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RIGHT TO EDUCATION AND MINORITY RIGHTS

TOWARDS A FINE CONSTITUTIONAL BALANCE

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CONTENTS

EXECUTIVE SUMMARY

Pursuant to its commitment to universalise elementary education, the Government of India enacted the 86th Amendment to the Constitution. With this, Article 21A was introduced, making free and compulsory elementary education a fundamental right for all children within the age group of 6-14 years. Following this, the Parliament in 2009 passed the Right of Children to Free and Compulsory Education Act (hereafter, RTE Act), detailing the content and enforcement of this right. The RTE Act mandates unaided schools to reserve 25% of their seats for children from weaker sections and disadvantaged groups. It also 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?

This paper answers this question in the negative. We argue that a key rationale for including the rights of religious and linguistic minorities in the Constitution is to ensure preservation of their culture and the creation of an educated minority citizenry in the country. The RTE Act is not only in alignment with this purpose, but also furthers it by making elementary education of minimum acceptable quality available to all children including those from minority communities. For this, we look at the Constituent Assembly Debates and judgments of the Supreme Court which interpret the meaning and scope of Article 30 and Article 21A. We believe that questions of 'minority character' of an educational institution as well as the 'welfare of minorities' should be answered keeping in mind the purpose of both these provisions.

We contend that this Act has nothing in it to suggest that it would 'annihilate' the minority character of these institutions and would thus be an impediment to the welfare of minorities. The case is fairly straightforward when we take into account provisions which are largely regulatory in nature and are meant to make schools conducive spaces for learning. At the same time, some minority schools are also aided by the state. This gives greater legitimacy for state regulation. This principle has been upheld by various judicial pronouncements. Unaided minority schools, however, should be considered distinctly from aided schools. They enjoy relatively higher autonomy in their administration and day to day functioning. Yet, considering that the purpose of constitutional provisions on minority rights and the right to education could be harmonised, this distinction is not critical to our argument. The entire RTE Act, including the 25% quota provided in it, we argue, should apply to all minority schools. This reservation is different from those argued about in cases of higher education as it cuts across religious, linguistic and other identity groups. It should not unsettle the current demography of minority schools to the extent that it endangers their minority character. On the contrary, provision of free and compulsory elementary education should be regarded as a minimum core obligation of the state that seeks to capitalise on its demographic dividend in an increasingly knowledge driven economy.

I. INTRODUCTION

The Right of Children to Free and Compulsory Education Act was passed in 2009, to realise the fundamental right to education enshrined in Article 21A[1] of the Constitution of India. One of the most controversial provisions of the Act has been Section 12(1)(c)[2] which imposes an obligation on all private schools to reserve 25% seats for economically weaker sections and disadvantaged groups in their entry-level classes.

This provision was reviewed by the Supreme Court of India in *Society for Unaided Private Schools v the Union of India*[3] and its constitutionality was upheld. The operative conclusion of the judgment was that private schools were required to abide by Section 12(1)(c). However, all unaided minority schools were exempted from the application of this provision.

The Court in the subsequent case of *Pramati Educational and Cultural Trust v Union of India*[4] overturned this position. It reasoned that minority schools are protected under Article 30(1) of the Constitution of India, which gives all religious and linguistic minorities the right to establish and administer educational institutions of their choice. As a result, it exempted *all* minority schools (aided and unaided) from the purview of the *entire* Act. Unsurprisingly, there has been a marked increase in schools seeking minority status post this judgment.[5]

Our objections to the judgment are both on conceptual as well as pragmatic grounds. These objections segue into the larger research objective of this paper — enquiring into the conceptual and enforcement-related questions arising in the interface between the constitutional right to education for all and the specific educational rights of minorities. In a nutshell, we argue that a constitutionally permissible balance between Articles 21A and 30 that makes them mutually supporting rather than cancelling is not only possible, but also necessary. In this paper, we present our alternate reading of

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[1] Constitution of India, Article 21A - Right to Education - 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.

[2] 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.)

[3] (2012) 6 SCC 102 (Hereafter '*Society*').

[4] (2014) 8 SCC 1 (Hereafter '*Pramati*').

[5] 'Right to Education: Schools Chase Minority Status', (*Daily Bhaskar*, 28 May, 2012), <http://daily.bhaskar.com/article/RAJ-JPR-right-to-education-schools-chase-minority-status-3329365.html> accessed 31 December 2015.

Article 30 that makes this possible. Such a reading makes the RTE Act consistent with the rights of minorities elucidated in the Constitution and elaborated by the courts. The reading requires a more careful identification of criteria and processes to grant minority status to educational institutions while fully recognising the wide remit of constitutional rights available to minorities. We, therefore, neither recommend amending the present scheme of educational rights of minorities in the Constitution nor the unit of their determination. We do, however, make certain structural and methodological suggestions which, we believe, would better balance rights under both Article 21A and Article 30 and advance their respective purposes in a mutually reinforcing manner. In terms of administrative structures, we argue (i) that consistent with the constitutional scheme, the authority governing linguistic minority educational institutions should have the same powers as its religious minority counterpart; and (ii) these authorities across different States ought to have a modicum of coherence in the standards and criteria for recognition of institutions eligible for protection under Article 30.

To this end, Part II of the paper critically examines the identification of minorities in India and the scope and ambit of Article 30 which guarantees minorities the right to establish and administer their own educational institutions. Part III elaborates on the intersections of obligations under the RTE Act and Article 21A on one hand and Article 30 on the other. Part IV discusses the authorities administering granting of minority status to educational institutions along with the criteria and procedure evolved for the same, both at the Central and State level. Part V examines the consequences of the exemption of all minority schools from the purview of the RTE Act. Finally, in Part VI, we summarise our findings and present recommendations.

II. EDUCATIONAL AND CULTURAL RIGHTS OF RELIGIOUS AND LINGUISTIC MINORITIES

The Constitution contains well-enumerated rights and safeguards for religious and linguistic minorities. Articles 29 and 30 form the bedrock of the educational rights of minorities.[6] Article 29(1) gives a general right to anyone residing in any part of India to conserve his/her language, script and culture. Article 29(2) prohibits all state and state-aided educational institutions from denying admission on grounds of religion, race, caste and language. Article 30(1) gives a specific right to minorities to establish and administer educational institutions of their choice. Therefore, all religious and linguistic minorities have a right to administer an educational institution if the same has been established by them. The terms 'establish' and 'administer' must, therefore, be read conjunctively.[7]

Additionally, Article 30(2) prohibits the state from discriminating against any minority educational institutions while granting aid. Article 350A declares an aspirational obligation on every State in India to provide educational facilities to linguistic minorities in their mother tongue at the primary stage of education.

Yet, from the inception of the Constitution itself, questions such as the definition of 'minority', what counts as interference with the autonomy to establish and administer minority institutions, and the relationship between such autonomy and preservation of culture, language and script have been a constant source of public argumentation and litigation. In this sense, a literal interpretation of the constitutional text has not been capable of resolving these critical questions on the meaning and content of educational rights of minorities. We therefore propose that these provisions be interpreted

[6] Constitution of India, Article 29 - Protection of interests of minorities - (1) Any section of the citizens residing in the territory of India or any part thereof having a 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 - Right of minorities to establish and administer educational institutions - (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 educational institution on the ground that it is under the management of a minority, whether based on religion or language.

[7] *S. Azeez Basha v Union of India*, AIR 1968 SC 662, ¶ 19.

'purposively'. We shall be broadly following Aharon Barak's model described in his seminal work *Purposive Interpretation in Law*.[8]

A. Reading Article 30 purposively

Barak argues that purposive interpretation begins with the idea of 'pinpointing the legal meaning of a text along the spectrum of its semantic meanings.'[9] Purposive interpretation establishes 'purpose' as the criteria for determining legal meaning within this spectrum. For Barak, 'purpose' is a legal concept that includes 'goals, interests and values' that the author and the text at different levels of abstraction seek to actualise reflecting on the social values, morality, social goals and human rights prevalent when the text is interpreted.[10] In that sense, purposive interpretation no longer remains only 'archaeological' but acquires a distinctive 'dynamism'.[11]

In this light, it is instructive to consider the Constituent Assembly Debates and subsequent developments for a 'proper' interpretation of Article 30 of the Constitution. It is interesting to note that at the initial stages of the debates, the term minority seemed to have included religious minorities, backward castes and tribal communities, not so much on account of the numerical status of the group, but due to disadvantages suffered in the past. Earlier, the broad category of minorities was divided into political and religious-cultural groups.[12] The debates saw the representatives claiming minority status for their respective groups on various grounds like size of population, social backwardness and cultural distinctiveness (a common claim among the claimants of religious minority status). In terms of political representation, backwardness seemed a more plausible basis for group-differentiated rights, as compared to cultural distinctiveness.[13] On the other hand, in the backdrop of partition, it was generally agreed that minorities should have their right to culture protected, without any distinct political rights.[14]

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[8] Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2007). (Hereafter, 'Barak').

[9] Barak, xiii.

[10] Barak, xiii-xiv.

[11] William Eskridge Jr., *Dynamic Statutory Interpretation* (Harvard University Press 1994)

[12] Rochana Bajpai, Constituent Assembly Debates and Minority Rights, (2000) Economic and Political Weekly, Vol. 35, No. 21/22, 1837-1838; see also, H. J. Khandekar, Memorandum on Minorities in B. Shiva Rao, *The Framing of India's Constitution: Select Documents* (Universal Law Publishers 2012) Vol. 2, 324; Reply to the Questionnaire received from Jagjivan Ram in B. Shiva Rao, 330; R.N. Brahma, Memorandum on the Safeguards for the Plains Tribal people of Assam in B. Shiva Rao, 370.

[13] Rochana Bajpai, 'Multiculturalism in India: An Exception?', <http://www.bu.edu/cura/files/2015/06/bajpai-paper-formatted.pdf > accessed 31 December 2015.

[14] Zoya Hasan, E. Sridharan and R. Sudharshan, *India's Living Constitution: Ideas, Practices, Controversies,* (Anthem Press 2005) 213.

The Advisory Committee on Minority Rights recommended that 'minorities in every unit shall be protected in respect of their language, script and culture, and no laws or regulations may be enacted that may operate oppressively or prejudicially in this respect.'[15] By the time this idea was incorporated in the Draft Constitution (Article 23), this right was extended to every citizen in every corner of the Indian territory possessing distinct culture, language or script. For this purpose, religious and linguistic minorities were granted the right to establish and administer educational institutions of their choice.[16] It was also suggested that the government at all levels should provide for the 'promotion of the religious and secular education and culture of all national, religious or cultural minorities.'[17] Retaining a distinct identity of minority schools was seen as inseparable from preservation of cultural heritage.[18] In addition to this, it was insisted that 'the right of [a] minority to education in its mother-tongue is fundamental.'[19] It was also suggested that if certain percentage of students belonging to a minority group study in a school, that school would be eligible to apply for minority status, or where a certain threshold of minority students are studying in a school, the state should make provisions for instruction in their language and script.[20] Besides, it should provide for special educational facilities for backward classes who embrace a minority religion and protect them from injustice and exploitation.[21] Maulana Hifzur Rahman and Abdul Qaiyum Ansari, in their letters, said that 'educational scholarships, stipends etc. to minorities and grants-in-aid to educational institutions of minorities should not be given according to the proportion of the population of any minority. Such kinds of benefactions ought to be granted in proportion to the backward conditions of the minorities concerned…'[22] In addition to this Dr. Ambedkar, in his speech in the Assembly, said that:[23]

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[15] Ibid, 215.

[16] S.P. Mookerji, Memorandum of Minorities, B. Shiva Rao, *The Framing of India's Constitution: Select Documents* (Universal Law Publishers 2012) Vol. 2, 336; Frank Anthony, *Memorandum on the Anglo-Indian Community* in B. Shiva Rao, 343.

[17] Reply to Questionnaire by M. Ruthnaswamy, B. Shiva Rao, *The Framing of India's Constitution: Select Documents* (Universal Law Publishers 2012) Vol. 2, 312.

[18] Frank Anthony, Memorandum on the Anglo-Indian Community in B. Shiva Rao, 343

[19] Reply to the Questionnaire received from S.H. Prater. This point was reinforced in 'Memorandum of Minorities by Ujjal Singh and Harnam Singh', B. Shiva Rao, 362.

[20] Ibid, Ujjal Singh and Hamam Singh, Memorandum of Minorities.

[21] Ibid.

[22] Letter from Maulana Hifzur Rahman and Abdul Qaiyum Ansari in B. Shiva Rao, 386.

[23] Dr. B.R. Ambedkar in his response to Shri Lari's objections to the deletion of the word "minority" from the original clause (1) of Article 23. The said deletion was made by the Drafting Committee. [Presently, Article 29 (1) of the Constitution]. According to Dr. Ambedkar, the Drafting Committee was justified in altering the clause as the Committee feared that "*the word "minority" might be interpreted in the narrow sense of the term, when the intention of this House, when it passed Article 18, was to use the word "minority" in a much wider*

> 'The term 'minority' was used therein not in the technical sense of the word 'minority' as we have been accustomed to use it for the purposes of certain political safeguards such as representation in the Legislature, representation in the services and so on. The word is used not merely to indicate the minority in the technical sense of the word, it is also used to cover minorities which are not minorities in the technical sense, but which are nonetheless minorities in the cultural and linguistic sense. The article intends to give protection in the matter of culture, language and script not only to a minority technically, but also to a minority in the wider sense of the terms as I have explained just now.'

From the above discussion, the two points that emerge provide us an insight into the scope and purpose of Articles 29 and 30 of the Constitution. *First*, while numerical strength is an important indicator in categorising what counts as minority, it was not intended to be the sole factor. Other qualitative factors such as social backwardness and linguistic and cultural vulnerability could also be relevant. *Second*, the right to establish and administer schools and other educational institutions is important for the preservation of essential interests of minorities in their language, script and culture. This group-referentiality, it could be argued, makes this right under Article 30 distinct from the right to carry on a trade, occupation or business under Article 19(1)(g). This point shall be elaborated upon presently.

As mentioned before, the meaning-finding exercise that purposive interpretation espouses also encompasses the way subsequent courts and governments have interpreted the content of these articles. For this, we look at the judgments of constitutional courts, parliamentary debates and the reports of committees constituted, over time, to look into the affairs of minorities. Perhaps, the first time the Supreme Court attempted to define 'minority' was in its advisory opinion[24] on the constitutionality of the Kerala Education Bill, 1957 with respect to its application to minority schools in the State. While it did not go into the finer details of the issue, it held that in the particular context, the term 'minority' would constitute groups comprising less than 50% of the total population of the State.[25] As this observation was not critical to the outcome, it could not be considered a

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sense, so as to give cultural protection to those who were technically not minorities but minorities nonetheless.", Samaraditya Pal, *India's Constitution Origins and Evolution*, (Vol 3, LexisNexis, 2015) 22.

[24] *In Re Kerala Education Bill*, [1959] 1 SCR 995 (Hereafter '*In Re Kerala Education Bill*'); It was also held by the Hon'ble Kerala High Court in *A.M. Patroni v Kesavan*, (AIR 1965 Ker 75) that since there is no definition of minority in the Constitution, it must be less than fifty percent of the population of the State.

[25] *In Re Kerala Education Bill*, 1957, ¶39; The Court rejected the contention of the Kerala Government that minorities be determined with respect to a smaller unit, i.e. district, taluka, corporation etc. as it would not be administratively convenient and would lead to anomalous situations where a minority in one part of a city would be a majority in the other, hence creating a fair amount of confusion w.r.t. the rights outlined in Article 30(1) of the Constitution.

binding precedent. This view, nonetheless, was persisted with in subsequent judgments of the Court.[26] In *In Re Kerala Education Bill*, the Court observed that Articles 29 and 30 contemplate a minority institution with a 'sprinkling of outsiders' and that 'by admitting a non-member into it, the minority institution does not shed its character and cease to be a minority institution.' Significantly, the Court reinforced the link between establishment of an educational institution and preservation of culture, language and script, for 'it is by education that their culture can be inculcated into the impressionable minds of the children of the community.' This, the Court observed, may be served better by propagating it among the non-members as well. Categorically, the Court held that 'it is, therefore, that Article 30(1) confers on all minorities, whether based on religion or language, the right to establish and administer educational institutions of their choice.'[27]

While Article 29 guarantees the right to conserve language, script and culture to every citizen, Article 30 seems to recognise establishment of educational institutions as an effective vehicle for the minorities to do this. However, the apex court has also observed that it would be a mistake to read Articles 29 and 30 in a conjoint manner and has held that the choice given to minorities to establish and administer educational institutions is not limited to conserving language, script and culture or admitting students from minority communities only. A minority group, therefore, would be entitled to establish and administer, say, an engineering college or a business school under Article 30. While the two opinions seem contrasting, it needs emphasis that a 'liberal, generous and sympathetic approach is reflected in the Constitution in the matter of preservation of the right of minorities so far as their educational institutions are concerned.'[28] It is in this spirit that the 'minority character' of an institution and 'welfare of minorities' need to be interpreted. Considering the language of universality in Article 29 and group-referentiality in Article 30, it seems that while the two articles have content independent of each other (for example, any community may open an institution for cultural promotion under Article 29 and a minority community could open a technical education institution that may not relate to preservation of script or culture under Article 30), there is also an inescapable overlap between the two (where minority groups could use educational institutions as tools for preserving their culture, language and script). The 'welfare of minorities' may, therefore, be additionally served, for example, if such institutions reserve some seats for students from their

[26] *D.A.V. College v State of Punjab*, (1971) 2 SCC 261, (hereafter '*D.A.V. College Case*').; See also *Nehru National Higher Secondary School v State of Tamil Nadu*, 1987 1 MLJ 389 - In this case from Tamil Nadu, the position taken in *Re Kerala Education Bill* was challenged by a claim that minority status of religious/linguistic minorities should be determined by taking a locality as a unit of reference. The court, however, did not accept this contention.

[27] *In Re Kerala Education Bill*, ¶ 42.

[28] *Ahmedabad St. Xavier's College Society v State of Gujarat*, (1974) 1 SCC 717, (hereafter '*Ahmedabad St. Xavier's College Society*') (H. R. Khanna J.)

community. Further, the 'minority character' of such institutions need not be threatened if they admit students from other communities as well.

Of course, the unit for determination of who constitutes a minority would continue to remain an important question. In this context, a suggestion for State-based determination of minorities was made by the Supreme Court in 1958,[29] when the State Government had exclusive competence for legislating on educational matters. The question became further vexed with the 42nd Amendment to the Constitution in 1976 which brought education-related entries to the Concurrent List, thereby giving both the Central and State Governments legislative competence over it. The Supreme Court in an 11- judge bench verdict in the *T.M.A. Pai Foundation v. State of Karnataka*[30] held that this change would not affect the determination of a minority. It was reasoned that 'since reorganisation of the States in India has been on linguistic lines, therefore, for the purpose of determining the minority the unit will also be the State and not the whole of India. Thus, religious and linguistic minorities, who have been put at par in Article 30, have to be considered State-wise.'[31]

While the rationale for State-based determination of linguistic minorities seems intuitive, the same cannot be said of religious minorities. The concentration of religious communities, unlike the linguistic, has only a tangential correlation with the organisation of States. Nonetheless, it was suggested that because Article 30 gives equal footing to religious and linguistic minorities, both should have the same unit of determination.[32] However, this may lead to some intuitively anomalous results. For instance, a religious group, which is a majority with respect to the overall population of the country, could be a minority in certain States, such as Hindus in Nagaland, Punjab and Lakshadweep, where Christians, Sikhs and Muslims are the religious majorities respectively. Soli Sorabjee, appearing as *amicus curiae* in *T.M.A. Pai*, had submitted that 'the provision was not intended to protect a group with larger numbers against a group having smaller numbers.'[33]

In the pursuit of defining 'minority', it was suggested by the Constitution Bench in the case of *D.A.V. College v State of Punjab*[34] that religious or linguistic minorities should be determined 'only in relation to the particular legislation which is sought to be impugned, namely that if it is the State Legislature, these minorities have to be determined in relation to the population of the State.' The

[29] *In Re Kerala Education Bill.*

[30] *T.M.A. Pai Foundation v. State of Karnataka,* (2002) 8 SCC 481 (hereafter '*T.M.A. Pai*').

[31] *T.M.A. Pai*, ¶ 162.

[32] *T.M.A.Pai*,¶ 552.

[33] Additional Written Submissions of Mr. Soli J. Sorabjee, Attorney-General for India as Amicus Curae, in the case of *T.M.A. Pai* < http://www.ebc-india.com/lawyer/sp_case_comment/submissions_3.htm#Note8 > accessed 03 January 2016.

[34] (1971) 2 SCC 269, 274. (Note: This case is different from the D.A.V. College case cited before)

legislative source-based determination of minorities was also canvassed in Justice Ruma Pal's dissenting opinion in *T.M.A. Pai*, where she observed that 'the question of minority status must be judged in relation to the offending piece of legislation or executive order.'[35] Further, she opined that 'if the source of infringing legislation is the State, then the protection must be given against the State and the status of the individual or group claiming the protection must be determined with reference to the territorial limits of the State.' Consequently, she observed that 'when the entire nation is sought to be affected, surely the question of minority status must be determined with reference to the country as a whole.'[36]

While this view seems reasonable and could perhaps cover most bases, it seems to accord Article 30 a rather responsive role that gets activated only when direct state action is contested. Article 30, from its text and history, clearly has both positive as well as negative components. The latter empowers a minority group to challenge any kind of imposition by the state that would be inimical to their welfare. For example, in the *D.A.V. College Case*, the Court struck down a circular issued by Punjab University which sought to impose Punjabi and Gurumukhi as the sole medium of instruction and script in colleges affiliated to it. Significantly, the text as well as the context of Article 30(1), as discussed before, make this right inherently available to any individual belonging to a group affiliated to any religious or linguistic minority to establish and administer an educational institution of their 'choice', even if there is no law, offending or otherwise. Hence the question of determination of minority cannot be solely legislative source-based.

While holding that the determination of minorities can only be State-based, the majority in *T.M.A. Pai* observed that 'minority for the purposes of Article 30 cannot have different meanings depending upon who is legislating.'[37] This, we argue, refers to the positive component of this right. Hence, it may be noticed that the reference point for the positive and negative components of Article 30 is essentially the type of state action. The negative component is activated when the government passes an offending legislation that infringes the minority character of an educational institution, which is numerically a minority in that State and requires constitutional protection to preserve such character. The positive component is invoked when the government recognises a community as a 'minority' for the benefits of Article 30. It is our case that while a quantitative element is both necessary and sufficient for the purposes of the negative part, it is only a necessary and not a sufficient factor for the positive part of Article 30 and needs to be supplemented by other qualitative factors. Our argument does not disturb the existing units for determination of minority, but only proposes certain modifications in the methodology. Additionally, while Justice Pal's suggestion seems

[35] *T.M.A. Pai,* ¶ 648 (Pal J.)

[36] Ibid.

[37] *T.M.A. Pai,* ¶ 81.

adequate as far as the negative component is concerned, it would not be so for the positive part of the right.

Admittedly, the intuitive anomaly alluded to earlier is not strictly inconsistent with the language of the text. Yet, Article 30 was meant to be a provision for empowering minorities by allowing the use of educational apparatus to, primarily, preserve culture, language and script and promote their welfare. It follows therefore that Hindus, being an overwhelming majority in the rest of the country, may not require the support of Article 30. Of course, in States where they are a minority, Hindus could, as seen in the *D.A.V. College Case*, resist the imposition of any language or script or religious instruction by the state as this only concerns the responsive or negative component of Article 30.

While the application of the negative component is fairly elementary, the operationalisation of the positive component of this right would require the incorporation of qualitative factors.[38] The term 'minority' essentially denotes a certain position in a power relationship. Indeed, the size of the group may bear relation to the power it wields. Yet, there are other factors which could be relevant to understand the relationship a minority group shares with others. This was partly emphasised by the Supreme Court in *Bal Patil v Union of India*[39] where it was deciding on the minority status of the Jain community under Section 2(c) of the National Commission of Minorities Act, 1992.[40] The Court, while questioning the sufficiency of numerical criteria,[41] observed that '[if] it is found that a majority of the members of the community belong to the affluent class of industrialists, businessmen,

[38] Zoya Hasan, 'Defining India's Minorities' *The Hindu* (14 July 2007), 'The size of the group is not what should concern our policy-makers or those committed to eradication of inequity, prejudice, and discrimination. This is because numbers per se merely quantify and describe the proportion of a group in a population; they do not tell us anything about whether a particular minority group is powerful or powerless, advantaged or disadvantaged, represented or under-represented. A more meaningful conception of minority status would include sections of people who, on account of their non-dominant position in the country as a whole (not a specific State), and because of their religion, language, caste or gender, are targets of discrimination and therefore deserving of special consideration. The statistical approach disregards the crucial qualitative condition of vulnerability and disadvantage.'<http://www.thehindu.com/todays-paper/tp-opinion/defining-indias-minorities/article1872744.ece.> accessed 31 December 2015.

[39] AIR 2005 SC 3172 (Hereafter '*Bal Patil*')

[40] National Commission for Minorities Act, 1992, section 2(c) identifies Muslims, Sikhs, Christians, Buddhists, Zoroastrians have been notified as minority communities at the Central level; In an amendment to the Act in 2014, 'Jains' were notified as a minority community (As per S.O. 267(E), Ministry of Minority Affairs, New Delhi, 27 January, 2014.).

[41] *Bal Patil*, ¶ 40, 'If it is found that a majority of the members of the community belong to the affluent class of industrialists, businessmen, professionals and propertied class, it may not be necessary to notify them under the Act as such and extend any special treatment or protection to them as a minority. The provisions contained in Articles 25 to 30 form a protective umbrella against the possible deprivations of fundamental right of religious freedoms of religious and linguistic minorities.' It must be noted, however, that we do not advocate only economics driven filters for extending protection of Article 30(1).

professionals and propertied class, it may not be necessary to notify them under the Act as such and extend any special treatment or protection to them as minority.'[42]

The qualitative factors of disadvantage and vulnerability discussed in above paragraphs, however, cannot be limited to only economic considerations. In addition to this, other social, political and cultural factors should also be studied for ascertaining a community's location in the power relationships. From the text of Article 30, there appears no reason why minorities' right to conserve their religion, language, script or culture should be limited only by its economic status. This is particularly so when it is optional for minorities to seek state aid in establishing educational institutions. Moreover, the right to preserve culture, language and script is accorded to the general population irrespective of their minority status under Article 29. Yet, it is plausible that political and cultural disadvantages are more accentuated in case of minorities wherein the Constitution empowers them to use the educational apparatus for their welfare by, among other things, promoting their language, script and culture. Sorabjee, in his *amicus* brief in *T.M.A. Pai*, submitted that "Article 30 was intended merely to prevent, *in future*, oppression and suppression by the majority the rights of the minority to propagate their religion or language or to benefit the members of their community by establishing educational institutions",[43] hinting at the relevance of qualitative factors, besides numbers, for activating the positive elements of Article 30. In this light, Hidayatullah, J. importantly reminds us that 'the right under Article 30(1) forms part of a complex and inter-dependent group of diverse social interests. There cannot be a perpetually fixed adjustment of the right and those social interests. They would need adjustment and readjustment from time to time and in varying circumstances.'[44]

At this moment, it is difficult to list out the qualitative factors for the positive component with certainty. The answer, we argue lies in the purposive approach rather than merely a ministerial one to Article 30. The objectives underlying Article 30(1), as the Court has observed, are to enable the minorities to (i) conserve their religion and language, and (ii) to give a thorough, good, general education to children in their communities.[45] The search for exactitude with respect to detailing the positive component of this right would have to build on these observations and take into account views of all key stakeholders and experts besides parliamentary and constitutional scrutiny. The importance of the positive component, however, should be clearly recognised.

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[42] *Bal Patil*, ¶ 11.

[43] See n. 33.

[44] *Ahmedabad St. Xavier's College Society*, ¶ 280.

[45] *In Re Kerala Education Bill*; also relied on in the case of *Christian Medical College and Ors. v State of Tamil Nadu and Ors.*, (2008) 17 SCC 659.

To summarise, a liberal and considerate view, informed by our peculiar contexts and the objective to secure a democratic citizenship, has been taken by the Constitution and judicial pronouncements with respect to interpreting the educational rights of minorities.[46] Articles 29 and 30, while retaining their core constituencies, also have significant overlaps, particularly when a minority community uses education as a vehicle for promoting and preserving their culture, language and script. An engineering college, established by a minority, for example would be entirely within the domain of Article 30,[47] while any cultural institute exhibiting the development of religion, texts and heritage would likely be within the constituency of Article 29. It is, however, the overlap and its relation with right to universal elementary education that remains the bone of contention.

The next part discusses the broad issue of regulating minority educational institutions especially focusing on its bearing on the enforcement of the RTE Act in minority schools.

[46] *Ahmedabad St. Xavier's College Society*, ¶ 89.

[47] Although, Soli Sorabjee in his amicus brief in *T.M.A. Pai* seems to exclude professional institutions from the ambit of Article 30 (See, n. 33). We, however, are not taking any such position in this paper.

III. INTERFACE BETWEEN EDUCATIONAL RIGHTS OF MINORITIES AND RIGHT TO EDUCATION

The RTE Act, in its mandate to universalise elementary education, prescribes certain standards for an acceptable school and imposes a reservation of 25% seats for 'weaker sections and disadvantaged groups'. Necessarily, this legislation intersects with the educational right of minorities. At present, all minority schools are exempted from the purview of the RTE Act. This issue first came for consideration before the Supreme Court in *Society*. It was held that the Act would apply to all private schools including aided and unaided minority schools. Unaided minority schools, however, were exempted from Sections 12(1)(c) and 18(3)[48] of the 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. Moreover, the role of School Management Committees in minority aided schools was reduced to that of an advisory body.[49]

In 2014, the Constitution Bench in *Pramati* was called upon to examine the validity of Article 15(5)[50] and Article 21A of the Constitution. Article 15(5) obligates the state to make provisions for the advancement of any socially and educationally backward classes and Scheduled Castes and Scheduled Tribes for their admissions in private educational institutions as well. Minority institutions under Article 30(1) are exempted from this obligation. The validity of both provisions insofar as they apply to private unaided schools was challenged. While the two provisions were held to be valid, the Court went a step ahead and declared the entire RTE Act inapplicable to both aided and unaided minority schools.

In light of this exemption, three questions require consideration: (1) whether general regulations and measures taken in the interest of efficiency, utility and quality of schools can also be applied to

[48] RTE Act, section 18 - No School to be established without obtaining certificate of recognition – (3) On the contravention of the conditions of recognition, the prescribed authority shall, by an order in writing, withdraw recognition: Provided that such order shall contain a direction as to which of the neighbourhood school, the children studying in the derecognised school, shall be admitted: Provided further that no recognition shall be so withdrawn without giving an opportunity of being heard to such school, in such manner, as may be prescribed.

[49] RTE Act, sections 21 and 22, as amended via the Right of Children to Free and Compulsory Education Act, 2012 on 19 June, 2012.

[50] Constitution of India, Article 15 - Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth- (5) 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, other than the minority educational institutions referred to in clause (1) of article 30; inserted by the Constitution (Ninety-third Amendment) Act, 2005 with effect from 20.01.2006.

minority institutions in a constitutionally permissible manner; (2) whether the state can impose reservations in the interest of economically weaker sections and disadvantaged groups in minority schools and (3) whether aided and unaided minority schools should be treated at par in terms of complying with state prescribed regulations.

A. Extent of Permissible State Regulation

Before examining the extent of permissible regulation with respect to Article 30, it would be useful to briefly compare the right granted under Article 19(1)(g)[51] and that under Article 30(1), to underscore the point that administrative autonomy would acquire different meanings, depending upon the nature of institution in question. Every citizen has a right to establish an educational institution under Article 19(1)(g). But this right, which is available to all citizens, irrespective of their group membership, is vastly different from the right conferred by Article 30(1), which is specifically available to individuals in a collective, as members of a religious or linguistic minority. The provision was meant to provide confidence to minorities by securing them the right to promote and conserve their language, script and culture though the educational apparatus. Group-referentiality is, thus, key to the distinction between Article 30(1) and Article 19(1)(g). Moreover, what may be permissible by way of restriction under Article 19(6)[52] may fall foul of Article 30(1). For example, it would be permissible for the state to impose a medium of instruction in institutions operated by private individuals under Article 19(6) but the same law in case of minority institutions would violate Article 30(1).[53] This is an additional protection granted by Article 30(1) to minorities.[54] It is, thus, true that

[51] Constitution of India, Article 19(1) – All citizens shall have the right to – (g) to practise any profession, or to carry on any occupation, trade or business.

[52] Constitution of India, Article 19(6) - Nothing in sub clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub clause, and, in particular, nothing in the said sub clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

[53] Minority Educational Institutions enjoy the freedom to set the language of instruction as per their choice. The state may still prescribe a regional language as an additional medium of instruction which would not amount to an interference with their constitutional protections; see, Guidelines for Determination of Minority Status, Recognition, Affiliation and related matters in respect of Minority Educational Institutions under the Constitution of India, National Commission for Minority Educational Institutions, Government of India (hereafter 'NCMEI Guidelines') <http://ncmei.gov.in/> accessed 26 November 2015.

[54] *P.A. Inamdar and Ors. v State of Maharashtra*, (2005) 6 SCC 537, ¶ 95 (hereafter '*P.A. Inamdar*').

Article 30(1) subsumes a number of rights which have a bearing on general administration in an educational institution. These rights may pertain to, for example, admitting students, setting up reasonable fee-structures, constituting governing bodies, appointing staff (teaching and non-teaching) and taking action in case of non-compliance on the part of any employee,[55] yet this autonomy for the reasons mentioned above should not be read as synonymous to that under Article 19(1)(g). Of course, it is trite to say that neither private parties nor minorities have the right to mal-administer their educational institutions under the guise of 'autonomy'. Hence, despite having their respective core constituencies, there is bound to be some overlap between the two rights.

The rights under Article 30(1), despite having considerable amplitude, are amenable to reasonable restrictions imposed by the state for the maintenance of educational standards. These regulations, however, cannot undermine the constitutionally protected autonomy of the minorities to establish and administer institutions of their choice. The question here is: how should we separate permissible regulations from the ones which are impermissible? This question can be answered with reference to the purpose behind this article. Regulations that 'promote efficiency of instruction, discipline, health, sanitation, morality and public order' have been held to be permissible by the Court.[56] In the same vein, regulations that "maintain academic standards, build a credible teaching atmosphere, ensure proper infrastructure and prevent mal-administration" have also been allowed.[57] These regulations, being formal and procedural in nature, neither impinge on the 'minority character' of these institutions nor hamper the 'welfare of minorities' that they seek to promote.

On the other hand, fixing a rigid fee-structure, dictating the formation and composition of a governing body, nominating teachers and staff for appointment or nominating students for admission etc. have been declared unconstitutional as they impinge on the autonomy granted to minority schools under Article 30(1).[58] Thus, the nexus between administrative 'autonomy', preservation of 'minority character' and promotion of 'welfare of minority' is crucial to striking a balance between a general constitutional right, like the right to education, and specific constitutional protections granted to minorities under the Constitution. For example, the Supreme Court has held that educational institutions run by linguistic minorities (aided or unaided) have the right to impose their native language as the medium of instruction at the primary stage of education. The power of the state to determine the medium of instruction must yield to this fundamental right of minorities.[59] However,

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[55] *T.M.A. Pai*.

[56] *Rev. Sidhajbhai Sabhai and Ors. v State of Bombay*, [1963] 3 SCR 837.

[57] Ibid; see also, *T.M.A. Pai*, ¶ 54.

[58] Ibid.

[59] *State of Bombay v Education Society*, (1955) 1 SCR 568; D.D. Basu, *Shorter Constitution of India* (14th edn., LexisNexis 2013) vol. I, 496.

the state can impose a regional language as an additional medium of instruction and this would not amount to an interference with their constitutional protections.[60] It is clear from here that while the medium of instruction is crucial to the 'minority character' of the said institution and 'welfare' of the concerned minority, adding a regional language as an additional medium neither infringes on these aspects, nor significantly compromises the administrative 'autonomy' of the institution; in fact, it makes education more accessible to students of other communities.

Currently, as a result of *Pramati,* all minority schools are exempted from basic regulatory provisions of the RTE Act. Most of these provisions largely focus on developing and improving standards of infrastructure and student welfare in schools. These provisions should apply to all schools regardless of their minority status. For instance, provisions relating to prohibition of corporal punishment,[61] ban on screening procedures and capitation fee,[62] prescribed Pupil-Teacher Ratio (PTR),[63] prohibition of holding back and expulsion,[64] proof of age for admission,[65] basic norms and standards for infrastructural and other facilities[66] etc. are regulations which promote the interest of students and also improve educational standards of the institution without under-cutting the autonomy of the institution or impacting its 'minority character', and in fact serve the 'welfare' of the members of the community. The Court in *Pramati* acknowledged that the state can only enact regulatory measures with respect to minority institutions, without interfering with their administration.[67] Despite this, it decided to exclude all minority schools from the purview of the RTE Act.[68] It was observed that if the Act is made applicable to minority schools, *whether aided or unaided*, 'the right of the minorities under Article 30(1) of the Constitution will be abrogated.'[69] Considering the purpose of Article 30(1) as examined before, it is submitted that this observation requires reconsideration.

Further, it is fairly settled that as far as aided institutions are concerned, certain regulations, in consideration for granting recognition or aid, or utilisation of such aid, may be imposed.[70] In fact, several reasonable restrictions are built into the text of the Constitution itself. Article 29(2) forbids

[60] NCMEI Guidelines, 28-29.

[61] RTE Act, section 17.

[62] RTE Act, section 13.

[63] RTE Act, section 25.

[64] RTE Act, section 16.

[65] RTE Act, section 14.

[66] Schedule RTE Act, sections 19 and 25.

[67] *Pramati,* ¶ 45.

[68] *Pramati,* ¶ 46.

[69] *Pramati,* ¶ 46.

[70] *In Re Kerala Education Bill*, ¶ 31.

all aided institutions (which would also 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 roughly corresponds to the definition of 'child belonging to disadvantaged group' in the RTE Act.[71] Nobody attending an institution aided by the state can be forced to take part in any religious instruction that may be imparted in such institutions or attend any religious worship conducted by such institutions, under Article 28(3).

Besides constitutional limitations, it has been held that in consideration for granting aid or recognition to a minority institution, the state may impose reasonable regulations for the purpose of ensuring sanitation, competence of teachers, maintenance of discipline, conditions of services, providing for appeal against orders of termination etc.[72] Further, the Supreme Court has also observed that an aided minority institution can admit students of a non-minority group to the extent that its 'minority character' is not annihilated, and at the same time, the rights of the citizens engrafted under Article 29(2) are not subverted.[73] Therefore, there is a greater scope for regulation in aided minority schools in comparison to the unaided ones and the two sets of institutions cannot be treated in exactly the same manner for all purposes.

The position adopted by the Supreme Court in *Pramati* has considerably weakened the scope of Article 21A and the RTE Act. It must be emphasised that this 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'.[74] This would not only undermine Article 30, from where it claims its legitimacy, but also undercut Article 21A significantly.

One recourse available to the Court was what it did in *Society* where, by applying the doctrine of severability, it exempted only unaided minority schools from the ambit of sections 12(1)(c) and 18(3).

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[71] RTE Act, section 2(d) - 'Child belonging to disadvantaged group' means 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 factor, as may be specified by the appropriate Government, by notification; it is noteworthy that Section 12(1)(c) quotas are not only meant for economically weaker sections but also for 'children belonging to disadvantaged group'.

[72] D.D. Basu, *Shorter Constitution of India*, (14th edn, LexisNexis 2013) vol. I, 506; in *Secy. Malankara Syrian catholic College v T. Jose,* (2007) 1 SCC 386, the Supreme Court held that aided minority institutions' rights under Article 30(1) are protective only and reverse discrimination is not permissible.

[73] *T.M.A. Pai*.

[74] See, *A.P. Christians Medical Educational Society v Government of Andhra Pradesh*, (1986) 2 SCC 667.

The rest of the provisions were held to be applicable to them. For instance, the provision for School Management Committees (SMCs) in the RTE Act was addressed by the amendment to the Act following the litigation in *Society*. Since the structure and functioning of the SMCs was seen as a restriction on the rights of minority schools, the provision was diluted to make it applicable to them via the amendment.[75] However, the Court did not address this point in *Pramati*. It is our contention 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).

It should be noted that in 2014, prior to the *Pramati* 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 of the guaranteed right to administer educational institutions as provided under Article 30(1), are applicable to minority institutions also.[76] The clarification was issued in reference to the amendments made to the Act in 2012. The MHRD, curiously, has not issued any clarification following the judgment in *Pramati*. It is unclear whether these notifications too would now be inoperative. Even if it is argued that *Pramati* did not intend to give a blanket exemption, the subsequent judgments by High Courts following *Pramati* suggest otherwise. In one case,[77] a student of Standard VIII in a minority school was failed by the school in violation of the no-detention clause of the RTE Act.[78] The Karnataka High Court relied on *Pramati* and accepted the school's contention that it was exempt from all provisions of the RTE Act. Recently, the Supreme Court, in *J.K. Raju v. State of A.P.*, itself recognised the non-negotiability of imparting basic necessities such as separate toilets, drinking water, adequate teaching and non-teaching staff etc. in all schools whether state-owned or private, aided or unaided, minority or non-minority.[79] Similarly, the Karnataka High Court in the case filed by Azim Premji

[75] Right of Children to Free and Compulsory Education Act, 2012.

[76] Ministry of Human Resource Development, Applicability of the provisions of the RTE Act, 2009 to the minority educational institutions – detention of students between Classes I to VIII (27 August 2014) < http://mhrd.gov.in/sites/upload_files/mhrd/files/upload_document/RTE-Minority.pdf> accessed 21 November 2015.

[77] *Master Srikanth L. v The Principal*, W.P.No.13961/2015 <http://indiankanoon.org/doc/106834267/> accessed 31 December 2015.

[78] RTE Act, section 16.

[79] *J.K. Raju v State of Andhra Pradesh and Anr.*, Contempt Petition (C) No. 532 of 2013 in W.P(C) 631/2004 <http://supremecourtofindia.nic.in/FileServer/2015-01-27_1422353733.pdf> accessed 31 December 2015.

Foundation[80] recently directed the State Government to ensure that minority institutions also provide basic requirements like toilets, drinking water, classrooms etc. to students.

It is fairly settled that autonomy should not be a defence against corruption and illegality. In another case before the Madras High Court,[81] it was contended that an unaided religious minority school was admitting students in a discriminatory manner. The Court acknowledged that primary level admissions in the school were not being conducted in a transparent manner. Following the law laid down in *Pramati*, the Court, however, could not issue suitable directions to the school to rectify the admission guidelines.

The position adopted by the courts in the cases of *Azim Premji Foundation* and *J.K. Raju* accentuates the need to draw a distinction between permissible and impermissible regulations in minority educational institutions. For instance, regulations aiming to improve educational standards and welfare of students and faculty, as argued before, do not impinge upon the autonomy granted to such schools. Such measures would also not annihilate the minority character of these schools and would be consistent with the purposive interpretation of Article 30(1)(a). The previous judgments as well as executive orders have tried to arrive at these distinctions but the same seem to have been discarded by the Court in *Pramati*, It is felt that perhaps, a judgment providing a solid principled grounding would have greatly advanced the law in this area.

B. Reservation in Minority Schools

Relying heavily on the judgments delivered in *T.M.A. Pai* and *P.A. Inamdar*, the Court in *Pramati* held that reservation fetters the autonomy of minority institutions, leading to increased state control over admissions. However, the Court ignored the fact that the arguments around reservation in those judgments pertained to admissions in tertiary education systems. The quota envisaged in the RTE Act, however, deals with admissions in elementary education.[82] This distinction needs to be

[80] *Azim Premji Foundation v State of Karnataka and Ors.*, W.P. No. 42294/2014, judgment available at 2015 SCC OnLine Kar 6409; See also 'Rights in Review: The Supreme Court in 2014', CLPR <http://clpr.org.in/wp-content/uploads/2014/12/Rights-Review-final.pdf> accessed 31 December 2015.

[81] *G. Murugendran v. Union of India and Ors*, W.P. No. 4618 of 2015, <http://indiankanoon.org/doc/66030158/> accessed 28 December 2015.

[82] *Society*, ¶104, 'However, the terrain of thought as has developed through successive judicial pronouncements culminating in *Pai Foundation* is that looking at the concept of education, in the backdrop of the constitutional provisions, professional educational institutions constitute a class by themselves as distinguished from educational institutions imparting non-professional education. It is not necessary for us to go deep into this aspect of the issue posed before us inasmuch as Pai Foundation has clarified that merit and excellence assume special significance in the context of professional studies. Though merit and excellence are not anathema to non-professional education, yet at that level and due to the nature of education which is more general, the need for merit and excellence therein is not of the degree as is called for in the context of professional education'; see also Alok Prasanna Kumar, 'Right to Education: neither free nor compulsory' *The Hindu* (9 May 2014)

highlighted for two reasons, namely, (a) the nature and concerns of elementary education are vastly different from those of tertiary education, and (b) the reservation envisaged in the RTE Act is distinguishable from that contested in the abovementioned cases. Section 12(1)(c) reserves 25% seats for children from weaker sections and disadvantaged groups. 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. This is particularly true with elementary education inasmuch as it equips students with the grounding necessary to navigate their way towards higher education, where considerations of merit seem to acquire certain emphasis. Moreover, unlike tertiary education, there is a general prohibition of screening procedures in elementary education.[83] Thus, the notion of merit acquires a different proposition in the case of tertiary education as compared to elementary education.

As discussed previously, conditions imposed by the state which impede the interests of the minorities in exercising their right under Article 30(1) are not permissible. The Supreme Court in the case of *T.M.A. Pai,* however, held that regulations in furtherance of *national interest* would be permissible for minority educational institutions.[84] The meaning of 'national interest' was left unclear. Subsequently, the term was defined in *P.A. Inamdar* to include public safety, national security and national integrity.[85] 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, the Court in *Pramati* recognised that *T.M.A. Pai* had not given a blanket prohibition against reservations in minority institutions. It even stated that the law laid down by the Court is that,

> '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.'

<http://www.thehindu.com/todays-paper/tp-opinion/right-to-education-neither-free-nor compulsory/article5991271.ecehttp://www.thehindu.com/todays-paper/tp-opinion/right-to-education-neither-free-nor-compulsory/article5991271.ece.> accessed 31 December 2015.

[83] RTE Act, section 13.

[84] *T.M.A. Pai*, ¶107, 'Any regulation framed in the national interest must necessarily apply to all educational institutions, whether run by the majority or the minority. Such a limitation must necessarily be read into Article 30. The right under Article 30(1) cannot be such as to override the national interest or to prevent the government from framing regulations in that behalf.'

[85] *P.A. Inamdar*, ¶ 120.

Surprisingly, the Court failed to incorporate this analysis while considering the intersection of Article 30(1) with Section 12(1)(c) of the RTE Act. 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.' There are two points of note here. *First*, aided minority institutions under a simultaneous reading of Articles 15(4) and 29(2),[86] as mentioned before, may be obligated to adhere to the special provisions created by the state for the advancement of socially and educationally backward classes or for Scheduled Castes and Scheduled Tribes (Section 12(1)(c) of RTE Act could arguably be considered a special provision as it also caters to 'children from disadvantaged groups'). *Second*, while it is true that a minority institution, like any other institution, would be affected if a quota is imposed on it, what needs to be analysed is whether such an effect is tantamount to 'annihilation of minority character' of that institution. These issues were neither distinguished nor explained in the *Pramati* judgment.

It must be reiterated that the legislation, being essentially regulatory, does not dilute the 'minority character' of the institution, much less annihilate it. In fact, the Act, through its policy of reimbursement, significantly alleviates anxieties regarding the expenditure that these schools might have to incur while complying with 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.

[86] In this light, Justice Kirpal's observation in *T.M.A. Pai* is instructive. He says: 'Although the right to administer includes within it a right to grant admission to students of their choice under Article 30(1), when such a minority institution is granted the facility of receiving grant-in-aid, Article 29(2) would apply, and necessarily, therefore, one of the right of administration of the minorities would be eroded to some extent.'

C. Towards a Balance between Article 30(1) and the Right to Education

Elementary education in India has always been accorded a high priority in policy documents on education as can be seen from the Report of the Education Commission (1966) and the National Policy on Education, of both 1968 and 1986. The 1986 Policy stated that the nation as a whole should assume responsibility for providing resource support for implementing programmes of educational transformation, reducing disparities and achieving universalisation of elementary education.[87]

Moreover, it must be remembered that India is also a signatory to the International Covenant on Economic, Social and Cultural Rights (ICESCR) whereby state parties are obligated to prioritise the introduction of compulsory, free primary education.[88] The Committee on Economic, Social and Cultural Rights in General Comment 13 mandates that basic education should be both available and accessible to everyone without discrimination.[89] Providing free and compulsory elementary education to all is an important dimension of this commitment. Basic forms of education are a part of a state party's minimum core obligations under the Covenant.[90] The minimum core in light of the right to education commitments of ICESCR includes the following,

> 'an obligation to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in Article 13(1); to provide primary education for all in accordance with Article 13(2)(a); to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to conformity with "minimum educational standards" (Articles 13(3) and (4)).'[91]

Section 12(1)(c) of the RTE Act is a legislative embodiment of India's commitment towards making education freely accessible to all and consequently a part of the minimum core. It is further stated that if a significant number of individuals are deprived of essential [economic, social or cultural] entitlements, the state has failed to discharge its obligations under the Covenant.[92] While the

[87] National Policy on Education, 1986 (revised in 1992).

[88]ICESCR General Comment No. 13 - The Right to Education (Article 13 of the Covenant), E/C.12/1999/10, ¶ 51.

[89] Availability, Accessibility, Acceptability, Adaptability are the four essential requirements of primary education as outlined by the Special Rapporteur on the Right to Education in her preliminary report to the Commission on Human Rights, E/CN.4/1999/49.

[90] ICESCR General Comment No. 3 - The Nature of States Parties' Obligations (Article 2(1) of the Covenant), (1 January 1991), ¶ 10.

[91] ICESCR General Comment No. 13 - The Right to Education (Article 13 of the Covenant), E/C.12/1999/10, ¶ 57.

[92] See n 91.

'minimum core obligation' can be customised according to the development levels of a given nation, there would still exist a core set of obligations that nations party to the Covenant must fulfil.

The RTE Act was enacted to give effect to India's long-standing constitutional commitment to provide free and compulsory (elementary) education to all children. This, arguably, could also form the 'minimum core' of the right to education under ICESCR. In the Statement of Objects and Reasons appended to the Bill,[93] 'the crucial role of universal elementary education for strengthening the social fabric of democracy through provision of equal opportunities' is acknowledged.[94] The Statement further states that providing 'free and compulsory education of satisfactory quality to children from disadvantaged and weaker sections is, therefore, not merely the responsibility of schools run or supported by the appropriate Governments, but also of schools which are not dependent on Government funds.'

The MHRD issued a subsequent clarification for Section 12(1)(c),[95] where among other things, it stated: 'Admission of 25% children from disadvantaged groups and weaker sections in the neighbourhood is not merely to provide avenues of quality education to poor and disadvantaged children. The larger objective is to provide a common place where children sit, eat and live together for at least eight years of their lives across caste, class and gender divides in order that it narrows down such divisions in our society.'

It can thus be established that elementary education is uniquely situated in the Indian education policy framework and the same cannot be equated with tertiary education. It is an area of high priority, both internationally and nationally. The question of reservations in minority schools must be answered keeping the aforementioned commitments in mind. It was recognised as early as 1959 by the Supreme Court 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.[96] The qualification was that the state is not required to discharge this duty at the expense of the minority community, 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 principle, this reconciliation is possible by making the entire RTE Act, including the 25% quota for economically weaker sections and disadvantaged groups, applicable

[93]The Right of Children to Free and Compulsory Education Bill, 2008, Statement of Objects and Reasons.

[94] Ibid.

[95] Ministry of Human Resources and Development, RTE Act 2009 - Clarification of Provisions, <http://mhrd.gov.in/sites/upload_files/mhrd/files/upload_document/RTE_Section_wise_rationale_rev_0.pdf> accessed 31 December 2015.

[96] *In Re Kerala Education Bill*.

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 a nebulous and opaque system of minority school recognition that is not only illegitimate *per se* but derails the promise of the RTE Act too.

IV. ADMINISTRATIVE FRAMEWORK: HOW DOES A SCHOOL GET MINORITY STATUS?

To bring some realism to the discussion, it is important to examine the administrative machinery which has emerged over the years in order to enable minorities to realise their right under Article 30. This contains authority structures, at both the Central and State levels that evaluate and recognise the minority status of educational institutions, including schools, in addition to safeguarding other rights of minorities.

This part closely examines the institutions and authorities involved in granting certificates of minority status to schools and the functional criteria evolved to determine such status. The object of this exercise is to understand how the legal principles underpinning Article 30 have been translated into executive provisions and then assess, whether, and to what extent these provisions further the purpose of Article 30.

A. Central and State Authorities

The National Commission for Minority Educational Institutions (hereafter 'NCMEI') is the highest statutory body[97] which presides over all matters and disputes relating to the minority status of educational institutions in India. It is envisioned as a custodian of the educational rights of minorities provided by the Constitution.

The original mandate of the NCMEI was simply to protect the rights of minority educational institutions to seek affiliation to universities, look into any related disputes, and examine specific complaints regarding violations of Article 30.[98] In the following years, its powers were expanded through two amendments to the NCMEI Act. In 2006, the Commission was granted the power to protect the right of minorities to establish their educational institutions by applying to a competent authority for a no-objection certificate (hereafter 'NOC').[99] Additionally, the list of its functions was extended to include reviewing safeguards for educational rights of minorities and deciding all questions relating to the minority status of an institution. In 2010, universities were also brought under the authority of the Commission; the number of members on the Commission was increased to

[97] It was established under National Commission for Minority Educational Institutions Act, 2004 (hereafter 'NCMEI Act') section 3.

[98] NCMEI Act, Statement of Objects and Reasons.

[99] NCMEI Act, section 10.

three and the requirement to consult State Governments for deciding cases of affiliation was discarded.[100]

The NCMEI functions as a quasi-judicial body which can adjudicate on all disputes relating to recognition, affiliation and minority status of educational institutions established by minorities. It is the appellate authority for certain grievances specified in the NCMEI Act. The two which are relevant for minority schools pertain to (i) grant of NOCs[101] to establish an institution, and (ii) grant of minority status.[102] The schools may file an application with the NCMEI for the grant of minority status, with an affidavit and other details pertaining to the school and the trust or other entity which established it.[103] According to a recent report, CBSE and ICSE schools may apply directly to NCMEI for minority status, instead of first applying to the competent authority in the State.[104]

The NCMEI is also empowered to cancel the minority status granted to an institution by any other authority.[105] The application for cancellation can only be moved upon the proof of certain conditions such as if the aims and objects of the institution no longer reflect its minority character or if the institution fails to admit the prescribed percentage of students from the minority community. Moreover, the NCMEI is empowered to investigate matters of violation of educational rights and call for information on such matters from the Central or State Government.

Importantly, none of the aforementioned functions pertain to linguistic minorities and the educational institutions established by them. The NCMEI Act defines 'minority' as 'a community notified as such by the Central Government' which further points to only the religious minorities notified by the National Commission for Minorities (hereafter 'NCM').[106] The NCMEI, therefore, does not deal with educational institutions run by linguistic minorities. In its annual report for 2010-11, the NCMEI had recommended that it should have jurisdiction to protect linguistic minority institutions

[100] The National Commission for Minority Educational Institutions (Amendment Act), 2010.

[101] NCMEI Act, section 12A.

[102] NCMEI Act, section 12B.

[103] NCMEI: Application for Minority Status <http://ncmei.gov.in/writereaddata/Filelinks/66f3bd87_doc.pdf> accessed 26 November 2015.

[104] S Gaffar and J Padalath, *Role of NCMEI in Strengthening the Minority Educational Profile in India*, (All India Confederation for Women's Empowerment through Education, 2014).

[105] NCMEI Act, section 12C.

[106] National Commission for Minorities Act, 1992, section 2(c).

as well.[107] A similar demand had been made to the Central Government by a parliamentary panel.[108] However, this demand has not been met so far.

The National Commissioner for Linguistic Minorities (henceforth NCLM) is the apex authority which safeguards the rights of linguistic minorities. It was constituted in accordance with Article 350B of the Constitution.[109] The NCLM has laid down guidelines for the identification of linguistic minorities. As per the information in the FAQ section of the NCLM website,[110] every State has 'a language which is the mother tongue of the majority of the residents of that state. All others who do not have that language as their mother tongue belong to the linguistic minorities.' It is further noted by the NCLM that a minority language need not be recognised as such. Any language not spoken by the majority of residents in a State is by default a minority language and its speakers are entitled to the rights provided to linguistic minorities.[111]

Importantly, the NCLM does not have statutory powers and can only make recommendations to the government based on its findings on the status of protection of linguistic minority rights. The NCLM can neither grant Minority Status Certificates (hereafter 'MSCs') to schools nor can it regulate the grant of such certificates by State-level authorities. It can simply review whether States have appointed a competent authority to grant linguistic minority status, and the number of institutions which have been certified as linguistic minority educational institutions.

The mismatch in the protection granted to religious and linguistic minorities seems puzzling. When it comes to Article 30, we notice that courts rightly observe that the Constitution keeps both linguistic and religious minorities on the same pedestal. Yet when we look at the authority structures in place to ensure the fulfilment of this right, linguistic minorities do not appear to have comparable protection.

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[107] NCMEI, Annual Report 2011-12, <http://ncmei.gov.in/writereaddata/filelinks/ff10a3f8_Annual%20Report%202011-12%20Eng.pdf> accessed 28 December 2015.

[108] Ifthikar Gilani, 'Panel wants to protect linguistic minority schools' *DNA India* (13 May 2012) <http://www.dnaindia.com/india/report-panel-wants-to-protect-linguistic-minority-schools-1688054.> accessed 28 December 2015.

[109] Constitution of India, Article 350B - Special Officer for Linguistic Minorities - (1) There shall be a Special Officer for linguistic minorities to be appointed by the President,

(2) It shall be the duty of the Special Officer to investigate all matters relating to the safeguards provided for linguistic minorities under this Constitution and report to the President upon those matters at such intervals as the President may direct, and the President shall cause all such reports to be laid before each House of Parliament, and sent to the Governments of the States concerned.

[110] National Commissioner for Linguistic Minorities, Frequently Asked Questions <http://nclm.nic.in/faqdetail.asp?langid=2&faqid=65 > accessed 28 December 2015.

[111] Ibid.

State Governments are required to notify a competent authority to grant NOCs for the establishment of minority educational institutions[112] and to grant minority status to educational institutions[113] according to the NCMEI Act. At the State level, different public officials have been notified as the competent authorities for granting minority status, ostensibly to both religious and linguistic minorities. For example, in Chandigarh it is the Director of Public Instruction, in Rajasthan, the Secretary of the Minorities Development Department, and in Gujarat, the Commissioner of the School Education Department.[114]

However, both NCMEI[115] and NCLM[116] have reported the fact that many States do not have appropriate mechanisms for granting MSCs. This remains an impediment, particularly for linguistic minority schools which cannot even apply to the NCMEI.

In 2010, it was clarified by the former Chairperson of the NCMEI Justice M.S.A. Siddiqui, that State Minority Commissions did not have the power to declare the minority status of an institution and that such power was only vested in the Central Government, State Governments and NCMEI.[117] It is unclear if this was in reference to only religious minorities or linguistic minorities as well. Moreover, there is still a need to clarify the role of the NCM regarding the grant of minority status. According to the NCLM report, the competent authority in Uttar Pradesh is actually the NCM.[118] Furthering the confusion, in a recent case, the Karnataka High Court called upon the NCM to decide on the linguistic minority status of certain institutions.[119]

There is a need for every State to clearly identify the competent authority to recognise minority educational institutions and grant them MSCs, for both religious and linguistic minorities. This would enable minorities to realise their right under Article 30 in a coherent and efficient manner. Moreover,

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[112] NCMEI Act, section 2(ca).

[113] NCMEI Act, section 12B(1).

[114] Government of India, Ministry of Minority Affairs: 50th Report of the Commissioner for Linguistic Minorities in India (June 2012 – June 2013) 5, 23, 119 (hereafter '*Report of the Commissioner for Linguistic Minorities in India*')

[115] NCMEI, Annual Report 2011-12 <http://ncmei.gov.in/writereaddata/filelinks/ff10a3f8_Annual%20Report%202011-12%20Eng.pdf> accessed 26 November 2015 135.

[116] *Report of the Commissioner for Linguistic Minorities in India* (n 114), 174

[117] Staff Reporter, 'Rights for minority institutions of Tamil Nadu' *The Hindu* (18 July 2010) <http://www.thehindu.com/news/cities/chennai/rights-for-minority-institutions-of-tamil-nadu/article522130.ece.> accessed 28 December 2015.

[118] *Report of the Commissioner for Linguistic Minorities in India* (n 114), 46.

[119] Shyam Prasad S, 'Linguistic Minority School: Who Will Decide?' *Bangalore Mirror* (8 February 2014) <http://www.bangaloremirror.com/bangalore/others/Linguistic-minority-school-Who-will-decide/articleshow/30009410.cms.> accessed 31 December 2015.

the role of existing authorities at the Central and State level should be clearly delineated and publicised.

B. Criteria for Determining Minority Status

The NCMEI has published a set of guidelines for the determination of minority status of educational institutions, recognition, affiliation and other related matters.[120] These are essentially a discussion of the case law on the subject, through which the following three criteria for determining minority status have been distilled.[121]

'On a reading of Article 30(1) of the Constitution read with several authoritative pronouncements of the Supreme Court and the definitions of Minority Educational Institution in Section 2(g)[122] of the Act and Section 2(f)[123] of the Central Educational Institutions (Reservation in Admission) Act, 2006, the following facts should be proved for grant of minority status to an educational institution on religious basis:

1. that the educational institution was established by a member/members of the religious minority community;
2. that the educational institution was established for the benefit of the minority community; and
3. that the educational institution is being administered by the minority community.'

It is stated that there should be some 'positive index to enable the educational institution to be identified with religious minorities'. It is then stipulated that the three aforementioned facts should be borne out by evidence of the following nature. First, the majority of members on the trust or society running the institution must belong to the minority community. Second, the trust deed or other relevant document of the institution must reflect the objective of serving the interest of the

[120] NCMEI Guidelines <http://ncmei.gov.in/writereaddata/filelinks/c296efcb_Guidelines.pdf.> accessed 26 November 2015.

[121] It should be remembered that these criteria only pertain to religious minority status.

[122] NCMEI Act, section 2(g) - "Minority Educational Institution" means a college or an educational institution established and administered by a minority or minorities.

[123] Central Educational Institutions (Reservations in Admission) Act, section 2(f): "Minority Educational Institution" means an institution established and administered by the minorities under clause (1) of article 30 of the Constitution and so declared by an Act of Parliament or by the Central Government or declared as a Minority Educational Institution under the National Commission for Minority Educational Institutions Act, 2004.

minority community. Once these two facts are established, an institution would be eligible for grant of religious minority status.[124]

It remains unclear whether a minority educational institution is required to admit a minimum percentage of students from the concerned minority community. According to the NCMEI guidelines, 'the State Government can prescribe percentage of the minority community to be admitted in a minority educational institution taking into account the population and educational needs of the area in which the institution is located. There cannot be a common rule or regulation or order in respect of types of educational institutions from primary to college level and for the entire State fixing the uniform ceiling in the matter of admission of students in minority educational institutions'.

The guidelines have interpreted Section 12C(b) of the NCMEI Act[125] as enabling the State Governments to prescribe a percentage governing admissions. Further the guidelines state that this may be done in accordance with the principles of law enunciated in *T.M.A. Pai*[126] and *P.A. Inamdar*.[127] The conclusive principle which may be derived from both these judgments is that a minority educational institution should *primarily* cater to students from the minority community; however, a 'sprinkling' of non-minority students will not affect its minority character. Moreover, any reasonable percentage governing the admissions of minority students may vary depending on the type of institution and the nature of education being provided.

[124] NCMEI Guidelines, 10.

[125] NCMEI Act, section 12C - Power to cancel - (b) if, on verification of the records during the inspection or investigation, it is found that the Minority Educational Institution has failed to admit students belonging to the minority community in the institution as per rules and prescribed percentage governing admissions during any academic year.

[126] In *T.M.A. Pai*, ¶ 144 the following was argued with respect to the percentage criteria, 'The situation would vary according to the type of institution and the nature of education that is being imparted in the institution. Usually, at the school level, although it may be possible to fill up all the seats with students of the minority group, at the higher level, either in colleges or in technical institutions, it may not be possible to fill up all the seats with the students of the minority group. However, even if it is possible to fill up all the seats with students of the minority group, the moment the institution is granted aid, the institution will have to admit students of the non-minority group to a reasonable extent, whereby the character of the institution is not annihilated, and at the same time, the rights of the citizen engrafted under Article 29(2) are not subverted.'

[127] In *P.A. Inamdar*, ¶ 102 the following observation was made, 'It necessarily follows from the law laid down in Pai Foundation that to establish a minority institution the institution must primarily cater to the requirements of that minority of that State else its character of minority institution is lost. However, to borrow the words of Chief Justice S.R. Das (in Kerala Education Bill) a 'sprinkling' of that minority from other State on the same footing as a sprinkling of non-minority students, would be permissible and would not deprive the institution of its essential character of being a minority institution determined by reference to that State as a unit.'

It may be noted that in 2010, the NCMEI had proposed that 30% of students in minority schools should belong to the minority community.[128] This criterion was opposed by many schools, notably by associations of Christian minority schools.[129]

In the same year, a primary school in Odisha which had not been granted minority status by the State Government lodged a case before the NCMEI.[130] In the order issued subsequently, the three points of criteria specified in the NCMEI guidelines were tested and all three were found to hold true for the concerned school. It was noted that the percentage of minority students in the school was around 31%. It was then argued that it was unconstitutional to have a 'percentage criteria', and impractical as well. It was pointed out that the number of Christians in the Cuttack district of Orissa is less than 1% of the total population. It was held that the school was, in fact, eligible for the grant of religious minority status, as it fulfilled the three criteria points and as it had not *denied* admission to any minority student. It was also held that any such rigid percentage criteria would amount to 'an abject surrender' of the right under Article 30. Thus, at present, there is no percentage criteria prescribed by the NCMEI. Nonetheless, State Governments have the authority to fix the same if they require to. It can be noted that the Karnataka government had fixed a criteria of 75% minority students in minority schools which was later revised to 25%.[131] Even when it was 25%, it proved to be difficult for most schools to retain their status as minority institutions in the State since the proportion of students belonging to the minority community itself fell short of the given percentage. Maharashtra has also seen some confusion over this matter recently. 10 prominent schools of Mumbai were issued notices for not complying with the obligation to reserve at least 51% of their seats for students from minority schools.[132] The Maharashtra guidelines for minority status, however, only lay down this criterion for

[128] Charu Sudan Kasturi, 'Minority ache for schools - 30% rule to hit Christian institutes' *The Telegraph* (6 March 2010) <http://www.telegraphindia.com/1100307/jsp/frontpage/story_12187115.jsp.> accessed 31 December 2015.

[129] Special Correspondent, 'Cry to scrap 30% norm' *The Telegraph* (24 March 2010) http://www.telegraphindia.com/1100325/jsp/bengal/story_12259827.jsp.> accessed 31 December 2015.

[130] *Buckley Primary School v The Principal Secretary to Government of Odisha*, Case No. 1320 of 2009 <http://ncmei.gov.in/writereaddata/filelinks/8f182880_Buckley%20Primary%20School.pdf> accessed 31 December 2015.

[131] Express News Service, 'Only Seven Schools in State Now Have Minority Status' *The New Indian Express* (13 September 2014) <http://www.newindianexpress.com/cities/bengaluru/Only-Seven-Schools-in-State-Now-Have-Minority-Status/2014/09/13/article2428608.ece.> accessed 31 December 2015.

[132] Sudhir Suryawanshi, 'Ten elite SoBo schools may lose minority status' *DNA India* (12 June 2015) <http://www.dnaindia.com/mumbai/report-ten-elite-sobo-schools-may-lose-minority-status-2094807.> accessed 31 December 2015.

institutions of higher education.[133] It is unclear whether minority schools in Maharashtra are in fact required to follow this criterion for admissions.

A rigid percentage criterion for minority schools appears to be unworkable for two reasons. *First*, it would be difficult to arrive at any uniform reasonable percentage, given the differences in the population of different minorities in different regions of a State. *Secondly*, even if a percentage is set, schools may find it difficult to admit the requisite number of students from the minority community on a continuous basis.

There are a few other points in the NCMEI guidelines which are of relevance. First, it is stated that a minority educational institution must be both established and administered by a person or persons from a minority community. It is further clarified that the proof of the fact of establishment is a condition precedent to claiming the right to administer.[134] Second, it is clarified that minority status need not be renewed unless there is a fundamental change of circumstances in accordance with the ruling in *T.K.V.T.S.S. Medical Educational & Charitable Trust v State of Tamil Nadu*.[135]

Different States have notified similar guidelines for recognising minority educational institutions or determining minority status, with a few minor points of difference. It should be noted that while the NCMEI guidelines pertain only to religious minorities, the State guidelines also apply to linguistic minorities.

[133] Government of Maharashtra, Minorities Development Department, Government Resolution No ASS – 2008/CR /2008/Desk1 Mantralaya, Mumbai 400032, 'Recognition of Minority status to Minority Educational Institutions in the state of Maharashtra – Procedure, Terms and Conditions of Recognition' <http://k12schoolsindia.in/admin/upload/english/3447905051364476248.pdf.> accessed 31 December 2015.

[134] NCMEI Guidelines, 3.

[135] *T.K.V.T.S.S. Medical Educational & Charitable Trust v State of Tamil Nadu,* AIR 2002 Madras 42.

Maharashtra,[136] Rajasthan,[137] West Bengal,[138] Andhra Pradesh[139] and Haryana[140] have notified guidelines at different points of time regarding the criteria and procedure for obtaining minority status. An examination of these is warranted to understand how Article 30 is being realised by minority groups in practice.

The following table summarises some of the important points notified in these guidelines by the six States pertaining to grant of minority status:

	Haryana	Maharashtra	Rajasthan	West Bengal	Andhra Pradesh
Definition of Minority	Communities notified by government of Haryana	All religious minorities notified by GoI and Government of MH will be eligible	All religious minorities notified by GoI and Government of RJ; all those whose mother tongue is a	As defined under the West Bengal Minorities Commission Act, 1996[141]	No definition; definition of religious MEI to be subject to SC decision in T.M.A. Pai

[136] Government of Maharashtra, Minorities Development Department: Government Resolution No ASS – 2008/CR /2008/Desk1: Recognition of Minority status to Minority Educational Institutions in the state of Maharashtra – Procedure, Terms and Conditions of Recognition, <http://k12schoolsindia.in/admin/upload/english/3447905051364476248.pdf> accessed 31 December 2015.

[137] Government of Rajasthan, Minorities Affairs Department, Government Resolution No ASS – 2008/CR /2008/Desk-1, Sachivalaya, Jaipur Date: 24 January 2011: Recognition of Minority status to Minority Educational Institutions In the State of Rajasthan – Procedure, Terms and Conditions of Recognition.

[138] Minority Affairs and Madrasah Education Department, Government of West Bengal: Guidelines for Recognition of Educational Institution as Minority Institution in West Bengal (Issued Vide GO No. 942-MD dated – 30. 6.2008) <https://mcmscholarship.wb.gov.in/portal/documents/10180/0/E23-Recog_Edu1_Ins.pdf/73ce7c7c-6750-4edc-9421-dc985a65d402;jsessionid=LXlgDCV3nOaLPWf2I2p5-Wz2?version=1.0> accessed 04 January 2016.

[139] Minorities Welfare Department - Certain Guidelines for issuing Minority Status Certificate for making admissions and appointments etc., in Minority Educational Institutions, 16 January 2004, <http://www.aponline.gov.in/Quick%20Links/Departments/Minorities%20Welfare/Govt-Gos-Acts/2004/GO.Ms.1.2004.html> accessed 31 December 2015.

[140] Guidelines for grant of No Objection Certificate (NOC) for Minority Status to the Schools to be set up by Minority Educational Institutions in Haryana: Memo No. 35/9-20.12 PS (2), 2015, <http://schooleducationharyana.gov.in/downloads_pdf/Circullers/NoticePS_14082015.PDF> accessed 20 December 2015.

[141] West Bengal Minorities Commission Act, 1996, section 2(c) – 'Minority', for the purpose of this Act, means a community based on religion such as Muslim, Christian, Sikh, Buddhist, or Zoroastrian (Parsee), and includes-

(i) such other minority as the Central Government may notify under clause (c) of section 2 of the National Commission for Minorities Act, 1992, or

(ii) such other minority based on language within the purview of article 29 of the Constitution of India (hereinafter referred to as the Constitution) as the State Government may, by notification, specify from time to time.

			language other than Hindi		
Competent Authority	Principal Secretary, School Education Department	Principal Secretary/ Secretary, Minorities Development Department	Principal Secretary/Secretary, Minorities Development Department	Principal Secretary/ Secretary to Government, Minority Affairs and Madrasah Education Department or an officer duly authorized by him	Principal Secretary/ Secretary to Government, Minorities Welfare Department
Proportion of Members in the Trust/ Society	Minimum of two-third from minority community	Minimum of two-third from minority community	Minimum of two-third from minority community	100% of members from minority community	100% from minority community
Minimum Percentage of Minority Students	50% students	51% specified for higher, technical and professional institutions (and 50% for similar aided institutions) No percentage specified for schools	None	As many seats as possible to be filled by available eligible minority students	70% of seats t in higher educational institutions
Provision for Renewal	None	None	None	Mention of renewal of minority status after every 3 years	Mention of renewal of minority status after every 3 years

A careful examination of these guidelines raises the following points for consideration:

1. With the exception of Rajasthan, none of the States have included linguistic minorities in the definition of 'minority' or given any indication as to which groups would constitute a linguistic

minority. However, all the guidelines include a requirement for the applicant(s) to specify whether they are applying for religious or linguistic minority status.

2. While the NCMEI guidelines clearly state that a trust or society running the institution ought to have majority of members from the minority community, the States have indicated different minimum percentages, including 100% in West Bengal.

3. States have also indicated different percentages for the minimum number of minority students required to be admitted in a minority institution. It needs to be elucidated clearly whether such a percentage is applicable only to institutions of higher education or if it applies to schools as well. As was highlighted through the discussion on the Maharashtra case in the previous section, this remains an area of confusion. Secondly, State Governments must contemplate on whether this kind of criteria for schools is meaningful or even practical.

4. Both, the Andhra Pradesh and West Bengal guidelines categorically state that minority status will be granted to the institution and not the trust or society running it. In contrast, the Maharashtra and Rajasthan guidelines mention that recognition of minority status will be accorded to the trust and will by default be conferred upon any educational units being run by it. It needs to be examined further which method is more appropriate.

5. The criteria for granting minority status appear to be the same for both religious and linguistic minorities. However, in the Maharashtra guidelines, there is a reference to the medium of instruction to be in the recognised minority language in unaided and aided linguistic minority educational institutions. It is unclear if this is a part of the eligibility for minority status.

Upon examination of the administrative machinery, there appears to be some misalignment between the legal principles established through various judgments on Article 30 and the executive provisions being used by NCMEI and the States to grant minority status. To begin with, in one judgment,[142] the Supreme Court emphasised the need to establish a real positive index for determining the minority status of an educational institution.[143] This ruling has also been cited in the NCMEI guidelines. In the guidelines, it is further argued that educational institutions protected under Article 30 are duty-

[142] *A.P. Christians Medical Educational Society v Government of Andhra Pradesh*, (1986) 2 SCC 667.

[143] Ibid, ¶ 8; it is argued that institutions established under Article 30, 'must be educational institutions of the minorities in truth and reality and not mere masked phantoms. They may be institutions intended to give the children of the minorities the best general and professional education, to make them complete men and women of the country and to enable them to go out into the world fully prepared and equipped. They may be institutions where special provision is made to the advantage and for the advancement of the minority children. They may be institutions where the parents of the children of the minority community may expect that education in accordance with the basic tenets of their religion would be imparted by or under the guidance of teachers, learned and steeped in the faith. They may be institutions where the parents expect their children to grow in a pervasive atmosphere which is in harmony with their religion or conducive to the pursuit to it.'

bound to cater to the needs of children from the minority community. However, it is unclear if the present criteria for determining minority status actually constitute the 'real positive index' required by the Court. All that the current guidelines seek to verify is, whether the majority of the members on the trust that established the school belong to the minority community, and whether the trust deed of the institution provides that it has been established for the benefit of the minority community. It remains unclear how the competent authority would verify whether the institution is indeed being run for the benefit of the minority community. Technically, there could be a minority school that largely caters to student from other communities and does not provide any specific benefit to the minority community. It could still be eligible for minority status and enjoy the attendant privileges. This would defeat the purpose of Article 30 and the spirit behind the judgments of the apex court.

In addition to this, there is a challenge of the fixing a 'percentage criteria'. In the case of a primary school in Odisha discussed above, the NCMEI has observed that the prescription of any rigid minimum percentage for admission of students from the minority community would amount to a violation of their right under Article 30. It should be noted here that in the NCMEI application for minority status, there is a requirement for the applicant to furnish details on the percentage of students from the minority community admitted to the institution. It is not known to what extent this percentage factors into the decision of granting minority status. Moreover, State Governments still have the authority to set a minimum percentage. It is unclear how a State would go about setting a reasonable criterion in this matter. In the case of Karnataka, the percentage was lowered to 25% but potentially even this could be unconstitutional.

In this light, it needs to be examined if certain other parameters should also be considered while conferring minority status on these schools. These parameters may include, for example, recruitment of teachers from the minority community or use of contextual curriculum and practices which propagate that community's culture, language or script in a tangible way, in addition to the criteria points prescribed by the NCMEI. Perhaps, a criterion for granting linguistic minority status could also include a qualification relating to the medium of instruction or other measures designed to promote the language and script. There cannot be, as said before, a definite elucidation of such qualitative factors. However, if the state prescribes a specific medium of instruction and examination, it could be declared as unconstitutional, as seen in the *D.A.V. College Case*. Thus, for the enforcement of the positive component of Article 30, the state may need to provide certain broad standards that could become the guidelines for granting minority status to a community and its school.

Lastly, the prescription that minority status need not be renewed needs reconsideration. Given that the NCMEI and State authorities do have the power to cancel minority status in the eventuality of a fundamental change in circumstances, it must be questioned how such changes would be determined in the absence of a periodic review. Some of the State guidelines mention a requirement for a

minority institution to notify the competent authority as and when there is a change in the composition of its trust.[144] But this seems to be a rather narrow and procedural review whereas a more substantive review may be required.

It may be contended that the present criteria open up the possibility for schools to claim minority status even though they might not actually be doing anything reflective of their 'minority character' or for the 'welfare' of the minority community. Granting autonomy delinked from these conditions would tend to frustrate the purpose behind Article 30. It is plausible, in these cases, that Article 30 would be reduced to a mere strategic instrument to circumvent the requirements of Article 21A, an outcome which must be resisted in both principle and practice.

V. CONSEQUENCES OF THE MINORITY EXEMPTION

The exemption from RTE Act and the opacity surrounding rules pertaining to grant of minority status for educational institutions seems to have spurred an increase in the number of schools applying to get such status. However, this claim is hard to substantiate fully as there is no reliable database of minority schools in the country. It may be noted that the District Information System for Education (DISE) survey for 2014-15 includes a question on whether or not the school is a religious minority.[145] Once the results of this survey are released, that may provide some clarity on the matter.

NCMEI has released some data on the number of MSCs it has issued.[146] From 21 MSCs in 2005, to 1966 in 2012 alone, the number for 2015, as of 31st July is 696. If 2010, the year when the RTE Act was enacted, is taken as the point of departure, the average number of MSCs granted before 2010 was 507 while the average since 2010 has risen to 1585.8 (not counting 2015 since data for that year is incomplete). It is hard to ascertain any clear trend in the years before and after 2012 – the year minority schools were first exempted from the RTE Act and when the RTE Act was amended to make its provisions subject to Article 30.

Even the earlier comparison cannot be unequivocally attributed to the RTE Act, as there may have been other factors at play such as a general increase in the number of private schools established to

[144] Both Maharashtra and the Rajasthan guidelines have a provision to this effect. This again points to wide variance across states and require certain degree of uniformity. Even if this provision is insufficient, the other state could at least adopt this to begin with.

[145] U-DISE: Guidelines for Filling up Data Capture Format, 2014-15, <http://dise.in/Downloads/GuidelinesforfillingDCF2014-15.pdf> accessed 31 December 2015.

[146] State-wise and Year-wise Details on Minority Status Certificates Issued, <http://ncmei.gov.in/writereaddata/Filelinks/b90222ba_Year-wise%20&%20State-wise%20statistics%20of%20MSC%20issued%20as%20on%2031%20July%202015.pdf> accessed 31 December 2015.

meet the increasing demand or simply an increase in awareness about the protection granted to minorities. It must also be kept in mind that the figures offered by NCMEI include both schools and institutions of higher education. Importantly, they do not cover linguistic minorities.

There are some States for which data on minority schools is publicly available. The Maharashtra Minorities Development Department had published a list of 2432 minority institutions,[147] or more accurately speaking, trusts, which have presumably been recognised by the department as having minority status since 2007. The educational institutions run by these trusts may be much higher in number. An article published in an online news portal[148] claims that 2200 trusts in Maharashtra operate nearly 28,000 schools which is around 77% of the total number of private schools in the State.

The Department of Public Instruction in Karnataka also has some information about minority schools on its website. It has published a list of 1059 minority institutions so declared by the government.[149] However, this was before the order requiring schools to ensure that at least 25% of students belonging to the minority community are admitted to the schools.[150]

A perusal of news articles between 2012 and 2015 reveals some interesting trends. The number of minority schools in many cities does seem to have witnessed a rise, according to the news reports which have surfaced during this time. 17 out of 69 private recognised schools have minority status in Chandigarh,[151] 45 out of 63 in Bhopal[152] and 8 out of 14 in Raipur.[153] Moreover, in Kerala, there have been allegations that schools are changing their trust deeds and even the constitution of their

[147] <https://mdd.maharashtra.gov.in/Pdf/STATUS-FINAL-LIST-20-06-2013.pdf. > accessed 20 November 2015.

[148] Kanchan Srivastava, 'Minority status in flat 40 days!' *DNA India* (8 May 2014). <http://www.dnaindia.com/mumbai/report-minority-status-in-flat-40-days-1986149.> accessed 31 December 2015.

[149] District-wise List of Minority Institutions Declared by the Government <http://www.schooleducation.kar.nic.in/minoedn/MinPdfs/MinDeclarationDistwiseList.pdf.> accessed 31 December 2015.

[150] Express News Service, 'Only Seven Schools in State Now Have Minority Status' *The New Indian Express* (13 September 2014) <http://www.newindianexpress.com/cities/bengaluru/Only-Seven-Schools-in-State-Now-Have-Minority-Status/2014/09/13/article2428608.ece.> accessed 31 December 2015.

[151] Vivek Gupta, '25% of city's schools have minority status' *The Hindustan Times* (5 August 2014) <http://www.hindustantimes.com/chandigarh/25-of-city-s-schools-have-minority-status/story-6aGFLNkTZBH9ya2Drguz6I.html.> accessed 31 December 2015.

[152] TNN, 'Many private CBSE-affiliated schools shut doors on RTE seats' *The Times of India* (7 February 2013) <http://timesofindia.indiatimes.com/home/education/news/Many-private-CBSE-affiliated-schools-shut-doors-on-RTE-seats/articleshow/18376409.cms.> accessed 31 December 2015.

[153] TNN, 'Three-day admission fair at private schools' *The Times of India* (13 May 2014) <http://timesofindia.indiatimes.com/city/raipur/Three-day-admission-fair-at-private-schools/articleshow/35033127.cms. >accessed 31 December 2015.

managing committees to get minority status and escape the 25% clause.[154] An educationist has claimed that over 40% of the schools in Kerala are minority schools.[155]

If these numbers are any indication, a considerable number of private schools in India are minority schools, and therefore exempted from the RTE Act. This could have an adverse impact on the goals of universal elementary education and promoting social inclusion in schools. It will also undermine the role of non-state actors in realising the right to education which has been envisioned in the RTE Act if a clearer set of norms for granting minority status is not laid down. This lends further support to the principled proposition that minority schools should be brought within the fold of RTE Act if the goal of universal elementary education is to be met.

[154] Preetu Venugopalan Nair, 'Schools desperate for minority tag to avoid RTE' *The Times of India* (17 December 2012) <http://timesofindia.indiatimes.com/city/kochi/Schools-desperate-for-minority-tag-to-avoid-RTE/articleshow/17644467.cms.> accessed 31 December 2015.

[155] Ibid.

VI. CONCLUSIONS AND RECOMMENDATIONS

Cultural and educational rights are granted by the Constitution to religious and linguistic minorities to provide them with confidence and security that they can establish and administer educational institutions of their choice to protect their language, culture and script, or otherwise promote the welfare of their community by imparting quality education. Crucially, while population numbers provide us with an administratively convenient strategy to determine the minority status and could even have a significant bearing on the power relation in which the minority community stands vis-à-vis other communities, other factors of disadvantage, vulnerability and discrimination are also relevant to the conceptualisation of 'minority'. Thus, we argue that for a proper interpretation of Article 30, it should be divided into negative and positive components. The negative component is attracted when the government enacts an offending law which imposes, for example, a medium of instruction or syllabus or any other measure that fetters the administrative autonomy of these institutions. For this, the numerical method of determining a minority is adequate. The positive component, on the other hand, is needed when the state recognises a community as 'minority' and its school as a 'minority educational institution'. This component combines both quantitative and qualitative factors in interpreting a community's position in a power relationship, in a given context. At this stage, we cannot list out these mechanisms with any exactitude. Yet, one could reasonably suggest that a purposive inquiry is called for while granting certificates of minority status to different educational institutions. The promoters of such institutions could be asked to explain the 'minority character' of these institutions and elaborate how the institution would promote the 'welfare' of its community. This itself, we believe, could be helpful in achieving the much needed coherence in the realm of educational rights of minorities, since an ambiguous conceptualisation could easily lend itself to incongruous application. To restate, we are neither recommending any amendment to the Constitution nor any change in the unit for determination of minority.

Our central argument, however, is that the RTE Act which enforces the right to education, enshrined in Article 21A of the Constitution is consistent with the rights of religious and linguistic minorities thus understood. Most provisions of RTE Act are regulatory in nature, geared to provide an accessible and acceptable learning space for students. These provisions, we argue, neither annihilate the 'minority character' of these schools nor impede the welfare of the community. We further argue that even Section 12(1)(c) which reserves 25% seats for children from weaker sections and disadvantaged groups does not violate the mandate of Article 30. The case for this is much clearer with respect to aided minority schools. By virtue of claiming grants-in-aid from the government, these schools provide a greater ambit for state regulation. Besides, they are directly amenable to constitutional limitations enshrined in Articles 29(2) and 15(4). But even for unaided schools, we believe that the quota should not cause serious demographic changes and would not endanger their

'minority character'. A reconsideration of the judgment delivered by the Supreme Court in *Pramati*, therefore, is necessarily entailed.

Doing so is essential so that Article 30 does not become a mere strategic tool to bypass any state regulations which are deemed undesirable. The relative autonomy granted to educational institutions under Article 30 must be in tandem with the 'minority character' of the institution and its demonstrative commitment to the welfare of that community. In the post-Pramati scenario, minority status could become a vehicle for circumventing the mandate of the RTE Act. In this light, it is important to re-examine the criteria which are used for granting minority status to educational institutions. Such criteria must reflect the purpose of Article 30 and conform to the prevailing legal principles surrounding this right.

The present criteria only assess the composition of the trust running the educational institution and the trust deed or by-laws of the institution. There is no clear mechanism for verifying whether the institution is indeed being run for the welfare of the community. As discussed, the prescription of a fixed minimum percentage for the intake of students from the minority community might prove to be unviable and potentially unconstitutional. Therefore, we perhaps need alternative criteria which could reliably encapsulate the ideas of 'minority character' and 'welfare of the minority community'. Such criteria may comprise a broad set of qualitative indicators, such as recruitment of teachers and admission of students from the minority community, scholarships and other benefits provided to the students of the community, use of contextual curriculum and medium of instruction, and so forth. We acknowledge that an exact identification of such indicators cannot be made without a deeper inquiry and wide-ranging consultations involving various stakeholders, both of which are beyond the scope of this paper. However, we posit that the current mechanism needs to be reviewed in order to make it consistent with the purposive interpretation of Article 30.

Lastly, we contend that there should be a proper administrative apparatus to facilitate the realisation of rights under Article 30. This would involve, first of all, providing equal protection to religious and linguistic minorities. At present, the NCMEI is empowered to protect the rights of only religious minorities. While some States have notified competent authorities to grant linguistic minority status to educational institutions, there is no separate authority which can effectively protect the rights of such institutions in the event of any violation and regulate the criteria and process of granting linguistic minority status. In this situation, different options may be explored. One option could be to amend the powers of the NCLM so that it may effectively serve as a constitutional body for the protection of rights of linguistic minorities, including the right to establish and administer educational institutions. This may even entail a constitutional amendment as, currently, the NCLM is only empowered to investigate safeguards for linguistic minorities and report its findings to the government. Another option could be to amend and expand the powers of the NCMEI, thereby allowing the NCMEI to protect both linguistic and religious minorities, without disturbing the current

role of NCLM. The crucial consideration here is that given the equal status of religious and linguistic minorities under Article 30, the protection afforded to them by the state machinery should also be equally efficacious.

It is important that competent authorities for granting minority status should be notified and publicised in every State so that the process of recognition and certification of minority educational institutions is coherent and efficient. Moreover, there must be a synergy between the Central and the State level authorities to achieve consistency and clarity in the process of recognition and certification. In effect the Central authority, whether it is the NCMEI or NCLM, should specify broad procedural guidelines relating to the grant and review of minority status, which the States may customise as per their specifications.

These structural changes in the administrative apparatus would facilitate a meaningful realisation of the educational rights of the minorities. This would be a necessary step towards striking a harmonious balance between Article 30 and Article 21A such that one does not impede the other and both become mutually reinforcing.

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