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CENTRE FOR COMPARATIVE CONSTITUTIONAL LAW AND  
ADMINISTRATIVE LAW

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## ASSESSING STATE SCHOOL EDUCATION LAWS ON ADMINISTRATIVE SAFEGUARDS

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*This paper reviews the quality of all laws governing K-12 education across sixteen states. The authors assess these laws on four parameters: (i) procedural safeguards (due process and principles of natural justice) encoded in the law; (ii) guidance provided by the law for the quasi-judicial functions of the executive; (iii) the proportionality of the provisions of the law (based on its intended objective); and (iv) checks that the law places on the rule-making powers of the executive. These parameters have been drawn based on a review of international literature on administrative law. Laws that fare poorly on these benchmarks can impinge heavily on the rights and liberties of individuals they govern. In the case of the K-12 sector, the absence of such safeguards in the law may ultimately affect children's access to quality education.*

*We find that most state laws fare poorly on one or more of the parameters listed above. There is no parameter on which all states perform well. While these laws continue to expand the scope of discretionary powers granted to the executive, they fail to provide procedural safeguards which could guide or limit the said discretion. Furthermore, some laws have also introduced provisions that are excessive or arbitrary in nature.*

*Wide discretionary powers often run the risk of abuse in the form of rent-seeking and corruption. Past analyses show the numerous ways in which the departments of school education commit excesses while exercising their discretionary powers. Given that the executive draws its powers from the legislations studied, it is imperative that laws encode the safeguards highlighted in this paper.*

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# ASSESSING STATE SCHOOL EDUCATION LAWS ON ADMINISTRATIVE SAFEGUARDS

## INTRODUCTION

The National Education Policy, 2020<sup>3</sup> (“**NEP**”) emphasises the need to review and revise the existing regulatory framework for school education in India. The NEP points out that the laws governing education should aim at improving the overall quality of education imparted. While the NEP gives the nudge to reform, states need a clear roadmap on the direction and nature of reform. This requires a systematic review of the gaps in the current regulatory framework. At present, research on the *de jure* regulatory environment for private schools in India is sparse.<sup>4</sup>

This paper attempts to fill the gap by analysing all laws governing K-12 education<sup>5</sup> across sixteen states of India using the Quality of Laws Toolkit (“**QoL Toolkit**”).<sup>6</sup> This includes Andhra Pradesh (six laws), Delhi (two laws), Gujarat (seven laws), Haryana (four laws), Jammu and Kashmir (two laws), Jharkhand (four laws), Karnataka (five laws), Kerala (one law), Madhya Pradesh (three laws), Maharashtra (seven laws), Nagaland (one law), Puducherry (three laws), Rajasthan (three laws), Telangana (six laws), Uttar Pradesh (nine laws), and West Bengal (seven laws). The paper also analyses all the rules under these laws.

The QoL Toolkit assesses laws on three parameters: representation, rights, and resources. *Representation safeguards* ensure that the preferences and interests of stakeholders are reflected in the law.<sup>7</sup> *Rights safeguards* ensure that the principles of natural justice and proportionality are incorporated into the law to protect the rights of individuals. *Resources safeguards* ensure that the impact of the law on stakeholders’ incentives is positive, and the administrative burden imposed by it is limited.<sup>8</sup> The QoL Toolkit is based on a review of literature on administrative law and a study of global indices.

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<sup>3</sup> MINISTRY OF HUMAN RESOURCE AND DEVELOPMENT, NATIONAL EDUCATION POLICY (2020).

<sup>4</sup> CENTRE FOR CIVIL SOCIETY, ANATOMY OF K-12 GOVERNANCE IN INDIA, 44–72 (2019), <https://ccs.in/sites/default/files/Anatomy-of-K-12-Governance-in-India.pdf>.

<sup>5</sup> K-12 refers to the school education system (including primary and secondary education).

<sup>6</sup> Prashant Narang & Jayana Bedi, *Quality of Laws Toolkit*, CENTRE FOR CIVIL SOCIETY (2021), <https://ccs.in/sites/default/files/Quality-of-Laws-toolkit-CCS.pdf>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

For analysing state school education laws, the authors have only focused on the “*rights*” safeguards (explained under the methodology).<sup>9</sup>

This paper studies seventy laws that regulate several aspects of school education, such as the establishment of schools, fees charged, admission process, teacher training and salaries, medium of instruction, the establishment of school boards and tribunals, disbursement of grants, and transfer/takeover of management. These require bureaucrats to take administrative decisions that have a bearing not only on the rights and liberties of individuals but also the ease with which schools can be established and operated. For instance, under state school education laws, the government has the authority to derecognise or shut schools. This has a bearing on children’s right to education and affects the livelihood of school owners, along with their teaching and non-teaching staff. Although there are procedures in place to shift students to nearby schools, such closures impinge on their freedom and choice.

In the following sections, the authors provide an overview of the quality of school education laws in sixteen states and highlight the best and worst practices. Our analysis can be used to draw insights into the regulatory hurdles that make it difficult for school owners to operate and could come in the way of providing quality education. Ultimately, insights from this paper could help guide deliberations on reforming the existing regulatory architecture for school education.

## **METHODOLOGY**

Since the early twentieth century, the role of the administrative state has expanded considerably. The executive now exercises a wide range of adjudicative and legislative powers. In education, the government exercises discretionary powers at several touchpoints. Some of the adjudicative functions performed by the government include making decisions on granting recognition to schools and approving their fee structures. Along with this, state legislatures have also granted the government quasi-legislative powers. These include drafting rules that specify the manner of conducting school inspections, minimum qualifications of teaching and

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<sup>9</sup> Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1044–1179 (1984).

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non-teaching staff and conditions for recognition of schools among others. In the following sections, the authors elaborate on how a wide range of these adjudicative and legislative powers are discretionary.

As the field of discretion expands, so does the room for arbitrary conduct.<sup>10</sup> Given that these powers have a bearing on the rights and obligations of people, they must be constrained by the same traditional procedural restrictions that are applicable to judicial decisions.<sup>11</sup> These procedural restrictions include due process and the principles of natural justice.

A law must ensure that it protects the rights of all individuals to fare well on the “*rights*” safeguards of the QoL Toolkit in the following four ways:

- (i) provides clear and sufficient guidance for bureaucratic decision making;<sup>12</sup>
- (ii) encodes due process and principles of natural justice by mandating pre-decisional hearing,<sup>13</sup> reasoned order<sup>14</sup> and recourse to appeal for all decisions that have a bearing on an individual’s life, liberty or property;<sup>15</sup>
- (iii) introduces provisions that are proportional to its objective and the problem it intends to tackle;<sup>16</sup>

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<sup>10</sup> Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 614–621 (1927).

<sup>11</sup> Rubin, *supra* note 9.

<sup>12</sup> Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343 (2009).

<sup>13</sup> Clark Byse, *Opportunity to be Heard in License Issuance*, 101(1) U. PA. L. REV. 57, 57–104 (1952).

<sup>14</sup> V. S. Chauhan, *Reasoned Decision: A Principle of Natural Justice*, 37(1) J. INDIAN L. I. 92, 92–104 (1952).

<sup>15</sup> 1 HALSBURY’S LAWS OF INDIA, ADMINISTRATIVE LAW (2019).

<sup>16</sup> Jud Mathews, *Proportionality Review in Administrative Law*, in COMPARATIVE ADMINISTRATIVE LAW (Susan Rose-Ackerman et al. eds., 2d ed., Edward Elgar 2017); European Commission, *Better Regulation Toolbox* (2017), <https://ec.europa.eu/info/sites/default/files/better-regulation-toolbox.pdf>.

- (iv) sets clear contours for the executive’s rule-making powers (including subject matter and timelines) and maintains strict control over it.<sup>17</sup>

A law that lacks these basic safeguards leaves room for abuse of powers by the executive and fails to protect individual liberties.<sup>18</sup>

Administrative safeguards act to protect against “*individualised oppression by the government*” and impose absolute limits on the government’s scope of powers.<sup>19</sup> In this paper, the authors review how state school education laws fare on four integral administrative safeguards: due process and principles of natural justice, legislative guidance on discretion, proportionality and nexus, and checks on the executive’s rule-making powers (questions attached in the **Annexure** at the end of this paper). We will briefly discuss these four safeguards in this section.

## **A. DUE PROCESS AND PRINCIPLES OF NATURAL JUSTICE**

Any government action which deprives an individual of their life, liberty, or property must follow due process and the principles of natural justice. At the minimum, this includes: getting an advance (and adequate) notice of such government action, an order detailing the reasons for undertaking the particular action, and a reasonable opportunity to be heard before such a deprivation.<sup>20</sup> These principles are derived from common law and precede the Indian Constitution.<sup>21</sup>

Once the decision is taken, an individual should have recourse to appeal against the decision or get it reviewed by another authority.<sup>22</sup> Central to this

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<sup>17</sup> Jaivir Singh & Raghav P. Dash, *The Hazards of Erroneous Delegation*, in *THE INDIAN PARLIAMENT AND DEMOCRATIC TRANSFORMATION*, 233–251 (Ajay K. Mehra ed., 1st ed. Routledge India 2017).

<sup>18</sup> Rubin, *supra* note 9.

<sup>19</sup> *Id.*

<sup>20</sup> S.N. Jain, *Judicial Systems and Legal Remedies*, in *THE INDIAN LEGAL SYSTEM*, 151 (Joseph Minattu ed., Indian Law Institute 2006); V.S Chauhan, *Reasoned Decision: A Principle of Natural Justice*, 37 *J. INDIAN L. I.* 92, 92–104 (1995).

<sup>21</sup> V. S. Deshpande, *Administrative Law*, in *THE INDIAN LEGAL SYSTEM* 335–383 (Joseph Minattu ed., Indian Law Institute 2006).

<sup>22</sup> 1 *HALSBURY’S LAWS OF INDIA, ADMINISTRATIVE LAW* (Universal LexisNexis 2d ed. 2019).

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appeal process is its independence. One of the key principles of natural justice is “*nemo iudex in causa sua*”, which literally translates as “*no one must be a judge in their own case*”.<sup>23</sup> This ensures that bias and conflict do not creep into the decision-making process.

Another important procedural safeguard is a check against inaction by bureaucrats since delay in decision making may adversely impact individual rights. A study by the Centre for Civil Society reveals that for some schools, the application to obtain a Certificate of Recognition<sup>24</sup> remained under review for over five years.<sup>25</sup> One way in which laws check against such delays is by prescribing an upper time limit or deadline within which the executive must make a decision. For instance, under the Haryana Education Rules, 2003 (Rule 29), the “*appropriate authority*” is required to decide on a school owner’s application seeking permission to establish a school within ninety days.<sup>26</sup> In case the authority fails to do so, the establishment of the school will be “*deemed to have been permitted*”. Without such deadlines, it becomes difficult for the judiciary to hold the government accountable for inaction or slow action.<sup>27</sup>

Another safeguard that enhances procedural efficiency includes clear identification of the decision-making authority.<sup>28</sup> A law must encode all these principles and make it binding for the executive. Without such an express mandate, the executive may bypass, overlook, or compromise on them while undertaking its functions.

### **B. LEGISLATIVE GUIDANCE ON DISCRETION**

Given that performing quasi-judicial functions does not fall within the realm of the executive’s competence, discretion must be guided.<sup>29</sup> The rule

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<sup>23</sup> Jain, *supra* note 20.

<sup>24</sup> Schools in most states require this certificate to operate legally.

<sup>25</sup> Centre for Civil Society, *supra* note 4.

<sup>26</sup> Haryana School Education Rules, 2003, Gazette of Haryana, § 24 (Apr. 30, 2003).

<sup>27</sup> Jacob E. Gersen & Anne Joseph O’Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 923–990 (2008).

<sup>28</sup> Bhuvana Anand et al., *What does a Framework of Regulatory Quality and Hygiene entail*, CENTRE FOR CIVIL SOCIETY (2019), <https://ccs.in/sites/default/files/what-does-a-framework-of-regulatory-quality-and-hygiene-entail.pdf>.

<sup>29</sup> Mantel, *supra* note 12 at 343.

of law requires discretionary powers to be guided by certain guidelines. Without guiding norms, “*it may be difficult to assess whether a particular administrative decision is bona fide and based on merits and proper considerations or is mala fide and motivated by some improper and corrupt consideration*”.<sup>30</sup> This implies that clearly defined guidance provides the necessary basis to bring action into question and thereby helps ensure better accountability on the part of the public officials. Unguided discretion opens room for corruption, arbitrariness and misuse of powers.

One way to curb abuse of power is to ensure that the criteria on the basis of which the executive takes decisions are laid down in the law itself.<sup>31</sup> Clear mention of the criteria in a statute helps introduce predictability.<sup>32</sup> For instance, laws must clearly enlist the criteria based on which the executive should grant approvals or impose a penalty. A school owner must know the criteria they have to meet to get recognised. Similarly, a law that elaborates on the criteria for breach increases the school’s awareness of actions that could result in a penalty or sanction. The key challenge lies in developing guidance that is “*sufficient*” to curb abuse of power while also providing flexibility to the executive to administer the law efficiently.<sup>33</sup>

### C. PROPORTIONALITY AND NEXUS

The third way to establish a check on the executive’s exercise of powers and protect the rights, property and freedom of individuals is to use the test of proportionality and nexus. Principles of proportionality help ensure that there is a link between an intervention and the intended outcome. The majority of the school education laws across states aim to better organise and develop school education.<sup>34</sup> The purpose of the proportionality test is to ensure that “*when the government acts, the means it chooses should be well adapted*

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<sup>30</sup> Jain, *supra* note 20.

<sup>31</sup> Anand et. al., *supra* note 28.

<sup>32</sup> Mantel, *supra* note 12; Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1991–1992 (2015).

<sup>33</sup> Lewis Allen Sigler, *The Problem of Apparently Unguided Administrative Discretion*, 19 ST. LOUIS L. REV. 261, 261–321 (1934).

<sup>34</sup> As stated in the preamble of laws such as The Haryana School Education Act, 1995 and the Delhi School Education Act, 1973.



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to achieve the ends it is pursuing”.<sup>35</sup> As a result, in order to pass the test of proportionality, these laws must choose a method that aligns with the aforementioned policy objective and is the least restrictive way to achieve it.<sup>36</sup>

The proportionality test has four elements: (i) legitimacy; (ii) suitability; (iii) necessity; and (iv) proportionality *stricto sensu*.<sup>37</sup> It helps in two ways: *first*, to ascertain if the objective aligns with what is needed to tackle the problem identified, and *second*, to check if the measures used by the law (such as penalties sanctioned) align with the stated objective of the law.<sup>38</sup> In the section above, we highlighted the need for laws to mention the criteria on the basis of which the executive must decide. However, to pass the test of proportionality, the criteria set must also be reasonable. In other words, the criteria set must be neither arbitrary nor excessive.<sup>39</sup>

Arbitrary conditions are the ones that have no nexus or connection with the purpose of the legislation or statute. Each law, through its preamble, must make its objective clear and highlight the issue it intends to tackle. This is a necessary precondition to ascertain whether the measures introduced by the law are arbitrary or not. Excessive conditions are the ones that go overboard. Measures are deemed to be excessive if there exists a less restrictive alternative that could achieve the same intended result. The least restrictive method is the one that puts the least restrictions on the freedoms of an individual. For instance, the penalties imposed by law must not be disproportionate to the misconduct or violation.<sup>40</sup>

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<sup>35</sup> Jud Mathews, *Proportionality Review in Administrative Law*, in COMPARATIVE ADMINISTRATIVE LAW (Susan Rose-Ackerman et al. eds. 2d ed., Edward Elgar 2017) European Commission, *Better Regulation Toolbox* (2017), <https://ec.europa.eu/info/sites/default/files/better-regulation-toolbox.pdf>.

<sup>36</sup> AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* (Cambridge University Press 2012).

<sup>37</sup> *Id.*

<sup>38</sup> European Commission, ‘*Better Regulation*’ *Toolbox: Tool #3. Legal Basis, Subsidiarity and Proportionality*, 21–26 (2015), [https://ec.europa.eu/info/sites/default/files/better-regulation-toolbox-2015\\_0.pdf](https://ec.europa.eu/info/sites/default/files/better-regulation-toolbox-2015_0.pdf).

<sup>39</sup> Aparna Chandra, *Proportionality in India: A Bridge to Nowhere?*, 3(2) U. OXFORD HUM. RTS. HUB J. 57, 62-85 (2020).

<sup>40</sup> Arbitrariness and excessiveness are used to judge whether an administrative action is reasonable; see Paul Craig, *The Nature of Reasonableness Review*, 66(1) CURRENT LEGAL

## D. CHECKS ON EXECUTIVE’S RULE-MAKING POWERS

Apart from taking decisions on a case-by-case basis, the executive is also responsible for putting in place general rules applicable to all. Implementing a law requires technical and localised knowledge. As a result, the parent legislation only outlines the broad principles and often leaves matters of administrative details to be elaborated upon by the executive based on the ground realities. This helps the executive to be more responsive to changes.<sup>41</sup>

However, since rules are not made by elected representatives or subject to close scrutiny, the legislature must ensure that these rules are not in contravention of the interests of the people and the key stakeholders. Safeguards in the parent legislation help ensure that the quasi-legislative powers are not used indiscriminately.<sup>42</sup> The parent legislation can establish this check on the extent and volume of the subordinate legislation in multiple ways.

*First*, the parent legislation must closely guide the subject matter on which the executive can frame rules to limit the scope of their powers.<sup>43</sup> *Second*, the legislation should provide a time frame within which these rules must be framed.<sup>44</sup> This becomes especially salient when most provisions of the law can be realised only once the rules notify the details. *Third*, to ensure that the rules are in line with the statute and that the executive does not overreach its powers, the law must prescribe that the rules made under it be laid before the Parliament for approval.<sup>45</sup>

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PROBLEMS 131–167 (2013). In this paper, we use the lens of reasonableness to evaluate the provisions introduced under state school education laws.

<sup>41</sup> CECIL THOMAS CARR, *Delegated Legislation*, in CONCERNING ENGLISH ADMINISTRATIVE LAW (Columbia University Press, 1941).

<sup>42</sup> JEFF KING, THE PROVINCE OF DELEGATED LEGISLATION (Oxford Scholarship Online 2020); PAUL BYRNE, PARLIAMENTARY CONTROL OF DELEGATED LEGISLATION (Oxford University Press 1976).

<sup>43</sup> Gwalior Rayon Silk Mfg. (Wvg) Co. Ltd. v. Asstt. Commissioners of Sales Tax, AIR 1974 SC 1660 (India). The Supreme Court held that delegation of rule-making powers would be excessive if: it does not lay down any policy; expresses its policy in “*vague and general terms*”; and lays no guidance for the executive.

<sup>44</sup> Singh & Dash, *supra* note 17.

<sup>45</sup> Elmer A. Driedger, *Subordinate Legislation*, 38 CAN. B. REV. 1 (1960).

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In some cases, laws also mandate the executive to consult the relevant stakeholders before notifying a rule.<sup>46</sup> If the delegation of quasi-legislative power is not guided by procedural safeguards, it may be deemed as “*excessive delegation*”.<sup>47</sup> Similarly, the executive must exercise its powers within the framework set by the parent statute. For instance, the executive must not sub-delegate its powers unless it has an express authority to do so.

### **HOW DO STATE EDUCATION LAWS FARE ON THE ADMINISTRATIVE SAFEGUARDS?**

State school education laws govern several aspects of a school’s lifecycle, such as entry/establishment, regulation of fees, operation in line with set norms, upgradation and exit. Given that these powers are exercised by the executive (unelected officials), the laws must limit their scope to avoid abuse. The executive ought to operate within a constrained framework and only perform actions for which it has express legal authorisation. Unrestrained powers can impinge on the rights of individuals. In the case of school education, it could create hurdles for new entrants as well as existing school owners. The majority of the seventy laws analysed confer upon the executive either licensing or penal powers.

For the purpose of analysis, the authors further categorise quasi-judicial powers as either related to approval or enforcement. An approval function is defined as one where officials are required to use reason and ascertain facts to determine whether approval is to be granted or not. Our analysis shows that in the majority of the cases, these approval functions pertain to recognition of schools. Other approval functions include grant/funding approvals for aided schools, granting building permits and approval for the upgradation of schools.

Enforcement functions are defined as ones where the executive penalises individuals for non-compliance or violation of the provisions of the law. These include actions such as revocation of licences or any other approval

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<sup>46</sup> For instance, the National Food Security Act 2013 mandates the draft of all rules to be placed in the public domain before enactment. In compliance with this provision, the Tamil Nadu food security rules, 2017 were placed in the public domain before being enacted.

<sup>47</sup> Jain, *supra* note 20.

granted, derecognition, seizure of property, imposition of a monetary penalty and imprisonment.

## **A. PROCEDURAL SAFEGUARDS**

### **Issuance of Notice or a Pre-Decisional Hearing**

Of the forty laws that give powers to the executive to grant approval, only the Karnataka Education Act, 1983 mandates the issuance of a notice or a pre-decisional hearing before an application is rejected.<sup>48</sup> But even in this case, an opportunity to be heard is not provided for all kinds of approval functions.

In cases where an individual is punished with a penalty or sanction, a pre-decisional hearing and notice become even more pertinent to ensure that no individual is wrongfully penalised. However, thirty-one laws fail to mandate either a notice or a hearing before such enforcement measures are undertaken.<sup>49</sup>

### **Identification of Decision-Making Authority and Time Limit**

In eight laws, there is no clarity on who is the concerned authority for approvals.<sup>50</sup> Of the fifty-three laws that give enforcement powers to the executive, in twenty-nine laws, there is no clarity on the official who is responsible for ensuring enforcement. These laws either do not mention the authority or direct the state government to identify and appoint the

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<sup>48</sup> See Karnataka Education Act, 1983, § 96, No. 1, Acts of Karnataka State Legislature, 1995.

<sup>49</sup> See Karnataka Prohibition Of Admission Of Students To Unrecognized And Unaffiliated Educational Institutions Act, 1992, No. 7, Acts of Karnataka State Legislature, 1993; Andhra Pradesh Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act, 1983, No. 5, Acts of Andhra Pradesh State Legislature, 1983 and Delhi School Education Act, 1973, No. 18, Acts of Delhi Legislature, 1973.

<sup>50</sup> See Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1983; Maharashtra Self-Financed Schools (Establishment and Regulation) Act, 2012 No. 1, Acts of Maharashtra State Legislature, 2013; and Puducherry School Education Act, 1987, No. 9, Acts of Puducherry Legislature, 1987.

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concerned authority.<sup>51</sup> Once identified, the state government needs to notify the details of the authority either by way of rules or an order. This information is often scattered and can be difficult to collect.

Only six laws set an upper time limit or deadline for all approval functions.<sup>52</sup> In Haryana, the law also puts in place a provision for deemed approval.<sup>53</sup>

### **Reasoned Order**

Once the executive decides to reject an application, the applicant must at least know the ground for rejection.<sup>54</sup> However, most laws either require the executive to communicate the decision in writing (not necessarily with reasons) or communicate the reasons to the concerned school (not necessarily as a written order). The Karnataka Education Act, 1983 mandates the executive to do both in case an application for approval is denied.<sup>55</sup> For enforcement functions, only three laws mandate the executive to provide a reasoned order when imposing a penalty or sanction.<sup>56</sup> Even in the case of these laws, the mandate for a reasoned order is not imposed for all kinds of enforcement functions.

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<sup>51</sup> See Karnataka Prohibition Of Admission Of Students to Unrecognized And Unaffiliated Educational Institutions Act, 1992, No. 7, Acts of Karnataka State Legislature, 1993; Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, 1984, No. 37, Acts of Karnataka State Legislature, 1984; and Andhra Pradesh Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act, 1983, No. 5, Acts of Andhra Pradesh State Legislature, 1983.

<sup>52</sup> See Haryana School Education Act, 1995, No. 12, Acts of Haryana State Legislature, 1999; Rajasthan Non-Government Educational Institutions Act, 1989, No. 19, Acts of Rajasthan State Legislature, 1992; Jharkhand Education Tribunal Act, 2005, No. 6, Acts of Jharkhand State Legislature, 2005; and The Gujarat Educational Institutions (Regulation) Act, 1984, No. 7, Acts of Gujarat State Legislature, 1984.

<sup>53</sup> See Haryana School Education Act, 1995, No. 12, Acts of Haryana State Legislature, 1999.

<sup>54</sup> Chauhan, *supra* note 14 at 92–104.

<sup>55</sup> Karnataka Education Act, 1983, §§ 31 & 36, No. 1, Acts of Karnataka State Legislature, 1995.

<sup>56</sup> See Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1983; Karnataka Education Act, 1983, No. 1, Acts of Karnataka State Legislature, 1995; and Telangana Education Act, 1982 No. 1, Acts of Telangana State Legislature, 1982.

## Recourse to Appeal

Finally, even after the decision has been taken, an individual or entity must have recourse (in the form of appeal) to get the decision reviewed.<sup>57</sup> Only seventeen laws allow for appeal against all approval related decisions of the government,<sup>58</sup> and twelve laws allow an individual to appeal against all kinds of enforcement actions or measures.<sup>59</sup> In fact, under laws such as the Karnataka Education Act, 1983<sup>60</sup> and the Maharashtra Educational Institutions (Management) Act, 1976,<sup>61</sup> appeals against some decisions of the Director of Education and the state government are explicitly denied.

## Independent Appeal Mechanism

For laws that provide an appeal mechanism, the authors have looked into the constitution of the appellate committee to ascertain if the process is independent. Some states like Gujarat, Jharkhand, Karnataka, and Puducherry establish an independent appeal mechanism by setting up independent tribunals.<sup>62</sup> For instance, the Karnataka Education Act, 1983,

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<sup>57</sup> 1 HALSBURY'S LAWS OF INDIA, ADMINISTRATIVE LAW (Universal LexisNexis 2d ed. 2019).

<sup>58</sup> See Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1983; Haryana School Education Act, 1995, No. 12, Acts of Haryana State Legislature, 1999; M.P. Ashaskiya School Viniyaman Adhinyam, 1975, No. 33, Acts of Madhya Pradesh State Legislature, 1975; and Puducherry School Education Act, 1987, No. 9, Acts of Puducherry Legislature, 1987.

<sup>59</sup> Instances include: Gujarat Higher Secondary Schools Services Tribunal Act, 1983, No. 12, Acts of Gujarat State Legislature, 1983; The Gujarat Educational Institutions (Regulation) Act, 1984, No. 7, Acts of Gujarat State Legislature, 1984; Puducherry School Education Act, 1987, No. 9, Acts of Puducherry Legislature, 1987; Rajasthan Non-Government Educational Institutions Act, 1989, No. 19, Acts of Rajasthan State Legislature, 1992; Rajasthan Schools (Regulation of Fee) Act, 2016, No.14, Acts of Rajasthan State Legislature, 2016; and Telangana Education Act, 1982, No. 1, Acts of Telangana State Legislature, 1982.

<sup>60</sup> The Karnataka Education Act, 1983, No. 1, Acts of Karnataka State Legislature, 1995.

<sup>61</sup> The Maharashtra Educational Institutions (Management) Act, 1976, No. 13, Acts of Maharashtra State Legislature, 1976.

<sup>62</sup> See Gujarat Higher Secondary Schools Services Tribunal Act, 1983, No. 12, Acts of Gujarat State Legislature, 1983; Gujarat Educational Institutions Services Tribunal Act, 2006, No. 20, Acts of Gujarat State Legislature, 2006; Jharkhand Education Tribunal Act, 2005, No. 6, Acts of Jharkhand State Legislature, 2005 and Puducherry School Education Act, 1987, No. 9, Acts of Puducherry Legislature, 1987.

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requires the state government to constitute Education Appellate Tribunals for adjudicating appeals.<sup>63</sup> These tribunals must have a judicial officer who is not below the rank of a district judge. In other cases, appeals against an officer in the education department are heard by a senior officer in the same department.

### **B. GUIDANCE ON EXECUTIVE DISCRETION**

#### **No Criteria for Approval or Breach**

Of the forty laws that confer upon the executive the authority to grant approvals, only ten laws define the criteria on the basis of which all such approvals may be granted.<sup>64</sup> In twenty laws, the power to define the criteria has been delegated to the executive.<sup>65</sup> Such delegation may give the executive room to introduce conditions that are not consistent with the parent legislation or are *ultra-vires*.

For instance, several state rules under the Right to Education Act require schools to be registered as “*societies*” that are not-for-profit.<sup>66</sup> Such a requirement finds no mention in the parent legislation and has considerable ramifications for school owners. It disallows individuals, a group of individuals, or companies registered under the Companies Act, 2013 from setting up schools.<sup>67</sup>

Of the laws studied, only twenty-three laws lay down the criteria for the imposition of penalties or sanctions. Of these, some laws prescribe very wide criteria for what constitutes a breach. For instance, under the Jammu

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<sup>63</sup> The Karnataka Education Act, 1983, § 96, No. 1, Acts of Karnataka State Legislature, 1995.

<sup>64</sup> See Jharkhand Education Tribunal Act, 2005, No. 6, Acts of Jharkhand State Legislature, 2005; Gujarat Self-financed Schools (Regulation of Fees) Act, 2017, No. 12, Acts of Gujarat State Legislature, 2017.

<sup>65</sup> See Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1982; Bihar High Schools (Control and Regulation Administration) Act, 1960, No. 13, Acts of Bihar State Legislature, 1960 and Puducherry School Education Act, 1987, No. 9, Acts of Puducherry State Legislature, 1987.

<sup>66</sup> Akash Pratap Singh & Tarini Sudhakar, *Restrictions on For-Profit Education in India*, CENTRE FOR CIVIL SOCIETY (May 11, 2020), <https://ccs.in/restrictions-profit-education-india>.

<sup>67</sup> *Id.*

and Kashmir School Education Act, 2002, the executive can derecognise any school if it is of the opinion that the school has violated provisions of the Act.<sup>68</sup> In twenty laws, this power is delegated to the executive. For instance, the Madhya Pradesh Secondary Education Act, 1965 prescribes the board to lay down the criteria for the derecognition of schools.<sup>69</sup>

### **Ambiguous, Vague and Unclear Criteria**

Although twenty-three laws mention the criteria for breach or violation, they are often vague, ambiguous, and unclear. This expands the scope of powers that the executive can exercise. In Andhra Pradesh, recognition can be withdrawn in “*public interest*”.<sup>70</sup> However, it is not clear what constitutes “*public interest*”. Under other laws, such as the Maharashtra Educational Institutions (Transfer of Management) Act, 1971, ambiguous terms are used in the objective itself:<sup>71</sup>

*“An Act to provide for the transfer of management of the undertaking of certain educational institutions, which are being managed in a manner detrimental to the public interest and to provide for matters connected with the purpose aforesaid.”*

The term “*detrimental to public interest*” is broad and all-encompassing. The Act does not define what actions would be considered detrimental to public interest. Similarly, under the Maharashtra Self-Financed Schools (Establishment and Regulation) Act, 2012, permission for upgradation can be withdrawn if the school is found to be engaging in activities that are “*prejudicial [to] the interests of the students*”.<sup>72</sup> The issue with such overarching phraseology is that almost any action on the part of the school can be misconstrued to be prejudicial to the interests of the students.

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<sup>68</sup> Jammu & Kashmir School Education Act, 2002, § 16, No. 21, Acts of Jammu & Kashmir State Legislature, 2002.

<sup>69</sup> Madhya Pradesh Secondary Education Act, 1965, No. 3, Acts of Madhya Pradesh State Legislature, 1966.

<sup>70</sup> The Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1982.

<sup>71</sup> The Maharashtra Educational Institutions (Transfer of Management) Act, 1971, No. 49, Acts of Maharashtra State Legislature, 1971.

<sup>72</sup> Maharashtra Self-Financed Schools (Establishment and Regulation) Act, 2012, No. 1, Acts of Maharashtra State Legislature, 2013.



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### **Expanding the Executive's Scope of Powers**

Some laws expand the sphere of powers that the executive can exercise. However, they fail to provide sufficient guidance to the executive for exercising these powers. For instance, the Telangana Education Act, 1982 grants power to the executive to exempt any school from the provisions of the law.<sup>73</sup> This could potentially open room for favouritism.

### **C. PRINCIPLES OF PROPORTIONALITY AND NEXUS**

#### **Unclear Objective of the Law**

Twenty-three laws do not mention the issue that they intend to tackle in their objective.<sup>74</sup> Furthermore, eighteen laws use ambiguous and unclear terms in their objectives, such as “*integrated development*” of children, “*better organisation*” and “*national integration*”.<sup>75</sup> In such cases, an assessment of whether the law is meeting its objectives becomes difficult.

#### **Arbitrary and Excessive Conditions/Provisions**

Four laws introduce conditions that are either arbitrary or excessive.<sup>76</sup> The Andhra Pradesh Education Act, 1982 aims to “*reform, organise and develop*” the education system and ensure the “*integrated development*” of children.<sup>77</sup> This objective does not clarify the specific challenge that warrants the

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<sup>73</sup> Telangana Education Act, 1982, § 100, No. 1, Acts of Telangana State Legislature, 1982.

<sup>74</sup> See, for instance, Gujarat Educational Institutions (Regulation) Act, 1984, No. 7, Acts of Gujarat State Legislature, 1984; Haryana School Teachers Selection Board Act, 2011, No. 21, Acts of Haryana State Legislature, 2011; and Telangana Private Educational Institutions Grant-In-Aid (Regulation) Act, 1988, No. 22, Acts of Telangana State Legislature, 1988.

<sup>75</sup> See Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1982; Delhi School Education Act, 1973, No. 18, Acts of Delhi Legislature, 1973; and the U.P. Educational Institutions (Taking-Over of Management) Act, 1976, No. 18, Acts of Uttar Pradesh State Legislature, 1976.

<sup>76</sup> See Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1982; Karnataka Education Act, 1983, Acts of Karnataka State Legislature, 1995; Telangana Education Act, 1982, No. 1, Acts of Telangana State Legislature, 1982; and Maharashtra Educational Institutions (Management) Act, 1976, No. 13, Acts of Maharashtra State Legislature, 1976.

<sup>77</sup> The Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1982.

attention of the government. One of the conditions that it introduces for those who wish to establish a school is to prove the “*need*” for such a school in the first place.<sup>78</sup> It is not clear how this condition has any nexus with the objective of the statute.

A criterion that is excessive creates an unnecessary compliance burden for school owners to meet their objectives. For instance, the Karnataka Education Act, 1983 aims to improve the quality of education and ensure “*harmonious development of the mental and physical faculties of students*”.<sup>79</sup> To meet this end, one of its provisions prohibits employees of a recognised school from giving private tuition to *any* individual.<sup>80</sup> While many may argue that private tuition to some students of the school can compromise the performance of other students,<sup>81</sup> it is not clear why private tuition to students outside the school is prohibited. This criterion for breach is excessive and prevents an individual from having an alternative source of livelihood.

In other cases, the penalty sanctioned exceeds what the violation may merit. The Madhya Pradesh Ashaskiya School Viniyaman Adhiniyam, 1975 mentions that the breach of “*any rule*” formulated under this Act could attract an imprisonment of up to six months.<sup>82</sup> Under the Andhra Pradesh Education Act, 1982 the government can take over the management of a school if it is of the opinion that such a takeover is in “*public interest*” and will help ensure “*proper management*” of the school.<sup>83</sup> Furthermore, if the government deems any contract that the erstwhile management engaged in

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<sup>78</sup> The Andhra Pradesh Education Act, 1982, § 20(3), No. 1, Acts of Andhra Pradesh State Legislature, 1982.

<sup>79</sup> Preamble of the Karnataka Education Act, 1983, No. 1, Acts of Karnataka State Legislature, 1995.

<sup>80</sup> Karnataka Education Act, 1983, § 4, No. 1, Acts of State Karnataka Legislature, 1995.

<sup>81</sup> Hai-Anh Dang & F. Halsey Rogers, *The Growing Phenomenon of Private Tutoring: Does It Deepen Human Capital, Widen Inequalities, or Waste Resources?*, 23(2) THE WORLD BANK RESEARCH OBSERVER (2008).

<sup>82</sup> The Madhya Pradesh Ashaskiya School Viniyaman Adhiniyam, 1975, § 21(e), No. 33, Acts of Madhya Pradesh State Legislature, 1975.

<sup>83</sup> The Andhra Pradesh Education Act, 1982, § 60, No. 1, Acts of Andhra Pradesh State Legislature, 1982.

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to be “*bad faith*” or “*detrimental to the interests of the educational institution*”, these contracts can be varied or even cancelled.<sup>84</sup>

The Andhra Pradesh Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act, 1983 prohibits capitation fees, regulates school fees, regulates the admission of students, and lays down norms for the collection of donations.<sup>85</sup> If, according to the government, an educational institution is found to violate *any* provisions of the Act, it can take over the management of the school. Another section of the Act prescribes imprisonment (that can go up to a term of seven years) for contravention of the provisions of the Act.<sup>86</sup> However, the provision to punish those in violation with jail time serves no additional purpose than mere removal of the guilty parties would not do.

Some rules also elaborate on enforcement measures to be taken for students (not just school owners). For instance, under the Delhi School Education Rules, 1973 a student below fourteen years of age can be shifted by an administrator to a “*special school*”, if (among other things) they do not spit in a spittoon.<sup>87</sup> Shifting schools for not meeting these disciplinary requirements is an excessive measure.

### **Archaic and Outdated Provisions**

Many state school education laws were introduced before the year 2000. While, in most cases, the provisions of these laws have been revisited and revised in the form of amendments, some laws continue to have archaic and outdated provisions. For instance, under the Karnataka Education Act 1983, penalties for contravention range from Rs. 2 to Rs. 100.<sup>88</sup>

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<sup>84</sup> The Andhra Pradesh Education Act, 1982, § 62, No. 1, Acts of Andhra Pradesh State Legislature, 1982.

<sup>85</sup> Andhra Pradesh Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act, 1983, No. 5, Acts of Andhra Pradesh State Legislature, 1983.

<sup>86</sup> Andhra Pradesh Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act, 1983, § 9, No. 5, Acts of Andhra Pradesh State Legislature, 1983.

<sup>87</sup> The Delhi School Education Rules 1973, R. 36, Gazette of Delhi, pt. IV (Dec. 12, 1973).

<sup>88</sup> The Karnataka Education Act, 1983, § 113, No. 1, Acts of Karnataka State Legislature, 1995.

## D. CHECKS ON THE EXECUTIVE'S RULE-MAKING POWERS

### Limiting the Breadth and Depth of the Executive's Rule-Making Powers

Of the seventy laws studied, sixty-two laws delegate rule-making powers to the executive. However, only thirty-one laws enumerate distinct rule heads that the executive can cover in the rules. Other laws leave the subject matter open to the executive.<sup>89</sup>

Of the laws that enumerate rule heads, twenty-six laws also contain a “*residual clause*”.<sup>90</sup> This clause gives the executive the powers to make rules on “*any other matter*” they may deem necessary. Our analysis reveals that eleven rules have introduced provisions that fall under the residual clause. For instance, Rules 34-37 of the Delhi School Education Rules, 1973 mandate an enforceable code of conduct for students in educational institutions.<sup>91</sup> This does not fall under any of the rule-heads of the Delhi School Education Act, 1973 (except the residual clause).<sup>92</sup>

Apart from limits in the range, there must also be limits in the depth of rule-making powers exercised by the executive.<sup>93</sup> Rules must largely cover administrative details rather than questions of substantive rights and duties of individuals. However, we noted in the sections above that the parent legislation often delegates the power to frame criteria for approval or

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<sup>89</sup> See, for instance, the Gujarat Educational Institutions Services Tribunal Act, 2006, No. 20, Acts of Gujarat State Legislature, 2006; Bihar Non-Government Elementary Schools (Taking Over of Control) Act, 1976, No. 30, Acts of Bihar State Legislature, 1976; Maharashtra Educational Institutions (Regulation of Fee) Act, 2011, No. 7, Acts of Maharashtra State Legislature, 2011; and Puducherry Compulsory Elementary Education Act, 2000, No. 8, Acts of Puducherry Legislature, 2001.

<sup>90</sup> See, for instance, Andhra Pradesh Education Act, 1982, Acts of Andhra Pradesh State Legislature, 1982; Delhi Primary Education Act, 1960, No. 39, Acts of Delhi Legislature, 1960; Gujarat Secondary and Higher Secondary Education Act, 1972, No. 18, Acts of Gujarat State Legislature, 1972; and Haryana School Education Act, 1995, No. 12, Acts of Haryana State Legislature, 1999.

<sup>91</sup> The Delhi School Education Rules, 1973, Gazette of Delhi, pt. IV (Dec. 12, 1973).

<sup>92</sup> The Delhi School Education Act, 1973, No. 18, Acts of Delhi Legislature, 1973.

<sup>93</sup> JEFF KING, THE PROVINCE OF DELEGATED LEGISLATION (Oxford Scholarship Online 2020); PAUL BYRNE, PARLIAMENTARY CONTROL OF DELEGATED LEGISLATION (Oxford University Press 1976).

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breach to the executive. For instance, Section 43 of the Rajasthan Non-Government Educational Institutions Act, 1989 requires the state government to prescribe the terms, conditions, and standards on the basis of which educational institutions will be recognised.<sup>94</sup>

### **Laying Before the Parliament and Consulting Relevant Stakeholders**

Of the sixty-two laws that delegate rule-making powers, twenty laws do not put in place any mandate for rules to be laid before the Parliament.<sup>95</sup> Of the sixty-two laws that delegate rule-making powers, no law directs the executive to consult stakeholders while drafting rules.<sup>96</sup>

### **Other Challenges with the Delegation of Rule-Making Powers**

The authors observed three other issues with the delegation of rule-making powers. *First*, laws in Delhi and Gujarat allow the designated authority or official to sub-delegate their rule-making powers.<sup>97</sup> Such sub-delegation could make control over subordinate legislation more difficult. *Second*, five laws (across Andhra Pradesh, Jharkhand, Maharashtra, and Karnataka) allow the executive to give retrospective effect to rules.<sup>98</sup>

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<sup>94</sup> The Rajasthan Non-Government Educational Institutions Act, 1989, § 43, No. 19, Acts of Rajasthan State Legislature, 1992.

<sup>95</sup> See, for instance, Jharkhand Academic Council Act, 2002, No. 2, Acts of Jharkhand State Legislature, 2003; Gujarat Secondary and Higher Secondary Education Act, 1972, No. 18, Acts of Gujarat State Legislature, 1972 and Puducherry Board of Secondary and Higher Secondary Education Act, 2003, No. 8, Acts of Puducherry Legislature, 2004.

<sup>96</sup> See Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1982; Delhi School Education Act, 1973, No. 18, Acts of Delhi Legislature, 1973; Haryana School Education Act, 1995, No. 12, Acts of Haryana State Legislature, 1999; and Kerala Education Act, 1958, No. 6, Acts of Kerala State Legislature, 1959.

<sup>97</sup> See Delhi Primary Education Act, 1960, No. 39, Acts of Delhi Legislature, 1960; and Gujarat Compulsory Primary Education Act, 1961, No. 41, Acts of Gujarat State Legislature, 1961.

<sup>98</sup> See Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1982; Jharkhand Education Tribunal Act, 2005, No. 6, Acts of Jharkhand State Legislature, 2005; Karnataka Education Act, 1983, No. 1, Acts of Karnataka State Legislature, 1995; Karnataka Compulsory Primary Education Act, 1961, No. 9, Acts of Karnataka State Legislature, 1961 and Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977, No. 3, Acts of Karnataka State Legislature, 1978.

Allowing retrospective enactment of rules increases uncertainty and unpredictability.<sup>99</sup> In the case of school education, this has a bearing on the decisions that school owners take to improve quality and expand access to education.

*Third*, twenty-six laws give the executive the “*power to remove difficulties*”.<sup>100</sup> This provision, also known as the Henry clause, allows the executive to modify or alter the law itself in case challenges emerge during implementation.<sup>101</sup> Since such changes typically do not go through the legislative process, this power must be subject to certain restrictions. These include limits to the nature of amendments that may be made and limits to the time frame within which such amendments may be made.<sup>102</sup> The former takes the form of guidance that the amendments must not be “*inconsistent with the Act*”. The latter typically involves setting a time frame beyond which the executive ceases to have powers to amend the law.

Of the laws that grant this power to the executive, eleven laws fail to set both limits to the executive’s exercise of this power.<sup>103</sup> The Karnataka Secondary Education Examination Board Act, 1966 and Telangana Private Aided Educational Institutions Employees (Regulation of Pay) Act, 2005 are the only two laws that require such orders to be laid before the Parliament after it is published.<sup>104</sup>

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<sup>99</sup> CHARLES SAMPFORD, *Arguments against Retrospective Laws*, in RETROSPECTIVITY AND THE RULE OF LAW (Oxford Scholarship Online 2012).

<sup>100</sup> See, for instance, Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1982; Delhi School Education Act, 1973, and Kerala Education Act, 1958.

<sup>101</sup> V.S. Deshpande, *Rights and Duties under the Constitution*, 15 J. INDIAN L. I. 94, 94–108 (1973).

<sup>102</sup> *Id.*

<sup>103</sup> For instance, see Gujarat Secondary and Higher Secondary Education Act, 1972, No. 18, Acts of Gujarat State Legislature, 1972; Madhya Pradesh Secondary Education Act, 1965, No. 3, Acts of Madhya Pradesh State Legislature, 1966; Bihar Non-Government Elementary Schools (Taking Over of Control) Act, 1976, No. 30, Acts of Bihar State Legislature, 1976 and Telangana Education Act, 1982, No. 1, Acts of Telangana State Legislature, 1982.

<sup>104</sup> See Karnataka Secondary Education Examination Board Act, 1966, No. 16, Acts of Karnataka State Legislature, 1966 and Telangana Private Aided Educational Institutions Employees (Regulation of Pay) Act, 2005, No. 37, Acts of Telangana State Legislature, 2005.

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Along with reviewing the parent legislations, we also studied sixty-one rules governing K-12 education to review how the executive exercises its power under the parent statute.

### **No Clarity on where Rules Derive their Power From**

The government is required to mention the section and subsection of the parent act from which they derive their powers in the preamble of the rules. However, four rules (across Gujarat, Madhya Pradesh, Rajasthan and Uttar Pradesh) do not mention the section or subsection of the parent act from which they derive their power.<sup>105</sup> Without a clear mention of the relevant provisions of the parent act, it becomes difficult to adjudge whether rules are *ultra vires*.

### **Rules Go Beyond the Mandate of the Act**

Even in cases where the relevant sections and subsections have been mentioned, we observed that provisions introduced under three rules (across Andhra Pradesh, Delhi, and Goa) go beyond the rule heads mentioned in the parent act.<sup>106</sup> For instance, the Delhi School Education Rules, 1973 requires schools to ensure that they do not affect enrolment levels in nearby schools if they are to obtain recognition.<sup>107</sup> Such a condition finds no mention in the parent act. One example of best practices is the Haryana School Education Rules, 2003. For each rule, the subordinate legislation has a header that refers to the section of the parent

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<sup>105</sup> See Assistant Education Inspector and Assistant Teacher, Class III (Departmental Examination) Rules, 2012, Gazette of India (Dec. 21, 2012); The Rajasthan Education Department (Primary and Secondary Teachers) Benevolent Fund Rules, 1975, Gazette of Rajasthan, pt. IV(I) (Feb. 10, 1975); Rules of the U.P. School and College Teachers Gratuity Fund (1964), Gazette of Uttar Pradesh, pt. VIII (Apr. 1, 1964) and The M.P. Date of Birth (Entries in the School Register) Rules, 1973, Gazette of Madhya Pradesh, pt. IV (Nov. 16, 1973).

<sup>106</sup> See Andhra Pradesh Educational Institutions (Establishment, Recognition, Administration and Control of Institutions of Higher Education) Rules, 1987, Gazette of Andhra Pradesh, pt. I (Jan. 1, 1994); Delhi School Education Rules, 1973, Gazette of Delhi, pt. IV (Dec. 12, 1973); and Goa, Daman and Diu School Education Rules, 1986, Gazette of Goa and Daman and Diu, § 29 (Dec. 22, 1988).

<sup>107</sup> Delhi School Education Rules, 1973, R. 50, Gazette of Delhi, pt. IV (Dec. 12, 1973).

legislation under which it has been drafted (or from which it derives its powers).<sup>108</sup>

### **Rules Introduce Criteria that are Arbitrary**

Three rules introduce criteria for decision-making that are inconsistent with the provisions of the parent act.<sup>109</sup> Rules under the Madhya Pradesh Secondary Education Act, 1965 require schools to have at least one acre of land to be recognised. It also requires schools to deposit a security fund on the basis of the number of students (rather than a standard deposit amount).<sup>110</sup>

The deposit becomes a costly affair for schools that have a high number of students. Furthermore, this amount is over and above the recognition fees that the school needs to pay. Such criteria have not been mentioned in the parent statute. There is no clarity on how these criteria relate to the objective of the Act.

Similarly, Rule 50 of the Delhi School Education Rules, 1973<sup>111</sup> requires a private school to be run by a society registered under the Societies Registration Act, 1860 or a Trust.<sup>112</sup> The parent act does not introduce any such condition. Another example is that of the Andhra Pradesh Educational Institutions (Establishment, Recognition, Administration and Control of Schools under Private Managements) Rules, 1993. The rules create a limitation that finds no mention in the parent legislation. It allows schools to be upgraded to class ten only after three years have passed since the commencement of class eight.

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<sup>108</sup> Haryana School Education Rules, 2003, R. 24, Gazette of Haryana (Apr. 30, 2003).

<sup>109</sup> See Andhra Pradesh Educational Institutions (Establishment, Recognition, Administration and Control of Schools under Private Managements) Rules, 1993; Delhi School Education Rules, 1973; and Madhya Pradesh Recognition of Secondary and Higher Secondary School Rules, Secondary School Rules, 2017.

<sup>110</sup> Madhya Pradesh Recognition of Secondary and Higher Secondary School Rules, 2017, R. 5, Gazette of Madhya Pradesh (Mar. 09, 2017).

<sup>111</sup> The Delhi School Education Rules, 1973, R. 50, Gazette of Delhi, pt. IV (Dec. 12, 1973).

<sup>112</sup> Societies Registration Act, 1860, No. 21, Acts of Parliament, 1860.



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### CONCLUSION

This paper reviewed the quality of the laws and rules governing K-12 education across sixteen states. We found that several school education laws and rules fare poorly on the four integral administrative safeguards: due process and principles of natural justice, legislative guidance on discretion, proportionality and nexus, and checks on the executive's rule-making powers. The absence of these safeguards provides the executive with considerable discretionary powers to derecognise or shut schools, regulate their fees, and take over their management. Such regulatory hurdles may discourage the establishment of new schools, limit innovation, and affect access to quality education. Together, this can impinge on the rights and liberties of children, school owners, and the employees working in schools.

On one hand, laws continue to grant tremendous discretionary powers to the executive in the regulation of schools, on the other hand, they fail to provide procedural safeguards which guide or limit this discretion. Furthermore, some laws have also introduced provisions that are excessive or arbitrary in nature.

Wide discretionary powers often run the risk of abuse in the form of rent-seeking and corruption. Past analyses show the numerous ways in which the departments of school education commit excesses while exercising its discretionary powers.<sup>113</sup> Given that the executive draws its powers from the legislations studied, it is imperative that education laws encode the safeguards highlighted in this paper.

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<sup>113</sup> CENTRE FOR CIVIL SOCIETY, ANATOMY OF K-12 GOVERNANCE IN INDIA, 44–72 (2019).

**ANNEXURE**

We used the following question-sets to analyse the presence of administrative safeguards in state school education laws and rules. This question-set is taken from the Quality of Laws Toolkit.<sup>114</sup>

**PARENT LEGISLATION**

Questions	Response (Y/N/N.A)
Does the preamble of the legislation capture why the legislation was introduced?	
Is the preamble written clearly and unambiguously? Provide reasons and examples to substantiate.	
Does the legislation delegate rule-making powers to the executive?	
Does the legislation empower the executive to sub-delegate its legislative/rule-making powers?	
Does the legislation grant the executive (rule-making authority) power to give retrospective effect to the subordinate legislation?	

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<sup>114</sup> Narang & Bedi, *supra* note 6.

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Does the legislation prescribe consultation with stakeholders while making subordinate legislation?	
If the legislation delegates rule-making powers to the executive are the rule-making heads for the subordinate legislation enumerated in the parent legislation?	
If the parent legislation grants the executive power to remove difficulties, are there any limits to that power?	
Does the parent legislation introduce a residual clause as one of its rule-heads?	
If the legislation delegates rule-making powers to the executive, does it specify when the subordinate legislation must be made?	
Does the parent legislation mandate that the subordinate legislation be placed before the parliament/state legislature before being notified?	
Does the legislation confer upon the executive the authority to grant approval/licence?	
Does the legislation identify the decision-making authority for granting approval/licence?	

CALJ 6(2)

<p>Does the legislation empower the concerned authority to sub-delegate its powers to grant approval?</p>	
<p>Does the legislation define the criteria for grant of approval?</p>	
<p>Does the legislation delegate the power to define the criteria for approval to the executive?</p>	
<p>Are there any arbitrary conditions laid down for the grant of approval?</p>	
<p>Are there any excessive conditions laid down for the grant of approval?</p>	
<p>Does the legislation set a time limit for grant of approval/licence?</p>	
<p>Does the legislation mandate the decision-making authority to provide reasons in writing (for denial or approval)?</p>	
<p>Does the legislation mandate a pre-decisional hearing (or issuance of a show-cause notice) in case of denial of approval?</p>	
<p>Does the legislation allow for an appeal against the decision on denial of approval?</p>	

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Is there a limitation period within which the aggrieved has to file an appeal?	
If yes, has the appellate authority been empowered to condone the delay in appropriate cases?	
Does the legislation prescribe the time limit within which the appellate authority must dispose of the appeal?	
Can the appellate authority extend the time limit if there is a reasonable cause for delay?	
Does the legislation confer upon the executive the responsibility to ensure enforcement?	
Does the legislation identify the authority for carrying out enforcement actions?	
Does the legislation empower the concerned authority to sub-delegate its powers to ensure enforcement?	
Does the legislation define the criteria for breach?	
Does the legislation delegate the power to define the criteria for breach to the executive?	

CALJ 6(2)

Are these conditions/criteria clear and unambiguous?	
Are any of these criteria for breach arbitrary?	
Are all the criteria proportionate?	
Are all the measures proportionate to the breach?	
Does the legislation mandate the enforcement authority to provide reasons for its decision in writing?	
Does the legislation mandate a pre-decisional hearing (or issuance of show cause notice)?	
Does the legislation allow for appeal against the decisions of the enforcement authority?	
Is there a limitation period within which the aggrieved has to file an appeal?	
If yes, has the appellate authority been empowered to condone the delay in appropriate cases?	
Does the legislation prescribe the time limit within which the appellate authority must dispose of the appeal?	

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Can the appellate authority extend the time limit if there is a reasonable cause for delay?	
Does the Act provide for an independent appeal mechanism?	

**SUBORDINATE LEGISLATION**

Questions	Response (Y/N/N.A)
Does the subordinate legislation mention the section and subsection of the parent legislation under which it has been introduced (in its preamble)?	
Does the subordinate legislation sub-delegate rule-making powers?	
Has the subordinate legislation been given retrospective effect?	
Does the subordinate legislation introduce any provision(s) under the residual powers clause of the parent legislation?	

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<p>Does the subordinate legislation introduce any provision that does not fall under the clause(s)/ rule-head(s) it has invoked?</p>	
<p>If not, does the subordinate legislation introduce any provision that does not fall under the rule-head(s) mentioned in the parent legislation?</p>	
<p>Was the subordinate legislation placed before the Parliament/state legislature before being notified?</p>	
<p>Does the subordinate legislation introduce any criterion for approval that is inconsistent with the objective of the parent legislation?</p>	
<p>Does the subordinate legislation introduce any criterion for breach that is inconsistent with the objective of the parent legislation?</p>	
<p>Does the subordinate legislation introduce any measures of enforcement that are inconsistent with the objective of the parent legislation?</p>	
<p>Was the subordinate legislation made within the time frame mentioned (if any) in the parent legislation?</p>	