Law & Policy BRIEF

O.P. Jindal Global University
A Private University Promoting Public Service

THE RIGHT OF CHILDREN TO FREE AND COMPULSORY EDUCATION ACT, 2009 IN UTTAR PRADESH – THE CAGED LIBERTY

Vol. II | Issue 2 | February 2016

The Right of Children to Free and Compulsory Education Act of 2009 mandates 25 percent reservation in schools for economically weaker section (EWS) and disadvantaged category (DG) children. This assumes all the more importance when the admission, under the 25 percent reservation clause, is only to be granted to children in class Ist and no other senior class. The executive in the state of Uttar Pradesh has issued multiple regressive notifications, which inhibit children in the above categories from seeking admission under the 25 percent reservation clause and prejudice their future in entirety. This issue of the Law & Policy Brief argues that these notifications not only fail to satisfy the equality principle under the Indian Constitution but are also ultra vires the provisions of the parent statute.

Fair equality of opportunity and dignified life echoed the unchartered constitutional space on primary education, which led to insertion of Article 21A in the Indian Constitution. The movement was followed by an interesting piece of legislation on education – the Right of Children to Free and Compulsory Education Act (the RTE Act) – enacted by the outgoing United Progressive Alliance government in 2009. Kant's imperfect duty of beneficence which provides for theoretical discourses on an individual's duty to do charity, was partially recognized under this present enactment (Cummiskey 1996: 105-122). The present legislation chalks out 25 percent reservation in private unaided schools for children belonging to economically weaker section (EWS) and disadvantaged group (DG) category. This provision was assailed for transgressing private schools' right to occupation under the Indian Constitution but was holistically approved by the Supreme Court in Rajasthan Unaided Society v. Union of India [(2012) 6 SCC 1].

In this essay I wish to vet the implementation of 25 percent reservation clause under the RTE Act in the state of Uttar Pradesh. The Indian Institute of Management, Ahmedabad, Central Square Foundation, Accountability Initiative and Vidhi Centre for Legal Policy studied the data from the District Information System for Education (DISE) published by published by National University of Educational Planning and Administration and Department of School Education and Literacy, Ministry of Human Resource Development; and observed that the states with top 10 fill rates under 25 percent reservation clause (in %) included Delhi: 92.08, Madhya Pradesh: 88.24, Manipur: 64.77, Chhattisgarh: 63.1 and Sikkim: 50.26 while in the state of U.P. it was a staggering low at 3.62 (IIM-A et al 2015). The same report estimates around 6,37,149 seats under 25 percent reservation clause in Uttar Pradesh, out of which 5,65,406 are in the rural areas (NUEPA 2014). The EWS and disadvantaged category has been defined in Government Order No. 3087 (1)/79-5-2012-29/09 T.C. - II notified by the state of U.P on 3rd December, 2012. In the last admission season (until June, 2015) only 3061 admissions were approved by the Basic Education officers in the state under the 25 percent reservation clause. The state government seem to be on a prowl to mutilate this clause in its bud. The debacle

Law and Policy Research Group, *at the Jindal Global Law School, brings the tools of legal analysis and policy analysis in conversation with each other. Its* ***Law & Policy Brief*** *presents inter-disciplinary analyses of Bills pending before the Parliament, recent court judgments, amendments to existing laws, recently enacted laws, and other topical legal issues that have important policy implications.*

Editors
Dr. Ashish Bharadwaj
Saptarshi Mandal
jgls-lpb@jgu.edu.in
www.jgu.edu.in
www.jgls.edu.in

Jindal Global Law School
India's First Global Law School

JGLS offers B.A. LL.B., B.B.A. LL.B., LL.B. and LL.M. programmes. It promotes research on legal and policy issues to support an informed policymaking and legislative process. It also publishes the *Jindal Global Law Review.*

is created by three regressive Government Orders (GOs) notified by the state government in 2012, 2013 and 2015. There are droves of children who are perpetually spurned by the school authorities citing provisions from these regressive Government Orders.

Under these three GOs reasons for denial could be marshalled largely into following four categories:

1. The neighborhood area shall be a 'ward' and not within 1.0 Km radius from the home of a EWS child seeking admission. (GO 2013)
2. The 25 percent reservation clause shall be applicable only in urban wards and not in rural wards. (GO 2015)
3. Those wards have to be identified where no Government/Board/Aided schools exist and 25 percent reservation clause shall be applicable only in private unaided schools of such identified wards. (GO 2015)
4. Arbitrary rejection on the ground of age.

There are bunch of petition which have already been filed before the Allahabad High Court and many more anticipated in the months to come impending next academic session. It is imperative at this stage to demystify these four categories for its sheer impact on the looming fate of teeming millions. Before an excursion into these categories, it is pertinent to mention that vires of these GO's have already been challenged in a Public Interest Litigation, Ajay Kumar Patel v. State of U.P. [Writ Petition No. 3334 of 2016]. This Public Interest Litigation was admitted by a division bench comprising of the Chief Justice Dr. D. Y. Chandrachud and Justice Yashwant Verma on 27th January, 2016 and is due for hearing on 24th February, 2016.

First Category:

Rule 2 (c) of Government Order No. 539/79-6-2013 published on 20th June, 2013 provides that in ascertaining the definition of 'neighborhood' under the RTE Act and the UP RTE Rules, 2011 (the Rules), the relevant units shall be 'wards' (Wards are smaller units of a district where each district is subdivided into many wards based on its population and not on distance). The 'neighborhood' as defined under Rule 4 (1) (a) read with Section 6 of the RTE Act provides for it to be within 1.0 Km from the home of an EWS and disadvantaged children. These definitions are clearly conflicting. For instance, if an EWS or disadvantaged student resides in ward A and wishes to avail admission in a school X which is 0.5 Km from her home but it falls in ward B. Then, under the present regime of rules she is denied admission on the ground of different wards. This is absurd and reduces the legitimacy of the state government to zilch. This has led to denial of admission to unfathomable number of students in the state. The state refuses to play with a full deck. It is against the entrenched canon of statutory construction that a direction issued under s. 35 (2) of the RTE Act be allowed to mutilate provisions of the RTE Act and rules enacted by the state of U.P. pursuant to s. 38 of the RTE Act. In case of inconsistency, it must be resolved harmoniously in favor of the beneficiary. This is evident from the observation made by the Delhi High Court in Federation of Public School v. Director (Education) [187 (2012) DLT 184] wherein the then Chief Justice, A.K. Sikri on para 10 observed:

> We are however of the view that the paramount purpose is to provide access to education. Whether for that access, the child is to travel within 1 Km. or more is secondary.

In wake of the purpose behind enacting the RTE Act, the state government must dispense with its regressive attitude and must devise guidelines explicating the contours of 'neighborhood' in the upcoming admission season. Perhaps, 'wards' may be kept as units and preference may be given to those EWS students whose residence falls within 1.0 Km from such private unaided schools. For instance, A and B from ward X apply to M school (also in ward X) and A's house is 0.5 Km from M school, while B's is 1.5 Km away. In case of a single vacancy A must be preferred over B. However, in the above proposition, if A was from ward Y and B from ward X and school M was in ward X. This situation might entail a prejudicial outcome for A under the present GO despite A having a home within 0.5 Km from the school (in accordance with U.P. RTE Rules, 2011) only because her home falls in a different ward (Y) from that of school (X). Thus, it is proposed that in case of conflict between 'ward' and '1.0 Km' rule, '1.0 Km' rule must trump the ward, otherwise both may operate harmoniously. This would obligate offering seat to A first and then to B, despite A having her home in a different ward from that of school. However, in case of sufficient vacancies, the effort should be to offer seats to both A and B, despite B having her home 1.5 Km from the school and A having her in the other ward. This would require District Basic Education officers to calculate 1.0 Km distance only if a dispute has arisen otherwise wards may very well serve the purpose without abrogating the values espoused by the RTE Act.

Second Category:

Principle of fair equality of opportunity and dignified life would be reduced to a chimera if access to education is made a hostage to whimsical functioning of the state. Government Order No. 33577 – 926 notified on January 6th, 2015 exemplifies this. Rule 1 of the impugned notification obligates the District Basic Education Officer to identify wards in the district headquarter and further identify those wards where no Government/Board/Aided school exists for the enforcement of 25 percent reservation clause. Thus, in simple words, wards in rural areas are to be kept beyond the scope of 25 percent reservation clause. It is pertinent to flag at this juncture that 5, 65,406 out of 6, 37,149 seats identified in the DISE report, belong to rural areas. A vast segment of EWS and disadvantaged students are kept in abeyance in rural areas from availing the right conferred upon them under the RTE Act. The stinking rule not only commits a treachery on the 2009 Act, and the state Rules, but also wrecks all corners of the equality clause under the Indian Constitution. No delegated legislation can transgress the provisions of the enabling statute and Part III rights under the Constitution. It is an equally settled principle that a subordinate legislation cannot be permitted to trample the policy embraced by the enabling statute. This obnoxious rule unsettles the policy enunciated by the RTE Act and must be set aside. The state must consciously take a note of this and make a whole hearted endeavor in securing the admissions of economically weaker section (EWS) and disadvantaged group (DG) in the coming admission season starting this year.

Third Category:

Rule 1 and Rule 2 of the 2015 GO impels the EWS and disadvantaged students to take admissions in Government/Board/Aided schools in their respective wards, and in case these schools do not exist in their wards then they may seek admission in private unaided schools, as envisaged under Section 12 (1)(c) of the RTE Act. Such perverse rules mangles the spirit of this provision read with Article 21A of the Constitution. As stated earlier, a delegated legislation lacks competence to overhaul the policy espoused by the enabling statute. It also lacks the force to corrode the value guarded by a right under Part III of the Constitution. This reading is consistent with the ruling of the Supreme Court in In Re Delhi Laws Act case (1951) as well as Dwarka Prasad v. State of U.P. (1954). To illustrate, say A, who is an EWS or disadvantaged student is keen on taking admission in a private unaided school M within her neighborhood. Now, A will only be able to seek admission in M if there is no Government/Board/Aided school in her neighborhood or all the seats in a Government/Board/Aided schools are filled. This creates a hierarchy and divests an EWS or disadvantaged student from the 'choice' of seeking admission in a school of her preference especially when neither the enabling statute nor the enacted rule conceives of any such situation. Few months back, a prestigious school from Lucknow refused to admit 31 EWS and disadvantaged students and filed a petition before the Lucknow Bench against the order of District Basic Education officer. Rebuking the school for regressive attitude, in CMS v. State of U.P. (2015), Lucknow Bench of the Allahabad High Court observed strongly against such a hierarchy and divesting such a choice from economically weaker section and disadvantaged students. The court observed:

> Neither Section 3 nor the definition of 'school' contained in Section 2(n) lays down a preferential order in respect to the said schools for the purpose of admission therein. The area or limits of 'neighborhood' through not defined in the Act, 2009 has been specified in Rule 7 (3) read with Rule 4 (1) of the Rules 2011 framed by the State of U.P. to mean, in respect of children in Class I to V, a school 'within a distance of 1.0 km and population of 300. Thus, as per a conjoint reading of the aforesaid provisions, a child residing within a 1.0 km of the Schools as defined in Section 2 (n), is entitled to free and compulsory education in any of the said schools, therefore, the contention of learned counsel appearing for the petitioners that, first of all the admission are to be made in a Government/Board/Aided school and only if the seats are not available therein, the 4th category of unaided school, such as the petitioner can be asked to make admissions, is not borne out from the provisions and scheme of the Act 2009. This is not the intention of the legislature. Having the option of more than one school in the neighborhood, the child or the guardian has the right to choose therefrom.

This decision excoriates 'hierarchy' and invests EWS and disadvantaged students with a 'choice' to seek admission in any private unaided school within their neighborhood. The Lucknow Bench stood as a sentinel on qui vive. The irony is that in PM Modi's own constituency, Varanasi, only 3 wards out of roughly 50 (urban) wards have been identified where 25 percent reservation clause is applicable. This only adds insult to the injury and mocks the whole bureaucratic process. The District Basic Education officer awaits the verdict of the Supreme Court before which the judgment of the Lucknow Bench has been appealed and the constitutional promise of dignified life to EWS and disadvantaged students has been kept on hold.

Fourth Category:

The exercise of discretion by the executive in the present case is an assault on the norms of public reason. Public reason, in democratic institutions, is oftenly invoked as a relevant standard to evaluate rules and govern executive's conduct. Public reason, whose subject is always public good, mandates the executive to exercise its discretion in a fair and reasonable way. Distinct from the idea of public reason, ideal of public reason is satisfied when the executive acts from and follow the idea of public reason and explain to other citizens their reasons for supporting fundamental political positions in terms of the political conception of justice they regard as the most reasonable (Rawls 1997). There is no remnant of public reason in the exercise of discretion related to admissions of EWS and disadvantaged group students by the executive in the state. It is axiomatic that the RTE Act obligates providing education to children in the age group of 6 – 14 years. There have been many instances where EWS and DG group children in the age bracket of 6 – 7 years were denied admission without giving any reason. A recently obtained information under the Right to Information Act revealed 10 out of 21 students in Varanasi were denied admission last year despite fulfilling the age criterion.

Conclusion:

If one digs deep, one might sense an obnoxious collusion between the unaided private schools and the executive in the state. There are flagrant infraction of liberty of education by the state and this must stand corrected. Transgression of 'equality clause' and provisions of the RTE Act, crudely characterizes functioning of the state. Fairness and transparency must be exuded in the functioning of the state and any aberration must be punctiliously dealt with by the courts. The fundamental liberties must be safeguarded in all possible situations and state must protect it at all costs. The destiny must not be allowed to have the last laugh on the posterity to the prejudice of our nation. The state must do what all needs to be done in liberating this caged liberty.

References

David Cummiskey, Kantian Consequentialism, (Oxford University Press, 1996)

IIM-A et al, State of the Nation: RTE Section 12(1)(c), (2015). Available at http://www.dise.in/Downloads/State-of-the-Nation-Section-12-1-c-CSF-March-2015.pdf

John Rawls, Public Reason, 64 The University of Chicago Law Review 765, 768 (1997)

NUEPA, Elementary Education in India: Progress towards UEE, (2014). Available at http://www.dise.in/Downloads/Publications/Documents/Flash%20Statistics2013-14.pdf

About the Author

Sushant Chandra [BCL (Oxford); BA LLB (GNLU)] is Assistant Professor & Assistant Director, Clinical Programmes, Jindal Global Law School, Sonipat, India. The author wrote the pending PIL in the name of Ajay Kumar Patel and has also assisted on other petitions on the RTE before the Allahabad High Court.