability). Suitability here includes the notion of "rational connection" between the means and ends. The next step asks whether the measure is necessary and whether a less restrictive or onerous method could have been

adopted (the test of necessity - requiring minimum impairment of the rights or interest in question).

2. A. Barak, The Judge in a Democracy, Princeton, p.255.
3. Halsbury's Laws of England, Vol. 1(1), 4th Edn. Para. 78.
4. Administrative Law by H.W.R. Wade and C.F. Forsyth, 11th Edn. P.306.
5. 8th Edn, Sweet and Maxwell. Pp.636-641 " .

21. Hajj is sacred religious duty. During Hajj millions of Muslims leave behind all disparities of race, caste, economic status, nationality, and sect to unite in the holy pilgrimage but it is seen every so often that some disputes are cropped up on Hajj Policy each year between the Ministry of Religious Affairs and private HGOs. Fortunately, this time there is no dispute on Hajj Policy or ratio of quota but Hajj Formulation Committee, (more loyal than the king) superfluously added a condition one-sidedly which is wholly unjust, unfair and without jurisdiction. Nothing produced before us which may amount to any tacit approval on the contrary, the affidavit of chairman and letters written by HOAP Punjab and KPK Zones are self-explanatory. On one hand, paragraph 16 of Hajj Policy (Private Hajj Scheme) encapsulates our Government policy of engaging private sector in various areas including management, logistics and welfare services of Hujjaj which policy aims to supplement the efforts of the Government by involving private sector and as a matter of policy, Ministry of Religious Affairs and Interfaith Harmony proactively encouraged the private sector for Hajj Management since 2005 but on the other hand, the Hajj Formulation Committee imposed an unreasonable, disproportion and inconsistent condition which is not only beyond the framework and constituents of Hajj Policy 2019 but tantamount an indirect reduction in HGOs quota. Moreover, the response of CCP also melt down that as regards the condition for booking 5% Hujjaj at Government Hajj Package, CCP has not expressed any opinion in its abovementioned report or otherwise that this would ensure economy of financial packages. They further figure out that under the spirit of competition law the condition of booking 5% Hujjaj at Government Hajj Package by HGOs may lead to price discrimination by charging different prices for the same goods or services from different customers in the absence of objective justifications that may justify different prices. The response of CCP is quite logical and commonsensical and we endorse their viewpoint.

22. As a result of above discussion, the impugned condition inflicted by the respondent No.1 vide letter 09.04.2019 is set aside henceforth all correspondence and directions issued by Respondent No.1 for the compliance of the impugned condition are declared to be inconsequential. The petitions are allowed in the above terms and pending applications are also disposed of accordingly.

MH/H-23/Sindh Petitions allowe

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