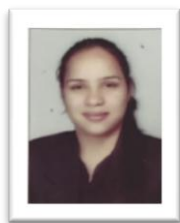


# Universal Elementary Education under Right to Education Act and Rights of Minorities to Establish and Administer Educational Institutions of their Own Choice: A Study



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## Abstract

Equality is the key concern of multicultural societies where groups compete in a complex interplay of primordial, contextual and instrumental factors. India, as one of world's most heterogeneous societies provides an ideal ground for competing groups to assert their identities, which though determined by birth are significantly shaped by political decisions. However, structural realities play a crucial role in guiding state response which has to adapt itself to meet the diverse needs of the society through multilayered strategies that range from accommodation, cooption to repression. In a plural society, state neutrality vis-à-vis various religious and linguistic groups must be jealously maintained. In a country so large in size as India, it is delicate and indeed very difficult task to reconcile the two different trends-the process of assimilation of the minorities with the rest of the people so that they may not remain separate and isolated and at the same time provide them opportunity to preserve their identity and to secure their distinctive aspirations as to their language, script and culture.

**Keywords:** Minorities, Underprivileged Children, Infrastructure, Reservation

## Introduction

Education plays a vital role in building a modern society which cannot be expected to achieve its aims of economic growth, technical development and cultural advancement without fully harnessing the talents of its citizens. Education strives to develop fully the internal potential of the students and make efforts to see that the potentialities are fully realized and that of the society.<sup>1</sup> Equality is the key concern of multicultural societies where groups compete in a complex interplay of primordial, contextual and instrumental factors. In a country so large in size as India it may be mentioned that it is delicate and indeed very difficult task to reconcile the two different trends – the process of assimilation of the minorities with the rest of the people so that they may not remain separate and isolated and at the same time provide them opportunity to preserve their identity and to secure their distinctive aspirations as to their language, script and culture.<sup>2</sup> India, as one of world's most heterogeneous societies provides an ideal ground for competing groups to assert their identities.<sup>3</sup> The architects of the Indian Constitution tried to strike a balance between these two competing considerations through Articles 29 and 30 which may be characterized as two pillars of the cultural and educational interests on minorities.<sup>4</sup> On the other hand, Right to Free and Compulsory Education (RTE) Act, 2009, which became operative on 1<sup>st</sup> April, 2010 represented a momentous step forward towards universalizing the elementary education in the country<sup>5</sup>, mandated 25% reservation for economically disadvantaged children. Necessarily, this legislation intersects with the educational right of minorities.<sup>6</sup>

## Objectives of the Study

The task of reconciling the conflicting claims has fallen on judiciary. A five-bench Constitution bench headed by Justice R M Lodha on May 6, 2014 had clarified that Minority-run schools cannot be forced to implement the Right to Education Act, 2009, that mandates 25%

reservation for economically disadvantaged children in all schools. The result has been that judicial decision in which competing claims based on Articles 29 and 30 have been adjudicated by the courts have tilted the balance in favour of minority elites. The Supreme Court has been so solicitous of the rights of the minorities as to secure for them more rights than it has conceded to the majority by giving a strained interpretation to the Articles. This attempt of the court, it is remarked, has made the fundamental rights of minorities more fundamental than others by placing the minorities in a more favoured position than the majority community. The State is permitted to impose only those regulations which are promotive of academic excellence and public interest. The minority management, however, cannot be allowed to act contrary to law and order and are required to conform to norms of natural justice and national interest at large. The judicial activity in this area has, however, failed to clarify many confusions. All these and many other questions still await convincing answers. The objects of the paper in hand may be summarized as follows:-

1. To study the constitutional providing special protection to minorities to establish and administer institutions of their own choice.
2. To study the salient features of Right to Free and Compulsory Education Act, 2009 (hereinafter referred as RTE).
3. To study the interface between constitutional protection to minorities and provisions of RTE.
4. To study the role of judiciary in tilting the balance in favour of minorities while interpreting the above-mentioned interface.
5. To analyze and to find way outs to resolve and harmonize the abovementioned interface.

#### **Constitutional Provisions for Minorities**

Constitution of India embodies the philosophy of distributive justice with a strong determination to build up a new and independent nation which will ensure the triumph of justice, liberty, equality and fraternity to every citizen and provides protection to minorities in following words:-

#### **Cultural and Educational Rights**

Article 29- (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same. (2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Article 30- (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice. (1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause. (2) The State shall not, in granting aid to educational institutions, discriminate against any

### **Remarking An Analisation**

educational institution on the ground that it is under the management of a minority, whether based on religion or language.

Thus, Articles 29 and 30 guarantee cultural and educational rights of religious and linguistic minorities. While, Article 29(1) secures to every section of citizens, residing in the territory of India, the right to conserve its own language, script or culture, Article 30(1) guarantees to every religious or linguistic minority, the right to establish and administer educational institutions of their choice.<sup>7</sup> The object behind Articles 29 and 30, is the recognition and preservation of the different types of people, with diverse languages and different beliefs, which constitute the essence of Secularism in India. The Supreme Court in *T.M.A. Pai Foundation v. State of Karnataka*,<sup>8</sup> explained:-

Articles 29 and 30 do not more than seek to preserve the differences that exist, and at the same time, unite the people to form one strong nation.

#### **Right To Free And Compulsory Education Act, 2009 : Salient Features**

When the 'Free and compulsory education' was made a 'fundamental right' under Article 21A<sup>9</sup> of the Constitution in December, 2002 through the 86th Amendment, it was a very important step and conclusion of a long journey, which commenced from the Charter Act 1813, to the Macaulay's Minute (1835), to Wood Despatch (1854), to Elementary Education Act (1870), to Maharaja Baroda's compulsory Education (1906), to Gopal Krishna Gokhale's Bill (1911), to Hartog Committee(1929), to Mahatma Gandhi's Basic Education (1937) and after independence through the Article 45, NPE 1968 and 1986, DPEP (1991), and SSA (2001).<sup>10</sup> Withdrawing its force from Article 21A of Indian Constitution, the Right to Free and Compulsory Education Act, 2009 (hereinafter mentioned as RTE) came into operation on 1<sup>st</sup> April, 2010 aiming at universalising free elementary education to every child of India. This Act serves as a building block to ensure that every child has his or her right (as an entitlement) to get a quality elementary education, and that the State, with the help of families and communities, fulfils this obligation.<sup>11</sup> Salient features of the RTE are as follows:-

1. Every child between the ages of 6 to 14 years has the right to free and compulsory education. There is no direct (school fees) or indirect cost (uniforms, textbooks, mid-day meals, transportation) to be borne by the child or the parents to obtain elementary education.<sup>12</sup>
2. The Act lays down the norms and standards of Pupil Teacher Ratios (PTRs)<sup>13</sup>, buildings and infrastructure, school working days, teacher working hours<sup>14</sup> and well trained teachers<sup>15</sup>. Schools that do not fulfill these standards will not be allowed to function. Specification of the PTR ensures that there is no averaging at the State or District or Block level, preventing urban-rural imbalance in teacher postings.<sup>16</sup>

3. The Act prohibits deployment of teachers for non-educational work, other than decennial census, elections to local authority, state legislatures and parliament, and disaster relief.<sup>17</sup>
4. The Act prohibits donation, capitation fee, screening test/interview of child or parents, physical punishment or mental harassment, private tuition by teachers, and running schools without recognition.<sup>18</sup>
5. The Section 12(1)(c) of the RTE Act mandates unaided and non-minority schools to keep aside 25% seats for underprivileged children of society through a random selection process. Government will fund education of these children. No seats in this quota can be left vacant. These children will be treated on par with all the other children in the school and subsidized by the State at the rate of average per learner costs in the government schools (unless the per learner costs in the private school are lower). All private schools will have to apply for recognition, failing which they will be penalized as per the laid down norms.<sup>19</sup>

If implemented enthusiastically, this can have a far reaching impact in improving the education system of the country by inclusiveness. It allows parents to send their kids to schools of better quality. The only constraint is the distance between the school and home, rather than financial capacity. It puts students from the economically weaker sections and disadvantaged groups among the relatively privileged children of rather sound financial background. This mix up goes a long way towards inclusive education making all children more pro-social and accommodative, without affecting their academic outcomes. Finally, it enables children from poor families access quality education.<sup>20</sup>

#### **RTE Vis-À-Vis Educational Rights of Minorities**

RTE thus, prescribes regulations regarding minimum acceptable infrastructure, staff and facilities that all schools should compulsorily provide. The broad canvas that the RTE Act seeks to cover leads to the question: does the Act take away the autonomy of religious and linguistic minorities to establish and administer educational institutions of their choice that the Constitution safeguards under Article 30?<sup>21</sup> One of the most controversial provisions of the Act has been Section 12(1)(c)<sup>22</sup> which imposes an obligation on all private schools to reserve 25% seats for economically weaker sections and disadvantaged groups in their entry-level classes. In this regard, when the issue first came for consideration before the Supreme Court in **Society for Unaided Private Schools of Rajasthan v Union of India & Another**<sup>23</sup>

Hon'ble Supreme Court of India upheld the constitutionality of Section 12 of the Right of Children to Free and Compulsory Education Act (RTE Act), which requires all schools, both state-funded and private, to accept 25% intake of children from disadvantaged groups. It was held that RTE Act would apply to all private schools including aided and unaided minority schools. Unaided minority schools, however, were exempted from the provisions of Section 12 (1) (c) and 18(3) RTE Act. As a follow-up to this judgment, the Right of Children to Free and

Compulsory Education (Amendment) Act, 2012 was passed by Parliament. As per the amendment, the provisions of the Act which applied to minority schools were to be subject to Articles 29 and 30.

In 2014, in *Pramati Educational & Cultural Trust vs Union Of India & Ors*<sup>24</sup> a five-bench Constitution bench headed by Justice R M Lodha on May 6, 2014 upholding the validity of the RTE Act and reservation of SC/ST and OBCs in educational institutions, the court said: "We hold that the Constitution (Ninety-Third Amendment) Act, 2005 inserting Clause (5) of Article 15 of the Constitution and the Constitution (Eighty-Sixth Amendment) Act, 2002 inserting Article 21A of the Constitution do not alter the basic structure or framework of the Constitution and are constitutionally valid."

Holding that the RTE Act is not ultra vires Article 19(1)(g) of the Constitution, the court said: "We, however, hold that the 2009 Act insofar as it applies to minority schools, aided or unaided, covered under clause (1) of Article 30 of the Constitution is ultra vires the Constitution."

Thus, it had been clarified that Minority-run schools cannot be forced to implement the Right to Education Act, 2009, that mandates 25% reservation for economically disadvantaged children in all schools.<sup>25</sup> The result has been that judicial decision in which competing claims based on Articles 29 and 30 have been adjudicated by the courts have tilted the balance in favour of minority. Unsurprisingly, there has been a marked increase in schools seeking minority status post this judgment.<sup>26</sup>

Interestingly in view of the exemption mentioned above as laid down by Hon'ble Supreme Court of India following important questions have arisen :-

1. Whether minority institutions are now excluded from permissible state regulations striving for excellence and standards of universal elementary education laid down under RTE Act?
2. How the exclusion of minority institutions from reservations of economically weaker sections would affect the essence of RTE?

#### **Permissible State Regulations under RTE and Minority Institutions**

In answer to the questions mentioned above, it would be relevant to mention here that In *re Kerala Education Bill, 1957*,<sup>27</sup> the Supreme Court said that the right to administer educational institutions contained in Article 30(1) did not militate against the claim of the State to insist that in granting aid, the State might not prescribe reasonable regulations to ensure excellence in the institutions. The court thus, upheld certain conditions designed to give protection and security to the ill paid teachers who were rendering service to the nation and to protect backward classes.

It has been well ruled that the right to administer engrafted under Article 30 would not confer on a minority the right to maladministration. Statutory measures for maintaining educational standards and excellence in by Article 30(1). Even though Article 30 does not lay down any limitation, but that right cannot be said to be absolute. It must be subject to reasonable restrictions, consistent with national

E: ISSN NO.: 2455-0817

interest. Regulations, therefore, can always be made to maintain educational character and standard of institution. When any regulatory measure is assailed, it is ruled that it would be obligatory for the court to find out as to whether the provision, in fact, secures a standard of excellence of the institution and of preserving the right of the majority to administer the institution as a minority institution.

In *M.S.Catholic College v. T. Jose*,<sup>28</sup> the Apex Court held that general laws relating to national interest/security, social welfare, public order, morality, health, sanitation, taxation, etc. would be equally applicable to minority institutions.

The Supreme Court in *Pramati*<sup>29</sup> also acknowledged that the State can only enact regulatory measures with respect to minority institutions, without interfering with their administration. Despite the above mentioned rulings, it decided to exclude all minority schools from the purview of the RTE Act. It was observed that if the Act is made applicable to minority schools, whether aided or unaided, 'the right of minorities under Article 30(1) of the Constitution will be abrogated.'<sup>30</sup> Considering the purpose of Article 30(1) as mentioned before and objectives behind enforcing RTE, it is submitted that this observation requires reconsideration, since provisions of RTE aim at providing universal elementary education and exemption of minority institutions from the ambit and mandates of same would render the Act a failure. Now, as a result of *Pramati*<sup>31</sup>, all minority schools are exempted from basic regulatory provisions of the RTE Act. Numerous provisions, for instance provisions relating to prohibition of corporal punishment,<sup>32</sup> ban on screening procedures and capitation fee,<sup>33</sup> prescribed Pupil-Teacher Ratio (PTR),<sup>34</sup> prohibition of holding back and expulsion,<sup>35</sup> proof of age for admission,<sup>36</sup> basic norms and standards for infrastructural and other facilities<sup>37</sup> etc. are regulations which promote the interest of students and also improve educational standards of the institutions of national at large without affecting the autonomy of the institution or impacting its 'minority character', and in fact serve the 'welfare' of the members of the community. It is pertinent to mention here that in 2014, prior to the *Pramati*<sup>38</sup> judgment, the Ministry for Human Resources and Development (hereafter 'MHRD') had issued a clarification stating that regulatory provisions like 'prohibition on holding back' and 'corporal punishment', which do not affect the substance as provided under Article 30(1), are applicable to minority institutions also.<sup>39</sup> The clarification was issued in reference to the amendments made to the Act in 2012. The MHRD, has not issued any clarification following the judgment in *Pramati*.<sup>40</sup> Consequently, the continuance of operation of these notifications need clarification.

#### **Reservation under Rte And Minority Institutions**

Time and again it is laid down by Hon'ble Supreme Court that as far as aided institutions are concerned, certain regulations, in lieu of granting recognition or aid, or utilization of such aid, may be imposed by the State.<sup>41</sup> In fact, several reasonable restrictions are built into the text of the Constitution

### **Remarking An Analisation**

itself. Article 29(2)<sup>42</sup> forbids all aided institutions (which include aided minority institutions) from denying admission to students based on grounds of religion, race, caste, language or any of them. Article 15(4) states that nothing in Article 29(2) shall prevent the State from making provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes, which corresponds to the definition of 'child belonging to disadvantaged group'<sup>43</sup> in the RTE Act. Thus, exclusion of minority institutions from ambit of RTE by Hon'ble Supreme Court itself goes contrary to above-mentioned constitutional provisions. The position adopted by the Supreme Court in *Pramati*<sup>44</sup> has considerably weakened the scope of Article 21A and the RTE Act. It must be noteworthy that RTE is a comprehensive legislation for promoting universal elementary education that takes on board the issues of availability, accessibility as well as acceptability of such education and the schools that purport to impart it. It would be an unfortunate outcome if an institution established as a minority school operates contrary to the purpose of Article 30 and becomes 'a cloak for private benefit'. This would not only undermine Article 30, from where it claims its legitimacy, but also undercut Article 21A significantly. It is submitted that the entire RTE Act, including the 25% quota prescribed under Section 12(1)(c), is consistent with the constitutional scheme and does not violate the rights of minorities. Insofar as general regulatory provisions are concerned, there is ample law to suggest that such provisions which aim at improving the quality of education, access and infrastructure are in consonance with the right of minorities under Article 30(1).<sup>45</sup>

Relying heavily on the judgments delivered in *T.M.A. Pai*<sup>46</sup> and *P.A. Inamdar*<sup>47</sup>, the Court in *Pramati*<sup>48</sup> held that reservation fetters the autonomy of minority institutions, leading to increased State control over admissions. However, with due regard, it is submitted that the Court has not taken into notice the fact that the arguments around reservation in those judgments pertained to admissions in tertiary education systems.<sup>49</sup> The quota envisaged in the RTE Act, however, deals with admissions in elementary education, the nature and concerns of which are vastly different from those of tertiary education. The benefits of providing free education to disadvantaged sections, in terms of improving accessibility and affordability of education to persons who would have been excluded otherwise, are clear and pervasive.<sup>50</sup> The Supreme Court in the case of *T.M.A. Pai*,<sup>51</sup> however, held that regulations in furtherance of national interest would be permissible for minority educational institutions. The meaning of 'national interest' was left unclear. Subsequently, the term was defined in *P.A. Inamdar*<sup>52</sup> to include public safety, national security and national integrity. This seems to be a rather narrow conception as 'national interest' could easily include universal elementary education or other welfare oriented measures that a State may take to create a more egalitarian society.

With respect to minority institutions, in *T.M.A. Pa*<sup>53</sup> Hon'ble Supreme Court has observed the following:-

'The minority character of an aided or unaided minority institution cannot be annihilated by admission of students from communities other than the minority community which has established the institution, and whether such admission to any particular percentage of seats will destroy the minority character of the institution or not will depend on a large number of factors including the type of institution.

However, now in *Paramati*,<sup>54</sup> the Hon'ble Supreme Court while considering the intersection of Article 30(1) with Section 12(1)(c) of the RTE Act, laid down a contrary ratio. In fact, while deciding on the constitutional validity of Article 15(5), which empowers the State to provide for quotas in private schools but exempts minority institutions, it held that minority educational institutions referred to in Article 30(1), whether aided or unaided, 'may be affected by admissions of socially and educationally backward classes of citizens or the Scheduled Castes and the Scheduled Tribes'. In this regard, minority institution, like any other institutions, would be affected if a quota is imposed on it, what needs to be considered is whether such an effect tantamounts to 'annihilation of minority character' of those institutions. RTE Act, through its policy of reimbursement, significantly alleviates anxieties regarding the expenditure that these schools might have to incur while complying with provision of 25% quota under Section 12(1)(c). Thus, it largely keeps the administrative autonomy of schools intact, at least from a financial point of view. It is submitted that both aided and unaided minority institutions enjoy autonomy with respect to admitting students, especially from the concerned minority community. Yet, both admit students from other communities as well. If the admissions are continued to be carried out under a reasonable scheme of quota (for example, reserving 25% seats under the RTE Act), it neither would significantly alter the demography of the school nor would it be inimical to the school's 'minority character'. In fact, Section 12(1)(c), as it applies to children from weaker sections and disadvantaged groups, cuts across different religious and linguistic groups and communities. Therefore, minority institutions need not be exempted from the purview of this provision, especially, though not exclusively, those aided by the State.<sup>55</sup>

#### Conclusion and Suggestions

In nutshell it can be concluded that RTE Act is a legislative embodiment of India's commitment towards making education freely accessible to all and Act was enacted to give effect to India's long-standing constitutional commitment to provide free and compulsory (elementary) education to all children. Moreover, admission of 25% children from disadvantaged groups and weaker sections in the neighbourhood, PTR regulations, infrastructure and training of teachers' guidelines are not merely to provide avenues of quality education to poor and disadvantaged children. The larger objective is to provide a common place and create a secured

## Remarking An Analisation

educational environment where children sit, eat and live together for at least eight years of their lives across caste, class and gender divides in order to narrow down such divisions in our society.

Besides this, in *re Kerala Education Bill*<sup>56</sup>, it has been observed by that there should be an attempt to reconcile the right of minorities to establish and administer their own educational institutions with the duty of the state to promote education under Articles 41, 45 and 46 of the Constitution provided the protection is not infringed by taking over the management of their institutions. The directive of Article 45 has now taken the form of a fundamental right to education under Article 21A. There is a renewed need to reconcile this right with the right of minorities under Article 30(1). In fact, legitimate way out is possible by making the entire RTE Act, including the 25% quota for economically weaker sections and disadvantaged groups, applicable to all minority schools, whether aided or unaided. In practice, such a principled reconciliation will ensure that the larger constitutional vision of providing for a just and equitable democracy is achieved and not sidetracked by an opaque system of minority school recognition that is not only illegitimate per se but details the promise of the RTE Act too.<sup>57</sup>

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8. *AIR 2003 SC 355*
9. *Art. 21A provides that the State shall provide free and compulsory education to children between 6–14 years of age. On the other hand Art. 45 provides that the State shall endeavour to provide early childhood education and care for all children upto 6 years of age.*
10. *Supra note 5*
11. Available at: <http://vikaspedia.in/education/policies-and-schemes/right-to-education/right-to-education-act>
12. Available at: <http://vikaspedia.in/education/policies-and-schemes/right-to-education/right-to-education-act>
13. *Two trained teachers will be provided for every sixty students at the primary level.*

14. Teachers are required to attend school regularly and punctually, complete curriculum instruction, assess learning abilities and hold regular parent-teacher meetings.
15. The Act provides appointment of appropriately trained teachers. Norms and standards of teacher qualification and training are clearly laid down in the Act
16. *Supra* note 5
17. *Ibid*
18. *Id*
19. *Id*
20. *Id*
21. *Supra* note 6
22. RTE Act, section 12(1)(c)- Extent of school's responsibility for free and compulsory education - For the purposes of this Act, a school specified in sub-clauses (iii) and (iv) of clause (n) of section 2 shall admit in class I, to the extent of at least twenty-five per cent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion. (The proviso to the section says that if such schools are also imparting pre-school education then the quota shall apply for admission to such pre-school education as well.)
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34. RTE Section 25
35. RTE Section 16
36. RTE Section 14
37. RTE Section 13
38. *Supra* note 24
39. Schedule RTE Act, sections 19 and 25
40. *Supra* note 24
41. *Supra* note 6
42. Article 29(2) - No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.
43. Section 3 of the RTE Act defines "a child belonging to Disadvantaged Groups" as a child belonging to the Scheduled Caste, the Scheduled Tribe, the socially and educationally backward class or such other group having disadvantage owing to social, cultural, economical, geographical, linguistic, gender or such other fact, as may be specified by the appropriate Government, by notification" (RTE Act, 2009, Section 2, Clause (d)). Further, Section 3 of RTE Act defines "a child belonging to Weaker Section" as refers to "a child belonging to such parent or guardian whose annual income is lower than the minimum limit specified by the appropriate Government, by notification"(RTE Act, 2009, Section 2, Clause (e)).
44. *Supra* note 24
45. *Supra* note 6
46. *Supra* note 8
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50. *Ibid*
51. *Supra* note 8
52. *Supra* note 47
53. *Supra* note 6
54. *Supra* note 24
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56. *Supra* note 27
57. *Supra* note 6