

ARTICLE 21A ARTICLE VERSUS 30 (1): RIGHT TO EDUCATION VERSUS MINORITY RIGHTS

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Abstract

Education is a key to development of humanity. Indian Judicial system, in *Unni Krishnan* case, has endeavored to read right to education as part of right to life, and which was equally responded by Indian parliament, through Eighty Sixth Constitutional Amendment. Other important part of Indian Constitution is minority rights. Right to education became a part of Constitution of India in last 25 years only, but minority's right to establish educational institutions of their own choice was present in original constitution also. It is important to analyze whether there is any conflict between articles 21A and article 30 (1) of Constitution of India. Whether meaning, scope and nature of education under both these articles is same? Is it a conflict between the individual rights of a child and collective right of a religious or linguistic minority or a conflict between right to a basic education and right to a specialised education? This paper will attempt to focus on these points of conflict. This study is even more important when there are allegations that educational institutions of religious nature are breeding fundamentalism in young minds. Recently, Maharashtra government has also derecognised some madrassahs as educational institutions. But the biggest question which writer is trying to emphasize is; whether these rights can be harmoniously constructed, which could be beneficial for the child's right as well as society's right in general and minority's rights in specific?

I Introduction

EDUCATION IS a key to development of humanity. Future of any country depends on the nature of education system of the country. Though members of constituent assembly knew the importance of universal education but even then, due to paucity of resources they could not provide it as a fundamental right, but it was mentioned in Directive Principles of State Policy. In 1993, Indian Judicial system, in *Unni Krishnan v. State of Andhra Pradesh* case,¹ has endeavored to declare right to education as part of right to life. In 2002 Indian parliament also provided right to education to its budding citizens through a constitutional amendment,² and then right to education act was also passed.³ In total there were three different occasions when either judiciary or parliament had an opportunity to clearly explain the nature of this newly created fundamental right especially with reference to its possible clash with already existed fundamental

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¹ AIR 1993 SC 2178.

² The Constitution (Eighty-sixth Amendment) Act, 2002.

³ The Right of Children to Free and Compulsory Education Act, 2009.

right of minorities to establish and administer educational institutions of their choice.⁴ There were some very important questions to be answered. Whether, declaration of Supreme Court that right to education is part of article 21 and addition of this new right to education along with right to life has given this right any overriding status on other related rights? These opportunities were missed by both judiciary as well as legislature. Supreme Court has got several occasions to discuss the nature of rights provided by article 30 (1), such as in *Re Kerala Education Bill*,⁵ *Saint Xavier College v. State of Gujarat*,⁶ *Saint Stephen's College v. University of Delhi*,⁷ *T.M.A. Pai Foundation v. State of Karnataka*,⁸ *Islamic Academy of Education v. State of Karnataka*.⁹ But every time the issue was related only to the extent to which various government regulations may penetrate in to the right to 'administer' minority educational institutions; even in *Pramati Educational and Cultural Trust v. Union of India*,¹⁰ constitutional bench of apex court concentrated only on the question that whether aided or unaided minority education institutions are under obligation to provide "free" and compulsory education to "all", *i.e.*, free education to 25% children even from non-minority educational institutions. But other aspect of this right was not touched *i.e.*, right to 'establish' minority education institution. This matter has never got desirable attention, that what kind of educational institutions can be established by minorities. This paper is an attempt to discuss this aspect that whether minorities can establish any kind of educational institutions of 'their choice' or the substantive nature of the institutions can be regulated according to the public policy and constitutional goals.

II Points of conflict in 21A and 30 (1)

In essence article 21A and article 30 (1) are both related to right to education only, but there is a difference of approach in them. Former is the individual right of every child later is community right only of minorities. It is pertinent to analyse that where the two articles are complementary to each other and where these are competitive or contradictory, and to what extent. This analysis can be done under two basic headings *i.e.*, conflict of basic education versus

⁴ The Constitution of India, 1950, art. 30. (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

⁵ AIR 1958 SC 956.

⁶ AIR 1974 SC 1389.

⁷ AIR 1992 SC 1630.

⁸ AIR 1994 SC 2772.

⁹ AIR 2003 SC 697.

¹⁰ WRIT PETITION (C) No.136 OF 2014.

specialized education and nature and scope of the phrase 'educational institutions of their choice', as used in article 30 (1), Constitutional of India.

Basic education versus specialised education

Article 21A of Constitution of India is a positive right to have an elementary education provided to all children of India, irrespective of caste, class or creed or religion *etc.* Every child has a right which cannot be waved off, as doctrine of waiver does not apply on fundamental rights in general. But in case of Article 21A, target citizens are minor children between the age of 6 to 14 years, hence state has even more positive duty to enforce children's right to have education. Most important aspect of article 21A is the nature of education ensured in this is basic education of elementary level. It is not supposed to be any religious education or any kind of specialised education.

Whereas, education presumed to be imparted by educational institutions established under article 30(1) of the Constitution of India, includes any type of education which a minority community wants to impart. Reading in isolation there is no constitutional compulsion that institutions developed under article 30(1) should impart basic elementary education also. If some intuitions established by linguistic or religious minorities chose to impart only specialized education of only one language or only one religion, then practically such institutions have all the rights to do so. Though Supreme Court in many cases has explained that article 30 (1) does not mean that minorities will establish and administer institutions only for their religious education but also for the formal school education. Both the purposes should be served. In *Re Kerala Education Bill*¹¹ Supreme Court has provided as under:

What the article say and means is that the religious and the linguistic minorities should have the right to establish educational institutions of their choice. There is no limitation placed on the subjects to be taught in such educational institutions. As such minorities, will ordinarily desire that their children should be brought up properly and efficiently and be eligible for higher university education and go out in the world fully equipped with such intellectual attainments as will make them fit for entering the public services, educational institutions of their choice will

¹¹ AIR 1958 SC 956.

necessarily include institutions imparting general secular education also. In other words, the Article leaves it to their choice to establish such educational institutions as will serve both purposes, namely, the purpose of conserving their religion, language or culture, and also the purpose of giving a thorough, good general education to their children. The next thing to note is that the Article, in terms, gives all minorities, whether based on religion or language, two rights, namely, the right to establish and the right to administer educational institutions of their choice.

It is very clear that according to the constitution there is no express restrictions but its judicial interpretation has also not issued any binding order that minorities will have to open such institutions which could serve both the purposes. The apex court has presumed that ordinarily all minorities would themselves wish that their children should be given modern education along with religious education in order to make them honorable citizens. But these remarks were not in the spirit of authoritative guidelines. This is the reason that why these guidelines provided by Supreme Court have not been implemented at the ground level. Order of Maharashtra government to declare '*Madrassahs* not teaching normal subjects' as non-schools, itself is evidence that so far such *Madrassahs* were considered as educational institutions in the State of Maharashtra. Similar situation prevails in many other states such as Uttar Pradesh, Bihar and West Bengal also. Recognition of such educational institutions as schools by the state amounts to violation of fundamental right of children to get basic education, as desired by article 21A. Every child has a right to get basic education for at least 12 years so that a foundation of his personality and intellect is laid down. This right has been very beautifully explained by a Pakistani thinker Moiz Amjad in following words:¹²

...[W]hether a child wants to become a Doctor or an Engineer, a Scientist or a Lawyer, up till class twelve all the students study the same courses with the exception of a few specialized ones. It is because of this common ground that masters of these different faculties share common intellect, thinking process, language and

¹² Moiz Amjad, Schools of Religious Education, Renaissance Monthly Journal (Online Edition), Sep. 1997. Available at: <http://www.javedahmadghamidi.com/renaissance/view/schools-of-religious-education> (last visited on Jan. 23, 2017).

way of living. They can talk to each other and explain their thoughts easily. They can comprehend each other's problems and share happiness. They actually seem to be people of the same society.

..... masters in the field of religious education are also an important need of the society. ... But the method adopted for producing religious scholars is the one in which a student is admitted to a totally different system of education from the beginning. He lives in a different atmosphere, speaks a different language. In fact, he becomes totally different from the society in his style of living, appearance, dress code, ideals and emotions. It is because of this separation that the doctors, engineers, lawyers etc. can talk to each other freely but these religious scholars can neither convey their message nor understand what the society says. In their eyes the whole society is on the wrong track while in the sight of the society these scholars are incapable of understanding the realities of the world. In this way, these religious scholars cannot perform the important task of guiding people.¹³

According to Moiz, providing specialized religious education to tender aged children is not only a violation of their basic human rights, but also such treatment plants in their young minds a hatred towards the people of other religion.

Supreme Court has not touched this issue. This writer feels that such institutions which provide only religious education are neither good for the children studying there or for the society as a whole. Such institutions run by minority community as well as by non-minority, where exclusively religion is taught to tender aged children should not be allowed.

From above analysis, a situation of conflict is appearing that whether a minority community's right based on religious consciousness can curtail a child's individual, right? Whether state has a

¹³ *Ibid.*

justiciable positive duty that no child should go to such schools where only religious education is imparted.

There are many, sects of Islam in India which are running such *Madrassahs* where normal education is also imparted along with religious teachings and students from other communities are also enrolled. But some religious denominations of Islam in India believe that *Madrassahs* are not open for the students from other communities, because these institutions are supposed to be only for producing Islamic religious scholars. These institutions are also enjoying the status of minority-run education institutions and consequently are availing economic aid from the state. Such institutions are working clearly in violation of article 29 (2) of the constitution of India, which provides that any citizen of India cannot be denied admission in educational institutions run by the state or are receiving aid from the state funds. In *T.M.A. Pai v. State of Kerala*¹⁴ Supreme Court under a constitutional bench has also clarified the position in this regard as under:¹⁵

It would be anomalous to say that an educational institute set up to teach religion or to conserve a distinct language, script or culture does not have to comply with Article 29(2) but an educational institute set up to give general secular education has to comply with Article 29(2). It must again be remembered that Article 30 was not framed to create a special or privileged class of citizens. It was framed only for purposes of ensuring that the politically powerful majority did not prevent the minority from having their educational institute. We cannot give to Article 30(1) a meaning which would result in making the minorities, whether religious or linguistic, a special or privileged class of citizens. ¹⁶

It is clear from above mentioned judgement that if some minority run educational institution are not providing normal education along with the teachings of language and religion or are not open for the students from other communities then such institutions cannot be held as educational institutions *per se* in first case and cannot be held as minority run-educational institutions for the purpose of article 30 (1) in the second case.

¹⁴ AIR 1994 SC 2772.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

III Meaning and scope of term “their choice”

Next important aspect for consideration is that what is the nature of right granted under article 30 (1) of the Constitution of India. What is meaning and scope of the term “their choice” as used in this article. In common parlance, this term means that minorities are free to open any kind of educational institution, such as institutions for the study of humanities or the institutions for the study of various sciences. But whether this term ‘their choice’ has some relation with the type of religious instructions which are imparted to the students along with the general syllabus.

This question has become all the more important when there are allegations that some the *Madrassahs* are teaching religious fundamentalism to their students.¹⁷ It is well known that there are 73 sects of Islam in entire world, and all these together are found only in India.¹⁸ Most of the denominations of Islam in India are peace loving and are living in peace with their non-Muslim neighbors, such as *Bohra* and *Ahmadis etc.*, who are progressive and peace loving in nature. Educational Institutions run by such denominations are working very well and this study does not raise any question on their goodwill. But out of 73 sects there are some who believe in Wahhabism and Salafism.^{19,20} Wahhabis are those who believe in the ideology of Ibn-Abd-Al-Wahab. They believe that whole world including India should be Islamized through the sword. It is historical fact that Wahhabism has got its root in India in 18th century, when they launched a well-planned attack, on the western borders of India.²¹ Salafism also has similar thoughts. Though all the people of these two belief systems are not involved in any armed struggle directly against the non-Muslims, but whether these two religious ideologies are allowed to be taught in the educational institutions run by the minorities? Can state impose ban on teaching radical *Islam* in *Madrassahs*. Whether term ‘their Choice’ as mentioned in the constitution is an absolute right or it is also subject to the regulations. If some reasonable restrictions can be imposed on such tendencies then whether it can lead to a new requirement that minority run institutions should

¹⁷ Editorial, Odisha: Suspected terrorist Rahman's illegal madarsa shutdown, students sent back home, *India Today*, Dec. 19, 2015. Available at: intoday.in/story/suspected-terrorist-rahmans-illegal-madrassa-shutdown-students-sent-back-home/1/551508.html.

¹⁸ Available at: <http://www.dawn.com/news/1035023>.

¹⁹ Available at: <http://www.dailyo.in/politics/muslims-narendra-modi-islam-world-sufi-forum-wahhabi-shia-sunni-deoband-rss/story/1/9961.html>.

²⁰ Sunil Raman, The New Threat to Islam in India Hardline Wahabis and Salafis are attracting new converts, *The Diplomat*, Feb.4, 2016. Available at: <http://thediplomat.com/2016/02/the-new-threat-to-islam-in-india/>

²¹ Available at: <http://www.dailyo.in/politics/muslims-narendra-modi-islam-world-sufi-forum-wahhabi-shia-sunni-deoband-rss/story/1/9961.html> (last visited on Dec. 22, 2016).

formulate a proper syllabus of religious teachings, which are to be preached to young mind. And such syllabi should be approved by the government so that anything which is against the public policy and is against the values of Constitution of India cannot be taught the future citizens of the country.

According to the provisions of article 28 any unaided or partially aided non-minority educational institution can also impart religious instructions to their students. Unaided institutions run by Hindu community, such as *Saraswati Shishu Mandir* and *Saraswati Vidya Mandir* can also impart religious instruction to the students. But article 28 does not provide any expressed right that religious denominations related to Hindu majority can establish educational institution of 'their choice'. Hence such regulation of approving syllabus of religious teaching can be easily applied on unaided or partially aided educational institutions run by majority community, where religious instructions are also imparted along with normal basic education.

But in the presence of the term 'their own choice' it can be contended that minority run educational institutions are free to impart any kind of teachings whatsoever. But it is pertinent to quote an opinion of Supreme Court delivered in *T.M.A. Pai* case,²² though not delivered in same reference but it is relevant for the purpose of deciding that whether article 30 (1) carves out any privileged class or not?²³

We should give to Article 30(1) a meaning which would further the basic and overriding principles of our Constitution viz. equality and secularism. The interpretation must not be one which would create a further divide between citizen and citizen.

Earlier also Apex court has held in various cases that regulatory measure can be applied on minority educational institutions. There is no immunity to them from such regulations which apply on other non-minority institutions also. In *Saint Xavier College v. State of Gujrat*²⁴ also the court held as under:²⁵

²² AIR 1994 SC 2772.

²³ *Ibid.*

²⁴ AIR 1974 SC 1389.

²⁵ *Ibid.*

Freedom, which may be expressed in absolute terms in the Constitution, is not inconsistent with regulatory measures in an orderly society in the interest of the society. The regulatory measures must necessarily be uniformly applicable to all educational institutions and cannot be discriminatory.

Though Supreme Court discussed these regulatory measures with regard to those minority education institutions which are imparting general secular subjects. But this opinion of the court is helpful in understanding that as a principle apex court has already accepted that regulatory measure can be applied on minority run educational institutions. Only consideration is that such regulations are applicable on non-minority educational institutions also, and they should not be detrimental to the minority character of the institution.

In 2014 in *Pramati Educational and Cultural Trust v. Union of India*,²⁶ a constitutional bench case, Supreme Court held that 'Right to Education Act 2009, cannot force minority educational institutions to admit student from the other communities to enforce the state's aim of "free" and compulsory education to "all". But the court reiterated that regulatory measures can be applied by the state to all educational institutions including aided and unaided minority educational institutions. In *Pramati case*²⁷ Supreme Court held as thus:

...[this] Court has repeatedly held that the State has no power to interfere with the administration of minority institutions and can make only regulatory measures and has no power to force admission of students from amongst non-minority communities, particularly in minority schools, so as to affect the minority character of the institutions.

In above mentioned case Supreme Court had an opportunity to deliberate on the nature of regulatory measures provided in Right to Education Act, 2009. Many regulations provided therein the Act were related to the quality of education, but court blindly declared the whole Act *ultra vires* for the purpose of aided and unaided educational institutions, while upholding the validity of article 21 A of the Constitution of India, at the same time. But even in *Pramati case*²⁸ Apex court upheld its earlier judgments providing that aided or unaided minority education

²⁶ Writ petition (C) No.136 OF 2014.

²⁷ *Ibid.*

²⁸ *Ibid.*

institutions can be subjected to regulatory measure which are necessary to recognize an institution as 'educational institution'. It is very clear from above views of Supreme Court that right provided to religious minorities under article 30 (1) of the constitution of India is not absolute. This right is subject to the basic and overriding principles of our Constitution, such as equality and secularism. Hence, if such regulatory measures are introduced, in schools related to all religions, for quality check of religious instructions to be given to the children, then such measure are constitutionally valid. In such a way, individual rights of children and collective rights of minority community can be harmoniously construed, which could be beneficial for the country as a whole aslo.

IV Conclusion and suggestions

Minorities' right to establish and administer educational institution was provided in the original constitution of India. So far Supreme Court has, mainly addressed the issues related to 'administration' of minority educational institutions. Where state's right to regulate was accepted but only to that extent with which minority character of these institutions is not disturbed. In present times when many terrorist organizations are misinterpreting Islam and trying to misguide young minds. In Indian State of Odisha we have an example where a terrorist was running a *Madrasah*.²⁹ In such times, it is necessary that first part of right provided in article 30 (1) *i.e.*, right to 'establish educational institutions' should also be regulated. The author suggests following measures which can find solution for such problems.

Suggestions

- (i) Institutions, of all religions which are providing only religious education to children below 14 years should be strictly banned, as it is violation of children's right to have basic education as mentioned in article 21A.
- (ii) Only those Educational Institutions should be allowed whether related to minority or non-minority, which are teaching normal basic subjects also along with religious education.

²⁹ Editorial, Odisha: Suspected terrorist Rahman's illegal madarsa shutdown, students sent back home, *India Today*, Dec. 19, 2015. Available at: intoday.in/story/suspected-terrorist-rahmans-illegal-madrassa-shutdown-students-sent-back-home/1/551508.html.

(iii) In such institutions, religious content to be preached should be approved by a committee working under the control of government.

(iv) Such committee should have 7 scholarly members, having religious knowledge, from the concerned religion and 3 members from other religions also. So, that there may be a twofold qualitative check. First, the syllabus is checked by the profound religious scholars of the religion. Second, the scholars of other religions have also seen that content is within the norms of public policy and constitutional values. Such measures may be useful in advancing the goals of secularism and promoting understanding between the different religions.