EDUCATION, STATE RESPONSIBILITY & CONSTITUTIONAL BEARINGS

Sharad Verma[*]

Abstract *In post-independence India, education has remained at the core of constitutional values, originally as a Directive Principle under Article 45 of the Constitution of India. Yet, the provision was deleted through the 86th Amendment in December 2002, only to be modified from a mere directive, to a constitutional guarantee under Part III of the Constitution. It is largely the Supreme Court's activism towards the realization of the ideal of free education in Unni Krishnan, J.P. v. State of A.P. (1993) which led t o this constitutional development. Subsequently, the Right to Education Act, 2009 was enacted as a regulatory measure, facilitating another addition made to Part III, that of Article 15(5) through the 93rd Constitutional Amendment, to expand the purview of the guarantee of education to private educational institutions.*

While the prudence of a legal guarantee of education is beyond question, the author seeks to argue that this selective extension of state responsibilities to private institutions under Article 15(5), without extending the same objectives to either unaided or aided "minority" institutions, is a misinterpretation by the Parliament of the mandate of Article 30(1), and constitutes violation of Article 14 between "minority-administered" and private institutions, which raises questions regarding the constitutionality of the 93rd Consitutional Amendment itself, bearing in mind that the extension of such responsibilities to minority education institutions will only supplement educational guarantees further, and would not affect their "minority character", or in any other manner impinge upon the limited prohibitions of Article 30(1).

In this submission, the author seeks to focus on the role of recent judgments of the Supreme Court of India, in neither considering the aspect of violation of Article 14 nor considering the new dimension of constitutionalism that has found acceptance in India through the 'horizontal' application of fundamental rights, which the author argues must be applied equally amongst educational institutions of all kind, and that the current distinction on the basis of Article 30 (1) is unfounded and against views expressed by the Supreme Court in T.M.A. Pai Foundation v. State of Karnataka (2002).

1. INTRODUCTION

Education in India is seen as a means of enabling the citizens to live a successful life and contribute their worth to the society. It may also be seen as a liberating force which awakens the people to their rights and responsibilities, sometimes regarded as a panacea to the many complications that we collectively face. The Constitution of India envisages that there should be no discrimination in the distribution of available facilities in this area, and ensures that, in particular, the disadvantaged sections get their due.

It is important to note the reason that the right to education has currently become an enumerated fundamental right can be safely attributed to the efforts of the Supreme Court. It is one of the rights that the Court created which imposes a positive obligation on the State. The Court was prompt to read in Article 21 a fundamental right to primary education, as part of the wider right to life and liberty. The case of *Unni Krishnan, J.P.* v. *State of A.P.*[1] shook the Parliament which then made the necessary constitutional changes, and this led to the enactment of the 86th Constitutional Amendment Act, 2002, incorporating the guarantee of free and compulsory primary education, in the Part III as Article 21A. The refreshed Article 45 in Part IV now reads that "The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years." The right to education being a fundamental right, can now be enforced as a matter of constitutional entitlement, and has been described as the most important right, "as one's ability to enforce fundamental rights flows from education."

Additionally, with the stated objective of advancement of the socially and educationally backward classes of citizens, i.e. the Scheduled Castes, Scheduled Tribes and the OBCs, the Parliament introduced Article 15(5) by the 93rd Constitutional Amendment Act, 2005. This provision added to the Constitution is elaborate, and is of the nature of an enabling provision. It provides constitutional protection to legislative action by the State to extend the responsibility of providing seats in educational institutions even to the private institutions, whether aided or unaided, whilst expressly exempting from its purview, aided and unaided "minority" educational institutions referred to in Article 30(1).

It is this curious exemption given to minority-administered institutions by the Parliament which requires analysis, since the extension of the same state-responsibilities that have been mandated upon the private educational institutions could have been legally and constitutionally extended to cover minority educational institutions, which in no manner whatsoever would have transgressed upon the protection guaranteed under Article 30(1), in further pursuit of the stated object of the 93rd Constitutional Amendment, i.e. "to promote the

[1] (1993) 1 SCC 645.

educational advancement of the socially and educationally backward classes of citizens or of the Scheduled Castes and Scheduled Tribes."

2. HORIZONTAL APPLICATION OF CONSTITUTIONAL GUARANTEES

Amongst the most intensely debated contemporary issues in constitutional law is the scope of application of Fundamental Rights provisions. The central question is whether the rights regulate the relationship between the State and the individual, called vertical application, or whether they also apply to relations between private individuals, called horizontal application. With its limited resources and slow-moving machinery, the State has until now been unable to fully develop the genius of the Indian people. By taking the public-private distinction to be not as categorical as supposed, the State in India is ready to reconsider the traditional doctrinal approaches to the scope of application of fundamental rights and the doctrine of "State action".

The State's duty to provide education can be said to be of two kinds, depending on the level of education in context. Constitutionally, primary and upper primary education fall into one category in respect of which an imperative obligation is imposed upon the State to provide free and compulsory education. Yet, the extent of facilities to be provided in this area is dependent on the limits of economic development and the available financial resources. In the Indian context, the Right to Free and Compulsory Education Act, 2009, hereinafter referred to as the "RTE Act", is an appropriate example of horizontal application of constitutional guarantees to regulate and mandate the grant of free education by private educational institutions.

The existing affirmative action programs applying exclusively to State institutions are designed under the shadow of the guarantee of equality under the Constitution. The fundamental objection to such an extension is grounded in a limited application of the equality guarantee, which is bolstered by the prevailing understanding of the scope of the principle of "State Action". It will be clear from of the judgment of the eleven-Judge Bench of the Supreme Court in *T.M.A. Pai Foundation* v. *State of Karnataka*[2], that the Court has been in favour of horizontal application, and therefore, observed that reserving a small percentage of seats in educational institutions, aided or unaided, for weaker, poorer and backward sections of society, phrased as a "sprinkling of outsiders", did not affect the rights of minority institutions, thereby justifying future horizontal application of constitutional guarantees to non-State stakeholders, in a limited and constitutional manner.

Since the enactment of the RTE Act, there have been multiple occasions of challenge to its constitutionality and that of its parent constitutional provision,

[2] (2002) 8 SCC 481.

Article 15(5), with the line of argument remaining largely the same: a challenge to the horizontal application of state responsibilities, and how the same is not constitutionally tenable. In *Ashoka Kumar Thakur* v. *Union of India*[3], this horizontal aspect of the provision was challenged before the Supreme Court as unconstitutional for violating the "basic structure" of the Constitution. The case was heard by a Constitution bench of five Judges, and in a divided (4:1) verdict, the Court held:

> *"... Constitution 93rd Amendment Act, 2005, is valid and does not violate the "basic structure" of the Constitution so far as it relates to the State maintained institutions and aided educational institutions. Questions whether the Constitution (Ninety Third Amendment) Act, 2005 would be constitutionally valid or not, so far as "private unaided" educational institutions are concerned, are not considered and left open to be decided in an appropriate case."*

The above-mentioned question, left open to be decided, was considered finally in *Society for Unaided Private Schools of Rajasthan* v. *Union of India*[4], in which the constitutional validity of several provisions of the RTE Act was again challenged before the Court. It was contended by the petitioners that "Article 21A or Article 45 do not even remotely indicate any idea of compelling the unaided educational institutions to admit children from the neighbourhood ... since no constitutional obligation is cast on the private educational institutions under Article 21A, the State cannot through legislation transfer its constitutional obligation on the private institutions." Contrary to this, Kapadia CJ., writing for the majority, held that the seat-reservation provision under S. 12(1)(c) of the Act, is a "reasonable restriction" under Article 19(6) upon the contended rights of private educational institutions under 19(1)(g), if any, and is therefore constitutional.

This is not the correct exposition of law since it will be seen that the intricate language and construction of Article 15(5) insulates all laws that provide for reservation made thereunder, from application of Article 19(1)(g) in the first place, and the RTE Act is such a law. This being the case, Article 19(6) being a restriction on Article 19(1)(g), and Article 19(1)(g) itself being inapplicable to Article 15(5), the natural corollary of this legal position is that while examining the constitutional validity of S. 12(1)(c), Article 19(6) cannot be a possible relevant consideration. It is interesting to note that this curious approach of the Court in limiting the scope of the inquiry into the constitutionality of Article 15(5), upon the justification of it being a "reasonable restriction", has been maintained even in the latest case pertaining to the issue, in *Pramati Educational & Cultural Trust* v. *Union of India*[5].

---

[3] (2008) 6 SCC 1.
[4] (2012) 6 SCC 1.
[5] (2014) 8 SCC 1.

3. CONSTITUTIONALLY-WARRANTED REGULATION OF ARTICLE 30(1)

The reluctance of the political establishment to apply provisions of the RTE Act to the minority educational institutions stems not only from their erroneous understanding, purposive or otherwise, of the scope and operation of Article 30(1), but also due to the political ramifications of such a move, owing to the strong class-consciousness of the minority communities and minority-administered institutions, and since elections in India are still predominantly communal and also upon linguistic lines in some parts. In order to appreciate why the responsibility to provide free education must be extended to minority educational institutions, an analysis of Article 30(1) cross-examining the Parliament's stance regarding it, is necessary.

An analysis of the very provision cited as the reason for specific exemption of minority-administered educational institutions, shows that Article 30 guarantees to religious and linguistic minorities the right to establish and administer educational institutions of their choice, and the right that their institutions shall not be discriminated against by the State in the grant of aid.

The judicial view regarding the scope and width of regulations which may be lawfully imposed either by legislative or executive action without transgressing into the ambit of Article 30(1) is that these must be directed to making the institution, while retaining its character as a minority institution, "effective" as an educational institution. In *Sidhajbhai Sabhai* v. *State of Gujarat*[6], the Supreme Court observed that any regulation framed in the "national interest" must necessarily apply to all educational institutions, whether run by the majority or the minority. It is, of course, true that government regulations cannot destroy the "minority character" of the institution or make the right to establish and administer a mere illusion; but the right under Article 30(1) is not absolute, so as to be above the law.

In *State of Kerala* v. *Mother Provincial*[7], dealing with Article 30(1), the Court observed that an exception to the right under the provision was the power with the State to regulate education, educational standards and allied matters. To add to this principle, *St. Stephen's College* v. *University of Delhi*[8], the Court clarified that, "the standards of education are not a part of the management as such. The standard concerns the body politic and is governed by considerations of the advancement of the country and its people."

In *Ahmedabad St. Xaviers College Society* v. *State of Gujarat*[9], H.R. Khanna J., in his separate judgment, has clarified that the idea of giving some

---

6 AIR 1963 SC 540.
7 (1970) 2 SCC 417.
8 (1992) 1 SCC 558.
9 (1974) 1 SCC 717.

special rights to the minorities is not to have a kind of a "privileged or pampered" section of the population, but to give to the minorities a sense of security and a feeling of confidence. This interpretation was expressly referred to by the Court in *T.M.A. Pai Foundation* v. *State of Karnataka*[10], wherein it was expressed that there also cannot be any "reverse discrimination." No one type or category of institution should be disfavored or, for that matter, receive more favorable treatment than another.

A holistic analysis of the scope of Article 30(1) and its relation with the other provisions of the Constitution enabled the 11-Judge Bench of the Supreme Court in *T.M.A. Pai Foundation* v. *State of Karnataka*[11] to truly appreciate and clearly hold that Article 30(1) is not an "absolute right". It has its limitations and is not transgressed at any and every attempt at regulation of minority institutions. Unfortunately, despite a plethora of judgments on the nature of Article 30(1), the Supreme Court has faltered with its interpretation while drawing a comparison between the scope of Article 19 (1)(g) and Article 30(1). The Court surprisingly expressed in *Society for Unaided Private Schools of Rajasthan* v. *Union of India*[12]., that since Article 19 (1)(g) is not an "absolute right as Article 30(1)", the RTE Act, insofar that it does not cover minority institutions, cannot be termed as unreasonable. This interpretation is misconceived, since Article 30(1), as the above analysis of the Court's consistent view exhibits, is not absolute, and its beneficiaries can be regulated within the bounds of constitution, even without a "reasonable restrictions" clause like Article 19(6) being appended to it.

Additionally, considering that the special Bench *T.M.A. Pai Foundation*v. *State of Karnataka*[13] consisted of eleven-judge bench, it can be seen that the verdict given by a three-judge bench in *Society for Unaided Private Schools of Rajasthan* v. *Union of India*[14], holding that Article 30(1) is absolute and thereby upholding the misconceived interpretation of Article 30(1) by the Parliament, is *per incuriam* since "it is not possible to reconcile its ratio with that of a previously pronounced judgment of a co-equal or larger Bench."

However, this is not to suggest that the duty to reserve seats under the RTE Act must be extended to minority institutions solely because it would be in the interest of education. It must be noted that such selective application of Article 21A only to private aided or unaided educational institutions constitutes a glaring violation of Article 14, being bereft of any semblance of "intelligible differentia" between private institutions and minority institutions. It is sought to be emphasized that in the absence of any constitutionally-warranted "differentia" in favor of minority institutions, after fully considering the binding

[10] (2002) 8 SCC 481.
[11] (2002) 8 SCC 481.
[12] (2012) 6 SCC 1.
[13] (2002) 8 SCC 481.
[14] (2012) 6 SCC 1.

judicial views regarding Article 30(1), it becomes clear that the Parliament has failed to maintain 'equality before the law' under Article 14 and its positive implications.

4. THE 93RD AMENDMENT & EQUALITY BEFORE LAW

In *Kesavananda Bharati* v. *State of Kerala*[15], it has been observed that "one cannot legally use the Constitution to destroy the Constitution itself." Applying this principle in the context of Article 15(5), the very provision that was intended to provide constitutional propriety to the "reservation provision" of S. 12 (1)(c), makes an un-intelligible distinction between private and minority institutions, and treats them unfairly in the matter of making special provisions for advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes, insofar as these special provisions relate to their admission to such educational institutions, whereby, Article 14 stands violated.

The emphasis on the aspect of equality under Article 14 can be understood by analyzing the nature of the guarantee of equality under the Constitution. A right becomes a Fundamental Right because it has foundational value. One has to see the structure of the Article in which the fundamental value is incorporated. In *M. Nagaraj* v. *Union of India*[16], while referring to the eminent jurist H.M. Seervai, the Supreme Court distinguished between the abstract concept of equality, and specific conceptions of it, holding that equality before the law, guaranteed by the first part of Article 14, is a "negative" concept, while the second part is a "positive" concept which is enough to validate equalizing measures depending upon the fact-situation.

It is interesting to note that the Supreme Court has already dealt with the aspect of equality while deciding the case of *Pramati Educational & Cultural Trust* v. *Union of India*[17]. In this case, the Court dismissed the same argument submitted by Mr. Rohinton Nariman, as he then was, made specifically in context of Article 15(5) itself and contending that Article 14 stood violated due to its addition. Contrarily, it was held that the argument of violation of equality does not hold merit, since a future legislation made in pursuance of Article 15(5) by the State is not immune from a challenge under Article 14 on the ground that it treats private and minority institutions unequally. However, it is on record that Mr. Nariman had in fact argued that a violation of Article 14 is constituted by the very addition of Article 15(5) through the 93rdConstitutional Amendment to the Constitution, regardless of any laws made thereunder. It becomes apparent that since the constitutionality of Article 15(5) has not yet been properly construed by the Supreme Court, the controversy remains alive.

---

[15] (1973) 4 SCC 225.
[16] (2006) 8 SCC 212.
[17] (2014) 8 SCC 1.

Bearing the positive purport of Article 14 in mind, and after analyzing Article 30(1) of the Constitution, it becomes clear that the admission of a "sprinkling of outsiders", an expression well within the quantum of reservation of 25% of the class-strength as prescribed under the RTE Act, will not deprive an institution of its minority status and character. This shows that the defence taken, and the specific latitude extended by the Parliament, and further giving it a constitutional vestige through the 93rd Constitutional Amendment, clearly violates the constitutional guarantee of equality, being "basic feature" of the Constitution, as had been held in *M.G. Badappanavar* v. *State of Karnataka*[18] and in *M. Nagaraj*[19]. A regrettable consequence of this purposive misinterpretation of Article 30(1) is that the undue favorable exemption granted in favor of the minority institutions today stands as a part of the Constitution in the form of Article 15(5).

5. CONCLUSION

It is apparent that the erstwhile "activist" judiciary, which led the campaign to realize the ideal of free and compulsory education, has taken an unusual approach suited to the convenience of the political branch. The above discourse has sought to expose that the exemption granted to minority-administered educational institutions is unconstitutional, being based upon a masqueraded interpretation of Article 30(1), which is contrary to the oft-explained interpretations rendered by greater benches the Supreme Court in the past. Not only does such an exemption deprive young Indian citizens from the fuller achievement of the guarantee of education, but an analysis of this unprincipled exemption further exposes that it is a glaring violation of the principle of equality under Article 14 of the Constitution, which has unfortunately become a blemish upon the Constitution, as the ill-conceived Article 15(5).

"If Article 14 is withdrawn, the political pressures exercised by numerically large groups can tear the country apart by leaving it to the legislature to pick and choose favored areas and favorite classes for preferential treatment." These words of Chandrachud J. expressed in *Minerva Mills Ltd.* v. *Union of India*[20] seem prophetic in context of the undue and unconstitutional preferential treatment being given to the minority institutions. In its present form, Article 15(5) is a provision designed by Parliament to appease socially and educationally backward classes of citizens and the Scheduled Castes or the Scheduled Tribes for political gains, and it is for this reason that the State must recognise and preserve the mandate of equality under Article 14 of the Constitution in furtherance of full realization of the right to education, but has so far failed to do so.

---

[18] (2001) 2 SCC 666.
[19] (2006) 8 SCC 212.
[20] (1980) 3 SCC 625.

Considering that the legislative intent with which Article 15(5) was added was to ensure that the institutions upon which a responsibility to comply with the mandate of the Right to Education Act do not challenge such responsibilities as a violation of the freedom to administer educational institutions under Article 19, which was the erstwhile constitutional and legal provision, the suitable amendment of the Article in its present form would be simply as follows:

> *"Article 15 (5A): 'Nothing in this Article or in sub-clause (g) of clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State'."*

It is expected that with this measure, not only will the horizontal application of educational rights in the constitution be more broad-based, it will also be consistent with the mandate of equality, and the current inequality that has been given effect to by the purposive mis-interpretation of the mandate of Article 30(1) by the Parliament will be ameliorated.