

RIGHT TO EDUCATION IN INDIA AS A FUNDAMENTAL RIGHT –THE ROAD TRAVELLED AND THE JOURNEY AHEAD

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INTRODUCTION

India is a young country that dreams for its youth. This country after getting independence from the colonial rule for hundreds of years, has adopted democracy as a form of government.¹ Democracy which is alive in its very form in India, believes in giving independence to the people with a belief that the foundation of a representative democracy is an informed and educated electorate. But India being the most diverse country, has a vast part of the multitude as illiterate and living below the poverty line. And if the people are not educated, then this independence would be of no use. The only tool which can be used for the upliftment and progress of such diverse communities is education.² In other words, education and educated citizens is the pre-condition for enjoyment of the right, understand its content and importance. Without education, the Society cannot progress, its citizens cannot grow and a nation cannot excel.³

Education as a tool is the most potent mechanism for the advancement of human beings, not just in India, but all over the world. Education is the basis for development and empowerment of every nation. It emancipates the human beings and leads to liberation from ignorance.⁴ In *Brown vs. Board of education of Topeka*⁵, which is a US Supreme Court case, it was held that

¹Anonymous, *Democracy and Educational Implications*, RARE ECONOMIC NOTES, (February 14, 2012), <http://easyeconomicsforyou.blogspot.com/2012/02/democracy.html>, accessed on July 07, 2016 21:03 pm

² TMA Pai Foundation v. State of Karnataka AIR 2003 SC 355

³ CONSTITUTION ASSEMBLY OF INDIA DEBATES (PROCEEDINGS)- Volume VII November 23, 1948

⁴ Fundamental Right to Education in India

⁵ 347 U.S. 483 (1954)

a quality education was crucial for all children and it was the state's responsibility to ensure educational equality. It was observed by the Court:

"Today, education is the most important function of the State and local Governments. It is required in the performance of our most basic responsibility, even services in the armed forces. It is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days it is doubtful any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."

Perhaps, with this similar kind of understanding, our Constituent Assembly recognised the importance and significance of the Right to Education and made it a constitutional goal, and placed the same under Part IV of the Constitution of India, which is unfortunately not enforceable in the court of law. But, later in the decade of 90s, the Judiciary realised the uttermost importance of Right to Education and showed its keen interest in providing free and compulsory education to all the children below the age of 14 years. The Apex court in its different judgments held that the right to education is a fundamental right under Article 21 of the Constitution of India as it directly flows from Right to Life.⁶ Spurred by the landmark judgment in the case of Unnikrishnan⁷ and different conventions and treaties signed by the Government of India, added by the public demand to enforce Right to Education, the Parliament worked towards bringing a constitutional amendment to make education as an exclusive fundamental right. This led to the 86th amendment of December, 2002 which inserts Article 21A making Right to free and Compulsory Education, a fundamental right under part III of the Constitution of India.

Thus, this paper is a humble attempt to analyse the journey of the 'Right to Education in India' from the time of the inception of the Constitution till present, especially the jurisprudential development of this Right to education as a fundamental right in India. This paper along with analysing different judgments also focuses on Constitutional Assembly Debate on education, different international treaties on Education and views of different jurists on right to education,

⁶ Mohini Jain vs. State of Karnataka, (1992) 3 SCC 666

⁷ Unni Krishnan J.P vs. State of A.P, (1993) 1 SCC 6

etc. It also aims to analyse the views of different activists after 7 years of the enactment of Right to Education Act, 2009 and pin pointing the flaws in its implementation.

BACKGROUND OF THE ‘RIGHT TO EDUCATION’

This chapter will throw light on the background of Right to Education in India in the context of Directive Principle of State Policy and the Constitutional Assembly Debate which will also analyse different Articles mentioned under DPSPs which talks about the right to education, either directly or indirectly.

Right to Education was extensively discussed and debated in the Constituent Assembly during its drafting. The makers of the constituent assembly were aware of the importance of education and the need for the state to make provisions to foster education among a largely illiterate populace. At the same time, they were pragmatic enough to understand the enormity of the task to implement it, especially in the Indian context at that period of time.⁸

The sub-committee of the constituent assembly on Fundamental Rights included the right to education as the fundamental right⁹ but the advisory committee of the constituent assembly rejected this proposal, reason being the cost in providing free education and placed in the category of “non-justifiable fundamental rights”, i.e Directive Principle of State Policy.¹⁰ The debate also included discussion on the phrase “Every citizen is entitled as of right to free primary education and it shall be the duty of the State to...” which seems more like a fundamental right which in reality is a directive principle, therefore, finally replaces it with “The State shall endeavour to...” Finally, **Article 45** which has now been amended by the Constitution (Ninety- third amendment) Act, 2003 provided that the State should endeavour to provide free and compulsory education for all children upto the age of 14 years within ten years of the commencement of the Constitution.¹¹ Apart from this provision, **Article 41** directed the State to make effective provision to secure the right to education within the limits of its

⁸ SAMARADITYA PAL, INDIA'S CONSTITUTION ORIGINS AND EVOLUTION, 655 (Lexis Nexis, 2015)

⁹ “*Clause 23-* Every citizen is entitled as of... right to free primary education and it shall be the duty of the State to provide within a period of ten years from the commencement of this Constitution for free and compulsory primary education for all children until they complete the age of fourteen years.”

¹⁰ CONSTITUENT ASSEMBLY OF INDIA DEBATES (PROCEEDINGS)- VOLUME VII (November 23, 1948)

¹¹ SUJATA V. MANOHAR, CONSTITUTIONAL LAW OF INDIA 429, (Eastern Book Company 2010)

economic capacity and development. There was no particular significance in choosing the age of 14 years as the limit at which the State has to provide free and compulsory education for all children to cease.¹² The founding fathers of the nation while drafting the Constitution had put a time- limit, i.e. 25 January 1960, within which the goal set forth in the article was to be achieved. But unfortunately, the Directive Principles remained largely either under-utilised or under-implemented and the goal continued to remain very far from the ground realities. The 10 year mandate remained symbolic of the goals unachieved and the Constituent Assembly as a whole had failed to provide a due share to the children of India. It is in 1993,¹³ when the court read this article into Article 21 and in effect converted it into a fundamental right.

Finally a modified version of this original article¹⁴ was incorporated in Article 21A as a fundamental right by the Constitution (eighty-sixth amendment) Act, 2002. This same amendment changed this article in the form which we see at present in the amended constitution.

In the forthcoming section, the paper tries to capture the highlight of Right to Education in an international sphere which played a major role in bringing RTE as a fundamental right.

INTERNATIONAL STANDARDS ON RIGHT TO EDUCATION

The Right to Education was marked a priority on the agenda of the international community since right to education is not only a human right in itself but also is quintessential for the exercise of all other human rights.¹⁵ A number of treaties on human rights which are accepted and recognized internationally, identifies right to education as a fundamental aspect for development and social transformation of any nation. There are large numbers of problems which cannot be solved until we do not address the right to education. Therefore, the **Universal Declaration of Human Rights of 1948** has laid down Right to education as a basic human right under *Article 26*. This article lays down that –

¹² MAHENDRA PAL SINGH, CONSTITUTION OF INDIA 381, (Eastern Book Company 2013)

¹³ After 43 years of the enactment of the Constitution of India

¹⁴ Article 45 of THE CONSTITUTION OF INDIA, 1950 before amendment

¹⁵ Elumalai & Deepthi S. Nair, *Human Rights vis-a-vis Right to education in Indian Context: Problems and issues*, WIKIEDUCATOR, pp. 1, http://wikieducator.org/images/7/78/SJ_Elumalai.pdf, accessed on July 17, 2016 09:06 pm

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.

Apart from UDHR, right to education is affirmed, protected, and promoted via number of treaties and conventions. India, also being a democratic nation ratified to most of the treaties and conventions. India being a member of the **World Conference on Education for All** held in Jomtien, Thailand in 1990, took a pledge to ensure education for all by the year 2000.¹⁶ To highlight India's drive towards modernity and recognition, India also became signatory to the **UN Convention on the Rights of the Child** in 1992.¹⁷ Article 28 of this Convention clearly states:

“State parties recognize the right of the child to education and with a view to achieving this right progressively, they shall in particular (a) make primary education compulsory and available free to all.....”¹⁸

Being a part of this agreement, India was also committed to review its laws and bring them in line with the Convention. Therefore, after this convention, free and compulsory education has been reinforced in the provisions of the Right of Children to Free and Compulsory Education (RTE) Act (2009), which came into effect in India on 1 April 2010,¹⁹ enshrining in law for the first time the rights of all Indian children aged between six and 14 years to free and compulsory elementary education regardless of caste, class, gender, etc.²⁰

¹⁶ Ramakant Rai, *Challenges in implementing the RTE Act*, INFO CHANGE INDIA, (MAY 2012), <http://infochangeindia.org/education/backgrounders/challenges-in-implementing-the-rte-act.html>, accessed on July 24, 2016 - “However in 1998, when UNESCO and other agencies reviewed India’s position in achieving these goals, it was found that very little progress had been made. The country was among those at the bottom of the list.”

¹⁷ Amitkumar S. Gagare, *Problems in implementing the RTE Act*, RESEARCH FRONT (2015), <http://www.researchfront.in/15%20Special%20Issue%205/16.pdf>, accessed on July 15, 2016 05:20 pm, pp. 77

¹⁸ Nalini Juneja, *Constitutional amendments to make education a fundamental right*, pp.41 <http://www.nuepa.org/Download/Publications/Occasional%20Paper-33njuneja.pdf> (accessed August 09, 2016)

¹⁹ Ibid.

²⁰ Seema S. Ojha, *Implementing Right to Education: Issues and Challenges*, 1 RESEARCH JOURNAL OF EDUCATIONAL SCIENCES 1, 1-7 (May 2013)

RIGHT TO EDUCATION AND JUDICIAL DECISIONS

The Right to Children to Free and Compulsory Education Act, 2009 (RTE Act) has a long and chequered history, having been subjected to numerous rounds of heated debate in Constituent Assembly as well as Loksabha and philosophical and semantic alterations. When India got independence from British rule, education was seen as one way out of darkness and towards modern nation building. Therefore, between 1950 and 1990, Indian legislators made several attempts to shape the education system of India by defining its scope and responsibilities for central and state government.²¹ There was a **National Policy on Education** in the year 1986 which made several efforts to look into this issue. Each of such moves brought the nation towards its highly ambitious goal regarding education but it was still mired in oblique language as the National Policy on Education never talked about making education compulsory making it the biggest drawback of the policy. Then, it was in the year 1990s, when a sudden revival of interest was observed among the people in the matter of securing the right to free and compulsory education for all children in India aged between 6-14 years when India took part in the *World Conference on education for all*, held in Thailand and the official recommendation, in the form of report²², was given by the **Acharya Ramamurti Committee** for the inclusion of a fundamental right to education.²³ This committee reviewed the 1986 policy and concluded that our country and the government failed to address the most fundamental problem of our education system.²⁴ Thereafter, several political as well as policy level changes influenced the course of free and compulsory education but nothing of these had any impact in the reality.

Then, it was the Judiciary which showed keen interest in this subject and came forward by giving several judgments which spurred the need of an hour. The Hon'ble Supreme Court of India first recognised the right to education as a fundamental right in the case of **Bandhua Mukti Morcha v Union of India**²⁵ and began its engagement by explaining the importance of education for children- in the context of children who are enslaved in the carpet industry and

²¹ Supra note 17

²² Report titled “*Towards an Enlightened and Humane Society – NPE 1986 – A Review*”

²³ Anonymous, *Right to Education*, AZIM PREMJI FOUNDATION, http://www.azimpremjifoundation.org/Right_to_Education, accessed July 27, 2016 06:26 pm

²⁴ Retrieved from http://www.ncert.nic.in/oth_anoun/npe86.pdf, accessed on July 25, 2016 08:08 pm

²⁵ (1984) 3 SCC 161

therefore deprived of the right to education.²⁶ And later, this Court broadened its ambit, and explicitly gave two landmark judgments, *Mohini Jain v. State of Karnataka*²⁷ and *Unnikrishnan v. State of Andhra Pradesh*²⁸, in which it observed that the Right to Education is a fundamental right that directly flows from the basic right of Right to live under Article 21 of the Constitution of India.

Bandhua Mukti Morcha v. Union of India

In the case of Bandhua Mukti Morcha, it was held by the Apex Court that the right to life guaranteed by Article 21 does take in 'educational facilities'²⁹ and it is the solely the duty of the state to provide basic education to children who are working in different industries or factories and the court directed the government to take such steps which ensures education to all the children.³⁰ Justice P.N. Bhagwati while affirming the proposition that Article 21 must be construed in the light of Directive Principles of State Policy observed:

The right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity.

Mohini Jain v. State of Karnataka

In the case of *Mohini Jain vs. State of Karnataka*,³¹ which was a case of Public Interest Litigation, the apex court actually enforced the right to education. This case is popularly known as '*capitation fee case*' in which the court held that the right to Education is a fundamental

²⁶ ALAN RICHTER, CHERYL SAUNDERS & DENNIS DAVIS, AN ENQUIRY INTO THE EXISTENCE OF GLOBAL VALUES: THROUGH THE LENS OF COMPARATIVE CONSTITUTIONAL LAW 229-232 (Bloomsbury 2015), <https://books.google.co.in/books?id=l9rnCQAAQBAJ&printsec=frontcover#v=onepage&q&f=false>

²⁷ *Supra* note 6

²⁸ *Supra* note 7

²⁹ Para 42, *supra* note 7

³⁰ Dr. Sanjay Sindhu, *Fundamental Right to Education in India : An Overview*, 3 GLOBAL JOURNAL OF INTERDISCIPLINARY SOCIAL SCIENCES 93, 92-95 (September 2014)

³¹ *Supra* note 6

right which directly flows from Right to Life under Article 21 of the Constitution which cannot be denied by any authority to any citizen by charging higher fee, also known as captivation fee.

In this case, the petitioner had challenged the validity of the notification issued by the government under the Karnataka Education Institution (Prohibition of Captivation Fee) Act, 1984 which was passed to regulate the tuition fee to be charged by the private medical colleges in the state.³² The division bench of two judges headed by **Justice Kuldip Singh**, held that the right to education at all level is a fundamental to citizen under Article 21 of the constitution and charging captivation fee for admission to education institutions is illegal and amount to denial to citizen's right to education and also violative of Article 14 being arbitrary, unfair and unjust. It was analysed in this case that when we look into the wordings of Preamble which states "Justice – social, economic and political", "equality of status and opportunity" and assures dignity of an individual, it becomes very evident that all these rights and freedoms can be achieved only when the majority of the people are literate and knows about their rights. The framers of the Constitution were aware that more than seventy percent of the people, to whom they were giving the Constitution of India, were illiterate.³³ They knew that the objectives flowing from the preamble cannot be achieved and shall only remain on paper unless the people in the country are educated and the justice promised by our Preamble remains an illusion for the millions of people who are illiterate. Article 41 which recognises the individual's right to education, though not enforceable, was not intended to be a mere pious declaration. Therefore it has been said in this case:

Without making "right to education" under Article 41 of the Constitution a reality the fundamental rights under Chapter III shall remain beyond the reach of large majority which is illiterate.

It is no doubt that when Article 21, 38, 39 (a) (f), 41 and 45 are read cumulatively, it becomes clear that the framers of the Constitution made it obligatory for the State to provide education for its citizens, especially when Article 21 explicitly talks about the dignified life to everyone. An individual cannot be assured of human dignity unless his/her personality is developed and the only way to do that is to educate them. With reference to this, the court stated:

³² *Supra* note 3

³³ *Supra* note 8, at 675

"Right to life" is the compendious expression for all those rights which the Court must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct which the individual is free to pursue. 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 endeavour to provide educational facilities at all levels to its citizens."³⁴

And for this purpose, the directive principles which are fundamental in the governance of the country cannot be isolated from the fundamental rights guaranteed under Part III. These principles have to be read into the fundamental rights. Both are supplementary to each other. The State is under a constitutional mandate to create conditions in which the fundamental rights guaranteed to the individuals under Part III could be enjoyed by all.³⁵

Compiling everything mentioned in the judgment, it was said that the "Right to Education", is concomitant to the fundamental rights enshrined under Part III of the Constitution. The State is under a constitutional-mandate to provide educational institutions at all levels for the benefit of the citizens and the educational institutions must function to the best advantage of the citizens. Opportunity to acquire education cannot be confined to the richer section of the society.

Unnikrishnan v. State of Andhra Pradesh

In the given case, the Apex Court was asked to examine the correctness of the decision given by the court in *Mohini Jain* case. The five judge bench by 3-2 majority appreciated the importance of education which was rightly stressed in the case of *Mohini Jain* and acknowledged the observation in the *Mohini Jain* case that without education being provided to the citizens of this country, the objectives set forth in the Preamble to the Constitution cannot be achieved. The Constitution would fail.³⁶ And it was held that the Right to Education is a fundamental right as 'it directly flows' from the Right to Life under Article 21 of the Constitution of India. **Justice Reddy** along with other judges observed:

Right to education is not stated expressly as a Fundamental Right in Part III of the Constitution of India. However, having regard to the fundamental significance of education

³⁴ *Supra* note 23

³⁵ *Supra* note 8, at 676

³⁶ *Supra* note 7

to the life of an individual and the nation, right to education is implicit in and flows from the right to life guaranteed by Article 21.

But the Mohini Jain case was partly overruled in the sense that the right to free education is available only to children upto the age of 14 years and providing further education after 14 years is an obligation of the state which is subject to the limits of its economic capacity.³⁷ With regard to this, the Apex Court in para V of this case observed:

The citizens of this country have a fundamental right to education. The said right flows from Article 21. This right is, however, not an absolute right. Its content and para meters have to be determined in the light of Articles 45 and 41. In other words every child/citizen of this country has a right to free education until he completes the age of fourteen years. Thereafter his right to education is subject to the limits of economic capacity and development of the State.

While adopting the reasoning and logic adopted in the case of Bandhua Mukti Morcha in this case with reference to the fundamental significance of education to the life of an individual and the nation, the Apex Court by rightly and harmoniously construing the provision of Part III and Part IV of the Constitution has made Right to Education, a basic fundamental right and hold that:

That the right to education has been treated as one of transcendental importance in the life of an individual has been all over the world. Without education being provided to the citizen of this country, the objectives set forth in the Preamble to the Constitution cannot be achieved. The Constitution would fail.

With respect to Part IV being non enforceable in the court of law, it was said that the right to education which is implicit in the right to life and personal liberty guaranteed by Article 21 must be construed in the light of the directive principles in Part IV of the Constitution. Right to Education was explicitly mentioned in several articles under part IV of the Constitution. **Article 41** says that the "*State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance*

³⁷ *Supra* note 30

in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want".³⁸

Article 45 says that *"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".³⁹*

Article 46 commands that *"the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation".⁴⁰*

These three Articles- 41, 45 and 46 are designed to achieve the said goal among others. It is in the light of these Articles that the content and parameters of the right to education have to be determined.

Right to education, understood in the context of Articles 45 and 41, meant: (a) every child/citizen of this country has a right to free education until he completes the age of fourteen years and (b) after a child/citizen completes 14 years, his right to education is circumscribed by the limits of the economic capacity of the state and its development.

The importance of education was emphasised in this case by quoting 'Neethishatakam' by Bhartruhari (First Century B.C.)⁴¹:

Education is the special manifestation of man; Education is the treasure which can be preserved without the fear of loss; Education secures material pleasure, happiness and fame; Education is the teacher of the teacher; Education is God incarnate; Education secures honour at the hands of the State, not money- A man without education is equal to animal."

³⁸ The Constitution of India, 1950

³⁹ *Ibid*

⁴⁰ *Ibid*

⁴¹ Retrieved from <http://www.speakingtree.in/blog/neethishatakam-by-bhartruhari-first-century-bc-in-the-following-words-translation>, accessed August 13, 2016 07:45 pm

ARTICLE 21A AND THE SUBSEQUENT FOLLOW-UP

Pre-Amendment Journey:

A number of efforts were initiated in the country to make elementary education a fundamental right of every child.⁴² The enactment of Right to Education was definitely not a cake walk. It took decades for our legislators to bring the Right to Education Bill in the Parliament even after the *Unnikrishnan* case clearly stated Right to Education as a fundamental right. The 93rd Constitution Amendment Bill was passed by the Lok Sabha, the lower house of the Parliament, on November 27, **2001** and then with the passing of the Bill by the Rajya Sabha, the upper house of the Parliament, on May 14, **2002**, a major stride was witnessed in the evolution of the 93rd Constitution Amendment Bill into the 86th Constitution Amendment Act which finally tailored this right into existence by inserting Article 21A in the part III of the Constitution of India making the right to education a fundamental right.⁴³ With this Act, it was for the first time since the framing of the Constitution that a fundamental right had been added to the Constitution. Befittingly, for India, with the largest number of illiterates in the world, this first edition to the Fundamental Rights list relates to education. The Indian Constitution now guarantees eight years of elementary education to each and every child in the country irrespective of any caste, class, economic position, race, gender, etc.⁴⁴

A Journey towards legislation:

Now, this Article 21A⁴⁵ places the onus of the provision of this right onto a follow-up legislation, which will, in different ways, shape the future of Indian education, and which arose a lot of questions before this country regarding the implementation of this Right and by whom and in what manner the Right should be implemented.⁴⁶

This follow up legislation is nothing but the ‘Free and Compulsory Education for Children Bill, a first draft of which was prepared in October, **2003** and posted on the government website, inviting comments and suggestions from the public at large. Subsequently, taking into account

⁴² *Supra* note 18, at 1

⁴³ *Ibid*

⁴⁴ *Supra* note 30

⁴⁵ “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.”

⁴⁶ *Supra* note 46, at 42

the suggestions received on this draft, a revised draft of the Bill entitled Free and Compulsory Education Bill, **2004**. After this, in the year of **2005**, the CABE (Central Advisory Board of Education) committee drafted the 'Right to Education' Bill and submitted to the Ministry of HRD. It received much opposition due to its mandatory provision to provide 25% reservation for disadvantaged children in private school but the CABE held this provision as a significant prerequisite for creating a democratic and equalitarian society.⁴⁷ MHRD then sent this Bill to NAC, where Mrs. Sonia Gandhi who was the chairman sent the bill to PM for his assent. In **2006**, the finance committee along with the planning commission rejected the Bill citing the lack of funds and a Model bill was further sent to states for making the necessary arrangements.⁴⁸ Finally, Right of Children to Free and Compulsory Education Bill, 2008 was passed by the Lok Sabha in **2008** and was finally placed before the Rajya Sabha which passed it in July **2009** and this act finally came into force on April 1, **2010**.⁴⁹

Features of Right to Education Act:

The RTE Act proved to be a milestone which ensures free and compulsory education to all children between the age of 6-14 years.⁵⁰ It was the first time in the history of India when a law was brought into force by a speech by the Prime Minister.⁵¹ Introducing the RTE Act in Parliament, Prime Minister Manmohan Singh said:

*"We are committed to ensuring that all children, irrespective of gender and social category, have access to education — an education that enables them to acquire the skills, knowledge, values and attitudes necessary to become responsible and active citizens of India."*⁵²

According to this new law, every child has a *right to life, shelter, and education* in India. The law's significance lies in the fact that it is not just a recommendation, it is a *legal right*.⁵³ This Act intends to provide full time elementary education to every child in a formal school, which satisfies certain essential norms and standards. And for that purpose, it has number of

⁴⁷ Dr. Mohd. Zubair Kales & Babu Lal Thakur, *Challenges Confronting Right to Education Act-2009 and Implementation*, 2 EXCELLENCE INTERNATIONAL JOURNAL OF EDUCATION AND RESEARCH 21, 21-29 (2014).

⁴⁸ Anonymous, Right of Children to Free and Compulsory Education Act, 2009 (Right to Education Act), <http://vikaspedia.in/education/policies-and-schemes/right-to-education/right-to-education-act>

⁴⁹ *Supra* note 23

⁵⁰ Also see, Section 3 of the RTE Act, 2009

⁵¹ *Supra* note 47

⁵² *Supra* note 17

⁵³ *Ibid*

provisions laid down in the act itself which aims to attain the objective of this legislation. Some of these provisions/features are as follows:

- It is the first legislation in the world that puts the responsibility of ensuring enrolment, attendance and completion on the government.⁵⁴ It serves as a building block to ensure that every child has his or her right (as an entitlement) to get a quality elementary education, and that the State, with the help of families and communities, fulfils this obligation.
- No child shall be liable to pay any kind of expenses, be it direct fee (school fees) or indirect cost (uniforms, textbooks, mid-day meals, transportation) which may prevent him or her from pursuing and completing elementary education.⁵⁵ The government will provide schooling free-of-cost until a child's elementary education is completed.
- If a child above 6 years of age has not been admitted in any school or could not complete his or her elementary education, then that child should be admitted in a class which is appropriate to his or her age.
- All the Government schools should be managed by the School Management Committee.⁵⁶
- Private education institutions have to reserve 25% of their seats for children from weaker sections⁵⁷ and disadvantaged groups⁵⁸, starting from Class I till they reach the age of 14 years.
- A strict criterion for the qualification of teachers is also one of the important provisions. There is a requirement of a teacher student ratio of 1:30 at each of these schools that ought to be met within a given time frame. These school teachers need to have adequate professional degree within 5 years or else they will lose the job.
- The school needs to have certain minimum facilities like playground and proper infrastructure, etc.⁵⁹ School infrastructure, if in case has any problem, needs to be improved in three years, else the recognition shall be cancelled.

⁵⁴ *Supra* note 47, at 22.

⁵⁵ *Supra* note 48

⁵⁶ This Committee shall comprise of local authority officials, parents, guardians and teachers, who shall be responsible to form School Development Plans and monitor the utilization of government grants and the whole school environment.

⁵⁷ Section 2(e) of the Right to Education Act, 2009

⁵⁸ Section 2(d) of the Right to Education Act, 2009

⁵⁹ Section 8(d) of the Right to Education Act, 2009

- This act also contains specific provisions for disadvantaged groups, such as child labourers, migrant children, children with special needs, or those who have a disadvantage owing to social, cultural, economic, geographical, linguistic, gender or any such factor.
- The Central and the State Government shall have concurrent responsibility for providing funds for carrying out the provisions of this Act.⁶⁰
- This Act also provides for a special organization, NCPCR (National Commission for Protection of Child Rights), an autonomous body to monitor the implementation of the act and address all the grievances related to this Act.

IMPLEMENTATION OF THE RIGHT TO EDUCATION ACT, 2009

No doubt that the RTE have the far reaching consequence for implementing the mission of free and compulsory elementary education. But, this task, however, is not much easy as it appears. Even after 7 years of enactment of the Right to Free and Compulsory Education Act 2009, our country is not able to achieve its goal. Even today, India, which is a home to 19% of the world's children and about one-third of its population, is below 18 years of age, a worried some 1/3rd of the total population is illiterate which in itself is a very shocking fact.⁶¹ The main reasons which pose daunting challenges for executing RTE of this result is nothing but prevailing socio-cultural and economic ground realities.

The Government today is facing a lot of challenges in implementing the RTE Act, some which have contemporary relevance and thus highlighted below:

- **Controversies between the Central and the State Government:** There are controversies between the Central and the State Government regarding the implementation of this Act. There are few states and the Union territories which do not adhere to the RTE norms and standards due to financial constraints and therefore not implemented few provisions of the Act.⁶²

⁶⁰ Anonymous, Right to Education Act, (July 09, 2012), <http://www.archive.india.gov.in/citizen/education.php?id=38>

⁶¹ *Supra* note 17, at 77-78

⁶² *Supra* note 47, at 25

- **Out-of School Children:** This basically includes children who have never gone to school as well as out-of-school children who after getting admission and joining the school do not go there for more than three months. The main reason behind these drop outs are poverty, child labour, lack of toilet for girls in school, lack of drinking water facility, lack of playgrounds, lack of teachers, caste and gender discrimination, lack of pre-schooling and inadequate learning tools.

Among all the reasons mentioned above, social biases and gender discrimination is something which pushes all of us to think about the effective implementation of the provisions of this act under such circumstances. It also includes providing education to the children of sex workers which is also a major challenge for our Government.

Every other day we see children working at roadside restaurants, tea stalls, selling balloon and if nothing, begging. Picking up these children and putting them in school in itself a big challenge for the government. It's not just enough to have stringent laws prohibiting child labour, etc but there is a need to change the mind-set of the people who send their children to work as labourers.⁶³

According to the Census of 2001, 8.5 Crore children are out-of school in the country whereas the HRD Ministry puts the number at 8 lakh.⁶⁴ Another statistics says that nearly 92 lakh children have either dropped out from schools or have never been to any educational institution at present.⁶⁵ Now, even if we consider the number given by HRD Ministry which is the least, it's still a huge number and it would be naive to believe that a mere enactment of the RTE Act will magically put all the children into classroom without any action taken by the Government to effectively implement it. It will be binding on part of the local and state governments to ensure that all these children are brought back to schools.

- **Prerequisite of Professionally Qualified Teachers:** Children are entitled not only for education but also for quality education. Quality in elementary education is one of the

⁶³ Anonymous, *Right to Education implemented; Challenges still remain*, DNA, April 1, 2010, <http://www.dnaindia.com/india/report-right-to-education-act-implemented-challenges-still-remain-1366189>, accessed at August 25, 2016 01:23 pm

⁶⁴ *Supra* note 17

⁶⁵ *Supra* note 63

vital issues. For this purpose, the major challenge is to ensure the availability of professionally qualified and committed teachers in sufficient number to impart child-centred education. But unfortunately, the teachers' posts have been lying vacant. There is a shortage of nearly five lakh teachers while there are about three lakh untrained teachers at elementary stage. According to this act, there should be one teacher for every 30 students at elementary level but at present, there are about seven lakh teachers in all the 1.29 million recognised elementary schools in the country. Of them, nearly three lakh teachers are either untrained or under-trained.⁶⁶

- **Setting up of neighbourhood schools:** This is also one of the major challenges which the Government is facing at present. The model rules for the Act state that the government and the local authorities should establish schools within walking distance of one km of the neighbourhood and in case of children for Class VI to VIII, the school should be within a walking distance of three km of the neighbourhood but unfortunately there are uncountable number of villages in India where the children have to walk more than 5 kms to go to their school.⁶⁷
- **Lack of proper infrastructure:** The children who are supposed to stay in school for more than 6 hours need proper facility of toilets and drinking water, but unfortunately the report indicates that 16% of schools don't have toilets and proper facility for drinking water which directly results in the great number of drop outs in the school.⁶⁸ And if we count separate toilet for girl children, the situation would be more horrible.
- **Enrolment of children of Economically Weaker Sections:** The Act (under Section 12) mandates that private educational institutions have to reserve 25 per cent seats for children belonging to weaker sections and disadvantaged groups in the neighbourhood, and must provide them free education, for which these schools will be reimbursed by the government.⁶⁹

However, this provision was challenged in the court of law by the *Society for Unaided Private School* on the basis that imposing regulatory requirements on private schools

⁶⁶ *Supra* note 17, at 80

⁶⁷ *Supra* note 63

⁶⁸ *Supra* note 47, at 27

⁶⁹ *Supra* note 67

violated the right to practice any profession or occupation free from government interference under Article 19 of the Constitution, and the right of minority groups to establish and administer schools under Article 30 of the Constitution.⁷⁰ But in the majority decision by the Court in the Case of **Society for Unaided Private Schools of Rajasthan v. Union of India and Anr**⁷¹, it upheld the constitutionality of Section 12 of the RTE Act and affirmed that private institutions were also subject to the state policies of integration and compensation for historical and social disadvantage experienced by some quarters of society.

The Court said that the authority of the State to fulfil its obligation under the RTE Act can be extended to private, non-State actors. The State has the authority to determine the manner in which it discharges this obligation; it can elect to impose statutory obligations on private schools so long as the requirements are in the public interest.

The Court located its rationale in the importance of education and the fabric of social democracy. It was education that provided for equal opportunities and therefore strengthened the social fabric of democracy.⁷² The Court reasoned that the RTE Act is *“child centric and not institution centric”*, meaning that the provision of education to all children is a priority, irrespective of the fact that it might burden private schools.

But contrary to this, no method is prescribed for selection of those 25% poor children who have to get admission in unaided private schools. They can choose the children in the way that would benefit them. In spite of this, the private schools have been expressing one or the other excuse for not admitting such children. Their general impression is that due to under-privileged children in their schools, they have to compromise discipline and quality of education. The fact is that private schools are elitist and are trying to resist government control over admission. They feel that the rights they are enjoying for years would be taken and the basic character of the private

⁷⁰Retrieved from <http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/India%20Supreme%20Court.%20Society%20for%20Unaided%20Private%20Schools%20v%20India,%202012.pdf>, accessed on August 23, 2016 06:08 pm

⁷¹ (2012) 6 SCC

⁷² Society of Unaided Private Schools of Rajasthan v. Union of India (2012) 6SCC 1.

schools would also be demolished. As a result of this resistance in private schools many states are facing problems in implementing relevant provisions of the RTE Act.⁷³

CONCLUSION

Education, especially the primary and elementary education, is an important part of any civilized society. It is a shame for our country and a matter of great disgrace that even after we got Independence much earlier in 1947, universal primary education remained a distant dream for the poor children of this country till 2002. It was in the year of 2002 when the Government of India took a historic step and passed the Eighty-sixth Constitution Amendment making Right to Education, a fundamental right under Article 21A of the Constitution of India (it is numbered "21A" because this right is thought to flow from Article 21, the fundamental right to life and personal liberty). Undoubtedly, the Judiciary played a very active role in bringing this amendment bill into parliament which can shape the future of our country in a better way. The Apex Court, taking the discourse on the relationship between Part III, the Fundamental Rights, and Part IV, the Directive Principles of State Policy to its logical end, in the case of *Ms. Mohini Jain v. State of Karnataka* in 1992 followed by *Unnikrishnan J. P. v. State of Andhra Pradesh* in 1993 affirmed that Part III and Part IV of the Constitution of India not only mutually supplement and complement each other but one also flows from the other. It was the Apex Court which cemented its strong position as the author of an expansive fundamental right to education by giving these above mentioned judgments. Before the Supreme Court gave these judgments, education was not a fundamental right at all but merely an important time bound provision under the Directive Principles of State Policy.⁷⁴ Therefore, the judgment of *Unnikrishnan J. P. v. State of Andhra Pradesh* is considered to be a path-breaking verdict in the history of the right to education which provided the status of a fundamental right to the right to education for all children until the age of fourteen years.

Again, the RTE Act of 2009 which came much after the provision of free and compulsory education to children was inserted in Article 21A of the Constitution of India, marked a historic

⁷³ *Supra* note 68

⁷⁴ *Supra* 30

moment for the children of India.⁷⁵ But the reality is far away from what it seems to be on paper. The implementation of the RTE Act must be implemented in letter and spirit to fulfil the desired objectives.⁷⁶ There were and there are many challenges in the implementation of this Act, some which are also discussed in detail in the previous chapter. The most important challenge which the Researcher finds, if the ground reality is taken into account, is the abject poverty which further perpetuates child labour and illiteracy. The poverty coupled with population explosion emerges as the root causes of depriving the children their right to education. If our government is really serious about effective implementation of RTE, then the poverty has to be accepted as a biggest challenge.

The masses that are sending their children to government, government aided and local body institutions are socially, political and economically very weak. Now, in an unequal and unjust society such as ours it is not surprising if children are born unequal but it is a crime to deny these children their right to education of equitable quality. The problem doesn't lie in the Constitution but lies in the people that seek to implement it and the masses that are not demonstrating their unity in order to build an empowered and educated nation.

While highlighting the main aspects of the Right to Education Act 2009, it failed to promote a common school system; lack of provisions for children with disabilities; criteria for reservations of seats; financial assistance; provision regarding reimbursement to the private school; lack of clear cut provision for competent authority; assuring quality standards; action against government authorities in case of negligence in services etc.⁷⁷

At last, the Researcher finds the immediate need of an immediate action to be taken by the government to ensure all the basic facilities in the school like proper food, drinking water, sanitation, library, playground etc. Besides these basic necessities the schools must also provide proper teaching by way of visual aids, globes, charts, pictures, through projects etc. They must also ensure co-curricular activities, excursions, paintings, games, dance, music and quizzes to attract the students and help them in their personality development.

⁷⁵ *Supra* note 48

⁷⁶ *Supra* note 30

⁷⁷ *Ibid*