

RIGHT TO EDUCATION AS ANOTHER LICENSE RAJ¹

Punjab as a case study

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INTRODUCTION

Before the Right of Children to Free and Compulsory Education Act, 2009 ('RTE'), most states under their state education Acts, allowed unrecognized schools to exist and provide education. With the 2009 Act coming into force, under the provisions of Section 18 and 19 read with state rules thereof, it was incumbent upon every private school to apply for recognition from such authority as was prescribed under the purview of said Act. In this manner RTE mandates a certificate of recognition for all private schools. The certificate of recognition requires compliance with minimum infrastructure, i.e. toilets, drinking water, pupil-teacher ratio, no. of working days and most importantly weather-proof building. There is no mention of learning outcomes. Additionally, by-laws and rules made by the states under RTE or the respective state education Act mandate a minimum plot area failing which schools may not be recognised.

These norms may impact around 30,000 private schools across India. In garb of these provisions, the State Government shut down 931 private schools in Punjab. (Lewis, 2014) Further, 219 private schools in Punjab have been shut down vide order dated 20.08.2013 passed in a matter entitled *Balraj Singh v State of Punjab* CWP 7388 of 2010 (O & M) by a Division Bench of High Court of Punjab and Haryana at Chandigarh because of non-compliance with Sections 18 and 19 of the RTE Act read with Rule 11 & 12 of the Punjab RTE Rules. More than 1300 private schools in Haryana have been also been sent closure notices by the State Government (Siwach, 2013). This translates to displacing around half a million children from the schools of their choice. Further, in most school closure cases in Punjab as well as in Haryana, due process as prescribed in S.18 and 19 has not been followed.

¹ Based on the working paper presented at National Conference for Law and Justice-2014, Auro University, Surat which was awarded as the Best Paper (professional category).

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On the basis of legal and constitutional grounds as well as data from secondary sources pertaining to Punjab, this paper argues that the current wording and enforcement of S.18 and S.19 goes against the spirit and objective of the constitutional right to education and the RTE Act 2009. Being selective and discriminatory, the enforcement targets private schools only and penalizes them for inadequate compliance with necessary-but-not-sufficient norms. The paper further argues that S.18, 19 and the Schedule of RTE Act must be amended on the lines of Gujarat Rules to become output-focused, applicable and enforceable to both private as well as government schools and certification-based rather than licensure-based. The paper provides a draft amendment to achieve the said objectives.

The methodology is doctrinal and the arguments are based on secondary sources. Chapter one examines the constitutionality of S.18, 19 and the Schedule of RTE Act and argues that these sections can be constitutionally challenged for being discriminatory, unreasonable, detrimental to public interest, disproportionately restrictive, arbitrary, contrary to objectives of the parent Act and Article 21A of the Constitution of India. Chapter two examines a high court judgment on the issue. Chapter three proposes an amendment and provides a draft for amending S.19 of the Act.

I. CONSTITUTIONALITY OF S.18 AND 19

S.18, 19 and the Schedule of RTE Act can be constitutionally challenged on the following grounds: (a) these are discriminatory as those enforce recognition norms selectively against private schools only and exempt government schools; (b) they impose unreasonable licensure-based recognition criteria upon private unaided unrecognized schools infringing their autonomy and leading to adverse consequences detrimental to public interest; (c) they impose excessive and harsh penalties for non compliance that are disproportionately restrictive; (d) the Schedule is arbitrary and unreasonable as it gives 100% weightage to input norms and not to learning outcomes for the purposes of school recognition; therefore it lacks any intelligible differentia and has no rational nexus to the object sought to be achieved by the Act; (e) shutting down private schools and forcing economically weaker children to study in neighbourhood government schools is in violation of Article 21 and Article 21-A of the Constitution of India.

A. Selective enforcement of norms

The selective application and enforcement of recognition procedures with only private schools and not with government schools results in discrimination between the children studying in private schools vis-à-vis the children studying in government schools and hence violates Article 14 of the Constitution of India.

The Ministry of Law and Justice vide Corrigendum dated 27.04.2010 made a correction by way of deletion of a comma in section 19. The content of the corrigendum is reproduced herein below:

"In the Right of Children to Free and Compulsory Education Act, 2009 (35 of 2009), published in the Gazette of India, Extraordinary, Part II, section 1, dated the 27th August, 2009 (issue No. 39), at page 7, in line 15, for "established or recognized, under", read "established, or recognized under".

Aforementioned corrigendum was communicated to all State/ UTs Education Secretaries vide an office Memorandum dated 9.06.2010. As per the document entitled 'Section-wise Rationale of RTE Act' published by Ministry of Human Resource Development, norms and standards are applicable to both Government schools and private schools. Relevant portion of the said documents is reproduced below for ready reference:

"Section 18 stipulates that no private school should be established or can function without obtaining a Certificate of Recognition, and that such Certificate of Recognition would be issued to schools that fulfill the prescribed norms and standards. The Act does not have a provision for recognition of Government schools, since that would amount to Government giving recognition to its own schools, however section 19 clearly states that Government schools must meet the requirements of the schedule. Section 19 lays down the norms and standards for schools. Any school, whether Government or private that does not fulfill the prescribed norms and standards shall do so within a period of three years from the date of commencement of the proposed Act.

There appears to be a misconception that Government schools do not require to meet the norms and standards prescribed under the Act on account of a wrong insertion of a comma in the RTE Bill when it was introduced in Parliament. This has since been corrected and the provision for meeting norms and standards is applicable to all schools, ensuring that these schools also meet the norms prescribed will be monitored by the NCPCR."

By abundant caution, the government clarified the misconception that provision for meeting norms and standards does not apply to the government and therefore, it is amply clear now that the norms and standards as stated in the Schedule are equally applicable to all schools - private schools as well as public schools.

In September 2012, National University of Educational Planning and Administration in association with Department of School Education and Literacy published a report entitled 'Elementary Education in India: Progress towards UEE' under the District Information System for Education on school infrastructure. (DISE, 2012). It is pertinent to mention that according to DISE statistics, many of the government schools in

Punjab are non-compliant with the RTE norms and standards. Some of the Highlights of the Reports regarding government schools of the Government of Punjab, are as follows:

- More than 23% government primary schools have Student-Classroom ratio > 30 in 2012-13.
- Almost 30% government upper primary schools have student classroom ratio > 35 in 2012-13.
- 28% primary government schools have a Pupil Teacher Ratio (PTR) greater than the required 30 in 2012-13.
- 4.69% upper primary government schools have a PTR above 35 in 2012-13.
- As many as 2,278 (11.27%) government schools do not have libraries.
- Over 6,384 government schools do not have boys toilets and 3,664 schools do not have girls toilets.
- 1,010 (5%) government schools do not have a boundary wall.

The plight of government schools has not really changed in the past one year, and no government authority is monitoring to check the compliance of these norms and rules by the Government. It has been reported in the media that 1,042 government school buildings in Punjab are unsafe, 22% of government schools have no desks and 27% of government schools have a classroom deficit. (Dainak Sawera, 2013).

Certain single teacher government schools have a Pupil-Teacher ratio of more than 100, making it impossible for any quality teaching to take place. (Dainak Sawera, 2013) According to another media report, for 45,119 government primary students in Patiala, only 7,401 benches are available. 155 schools out of 470 schools in Patiala do not have any furniture for the students to sit on and they are made to sit on the ground in bone-chilling weather. (Grewal 2013). Further, of the 1.5 lakh-sanctioned posts, 29,006 have been lying vacant and these include posts of Principals and Headmasters (Bariana, 2013).

The RTE Act also delegated functions to statutory authorities such as the National Commission for Protection of Child Rights and State Commissions for Protection of Child Rights in the states, to examine and review the safeguards for the child's rights.³ Furthermore, the Act also provides for the constitution of

³ 31. Monitoring of child's right to education-

(1) The National Commission for Protection of Child Rights constituted Under Section 3, or, as the case may be, the State Commission for Protection of Child Rights constituted Under Section 17, of the Commissions for Protection of Child Rights Act, 2005, shall, in addition to the functions assigned to them under that Act, also perform the following functions, namely:-

(a) Examine and review the safeguards for rights provided by or under this Act and recommend measures for their effective implementation;

(b) Inquire into complaints relating to child's right to free and compulsory education; and

(c) Take necessary steps as provided Under Sections 15 and 24 of the said Commissions for Protection of Child Rights Act.

the National Advisory Council and State Advisory Council in order to recommend measures for the effective implementation of the Provisions of the Act.⁴ In the Landmark Judgment of *Society for Unaided Private Schools of Rajasthan v. Union of India and Anr.* (2012) 6 SCC 1, Hon'ble Apex Court while upholding the validity of the RTE Act, 2009 gave following directions:

In exercise of the powers conferred upon the appropriate Government under Section 38 of the RTE Act, the Government shall frame rules for carrying out the purposes of this Act and in particular, the matters stated under Sub-section (2) of Section 38 of the RTE Act.

- i. The directions, guidelines and rules shall be framed by the Central Government, appropriate Government and/or such other competent authority under the provisions of the RTE Act, as expeditiously as possible and, in any case, not later than six months from the date of pronouncement of this Judgment.
- ii. All the State Governments which have not constituted the State Advisory Council in terms of Section 34 of the RTE Act shall so constitute the Council within three months from today. The Council so constituted shall undertake its requisite functions in accordance with the provisions of Section 34 of the Act.
- iii. Central Government and State Governments may set up a proper Regulatory Authority for supervision and effective functioning of the Act and its Implementation.

The Hon'ble Supreme Court, therefore, directed the Central Government, the appropriate State Governments and other competent authorities functioning under the RTE Act to issue proper directions/guidelines for its full implementation within a period of six months from the date of the pronouncement of that judgment. This Court also directed all the State Governments to constitute a State Advisory Council within three months from the date of that judgment. Advisory Councils so constituted were directed to discharge their functions in accordance with the provision of Section 34 of the RTE Act and advise the Government. The necessity of constituting a proper Regulatory Authority for effective functioning of the RTE Act and its implementation was also highlighted.

(2) The said Commissions shall, while inquiring into any matters relating to child's right to free and compulsory education under Clause (c) of Sub-section (1), have the same powers as assigned to them respectively Under Sections 14 and 24 of the said Commissions for Protection of Child Rights Act.

(3) Where the State Commission for Protection of Child Rights has not been constituted in a State, the appropriate Government may, for the purpose of performing the functions specified in Clauses (a) to (c) of Sub-section (1), constitute such authority, in such manner and subject to such terms and conditions, as may be prescribed.

⁴ Section 34: Constitution of State Advisory Council

- (1) The State Government shall constitute, by notification, a State Advisory Council consisting of such number of Members, not exceeding fifteen, as the State Government may deem necessary, to be appointed from amongst persons having knowledge and practical experience in the field of elementary education and child development.
- (2) The functions of State Advisory Council shall be to advise the State Government on Implementation of the provisions of the Act in an effective manner.

The allowances and other terms and conditions of appointment of members of the State Advisory Council shall be such as may be prescribed.

The State Commission for Protection of Child Rights for the State of Punjab, was constituted vide Notification No. 5/1/2006-1SS/916, dated 15/04/2011, whereas the Fifteen Member State Advisory Committee u/s 34 of 2009 Act was constituted vide Notification No. 2/4/2010-2Ed7/3344-63 dated 14/06/2010. It is pertinent to mention here that, as per the news reports, the first and only meeting of the Committee was held on 12/10/2010 i.e. almost after three years of the constitution of the committee, which shows their failure to carry out their duties under the Act and Rules (5 Dariya News, 2013). After the perusal of the DISE reports and aforementioned news reports, it is apparent that SCPCR and State Advisory Council miserably failed in their duties for proper enforcement and implementation of the Act and Rules. The Norms and standards as enlisted in the Schedule and penalties as contained in S.19 of the RTE Act, 2009 have been selectively enforced against private schools only, whereas S.18-19 and the schedule to RTE Act, 2009 are equally applicable to government schools as well. The situation is very unfortunate as far as the learning outcomes are concerned. As per the latest ASER report, almost half the children in Std. III in government schools cannot read Std. I level text where as more than two-third of private school children in Std. III can read Std I text. 57% of Std. III children in government schools cannot do basic subtraction whereas more than 68% Std. III private school children can do that.

B. Unreasonable licensing: detrimental to public interest

S.18, S.19 and the schedule of RTE Act along with Rule 11 and Rule 12 of the Punjab Right of Children To Free & Compulsory Education Rules, 2011 impose unreasonable licensure-based recognition criteria upon private, unaided, unrecognized schools infringing on their autonomy and leading to adverse consequences detrimental to public interest and hence violate Article 19(1)(g) of the Constitution of India.

The Hon'ble Supreme Court has rightly held in *TMA Pai Foundation v. State of Karnataka* reported in **(2002) 8 SCC 481** that so far as private, unaided educational institutions are concerned, maximum autonomy has to be with the management with regard to administration, including the right to appointment, disciplinary powers, admission of students, the fee to be charged, etc. and that the authority granting recognition or affiliation can certainly lay down conditions for the grant of recognition or affiliation but those conditions must pertain broadly to academic and educational matters and the welfare of students and teachers. The Hon'ble Supreme Court held that the right to establish an educational institution can be regulated but such regulatory measures must be, in general, to ensure proper academic standards, atmosphere and infrastructure and prevention of maladministration. The necessity of starting more quality private, unaided educational institutions in the interest of the general public was also emphasized by the Hon'ble Apex Court by ensuring autonomy and non-regulation in the school

administration, admission of students and fee to be charged. The relevant paragraph (at page 549) from *Pai Foundation* Judgment (Per Kirpal, C. J.; for himself and Pattnaik, Rajendra Babu, Balkrishnan, Venkatrama Reddi and Pasayat, JJ.) is reproduced below for ready reference:

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

It is submitted that the aforementioned paragraph was quoted and reiterated by Radhkrishnan, J. in his dissenting judgment in *Society for Unaided Private Schools of Rajasthan v Union of India* reported in **(2012) 6 SCC 1**. The aforementioned observations as pronounced by the eleven judge bench in the *Pai Foundation* case are still binding and could not have been overruled by the majority judgment in *Society for Unaided Private Schools of Rajasthan v. Union of India*. The constitutional principles laid down in *Pai Foundation* on Articles 19(1)(g), so far as unaided private educational institutions are concerned, cannot be overlooked and Article 21-A, S.18 and S.19 have to be tested in light of those constitutional principles laid down by *Pai Foundation* and *Inamdar* because *Unnikrishnan* was the basis for the introduction of the proposed Article 21-A and the deletion of clause (3) from that Article. Interpretation given by the Courts to any Constitutional provision gets inbuilt in the provision interpreted (Article 19(1)(g) in this case).

S.18 and S.19 of RTE Act, 2009 will impose a massive financial burden on the private budget schools to comply with infrastructure related norms and standards within a period of three years from the date of such commencement. This burden will either make the schools unaffordable for low income families, result in their shutdown or will lead to corruption. The aforementioned sections mandate certain arbitrary and unreasonable input norms thereby either exponentially raising the cost of providing education or making education unaffordable for children belonging to low-income groups studying in private budget schools. The aforementioned input norms are unfeasible to the degree of being prohibitive in effect, thus making education unaffordable for children belonging to low-income groups. Moreover, some input norms such as all-weather building for schools located in low-income residential areas may be impossible to achieve.

The aforementioned norms and standards seek to micro-manage the day-to-day affairs of private schools and thus, violate the autonomy of private, unaided, non-minority schools guaranteed to them under Article 19(1)(g). The recognition criteria imposed by RTE Act is a distorted form of excessively restrictive

license-permit raj. Such excessive regulatory frameworks have been done away with in other sectors such as telecom, aviation and insurance but education has been even more tightly regulated without any basis in rationality. These stringent recognition criteria and penalties will make entry tough and create operational barriers for new schools to start and small schools to sustain themselves, which will lead to a shortage of private schools. It is submitted that private schools are already lesser in number compared to government schools, yet the demand for private schools is high due to the better quality of learning outcomes provided by private schools. However, with such stringent recognition norms, it will be very difficult for new private schools to come up and sustain themselves and consequently, there would be lesser choice for parents to decide which school their child goes to.

Despite less restrictive alternatives to achieve the same regulatory goals, S.18, S.19 and the schedule of RTE Act along with Rule 11 and 12 of Punjab RTE Rules impose excessively restrictive regulations on private schools resulting in their closure and hence violate Article 19(1)(g) of the Constitution of India;

The Government could achieve the same objective through less restrictive regulations, i.e. rating or certifying schools instead of creating another license-permit raj. It is submitted that these regulations being unnecessarily restrictive result in license-inspector raj, i.e. police extortion, bribery and corruption. Arvind Panagariya, a well-known economist and Professor at University of Columbia writes about these recognition norms. Failing to meet the prescribed norms, half of the existing schools will lose their recognition”(2013):

“Like the myriad of our internally contradictory labour laws, all parts of this law [RTE] cannot be simultaneously implemented. Therefore, it is a fair bet that an inspector raj would soon emerge whereby bribes will be extracted for delaying derecognition of recognised schools that do not meet the input norms and for letting unrecognised schools stay open. Of course, the real victims will be the poor, whose children disproportionately populate these schools and will have to pay higher fees to cover the bribes.

Moreover, just as onerous labour laws have discouraged the expansion of labour-intensive manufacturing in the organised sector, the demanding input norms in the RTE Act would discourage the entry of new low-cost private schools. Just as labour laws hurt low-skilled workers by hampering job creation, RTE norms would deprive the poor of quality education.”

Instead of license-based recognition norms, minimum level of infrastructure could have been ensured among private schools through any of the following alternatives or both:

- i. Pro-active disclosure: Private schools may be asked to proactively disclose their standard of infrastructure so that parents can know in advance the level of infrastructure available and make an informed choice;
- ii. Certification: Private schools could be assessed and rated on various parameters through a third party or through a government agency. Such a rating would inform parents and let parents decide whether they want to admit their children in those schools.

In contrast, private schools have been shut down and many are under threat of closure even though these schools have better learning outcomes in comparison to government schools. Instead of shutting down budget private schools for non-compliance with the impugned norms and standards, these schools could be accredited, certified or ranked as per performance and parents could have the freedom to choose the private schools they want their children to go to. Private schools that are ranked lower would automatically shut down if the parents stop sending their children to those schools and send them to other private schools instead and therefore, only better quality schools would survive.

The impugned sections don't see the woods for the trees - merely because it is desirable to see all the students studying in schools having great infrastructure and highly qualified teachers, it does not mean it is feasible and efficient for all the private schools or their students/ students' parents to afford all weather building, etc. It is humbly submitted that these private budget schools are proud of being low-cost neighborhood schools providing good quality education to marginalized sections of the society for an affordable fee. Being not-for-profit, these schools lack resources to improve infrastructure. With regard to school infrastructure, two studies have been reviewed; as per the first study (Muralidharan, 2013), there was *"no correlation between changes in average village-level school infrastructure (between 2003 and 2010) and changes in enrolment in government schools, though they do find a small positive effect on the number of students attending school"*. The study also found *"no correlation between changes in average village-level school infrastructure and either teacher absence or student test scores, even though as it found significant improvements in almost all measures of school infrastructure."* The other study (Borkum, He and Linden, 2010) reviewed in this paper studies the impact of a school-library program in Karnataka and found no correlation between the infrastructure index of the school and measures of student test-scores gains. With regard to Pupil-Teacher Ratio, the aforementioned paper summarized the existing research in the following words:

"These estimated impacts are modest in magnitude, and given the high cost of class-size reductions, it may not be very cost effective to aim to improve test scores by reducing class sizes. Thus even a 20% reduction in pupil-teacher ratio (which is a very

expensive intervention) would not yield large test scores gains (around 0.05 standard deviation/ year) and would be considerably less cost effective than achieving the same class-size reduction using contract teachers (Muralidharan and Sundararaman 2013) or introducing modest amounts of performance linked bonuses (Muralidharan 2012; see section 3.3.4)."

C. 100% weightage to input norms

The schedule of the RTE Act is also arbitrary and unreasonable as it gives 100% weightage based on input norms and not on learning outcomes for the purpose of school recognition, therefore it lacks any intelligible differentia and has no rational nexus to the object sought to be achieved by the Act and thus it violates Article 14 and Article 19(1)(g) of the Constitution.

The real objective of the Act is to improve the child's learning outcomes which is evident from the Statement of Objects and Reasons of the Act. The legislature has taken note of the humungous quality deficit in the learning achievement in the 'Statement of Objects and Reasons' of the Act. Relevant portions of the Statement of Objects and Reasons of RTE Act are reproduced below for ready reference:

STATEMENT OF OBJECTS AND REASONS

"The crucial role of universal elementary education for strengthening the social fabric of democracy through provision of equal opportunities to all has been accepted since inception of our Republic. The Directive Principles of State Policy enumerated in our Constitution lay down that the State shall provide free and compulsory education to all children up to the age of fourteen years. Over the years there has been a significant spatial and numerical expansion of elementary schools in the country, yet the goal of universal elementary education continues to elude us. The number of children, particularly children from disadvantaged groups and weaker sections, who drop out of school before completing elementary education, remains very large. Moreover, the quality of learning achievement is not always entirely satisfactory even in the case of children who complete elementary education."

The input based norms may be necessary but, they are not sufficient conditions for ensuring a child's learning outcome; thus assigning 100% weightage to input-norms without any scope for learning achievement assessment, as a licensure condition for opening or running a school is unreasonable and vague. The State Government should mandate only those requirements or norms that are known to be both effective and feasible; norms that are ineffective and unfeasible should not be mandated. Those that are effective/ efficient or only feasible should be adopted with great care, taking into account evidence

from research studies as well as geographical and socioeconomic factors. The aforementioned input norms are unfeasible to the degree of being prohibitive in effect – many of them would escalate the cost of education by four to six times thus making education unaffordable for children belonging to low-income groups and some input norms such as land, building and classroom size norms for private schools located in low-income residential areas may be impossible to achieve. The Gujarat RTE Rules assign only 15% weightage to input-based norms and the remaining 85% to learning outcomes, thereby according quality of education its due importance. It is submitted that clearly, by way of the aforementioned provisions, the Gujarat government has taken cognizance of the reality that private schools even though lacking in infrastructure norms do provide better quality education to low-income masses and shutting them down for the lack of infrastructure would be in violation of the objectives of the Act.

While in Gujarat there has been notable focus and effort on enrollment, and this has have brought a fair share of success for primary education, concern for learning outcomes and quality provided in primary education has been addressed by various enhancement programmes for learning improvement. It is for strengthening the quality outcomes, the government of Gujarat launched a programme called *Gunotsav*, or 'Celebrating Quality'. Therefore *Gunotsav* is defined as an accountability framework for the quality of primary education, which includes learning outcomes of children as well as co-scholastic activities, use of resources and community participation.

D. Against parental choice

The closure of private schools for non-compliance with resource intensive norms and standards would frustrate the very intention of the RTE Act and the parents' right to choose schools for their wards and would violate Article 21 and Article 21-A. The closure of private schools would violate Article 21 and 21-A of the Constitution for two reasons: (i) In addition to non-compliant private schools, many government schools are also resource deficit and non-compliant; there is no adequate capacity to absorb all children in compliant schools; (ii) aforementioned provisions violate Article 21 of the parents by depriving them of the choice of school they wish their child to go to.

The existing government schools are not enough to cater to the students, if the non-compliant private schools are also closed down, swathes of children (especially those belonging to marginalized sections of society) will not be able to avail education. In fact, many of the government schools are non-compliant; they maintain poor infrastructure and have high Pupil-Teacher Ratios. The direct consequence of the enforcement of these aforementioned provisions would be the closure of hundreds of private

unrecognized schools resulting in thousands of children being deprived of education. As submitted above, government schools are far too inadequate to absorb all students and provide universal enrollment. Therefore, the enforcement would lead to unintended outcomes contrary to the benign objects of the Act. The result of the provision would be that the parents will be forced to send their children to inferior quality government schools instead of better quality low-cost, private schools. Relevant excerpts from the works of Murray N. Rothbard entitled "Education: Free and Compulsory" is reproduced below for ready reference (at p.9-10):

"The key issue in the entire discussion is simply this: shall the parent or the State be the overseer of the child? An essential feature of human life is that, for many years, the child is relatively helpless, that his powers of providing for himself mature late. Until these powers are fully developed he cannot act completely for himself as a responsible individual. He must be under tutelage. This tutelage is a complex and difficult task. From an infancy of complete dependence and subjection to adults, the child must grow up gradually to the status of an independent adult. The question is under whose guidance and virtual "ownership" the child should be: his parents' or the State's? There is no third, or middle, ground in this issue. Some party must control, and no one suggests that some individual third party have authority to seize the child and rear it. It is obvious that the natural state of affairs is for the parents to have charge of the child. The parents are the literal producers of the child and the child is in the most intimate relationship to them that any people can be to one another. The parents have ties of family affection to the child. The parents are interested in the child as an individual, and are most likely to be interested and familiar with his requirements and personality. Finally, if one believes at all in a free society, where each one owns himself and his own products, it is obvious that his own child, one of his most precious products, also comes under his charge.

The only logical alternative to parental "ownership" of the child is for the State to seize the infant from the parents and to rear it completely itself. To any believer in freedom this must seem a monstrous step indeed. In the first place, the rights of the parents are completely violated, their own loving product seized from them to be subjected to the will of strangers. In the second place, the rights of the child are violated, for he grows up in subjection to the unloving hands of the State, with little regard for his individual personality. [...]"

II. JUDICIARY AND RECOGNITION NORMS

An association of private schools in Punjab filed a petition under Article 226 entitled *Punjab Private School Organization v. Union of India and Ors.*, Civil Writ Petition No. 7770 of 2014 challenging the provisions of Sections 18 and 19 of the Act along with Rules 11 and 12 of the Punjab Right of Children to Free and

Compulsory Education Rules, 2011 and the selective enforcement qua private schools only as being *ultra vires* of Articles 14, 19, 21 and 21-A of the Constitution. The High Court of Punjab and Haryana at Chandigarh vide order dated 25.04.2014 dismissed the petition.

The High Court dismissed the petitioner's objections, in a rather cursory manner, with a brief statement that "[t]o our mind, there is no satisfactory answer to the same (*how a challenge can stand to the impugned norms and condition*) other than seeking to contend that in view of these provisions of the act a number of private schools have closed down which were providing essential education at different levels." Indeed, schools closed down due to impugned sections and school closure is certainly an outcome contrary to the intended objectives of RTE Act. However, there was no reference to any written pleadings or any legal discussion on this point further.

A ground raised by the petitioner was that the norms under the impugned provisions were not being applied to Government schools despite non-compliance, whereas private schools were being strictly treated and closed down. Rejecting this contention, the Court held that lax implementation of the Act with respect of Government Schools would not qualify as a reason to not implement it on private schools; neither would such lax implementation become a challenge to the constitutional validity of the impugned provisions. This is logically flawed, and the Court does not explain at all how selective enforcement is not a ground for contending discrimination and violation of Article 14.

Further, the Court assigns a motive to the petitioner – "effectively seeks to negate the orders which have been passed in different proceedings by this Court..." There seems to be a bias in favour of school closure orders passed by the same Chief Justice and therefore it is not surprising that the order begins with questioning the credibility of the petitioner organisation.⁵

Law allows an accused/defendant to challenge the constitutionality of a statute/ provision. The challenge cannot be thwarted merely on the presumption that the defendant is attempting to evade the penalty. Courts are still bound to consider the challenge on merits and give a reasoned order. Moreover, the non-compliant schools were already shut down as per the directions passed vide order dated 20.08.2013 in CWP No. 7388 of 2010, as mentioned in the present order.

Citing the case of *Society for Unaided Private Schools of Rajasthan v. Union of India and Anr.* (2012) 6 SCC 1, the Court reasoned that all provisions of the Act, including Section 19 were examined and upheld, and

⁵ Ad hominem: attacking your opponent's character or personal traits in an attempt to undermine his arguments; a kind of fallacy.

thus no need arose to go into the constitutionality of the impugned provisions. However, a close perusal of the said judgment would show that it was Section 12(1)(c) of the Act that was examined on merits and upheld. The rest of the Act was merely discussed to highlight ends and means of the Act. Para 36.4 of the *Society* case states – “[I]ndeed, matters relating to the right to grant of recognition and/or affiliation are covered within the realm of statutory right, which, however, will have to satisfy the test of reasonable restrictions.” These provisions were nowhere specifically subjected to a thorough investigation in the *Society* case in light of Article 14, 19, 21 or 21A.

So far, there is no appeal filed before the Hon’ble Supreme Court.

III. PROPOSED AMENDMENT

As argued, S.18, 19 and the Schedule of RTE Act must be amended on the lines of Gujarat Rules to become output-focused, applicable and enforceable to both private as well as government schools and certification-based rather than licensure-based. The paper proposes a draft of S.19 to achieve the said objectives.

S.19 No school shall be established, or recognised under section 18, unless it fulfils the norms and standards specified by the appropriate government or local authority:

PROVIDED that the norms and standards as defined by the appropriate government or local authority shall include

- (a) Student Learning Outcomes (Absolute)
- (b) Student Learning Outcomes (Relative to previous year)
- (c) Inputs
- (d) Student Co-Scholastic Learning Outcomes, with no more than 30% weightage on Inputs.

PROVIDED FURTHER that the appropriate government or local authority shall clearly define

- (a) The period to comply with the norms and standards
- (b) A third party driven assessment process for measuring compliance with norms and standards
- (c) Minimum compliance standards
- (d) Penalties for not meeting minimum compliance standard

CONCLUSION

Although the then-HRD minister gave assurances while implementing the RTE 2009 that not a single school will be shut down, litigations after litigations have been filed to give due effect to these provisions of RTE 2009. Thousands of budget private schools have been shut down. It can be concluded that the license-based recognition norms are against the spirit and the objective of both the RTE 2009 and the Constitutional right to education. The rules and directives of the Act are input-based, focusing on infrastructure requirements for schools rather than being output-based and emphasizing learning outcomes. Moreover, S.18 and S.19 of the RTE 2009 can be constitutionally challenged and selective enforcement of the rules, aimed at only private schools, is detrimental to public interest as it takes away the right of parents to choose which school their children will attend. The aforementioned judgment pronounced by the High Court of Punjab and Haryana at Chandigarh is clearly erroneous and can be challenged. Alternatively, the impugned sections may be amended by the legislature on the lines of proposed draft.

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