25 per cent Reservation in Private Unaided Schools: Social Justice or Expropriation?[1]

- *Prashant Narang with inputs from Mimansa Ambastha*

As a judgment enumerating upon the constitutional validity of the recently enacted the Right of Children to Free and Compulsory Education Act, 2009 ("Act"), the *Society For Un-Aided Private Schools Of Rajasthan* v. *Union Of India & Another* (2012) 6 SCC 1 found the Supreme Court once again dealing with the controversial issue of reservation in private educational institutions. Decided on April 12, 2012, the majority opinion (*Kapadia, C.J. and Kumar J.),* held that all schools - whether aided or unaided, except minority unaided schools; they are statutorily required to accept a 25% intake of children from the economically weaker sections at entry level under s.12(1)(c) of the Act. *Radhakrishnan, J*. in dissent - held s. 12(1)(c) of the Act to be directory.

Facts

Several private unaided schools challenged the constitutional validity of Section 12(1)(c) r/w Section 2(n)(iv) of the Act, which provided for a quota of 25% of school seats to be reserved for children from economically weaker and disadvantaged sections in all schools - whether government or private schools; both aided and unaided.[2]

ANALYSIS

The majority opinion stated that the 2009 Act is "child centric and not institution centric"[3]. Understanding the need behind Article 21-A, the majority opinion recognized the deficiency of simply including a declaratory right to education under Article 21 (as the courts had previously done). The task of imparting quality education across financial barriers to all children was thus one of priority, and Section 12(1)(c) did just that, according to the majority opinion. Irrespective of the fact that Section 12(1)(c) might burden private unaided schools, it was seen as a necessary and desirable initiative and therefore was upheld. According to the majority opinion, Article 21-A quite literally provides the State with the power to determine the legal manner in which it will discharge the obligation under RTE. This enables the State to freely include *any* type of schools within the ambit of the RTE Act, including private unaided schools. Moreover, the legal obligation to provide education is placed not only upon the State, but also on *all* stakeholders involved, according to the majority opinion. A reciprocal agreement is envisaged between the State and parents[4], and can be appropriately distributed amongst the private schools as well, for it only helps to ensure better quality education to children of all classes.

The minority opinion notes the absence of any positive obligation being cast upon private non-state actors in Article21-A. The basis for the introduction of Article 21-A and the deletion

[1] The present case analysis deals only with the observations relating to unaided non-minority schools under the RTE Act 2009.
[2] The challenge also involved the validity of Articles 15(5) and 21-A of the Constitution of India, to that extent the matter was referred to the Constitution Bench of five Judges. For the purpose of deciding the constitutional validity of s.12(1)(c) of the Act, Art.15(5) and 21-A of the Constitution were presumed to be valid. Please see (2012) 6 SCC 102.
[3] Para 14
[4] Reference is made to Article 51(A)(k) which creates a parental duty to send children to school

of original clause (3) from article 21-A (that *specifically excluded* unaided institutions from the purview of the obligation) was due to judgment of *Unnikrishnan JP v State of AP*.[5] Article 45 and Article 51-A(k) were inserted in the Constitution on 12.12.2002, a month after the judgment in *TMA Pai Foundation and Ors v State of Karnataka and Ors*[6] was pronounced overruling *Unnikrishnan* on 31.10.2002. *TMA Pai* judgment stated that such reservation of seats in private unaided institutions leads to nationalization of seats. The Parliament was assumed to have been aware of the judicial dicta and thus, the absence of an affirmative duty being cast upon private players in Article 21A can be inferred to be a deliberate and conscious decision. A closer look at the wordings of Article 21-A would show the expression "*State shall provide*", and not "*provide for*". These words go a long way in indicating the responsibility was laid solely and imperatively upon the State in a clear and unambiguous tone. Extending such an obligation to private unaided institutions would amount not just to doing violence to the express language of the Constitution, but also to offloading of the State's burden on such institutions. An interesting observation was made by the minority opinion in relation to a series of national and international case laws[7] on various socio-economic rights and their enforcement: even in jurisdictions where such rights were given a constitutional status, such rights were only and only available against the *State*, and not private unaided actors. Moreover, quoting Articles 28(1) and 29 of the UN Convention on the Rights of the Child, Radhakrishnan J. stressed that there existed express provisions to exclude private players from the Convention's obligations. *TMA Pai* and *Inamdar* have established a *negative obligation* on private educational institutions in the sense that there be no profiteering, excessive fee, maladministration etc.[8] Art. 51(A)(k) of Part IV has imposed a constitutional duty on parents to provide educational opportunities to children and Part III has rendered the State's obligation to be absolute, but no such obligation has been cast either in parts or in whole on private unaided educational institutions.[9] Thus, all that existed was a negative obligation upon such institutions to not unreasonably interfere with the realization of the children's rights.[10] The abovementioned observations nowhere indicate that private schools have any kind of a *positive* obligation under Article 21-A. In this context, mandating them to take in such a substantial chunk of students against their wishes does indeed seem like the State offloading its legal obligations onto private schools.

The majority opinion is clearly flawed on this ground - citing Article 51(A)(k) doesn't seem to be adequate as a justification, considering the constitutional duty on parents is not justiciable at all; not to mention that no express constitutional provision exists either as under Part III or IV which even mentions the hint of an obligation on private unaided schools.

Secondly, the minority view noted that the restrictions under Article 19 of the Constitution of India must be interpreted *strictly*. Accordingly, the court must not transgress "beyond the

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[5] (1993) 1 SCC 645
[6] (1994) 2 SCC 199
[7] These include inter alia: *Bandhua Mukti Morcha v. Union of India* (1984) 3 SCC 161; *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan* (1997) 11 SCC 121; *Soobramoney v. Minister of Health (KwaZulu-Natal)* (1998) 1 SA 765 (CC); *Govt of Republic of South Africa v. Grootboom* (2001) 1 SA 46 (CC); *Minister of Health v. Treatment Action Campaign* (2002) 5 SA 721 (CC); *Certification of the Constitution of the Republic of South Africa, In re* (1996) 4 SA 744 (CC)
[8] Held in Para 227 to also have being seen in the South African Constitutional Court Case of *Juma Musjid Primary School v. Minister for Education* 2011 ZACC 13: (2011) 3 BCLR 761 (SA)
[9] Paras 234- 235
[10] Para 237

contours of Article 19(2)-(6) in curbing the rights guaranteed under Article 19(1)" no matter how necessary the legislation or how wise the policy is.[11] Thus, when such a reading of Article 19 (6) is done, public interest cannot be so broadly interpreted so as to curtail the very core decision-making in unaided schools. A closer analysis of *TMA Pai Case* especially went a long way in reiterating the minority stand that private unaided institutions' autonomy was not to be insulted. The entire concept of reserving seats in such institutions by the State would amount to nationalization of seats and an indirect cross subsidization of education.[12] Further, the case of *P.A. Inamdar*[13] clarified that autonomy of an institution would be subject to State interference in cases where aid was sought and granted. In cases where recognition of affiliation was sought, regulation by the State was permissible but only to the extent that it did not disrupt essential managerial decisions relating to admissions, staffing etc.[14] Any further interference such as controlling admissions or reserving seats would amount to a gross violation of the autonomy of such institutions, not amounting to a reasonable restriction under A. 19(6), so far as unaided institutions were concerned.[15]

The majority opined that education is a charitable activity[16], and any venturing into commercialization of the same would exclude the schools involved from the protection of Article 19(1)(g). Thus, the petitioning private unaided schools' contention under Article 19(1)(g) did not apply. Moreover the State is empowered by Article 19(6) to regulate activities of such private institutions by imposing reasonable restrictions. The Majority stressed upon the need to interpret such restrictions in light of the Directive Principles of State Policy, which would allow a broad and liberal interpretation of what really is reasonable.[17] In light of the above, the State may specify permissible percentage of the seats to be earmarked for children who are less fortunate, as has been done in the 25% earmarking under Section 12(1)(c) r/w Section 2(n)(iv) of the RTE Act, in furtherance of public interest needs under Article 19(6). Thus, the majority concluded that such a pre-condition to granting of recognition to private schools could not be termed as unreasonable. Section 12(1)(c), by differentiating children on the basis of what kind of financial barriers they face in accessing education, also satisfied the classification test under Article 14.

It has also stated that the constitutional obligation under A. 21A is co-extensive with A. 19(6) without elaborating on or citing how it came to this conclusion. The majority has also tried to distinguish the right to establish an educational institution under A. 19(1)(g) with the right to recognition and affiliation. What the court seems to have missed is that by way of S. 12(1)(c), the State has effectively curtailed the right of private unaided schools to *freely* establish and administer their institutions. In Radhakrishnan J.'s words - "citizens of this country have a no constitutional obligation to start an educational institution, and the question is after having started private schools, do they owe a constitutional obligation for seat-sharing with the State on a fee structure determined by the State?"[18] Both *TMA Pai* and *Inamdar* cases are unanimous in holding that such appropriation of seats cannot be held to be a regulatory

[11] Para 169
[12] Para 96-97
[13] *PA Inamdar v. State of Maharasthra* (2005) 6 SCC 537
[14] Para 55, *Pai Foundation*
[15] Para 228-229
[16] Para 29, 30; Reliance placed on T.M.A. Pai Foundation v. State of Karnataka (2002) 8 SCC 481
[17] Para 25
[18] Para 244

measure in the interests of rights of unaided institutions under Article 19(1)(g) and Article 30. *Inamdar* has also held that to admit students being an unfettered fundamental right, the State cannot make fetters up to the level of undergraduate education. Thus, unaided institutions enjoy total freedom and they can legitimately enjoy unfettered rights to choose their students subject to the process being fair, transparent and non-exploitative.

At best, the majority has stressed upon interpreting fundamental rights in light of directive principles in order to give a broader scope to the reading of A. 21A. However, such a broad reading was not backed by the detailed legal justification that such a major constitutional stance would require. Moreover, making Directive Principles justiciable always requires constitutional amendments, and not a mere legislation lest they make an inroad into the fundamental rights guaranteed to the citizens. The rights guaranteed to the unaided non-minority institutions under 19(1)(g)[19] have now been limited, restricted and curtailed so as to impose a positive obligation on them under Section 12(1)(c) and under Article 21-A, which should have been done only through constitutional amendments.[20]

Third, as stated by the minority opinion, such private unaided institutions are established with a lot of capital investment, and by offering superior services also often end up creating their own goodwill and reputation. Nobody should be allowed to rob them off the same, not even the State.[21]The majority opinion reasoned that since these unaided schools are being reimbursed for the children they are mandatorily required to admit, such a provision does not seem unfair. However, such an imposed arrangement amounts to expropriation of 25% seats. Not only there is absence of consent, the rate of reimbursement (rate assessed according to the per child expenditure of a government school) may be much lesser to the per child expenditure of a private school.

While the petitioners stressed upon the principles of voluntariness, autonomy, co-optation and anti-nationalization which had been recognized in *TMA Pai,* the majority held such principles to be applicable more in the context of higher/professional education where merit and excellence need to be give due weightage. These standards cannot apply to school admissions in Class I, as per the majority opinion. However, the Court did differentiate between day-scholars and boarders, stating RTE Act would apply only to the former.

A point that was neither raised nor dealt by the court was the possibility of state funding the students through vouchers and allowing them to choose their schools. Such arrangement would not just be consensual but also achieve the objectives of Directive Principles without offending fundamental rights of the private unaided schools.

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[19] As held in TMA Pai Foundation and reiterated in PA Inamdar
[20] Para 200
[21] Para 254