CHAPTER IV
LANDMARK JUDGEMENTS ON RTE: AN ANALYSIS

4.1 Landmark Cases:

From the Seventh Five-Year Plan onwards, the judiciary and the Supreme Court too have played an active role in upholding the rights of the child. The Supreme Court of India has developed the concept of jurisdiction under which any individual can approach the Court with regard to the violation of a fundamental right. The Supreme Court has also modified traditional concepts by allowing groups of persons or organizations to intervene in cases relating to violations of fundamental rights even though they may not have been affected personally in the matter. This concept of ‘social action litigation’ in India represents an effort to use the legal system to ensure action to realize constitutionally guaranteed rights. Some of the most important examples of social action litigation for children are the following cases, each of which has been a landmark in the process of ensuring children’s rights:


(f) Gaurav Jain vs. Union of India [1997 (8) SCC 114] on Problems of Prostitution and Children forced into Prostitution.

(g) Gita Hariharan vs. Reserve Bank of India [(1999) 2 SC 228] on Guardianship.
Besides the above cited landmark judgments, few other significant cases regarding free and compulsory education in India are Miss Mohini Jain vs State of Karnataka, Nitte Education Trust vs Union of India, Krishnagiri District Private vs State of Tamil Nadu, Social Jurist, A Civil Rights vs Govt. of NCT of Delhi, Adam B. Chaki vs Mr. Paras Kuhad, M. Veera Siva Nagi Reddy vs Osmania University, O.A. Joseph vs Chairman, Board of Governors, Vinay N. Pandya vs Union of India, Maharshi Mahesh Jogi vs State of MP etc.

4.2 Analysis:
A great legal breakthrough was achieved in 1992 when the Supreme Court of India held in Mohini Jain v State of Karnataka, that the ‘right to education’ is concomitant to fundamental rights enshrined under Part III of the Constitution” and that ‘every citizen has a right to education under the Constitution’. The Supreme Court held that a ‘right’ to education ‘flowed from’ the enforceable right to life and personal liberty guaranteed by Article 21 of the Constitution, since there could be no ‘dignified enjoyment of life’, or the realization of other rights, without adequate education. Again in later cases the apex court gave specificity to the Mohini Jain holding by imposing an obligation upon the State, again flowing from Article 21, to provide free education to all children until the age of fourteen. Furtherance the State responded by amending the Constitution in 2002, and crystallizing the dictum of the Court in a new Article 21A. The RtEA 2009, then, enacted by the government to fulfill its obligations under Article 21A. In the meanwhile, major policy level changes were made under the dictates of the IMF-World Bank Structural Adjustment Programme and the World Bank-funded District Primary Education Programme (DPEP) was introduced in 1994. Under DPEP, the national commitment towards FCE up to 14 years was reduced and primary education for the first five years was introduced. Further, the concept of multi-grade teaching and para-teachers was also introduced. Thus, the chapter will
discuss the evolution and development of the judicial judgement in the field of free and compulsory education of children.

Another substantial historic judgment by the Supreme Court of India in 1993 radically transformed the status of Article 45. In its Unnikrishnan Judgment (1993), the Supreme Court ruled that Article 45 in Part IV has to be read in 'harmonious construction' with Article 21 (Right to Life) in Part III of the Constitution, as Right to Life loses its significance without education. The apex Court made the following powerful interpretation: "It is thus well established by the decisions of this Court that the provisions of Part III and IV are supplementary and complementary to each other and that fundamental rights are but a means to achieve the goal indicated in Part IV. It is also held that the fundamental right must be construed in the light of the directive principles." The directive principles form the fundamental feature and the social conscience of the Constitution and the Constitution enjoins upon the State to implement these directive principles.... there is no apparent inconsistency between the directive principles contained in Part IV and the fundamental rights mentioned in Part III.... there is no difficulty in putting a harmonious construction that advances the object of the Constitution." "...The right to education flows directly from right to life..." Hence, the Supreme Court declared that Article 45 has acquired the status of a Fundamental Right. The years that followed have seen how the Indian State allowed the neo-liberal policies to dilute and distort the notion of Fundamental Right emerging from the Unnikrishnan Judgment. We shall shortly examine the deleterious impact of these policies on access to schools and the quality of school education provided therein. The Unnikrishnan Judgment went a step further. It ruled that the Right to Education continues to exist under Article 41 (Part IV) even beyond the age of 14 years but is limited by the State's "economic capacity and [stage of] development". The Constitution is clearly directing the State to envisage the entire sector of education - from kindergarten to higher and professional education in a holistic manner. Any policy to limit, distort or fragment this vision of education amounts to a violation of the Constitution of India which represents people's aspirations from the freedom struggle.
against imperialism! From Unnikrishnan Judgment (1993) to 86th Constitutional Amendment (2002) The above historic declaration by the Supreme Court in 1993 made India's ruling class evidently uncomfortable. The central government undertook a series of exercises in the following years designed to extricate itself of the implication of the judgment. The Saikia Committee Report (1997) and the 83rd Constitutional Amendment Bill (August 1997) along with the report of the HRD Ministry-related Parliamentary Committee (November 1997) provide evidence of the clever ways being conceived in order to dilute and distort the concept of the Fundamental Right to education. However, there was public criticism of these attempts. Intellectuals, activists and grassroots organizations presented memorandum of their concerns to the Parliamentary Committee and organized public debates j) engaging leadership of major political parties (e.g. Convention on 'Education ? as a Fundamental Right' organized by the Central Institute of Education, jjj Delhi University, December 1997)13. Sensing this resistance to the neo-liberal ? assault on the Fundamental Right to education, the entire matter was put in a cold storage for the next four years. ? In November 2001, the 86th Constitutional Amendment Bill was presented to the Lok Sabha. This Bill, like its predecessor 83rd Amendment $ Bill, too, was flawed14. It was misconceived insofar it (a) excluded almost 17 2! ero re children up to six years of age from the provision of Fundamental Right to free early childhood care and pre-primary education; (b) restricted the o Fundamental Right of even the 6-14 year age group by placing a conditionally in the form of the phrase "as the State mayy by law, determine" in Article 21 A; this gave the Stat? the instrumentality to arbitrarily restrict, ^ dilute and distort the Fundamental Right given through Article 21 A; (c) shifted the Constitutional obligation towards free and compulsory education from the State to the parents/guardians by making it their Fundamental Duty under Article 51A (k) to "provide opportunities for education" to their children in the 6-14 age group; and (d) reduced, as per the Financial Memorandum attached to the amendment Bill, the State's financial commitment by almost 30 percent of what was estimated by the Tapas Majumdar Committee in 1999; this was achieved through dilution of norms.
There was widespread public criticism of the anti-people character of the above Bill. A rally of 40,000 people, drawn from different parts of the country, at Delhi's Ramlila Grounds held on the day the Bill was discussed in the Lok Sabha (28 November 2001) demanded radical amendments in the Bill. Several Lok Sabha MPs, cutting across party lines, also criticized the Bill. In public mind, it was becoming clear that the hidden agenda of the Bill was not to accord the status of Fundamental Right to elementary education but to snatch away the comprehensive right that the children up to 14 years of age had gained through the Unnikrishnan Judgment. Ignoring the public outcry, however, a consensus was arrived at among all the political parties of varying ideological backgrounds and the Bill was passed in both Houses of the Parliament without even a single dissenting vote. The aforesaid four flaws in the 86th Constitutional Amendment Act (2002) have since provided the basis for legitimizing the lacunae of the Sarva Shiksha Abhiyan (SSA, 2000) and later of the consequent RTE Act 2009 framed under the Article 21 A. It is noteworthy that the new Article 21A introduced through the 86th Amendment is the only Fundamental Right that has been given conditionally. As pointed out above, this Right will be given to the children "as the State may, by law, determine." None of the other Fundamental Rights is tied to such a pre-condition. The restrictions that are placed on some of the other Fundamental Rights [e.g. on Article 19(1)] are not comparable in so far those are not organically made a part of the Fundamental Right and thus leave adequate space for the State to decide whether to apply them or not. This "g difference was noted by none other than Kapil Sibal himself when participating in the debate in May 2002 on the 86th Amendment Bill as a Rajya Sabha Member, then sitting in the Opposition. He declared that this conditionality in Article 21A shall reduce a Fundamental Right to an ordinary statutory right! However, when piloting the RTE Bill as the Minister of HRD in the Rajya Sabha in July 2009 he would talk of his inability to include the children below six years of age in the Bill and guarantee them pre primary education, citing the restrictions placed on him by the same Article 21A which he had criticized seven years earlier. He, of course, would not tell the Parliament that the limitations of
Article 21A in no way prevented the government from giving additional guarantees! Why did it become necessary for the ruling class to incorporate the afore mentioned conditionality in Article 21A and then dither for the next seven years - from the regimes of NDA to UPA-I to UPA-II? In order to answer this question, we must examine the major policy shift that has taken place as a result of the adoption of the so-called economic reforms and the neo-liberal agenda being pushed under globalization. While policy level changes had diluted the quality of FCE, the Unnikrishnan judgement empowered people with a legal claim to FCE. Several public interest litigation petitions were filed in different High Courts to enforce the Unnikrishnan Judgement and acquire admission into schools. This created tremendous pressure on the Parliament and thereafter a proposal for a Constitutional amendment to include the right to education as a fundamental right was made in 1996. Accordingly, the Constitution (Eighty-Third) Amendment Bill was introduced in the Rajya Sabha in July 1997. The 83rd Amendment proposed that Article 21-A be introduced (fundamental right to education for 6–14 years), former Article 45 be deleted (the then existing directive principle on FCE) and Article 51-A(k) (fundamental duty on parents) be introduced. Between 1997 and 2001, due to change in Governments, the political will that was required to bring about the amendment was absent. In November 2001 however, the Bill was re-numbered as the 93rd Bill and the 83rd Bill was withdrawn. The 93rd Bill proposed that former Article 45 be amended to provide for early childhood care and education instead of being deleted altogether. This Bill was passed in 2002 as the 86th Constitutional Amendment Act. Currently, under Article 21-A of the Constitution, every child between the ages of 6–14 has a fundamental right to education, which the State shall provide ‘in such manner as the State may, by law, determine’. Early childhood care and education (for children in the age group of 0–6 years) is provided for as a directive principle of State Policy under Article 45 of the Constitution. As mentioned earlier, the Constitution of India and the laws enacted over the years have some unique and far-reaching provisions to protect children. Yet, there are laws
in which the age of the child is not in consonance with the CRC, which the Government ratified way back in 1992. Besides, the age of the child has been defined differently in different laws. These different age-specifics under different laws not only create a dilemma, but also set the stage for injustice. This is because, whether the same human being is or is not a child depends upon the law that is being invoked in a given case. Moreover, when the laws are in conflict with one another due to diverse definitions, it is but natural a difficult task to decide the ‘best interests of the child’. It is thus necessary that the definition of the term ‘child’ be brought in conformity with the CRC, viz. “below 18 years of age”, by establishing one standard ‘age of majority’.

Society for Un-aided Private Schools of Rajasthan vs U.O.I. & Anr. CJI S. H. KAPADIA "we find ourselves in the unenviable position of having to disagree with the views expressed therein concerning the non-applicability of the Right of Children to Free and Compulsory Education Act, 2009 (for short "the 2009 Act") to the unaided non-minority schools". Education is a process which engages many different actors: the one who provides education (the teacher, the owner of an educational institution, the parents), the one who receives education (the child, the pupil) and the one who is legally responsible for the one who receives education (the parents, the legal guardians, society and the State). These actors influence the right to education. The 2009 Act makes the Right of Children to Free and Compulsory Education justiciable. The 2009 Act envisages that each child must have access to a neighbourhood school. The 2009 Act has been enacted keeping in mind the crucial role of Universal Elementary Education for strengthening the social fabric of democracy through provision of equal opportunities to all.

The Directive Principles of State Policy enumerated in our Constitution lay down that the State shall provide free and compulsory education to all children upto the age of 14 years.

The said Act provides for right (entitlement) of children to free and compulsory admission, attendance and completion of elementary education in a neighbourhood school. The word "Free" in the long title to the 2009 Act stands for removal by the
State of any financial barrier that prevents a child from completing 8 years of schooling. The word "Compulsory" in that title stands for compulsion on the State and the parental duty to send children to school. To protect and give effect to this right of the child to education as enshrined in Article 21 and Article 21A of the Constitution, the Parliament has enacted the 2009 Act. The provisions of this Act are intended not only to guarantee right to free and compulsory education to children, but it also envisages imparting of quality education by providing required infrastructure and compliance of specified norms and standards in the schools. The Preamble states that the 2009 Act stands enacted inter alia to provide for free and compulsory education to all children of the age of 6 to 14 years. The said Act has been enacted to give effect to Article 21A of the Constitution.

Section 3(1) of the 2009 Act provides that every child of the age of 6 to 14 years shall have a right to free and compulsory education in a neighbourhood school till completion of elementary education. Section 3(2) inter alia provides that no child shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing the elementary education. An educational institution is charitable. Advancement of education is a recognised head of charity. Section 3(2) has been enacted with the object of removing financial barrier which prevents a child from accessing education. The other purpose of enacting Section 3(2) is to prevent educational institutions charging capitation fees resulting in creation of a financial barrier which prevents a child from accessing or exercising its right to education which is now provided for vide Article 21A. Thus, sub-Section (2) provides that no child shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing or completing the elementary education. Section 4 inter alia provides for special provision for children not admitted to or who have not completed elementary education. Section 5 deals with the situation where there is no provision for completion of elementary education, then, in such an event, a child shall have a right to seek transfer to any other school, excluding the school specified in sub-clauses (iii) and (iv) of clause (n) of Section 2, for completing his or her
elementary education. Chapter III provides for duties of appropriate government, local authority and parents. Section 6 imposes an obligation on the appropriate government and local authority to establish a school within such areas or limits of neighbourhood, as may be prescribed, where it is not so established, within 3 years from the commencement of the 2009 Act. The emphasis is on providing "neighbourhood school" facility to the children at the Gram Panchayat level.

Chapter IV of the 2009 Act deals with responsibilities of schools and teachers. Section 12 (1)(c) read with Section 2(n) (iii) and (iv) mandates that every recognised school imparting elementary education, even if it is an unaided school, not receiving any kind of aid or grant to meet its expenses from the appropriate government or the local authority, is obliged to admit in Class I, to the extent of at least 25% of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion.

As per the proviso, if the School is imparting pre-school education, the same regime would apply. By virtue of Section 12(2) the unaided school which has not received any land, building, equipment or other facilities, either free of cost or at concessional rate, would be entitled for reimbursement of the expenditure incurred by it to the extent of per child expenditure incurred by the State, or the actual amount charged from the child, whichever is less, in such manner as may be prescribed. Such reimbursement shall not exceed per child expenditure incurred by a school established, owned or controlled by the appropriate government or a local authority.

Section 13 envisages that no school or person shall, while admitting a child, collect any capitation fee and subject the child or his or her parents to any screening procedure.

Section 15 mandates that a child shall be admitted in a school at the commencement of the academic year or within the prescribed extended period. Sections 16 and 17 provide for prohibition of holding back and expulsion and of physical punishment or mental harassment to a child. Section 18 postulates that after the commencement of
the 2009 Act no school, other than the excepted category, can be established or can function without obtaining a certificate of recognition from the appropriate authority. The appropriate authority shall be obliged to issue the certificate of recognition within the prescribed period specifying the conditions there for, if the school fulfills the norms and standards specified under Sections 19 and 25 read with the Schedule to the 2009 Act.

In the event of contravention of the conditions of recognition, the prescribed authority can withdraw recognition after giving an opportunity of being heard to such school. The order of withdrawal of recognition should provide a direction to transfer the children studying in the de-recognised school to be admitted to the specified neighbourhood school. Upon withdrawal of recognition, the de-recognised school cannot continue to function, failing which, is liable to pay fine as per Section 19(5). If any person establishes or runs a school without obtaining certificate of recognition, or continues to run a school after withdrawal of the recognition, shall be liable to pay fine as specified in Section 19(5). The norms and standards for establishing or for grant of recognition to a school are specified in Section 19 read with the Schedule to the 2009 Act. All schools which are established before the commencement of the 2009 Act in terms of Section 19(2) are expected to comply with specified norms and standards within 3 years from the date of such commencement. Failure to do so would entail in de-recognition of such school.

Section 22 postulates that the School Management Committee constituted under Section 21, shall prepare a School Development Plan in the prescribed manner. Section 22(2) provides that the School Development Plan so prepared shall be the basis for the grants to be made by the appropriate government or local authority, as the case may be. That plan, however, cannot have any impact on consideration of application for grant of recognition for establishing an unaided school. To ensure that teachers should contribute in imparting quality education in the school itself, Section 28 imposes total prohibition on them to engage in private tuition or private teaching activities.
Chapter VI inter alia provides for protection of rights of children. Section 32 thus provides that any person having grievance relating to the right of child under the 2009 Act, may make a written complaint to the local authority having jurisdiction, who in turn is expected to decide it within three months after affording a reasonable opportunity of being heard to the parties concerned. In addition, in terms of Section 31, the Commissions constituted under the provisions of the Commissions for Protection of Child Rights Act, 2005 can monitor the child's right to education, so as to safeguard the right of the child upon receiving any complaint in that behalf relating to free and compulsory education. By virtue of the 2009 Act, all schools established prior to the commencement of the said Act are thus obliged to fulfill the norms and standards specified inter alia in Sections 25, 26 and the Schedule of that Act. [See Section 19(2)]. The State is also expected to first weed out those schools which are non-performing, or under-performing or non-compliance schools and upon closure of such schools, the students and the teaching and non-teaching staff thereof should be transferred to the neighbourhood school. The provision is meant not only to strengthen the latter school by adequate number of students but to consolidate and to impart quality education due to the addition of teaching staff. Needless to observe, that if there is inadequate response to the government funded school, it is but appropriate that either the divisions thereof or the school itself be closed and the students and staff of such schools be transferred to a neighbourhood school by resorting to Section 18(3) of the 2009 Act. Only after taking such decisions could the School Development Plan represent the correct position regarding the need of government aided schools in every locality across the State. Besides, it will ensure proper and meaningful utilization of public funds. In absence of such exercise, the end result would be that on account of existing nonperforming or under-performing or non-compliance schools, the School Development Plan would not reckon that locality for establishment of another school. In our view, even the State Government(s), by resorting to the provision of the 2009 Act, must take opportunity to re-organise its financial outflow at the micro level by weeding out the
non-performing or under-performing or non-compliance schools receiving grant-in-aid, so as to ensure that only such government funded schools, who fulfill the norms and standards, are allowed to continue, to achieve the object of the 2009 Act of not only providing free and compulsory education to the children in the neighbourhood school but also to provide quality education. Thus, there is a power in the 2009 Act coupled with the duty of the State to ensure that only such government funded schools, who fulfill the norms and standards, are allowed to continue with the object of providing free and compulsory education to the children in the neighbourhood school.

Private school associations in various states (Rajasthan, UP and Karnataka) have petitioned the Supreme Court, challenging the RTE Act’s provision for reserving 25% seats for underprivileged students.

Petitioners’ concern areas:

- According to the petitioners, the Act violates the rights of private educational institutions. They also cite Supreme Court’s ruling in the TMA Pai case, which rules that maximum autonomy should be given to private educational institutions.
- Petitioners have expressed their concern about lack of educational provision between the age of three to six years for children under the RTE Act.
- They also believe that the amount of money paid by a state government (INR 2,800 per student) as school fee and other expenditure per annum is meager, given the amount of money spent on salaries and other facilities.
- The petitioners have also highlighted the fact that the Government’s expenditure on strengthening the school system is much less than that of other countries. (India’s public spending on education was only 3.1% of its GDP in 2006.)

On the other hand, private schools have been accused of implementing money-spinning ventures and have been told to wake up to their social responsibility of imparting education to all segments of society.

Education has long been recognized as the basic element for individual development as well as preparation for participation in the country’s economic development. It is
an individual need, both for personal gains as well as the progress of the nation. A large number of people are still out of the education system. There is also enough evidence to indicate that we have a large section of the educated population that is unemployable. School education, which lays the foundation for skill development in the future, has been provided as a right to all children. Formulation of the Act is a step forward in that direction. However, while there is hope for the future, there are also some reservations that without addressing key elements such as quality in education, learning outcomes, accountability and good governance, mere formulation of the Act will not help.

This is probably the most debated aspect of the Act and there are strong views expressed in favor of and against reservation of seats for students from disadvantaged communities. The principle behind 25% reservation is to promote social integration. A school is a perfect setting where existing inequalities in society can be bridged if the school encourages students to integrate psychologically, emotionally and academically.

Some respondents feel that 25% reservation in private schools should be increased progressively so that after a certain period of time, the Government meets the expenses of all children, since it is ultimately the responsibility of the state to provide free and compulsory education for all children.

The provision for reimbursement made under the Act is acceptable to most private schools. It will benefit small private schools. However, reimbursement per child on the total expenditure on education may be different from the fee charged in a private school.

There is a view that the schools that have bought land on concession from the Government should admit students from disadvantaged sections of society. Aided schools - 'shall provide free and compulsory education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum of twenty five per cent.'

According to the current law of the land, educational institutions cannot make profits.
The money generated has to be ploughed back into the institution for education development. Reactions to this differ in the case of small private schools and big and elite ones. While the former is open to this idea, bigger schools are opposing it vehemently. Whatever be the decision of the judiciary in this regard, what is important is that unless this provision is accepted willingly by schools and is followed in spirit, the larger objective of social inclusion will not be met.

4.3 Summary:
As per its constitutional obligation under Article 21-A and as a process of International Obligations, the Indian Parliament enacted the Right of Children to Free and Compulsory Education Act, 2009, with a host of provisions to regulate and even restrict the running of schools. The essential schema of this act, as articulated in Section 12, mandates government schools to provide for free and compulsory elementary education and directs private unaided schools to do the same in respect of children belonging to the weaker sections and disadvantaged groups, subject to a maximum of twenty five per cent of their student intake. In the case of the later, the act guarantees them reimbursement, in respect of the 25 per cent of students admitted through the ‘free’ quota, of the same per-child-expenditure as would be incurred by a government school. ‘Child belonging to disadvantaged group’ is defined in Section 2(d) as a child belonging to the Scheduled Caste, Scheduled Tribe, or any other socially and educationally backward class or similar group that is disadvantaged owing to gender or social, cultural, economic, geographic, linguistic, or similar factors, and the expression ‘child belonging to weaker section’ is defined in Section 2(e) as a child belonging to such parent or guardian whose annual income is lower than the minimum limit specified by the appropriate government.

After very much tardiness in the free and compulsory education policy, The Supreme Court, in response, has come out with its verdict upholding this enactment on 12.04.2012, in Society for Unaided Private Schools of Rajasthan v. Union of India.38

38 (2012) 6 SCC 1
The response is rendered even more interesting due to the strong notes of dissent struck by Justice Radhakrishnan.

There are three different themes common to any state regulation on educational institutions, regardless of the nature of education imparted. First, to what extent can the state insist upon ‘reservations’ in the case of educational institutions run entirely on private funds? The response to this is rooted in understanding the proper character of education vis-a-vis Article 19(1)(g) of the Constitution, such as whether it is a business, occupation, trade or pure charitable activity. If the state can indeed thrust the obligation to reserve a certain percentage of seats upon private unaided educational institutions, the second theme arises. Is there any distinction between ‘minority’ institutions and others in so far as extending the power of the state to provide for reservations is concerned? This, in turn, depends on the preferred reading of Article 30 and assessing whether this fundamental right goes beyond the general freedom to carry on business conferred under Article 19(1)(g).

The third theme is the nature and content of regulations, apart from reservations, that the state can provide for in both minority and non-minority educational institutions. Apart from these, the RTE Act, due to its specific regulatory domain of primary education and the presence of Article 21-A, raises a fourth theme, being whether non-state actors can be saddled with a responsibility primarily cast upon the government under Article 21-A. The court, in the RTE case, has addressed these issues but in an unsatisfactory manner. Since the fourth theme, that of horizontal application of rights, has seldom come up prior to this case for judicial scrutiny, this article will focus on this theme. In essence, this article argues that both the dissenting judgment and the majority verdict take extreme positions based on absolute prioritization of one set of fundamental rights over the other, thus resulting in ambiguous articulation of the proper standard of judicial review in situations involving the horizontal application of fundamental rights.

In general, fundamental rights are only enforceable against the state. Indeed, Article 13 prohibits the ‘state’ from making any law that takes away or abridges the
fundamental rights conferred by Part III of the Constitution. The constitutional history behind the introduction of fundamental rights also makes it clear that these rights were meant to protect the citizen against The State. However, our Constitution makers were aware of the fact that certain vital rights could be infringed upon by private actors too, and this explains the different language employed in provisions such as Article 17 (abolition of untouchability), Article 23 (prohibition of traffic in human beings and forced labour) and Article 24 (prohibition of employment of children in factories).

For a good thirty years this division between a few fundamental rights, enforceable against private citizens, and the many that were enforceable only against the state, worked well. It is with the unfettered expansion of Article 21 through the doctrine of ‘unenumerated’ rights that problems crept in with this otherwise simple division. If Article 21 did cover within its now wide sweep, the right to a clean environment, shelter, medical care and various other such judicially crafted rights, would these rights be enforceable at all without active cooperation by non-state actors? A classic instance of this difficulty caused by the unconstrained enlargement of the rights under Article 21 is the decision in *Vishaka v. State of Rajasthan.*

Here, the court took serious exception to an incident involving the rape of a social worker employed by the state of Rajasthan, and went to the extent of framing guidelines for prevention of sexual harassment in any workplace. The court justified this exercise of judicial power by harping on violation of fundamental rights under Articles 14, 15, 21 and 19(1)(g). However, the court failed to appreciate that the extension of these guidelines to private entities required a separate conceptual enquiry. While dispensing with conceptual analysis, the court showed concern only towards how best sexual harassment could be eradicated from the workplace. Keeping in mind the fact that many organizations are owned by private entities post liberalization, the sweeping application of fundamental rights to non-state actors perhaps brought about a desirable outcome on the facts of this case.

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39 AIR 1997 SC 3011
This does not unfortunately translate into doctrinally sound constitutional jurisprudence as private actors, as opposed to the state, have their own fundamental freedoms. The right to one man’s privacy could well amount to an unreasonable restriction on the other’s right to free speech, when horizontally applied. Similarly, the right of one person to non-discrimination could impact on a private corporation’s right to carry on business. In short, the nature of the enquiry has to be necessarily different when imposing a duty on non-state actors, who themselves enjoy fundamental rights, than on state actors who are mandated to respect fundamental rights regardless of the difficulty in complying with their ‘duty’.

It is also important to appreciate that the word ‘right’ allows for different contextual connotations. It may, on some occasions, give the right holder an entitlement to demand something positive from the world at large or specific duty bearing individuals. In certain other situations, the right holder is only immunized to the extent of non-interference with his right by others. The idea of fundamental rights was largely a guarantee of the latter, and not the former. The notion of positive action was in fact incorporated, though not as an entitlement, in Part IV of the Constitution that deals with the Directive Principles of State Policy. However, the judiciary, through creative expansion of Article 21, diluted the traditional ‘negative rights’ study of Articles 14, 19 and 21 by reading in some of the directive principles as well as international treaty obligations within the purview of Article 21.

The state could no longer remain a silent non-interfering spectator, and onus was cast upon it to dedicate its machinery to the effective fruition of these ‘socio-economic’ rights. This assumes particular importance in the context of primary education, as the court in *Unnikrishnan v. State of Andhra Pradesh* 40 relied on Article 45, a directive principle, to hold that the state had a duty, under Article 21, to provide for free and compulsory education of its citizens till the age of fourteen.

The difficulty with this approach towards interpreting Article 21 is twofold: one, the state has no real resources to ever guarantee the discharge of its duty and in most

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40 (1993) 1 SCC 645
cases, the right remains merely one on paper, and two, the state can justify resort to restrictions on private actors in the guise of giving wings to the positive right in question. This is precisely the case with the RTE Act, as the positive right judicially created in Unnikrishnan and Mohini Jain v. State of Karnataka, and constitutionally enshrined through Article 21-A, has been misconstrued to make private entities liable for the fulfilment of this right with little or no heed being paid to the fundamental rights enjoyed by them. This is evident from the best foot put forward by the Union in support of the act, being the submission that Article 21-A, which gives effect to a socio-economic right, would trump other fundamental freedoms and ‘negative’ rights such as the right to carry on business in Article 19(1)(g). The correct response to this submission required an understanding of the history behind Article 21-A as well as the possibility of horizontal application of rights in our constitutional jurisprudence, both of which are strikingly absent in the majority verdict.

In this regard, the dissent by Justice Radhakrishnan traces the events leading to the introduction of Article 21-A, and attempts to draw the majority’s attention to the potential hazards of imposing the state’s duty on private actors. The painstaking review of the progress of this constitutional amendment from the day the Constitution (Eighty-third Amendment) Bill, 1997 was born within the confines of the Department of Education in the Ministry of Human Resource Development, to when it finally got included in Part III, reveals that the initial draft specifically prohibited the state from making ‘any law, for free and compulsory education...in relation to the educational institutions not maintained by the State or not receiving aid out of State funds.’ Subsequently, political compulsion prevailed, and it was considered fit to leave it to the judiciary to decide on the scope and width of Article 21-A.

The dissent draws a linkage between the enactment of the RTE Act in 2009 and parallel developments in the field of higher education such as the decisions of the Supreme Court in T.M.A. Pai Foundation v. State of Karnataka, Islamic Academy of

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41 (1992) 3 SCC 666
Analyzing these decisions, the dissent concludes that Parliament was fully aware, at the time of enacting the RTE Act, that private unaided educational institutions of both minority and non-minority status could not be burdened with reservations. This judicial view, according to Justice Radhakrishnan, ought to permeate the debate surrounding Section 12 of the RTE Act, as there was no strong reason to deviate from the same.

More importantly, the dissent examines several decisions of the Indian Supreme Court where Article 21 was liberally interpreted to include positive socio-economic rights, as well as pronouncements by the South African Constitutional Court, to conclude that even in jurisdictions where socio-economic rights have been exalted to the status of constitutional rights, those rights are available only against the state and not against private non-state actors such as private schools or hospitals unless they receive some aid, grant or other concessions from the state. The dissent also concludes that the beneficiaries of a socio-economic right cannot make inroads into the rights guaranteed to other citizens.

This part of the dissent forms the crux of the actual debate surrounding Articles 21-A and 19(1)(g) and the interplay between these rights, and is unfortunately ignored in its entirety by the majority. This is unfortunate as the majority could have trodden the middle path, applied the doctrine of proportionality, and yet probably arrived at the same outcome that it eventually did. This would have been at variance with, and better than, the extreme position in the dissenting opinion that a constitutional amendment on the lines of Article 15(4) and 15(5) ought to have been introduced to specifically provide for reservations in private unaided educational institutions. This would also have been more a conceptually sound precedent than the other extremity that the majority endorsed, being a complete negation of Article 19(1)(g) by the mere presence of Article 21-A and its laudable objective.

Before examining the limited reasoning that the majority verdict discloses, a few words on judicial review are in order. Judicial review signifies both the power of, and the standard for, courts to examine the constitutional validity of state action. It is, therefore, imperative while exercising this power that the correct standard or approach is adhered to, so that future courts, when confronted with similar conflicts, can follow the right precedent. A judgment which arrives at the seemingly correct outcome through incorrect means is still a wrong decision, both because it serves as an undesirable precedent and because none can predict with clockwork accuracy the actual outcome had the correct test been followed. The majority verdict, when viewed from this angle, stands influenced entirely by a few factors, some of which are no doubt relevant but hardly conclusive, and thus falls into the above well of incorrect judicial reasoning.

There are two glaring errors in the majority reasoning. First, the assertion that the impugned scheme of the RTE Act is justified since the running of an educational institution is a charitable activity in India, heavily misconstrues the *TMA Pai* and *Inamdar* decisions. While it is no doubt true that the 11 judge bench in *TMA Pai* did consider education to be a recognized head of charity, the seven judge bench in *Inamdar* had categorically held that even this consideration would not permit the state to impose its reservation policy on private unaided educational institutions. It was, therefore, imperative that the majority explain why private unaided schools stand on a footing separate from private unaided colleges. But for the incantation of Article 21-A, the verdict is rather silent on this issue.

This brings us to the second major flaw, being that of absolute prioritization of Article 21-A over 19(1)(g) merely because of the laudable objective sought to be achieved through the introduction of the former provision. The majority holds that the RTE Act is a reasonable restriction under Article 19(6) since it has been enacted to give effect to Article 21-A, but this begs the question as to whether the scheme contained in this act is still a reasonable one. This, in turn, is an enquiry that goes way beyond the mere objective of the legislation to a balancing of competing interests. This is more so in
situations where a fundamental right is sought to be enforced against non-state actors who, as rightly pointed out by Justice Radhakrishnan, are themselves protected by fundamental rights. The majority conducts no such balancing exercise, thus leaving open to our imagination the correct standard of judicial review in cases involving horizontal application of fundamental rights.

Right from the decision in *State of Madras v. VG Row*, the Supreme Court has held that various factors such as the nature of the right alleged to have been infringed, the underlying purpose of the restriction, the extent and urgency of the evil sought to be remedied, the disproportion of the restriction, and the prevailing conditions at the time of imposition of the restriction, would all be relevant in determining the reasonableness of the restriction placed on a fundamental freedom contained in Article 19. Though the restriction in this case related to Article 19(2), the same principle was held applicable to Article 19(6) in *Collector of Customs, Madras v. Nathella Sampathu Chetty*. This has in fact prompted the court, in *Om Kumar v. Union of India*, to remark that the principle of proportionality has been applied vigorously to state action in India ever since 1950. The doctrine of proportionality essentially involves a balancing of competing interests to ensure a proportionality of ends, as well as securing the proportionality of means by permitting only the least restrictive choice of measures by the legislature or the administrator for achieving the object of the legislation or the purpose of the administrative order.

Essentially, there are three important criteria used while applying the doctrine of proportionality. The necessity criterion prevents the state from taking any action that goes beyond what is necessary to achieve its aims, i.e. the method least burdensome to the affected persons. The suitability criterion insists that the means chosen be suitable for achieving those aims. The balancing criterion guarantees a proportionate balance between the burden imposed on affected persons and the purpose sought to be achieved. In determining the reasonableness of any restriction using proportionality,

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43 AIR 1952 SC 196
44 AIR 1962 SC 316
45 2000 (7) SCALE 524
the legislative objective should be sufficiently important to justify such a restriction, the measures designed to meet the legislative objective should be rationally connected to it, and the means used to impair the right or freedom should be no more than is necessary to accomplish the objective. These principles go to show that the nature of the competing interests play a significant role in ascertaining the limit on constitutionally permissible restrictions.

The above framework of judicial review fits perfectly with the kind of issues that crop up when fundamental rights are sought to be extended to non-state actors. In the specific case of the RTE Act, factors such as the laudable objective behind Article 21-A, the exclusion of the exception favouring private unaided institutions in the final version of the amendment, the virtual impossibility of fulfilling this objective if non-state actors including minority educational institutions were to be excluded from its purview, the relatively reduced 25 percentage of reservations and the reimbursement of basic cost to the private unaided institutions would have weighed in favour of the act. On the other hand, factors such as those highlighted by Justice Radhakrishnan in the dissent would, instead of rendering the act unconstitutional under any circumstance whatsoever, end up on the proportionality scale as factors weighing the balance against the state. The court would also have to keep in mind the economic viability of running private schools post the introduction of the impugned scheme.

Needless to say, none of these factors would have arisen in a case of vertical application of fundamental rights, where the state is obliged to unconditionally respect the citizen’s right. The RTE case reveals a preference for one-dimensional analysis both by the majority and the minority, an approach wholly inadequate while reviewing the validity of legislation that casts duties of the state on non-state actors. For this reason alone, the constitutional validity of the RTE Act ought to be reconsidered by a larger Constitution Bench by expanding the scope of enquiry to include the factors highlighted above and balancing them.

The inadequacy of the court’s approach shows up best when it addresses the issue of application of the RTE Act to minority unaided institutions. This issue mattered not in
the dissent since Justice Radhakrishnan had concluded that the act would be constitutionally invalid regardless of the minority/non-minority character of these educational institutions. However, the majority’s treatment of this issue, and its conclusion that the act would not apply to minority unaided institutions, offers the most powerful argument yet to reconsider this decision. While arriving at this conclusion, the majority has yet again applied the ‘absolute prioritization of rights’ analysis, wherein Article 30(1) supersedes the obligation cast on the state and non-minority private unaided institutions under Article 21-A.

The basis for this prioritization is again unclear and more likely than not, erroneous, especially because the precedents in *TMA Pai* and *Inamdar* strongly indicate that both Articles 19(1)(g) and 30(1) provide the same level of protection to unaided private educational institutions with the latter being exclusively applicable to the schools run by the minorities. If the protection under Article 19(1)(g) could be superseded by the RTE Act due to the laudable objective furthered by Article 21-A, as the majority held it did, consistency demanded a similar view to be taken in respect of Article 30(1) as well.

An independent enquiry is, however, required to examine whether the above outcome could have been sustained, had the correct standard of review – the proportionality standard as put forth by this article – been applied. Coming back to the exercise of weighing and balancing, two additional considerations in law, and one of fact, would most certainly figure in this exercise. The considerations in law are Article 30(1), no doubt, and Article 15(5). Article 30(1) is a special provision that vests with religious and linguistic minorities, the important right to establish and administer educational institutions of their own choice. Whether this provision makes any difference to the balance is doubtful as Article 19(1)(g), in the opinion of the larger benches in *TMA Pai* and *Inamdar*, guarantee as much of protection as Article 30(1) to the non-minorities who cannot avail of the latter provision. More importantly, larger benches of the Supreme Court have held that Article 30(1) is not an absolute right and can be curbed in national interest.
The majority, which waxed eloquent about Article 21-A and its nationally significant objective, cannot possibly take a different view of this objective only when it comes to minority unaided institutions. Therefore, in the scales of proportionality review, Article 30(1) makes no difference, in the context of minority institutions, to the balance as exists in the case of non-minority institutions. At best, Article 30(1) would permit the minority institution to prefer students from their own community while admitting the 25 per cent ‘free quota’, as long as such preference was exercised in a fair and transparent manner. This was even conceded by the Union of India.

Article 15(5), on the other hand, does play an instrumental reason in tilting the balance, and for the reason that this provision, the constitutional validity of which was not in question before the court, specifically contains an exemption favouring minority educational institutions. The constitutional history of this provision, introduced in response to the decision of the court in Inamdar, is also a pointer to the fact that the state, while seeking to override the rights under Article 19(1)(g) in the field of education, never desired to do so in respect of the rights under Article 30(1). While the Union never sought to defend the RTE Act as a proposed measure under Article 15(5), and understandably so since the scope of this provision is much narrower than what the RTE Act attempted to cover, this is certainly a factor weighing in support of not extending the RTE Act to minority educational institutions. This factor could even be conclusive if not for the next factor, one of fact. This factual consideration puts back the balance in favour of Article 21-A, and the Union’s case for applicability of the RTE Act to minority educational institutions.

This all important factual consideration is the substantial percentage of the total number of unaided private schools that qualify for ‘minority’ status in various states. While no comprehensive nationwide study was presented in this regard for the consideration of the court, some of the facts speak louder than ever. In Karnataka, the rough estimates are that out of 10,252 unaided schools, 6,600 would qualify as minority institutions. As per the 2007-08 statistics relied on by the Supreme Court, of the 12,50,755 schools imparting elementary education in India, 80.2 per cent were
government run, 5.8 per cent were private aided and 13.1 per cent were private unaided. Due to the extreme ambiguity in defining the term ‘minority’, it has been difficult to ascertain the percentage of private unaided schools that would qualify for exemption. It could well be the case that if minority unaided institutions were exempt from the purview of the RTE Act, this legislation would not come anywhere close to achieving its stated objective. Apart from this, the court also ought to have factored in the rent-seeking behaviour this exemption would trigger, as institutions of all kind and character vie for minority status.

The above factors have been highlighted not to contend that the ultimate outcome in the RTE case is erroneous, but to show how an incorrect standard of review can result in various governing considerations being ignored by the adjudicatory body. This, in itself, is a strong reason to reconsider the debate on the constitutional validity of the RTE Act. The Supreme Court, by following an incorrect path, has muddled the manner in which enquiry into the constitutional validity of a legislation that advocates horizontal application of fundamental rights ought to be conducted. This error is accentuated by the apparently illogical and discriminatory conclusion arrived at by the court, that the RTE Act would not apply to minority unaided institutions. The application of the proportionality standard of review could have addressed most of this criticism by inspiring confidence that justice has not only been done, but evidently so.