

## **Right to Education: A Critical Study**

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### **ABSTRACT:**

Education has an acculturating role. It refines sensitive and perceptions that contribute to national cohesion. Education not only teaches but it imparts the skills to the students and main of the education is to develop the skills and create civilized and cultured personality. After almost 65 year of Independence, our nations still face the problem of illiteracy and poor education system. It is only after the 86<sup>th</sup> Constitutional amendment, which make the Education a fundamental right under Article 21A. However there are still many challenges face by this Act, which is still need to be improved for the success implementation of the Right to Education Act.

The objective of this project is to critically study the issues and challenges of the Right to free and Compulsory Education to Child Right Act, 2009, and analyze the impact of the provisions in the present day context for the promotion and protection of Children Rights in India, and the legislative initiative towards the improvement of this right. This paper tries to find out answers of the following questions.

1. Whether RTE ACT 2009 is successful in obtaining its aims and objectives?
2. Whether the age group mentioned in the Act justified?
3. Whether the reservation of 25% of seats for the weaker sections by Private unaided schools will turn out to be a boon or a bane?

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4. What will be the identification, selection and verification of economically weaker and disadvantaged children?
5. Whether The RTE Act 2009 will help to produce a quality education and quality student when the children according to the Act are not allow to be held back, expelled, or required to pass a board examination until completion of elementary education?

This paper is divided into seven parts. Second part gives overview of History of Education System in India. Third part deals with Right to education and the International Convention. The fourth part provides constitutional Provisions and the Judicial Interpretation on the Right to Education. The fifth and sixth parts focus on scope and features of Right to Education Act, 2009 to critical analysis respectively and to suggest some recommendation. The last part is conclusion.

*“Education is the most powerful weapon which you can use to change the world”*

**Nelson Mandela**

## **INTRODUCTION**

Education has an acculturating role. It refines sensitive and perceptions that contribute to national cohesion, scientific temper and independence of mind and spirit- thus further various goals set out in our Constitution. In sum, education is a unique investment in the present and the future. This cardinal principle is the key to the National Policy on Education.<sup>2</sup>

The very Literal meaning of the English words education means to rear bring up (children, animal) by providing food and attention to their physical wants. It is derived from the latin words *educat*. Later usages of the term show that it is primarily meant for young person’s so that their habits. Manners and intellectual and physical aptitudes are properly formed. In one sense the English words is comprehensive in its scope it comprise important aspects of the personality of the young person, viz., physical, mental and moral. But the meaning of the English words is somewhat limited in its scope and another sense. First it is concerned only with young human beings, one get the impression that, when men are no longer young, education has nothing to do with them. Secondly, the words education gives the impression may be unintentionally, that the young person to be educated are primarily *patient i.e.*, at the receiving end, and not agent or active in their enterprise. This is also not in conformity to the ideals of a rational system of education.

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<sup>2</sup> Law Commission of India, 165th Report on Free and Compulsory Education for Children, November,1998 available at <http://lawcommissionofindia.nic.in>, page-1, (last visit September 3, 2013)

The Sanskrit words *shiksha*, in contrast, means to learn by dint of efforts and followed up by exercises. The educated person must be inspired and enterprising. Unless one wants to learn, it is extremely difficult to educate one in the best possible way.<sup>3</sup>

Education is a powerful medium to achieve the high ideal of inter-cultural understanding. It can mould an individual into any form we like. As such, we should provide such wholesome educational experiences and programs which develop this understanding of other's cultural patterns, beliefs and way of living. They will be able, then, to understand and also to appreciate the ideals and values of others. Developments of such understanding will promote co-operation and, though a process of give and take a cultural synthesis will take place. Such education will be able to achieve the high goal of national cultural so essential of National Unity and National Integration.<sup>4</sup>

No doubt the children's rights have been given a central place in all the international as well as national bodies. As the universal declaration of human right (1948) under its article 26 states, "everyone has the right to free education at least at the elementary and the fundamental stages and it shall be compulsory."

However it is pity that our great nation failed to eradicate the menace of illiteracy even after 65years of independence and our policy makers have neglected this prime area of human resources development for such a long time. Because, it is and should be the prime duty of the state and central government to provide free Education and Health facilities to all the citizen of the country without any king of discrimination, anyways, because of the efforts made our educationist, NGO's and the civil society groups who follows a right based

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<sup>3</sup> D.D Agarwal, *History And Development Of Elementary Education In India* 3 ( Shirup and Son, New Delhi)

<sup>4</sup> Y.K.Singh Ruchika Nath, *History Of Indian Education System*, 14 (S.B.Nangia, New Delhi).

approach that resulted in the pass 86<sup>th</sup> constitutional amendment by the parliament and article 21A in the year 2002 which made Right to Education a fundamental right. Subsequently, “Right to free and compulsory Education Act” was approved by the president of India on 26<sup>th</sup> August 2009 and got officially published in the gazette of India on 27<sup>th</sup> August 2009. India became one of the 135 countries to make education a fundamental right for its citizen when the act came into force on 1<sup>st</sup> April, 2010. It put the right to Education at par with Right to life.<sup>5</sup>

## **HISTORY OF EDUCATION SYSTEM IN INDIA**

The development of education is a field, which gathers its past history into a living stream, flowing through the present into the future. It is essential to see the historical background of education development to understand the present and visualize the future, hence the present Chapter aim to briefly look at education developments from the ancient 2<sup>nd</sup> millennium BC to the modern period.

The development of the education system in India can be broadly divided into three stages

### **EDUCATION IN INDIA DURING ANCIENT AND MEDIEVAL PERIOD**

India is one of the ancient civilization in the world.<sup>6</sup>The education in ancient India was undertaken through Ashrams. The formal admission ceremony was known as ‘Upanayana’ with the accomplishment of this ceremony the child has to leave his home for the ‘ashram’ where he would receive education. As Indian progress from ancient to medieval its education system deteriorated.

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<sup>5</sup> Dr. Surjit singh Puar, “ Right To Education Act: A Critical Analysis” 27 IJEPR (2012).

<sup>6</sup> Evolution of Education system in India, available at: <http://shodhganga.inflibnet.ac.in>,( Last visit September 5th, 2013).

Various factors were responsible for the degradation of this most efficient and most ancient education system of the world<sup>7</sup>

Development prior to Muslim invasion began in the 10<sup>th</sup> Century, Nearly every village had its schoolmaster, who was support by the local contribution. The Hindus schools of learning, knowns as 'Pathasalas' in Western India and Bengal was formed by the Bramins acharyas at their residence. It is noticed that the growth of temple in India was an indication of growth of education. This is because religion dominated education<sup>8</sup>. During the eighteenth century, the process of delay of Hindu and Muslim seats of learning was accelerated due to political confusion which gripped the country after the downfall of Mughal Empire. By the end of the eighteenth century, the British gained political ascendancy in Bengal and Madras, by the end of the mid nineteenth century, the British established their control over entire India. The Court of Directors in London was mainly interested in amassing the wealth of the Indian and not in educating the people of India.<sup>9</sup>

### **1. EDUCATION UNDER THE BRITISH PERIOD**

During the British period, education was ignored; the East Indian Company was not at all interested in education. In India there were seats of Sanskrit and Arabic learning. There were 12,498 indigenious schools in Madras Presidency in 1882 and about one lakhs in Bengal in 1835. The earliest efforts to introduce any form of education beyond the indigenious system came from missionaries and private societies.

#### **(i) Christian Missionaries Contribution to Education System in India**

In 1600 A.D. The East India Company was established. It started trade with India, started spreading its influence in the political spheres too. In 1659, the Court of directors had declared their earnest desire to propagate the Gospels, out

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<sup>7</sup> Dr B.D. Rawat, "Child Education In India Restrospect And Prospect" *JLS* 2 (2011).

<sup>8</sup> *Supra.note7*, p- 37

<sup>9</sup> *Supranote at3*, p-55

of which Christianity was allowed to come to India with a view to spread Christianity.<sup>10</sup> Thus missionaries came to India and started charity schools for looking after the education of Christian children, and the Anglo- Indian children.<sup>11</sup>

**(ii) East Indian Company Charter**

In 1813, the British Government issued a charter on Indian Education. This charter declares to spend more than one lakh for the upliftment of the Indian Education. This Charter brought a long controversy among the people. People were divided into groups one supported the expenditure for the development of English language and literature, while other wanted the money to be spend for their mother tongues. But controversy could not solve the reason of which Macaulay commission 1833 was established.<sup>12</sup>

**(iii) Macaulay Commission**

In 1833, Macaulay Commission was appointed to remove the controversy prevailing in the earlier report on the actual condition of the Indian Education System.

In 1835, Macaulay submitted his report in support of the teaching of English Language and Literature in the country and bitterly criticized the scope and standard of Indian Language. The objective was to wider the propogation of the British regime in the country.

After publishing this report, the downward filtration theory' of education was established and executed. But this theory did not suit to the nation and was soon abandoned in practice.

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<sup>10</sup> A.K.Singh, *Education And National Character* 31( S.B.Nangia, APH Publishing Corporation, New Delhi 2008).

<sup>11</sup> A. Biswas, and S.P. Agrawal, *Development Of Education In India: A Historical Survey Of Education Documents Before And After Independence* 3-4 (Ashok Kumar Mittal, Publication New Delhi, 1986).

<sup>12</sup> Baman Das Basu, *History Of Education In India Under The Rule Of East India Company* 4-5 (Modern Review Office Calcutta, 1925).

The Macaulay's Minute' could not satisfy the burning problems of education. As a result Wood's Dispatch in 1854 and the Universities of Bombay, Calcutta and Madras were established<sup>13</sup>

**(iv) Wood's Education Dispatch**

Wood's Education Dispatch of 1854 was the first official document to a national education policy, which outline the Company's role with regard to the provision of schooling in British India. The Dispatch created an elaborate machinery of provincial education departments and established guidelines for the development of schools at the primary, secondary and college level. The Dispatch also introduced public subsidies known as 'grant-in-aids to support the schools. The East India Company also created an important role for private enterprise and consequently private funds became a significant force in the expansion of the public school system.<sup>14</sup> It's recommended the setting up of Universities of Bombay, Calcutta and Madras which were establish in 1857. The recommendation reflects the needs of the ruling colonial powers to train a section of upper classes in higher education, and set up the administrative structure for education.

**(v) The Magna Carta on Education**

After the Wood Dispatch, The Magna Carta on Education was introduced in India which changed the whole scenario. The purpose of it was to prepare Indian Clerks for running the administration. Under it the means of school education were the vernacular languages. British government started giving funds to indigenous schools in need to help and thus slowly some of the schools became government-aided.<sup>15</sup> After the establishment of British rule in India, some of the English Intellectuals like J.Duncun and William Jones were attracted by the

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<sup>13</sup> *Ibid*, p 32

<sup>14</sup> Latika Chaudhary, *Determinants of Primary Schooling in British India*, available at: <http://emlab.berkeley.edu> (last visit September 17<sup>th</sup> 2013).

<sup>15</sup> *Supranote at5*, page-3



Indian literature. The result was the establishment of the Asiatic Society of the Bengal in 1784, Sanskrit Colleges in 1791 and the starting of the Bombay branch of the Royal Asiatic Society in November 1804.

The debates in educational policy reflected the clash of interest between the British and Indian bourgeoisie. While the former attempted to restrict education and impose a control with a view to stop students from taking active part in politics, the latter saw the advantages of expansion of higher education as strengthening the national movement.<sup>16</sup>

The first attempt with regard to education as a matter of right, was made way back in 1909 when **G.K. Gokhale** introduced a Bill under the Indian Council Act of 1909 to make primary Education compulsory, with state funding. However the bill was defeated by a large majority. While addressing the legislatures Gokhale made the following observation that the issue would keep coming back again and again until all children realize that the right to free and compulsory education<sup>17</sup>

## **2. EDUCATION SINCE INDEPENDENCE**

Illiteracy constitutes a serious handicap for the development of the country in India.<sup>18</sup> At the time of adoption of the Constitution of India in 1950, the aim was to achieve the goal of **Universalisation of Elementary Education (UEE)** in a Directive Principle of State Policy, stated that "All states shall endeavor to provide within 10 years of commencement of constitution free and compulsory education to children till they reach the age of 10 years." However, in 1960, keeping in view the education facilities and the aim and objective of the UEE, and to facilitate the achievement of the UEE goal, The National Council of Education

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<sup>16</sup> Madan jha, *International Perspective on Education Diversity and Inclusion: Studies from America, Europe and India* 126 (Routledge)

<sup>17</sup> *Supranote at 13, P-4*

<sup>18</sup> Raj.C.Kumar, "International Human Right Perspective on the Fundamental Right to Education-Integration of Human Rights and Human Development in the Indian Constitution" 242, available at: [heionline.org](http://heionline.org). (last visit September 14<sup>th</sup> 2013).

Research and Training (NCERT), the National Institute of Education Planning and Administration (NIEPA) and many other institutes were set up in 1960's. In order to give access to elementary education for all children up to 14 years of age and for universal participation till they complete the elementary stage of education programs, the National Policy on Education (NPE) in 1968, the National Policy on Education 1986 have been setup to give an unqualified priority to the Universalisation of elementary education (UEE) program.

**a. National Policy of education 1968**

The (NEP) National Policy stressed on the improvement in the quality of the school. The emphasis was more on retention rather than merely on enrolment between 1950 to 1968, but the retention rate shows that in 1967-68 the retention rate came down to 35%. As a result, problem of access, quality of education failed.<sup>19</sup> In 1976, education becomes a concurrent subject i.e., a joint responsibility of state and center. Therefore another policy change came in 1986.

**b. National policy on Education 1986**

The National Policy on Education (NPE) was adopted by Parliament in May 1986.<sup>20</sup> This policy, define and recommend the universal retention and universal attainment. It also recommend Common School System, however, most of these policies were neither enforceable not justifiable and remained for from the achieved there targets<sup>21</sup>. Therefore in 1992 this policy was revised.

**c. The Revise Program of Action 1992**

The Revise Program of Action 1992 resolved to ensure free and compulsory education of satisfactory quality to all children upto 1992 to ensure

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<sup>19</sup> Sangeeta Shirname, "Education For All In India, Historical Development, Especially In The Light Of Gender Equality And Impact On The Present Day Situation"<sup>3</sup>, *available at:* <http://dise.in>, (Last visit September 17<sup>th</sup> 2013).

<sup>20</sup> National Policy on Education 1968, Government of India Department of Education Ministry of Human Resources Development, New Delhi (1988) *available at:* <http://www.academics-india.com> (last visit September 18<sup>th</sup> 2013).

<sup>21</sup> Shivakumar Jolad, "Policy Brief On Right To Education Bill India"<sup>3</sup> *available at:* <http://dise.in>. (last visit, September 17<sup>th</sup> 2013).

free and compulsory education of satisfactory quality to all children upto 14years before Indian enter the 21 century.<sup>22</sup> In 1993, due to public interest litigation, '*Unnikrishnan v state of Andra Pradesh*, the Supreme Court of India ruled that, Education is a fundamental right that follows from the right to life in Article 21 of the Constitution." However, this verdict was not followed by the legislative bill to amend constitution for many years. In 1997, a constitution amendment was proposed in the parliament to make education a fundamental right. But this was not passed.<sup>23</sup>

**d. The Sarva Shiksha Abhiyan 2001**

The Sarva Shiksha Abhiyan is the program launged by the government in the year 2001, its objective is to provide useful relevant education to all children in the 6-14 age groups by 2010. It is an initiative to universalize and improve quality of education. As India has made a long strides in the last 50years in the field of education, and a number of scheme/ programs were launched like the like the National Policy on Education 1986, and the program of Action in 1992 achieving the goal of the Universal Elementary Education which was not success, therefore (SSA) Sarva Shiksha Abhiyan Programs had been by the government with an aim to provide useful and relevant elementary education for all children in the 6 to 14 age group.

Thus we can see that the education in Indian is not newly introduced but it was there since Ancient civilization. However with the coming of the British the education system in Indian have developed all through, but when we focus on the study we will find that the mere objective of the British to introduce education in India is for their own benefit, but we cannot denied that fact the it is due to the Introduction of British education in India, that we are learning English at present,

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<sup>22</sup> M.Afzal Wani, "Education as A Human Right: Policy And Action In India", 40 *JILI* 252 (1998).

<sup>23</sup> *Supra note at 20, p-3*

and so even after achieving our Independent our objective is to improve our education system.

## **RIGHT TO EDUCATION AND THE INTERNATIONAL CONVENTION**

The first impression of International concern over the “situation of children” came in 1923 when the council of the newly established non-Government organization adopted the five declarations on the right of the child<sup>24</sup>. Although the Geneva Declaration of 1924 which make reference to the right of learner to education, it does lay some foundation for the child right.

### **I. Universal Declaration of Human Right (UDHR)**

According to the first sentence of Article 26(1)<sup>25</sup> of the UDHR (1948)” everyone has the right to education”. It includes all activities which human being transmits to their descendants a body of Knowledge and skills and a moral code. These declarations provide both moral and legal principles in education. It also stated that the parent shall have the right to choose the kind of education that shall be given to the children.

### **II. The International Convention on the Economic Social and Cultural Right (ICESCR)**

Article 13<sup>26</sup> and 14<sup>27</sup> of the ICESCR, set out the aim of education systems and the content of education. It also includes the right to free and compulsory

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<sup>24</sup> Dr N.L.Gurjar and Rakesh Dhaiya, “The Right Of Children To Free And Compulsory Education: The Human Rights Perception” *JLS* 64 (2011).

<sup>25</sup> Article 26(1) of the Universal Declaration of Human right proclaims; “Everyone has the right to education, technically and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.”

<sup>26</sup> Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity,

education for all, an obligation to developed equitable access to higher education by a progressive introduction of free higher education. The right also includes a responsibility to provide basic education to individual who have not completed primary education.<sup>28</sup>

### **III. United Nations Educational, Scientific and Cultural Organization (UNESCO) 1960**

The right to education has also been reaffirmed in the 1960 by the UNESCO Convention against the Discrimination in Education. It lays down the international legal obligations for the right to education. These instruments promote and develop the right of every person to enjoy access to education of good quality.<sup>29</sup>

### **IV. (U.N) United Nations Convention on The Right's of the Child**

Article 28<sup>30</sup>, of the United Nation Convention speaks about the right to education. As signatory to UN Child Rights Convention, India has accepted the

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2. 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;
- (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
- (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
- (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

#### <sup>27</sup> Article 14

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

<sup>28</sup> Dr Pratibha Chaudhary, "Monitoring Agencies For Children's Right For Education: An Overview" *JLS* 101 (2011).

<sup>29</sup> *Supra note at 29, p- 101*

<sup>30</sup> Article 28 (right to education) Every child has the right to an education. Primary education must be free. Secondary education must be available to every child. Discipline in schools must respect children's human dignity.

Wealthy countries must help poorer countries achieve this.

International definition of a child, which is up to age 18 years. The bill proposes to cover only children from age 6 to 14, clearly excluding and violating the right of the 0-6 and 14 to 18 years old. This problem can be traced to the 86<sup>th</sup> amendment and its article 21A, which define the age from 6 to 14. As a bill flowing out of the amendment, it is clear that the bill cannot go beyond Article 21A, which makes it imperative that the 86<sup>th</sup> amendment must be re-amendment.<sup>31</sup>

### **EDUCATION AS A HUMAN RIGHT**

Katarina Tomasevski, a Special Report on the Right to Education of the United Nations Commission on Human Rights (UNCHR) has observed in her recent book that “right base education necessitates two changes:

1. Human right ought to be moved from the margins to the core of the many policies that shape education.
2. Education ought to be translated into universal human rights obligations.

The global community recognizes education as a human right due to its indispensability to the preservation and enhancement of the inherent dignity of the person.<sup>32</sup> In the *State of Bihar and Others v Project uchcha Vidya, Sikshak Sangh and others*,<sup>33</sup> the Supreme Court said that, imparting education is the duty of the state. Although establishment of High Schools may not be a constitution function in the sense that citizens of India is above the age of 14, but education as a part of human development indisputably is a human right.<sup>34</sup>

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<sup>31</sup> *Supra note at 14*, p- 18

<sup>32</sup> *Supra note at 11*, p-252

<sup>33</sup> 2006 (2) SCC, 545

<sup>34</sup> Dr H.M.Mittal, and Malvika Mittal, “The Right Of Children: The Human Rights Prespective” *JLI* 172-173(2011).

## **CONSTITUTIONAL PROVISIONS AND THE JUDICIAL INTERPRETATION ON THE RIGHT TO EDUCATION**

Constitution is the supreme law of the land, all the right of the citizen have been enshrine under the Constitution of India. In 1950 Indian gained its own Constitution, which provided Fundamental Rights to equality, Freedom again exploitation, Freedom of religion, Freedom to constitution remedies and cultural and educational right. The right to free and compulsory education was retained in Part IV of the constitution that incorporates Directive Principle of State Policy.<sup>35</sup>

15<sup>th</sup> December 2008, seventy one years since Mahatma Gandhi gave the call for universal education in 1937; sixty one years since independence; fifty eight years since the Constitution, instead of making education a fundamental right made it part of the Directive Principle; fifteen years since the Supreme Court in 1993 ruled on the right to education; six years after the 86<sup>th</sup> constitutional amendment passed by the parliament 2002, inserting Article 21A and making the education a fundamental right. And four years after the draft bill was prepared by the (CABE) Central Advisory board of Education Committee, the right to Free and Compulsory Education Bill was introduced in the Rajya Sabha.<sup>36</sup>

### **Article 21 of The Indian constitution<sup>37</sup>**

The scope of Right to Life includes right to a political, social and cultural life and of human dignity would lead to the inclusion of right to education within the ambit of right to life under Article 21. The Supreme Court has implied the right to education as a fundamental rights as part of the right to life under Article 21. It

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<sup>35</sup> M.Dash, *Education In India* 5 ( Atlantic Publishers and Distributors 1984).

<sup>36</sup> Shantanu Gupta, "What Are The Different Strategies And Approaches To Realise Right To Education (Rte) In India", Institute of Development Studies, University of Sussex , 5 ( September 5<sup>th</sup> 2009).

<sup>37</sup> Article 21-Protection of life and Personal Liberty- No person shall be deprived of his life and personal liberty except according to the procedure established by law.

is submitted that the words “life” has been held to include “education” since education is an important requirement for a life with dignity.

In *Mohini Jain v State of Karnataka*, the Supreme Court held that the right to education flows directly from the right to life and that the Constitution did not expressly guarantee right to education.<sup>38</sup> In *Unni Krishnan v State of Andhra Pradesh*,<sup>39</sup> the Court held that 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 to the life of an individual and the nation, right to education is a fundamental right guaranteed by the Article 21.<sup>40</sup> In *Bandhua Muti Morcha v Union of India and others*,<sup>41</sup> the court held that the right to life guaranteed by Article 21 does take in “educational facilities”. The right to education has been treated as one of transcendental importance in the life of an individual’s has been recognized not only in this country since thousands of years but all over the world.<sup>42</sup>

Justice K. Ramaswamy and Justice Sagir Ahmad, observed, illiteracy has many adverse effects in a democracy governed by the rule of law. Education citizens could meaningfully exercise his political rights, discharge social responsibilities satisfactorily and developed spirit of tolerance and reform.<sup>43</sup>

**Article 21A of the Indian Constitution (Inserted by the 86<sup>th</sup> Amendment)** The State shall provide free and compulsory education to all children of the age of six to fourteen years.

Free education’ under Article 21A, means that no child, other than a child who has been admitted by his or her parents to a school which is not supported by the appropriate Government, shall be liable to pay any kind of fee or charges or

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<sup>38</sup> G.L. Shangi, N.L.U.D, SCR, Vol-2 (1992),p-669.

<sup>40</sup> G.L Sanghi. N.L.U.D, Supreme Court Report, Vol-1, (1993), Page- 603

<sup>41</sup> (1991)4 SCC 177

<sup>42</sup> *Supra note at 19, page-652*

<sup>43</sup> Dr Manju Koolwal, “Right To Education: A Fundamental Right In India” *JLS* 35-36(2011).



expenses which may prevent him or her from pursuing and completing elementary education. 'Compulsory education' casts an obligation on the appropriate Government and local authorities to provide and ensure admission, attendance and completion of elementary education by all children in the 6-14 age groups.<sup>44</sup>

**Article 41**, Article 41 of the Constitution recognised the "Right to Education". It says that the state shall, within the limits of its economic capacity and development make, effective provision for securing the right to education although a citizen cannot enforce the directive principle contained in the part IV of the Constitution. But these were not intended to be pious declaration. Without making "right to education under Article 41 of the constitution a reality the Fundamental Right under the Chapter III shall remain beyond the reach of large majority which is illiterate. The right to education therefore, is concomitant to the Fundamental Rights enshrined under Part III of the Constitution. Thus charging capitation fee for admission in private institution is illegal.<sup>45</sup> *In Islamic Academy of Education and others v State of Karnataka and others*<sup>46</sup> the issue arose was for the determination concerned of the fee structure in private unaided professional educational institutions. It was submitted on behalf of the managements that such institutions had been given complete autonomy not only as regards admission of students but also as regards determination of their own fee structure which could include a reasonable revenue surplus for the purpose of development of education and expansion of the institution. In *TMA Pai Foundation v State of Karnataka*,<sup>47</sup> the court observed that right to establish an institution included the right to admit students; right to set up a reasonable fee

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<sup>44</sup> Elementary Education, "Right To Education", Department of School Education and Literacy, Ministry of Human resources Development, Government of India. Available at :<http://mhrd.gov.in/rte>. (last visit September 9<sup>th</sup> 2013).

<sup>45</sup>H.K. Saharay, *The Constitution Of India; An Analytical Approach*, 369 (Easter Law House New delhi 3<sup>rd</sup> edn., 2002).

<sup>46</sup> *ibid* 697

<sup>47</sup> (2002) 8 SCC 481

structure; right to constitute a governing body, right to appoint staff and right to disciplinary action. It was held by majority that Arts. 19(1) (g) and 26 confer rights on all citizens and religious denominations respectively to establish and maintain educational institutions. In addition, Article 30(1) gives the right to religious and linguistic minorities to establish and administer educational institutions of their choice.<sup>48</sup>In *Modern School v Union of India*<sup>49</sup> J, Kapadia, stated that the right of education further means that a citizen has a right to call upon the state to provide educational facilities within the limits of its economic capacity and development.

**Article 45**<sup>50</sup> Article 45 of the Constitution declares that;

- (1) The State shall try to provide free and compulsory education for all children until they complete the age of fourteen years.
- (2) The State shall try to provide early childhood care and education for all children until they complete the age of six years.<sup>51</sup>

Article 45, no doubt, requires the state to provide for free and compulsory education for all children but, the State Government is under no obligation to impart free education and they are not, at law, bound either to pay the teacher or to meet any of the expenses incurred by the private schools.<sup>52</sup>

**Article 46**<sup>53</sup> of the Indian Constitution provides for promotion of education and economic interests of SC/ST and other weaker sections. This Article only enjoys promotion with special care of the education and economic interest of the weaker section of the people in particular, of the Scheduled Cast and

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<sup>48</sup> 2003 (6) SCC, 757

<sup>49</sup> AIR 2004 SC 2236:

<sup>50</sup> Article 45-The state shall endeavour to provide early childhood care and education for all children until they complete the age of six years.

<sup>51</sup> (1993)1 SCC 6

<sup>52</sup> *Ibid-p-372*

<sup>53</sup> Article -46, The state shall promote with special care the education and economic interest of the weaker sections of the people and, in particular, of the SC and ST, and shall protect them from social injustice and all forms of exploitation.

Schedule Tribe. It does not enjoy the State to scarifies the Indian society as a whole for promoting the education and economic interests of Schedule Tribes and Schedule Castes. Article 46 does not ignore the minimum primary need of Indian society.<sup>54</sup> *In Ashok Kumar Thakur v Union of India*<sup>55</sup> the Supreme Court ruled against the reservations on the Act on two grounds.

First, it held that the exact proportion of OBS, Other, Backward Classes in India Population was not accurately indentified.

Second, The Court held that setting quotas or reservations might not be an appropriate means of promoting diversity or affirmation action because it discriminates against “meritorious” candidate who do not suffer social disadvantage on account of cast, race or ethnicity. In *Society of Unaided Private Schools of Rajasthan v Union of India*,<sup>56</sup> the Supreme Court of India, for the first time, held that RTE Act is not applicable to unaided minority schools. The pare 65 read as "However, the said 2009 Act, and in particular Sections 12(1)(c) and 18(3) infringes the fundamental freedom guaranteed to unaided minority schools under Article 30(1) and consequently, applying the R.M.D. *Chamarbaugwalla v Union of India* principle of severability, the said 2009 Act shall not apply to such schools."<sup>57</sup> *In Pramati Educational and Cultural Trust v Union of India*.<sup>58</sup> the court, eventually heard and finally decided the issue by a majority of 2:1, without referring to the reference order dated 6.9.2010 and also without considering the opinion of Justice D Bhandari, in *Ashok Kumar Thakur v Union of India*<sup>59</sup>, striking down Article 15(5) as applicable to unaided educational institutions.

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<sup>54</sup> Supra note at 40,p-372

<sup>55</sup> Writ Petition (civil) 265 of 2006

<sup>56</sup> 2012 (6) SCC 1

<sup>57</sup> *ibid*

<sup>58</sup> W.P.(C)No.416,2012

<sup>59</sup> Writ Petition (civil) 265 of 2006

**Article 51A (k)**<sup>60</sup>; of the Indian Constitution; make an obligation to the parents to provide opportunities for education to their children.

**Article 350A**; Medium of Instruction at Primary Stage: of the Indian Constitution states to provide adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority group.<sup>61</sup>

### **3. RIGHT TO EDUCATION ACT-2009: SCOPE AND FEATURES**

After a long struggle the dream of making the Right to Education a Fundamental right has become true by the 86<sup>th</sup> amendment Act which has inserted the Article 21A.

#### **SCOPE OF THE RTE ACT, 2009**

Right of Children for Free and Compulsory Education Act, 2009 was passed by Parliament. The constitution amendment and the new law came into force from 1<sup>st</sup> April, 2010.<sup>62</sup> Even after 65 years of Independent, universal elementary education remains a distant dream. By the 86<sup>th</sup> Amendment, for effective implementation “Right of Children to free and Compulsory Education Bill” was drafted.<sup>63</sup> The new law makes an obligation on the part of the state governments and local bodies to ensure that every child gets education in a neighboring school in a school. Its implementation will directly benefit to those children who do not go to schools or have never been to any educational institution, The RTE is being touted by the UPA government as another major achievement it makes a right of

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<sup>60</sup> Article 51A(k) who is a parent or guardian has to provide opportunities for education to his child or ward (as the case may be) between the age of six and fourteen years.

<sup>61</sup> *Supra note at 13, p-5*

<sup>62</sup> Akhil Kumar “Right To Education: A Fundamental Right In India”, *JLS* 148 (2011).

<sup>63</sup> *Supra note at, Page-148*

every child to get education.<sup>64</sup>The Right to education Act 2009, has finally been notified after receiving the assent of the president of India.

**The salient features of the Right of Children for Free and Compulsory Education act are:-**

1. Free and compulsory education to all children of India in the six to 14 age group;
2. No child shall be held back, expelled, or required to pass a board examination until completion of elementary education;
3. A child who completes elementary education shall be awarded a certificate.
4. Calls for a fixed student-teacher ratio.
5. Will apply to all of India except Jammu and Kashmir.
6. Provides for 25 percent reservation for economically disadvantaged communities in admission to Class One in all private schools.
7. Mandates improvement in quality of education.
8. School teachers will need adequate professional degree within five years or else will lose job.
9. School infrastructure (where there is problem) to be improved in three years, else recognition cancelled.
10. Financial burden will be shared between state and central government.<sup>65</sup>

**1. THE RIGHT TO EDUCATION ACT-2009: A CRITICAL ANALYSIS**

No doubt the Right to Children for free and compulsory education 2009, is a significant contribution for securing right to education for every child in India, however, there are some drawback which the Act is facing, as these Act have not

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<sup>64</sup> *Supra note at 5, P-6*

<sup>65</sup> *Supra note at35, p31-32.*

been implemented with true spirit which disturb the progress of the nation. The right to Education Act makes responsible all the parties to play their respective roles as state and central government are responsible for the development, like school, curriculum, teacher-trainees, teachers and their recruitments, placement, new policies etc.<sup>66</sup>

Let's as now discuss about the drawback face by the Act, and refer some recommendation and suggestion which will make the Act more effective.

### **1. Deterioration in Quality of Education**

Quality of education particularly at the elementary level is poor in our country. Improvement in the quality of schooling is a matter of serious concern in our society.<sup>67</sup> Thus, one of the important features of the Act is also that the Government is mandates to improve the quality of education. However, the quality of learning is difficult to measure. Successive ASER reports have tried to do precisely over the last five years. According to ASER 2010, 50% of Grade 5 children could not read books assigned for Grade 2 level. The levels in mathematics were even worse. For the RTE to have any real meaning, it is clear that this problem must be addressed by improving the quality of teaching through appropriate textbooks and skilled teachers.

### **2. Appropriate Age of limitation of Children**

According to the Act “Every child of the age 6 to 14 years shall have a right to free and compulsory education in a neighboring school till completion of elementary education”.

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<sup>66</sup> Dr. Surjit Singh Puar, “Right To Education Act: A Critical Analysis,” IJEPR 27-30 (2012).

<sup>67</sup> Code Of Professional Ethics For Teachers, All Indian Primary Teacher's federation (AIPTF).

However, the elementary education in India starts with the age of 2 and half years. The schools take the kids in pre-nursery, play school or kindergarten if they are three year of age. A child who has an early schooling since the age of 3 will be far ahead from the children who enter the school at the age of 6years. Before the passing of the 86<sup>th</sup> amendment Act 2002, Article, 45 stated that the state shall endeavor 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.<sup>68</sup> Thus when we compare with the new Article, which provides the right from 6-14 years, it would not be wrong to say that the Act ignore the right of those who falls below 6years i.e., 0-6. Therefore, The act should be reviewed again and the age should be revised in this regard.<sup>69</sup>

### **3. Problem in enforcement of 25% quota for the weaker section**

According to the Act, There shall be 25 percent reservation for economically disadvantaged section in the entry level class. These students will not pay tuition fees and so the private institutes will receive reimbursement from the government calculating on the basis of per-child expenditure is needed on. However, no mechanism has been laid down as to what will be the mechanism for reimbursement to private schools? Moreover, the method for calculation of per-child reimbursement expenditure will yield an inadequate resource flow to private schools. It will end up charging more to the 75% student who are paying the tuition fee inorder to make space for the 25% students they are force to take.

Therefore, Reimbursement calculations should include capital as well recurring costs incurred by the government. By dictating the terms of payments, the

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<sup>68</sup> *Supra note at52, p-90*

<sup>69</sup> *Supra note at59,P- 56*

government has reserved the right to fix its own price, which makes private unaided schools resent this imposition of a flat price. Another point we can raise is that, back to the 25% provision. Everybody knows that, apart from the tuition fees, the private school child has to bear out the other expenditure throughout the year like, uniform and shoes, extra textbooks, picnic and extra-curricular charges, computer fees etc. Now, the question would arise here as to who will pay these expenditure? Thus, the government should keep all this in mind before framing the Act, as mere providing the fee does not suffice in the Private School.

In the case of **Society of Unaided Private Schools of Rajasthan v Union of India**,<sup>70</sup> the court upheld the constitutionality validity of the Right to Education Act 2009, which mandate 25 per cent free seats to the poor in government and private unaided schools uniformly across the country.<sup>71</sup>

Several private schools had challenged the constitutionality of the Act on two major grounds,

**Firstly-** that the section 12(1)<sup>72</sup> (c) obligation on private unaided school to provide free and compulsory education to children from weaker and disadvantages sections up to 25% of the class strength and various provisions of the Act which imposed infrastructural and regulatory requirements on the schools violated their Article 19(1)(g)<sup>73</sup> constitutional right to freedom of occupation.

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<sup>70</sup> 2012 (6) SCC 1

<sup>71</sup> INDIA TODAY, "Right To Education Act Constitutionally Valid", NEW DELHI, APRIL 12, 2012, available at [indiatoday.intoday.in](http://indiatoday.intoday.in), (last visit September 5<sup>th</sup> 2013).

<sup>72</sup> Article 21A- Right to Education- the state shall provide free and compulsory education to all children of the age of six to fourteen years in such a manner as the state may, by law determine.

<sup>73</sup> 19 (1) (g)- All citizen shall have the right to practice any profession, or to carry any on any occupation, trade or business.



**Secondly-** minority schools argued that the Act violated their special constitutional rights in Article 30(1)<sup>74</sup> to establish and administer educational institutions.<sup>75</sup>

By a majority view, a three-judge bench of Chief Justice S.H. Kapadia, Justice K.S. Radhakrishnan and Swatanter Kumar said the Act will apply uniformly to government and unaided private schools except unaided private minority schools.

However, in dissenting opinion, **Justice Radha krishnan's** held the Act is to be uniformly applicable to both unaided private school and the minority institutions which do not receive any aid or grant from the government.

#### **4. Lack of qualified teacher**

Teachers plays an important role in imparting good and quality education education to the children, though the quality of education is poor due to many factors, but the general perception of the people is that the teacher i.e., responsible for the poor quality of schooling, the status and dignity of teachers in our society has been declining steady over the last a few decades.

The availability of a good and qualified teacher is one of the crucial challenge to be face by the government in implementing the Act<sup>76</sup>

When we look at the statistical data by Pratham's Annual Status of Education Report's ASER) we will fine that, although enrolment has increased, actual attendance in class has declined. The 2011 Reports (ASER) shows the

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<sup>74</sup> 30(1) all minorities, whether based on religion or language, shall have the right to establish and administer education of their choice.

<sup>75</sup> Arjun Jayadev and Sudhir Krishnaswamy, "Healthcare Law In The US And The RTE In India, Steps Towards Unversal Provision Of Social Goods"<sup>34</sup>, available at: [www.epw.in](http://www.epw.in) (last visit September 5<sup>th</sup> 2013).

<sup>76</sup> *Supra note at 58*, p-24

decline of the student in past five years. For instance, in 2007, 73.4% of students enrolled for Stds I-IV/V were present in the class. But in 2011, this figure had fallen to 70.9%. These student might not necessary have dropped out altogether, but it is possible that what they have learn in the school is not enough to keep them engage. Another the absences of the student are linked with the quality of the learning in schools not address directly although some of the requirements, such As having a library ought to enhance learning. But how much children learn in school depends not just on the physical infrastructure, but also on the methods of teaching, the type of textbooks and the skill of the teacher. This is perhaps the most glaring deficiency in the system that still needs to be addressed. As a result, two-thirds of all classrooms are multigrade, that is, one teacher attending to children from different grades in the same classroom. It requires little imagination to visualize the quality of education imparted in such circumstances.<sup>77</sup>

### **5. Right of the children with disabilities**

Though the Act stated that “the children who is disable, shall have the right to be provided with education in an appropriate alternative environment as may be prescribed, however, it has not detailed as to the facilities needed by the enable children with disabilities to attend the school, as disabilities may be of different kind, one who is physically challenges and other who are mentally, thus it does not include such other disabilities as defined by the National Trust Act, 1999 i.e. excluding children with mental and learning disabilities.

Thus the Act must provide a Special Act which will deal specifically only with these children.

The RTE Act has been criticized for its lack of focus on securing quality education with a regulatory emphasis on measuring inputs rather than outputs.

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<sup>77</sup> *Supra note at75, page-35*

The majority opinion opens a small window to redress this imbalance in the Act as it casts a duty on state governments to ensure quality education. Hence, the capacity of state governments to implement the Act to ensure quality education will determine its success. Civil society groups will need to mobilize the grievance redressed machinery provided under the Act as well as the courts to secure quality education. Second, the exemptions under the Act need to be closely monitored. Minority schools are exempted from the application of the entire Act and state governments need to develop a systematic rigorous method of identification of minority schools entitled to this benefit. While the RTE Act does not define minority schools, several other judgments of the Supreme Court have dealt with this question. The judgment calls upon state governments to frame rules to govern boarding schools – a category not mentioned in the Act. The manner in which state rules determine the scope and nature of these exemptions will have a significant impact on the outcomes of the RTE Act.

The Statistical Data on The Right to Education in India shows that, The Indian education landscape saw significant development during the 11<sup>th</sup> plan. There was a pitch of growth in enrolment, expansion of school infrastructure and facilities, and the most significant development, however, was that Article 21-A inserted in the Constitution of India by the 86<sup>th</sup> Amendment Act, 2009. It implies that every child has a right to elementary education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards. But assessments are inevitable and the measurable results. The Union Minister for Human Resource Development Kapil Sibal seem to suggest just this even as he acknowledges that despite impressively enhanced investment in primary education, the results so far have not been spectacular.

The additional investment, up from Rs 7,166 crore in 2005-06 to Rs 25,555 crore allotted for 2012-13 has ensured that some of the glaring gaps in physical

infrastructure have been tackled. Thus, today's primary school have buildings, running water and other basic requirements that schools should have. There has also been substantial progree in increasing enrolment with the national average now at 98.3 % ( 2009-10)

However, according to the survey of Pratham of primary school across India, two-thirds of the schools surveyed had only one toilets and less than half had a separate toilet for girls. Of these only 50% were unlocked and therefore usable. The absence of toilets can be real disincentive to continuing in school for girls once they cross puberty.

## **CONCLUSIONS**

Thus, in concluding remark we can rightly stated that the passing Act Right to Education Act 2009, is not sufficient. As education is the most powerful instrument in reducing poverty and inequality and improving the quality of and life of every child and an educating every child will eventually bring an end to the social evils and it will also help in developing the country, thus, a successful implementation of the Act is required.

Though the Government has inserted the Article 21A by the 86<sup>th</sup> Amendment, to provide free education to children from 6 to14 years of age, however it has not successfully reach its aim and objective, there are still many drawback to which some of them has been elaborated in the previous chapter. The Right to Education Act should play an important role in achieving universal elementary education in India. And improve the Education system in the country. Thus, after analyzing the entire drawback discussed in the previous chapter we would not be wrong to say that the newly amendment Act Right to Education Act (2009) has not been successful in implementing its law towards The right to education.

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