Exorcising the Ghosts of Judgments Past:
The Case Against Excluding Minority Institutions From the RTE Act
Gaurav Mukherjee

The Supreme Court of India in Pramati Educational and Cultural Trust v. Union of India was called upon to rule on the validity of Articles 15(5) and 21A of the Constitution of India. While upholding their constitutional validity, the Court, inter alia, exempted minority administered institutions from the ambit of the Right of Children to Free and Compulsory Education Act, 2009 (RTE Act) in its entirety. This paper criticizes the judgment on three counts: the issue of defining who constitutes a minority group in the educational context, the conflation between reservation and regulation obligations by the RTE Act, and the approach of the judiciary in treating regulation of school education. The surprising decision of the court in universally imposing certain quality standards in schools in J.K. Raju v. State of Andhra Pradesh is also examined, and a reading down of the judgment in Pramati is suggested as a manner of ensuring a meaningful result being achieved by the judgment.

1. Introduction

The right to education under Article 21A of the Constitution of India (CoI) is operationalized by the Right of Children to Free and Compulsory Education Act, 2009 (RTE Act). The existence of a fundamental right to education for all was confirmed in 1994, with the SC clarifying subsequently that such right extended only to primary education between the ages of 6 and 14. Thereafter, in the absence of enabling legislation or constitutional amendment, the right lay dormant without

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2 The Supreme Court in Mohini Jain v. Union of India (1992) 3 SCC 666 in 1992 emphasized the existence of right to education. Note the following observation at paragraph 12 of the judgment:

“The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. The State Government is under an obligation to make endeavor to provide educational facility at all levels to its citizens.”

any mechanism to enable the citizen to realize it effectively. It thereby fulfilled the criteria for what Tushnet describes as a weak remedy, with the declaration of the strength of a right without a concomitant remedy. This was noted in the 165th Report of the Law Commission of India, which interestingly formed part of the Statement of Objects and Reasons (SOR) for the Eighty Sixth Amendment Bill in 2001. The SOR noted the resounding failure of the exhortation to make a provision for free and compulsory education for all children up to the age of fourteen years within ten years of promulgation of the Constitution as contained in Article 45 of the CoI, even though more than fifty years had elapsed since its commencement. The constitutionality of the statute was initially upheld in *Society for Unaided Private Schools of Rajasthan v. Union of India* (hereinafter Society), where the Supreme Court of India (SC) excluded unaided minority institutions and boarding schools from the operation of the RTE Act. I examine the judgment in the limited scope of this exemption and argue that the judgment is flawed on three counts. First, it builds on SC jurisprudence that has not provided a consistent understanding of what constitutes a minority group in the context of education; second, when justifying the exclusion of minority educational institutions, it ignores the difference between the reservation and regulation obligations cast by the RTE Act; and third, that the decision’s doctrinal support is derived from case law concerning higher, and not primary and secondary education. Finally, I confront the question of how the imposition of general standards on institutions imparting school education can be achieved by tracing the outcome of a writ petition decided after *Pramati* in the SC.

2. Facts and Judgment

The SC in its majority opinion in the *Society* case upheld the validity of the RTE Act, but did not address three questions. The first two were the constitutional validity of Articles 15(5) and 21A of the Constitution, while the third was the applicability of the RTE Act to unaided minority

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7 The unamended Article 45, read:

> “Provision for free and compulsory education for children - The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.”
8 AIR 2012 SC 3445.
9 Society, at para 12.
educational institutes. These questions were referred to a larger bench\textsuperscript{10}, which was then clubbed with petitions filed by several private unaided minority institutions, including the Pramati Educational and Cultural Trust which challenged, inter alia, the validity of Article 21A and its enabling legislation as being violative of Articles 14, 19 and 21 of the Constitution. \textsuperscript{11} Oral hearings commenced on 19 February before a constitution bench comprising the Justices Lodha, Patnaik, Kalifulla, Mukhopadhayay and Misra; and were concluded on 13 March. The constitution bench, speaking unanimously through Justice Patnaik, rendered judgment in \textit{Pramati} on 7 May. It stated that Articles 15(5)\textsuperscript{12} and 21A\textsuperscript{13} did not violate Articles 14, 19 and 21 of the Constitution. Also, neither did these provisions fall foul of its basic structure. Although the court reiterated the underlying constitutionality of the statute, it went a step further from the \textit{Society} case in excluding minority-administered institutions (both aided and unaided) from the operation of the RTE Act. This is problematic on the counts I elaborate on in the three sections below.

3. \textit{Who is a minority?}

3.1 What courts say, what governments do

Arriving at an answer to this question is often obfuscated by the considerable jurisprudence behind it, yet a beginning may be made in the Constituent Assembly Debates. While there remain questions over the advisability of leaving vague justifiable rights to undefined minorities,\textsuperscript{14} the overwhelming confusion in the minds of the members is apparent from Ambedkar’s statement on 8 December 1948:

\textit{“For instance, for the purposes of this Article 23, if a certain number of people from Madras came and settled in Bombay for certain purposes, they would be, although not a minority in the technical sense, cultural minorities.... The article intends to give protection in the matter of culture, language and script...”}

\textsuperscript{11} Petition filed by Pramati Educational and Cultural Trust (Aug. 8, 2012) (on file with author).
\textsuperscript{12} Pramati, at paras 16-29.
\textsuperscript{13} Pramati, at paras 39-44.
\textsuperscript{14} A. Yakin, \textit{Constitutional Protection of Minority Educational Institutions in India} (1988)
This taxonomy of identity seeks to distinguish those minority groups which were not as such in the technical sense from those that were to be accorded constitutional protection. I illustrate below how this confusion continues till date, in the absence of a unified normative lens to look through. One of the first cases to come before the SC on this question was In re Kerala Education Bill 1957, which was a special reference under Article 143(1) requiring the SC to exercise its advisory jurisdiction on the extent of regulation by the Bill that could be constitutionally permitted on minority administered educational institutions. In addition to the test of considering the quantity of the population of the minority community in relation to the population of the State, the case was significant for permitting the determination of minority status by the number in population as opposed to other factors like backwardness or under representation. While followed in subsequent case law, it interestingly came at a time when education was a state subject, which was altered by its insertion into the concurrent list by the Constitution (Forty-Second Amendment) Act in 1976. If religion and language are the axes on which the determination of minority status is made, certain curious nuances is discernable from SC jurisprudence. These include a religious denomination seeking certification being required to comprise a system of outwardly expressed beliefs or doctrines with a common faith and organization that is distinct from any existing religion. Linguistic minorities are required to have a separate spoken language, but not a distinct script. Existing jurisprudence also mandates that the institution

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15 Statement made by Dr. B.R. Ambedkar, CONSTITUENT ASSEMBLY DEBATES, Volume VII, 8 December 1948.
16 AIR 1958 SC 956.
17 143. Power of President to consult Supreme Court:

(1) If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.
needs also to be established by a group of minority citizens to further the interests of the minority, and that the words ‘establish’ and ‘administer’ in Article 30(1) of the Constitution are not be read disjunctively. Curiously, courts also consider determining whether the discrete group is numerically less than 50% of the total population of a state, a valid means of constituting a minority. Anomalously, this ensures that each religious and linguistic group is a minority in some part of India.

Opaque institutions, fluid criteria

The process of grant of minority status to an educational institute varies from state to state, is often opaque, and not very well understood. Religious minority identification is straightforward and is undertaken by the Union Government. The Central Government has so far notified six religious minorities: Muslims, Christians, Sikhs, Parsis, Buddhists, and Jains. Linguistic minorities present a greater challenge, and involve a multitude of state authorities whose jurisdiction is not clearly defined. Consider the case of Karnataka, where educational institutions seeking minority status had been applying to the Department of Public Instruction. This position may now change after certain educational institutions seeking minority status have challenged the basis on which the minority certification was being granted before the Karnataka High Court. The outcome of these proceedings may ensure that the criteria for determination of minority status of an institution is crystallized and made more inflexible. Following a notification in July 2008, the Secretary of the Minorities Development Department is responsible for minority educational certification in the state of Maharashtra. The situation is fuzzier in the National Capital Territory of Delhi. According to the Directorate of Training and Technical Education, the Secretary of the ‘concerned department’ is charged with this certification. Whether this is the Directorate of Training and Technical Education or the Directorate of Education is unclear. At the Union level, the National Commission for Minority Educational Institutions is statutorily

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24 St. John’s Teacher Training Institute for Women, Madurai v. State of Tamil Nadu 1993 SCR (3) 985, 987.
26 Patroni Aldo Maria v. Kesavan AIR 1965 Ker 75, the reasoning behind which was applied in D. A. V. College, Jullundur v. State of Punjab 1971 SCR 688, at paras 9-11.
empowered to grant and withdraw minority status to an applicant educational institution that is established and administered by persons belonging to a minority group\textsuperscript{30}, and fulfills certain other guidelines as established by case law like \textit{Kerala Education Bill, Sidhrajbhai, TMA Pai and PA Inamdar}. \textsuperscript{31} The general practice amongst states while granting minority status is to check whether the governing body of the institution consists of members belonging to a particular minority group and whether the institution serves educational interests of a minority. Therefore, it appears that there are a variety of institutions often having overlapping jurisdiction to deal with this question.

\textbf{4. Regulation v. Reservation}

Unlike social welfare legislation enacted in pursuance of a directive principle of state policy (which ensures weak substantive rights and judicial intervention only in the event of a dramatic legislative departure from constitutional requirements)\textsuperscript{32}, the RTE Act is enacted in pursuance of a Part III right.\textsuperscript{33} Fundamental rights have been understood to be agent-neutral, requiring abstention from the state in limiting freedoms\textsuperscript{34}; social welfare rights imply non-capable agents and positive action from the state.\textsuperscript{35} The inclusion of what is a social welfare right within the framework of justiciable fundamental rights is a bold move by any constitutional standard, since

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\textit{See The National Commission for Minority Educational Institutions Act, 2004 (No.2 of 2005)}
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\textit{“11. Functions of Commission — Notwithstanding anything contained in any other law for the time being in force, the Commission shall: (f) decide all questions relating to the status of any institution as a Minority Educational Institution and declare its status as such.”}
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\textit{The fact that the Union had enacted the RTE Act pursuant to Article 21A is evident from the SOR, as well as an affidavit filed by the Union of India during oral hearings before the 3 judge bench in the Society case (On file with author).}
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there is a consistent refrain that such a move poses a systemic risk since its beneficiaries lack political power\textsuperscript{36}, and its weakening of a constitution’s central function as a check on state power.\textsuperscript{37} The approach of the RTE Act when operationalizing the fundamental right to education is to cast two types of obligations on schools: \textit{reservation obligations} (where private schools are mandated to provide free and compulsory education to socially and economically disadvantaged students\textsuperscript{38}) and \textit{regulation} of schools (all schools are expected to meet minimum norms and standards in the nature of general regulation to function legitimately).\textsuperscript{39} The former has been the arena for fierce legal contestation\textsuperscript{40}, but is held to be constitutionally valid, yet the obligations imposed by the latter has received relatively lesser attention. The regulation obligations cast by the RTE Act provides, among others, specific entitlements to children such as access to education, building infrastructure, teacher-pupil ratios, non-discrimination and freedom from harassment.

The petitioners in \textit{Pramati}, a group of aided and unaided private schools, contended that these obligations under the RTE Act violated their right to freedom of profession under Article 19 (1) (g).\textsuperscript{41} Additionally, minority institutions claimed that their right to establish, administer and run educational institutions under Article 30 (1) was violated.\textsuperscript{42} The arguments put forth by the latter are discussed here. Article 30(1) is meant to ensure that a minority group is capable of conserving its religion and language, and enable children belonging to a minority group to receive a thorough general education\textsuperscript{43} (\textit{P.A. Inamdar v. State of Maharashtra, 2005}). Significantly, the jurisprudence of the SC points toward two circumstances under which this right may be limited. The first of these circumstances is in the application of a legal provision enacted in the national interest, which is applicable to all educational institutions. This line of reasoning emerges from the approach taken by the court in the \textit{Inamdar} case, departing from previous cases like \textit{Sidhrajbhai} (1963) and \textit{Ahmedabad St. Xavier's College} (1974). Despite this seemingly ambiguous formulation, it is brought into sharper focus by the second limiting circumstance,\textsuperscript{36} Cass Sunstein, \textit{Minimalism at War}, John M. Olin Law & Economics Working Paper No. 231 (2004), available at \url{http://www.law.uchicago.edu/files/files/231.crs_war.pdf}.\textsuperscript{37} William E. Forbath, “Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution” 46(6) Stanford L. Rev. 1877,1886 (1994), cited in Shankar, \textit{Scaling Justice} 120.\textsuperscript{38} Section 12(1)(b), RTE Act.\textsuperscript{39} These are found in Schedule I of the RTE Act, and the standards can be traced to Sections 19 and 25 of the Act.\textsuperscript{40} See Rajeev Dhavan and Fali Nariman, “The Supreme Court and Group Life: Religious Freedom, Minority Groups and Disadvantaged Communities” in B.N. Kirpal, Ashok Desai, et. al., (eds.) \textit{Supreme But Not Infallible: Essays in Honour of the Supreme Court 265} (2000), for a concurring opinion.\textsuperscript{41} Pramati, at paras 6, 8, 11.\textsuperscript{42} Pramati, at para 13.\textsuperscript{43} \textit{P.A. Inamdar v. State of Maharashtra} (2005) 6 SCC 537.
which provides that reasonable regulation may be imposed upon a minority administered institution “for the benefit of the institution as a vehicle of education, such as those intended to maintain the educational character and standard of the institution” (Re Kerala Education Bill, 1958). History points to permissible regulation in the areas of laying down qualifications and conditions for service, maintaining sound standards of teaching and administration, and ensuring no maladministration. Interestingly, it was precisely this kind of regulation imposed by the RTE Act, which was under challenge in Pramati. Further, the SC has ruled that labour legislation like the Industrial Disputes Act, 1947 may be validly imposed upon a minority educational institution so long as it does not take away the minority group’s right to administer the institution. Requirements for framing by-laws and takeover in case of mismanagement have also been held to be valid. In exempting minority educational institutions from the application of the RTE Act in its entirety, the court has ensured that a statutory scheme of maintaining educational and infrastructure standards is defeated.

5. *Laissez Faire, but only in higher education*

Without delving into the divergence on its philosophical underpinnings, there exists a difference in the judicial approach to higher, and school education. In deciding minimum educational standards, there is good reason to generally allow greater regulatory oversight in cases concerning school education in contrast to higher education. Such regulation would of course be limited to the narrowly circumscribed areas described in the preceding section. This has not been given adequate weightage by court. In her study of SC and High Court cases in the period between 1950-December 2005, where the right to education had been the thrust of the petitioner’s argument, Shankar found that 70% involved university and higher education, and not primary and secondary education. Interestingly, Shankar also finds that judgments were 76 percent less likely to lend support to primary education cases compared to university cases. The implications of this finding is beyond the scope of this paper.

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44 Christian Medical College Hospital Employees' Union v. Christian Medical College Vellore Association (1987) 4 SCC 691.
46 Bihar State Madrasa Education Board v. Madrasa Hanifa College (1990) 1 SCC 428.
48 Shankar, Scaling Justice, pp. 150-160. Interestingly, Shankar also finds that judgments were 76 percent less likely to lend support to primary education cases compared to university cases. The implications of this finding is beyond the scope of this paper.
which consequently lead to counsel arguing the *Pramati* matter, involving school education, with precedent originating in higher education.\textsuperscript{49}

Even though the move toward greater state regulation in education emerged with the *Agra University*\textsuperscript{50} case, it was the court allowing due procedure requirements for the removal of staff in *All Saints* that marked a shift in judicial attitude aimed at better management of schools.\textsuperscript{51} Regulatory intervention in school education continued with the imposition of certain measures (with adequate safeguards) on minority institutions being held to be valid.\textsuperscript{52} Oversight to ensure fair treatment of school employees has also been upheld by the SC as not being violative of Article 30(1).\textsuperscript{53} More recently, the SC has taken a pro-active stance on the maintenance of financial records by schools, and the trusts or societies administering them.\textsuperscript{54} It therefore follows that in deriving its doctrinal justification for the minority group exemption in *Pramati* from case law concerned with higher education, the court overlooks precedent where it had allowed a considerable level of regulation over institutions imparting school education. In the absence of a sophisticated judicial articulation on the content of the right to primary education, the approach of the court should have been informed by the line of cases concerning primary education that have been mentioned in the preceding section. These are representative of situations where larger policy objectives, derived from other rights contained in Part III of the Constitution, have trumped the right of minority groups to administer educational institutions.

**A Possible Way Forward?**

Following the judgment of the court in *Pramati*, a two judge bench of the SC on 9 May in a contempt petition initiated by J.K. Raju against the state of Andhra Pradesh\textsuperscript{55} (No.532 of 2013), asked the government to ensure the availability of drinking water facilities, separate toilets for

\textsuperscript{49} Transcripts of oral hearings in *Pramati Educational and Cultural Trust v. Union of India* before the Supreme Court of India (On file with author); Rajeev Dhavan, Written submissions dated 26 February 2014 on behalf of the petitioners in *Pramati Cultural and Educational Society v. Union of India* (on file with author); Rohington Nariman, Written submissions dated 4 March 2014 on behalf of the petitioners in *Pramati Cultural and Educational Society v. Union of India* (on file with author).

\textsuperscript{50} The SC in a 2:1 majority considered that a provision for ‘principal and staff’ representation on the management board of a college to be conducive to the better management of the college and *de minimis* in nature so as to not offend Article 30(1). *See Gandhi Faiz-e-Alam College v. Shah Jahanpur* (1975) SCC 2383.

\textsuperscript{51} *All Saints High School vs State of Andhra Pradesh* 1980 AIR 1042.

\textsuperscript{52} *Frank Anthony Public School Employees’ Association v. Union of India* 1987 AIR 311.

\textsuperscript{53} The SC sanctioned the prior approval of external authorities in case of disputed employee suspensions in *Y. Theclamma vs Union Of India* 1987 AIR 1210; it approved of the application of general employee disciplinary rules in *Manohar Harries Walters v. Basel Mission Higher Education Center* AIR 1991 SC 2230.

\textsuperscript{54} *Modern School v. Union of India* AIR 2004 SC 2236

boys and girls, and separate facilities for teaching and non-teaching staff. Significantly, the court cited *Pramati* as it reiterated that these directions would be applicable to both minority and non-minority institutions. The two judge bench chose the idiom of “*basic human rights that enhance the atmosphere where the education is imparted*” while justifying the need for these directions. While it is not entirely clear on what basis the court chose only drinking water and separate toilets as constitutive of an atmosphere conducive to learning, such facilities exist as general regulation as part of the RTE Act. A possible manner in which *J.K. Raju* and *Pramati* can be reconciled is by a reading down of the latter. This is practice that is common in comparative constitutional law parlance, and the device is used primarily employed to enable a court to construe legislation so as not to apply to the circumstances of the particular case.\(^{56}\) It has been urged elsewhere in limiting the subsequent precedential application of case law. \(^{57}\) This would mean that the ruling is interpreted as excluding minority administered educational institutions not from the ambit of the RTE Act in its entirety, but merely from the operation of the reservation rule embodied in section 12(1) (b) and (c). Such an interpretation would be consistent with the object of Article 30(1), which seeks to preserve the minority character of an institution.
