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THE RIGHT OF CHILDREN TO FREE AND COMPULSORY EDUCATION ACT, 2009: A CRITICAL ANALYSIS

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Abstract

The Right of Children to Free and Compulsory Education Act, 2009 (hereinafter referred to as RTE Act), is a landmark law that ensures elementary and primary education in India. Article 21A of the Constitution of India and the RTE Act mandate free and compulsory education for children between 6 and 14 years old. This paper critically examines the Act's key provisions, focusing on its purpose, legal framework, and judicial interpretation. Special emphasis is placed to the role of School Management Committees (SMCs) constituted under Sec 21, the child-centered approach and the constitutional challenges faced by private unaided schools. Furthermore, the paper discusses the impact of the Supreme Court judgments on implementing the Act. The findings indicate that the Act has strengthened access to education, but challenges remain in its implementation, especially in ensuring inclusion and equitable distribution of resources. Finally, the paper concludes by advocating for strong policy measures to enhance the effectiveness of the RTE Act.

Keywords: right to education, Article 21A, constitutional & judicial interpretation, school management committee, constitutional challenges

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Introduction

The subject of "Education" has always been of continuous universal significance because it lays down the firm foundation of any politically organized civil society and its social order. Indeed, it is perhaps the most potent weapon which enables the State to fructify its public policies by moulding and even unifying the understanding and resolve of its people on some rational scientific basis. In India, the subject of right of children to free and compulsory education is of immense fundamental importance. Unarguably, it constitutes the very basis for the meaningful functioning of our democratic political system. In this respect, the reference was to the constitutional commandment contained in Article 21A, which was introduced into the Constitution by the 86th Amendment Act of 2002 with effect from April, 2010. It makes right to education as the fundamental right by proclaiming: "*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*".

Seemingly, this is a very simple provision to look at, but it has the unique potential to bring about a silent qualitative change in the life of an individual as individual and also in the life of our democratic polity.

What is the connotation of the expression, "free and compulsory"? The meaning of "free" one can easily comprehend or understand, but what about "compulsory"? Connotatively, and not just literally, it refers to the State of social health of the large segment of our society, which has stepped into deep poverty, ignorance, superstition, a society in which the people do not have even a ghost of an idea, what 'education' is and what it should mean to them. They are least aware that education is their inalienable fundamental right, a right to live-not just to live, but to live with human dignity.[2] It is the children of a social segment of our society that need to be addressed. Their parents or guardians need to be persuaded, and pressurized if so required, to send their children for 'free and compulsory' education. They are to be 'enabled' to receive education by removing the letters of poverty coupled with superstition and ignorance. Looking at the sheer overwhelming number of such children-quoting the mere statistics of such children as just meaningless-the crucial question is how the

State is going to discharge such an onerous responsibility?[3]

What does Article 21 of the Constitution tell us on this count? Obviously, it confers on the State exceptionally very wide and unqualified power by simply stating that such an obligation is required to be fulfilled "in such manner as the State may, by law, determine."

If one reads this statement closely, it seems to suggest that the only condition imposed by Article 21 on the State in relation to exercising of its power to provide 'free and compulsory education to all children of the age of 6 to 14 years' is that such power may be exercised only through the intervention of 'legislative' 'law', and not by any 'random', 'arbitrary' or 'capricious' 'executive' action. But this is not something new about which we should feel worried or surprised. This is merely a re-statement of the doctrine of separation of powers, which obliges us to bear in mind that any executive action of the government should be duly supported by the law enacted by the legislature or Parliament, and the function of the judiciary is to ensure that both the legislature and the executive remain within the limits of their respective domains as determined by the Constitution.

The term 'law' under Article 21A of the Constitution simply means a proper law enacted by the legislature, a law which lays down policy perspective and provides for suitable strategies which are transparent and clearly reveal how to realize the constitutional objective-the objective of providing free and compulsory education to all children. Such a law, of course, would inherently be termed as 'a reasonable law'.

In carrying out of this constitutional mandate under Article 21A, the Parliament ordained the law namely, "*The Right of Children to Free and Compulsory Education Act, 2009"*. This Act came into force with effect from April 1, 2010, the date on which article 21A of the Constitution under which the said Act had been enacted, itself came into effect. The coincidence of the dates of both enactments suggests that there should be no delay between the constitutional commitment and its concretion by the Parliament, thereby implying that the state should act without delay to fulfill its constitutional commitment.

3 Virendra Kumar "The plight of children to free and compulsory education Act, 2009: A juridical critiques of its constitutional perspective" published in book titled "Criminal law, criminology and administration of criminal justice" authored by K.D.Gaur, published by Central Law publications, 4th edition, 2019 at p. 148.

What is the core objective of this Act? This Act is "anchored in the belief that the values of equality, social justice and democracy and the creation of just and humane society can be achieved only through a provision of inclusive elementary education to all the children."

Do all children need free and compulsory education? Certainly not those who belong to the privileged sections of society, because they do not. They already receive far more than the minimum required by others who are not as privileged or in as favorable a social position. So, how do we identify the children who desperately need 'free and compulsory education'?

The Right of Children to Free and Compulsory Education Act, 2009 itself identifies the targeted beneficiaries of free and compulsory education. These are the children belonging to vulnerable sections and disadvantaged groups of society who, mainly due to poverty, ignorance, and other factors, are unable to access even the universal elementary education. However, to provide 'free and compulsory education' to a vast, sprawling, segment of such children in our society, and that too without any more delay, with all the continuing constraints, is indeed a very tall order. We are already 50-60 years behind in fulfilling the promise of providing free and compulsory education to all children between 6 to 14 years. Therefore, the question arises: what strategy has the Parliament adopted under the Act of 2009 to achieve this objective of providing 'free and compulsory education to all children' without further delay?

One may decipher at least two-fold strategy; one in terms of the clear direction that we should take by adopting what we call, the child-centric approach making the child as the right-bearing unit and emphasizing the re-orientation of the teachers which is primarily child-friendly, the other one is how to realize the child-centric approach with all the continuing constraints of resources without any more delay.

Child Centric Approach

Every child between the age of 6 to 14 has the right to free and compulsory education. This statutory declaration implies that every child must be treated as a full-fledged human being and not merely as an inert object without fundamental

freedoms. This right is not merely statutory, but a constitutional fundamental right with a distinct character and broader connotation. It is not just an enforceable right before the courts, but something much more with a complexion that one that holds true significance and fundamental importance. Specifically,:

- Proximity to school: Every child shall have the right to admission in a "neighborhood school".
- Right to basic education is a continuing right: Every child shall have the right to continue receiving education "until the completion of elementary education."
- Economic Freedom: No child "shall be liable to pay any kind of fee or charges or expenses that would prevent them pursuing and completing elementary education."4
- A Child's disability is not a barrier to education: A child with disability shall have the right to pursue free and compulsory elementary education in accordance with special provisions as laid down in Chapter V of the Persons with Disabilities (Equal Opportunities, Protection and Full Participation) Act, 1996.
- Priority for disadvantaged groups: Priority should be given to children belonging to 'disadvantaged group"[5] and 'weaker section'[6] to ensure that they are not discriminated against or prevented from pursuing and completing elementary education for any reasons.[7]

Teacher's Re-orientation vis-à-vis child: The teacher entrusted with the responsibility of imparting elementary education is required to re-orientate himself as per the new curriculum and re-defined evaluation procedure prepared by the academic authority, which is legislatively enjoined to take into

4 See Section 3(2) of The Right to Education Act, 2009.
5 Child belonging to disadvantaged group means a child belonging to the scheduled caste, the scheduled tribes, 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. See Section 2(d) of the RTE Act, 2009.
6 Child belonging to weaker section" means a child belonging to such parent or guardian whose annual income is lower that the minimum limit specified by the appropriate government by notification. See Section 2€ of the RTE Act, 2009.
7 Section 9(c) of the RTE Act, 2009.

consideration the following facets:[8]

- Compliance with the constitutional values of equality and non-discrimination;
- Holistic development of the child;
- Development of child's knowledge, potential and talents;
- Enhancement of physical and mental abilities to the fullest extent;
- Learning through activities, discovery and exploration in a child friendly and child-centered manner;
- Providing instructions, to the extent as far as possible, through the child's own mother-tongue.
- Alleviating fear, trauma and anxiety and helping the child to express views freely; and
- Comprehensive and continuous assessment of child's understanding and ability to apply the same in real-life situations.

Realization of Child-centric Approach: In this respect, the two functional strategies that come to the fore which may be termed as, 'immediate' and 'remote or deferred' are:[9]

- Immediate: it is the strategy of exploiting in the first instance the infrastructural facilities and all other resources of all the existing recognized schools, including the state-owned, state-supported, and private unaided schools.
- Remote or deferred: It is the strategy of opening new neighborhood schools for making the universal elementary education accessible to all the children without belonging to weaker section and disadvantaged group in the neighbourhood. The essential components of these two sections may be abstracted as under:

8 Section 29(2) of RTE Act.

9 Although to fulfill this constitutional mandate the legislature has adopted a multi-pronged strategy, focusing simultaneously on the child the recipient of education.: his parents or legal guardian-the persons who are responsible for the education of the child; the providers of education, such as teachers, persons who establish and run educational institutions, both in public and private sectors with or without stateaid; and overall responsibility lying with the state to ensure that all the stake holders work "in manner as the state may, by law, determine ," nevertheless for the purpose of the juridical critique the author has resorted to two-fold broad classifications of all the relevant legislative measures.

Section 12(1) of the Act, defines its scope in three clauses:

- Clause (a) refers to the recognized state-owned or state-controlled schools, which must admit all such children without any discrimination. Their obligation is absolute concerning the children admitted.
- Clause (b) refers to the recognized state-aided private schools, whose obligation to provide free and compulsory education extends "to the proportion of admitted children that corresponds to the percentage of annual recurrent aid or grants received in relation to their own total annual recurrent expenditure, with a minimum requirement of 25%.
- Clause (c) refers to the recognized unaided private schools, which must admit at least 25% of the children belonging to weaker section and disadvantaged group in the neighborhood in Class I and provide them free and compulsory elementary education until completion, and are entitled to be compensation for expenses incurred per child.

Furthermore, under Section 18 if the recognized unaided school fails to comply with this obligation, it will be liable to pay fine or face the consequence of derecognition if it has already obtained the recognition.

In enforcing the provisions contained in three clauses, different kind of problems have come to the fore. In respect of clause (a), the objective of truly providing free and compulsory education could not be achieved fully and satisfactorily, because most of these schools lack even the basic infrastructural facilities, say, in terms of proper class rooms, black boards, drinking water, toilets, modicum of a library, playground etc. so far as recognized aided schools of both complexions whether of minority or non-minority falling within the ambit of clause (b) are concerned, there is not much difficulty in enforcing their obligation for providing 'free and compulsory education' to a limited number of children belonging to weaker section and disadvantaged group of society. However, contentious issues arose in relation to the recognized private unaided schools falling in clause (c), who resented and resisted the enforcement of these provisions under the threat of 'fine or de-recognition' as envisaged under Section 18(3) of the Act, not because of paucity of resources, but they vehemently challenged their constitutional validity of the Act in the Supreme Court as a violation of their fundamental right.

The core contentious issue in the implementation of the Act that has gained prominence is Whether the application of Section 12(1) (c) read with Section 18(3) of the Act, to recognized the unaided private schools is constitutionally valid ? This issue was directly raised before a three-judge bench of the Supreme Court in *Society for Unaided Private Schools of Rajasthan v. Union of India*,[10]

What is the law established by *T.M.A Pai Foundation*[11] *and P.A. Inamdar* [12]on articles 19(1)(g), 29(2) and 30(1) of the Constitution with respect to unaided private educational institutions? In this regard, Radhakrishnan, J. sums up the law as established in the 11-judge bench decision of the Supreme Court as follows:

"*Pai Foundation and Inamdar* cases have categorically held that any action of the State to regulate or control admissions in the unaided professional educational institutions, thereby compelling them to allocate a portion of their available seats to candidates chosen by the State, as if it was filling the seats available to be filled up at its discretion in such private institutions, would amount to nationalization of seats. Such imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions, it was held, are acts constituting serious encroachment on the right and autonomy of private unaided professional educational institutions and such appropriation of seats cannot be held to be a regulatory measure in the interest of minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution, insofar as the unaided minority institutions are concerned."

The gist of this summary statement is that in *TMA Pai Foundation Case* (2002), the Constitution Bench of the Supreme Court, by majority ruling, held that the State is constitutionally precluded by Article 19(1)(g), read in conjunction with Articles 19(6) and 30(1) of the Constitution, from reserving seats for students belonging to Scheduled Castes, Scheduled Tribes, and Other Backward Classes in private unaided educational institutions. While interpreting Article 21A, the Supreme Court in *Society for Unaided Private Schools of*

10 (2012) 6 SCC 1.
11 T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481.
12 P.A. Inamdar v. State of Maharashtra, (2005) 6 SCC 537.

Rajasthan v. Union of India[13], held that the State can impose obligations on private schools to ensure the fulfillment of this fundamental right. However, minority-run institutions were exempted, giving rise to debates on equitable access to education.

Now let us examine the judicial approach of the constitutional perspective of the right to education by critically examining the holdings of the Supreme Court in both the cases. A bare reading of the two abstracted statements from the minority judgment reveals the different approach of the minority court in determining the issue of constitutional validity of section 12(1)(c) of the Act of 2009. It is different because, instead of examining the constitutional validity of section 12(1)(c) in terms of the language of article 21A of the Constitution as the majority court has done, minority opinion examines the constitutional validity of Article 21A of the constitution in terms of the propounding of 11-judge bench decision of the supreme Court in TMA Pai Foundation case (2002), which had laid down that the state had no right to interfere in the matters of admission in the private unaided schools. Since Article 21A is to be read in consonance with T.M.A Pai law, section 12(1)(c) of the Act becomes ipso facto unconstitutional. This indeed is the point of deviation in terms of the 'basic approach' pursued by the minority court in its opinion.

The logical corollary that follows is that a private school imparting secular education can do without state-aid but not without state recognition. This also shows the primacy of State-recognition over that of state-aid and invariably always a condition precedent for receiving any aid from the state.

Thus, on this count one may conclude by stating that it is the primacy of the state-recognition, and not state-aid, which is the basic concept evolved by the politically organized society with two-fold objective. On the one hand, the element of State-recognition is the protector of public interest by modulating the fundamental rights of an individual through the sanction of reasonable restrictions, and, on the other hand, it is the promoter of individual interest by adding value to it. Looked from this angle, in the instant case, 'public interest' is protected by persuading or prompting the private unaided schools to "supplement the efforts of the State" in providing free and compulsory education to all children, whereas individual interest is promoted by granting it the requisite State-recognition on the fulfillment of conditions laid down by

13 Ibid

it in the interest of society. Such a recognition, and not the financial assistance, that makes the private unaided educational institution instantly identifiable as a 'standardized school' or 'School of substance' and thereby it is much sought after by the people and the society at large without questioning its credentials.

If that is the case, would it be unconstitutional for the state to withhold recognition if the unaided educational institution does not abide by the stipulation spelled out by it in section 12(1)(c) of the Act ? This is especially relevant, when the primary purpose of that stipulation relates to the creation of inclusive social order by following the constitutionally proclaimed policy of providing free and compulsory education to all children, especially by reserving a fraction of seats for the children belonging to weaker section and underprivileged group in the neighborhood schools imparting secular education and that too not without some degree of compensation.

In fact, the lack of judicial appreciation of the primacy of State-recognition over State-aid is resulting into dubious trend of, what is described as, "Schools rush for Minority Status" for avoiding the social responsibility of providing even partly free and compulsory education to the underprivileged children as envisaged under section 12(1)(c) of the Act.

Concluding Observation

As far as the above mentioned discussion, deliberation, debate, dialogue, discourse and analysis of case laws are concerned, the right of unaided minority schools imparting general or secular education as envisaged under the Act should be regulated under Article 19(1)(g) read with clause (6) thereof, and not under the article 30(1) of the Constitution, which provides protection only for the preservation of minority culture, language and script, not for their secular or commercial education activities. It is necessary to abandoned the distinction between aided and un-aided educational institutions merely in terms of finance factor (both minority and non-minority) prioritizing 'state-recognition' over that of 'state-aid of grants' to create an 'inclusive social order' by reserving some space for children belonging to weaker section and disadvantaged group of society, which indeed is a paramount public interest whose protection is, the responsibility of the State.

For the full realization of Right to Education as a fundamental right under Article 21A, stronger mechanisms such as well-functioning School

Management Committees, strict enforcement of the 25% reservation for EWS students, and judicial scrutiny of private school compliance are essential. After a jurisprudential analysis of judicial interpretation in both the cases, it is concluded that both the courts in their respective opinions are ceased of the limits of Article 30(1) of the Constitution and also the value of recognition granted by the State,[14] but still somehow or the other the primacy of the factor or recognition has got lost in the process of decision making.

Last but not the least, the analysis of the constitutional mandate guaranteed by constitution of India and the RTE Act, in relation to the right to education and judicial interpretation, remind us our obligation that we owe to the Judges and the judicial system for their sustained growth, development, and contribution to the society at large.

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14 See, Society for Unaided Private Schools Case, for the relatedness of 'State aid' and 'State recognition', Radhakrishann, J. citing with approval the observation made in Inamdar(supra) states: "Referring to the judgment in Kerala Education Bill, 1957, In re (AIR 1958 SC 956; 1959 SCR 995) and St. Stephen (St. Stephen's College v. University of Delhi, (1992) 1 SCC 558), the Court took the view that once an educational institution is granted aid or aspires for recognition, the State may grant aid or recognition accompanied by certain restrictions or conditions which must be followed as essential to the grant of such aid or recognition." See Society for Unaided Private Schools.