RIGHT TO EDUCATION: EDGING CLOSER TO REALISATION OR FURTHERING JUDICIAL CONUNDRUM?

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This paper examines the significance of Society for Unaided Private Schools of Rajasthan v. Union of India in the discussion surrounding the right to education. While appreciating judgment's conclusions, this paper raises serious concerns about the reasoning employed majority. The paper argues that although the RTE Case possesses immense potential in transforming the current system of elementary education, it not only treats crucial issues inconsistently it overlooks established constitutional norms. This judicial haste in achieving the desired end might result in worsening the existent confusion and further complicate an already tumultuous right.

I. INTRODUCTION

The Indian experience in dealing with education has and continues to have a chequered history. The idea of free and compulsory education as a fundamental right initially came up for discussion during the Constituent Assembly debates. Although there was general clarity as to there being two separate categories of rights: justiciable and non-justiciable, the actual placement of the right to education became a contentious issue.[1] The members of the Constituent Assembly argued that it would be inappropriate in both form and substance to word the provision in such a manner so as to convey a constitutional guarantee towards

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1 *See* 2 B. SHIVA RAO, THE FRAMING OF INDIA'S CONSTITUTION 174 (2004) (The right to education was initially placed as a justiciable right in the Report of the Sub-Committee on Fundamental Rights, 1947. This was however, rejected during subsequent discussions mainly apprehending the lack of government funds for its implementation and the inability of courts to properly adjudicate on it).

the right to education.[2] It was understood to be a mere policy intended to guide future governments.[3] The importance of education in the holistic development of the nation was, however, acknowledged and the Constitution accordingly obligated the State to provide, within a period of ten years from the commencement of the Constitution, free and compulsory education to all children until they completed the age of fourteen years.[4]

It was not until *Mohini Jain* v. *State of Karnataka*[5] that the right to education was formally recognised. Subsequent judicial decisions such as *Unni Krishnan, J.P.* v. *State of Andhra Pradesh*[6], *T.M.A. Pai Foundation* v. *State of Karnatataka*[7] and *P.A. Inamdar* v. *State of Maharashtra*[8] further developed the right and laid out the grounds for its justiciability. Yet, despite the gamut of judicial decisions, state policies and legislative enactments, India is still far from its goal of universalising elementary education. The Right of Children to Free and Compulsory Education Act, 2009[9] came as an urgent measure to remedy the vast inequalities existing in the field of elementary education. Certain provisions of the Act, however, attracted serious criticism and resistance from the academic community. Among these provisions was the mandatory scheme of a minimum of 25% reservations in all categories of schools, including the unaided schools, for the weaker and disadvantaged sections of the society. Consequently, the RTE Act was challenged in *Society for Un-aided Private Schools of Rajasthan* v. *Union of India.*[10] The Court, with a two-one majority, upheld the validity of the Act, exempting only unaided minority schools from the scheme of reservation.

The *RTE Case* was hailed by some and criticised by others,[11] with the approach adopted by the judges raising several pertinent constitutional issues.

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2 7 CONSTITUENT ASSEMBLY DEBATES 538 (1989). (Pandit Lakshmi Kanta Maitra, member of the Constituent Assembly remarked that "Part IV deals with the directive principles of State policy, and the provisions in it indicate, the policy that is to be pursued by the future governments of the country. Unfortunately, in Art. 36, this directive principle of State policy is coupled with a sort of a fundamental right, i.e. "that every citizen is entitled.....etc.". This cannot fit in with the others.").

3 *Id.* at 538-40.

4 The unamended Art. 45 read, "Provision for free and compulsory education for children: The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years".

5 (1992) 3 SCC 666 [hereinafter *Mohini Jain*].

6 (1993) 1 SCC 645 [hereinafter *Unni Krishnan*].

7 (2002) 8 SCC 481 [hereinafter *Pai Foundation*].

8 (2005) 6 SCC 537 [hereinafter *Inamdar*].

9 The Right of Children to Free and Compulsory Education Act, 2009, [hereinafter RTE Act].

10 *Society for Unaided Private Schools of Rajasthan* v. *Union of India*, (2012) 6 SCC 1 [hereinafter *RTE Case*].

11 *See* Law and Other Things, *Guest Post from Anup Surendranath: Evaluating the Right to Education Judgement,* Apr. 15, 2012, http://lawandotherthings.blogspot.in/2012/04/guest-post-from-anup-surendranath.html (last visited Mar. 1, 2014); Centre for Law and Policy Research, *Horizontal Application of Social Rights: The Supreme Court Decision on the Right to Education,* Apr. 12, 2012, http://clpr.org.in/

This paper seeks to evaluate the judgment within the constitutional framework of India and examine its significance within the developed jurisprudence concerning the right to education.

II. ARTICLE 21-A & THE ROLE OF NON-STATE ACTORS

The *RTE Case* centres on whether the constitution permits burden sharing with non-state actors in the realisation of socio-economic rights. It is therefore imperative to analyse Art. 21A, from which the RTE Act flows, in order to determine *first*, the nature and scope of the provision and *second*, the validity of the RTE Act itself.

Art. 21A reads:

> "The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.".

The provision, seemingly, is clear in its enunciation of legislative intent. A closer reading of the provision, however, highlights two phrases: "State shall provide" and "as the State may, by law, determine". The interpretation of these phrases is open to much debate and is the focus of the discussion to follow.

A. 'State shall provide'

Art. 21-A casts an obligation on the State to provide free and compulsory education to all the citizens within the prescribed age group. The word 'shall' conveys a mandatory obligation on the State to ensure that no child, within the age group of six to fourteen years, is denied the opportunity to attain education due to economic incapability.[12] Clearly, a literal interpretation indicates that the provi-

supreme-court-upholds-the-constitutional-validity-of-the-right-of-children-to-free-and-compulsory-education-act-2009 (last visited Mar. 1, 2014); Law and Other Things, *Continuing Commentary on the RTE Act and SC Judgment,* Apr. 20, 2012, http://lawandotherthings.blogspot.in/2012/04/continuing-commentary-on-rte-act-and-sc.html (last visited Mar. 1, 2014). *But see* Sudhir Krishnaswamy & Varsha Iyengar, *RTE Must be Extended to Minority Schools Also*, THE DECCAN CHRONICLE, Apr. 29, 2012, available at http://www.deccanchronicle.com/channels/cities/bengaluru/rte-must-be-extended-minority-schools-also-796 (last visited Mar. 1, 2014); *RTE Law and a Court Judgment Won't Fix Broken Public Education System,* THE ECONOMIC TIMES, Apr. 14, 2012, available at http://articles.economictimes.indiatimes.com/2012-04-14/news/31342060_1_private-schools-public-schools-public-education (last visited Mar. 1, 2014); Rajeev Dhavan, *Verdict has added to Right to Education Mess,* INDIA TODAY Apr. 16, 2012 available at http://indiatoday.intoday.in/story/supreme-court-verdict-has-added-to-right-to-education-mess/1/184642.html (last visited Mar. 1, 2014); Counter Currents, *Supreme Court Judgment On Right to Education: Much Ado For Nothing,* May 13, 2012, http://www.co untercurrents.org/teltumbde130512.html (last visited Mar. 1, 2014).

[12] Rishad Chowdhury, *"The Road Less Travelled": Article 21A and the Fundamental Right to Primary education in India*, (2010) IN. JL. CON. L. 2.

sion casts a primary responsibility on the State and not on any private individual or institution. An inquiry into the neighbouring provisions of Art. 21A supports this hypothesis.[13] Each of the provisions in Part-III, which begin with the phrase "The State shall", is construed to indicate that it is exclusively the burden of the State to prevent and remedy any breach. This is in contrast to Art. 15(2) which does not begin with the words 'the state shall 'and is, therefore, enforceable even against private parties.[14] The only debate surrounding the interpretation of these provisions, then revolves around the definition and scope of the term 'State'. The enforcement of a constitutional provision against an institution is not allowed if it does not fall within the ambit of 'the State', as interpreted by courts pursuant to a reading of Art. 12.[15] The *RTE Act* provides burden sharing with institutions, such as unaided institutions, which do not squarely fall within such a definition. Thus, the purport of the *RTE Act* is not supported by its corresponding constitutional provision.

Accordingly, the *RTE Act* which was enacted pursuant to Art. 21A, has to be anchored within the goals of its enabling constitutional provision. It would be pertinent to note here that this conception of the *RTE Act* emerged during the parliamentary debates as well, when the government conceded that it alone had the primary responsibility of universalising elementary education.[16]

B. 'State may, by law, determine'

Art. 21(A) grants liberty to the State to decide manner in which the right to education is to be enforced. How far this liberty can be extended is, however, a question to be answered keeping in mind principles of statutory interpretation and other constitutional provisions. One of the prominent interpretations of this provision strongly indicates that the State can only choose among the constitutionally permissible methods of enforcement.[17] The emphasis of this provision falls on the phrase 'by law', which limits the ambit of measures that may be utilised by the state and ensures conformity with the existing legal system. Neither of the opinions in the *RTE Case* denies this interpretation. The difference, however, arises in adjudicating the manner of such enforcement and particularly, whether law permits the State to reserve seats in private unaided institutions.

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[13] *E.g,* Art. 14 begins with "The State shall not deny...."; art. 15(1) begins with "The State shall not discriminate....". This is, however, not to suggest that Part III bars the horizontal application of fundamental rights.

[14] DURGA DAS BASU, SHORTER CONSTITUTION OF INDIA 189 (2000).

[15] *See R.D. Shetty* v. *International Airport Authority of India*, (1979) 3 SCC 489; *Ajay Hasia* v. *Khalid Mujib Sehravardi*, (1981) 1 SCC 722; *Rajasthan SEB* v. *Mohan Lal*, AIR 1967 SC 1857; *Zee Telefilms Ltd.* v. *Union of India*, (2005) 4 SCC 649.

[16] Discussion on the motion for consideration of the Right of Children to Free and Compulsory Education Bill, 2009 as passed by Rajya Sabha, available on http://164.100.47.132/LssNew/psearch/Result15.aspx?dbsl=511 (last visited Mar. 1, 2014).

[17] Rishad Chowdhury, *supra* note 12.

It would be pertinent to point here that Art. 21A as initially proposed in the Parliament read as follows:

> "21-A. Right to education.
>
> (1) The State shall provide free and compulsory education to all citizens of the age of six to fourteen years.
>
> (2) The Right to Free and Compulsory Education referred to in clause (1) shall be enforced in such manner as the State may, by law, determine.
>
> (3) The State shall not make any law, for free and compulsory education under Clause (2), in relation to the educational institutions not maintained by the State or not receiving aid out of State funds."[18]

The proposed bill not only recommended the constitutionalisation of the right to education, but also specifically incorporated the recommendation of the 165th Law Commission of India regarding the non-inclusion of unaided institutions.[19] Cl. 3 was, however, not included in the final draft of the bill and eventually it was passed as the Constitution (Eighty-sixth) Amendment Act, 2002.[20] The reason for this could be attributed to Parliament's hesitation in restricting itself from making laws regulating private unaided institutions in the future.

The majority judgment's interpretation of the clause follows on similar lines. It holds that the State is free to determine the means to adopt in enforcing the right to education.[21] This freedom is limited only by the provisions of the Constitution. Whereas the majority feels that the extension of reservation to unaided schools is constutional, the minority judge is of the opinion, in light of decided cases, that it violates the right of unaided schools to establish educational institutions. Thus, from the above discussion, it can be concluded that the minority and majority judges agree with each other in their interpretation of Art. 21A, to the extent that both allow the state to determine, by law, the means adopted to implement the right to education. They, however, differ in their conceptions of what

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[18] The Constitution (Eighty-third) Amendment Bill, 1997 (as originally tabled in the Lok Sabha. The Bill was later amended and presented as the Constitution (93rd Amendment) Bill).

[19] LAW COMMISSION OF INDIA, 165th REPORT: FREE AND COMPULSORY EDUCATION FOR CHILDREN (1998), http://lawcommissionofindia.nic.in/101-169/Report165.pdf (last visited Mar. 18, 2014).

[20] The Constitution (Eighty-sixth) Amendment Act, 2002 (art. 21A: "The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.").

[21] RTE Case, *supra* note 10, ¶45, *per* Justice Kapadia: "However, the manner in which this obligation will be discharged by the State has been left to the State to determine by law. The State may do so through its own schools or through aided schools or through private schools, so long as the law made in this regard does not transgress any other constitutional limitation".

is permissible under the law and test the same against the right to establish and administer educational institutions. The exact point of divergence in this regard is detailed in the next section.

III. THE RIGHT TO ESTABLISH AND ADMINISTER EDUCATIONAL INSTITUTIONS

In this part, we examine whether the mandatory reservation scheme for the unaided institutions violates the right to establish and administer educational institutions, in any manner. Consequently, the analysis centres on the following questions: Can the implementation of the reservation scheme be considered as a reasonable restriction on the right to establish and administer educational institutions? How does the *RTE Case* distinguish itself from its precedents and justify any derogation from the established constitutional principles? Finally, is there a need for a constitutional amendment to provide legitimacy to the reservation scheme?

A. Reasonability of The Mandatory Reservation Scheme

The right to establish and administer educational institutions stems from the right to freedom of trade and occupation as enumerated in Art. 19(1)(g). The strength and validity of this right has, however, always been contingent on the question whether education itself can be treated as a trade, occupation or profession. The historical setting of education in India has influenced judicial decisions in treating education as a noble and charitable cause, leaving no scope for profiteering.[22] The *Unni Krishnan* case was the first major occasion for the courts to deal with this issue. It categorically stated that the setting up of an educational institution could not be regarded as trade, business or commerce.[23] Consequently, it did not fall within the purview of Art. 19(1)(g). It only logically follows from this that the Court also denied any right to affiliation or recognition.[24] Two of the concurring judges, however, held that setting up of educational institutions could be regarded as an 'occupation' if no affiliation or recognition was sought. Moreover, it also formulated the '*Unni Krishnan* scheme' wherein seats could be reserved for the weaker sections of the society in private institutions in exchange for affiliation.[25]

The '*Unni Krishnan* scheme' was rejected in *Pai Foundation* on the ground that it would lead to nationalisation of education.[26] The Court also held that the

[22] *See* Dr. Niranjanaradhya & Aruna Kashyap, *The Fundamentals of the Fundamental Right to Education in India* available at http://unesdoc.unesco.org/images/0015/001510/151010e.pdf (last visited Mar. 1, 2014).

[23] *Unni Krishnan*, *supra* note 6, ¶202.

[24] *Id.* ¶204.

[25] *Id.*, ¶ 210, *per* Pandian J. & Jeevan Reddy, J..

[26] *Pai Foundation*, *supra* note 7, ¶ 38, *per* Kirpal C.J.

right to establish and administer educational institutions flows from Art. 19(1)(g) as education could be categorised as an 'occupation'.[27] While accepting that the right could be subjected to reasonable restrictions in order to prevent profiteering by prohibiting capitation fees, it limited the scope of such restrictions. The case emphasised the need to establish private educational institutions in light of state inefficiency in providing good quality educational facilities.[28] Most importantly, the case enumerated the components of the right to establish and administer educational institutions which included the right to admit students, to set up a reasonable fee structure, to constitute a governing body, to appoint teaching and non-teaching staff and to take action if there was dereliction of duty on the part of any employee.[29] Moreover, it held that unaided non-minority institutions had the right to admit students of their choice subject to the condition that the procedure employed is reasonable.[30] The seven judge bench in *Inamdar* took this view further by holding that the State could not impose its policy of reservation on unaided non-minority institutions.[31] It held that reservation in private schools would amount to nationalisation and would accordingly blur the distinction between government and private schools.[32] The reasoning in *Inamdar* was clear: right to impart education flows from Art. 19(1)(g) and extends to minority and majority institutions both and therefore, it could be limited only in accordance with Art. 19(6).[33]

Art. 19(6) enables the State to make reasonable restrictions in the interest of the general public. The imposition of a licence or license system in carrying out a trade, occupation and profession is considered to be a restriction and it is left for the courts to test the validity of such impositions against Art. 19(6).[34] If the condition for obtaining the license is considered to be unreasonable, it can be held to be violative of the right to freedom of trade.[35] The RTE Act makes affiliation a necessary prerequisite for setting up an educational institution. It not only prohibits but penalises the functioning of unrecognised schools[36]. Therefore, a direct

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[27] *Id.*, ¶450, *per* Variava J. & Bhan J.

[28] *Id.*, ¶35, *per* Kirpal C.J.

[29] *Id.*, ¶ 50, *per* Kirpal C.J..

[30] *Id.*, ¶53.

[31] *Inamdar*, *supra* note 8, ¶44, *per* Lahoti J.

[32] *Id.*, ¶44.

[33] *Id.*, ¶100.

[34] D.D. Basu, *supra* note 14, at 335.

[35] *See R.M. Seshadri* v. *District Magistrate, Tanjore*, AIR 1954 SC 747 [wherein the court invalidated a mandatory condition imposed on the licensee on the ground that it was unreasonable within the meaning of Art. 19(6)].

[36] RTE Act, *supra* note 9, §18(1): No school, other than a school established, owned or controlled by the appropriate Government or the local authority, shall, after the commencement of this Act, be established or function, without obtaining a certificate of recognition from such authority, by making an application in such form and manner, as may be prescribed; §18(5): Any person who establishes or runs a school, without obtaining a certificate of recognition, or continues to run a school after withdrawal of recognition, shall be liable to fine which may extend to one lakh rupees and in case of continuing contraventions, to a fine of ten thousand rupees for each day during which such contravention continues; §19(5): Any person who continues to run a school

link can be drawn with the licensing system and the requirement of affiliation as laid down under the RTE Act. As a result, any condition imposed in lieu of affiliation or recognition would have to satisfy the grounds for reasonableness.

The requirement of affiliation on its own could be accepted as a reasonable restriction. However, in this case the institutions would have to adhere to the mandatory 25% reservation in exchange for affiliation. The reasonability of such a requirement would then be questionable, especially in the light of *Pai Foundation* and *Inamdar*, which categorically prohibit any kind of reservation scheme in unaided institutions in lieu of affiliation or recognition and view them as unreasonable restrictions.

B. The Approach in The RTE Case

The majority judges in the *RTE Case* substantiate the restriction imposed on unaided institutions by relying on the principle that the rights to trade and business can be curtailed to some degree in order to give effect to directive principles.[37] It is true that directive principles can be used to limit a particular right in certain cases. There is, however, no set judicial trend or precedent for doing so. There is no dearth of precedents where courts have taken polar views on this issue.[38] Courts generally look into each case to test the reasonability of the restrictions imposed in the light of the directive principles. Moreover, *Inamdar* specifically held that the restrictions imposed on Art. 19(1)(g) in lieu of Art. 45 of the Constitution were unreasonable and hence had to be struck down. In light of the precedent and the absence of a fixed judicial trend, it would be difficult to authoritatively conclude that the right to establish an educational institution could yield to a directive principle.

Further, the majority opinion in the *RTE Case*, justifies the reservation of seats in unaided institutions by adopting a two pronged approach. First, the right to establish educational institutions could be reasonably curtailed in the interest of general public under Art. 19(6) and in order to enforce the directive principles of state policy, specifically, Art. 41, 45 and 46. Second, such restrictions can be imposed in exchange for affiliation or recognition. The second prong of the argument fails because the majority fails to appreciate that the RTE Act in effect, prohibits the setting up of educational institutions without recognition. At the same time it imposes an obligation on every educational institution, desirous of state

after recognition is withdrawn, shall be liable to fine which may extend to one lakh rupees and in case of continuing contraventions, to fine, which may extend to one lakh rupees and in case of continuing contraventions, to a fine of ten thousand rupees for each day during which such contravention continues.

[37] D.D. BASU, *supra* note 14, at 257.

[38] *E.g* in Inamdar, the Court refused to restrict the right to freedom of trade and commerce in lieu of Art. 46 of the constitution, however, in *State of Gujarat* v. *Mirzapur Moti Kureshi Kassab Jamat*, (2005) 8 SCC 534, the Court upheld the restriction on Art. 19(1)(g) in order to give effect to Art. 48.

affiliation and recognition to comply with the reservation scheme. Thus, it leaves no choice for institutions but to comply with the mandate of the legislation or face penalties for not being recognised. Since the requirement of affiliation itself is mandatory in nature, the reservation scheme also becomes mandatory on all educational institutions. Thus, the Court's reasoning that the reservation scheme would be applicable only in exchange for affiliation, does not have any practical grounding and fails to recognise the real implications of the RTE Act.

The first prong of the majority's argument can stand only if the constitutional precedents in *Pai Foundation* and *Inamdar* are disregarded. The majority judgment deals with this problem by distinguishing the present case from the former, inasmuch as the former cases applied to institutions imparting higher education only. However, the distinction between elementary and higher education becomes relevant only while dealing with aspects of education specific to higher education, such as the reasonability of entrance test, capitation fees and management seats. It is true that a large part of *Pai Foundation* and *Inamdar*, dealt with issues which confront higher educational institutions. In essence, however, these judgments held that the right to establish educational institutions flows from Art. 19(1)(g) and can be curtailed in a permissible manner. The reservation of seats in private unaided institutions was not considered to be reasonable and permissible restrictions. This core idea emanating from *Pai Foundation* and *Inamdar*, should apply across all educational institutions; elementary, secondary or higher learning.

It is also important, here, to examine whether Art. 15(5) provides legitimacy to the outcome of the *RTE Case*. After *Ashoka Thakur* v. *Union of India*[39], it had been argued by some scholars that the amendment created a distinction between the minority and non-minority unaided institutions in as much as it constitutionally permitted the imposition of reservation on unaided non-minority institutions.[40] Interestingly, the majority judgment mentions Art. 15(5) merely to distinguish the minority institutions from the non-minority ones and to emphasise the legislative intent to accord special protection to minority institutions. It ignores this line of reasoning whilst dealing with the applicability of the RTE Act on unaided non minority institutions. Instead, it relies more on the interplay of Art. 21, 21A and 19(1)(g). A possible explanation for this could be that Art.15(5) was brought in the context of institutions of higher education, as is clear from the statement of objects and reasons of the 93rd Amendment Act,[41] whereas, Art. 21A, which was brought about later, deals specifically with elementary education. Understandably, the *RTE Case* seems hesitant in relying on Art. 15(5) for its decision.

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[39] *Ashoka Kumar Thakur* v. *Union of India*, (2008) 6 SCC 1 [hereinafter *Ashoka Thakur*].

[40] *See* M.P.Singh, *Ashoka Thakur* v. *Union of India: A Divided Verdict on an Undivided Social Justice Measure*, (2008) 1 NUJS L. Rev 193 (for a detailed analysis of *Ashoka Thakur* and its interpretation of preceding judgments).

[41] The Constitution (Ninety-Third Amendment) Act, 2005.

C. The need for Constitutional Amendment

As elucidated earlier, the validity of the reservation scheme becomes questionable in the light of the constitutional provisions and judicial decisions. The minority judgment recognises this constitutional limitation and holds that the law as laid down in *Pai Foundation* and *Inamdar* cannot be disregarded, even if the end sought is extremely desirable. It thus emphasises that in the current constitutional setup, the provisions of the *RTE Act* would be held unconstitutional. Therefore, the only manner in which it can be brought about is by suitably amending Art. 21A to enable the State to enforce this legislation.[42]

The argument for a constitutional amendment is strengthened on an examination of Art. 15(5). Justice Radhakrishnan refers to Art. 15(5) to emphasise that the legislature has the authority to curtail the rights of the non minority institutions only by bringing about a constitutional amendment, similar to the 93rd Amendment. However, according to him, Art. 15(5) is not sufficient to enable the legislature to bring the unaided elementary institutions within the fold of reservation. As explained earlier, this could be attributed to the statement of objects and reasons of the 93rd Amendment Act, which specifies that Art. 15(5) was brought in the context of institutions of higher education, leaving elementary education out of its scope. Therefore, Art. 21A requires suitable amendment to incorporate within its fold, the power of the legislature to impose reservations on unaided non-minority institutions.

The majority judgment fails to understand the need for the amendment as it does not consider the Act to be transgressing any constitutional limitation. This indicates a sense of urgency in the majority judgment to achieve the ends which have been sought since the framing of the Constitution. But in doing so, it overlooks the role of precedents and attempt to slide out of the situation by creating an artificial distinction with the earlier cases. The majority judges ignore the constitutional scheme to service what they perceive to be a democratic result.

IV. MINORITY INSTITUTIONS: AIDED V. UNAIDED

In the context of minority institutions, the right to set up and administer educational institutions is further supplemented by the protection accorded under Art. 30(1). Under such a scheme, minority institutions are given added protection against government incursions. In this part, we shall examine the inconsistency in the court's treatment of minority institutions.

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[42] *See also* the comparison with Art. 15(5) made in the RTE Case, wherein Justice Radhakrishnan proposes an amendment to Art. 21A, in line with Cl. 5 of Art. 15, which enables the state to reserve seats for the socially and educationally backward classes, in order to constitutionalize the reservation scheme proposed by the RTE Act.

The right of minorities to establish and administer educational institutions originates from Art. 30(1) of the Constitution.[43] *Pai Foundation*, while dealing with the right of minorities, held that the right to establish and administer educational institutions stems from Art. 19(1)(g), but stated that Art. 30(1) accords minorities an extra protection and privilege. This added constitutional protection is to safeguard minority interests in a multicultural society.[44]A survey of judicial decisions in this area, ranging from *St. Stephen's College* v. *University of Delhi*[45] to *Islamic Academy of Education* v. *State of Karnataka*[46] and *Ashoka Thakur*,[47] indicates that the judiciary has time and again examined the question of implementing government regulations and reservation policy in such institutions. The dominant view taken by the Court has, however, been that any regulations imposed on minorities should be in the interest of minority institution.[48] Moreover, the Court has been hesitant in holding that minority educational institutions are subject to the reservation policy of the State.[49] The primary reason which influences the judicial opinion in such decisions is the apprehension that such institutions might lose their minority character.[50] Accordingly, even if reservation is allowed, it is only to the extent that it does not dilute the minority character of the institution.[51]

In the *RTE* Case, the majority, while emphasising the fact that Art. 30(1) constituted a special category of rights which could not be easily transgressed sought to distinguish unaided minority institutions from aided ones. In order to do so, they placed reliance on Art. 29(2) of the Constitution, which prohibits denial of admission in institutions maintained partly or wholly out of government funds on certain grounds such as race, caste, religion, language.[52] This clause, however, does not dilute the protection accorded to minorities under Art. 30(1). Even while complying with the provision of Art. 29(2), restrictions placed on minority institutions have to be reasonable. It has to be in the interest of the concerned minority group and the State has to ensure that it does not interfere with character of the minority institution. This legal position applies irrespective of whether an institution has been granted state funding.

To analyse the reasoning further, the majority upheld the reservation scheme in unaided non-minority institutions but rejected it in unaided minority

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[43] INDIA CONST., art.30 cl.1: "All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice."

[44] DURGA DAS BASU, SHORTER CONSTITUTION OF INDIA 502-504 (2009).

[45] (1992) 1 SCC 558.

[46] (2003) 6 SCC 697.

[47] *Ashoka Thakur*, *supra* note 39.

[48] D.D. BASU, *supra* note 14, at 495-498.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] INDIA CONST., art. 29 cl.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".

institutions because of the latter's minority character. Here, two distinct strands of reasoning must be distinguished. First, in relation to public funding of institutions it was argued that unaided educational institutions could not be mandated to adhere to the reservation scheme. The majority judgment, on this count, held that unaided educational institutions are not exempt as Art. 21A permitted implementation of the scheme in any manner which the 'state may, by law, determine'. The second strand of reasoning related to the nature of minority institutions where it was argued that the reservation scheme would be violative of the added constitutional protection under Art. 30(1). The majority agreed with this argument, and rejected the reservation scheme for unaided minority institutions Therefore, if the majority thought it fit to declare that the current reservation scheme would be violative of the constitutional protection accorded to minorities in case of unaided minority schools, this should hold true even for aided minority institutions. This is because the basis for such unconstitutionality lies in the minority nature of such institutions (and the additional rights accordingly guaranteed) and not in whether such institutions are publicly funded.

Thus, in the *RTE Case* the judiciary had two logical choices with respect to the fate of minority institutions. First, the Court could have upheld the protection accorded to minority institutions under Art. 30(1) by declaring the restrictions imposed to be unreasonable. This would have relieved the unaided and aided minority institutions from the ambit of the proposed reservation. Alternatively, the Court could have upheld the legitimacy of the proposed reservation scheme and declared the restrictions as not violative of Art. 30(1). This would have broughtboth unaided and aided minority institutions within the ambit of the Act. Instead, the majority judges chose a third option by upholding the validity of the reservation only against the aided minority institutions,excluding the unaided minority institutions from the purview of the reservation scheme.

Conversely, if the restrictions on minority aided educational institutions are considered not to be violative of Art. 30(1) and are deemed reasonable, then the same would hold true even for unaided minority institutions. The validity of the reservation scheme would then be dependent on the relevance of the unaided status of the institutions. One, therefore, has to look into how the Court has dealt with the applicability of the RTE Act on other unaided institutions. The majority upheld the reservation scheme for the non-minority unaided institutions on the ground that the State was constitutionally permitted to share the burden of realising socio-economic rights even with the unaided private institutions. If this was the legal justification for the majority judges, then they should have had no compulsions in allowing the reservation scheme in minority unaided institutions as well. Neither the minority status, nor the unaided status could then serve as the legal basis of exempting the unaided minority institutions from the ambit of reservation.

From this analysis, it appears that the majority judges are employing a dual policy. It seems to propose that "restrictions cannot be imposed on institutions which do not seek government funding or recognition" in case of unaided minority institutions but rejects the same for unaided non-minority institutions. Alternatively, it seems to propose that "the regulations imposed in the RTE Act violate the rights of the minority institutions" in case of unaided minority institutions while rejecting the same for aided minority institutions. This discrepancy in the reasoning employed by the majority judgment creates an anomalous situation wherein it becomes unclear as to which principle the Court actually intended to uphold and apply.

The reasoning of the minority judgment seems to be clearer in this respect. The judgment holds that with regard to the minority institutions, no distinction can be created between the aided and the unaided institutions. It rejects the implementation of reservation policy on both aided and unaided minority institutions as not being in the interest of the minorities and hence violative of Art. 30(1). There is a similarity in the manner in which the judgment treats the minority institutions (aided or unaided) and unaided institutions (minority or non minority). This consistency in reasoning is to be appreciated in the minority judgment, not least for its uniformity, but also for its adherence to settled constitutional questions.

Thus, we see that the majority judgment while dealing with minority rights seeks to create a distinction between unaided and aided institutions. In our opinion, this distinction is not based on sound reasoning and its sustainability is questionable. The lack of consistency in the reasoning employed by the Court is evident in the majority's treatment of minority rights.

V. THE AFTERMATH OF RTE CASE

The RTE Act, upheld by the *RTE* Case, came to effect on April 1, 2010. However, statistics reveal that the Act has failed to contribute significantly towards making education more accessible and increasing enrolment rates. There have been concerns about the lack of effective monitoring bodies, reluctance of unaided schools in implementing the scheme, budgetary constraints, lack of accountability and abysmal pupil teacher ratio, among others.[53] These issues certainly necessitate a re-examination of the existing scheme and its efficacy.

[53] *See* Aarti Dhar, *Even After Three Years, RTE Fails to Deliver,* THE HINDU, April 1, 2013, http://www.thehindu.com/news/national/even-after-three-years-rte-fails-to-deliver/article4567538.ece (last visited Mar. 1, 2014); Jasleen Kaur, *NCPCR Not Serious In Monitoring RTE Act,* Governance Now (April 3, 2013), http://governancenow.com/views/interview/ncpcr-not-serious-monitoring-rte-act (last visited Mar. 1, 2014); Ayokunle Abogan, Ayaz Achakzai, Vera Bersudskaya, Sebastian Chaskel, Megan Corrariono, Emily Garin, Betsy Hoody, Chris Johnson and Sangita Vyas, *Accountability in Service Delivery – Lessons in Learning: An Analysis of Outcomes In India's Implementation of the Right to Education Act* (Princeton University Woodrose Wilson School of Public & International Affairs) http://www.princeton.edu/rpds/

Implementational concerns aside, however, the *RTE Case* was challenged in *Pramati Educational and Cultural Trust* v. *Union of India,* (2013) 5 SCC 752 on the grounds that it involved a substantial question of constitutional law, requiring a five-judge bench and that the majority judgment ignored the relevant precedents while formulating its opinion.[54] The petitioners argued that the mandatory reservation scheme, enabled by Art. 21(A) violated the basic structure of the Constitution as it interfered with the unaided institutions' unfettered right to establish and administer educational institutions.[55] Moreover, the petitioners argued that Art. 15(5) violated the right to equality as enumerated in Art. 14 by making the reservation compulsory on unaided institutions whilst leaving the aided minority institutions out of its ambit.[56]As a result of *Pramati Educational*, the Supreme Court has referred the matter to a five-judge constitutional bench to examine the constitutional validity of Art. 21(A) and Art. 15(5), in so far as they relate to the *RTE Act. Pramati Educational* contributes to the already compelling analysis that the constitutional issues raised in the *RTE Case* require re-examination.

VI. CONCLUSION

The goal of universalising elementary education in India continues to be a distant dream. Although the State is to be primarily blamed, it can be seen as a failure on the part of parents, teachers and society as well. Reality points towards the fact that the goal of universal education cannot be the burden of the State alone. The *RTE Case* explores this crucial question. Yet, what we get as an end product is a judgment whose conclusion can be lauded, but the reasoning employed leave one unconvinced and dissatisfied.

The *RTE Case* starts on a promising note, elucidating the significance of elementary education in India and tracing the evolution of the right to education. The rationale adopted by the majority judges, however, indicates two specific areas of concern. First, the treatment of constitutional precedent and second, the inconsistency in reasoning as highlighted in Part-IV of this paper. The former

papers/Hammer_Policy_Workshop_Spring2013.pdf (last visited Mar. 1, 2014); Louis Georges Arsenault, *No High Five for RTE,* THE HINDU, April 1, 2013, http://www.thehindu.com/opinion/op-ed/no-high-five-for-rte/article4567385.ece (last visited Mar. 1, 2014; Vithika Salomi, Op-Ed, *Right to Education Failed to Deliver Satisfactory Results,* The Times of India, November 23, 2012, http://timesofindia.indiatimes.com/city/patna/Right-to-education-failed-to-deliver-satisfactory results/articleshow/17328840.cms (last visited Mar. 1, 2014;

Manzoor Ali, *National Policy for Children 2013, High on Promises, Low on Budget*, Economic and Political Weekly, December 28, 2013.

[54] Nick Robinson, *Uncertainty Again Over the Constitutionality of the Right to Education Act: Could it have been Avoided?*, Law and Other Things, Aug. 27, 2013, http://lawandotherthings.blogspot.in/2013/08/uncertainty-over-constitutionality-of.html (last visited Mar. 18, 2014).

[55] J. Venkatesan,*'Tilted' admissions law violates Constitution, say private schools*, THE HINDU, Mar. 6, 2014, http://www.thehindu.com/news/national/tilted-admissions-law-violates-constitution-say-private-schools/article5754327.ece (last visited Mar. 18, 2014).

[56] *Id.*

raises serious concerns about the significance and role of constitutional precedents and the manner in which courts choose to agree or differ with them; while the latter is not an unheard of trend, it is something which courts should avoid. The minority judgment, delivered by Justice Radhakrishnan becomes relevant for recognising these issues. Ultimately, both the majority and minority judgments exhibit a similar conception of socio-economic rights and their implementation. It is the different treatment of these contentious issues which leads to two distinct opinions.

A rights-based approach to elementary education needs strong judicial support for its effective implementation. It is therefore important that there be judicial clarity with respect to the content and applicability of the right to education. Sadly, the approach adopted by the majority judges in the *RTE Case,* seems to contribute to the existing judicial conundrum on the right to education and paves the way for further litigation.

VII. POSTSCRIPT

A Constitution Bench of the Supreme Court delivered its judgment in *Pramati Cultural and Educational Trust* v. *Union of India*,[57] the day this article went for publication. The Court upheld the validity of Art. 15(5) on unaided institutions and exempted all minority institutions from the purview of the RTE Act. It opined that Art. 15(5) was an enabling provision, intended to overcome the constitutional difficulties posed by earlier judicial decisions in reserving seats for the backward classes. Its applicability to unaided institutions would, therefore, not interfere with the right to establish and administer educational institutions under Art. 19(1)(g). However, the Court did not adequately address the Petitioners' contention that the validity of the RTE Act could only be determined based on Art. 21A, and Art. 15(5) would be irrelevant in the present case. It failed to explain why a provision admittedly intended for institutions of higher education (from the statement and object of the 93rd Amendment) should apply to primary educational institutions. The Court also held that the State is free to determine the manner of ensuring free and compulsory education to all, including the reservation of seats in unaided institutions. Additionally, the judgment rectified the inconsistency in the *RTE Case* by holding that all minority institutions would be exempt from the purview of the Act, in order to protect their minority character. The judgment of the constitutional bench serves as another occasion to highlight the glaring inconsistencies in the *RTE Case* and the inadequate treatment meted out to constitutional issues, a theme which has been the focus of this paper.

[57] W.P (c) No. 416 of 2012.