



## Full Length Research Article

### RIGHT TO EDUCATION AND CONSTITUTIONAL IMPERATIVES- THE SUMMITS OF JUDICIAL CREATIVITY IN INDIA

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#### ARTICLE INFO

##### Article History:

Received 15<sup>th</sup> July, 2016  
Received in revised form  
27<sup>th</sup> August, 2016  
Accepted 21<sup>st</sup> September, 2016  
Published online 31<sup>st</sup> October, 2016

##### Key Words:

Right to education,  
Constitution,  
Fundamental Right,  
Directive Principle of State Policy.

#### ABSTRACT

Right to education is fundamentally linked to the realization of potential of an individual which ultimately fosters human dignity. As a socio-economic right, right to education casts positive obligation on the State and was therefore placed under the non-justiciable Directive Principles of State Policy under Part IV of the Indian Constitution. The Constitutionalisation of right to education in India has been influenced by several human rights dimensions. The Indian Courts have creatively deduced the right to education as an implicit right under the right to life, enunciated in Article 21 of the Constitution. The content and parameters of the right was deduced from Directive Principles of the State Policy under article 41, 45 and 46. Significant judicial decisions on right to education have paved the way for the Constitutional Amendment in 2002 inserting Article 21 A and the enactment of Right of Children to Free and Compulsory Education Act, 2009. Although there was initial confusion regarding the applicability of the right to education to the minority schools, but the Supreme Court has consciously exempted the minority schools from the purview of the RTE Act. The article presents an analysis of the right to education in India from Constitutional Perspective. It highlights the evolution of right to education from non-enforceable Directive Principles of State Policy to judicially enforceable and constitutionally enumerated Fundamental Right. The article concludes that Indian courts as guardian of the Fundamental Rights have played a pivotal role in fulfilling the goal of universal education and transcended the ideals of education rights into reality, marking the summits of judicial creativity in India.

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#### INTRODUCTION

Education is one of the core Fundamental Right which promotes individual freedom, dignity and fosters conditions for development of individual's personality. Education being a social and economic right, revolves around the perceived role of the State for protection and assistance.<sup>1</sup> The journey of right to education from the non-justiciable Directive Principle of State Policy to the justiciable Fundamental Right has been accelerated by the gamut of judicial decisions.

This recognised right to education as implicit in right to life under the Article 21 of the Constitution. The decisions in *Mohini Jain v. State of Karnataka*<sup>2</sup> and *Unnikrishnan v. State of Andhra Pradesh*<sup>3</sup> have been influential in recognition of primary education as the minimum core right. Right to education as an explicit fundamental right was recognized in the Indian Constitution by the 86<sup>th</sup> Constitutional amendment, 2002<sup>4</sup> under Article 21-A.<sup>5</sup> The power of constitutional review have been crucial in the judicial enforcement of social and economic rights especially right to education in India.<sup>6</sup>

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<sup>2</sup> AIR 1992 SC 1858; (1992)3 SCC 666

<sup>3</sup> AIR 1993 SC 2178; (1993)1 SCC 645

<sup>4</sup> See Statement of the objects and reasons of The Constitution (Eighty-Sixth amendment) Act, 2002 available at [indiacode.nic.in/coiweb/amend/amend86.htm](http://indiacode.nic.in/coiweb/amend/amend86.htm). (accessed on Aug 25, 2016)

<sup>5</sup> Article 21-A of the Constitution of India states that "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."

<sup>6</sup> S. Murlidhar, *The Expectations and challenges of judicial enforcement of Social Rights Social Rights Jurisprudence in India in SOCIAL RIGHTS JURISPRUDENCE-EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE*

<sup>1</sup> DAPHNE BARAK-EREZ & AEYEL M GROSS (ED.), EXPLORING SOCIAL RIGHTS-BETWEEN THEORY AND PRACTICE 21-24(2007). Also See Ilias Trispiotis, *Socio-Economic Rights: Legally Enforceable or Just Aspirational?* 1826 OPTICON 3, 1-2(2010). The justiciability of the socio-economic rights are positive rights, imprecise and vague and has economic implications that substantially affects the State budget.

Judiciary has not only fostered the realisation of the goal of universal education but has expanded the ambit of the right to education to private unaided schools (except minority educational institutions). The present article analyses the Indian experience of the right to education and qualitatively analyses the judicial discourse of the right to education in India.

### Right to education-As an implied fundamental right

Education enables a person to live a meaningful life and thereby contributes to the development of society. It helps in better realization of individual rights and responsibilities. Right to education stands at a higher pedestal above all other rights as the ability to enforce one's Fundamental Right flows from it. India is a welfare State and seeks to promote the prosperity and well-being of the people. The Directive Principle of State Policy enunciated in Part IV of the Constitution of India promotes and strengthens the idea of social and economic justice enshrined in the Preamble.<sup>7</sup> Although the Directive Principle of State Policies are non-justiciable rights but nevertheless are fundamental in governance of the country.<sup>8</sup> Both the Fundamental Rights and the Directive Principles of State Policies were designed by the framers of the Constitution as a chief instrument to bring about the great reforms of the social revolution.<sup>9</sup> In the Constituent Assembly, there was a divisive opinion regarding the placing of right to education in the category of justiciable or non-justiciable rights, but however it was finally placed under the non-justiciable category.<sup>10</sup>

The Constitutionalisation of right to education in India has been greatly influenced by crucial dimensions of human rights.<sup>11</sup> Article 26 of the Universal Declaration of Human Rights (UDHR)<sup>12</sup>, Article 13 of the International Covenant of Economic Social and Cultural Rights (ICESCR)<sup>13</sup>, Article 28 United Nations Convention on Rights of Child (UNCRC)<sup>14</sup>

LAW 102 (Malcolm Langford ed., 2008)

<sup>7</sup>See The Preamble of the Constitution of India 1950, We, the People of India, .....to secure to all its citizens: Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity; and to promote among them all Fraternity assuring the dignity of the individual and the [unity and integrity of the Nation].

<sup>8</sup>Art-37 of the Constitution of India 1950 states that "The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws".

<sup>9</sup>GRANVILLE AUSTIN, THE INDIAN CONSTITUTION-CORNERSTONE OF A NATION 114 (2008)

<sup>10</sup>See the Constituent Assembly Debates (CAD) available in <http://parliamentofindia.nic.in/ls/debates/vol7p9.htm> (accessed on Aug 25, 2016)

<sup>11</sup>C. Raj Kumar, *International Human Rights Perspectives on the Fundamental Right to Education-Integration of Human Rights and Human Development in the Indian Constitution* 12 TULANE J OF INT'L & COMP. LA W 237, 237-238

<sup>12</sup>Article 26(1) of the Universal Declaration of Human Rights (UDHR) provides that "Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit."

<sup>13</sup>Article 13(1) of International Covenant on Economic and Social Rights provides that "The States Parties to the present Covenant recognize the right of everyone to education. Article 13(2)(a) The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:(a) Primary education shall be compulsory and available free to all."

<sup>14</sup>Article 28 of UNCRC states that "States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all "

calls the state for providing free and compulsory education. Judiciary has been a protective sentinel of the rights through creative interpretation of Fundamental Rights and has acted as conscience keeper of the Constitution.<sup>15</sup> It has adopted the view that the Directive Principles of the State Policies cannot be ignored in determining the ambit of Fundamental Rights. The Court should adopt the principle of harmonious construction and give effect to both as far as possible.<sup>16</sup> The harmony and balance between the Fundamental Rights and Directive Principles of State Policy forms the basic structure of the Constitution.<sup>17</sup> However, the judicial enforcement of socio-economic rights have faced negative response basically based on the principles of separation of power, expense and ineffectiveness.<sup>18</sup> The non-justiciability of the Directive Principles of State Policy points towards its ineffectiveness rather than inferiority to Fundamental Rights. The statement of non-enforceability of the Directive Principles of State under Part IV means that Courts cannot issue directions to the Parliament and State legislature to make laws. It does not signify that court while interpreting the Constitution and discharging its duty cannot consider Directive Principles in to account.<sup>19</sup> There has been selective shift of some Directive Principles of State Policy to the realm of justiciable fundamental rights.<sup>20</sup> Directive Principles of State Policies have been a source of great constitutional support for the government to frame development policies as well as for the judiciary to deliver significant judgements.

In *Mohini Jain v. State of Karnataka*, the right to education was formally recognized in India and it established the connection between Article 41, 45 and 21 of the Constitution. Subsequent judicial decisions such as *Unni Krishnan, J.P. v. State of Andhra Pradesh*, *T.M.A. Pai Foundation v. State of Karnataka*<sup>21</sup> and *P.A. Inamdar v. State of Maharashtra*<sup>22</sup> further developed the right and laid the grounds for its justiciability. The scope of right to education was discussed for the first time in *Mohini Jain v. State of Karnataka*<sup>23</sup> where an Act passed by the Karnataka legislature to regulate the tuition fee in private medical colleges in the State was quashed by the Supreme Court.<sup>24</sup> The Court took an absolutist view on the State obligation to provide education at all levels. The bench observed that charging capitation fee in consideration of admission to educational institutions is patent denial of right to education under the Constitution. However, from a practical point of view, such approach could hardly be tenable with regard to caveat of the availability of the financial resources

<sup>15</sup>Soli J. Sorabjee, *Expansion and Protection of Fundamental Rights By Judicial Interpretation And Intervention*, 7 NUJS L. REV.1, 7 (2014)

<sup>16</sup>*In Re Kerala Education Bill*, AIR 1958 SC 996

<sup>17</sup>*Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789

<sup>18</sup>Mark Tushnet, *Reflections on Judicial Enforcement of Social and Economic Rights in the Twenty-First Century* 4 NUJS L. REV.177,178 (2011)

<sup>19</sup>O. CHINNAPPA REDDY, THE COURT AND THE CONSTITUTION OF INDIA-SUMMITS AND SHALLOWS73 (1<sup>st</sup> ed. 2008)

<sup>20</sup>Mahendra P. Singh, *The Statics and the Dynamics of the Fundamental Rights and the Directives Principles - A Human Rights Perspective*5SCC (Jour) 1, (2003) available at [http://www.ebc-india.com/lawyer/articles/2003v5a4.htm](http://www.ebc-india.com/lawyer/articles/2003v5a4.htm#Note9)

<sup>21</sup>(2002) 8 SCC 481

<sup>22</sup>(2005) 6 SCC 537

<sup>23</sup>AIR 1992 SC 1858

<sup>24</sup>The Court emphasised that without making the right to education under Art 41 a reality, the fundamental right would be beyond the reach of a large majority which is illiterate; the other fundamental rights like rights under Art 19 cannot be fully enjoyed unless a citizen is educated and is conscious of his individual dignity. The Court ruled that right to education being concomitant to the fundamental rights, "the State is under a constitutional mandate to provide educational institutions at all levels for the benefit of the citizens".

with State. *Mohini Jain's* case has been criticized to be faulty on doctrinal and practical grounds.<sup>25</sup> It is pertinent to understand that right to education was well within the framework of the Constitution and furthermore, practicality cannot be the ground of recognizing or declaring a right.<sup>26</sup> In *Unnikrishnan* Case, the Supreme Court held that right to education is inherent in right to life guaranteed under Article 21 but subject to the caveat of the economic capacity of the state. Right to life guaranteed under the article 21 of the Constitution is fundamental to all and has a wider application.<sup>27</sup> The Supreme Court laid down that the word "life" under Article 21 includes education because education nurtures a good and dignified life. The Court has emphasized that a child has a Fundamental Right to free and compulsory education up to the age of 14 years. The content and the parameters of the rights were construed from Articles 41, 45 and 46.<sup>28</sup>

The Supreme Court has enunciated the doctrine of implied Fundamental Right and asserted that a right to be treated as fundamental right may not be specifically stated in the Constitution. With the change in political, social and economic situations new rights may be recognized to meet the social demands.<sup>29</sup> Especially, in the past two decades since the *Maneka Gandhi v. Union of India*<sup>30</sup>, Article 21 has been given new dimensions by judicial interpretation. It was observed that the attempt of the Court should be to expand the reach of Fundamental Rights rather than to limit their meaning by the process of judicial construction. While answering the issue of whether State could permit private professional educational institutions to charge capitation fees for admissions of students, the Court reiterated the proportion in *Mohini Jain* case that right to education is implicit in Article 21. But it stated that the parameters of the rights are not absolute. The Court limited the State obligation to provide educational facilities by averring that every citizen has right to free education until he completes the age of 14 years and beyond this stage, the obligation of the State to provide education is subjected to the limits of the economic capacity and development of the State.

The significance of the *Unnikrishnan* Judgement has been the identification of primary education as the minimum core right of right to education. This was derived from the wordings of the Article 45 which set out the progressive realization of this right. The Court decision to include right to education under Article 21 had less practical effects as no such directions were issued to effectuate the right.<sup>31</sup> The significant development post *Unni Krishnan* judgement was the constitutional amendment which placed right to education under category of justiciable Fundamental Right in the Part III of the Constitution.

## Constitutional Amendment and the Enumerated Fundamental Right

Subsequent to the *Unnikrishnan* Judgement, the 86th Constitutional Amendment, 2002 was milestone in the development of right to education in India. The amendment inserted the Article 21-A and introduced right to education as an explicit Fundamental Right under the Indian Constitution.<sup>32</sup> The Article states that "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." The amendment also led to the substitution of the new Article 45<sup>33</sup> under Part IV of the Constitution and amendment of Article 51A to include Article 51A(k) in Part IVA under the Fundamental duties.<sup>34</sup> The effect of the Constitutional Amendment was two fold- firstly, right to education as a Fundamental Right can be enforced henceforth. Secondly, the insertion of Article 51A-k has distributed the obligation of the providing the education between the State and the parents. While the State is concerned with providing free education, the parents have the duty to provide opportunity for compulsory education.

However, notwithstanding the parental obligation to provide compulsory education, State has a pertinent role to play for providing compulsory education to all.<sup>35</sup> Although right to education, no longer remains an unenumerated right in the Constitution but the contribution of the judicial decisions of the Supreme Court have been significant in this respect. This is one of the right created by the Supreme Court which imposes positive obligation on the State.<sup>36</sup> For the advancement of the socially and educationally backward classes of citizens, Parliament introduced Article 15(5) in the Constitution under the Ninety Third Constitutional Amendment, 2005. In *Ashok Kumar Thakur v. Union of India*, it was held that shifting the priority from primary education to higher education consequently leads to diversion of resources and therefore violated the article 21-A of the Constitution. The essential issue raised in the case was whether the fundamental right under Article 21-A can be accomplished without more emphasis on primary education.

Court replied in negative and asserted that nothing could be of more importance than the compliance with the mandate under Article 21A. The total compliance under Article 21A includes good quality education imparted to all children between six to fourteen years. The Court also urged that the Government should enact a legislation in this regard and fix a deadline in which the objective of the free and compulsory education can be reached.<sup>37</sup> To enforce the constitutional mandate, the Parliament enacted Right of the Children to Free and Compulsory Education Act, 2009 (also known as RTE Act) with the objective to provide elementary education with

<sup>25</sup>S.P Sathe, *SC on right to education* 27 E.P.W 1847, 1847 (1992) available at <http://www.doccentre.org/docsweb/FRE/Sathe.pdf> ( accessed on Aug 28, 2016)

<sup>26</sup>D. Nagasaila & V. Suresh, *Can right to education be a Fundamental Right* Nov E. P. W 2442, 2442 ( 1992)

<sup>27</sup>MAHENDRA P. SINGH , V.N SHUKLA'S CONSTITUTION OF INDIA 165(10<sup>th</sup> ed. 2001)

<sup>28</sup>M.P JAIN, INDIAN CONSTITUTIONAL LAW 1298 (6th ed. 2011)

<sup>29</sup>*Id.* at 1509.

<sup>30</sup>AIR 1978 SC 597; (1978) 1 SCC 248

<sup>31</sup>Atul M. Setalvad, *The Supreme Court on Human Rights and Social Justice: Changing Perspectives in SUPREME BUT NOT INFALLIBLE- ESSAYS IN THE HONOUR OF THE SUPREME COURT OF INDIA* 249 (B. N Kirpal, Desai et. al ed., 2004)

<sup>32</sup> 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."

<sup>33</sup>See Art 45 of the Indian Constitution which reads "The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years."

<sup>34</sup>See 51A(k) who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years."

<sup>35</sup>Bhandari J. in *Ashok Kumar Thakur v. Union of India* (2008) 6 SCC 1

<sup>36</sup>UDAI RAJ RAI, FUNDAMENTAL RIGHTS AND THEIR ENFORCEMENT 242 (2011)

<sup>37</sup>*Ashok Kumar Thakur Case* , *Supra* note 36

essential norms and standards for the children within age group of 6 to 14 years.<sup>38</sup> The object of the Act is to provide the elementary education with essential norms and standards for the children within age group of 6 to 14 years. The RTE Act was ratified in August 2009 and came into effect on April 2010. The enactment of the Act led to the historic transformation of right to education in India. Some of the important provisions of the Act includes- appointment of qualified and adequate number of teachers, learning equipments, library facilities, proper sanitation facilities, prescription of norms and standards for teacher and pupil ratio, prohibition of any form of physical and mental harassments etc.<sup>39</sup> The Act establishes provisions for quality education and provides a number of avenues for grievance reporting as well as monitoring compliance with non-discrimination. However, the act falls short on several aspects like fiscal commitments, lack of accountability, parental participation in right based learning etc.<sup>40</sup>

### Judicial expansion and realisation of the Right to education

The State has an imperative obligation to provide free and compulsory education till primary and upper primary level. However, the State is expected to provide facilities for higher and professional education depending upon the availability of the financial resources.<sup>41</sup> Although achieving universal elementary education is considered as an equity measure by the supporters of the free seats provisions but there has been resentment from the private sector that has State has shifted the burden on them.<sup>42</sup> Financial constraints have been the most challenging aspect of implementation of RTE Act. The Act lacks clarity on several provisions especially the financial responsibility and has the budgetary constraints in realization of the goals set under the Act<sup>43</sup>. Both the Union and State Governments share the concurrent responsibility of financial burden.<sup>44</sup> The success and the failure of the Right to Education Act will depend upon how the Act is implemented and whether there is allocation of adequate funds for implementation of the Act.<sup>45</sup> There is a pressing need to ensure transparency and accountability at the implementation level.<sup>46</sup>

<sup>38</sup> See the Preamble of the RTE Act which provides that "An Act to provide free and Compulsory education to all children of the age between 6 to 14 years"

<sup>39</sup> See the Right of children to Free and Compulsory Education Act, 2009 available at <http://eoc.du.ac.in/RTE%20-%20notified.pdf> (accessed on Sept 13, 2016)

<sup>40</sup> NishaThapliya, *Unacknowledged Rights And Unmet Obligations: An Analysis of The 2009 Indian Right To Education Act*, 13 ASIA-PACIFIC JOURNAL ON HUMAN RIGHTS AND THE LAW 65, 83-85 (2012)

<sup>41</sup> Udai Raj Rai; *supra* note 36, at 635

<sup>42</sup> Prachi Srivastava & Claire Noronha, *Institutional Framing of the Right to Education Act Contestation, Controversy and Concessions* XLIX No 18 E.P.W51, 52-53

<sup>43</sup> Praveen Jha & Pooja Parvati, *Right to Education Act 09-Critical Gaps and Challenges* VOL XLV NO 13E.P.W(2010); Also See Pankaj S Jain & Ravindra H Dholakia, *Feasibility of implementation of Right to Education Act* Vol XLIV No. 25 E.P.W 38, 40-41 (2009)

<sup>44</sup> Section 7(1) of the RTE Act 2009 states that "The central government and the state government shall have concurrent responsibility for providing funds for carrying out the provisions of this Act."

<sup>45</sup> Dr. Sangita Dubey & ShitiKanth Dubey, *Right to Education-Challenges and Judicial Response* Vol XXXVIII (3) I. B. R. 63, 63 (2011) A number of challenges like vacancy of teachers, appointment of teachers with adequate qualifications, infrastructural facilities, commercialization of education in India are some of the groom realities which cannot be ignored when the implementation question of Right to Education Act is considered.

<sup>46</sup> Dr. Rattan Singh, *The Right to Free and Compulsory Education Act in*

In *Avinash Mehrota v. Union of India*<sup>47</sup>, the Supreme Court established the link between the constitutional right to education and right to adequate environment. A Public Interest Litigation was filed before the Supreme Court where 93 children were burnt live due to a fire caused in a private school at Tamil Nadu. The Court asserted that failure to adopt proper fire safety measures at school was violation of Art 21-A read with right to life under Art 21. The Court stated that: ".....educating a child requires more than a teacher and a blackboard, or a classroom and a book. The right to education requires that a child study in a quality school, and a quality school certainly should pose no threat to a child's safety." The conjoint reading of Article 21-A and Article 19 (1)(a) has been also construed to give the right to access primary education to all children in the medium of their choice.<sup>48</sup> The judgments of the three-Judge Bench in *Society for Unaided Private Schools of Rajasthan v. Union of India*<sup>49</sup> and the Constitution Bench decision of the Supreme Court in *Pramati Educational and Cultural Trust v. Union of India*<sup>50</sup> are significant decisions relating to extent of application of right to education. The RTE provided a quota reservation of 25 per cent of school seats to be reserved for children of weaker and disadvantage sections. This was challenged in *Society for Un-aided Private Schools of Rajasthan v. Union of India*.

The private schools challenged the validity of the law on two grounds- firstly, the RTE Act violated the right to carry any profession or trade or occupation under Article 19(1)(g) of the Constitution and secondly, it violated the right to minority institutions to establish and administer the minority institutions under Article 30(1).<sup>51</sup> The 165<sup>th</sup> Law Commission Report of India<sup>52</sup> and the proposed draft of the Constitution (Eighty-Third) Amendment Bill provided for non-inclusion of unaided institutions under the regulation the right to education.<sup>53</sup> The Supreme Court with a majority 2:1 held that the RTE Act 2009 is constitutionally valid. The Court said that the Act applied to all government controlled schools, government aided schools which included the minority schools and private unaided non-minority school but did not apply to unaided minority schools. The obligation is on the State to provide free and compulsory education to all children of specified age but the manner in which State is to discharge the obligation has been left to the State to determine by law. Court examined the question that whether the RTE Act 2009 violates article 19(1)(g) of the Constitution which guarantees every citizen right to carry any trade, business or occupation. The right to establish an

*India-A transmission to required Education Zone* Vol XXXVIII(3) I.B.R 88, 109 (2011)

<sup>47</sup> (2009) 6 SCC 398

<sup>48</sup> *Associated Managements of Primary and Secondary Schools in Karnataka v. State of Karnataka* (2008) 4 Kar LJ 593

<sup>49</sup> (2012) 6 SCC 1

<sup>50</sup> (2014) 8 SCC 1

<sup>51</sup> See Article 30 (1) of the Constitution of India states that "All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice"

<sup>52</sup> THE LAW COMMISSION OF INDIA, 165<sup>TH</sup> REPORT: FREE AND COMPULSORY EDUCATION FOR CHILDREN (1998), available at <http://Lawcommissionofindia.Nic.In/101-169/Report165.Pdf> (accessed on Sept 20, 2016)

<sup>53</sup> The Constitution (Eighty-Third) Amendment Bill, 1997. Art 21A(3) provided that "The State shall not make any law, for free and compulsory education under Clause (2), in relation to the educational institutions not maintained by the State or not receiving aid out of State funds." Even in *Unni Krishnan* judgement, the Supreme Court laid down that no private institution can be compelled to provide free services. However, there was strong disagreement with this regard by various experts for keeping private institutions outside the purview of the Act.

educational institution has been recognized as a fundamental right within the meaning of Article 19(1) (g) which is subject to reasonable restrictions under Article 19(6).<sup>54</sup> The constitutional obligation of the State to provide for free and compulsory education to the between age of 6-14 years is co-extensive with the Fundamental Right guaranteed under Article 19(1) (g) to establish an educational institution.<sup>55</sup> The State can regulate by law the activities of the private institutions by imposing reasonable restrictions under Article 19(6). Therefore, the reservation imposed on private unaided non-minority school under Section 12 (c)<sup>56</sup> of the RTE Act is a reasonable restriction under Article 19(6) of the Constitution. Regarding the validity and applicability of the RTE Act, 2009 to unaided minority schools, the Court stated that 2009 Act and in particular section 12(1) (c) and section 18(3) of the Act infringes the fundamental freedom guaranteed to unaided minority schools under Article 30(1). The imposition of the reservation on the minority unaided schools would change their character and would violate their minority rights.

J. Radhakrishnan in dissent said that the RTE Act shall not apply to the unaided schools whether minority or non-minority.<sup>57</sup> According to him, RTE Act has in itself constitutionally impermissible procedure to give effect to the object of social inclusiveness. Legislature cannot under the guise of interest of general public “arbitrarily cast burden or responsibility on private citizens running a private school, totally unaided”. State cannot outsource its constitutional obligation of the State to private unaided educational institution. The majority judgement, making the distinction between aided and unaided institutions added to the judicial conundrum to the right to education and minority jurisprudence.<sup>58</sup> In *Pramati Cultural and Educational Trust v. Union of India*<sup>59</sup>, five judged bench exempted all minority institutions from the purview of the RTE Act. The RTE Act imposed legal obligation on the unaided minority schools to admit children belonging to weaker sections and disadvantaged groups in the neighbourhood who need not be members of the minority community which has established the school.<sup>60</sup> The Court stated “that if the 2009 Act is made applicable to minority schools, aided or unaided, the right of the minorities under Article 30(1) of the Constitution will be abrogated.” It held that the majority judgment in *Society for Unaided Private Schools of Rajasthan v. Union of India* which made the applicability of the 2009 Act to the minority aided institution was not correct. Therefore, the provisions of the RTE Act, 2009 which is applicable to minority institutions

<sup>54</sup> See *T.M.A. Pai Foundation and P.A. Inamdar* judgements

<sup>55</sup> The Court stated that “it is clear that the primary obligation of the State is to provide for free and compulsory education to children between the age of 6 and 14 years and, particularly, to children who cannot afford elementary education. Further, every citizen has a right to establish and administer schools under Article 19(1)(g) so long as the activity remains charitable. Such an activity undertaken by private schools supplements the primary obligation of the State”.

<sup>56</sup> Article 12(c) of the RTE Act 2009 provides that “For the purpose 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 percent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory education till its completion.

<sup>58</sup> Aishwarya Ayushmaan & Deepthi Bavirisetty, *Right To Education: Edging Closer To Realisation Or Furthering Judicial Conundrum?* 26 NAT'L L. SCH. INDIA REV. 87, 98-99(2014)

<sup>59</sup> *Supra note 50*

<sup>60</sup> Section 12 (1) (c) and Section 2 (n)(1) of the Right to the Children to Free and Compulsory Education Act, 2009

whether aided or unaided under Article 30(1) of the Constitution was *ultra vires* the Constitution. The decision in the *Pramati* Case has unraveled the judicial incongruity of applicability of the right to education Act.

## Conclusion

The Indian judiciary has taken an affirmative stance holding right to education as an implied right under the right to life and has expanded the goal of universal education. The decisions in *Mohini Jain* and *Unni Krishnan* judgements accentuated the core responsibility of the State to enforce the socio-economic right and significantly paved way for the historic Constitutional Amendment, 2002 with insertion of Article 21-A and the enactment of the RTE Act, 2009. The Courts have time and again emphasized the applicability of the right to education up to primary level and deferred to include higher and professional education and have also stressed upon providing quality education by the State. Furthermore, the judicial conundrum on minority jurisprudence and applicability of the RTE Act is now settled. The Constitutional Bench decision of the Supreme Court in *Pramati Educational and Cultural Trust* is important in exempting the minority educational institutions from the purview of the RTE Act in order to protect the minority character of the institutions. Courts as guardian of the Fundamental Rights have played an essential role in fulfilling the goal of universal education and transcended the ideals of education rights into reality. A sturdy right based approach blended with judicial creativity has created a constructive platform for the effective realisation of the right to education in India.

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