A CRITICAL ANALYSIS OF THE SELECTIVE ENFORCEMENT OF DPSPS THROUGH RIGHT TO EDUCATION

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ABSTRACT

What is unique about the Constitution of India is the dynamism between justiciable Fundamental Rights (Part III) and non-justiciable Directive Principles of State Policy (DPSP). It has been noted in this paper that instead of being enforced directly, transformation of Right to Education (RTE) as a DPSP to a fundamental right, instead, provided a framework of selective enforcement. This is analysed by the paper by noting the Constituent Assembly Debates which begin with the pragmatic move by the framers to place under Article 45 education as a time-limited aspiration because of economic limitations.

To which would extend the so-called judicial alchemy, which elevated education as a set right starting with anything like a broad interpretation in Mohini Jain and onwards to a harmonious one at Unni Krishnan which constrained the role of the state to those children who had not yet attained the age of fourteen. This judicial activism led to the legislature responding to provide to the 86th Amendment (Article 21A) and the RTE Act, 2009.

Much of the discussion in the analysis concerns the constitutional tension between welfare interests of the state and the independence of private institutions. It is argued in the paper that the Supreme Court established an implicit hierarchy of rights in Society for Un-aided Private Schools of Rajasthan v. Union of India. It held that the 25% quota was a reasonable restriction on non-minority schools in the national interest. However, it was an unacceptable violation of the unique right of autonomy granted to unaided minority schools under Article 30. The paper ends with the statement that this selective enforcement is not an exception, but, rather, the product of a dialogic model of constitutionalism where socio-economic rights are traded off against established private rights; it therefore leads to a haphazard and winding implementation process.

CHAPTER I

Introduction

The Indian Constitution has had a distinctive and rather contradictory rights architecture. It splits its charter of freedoms and socio-economic objectives into two sections, the justiciable Fundamental Rights in part III, binding on the courts and the non-justiciable Directive Principles of State Policy (DPSP) in part IV. Although the latter are not enforceable, Article 37 states that they are fundamental in the governance of the country and there is a responsibility on the State to enforce the given principles in the creation of laws, which has brought about a dynamic tension that is usually resolved through the judiciary system.[1] A classic case in point of such constitutional evolution by a long-running judicial-legislative process is the transformation of the Right to Education (RTE), originally a Directive Principle, to a fundamental right.

In this report, it is hypothesised that despite the celebrated transformation of the RTE, having been a major success in constitutional law, it has been found to create a structure of selective enforcement. Such selectivity is not an anomaly but just a characteristic of operationalizing DPSPs in the Indian context. It has been revealed as a complicated, and even contradictory hierarchy of constitutional values, especially on the border of the welfare obligations of the State and the rights of the private actors. The main argument is that the transformation of a DPSP into a justiciable right is not a straightforward binary change to the unenforceable to the fully enforceable. Rather, it is a bargaining game in which the scope, application, and restriction of the right are incessantly challenged and compromised by other provisions in the constitution and the established interests. The final judicial system, which is the case with the landmark decision of the Supreme Court in *Society for Un-aided Private Schools of Rajasthan v. The Union of India*, which affirmed the *Right of Children to Free and Compulsory Education Act, 2009 (RTE Act)* and made a vital carving out of a crucial exception in minority institutions, suggests that the implementation of this fundamental right in India is partial and incomplete.[2]

Statement of Problem

The Directive Principles of State Policy (DPSP) that are imprinted in the Indian Constitution

[1] India Const. art. 37
[2] Society for Unaided Private Schools of Rajasthan v. Union of India, (2012) 6 SCC 1 [hereinafter RTE Case].

are not justiciable in nature but are considered fundamental in governing the country. This paper explores the problem of selective enforcement, where the select few DPSPs are promoted in courts and legislations to enforce them as rights whereas others are kept at arm length. The paper explores how the evolution of the Right to Education (RTE) as a DPSP (were Article 45 originally) and then a Fundamental Right (Article 21A) has not brought a consistent application, but a mottled and patchy legal system based on a case study of the Right to Education (RTE). The issue is presented by *Society for Un-aided Private Schools of Rajasthan v. judgement. Union of India*, which waived the requirement of the RTE Act to provide minority schools under 25 percent quota exemption. This finding shows that the application of the new right is discriminatory against other constitutional rights, and most specifically, the right to profession (Article 19(1) (g)) and the rights of minority institutions (Article 30).

Research Objectives

1. To examine the Constituent Assembly Debates of the framers of the non-justiciability of education.

2. To follow the judicial rise of the RTE as a DPSP into a right that is articulated by the case of Mohini Jain and Unni Krishnan.

3. To look into the formalisation of the right under legislation by the 86th Amendment (Article 21A and the RTE Act, 2009.

4. In order to examine the constitutional irritation between Article 21A and constitutional rights of private institutions in Article 19(1)g and 30 how has been decided in T.*M.A. Pai, P.A. Inamdar, and Society for Un-aided Private Schools*.

Core Issues Addressed

1. How do non-justiciable DPSPs get judicially and legislatively changed into enforceable rights?

2. How does the judiciary relationship with Parliament become dialogic in the implementation of the socio-economic rights?

3. How is a DPSP achieved in balance with other pre-existing rights, including the right

to occupation (Art.19(1)(g)) and minority rights (Art.30), when it has been established as a fundamental right? (Art 21A).

4. Does the affirmative obligation of a State to satisfy a socio-economic right, which the State possesses, possibly be delegated to private, unassisted actors, constitutionally speaking?

Review of Literature

The current research is applied based on the analysis of the following primary and secondary sources:

Constituent Assembly Debates (CADs): These are the main records that are examined to determine the original, pragmatic choice by the framers of locating the right to schooling in the non-justiciary Part IV. The historians of the arguments have been to point out that there has been a conscious rephrasing of the Enforceable draught provision (Every citizen is entitled...), to the aspirational, time-bound Art.45 of the Constitution (The State shall endeavour...), mainly out of a perceived lack of financial means in the new state.

165th Report of the Law Commission of India (1998): This report is reviewed because it officially virgins the judicial mandate and the following constitutional amendment. It *suo moto* resolved the matter after the decision in Unni Krishnan and suggested that a central law should be enacted immediately. Most importantly, it held that making a mandatory admission to private unaided schools of a certain quota of students (implicative of 20) was a thoroughly legitimate form of implementation.

Chowdhury, Rishad (2010) the road less travelled: **Article 21A and the fundamental right to primary education in India:** This paper was composed when Article 21A was being implemented, and it discusses the manner in which the judiciary ought to apply this new fundamental right. It examines the dismal failure to adhere to the timeline of the original 45-year-old document of Article and criticises the 7-year lag in informing the 86th Amendment, thus surrounding the remaining case of the courtroom issues.[3]

[3] Chowdhury, Rishad (2010) the road less travelled: Article 21A and the fundamental right to primary education in India, https://www.commonlii.org/in/journals/INJlConLaw/2010/2.pdf

Surendranath, Anup (2012) "Evaluating the Right to Education Judgement: Analysis of the case of RTE judgement. It dissects the right into two, between the child-focused balancing of Article 21A by the majority, concerning the balancing of Article 19(1)(g) versus Article 19(1)(g) of the constitution by Justice Radhakrishnan. It highlights the main point of dissent that positive socio-economic duties lie only with the State and cannot be projected horizontally on individual, the unassisted institutions.[4]

Ayushmann, Aishwarya and Bavirisetty, Deepthi (2014) Right to Education: Edging closer to realisation or furthering judicial conundrum, National Law School Of India Review: This is a critical review of the RTE case judgement by the Supreme Court. The authors are supportive of the outcome, but they post serious concerns regarding the reasoning used by the majority. According to them, the judicial haste to support the RTE Act ignores some established constitutional norms and poses conflicting differences that only serve to complicate a right that is already stormy.[5]

CHAPTER II

The Framers Vision: Education as a Constitutional Vision.

In a study of the Constituent Assembly Debates, we can see that the decision to put the right to education in Part IV of the Constitution was not the result of a diminished sense of the importance of education in itself, but the result of a sober evaluation of the finances and administrative stringency of the nascent state. The framers struggled to reconcile between the high idealism and the realities of a newly independent country that was confronted with poverty and illiteracy on a broad scale.[6]

The first step taken in the Assembly was to make education a right which was entirely justiciable. The 1st proposal, "Clause 23", was introduced before the Sub-Committee on Fundamental Rights, saying, unequivocally: "Every citizen has a right as of right to free

[4] Anup Surendranath, *Evaluating The Right to Education Judgment*, Law and Other Things (Apr. 15, 2012), https://lawandotherthings.com/guest-post-from-anup-surendrana/.
[5] Ayushmann, Aishwarya and Bavirisetty, Deepthi (2014) Right to Education: Edging closer to realisation or furthering judicial conundrum, National Law School of India Review, https://repository.nls.ac.in/cgi/viewcontent.cgi?article=1126&context=nlsir
[6] 7 Constituent Assembly Debates at 538 (1948). (Pandit Lakshmi Kanta Maitra, member of the Constituent Assembly remarked that "Part IV deals with the directive principles of State policy, and the provisions in it indicate, the policy that is to be pursued by the future governments of the country. Unfortunately, in Art. 36, this directive principle of State policy is coupled with a sort of a fundamental right, i.e. "that every citizen is entitled.... etc.". This cannot fit in with the others.").

primary education and it is the duty of the State to provide primary education free and compulsory...".[7] But within the debates, it was agreed that such a positive right could not be made immediately enforceable, and should be transferred out of the section on enforceable rights, to the section with guiding principles of the state.[8]

Such compromise is clearly evident in the development of the constitutional writing. The aggressive wording of entitlement was dropped in favour of the aspirational wording of what was to become Article 45:

"The State shall strive to provide, within a period of ten years following the commencement of this Constitution, free and compulsory education to all children to the age of fourteen years".[9]

This practical change can be highlighted by the debates of this provision that occurred on November 23, 1948[10] and December 13, 1948[11].

However, the choice made by the framers was not a mere delegation of education to a list of "pious desires". This new Article 45 was the only Article 45 of the total of all Directive Principles to provide a set time frame (10 years).[12] The aspect was an indication that the provision was not an abstract ideal but a time-bound, high-priority, programmatic right, a duty founding obligation on the republic, which was morally and constitutionally entitled to fulfil. The framers made a difference between negative rights that could be imposed by direct action against state intrusion and the positive rights that needed the state to develop the capacity and devote resources to their gradual achievement. The ten-year deadline was a strong constitutional expectation that the State would be proactive to develop this capacity. The legal interventions that followed several decades later can be interpreted, therefore, not as radical departure by the intent of the framers but as the constitutional reaction to the obvious failure of the State to meet this time-limited moral-constitutional duty. The judicial, in a way, intervened when the political branches did not succeed in putting the endeavour into reality during the outlined and long overdue period.

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[7] *Id*. at 538-40.
[8] *Id.*
[9] The unamended Art. 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".
[10] 7 Constituent Assembly Debates at 1019-1022 (1948).
[11] *Id.*
[12] India Const. unamended art. 45.

CHAPTER III

Judicial Alchemy: Transforming a Principle into a Right

The failure of the state in achieving the goal of universal elementary schooling came to grow conspicuous in the decades after the adoption of the Constitution. The result of this legislative and executive inertia was an exceptional effort of judicial activism on the part of the Supreme Court of India in transposing the non-enforceable directive of Article 45 into a fundamental right which is judicial. The so-called judicial alchemy played out in two defining phases and, as such, demonstrated a typical journey of jurisprudence of proclamation and subsequent practicalisation.

The Expansive Interpretation in Mohini Jain

The initial serious concession came with the case of *Mohini Jain v. State of Karnataka* (1992).[13] The case involved objection to the practise of a group of private medical colleges charging students with exorbitant capitation fees; here the petitioner's admission was not based on government-merit admissions. In a landmark decision the practise of charging students, excessive capitation fees by a group of private medical colleges was struck down with an elevation of the right to education into the category of fundamental rights.[14] The reasoning of the Court was a masterpiece of constitutional interpretation because it connected the Title of Directive Principles of State Policy (DPSP) on education directly to the fundamental right of life in Article 21.

This judgement eloquently spoke of the fact that the right to life was a compendious declaration of all those rights which the Court must enforce since they were inherent to dignified enjoyment of life. The Court found that a dignified life which it had earlier asserted was a part of Article 21 could not be met without education. The Court stated in what became an infamous quote that:

‘"Right to life" is the compendious expression for all those rights which the Courts 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

[13] (1992) 3 SCC 666 [hereinafter Mohini Jain].
[14] *Id.*

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".[15]

In this reasoning, the right to education was considered to receive a direct derivation off of the right to life. The decision of the Court to assert that the state recognised the operations of the private educational organisations was radical and maximal which made it sound as though the state accepted this as a right to education at any of the levels without specifically stipulating the limits.

Affirmation and Contraction in Unni Krishnan.

The sweeping and likely unsustainable consequences of the ruling in the case of the *Mohini Jain* inspired the Supreme Court to call a larger five-judge bench to revisit the matter in *Unni Krishnan J.P. vs. state of Andhra Pradesh* (1993).[16] This was the second and more resonant step of the judicial change. The Court in *Unni Krishnan* reaffirmed the main principle of *Mohini Jain*, according to which the right to education is implicit in the right to life specified in Article 21, but also made a substantial qualification to it.

The Court did this by coming up with the new interpretive approach: to interpret the basic right in the Part III in harmony with the directive principles in Part IV. The Court made it that the content and parameters of the right to education of Article 21 were to be determined in the light of articles 41, 45 and 46.[17] By so doing, the Court made a direct importation of the text and limitations of the DPSPs into the newfound basic right. This decision held that the basic right was restricted to free education till he attains age of 14 years which was close to the words used in Article 45. Based on these considerations, the Court upheld the right to education after 14 years as a directive statement that had to be confined to the restrictions of economic capacity and development of the State.[18]

Such a decision by the judiciary established a special form of right a judicial imposed DPSP. The transition from *Mohini Jain* to *Unni Krishnan* reflects one of the most important judicial principles: DPSPs do not have a binding force, but may be used as a potential interpretation

[15] Mohini Jain, supra note 10, ¶12.
[16] (1993) 1 SCC 645 [hereinafter Unni Krishnan].
[17] *Id*. at ¶171.
[18] Unni Krishnan, supra note 13, ¶¶ 171-183.

method to not only broaden, but more to the point, outline the boundaries and borders of the enforceable fundamental rights. This created a mutually beneficial and dynamic relationship between part III and part IV with the judicial body served as the final determinant over the relationships and hence leading to a legislative reaction.

CHAPTER IV

The Legislative's Response:

The conclusive declaration of the Supreme Court in the case of *Unni Krishnan* created a need for legislative action. This legislative procedure was the result of judiciary framing a detailed scheme for admissions and charges in professional colleges, a quasi-legislative act, which compelled the legislative to take action that resulted in constitutional amendment and a new statute which not only helped them reclaim their right to formalize the right in their own terms but also led to additional levels of complexity.

The most significant document between the judicial mandate and the legislation was the 165th Report of the Law Commission of India (1998), who, under the chairmanship of Justice B.P. Jeevan Reddy, largely foretold the future line the conflict of dominance between courts and parliament.[19] The report had a strong recommendation regarding the necessity of enacting the central legislation to enforce the right immediately without the need to wait until a constitutional amendment. It said that the State, as a condition for affiliation or recognition of private unaided institutions to provide free education up to a rate of certain percentage (Suggested starting figure was 20%) of their student body, was "perfectly legitimate" to require that such institutions meet the same obligation it served according to the ratio in the case of *Unni Krishnan*.[20]

The push resulted in the enactment of the Constitution (86th Amendment) Act, 2002. This amendment had three main fundamental changes to the constitution:

1. It added a new Article 21A and it reads thus:

   "The State shall provide free and compulsory education to all children of the age of six

[19] B. P. Jeevan Reddy, Law Commission of India, 165th Report: Free and Compulsory Education for Children (1998),https://cprindia.org/edu_repository/jeevan-reddy-law-commission-165th-report-on-free-and-compulsory-education-for-children/. [hereinafter Jeevan Reddy Report]
[20] *Id.* at 69 ¶6.1.4

to fourteen years in such manner as the State may, by law, determine".[21]

2. It replaced the old article 45 with a new pronouncement, and its focus was changed to, *"The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years."*[22].

3. It introduced a new basic responsibility effortlessly stipulated under Article 51A(k) rendering it a responsibility that the guardians or parents should offer educational chances to their children.[23]

The phrase *"in such manner as the State may, by law, determine"* in Article 21A was in fact a deliberate legislative choice. It was a constitutional counter move to the *Unni Krishnan* judgement, by the legislature of the specification of the *method* and *means* of implementation. This writing was used as the basis of the legal background of the Right of Children to Free and Compulsory Education (RTE) Act, 2009[24].

The right was operationalised under the RTE Act, but it was the most transformative, and most controversial section, in the Act consisting of Section 12(1)(c). Under this section, all privately-run unaided schools were required to admit, at least 25 percent of the strength of their entry level class to, children of the weaker section and disadvantaged group in the neighbourhood and to afford them free and compulsory education.[25] The given reason was to encourage social inclusion and to provide the State with the constitutional responsibility to the stakeholders of the national education. But through enforced imposition of this positive duty on the part of the private actors, the Act predisposed the constitutional conflict to a more difficult one of a *"law versus no law",* but one of whether the mode of its application is "reasonable" or not.

CHAPTER V

State Obligation versus Private Autonomy

The selectivity of the application of the Right to Education came at exactly the newly-codified

[21] The Constitution (Eighty-Sixth Amendment) Act, 2002
[22] *Id.*
[23] *Id.*
[24] The Right of Children to Free and Compulsory Education Act, 2009, [hereinafter RTE Act].
[25] RTE act, sec. 12(1)(c)

duty of the State by Article 21A. Which came into conflict with another parallel jurisprudence which, during the past years had strengthened the independence of the private educational institutions. This split decision of the *Supreme Court in Society for Un-aided Private Schools of Rajasthan v. Union of India (2012)*[26] is the culmination of this conflict. The resolution to this dispute brought forward a reasoned application of a fundamental right depending on the nature of the institution.

The table that follows demonstrates the divergence in the judicial interpretation of the Right to Education and the regulation of the private schools that eventually converged and clashed in the year 2012.

Table 1: Evolution of Judicial Doctrine on the Right to Education and Regulation of Private Institutions

Case	Year	Key Ruling on Right to Education	Key Ruling on Regulation of Private Institutions
Mohini Jain v. State of Karnataka[27]	1992	Right to Education is a fundamental right under Article 21, essential for a life of dignity. Appears to apply to all levels of education.[28]	Private institutions recognized by the State act as its agents and cannot charge capitation fees, which deny the right to education.[29]
Unni Krishnan, J.P. v. State of A.P.[30]	1993	Affirms RTE as a fundamental right under Article 21, but limits it to free education for children up to age 14.[31]	Overrules *Mohini Jain*'s broad prohibition on differential fees. Establishes a detailed regulatory scheme for admissions and fees in private professional colleges.[32]
T.M.A. Pai Foundation v. State of Karnataka[33]	2002	Upholds the *Unni Krishnan* dictum that	Overrules the rigid scheme of *Unni Krishnan*, calling it an "unreasonable restriction." Establishes education as an

[26] Society for Unaided Private Schools of Rajasthan v. Union of India, (2012) 6 SCC 1 [hereinafter RTE Case].
[27] Mohini Jain, supra note 10.
[28] *Id.*
[29] *Id.*
[30] Unni Krishnan, supra note 13.
[31] *Id.*
[32] *Id.*
[33] (2002) 8 SCC 481 [hereinafter T.M.A. Pai].

		primary education is a fundamental right.[34]	"occupation" under Article 19(1)(g), granting significant autonomy to private unaided institutions.[35]
P.A. Inamdar v. State of Maharashtra[36]	2005	Not directly addressed, but builds on the framework of private rights established in *T.M.A. Pai*.	Clarifies that the State cannot impose its reservation policy (seat-sharing) on unaided private institutions (both minority and non-minority).[37]
Society for Un-aided Private Schools v. U.O.I.[38]	2012	Upholds the RTE Act, 2009, which operationalizes Article 21A.[39]	Upholds the 25% reservation in private non-minority schools as a "reasonable restriction" under Article 19(6), but strikes it down for unaided minority schools as a violation of Article 30.[40]

The Rise of Private Autonomy - *T.M.A.* Pai and *Inamda*r.

When the right to education was being formed, another strong counter-narrative, the independence of the privatised educational institutions was becoming judicially strong as well. The eleven judges bench decision in *T.M.A. Pai (2002)*[41] was the turning point. This ruling overruled the scheme framed in *Unni Krishnan*, deeming it to be an *"unreasonable restriction"* on the rights of all private institutions that resulted in revenue loss.[42] The Court essentially redefined the establishment and management of an educational institution as an "*occupation*" protected under the fundamental right to freedom of profession under Articles 19(1)(g).[43]

This was upheld in *P.A. Inamdar (2005)*.[44] A seven-judge bench made it clear that the State could not enforce its reservation policy and to take quotas of seats of the unaided private institutions. The Court considered such imposition to be not a reasonable restriction under the

[34] *Id.*
[35] *Id.*
[36] (2005) 6 SCC 537 [hereinafter Inamdar].
[37] *Id.*
[38] RTE Case, supra note 23.
[39] *Id.*
[40] *Id.*
[41] T.M.A. Pai, supra note 30.
[42] *Id.* at ¶35.
[43] *Id.* at ¶243.
[44] Inamdar, supra note 33.

Article 19(6) and thus it amounted to a *"serious encroachment on the right and autonomy"* of these institutions by subjecting them to state-imposed reservation policies.[45] By 2005, the judiciary had drawn up a robust constitutional barrier to protect from encroachment on the freedom and independence of such institutions as mandated by state-reservation regulations.

Collision Point – *RTE Case*

With the enactment of the RTE Act in 2009 and especially the Section 12(1)(c), these two conflicting lines of jurisprudence crashed into head on collisions. The main issue to be considered in the *RTE Case* was whether the 25% mandate was a permissible constitutional law that could be enforced to secure the first fundamental right of the child under Articles 21A or it was an infringement of the fundamental rights of the institution that infringed Articles 19(1) (g) and 30 and thus was unconstitutional.[46]

This conflict, in the majority opinion of Chief Justice S.H. Kapadia, was resolved through a approach called *"child centric and not institution centric"* approach, to the effect that the 25 percent reservation was a reasonable restriction on the right of private non-minority schools under Article 19(1)(g). It was explained by the national interest in providing of universal elementary education, which is now a mandatory right under Article 21A. The State, acting within the powers of Article 21A, could reasonably impose this on the private schools as a condition of their recognition.[47]

Nevertheless, most of them rendered a critical exemption of unaided minority schools. It believed that subjecting the same quota of 25 percent, to these institutions, was against their unique and specific right of Article 30 to form and manage educational institutions of their own preference. The Court found that compelling such a quota on a minority school was wholly contrary to its very nature and violated its administrative freedom in a manner not allowable even in the name of another fundamental right.[48]

In his forceful supposition, Justice K.S. Radhakrishnan said that the positive duty to make a socio-economic right such as education, was solely vested in the State and could not be

[45] *Id.* at ¶135.
[46] RTE Case, supra note 23. ¶9.
[47] *Id.* ¶10.
[48] *Id.* ¶20; India Const., art.30(1): "All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice."

transferred to individual citizens. He argued that Section 12(1)(c) was simply an extraordinary and unreasonable restriction of rights of all unaided private schools (non-minority and minority alike) as laid down by the larger benches in case of *T.M.A. Pai and Inamdar*.[49]

The decision by the majority effectively instituted an implicit hierarchy of fundamental rights. In this specific constitutional context, a child's collective, socio-economic right to education under Article 21A was found compelling enough to limit a non-minority institution's right under Article 19(1)(g). In contrast, however, that same right to education was found insufficient to limit a minority institution's culturally and administratively specific right under Article 30. This is what we mean by selective enforcement, the invocation of a fundamental right does not have to be the same for entities based on their identity and corresponding constitutional status. Thus, a child's fundamental right applies to one private school and not the other based on a court-created hierarchy of competing constitutional values.

CHAPTER VI

Conclusion:

The complicated history of the Right to Education in India, since its inception as a non-justiciable promise, through its application as a selective enforceable right, is far more than a story of poor or arbitrary application. It is a stark example of a unique form of dialogic model in Indian constitutionalism, in which the dream objectives that are the articulations of the goals of state policy are not fixed, but gradually transformed into enforceable rights in a dynamic, and at times adversarial, dialogue between the legislature and the judiciary. This selective character deliberately constituting the final structure of the RTE is a natural and rational product, therefore, of such a dialogic procedure, in which the universal aspiration of a DPSP is shaped to accommodate itself to an extent, complex system of competing fundamental rights.

The judiciary serves as a constitutional catalyst in which the saga begins. Faced by state inactivity over the decades on the time-limited directive of original Article 45, the Supreme Court in *Mohini Jain* and *Unni Krishnan* stepped in to take the place of governance, thus, placing the matter of education on a national agenda by making it depend on the fundamental

[49] RTE Case, supra note 23. ¶19, See also the comparison with Art. 15(5) made in the RTE Case, wherein Justice Radhakrishnan proposes an amendment to Art. 21A, in line with Cl. 5 of Art. 15, which enables the state to reserve seats for the socially and educationally backward classes, in order to constitutionalize the reservation scheme proposed by the RTE Act.

right to life. This judicial activism, by extension, garnered an act of retaliation on its part. The 86th Amendment and the RTE Act are results of the efforts by parliament to codify what was a judicially recognised right and in the process to re-assert its own powers over the manner of application.

The next clash against the rights of the independent educational institutions, leading to the *RTE Case* verdict, is the last step in this process: the judicial balancing. Operationalisation of a new socio-economic right is not absolute, but has to be negotiated as opposed to other already established rights. The mechanism of this negotiation is that the Court imposed a hierarchy, with the rights of minority institutions under Article 30 above the right of the child under Article 21A, and the right under Article 21A was in turn above the right of non-minority institutions, under Article 19(1)(g). The state's duty to fulfil a socio-economic right can be assigned to the private players, but only up to the extent that the constitutional status of such players.

This case study gives a realistic, yet intriguing, roadmap on how other Directive Principles would look like in the future. It suggests that the road to their enforcement (had it been sought) would be probably just as discriminative and contentious and would be influenced by judicial balancing gestures as opposed to general and unrestricted decrees. The Right to Education is, rather, a story of constitutional failure but constitutional evolution in practice that provides an effective, but flawed, example of how positive rights may be applied in the Indian constitutional democracy, which is both dynamic and controversial.

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