

## PRIMARY EDUCATION AS FUNDAMENTAL RIGHT – A CRITICAL APPRAISAL

By

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### Introduction

Judicial Activism means different things to different people. Some Jurists think it is dynamism of Judges or judicial creativity. There is no statutory definition for Judicial Activism. *Satybrata Sinha* Hon'ble former Chief Justice of A.P. High Court defined the term Judicial Activism as, "an Activism by taking recourse to judicial process leading to judicial pronouncements on different intricate issues whereby new approach towards legal philosophy is made"<sup>1</sup>. Almost two centuries ago in *Marbury v. Madison* case American Supreme Court initiated the concept of judicial review, which was the starting point of Judicial Activism. Decision in this case has evolved the principle of the Supremacy of Constitution over other laws and of the judicial power to disregard unconstitutional laws.

In the present paper an endeavour is being made to highlight the Judicial Activism in the context of Right to Child Education.

### Judicial Activism - The Genesis

During the period 1950 to 1978 Judiciary was with conservative approach. After 1975 the Judiciary has become unelected representative of the people. Justice *Krishna Iyer*, Justice *P.N. Bhagvatbi*, Justice *Chinnappa Reddy* and others played an important role in protecting the Human Rights by way of Judicial Activism and Judicial Creativity. In

*Maneka Gandhi v. Union of India*,<sup>2</sup> the Apex Court held that, "the term procedure established by law appearing in Article 21 of the Constitution is controlled by the Article 14 and procedure contemplated under Article 21 can't be unfair or arbitrary but it must be just, fair and reasonable". This judgment played the role of catalyst for the evolution of the Judicial Activism and the law relating to judicial intervention on Human Rights cases. Thus Judicial Activism in India has become a tool of social engineering and an example of legal realism. The reading in of un-enumerated rights in Article 21, like, laying down guidelines regarding the sexual harassment of women at work place and the Right to education offers an excellent examples of how the Judiciary can creatively adjust the law to meet the changing social circumstances.

### Right to Education as Fundamental Right

Part IV of the Indian Constitution consisting Directive Principles of State Policy, though fundamental in the governance of the country are not enforceable. Till 1980's Indian Judiciary has not seriously considered enforceability of the Directive Principles of State Policy following positivistic approach. Later the Supreme Court started taking Directive Principles of State Policy as basis for the meaningful enforcement of Fundamental Rights. This can be witnessed from the judgments of Apex Court in *Maneka Gandhi*, *Mobini Jain* and *Unni Krishnan* cases. Now Directive Principles of State Policy are

1. Judicial Activism Dimensions and Directions, Edited by D. Banerjee, A. Subrahmanyam and V. Vijayakumar, Vikas Publishing House Pvt. Ltd., New Delhi, 2002, P.14.

2. AIR 1978 SC

not unenforceable, they are supplementary and complementary to Fundamental Rights.

Education makes man free from all prejudices and presuppositions. The object of education is the attainment of scientific truth by providing intellectual excellence, moral strength and emotive commitments. Since last three decades, demands of the society have been reflected in the judgments of Supreme Court. Some Directive Principles of State Policy have been transformed into Fundamental Rights by Supreme Court and one among them is Right to Education. Right to Education has always been declared as a Fundamental Right by the Supreme Court of India. When the issue of right to education came up for consideration in renowned case of *Mohini Jain v. State of Karnataka*,<sup>3</sup> the Supreme Court observed that, "it is no doubt correct that right to education as such has not been guaranteed as Fundamental Right but reading the above quoted provisions cumulatively it becomes clear that the framers of the Constitution made it obligatory for the State to provide education for its citizens". Having considered all other observations the Supreme Court finally considered that, "the right to education directly flows from the right to life. The right to life under Article 21 and dignity of an individual cannot be assured unless it is accompanied by the right to education. The State Government is under an obligation to make an endeavour to provide educational facilities at all levels to its citizens".

### ***Elevation of Primary Education as Fundamental***

Right to education of every child is a human right. Millions of children around the world are denied their right to education, ultimately denying them to build decent lives for themselves. The absence of primary education of an acceptable quality remains a serious problem in most parts of the

developing world. Despite the repeated promises made in Five-year Plans of India to take care of primary education, universal elementary education has not been attained. "About a hundred million Indian children are not in school and many are at work and thirty seven per cent of children who join school drop out before completing even the five years of primary schooling"<sup>4</sup>. The problem of poverty, scarcity of neighbourhood schools, low quality of education in Government schools and proper motivation of parents are the reasons lagging behind in achieving the target of universal primary education in India. *Unni Krishnan v. State of Andhra Pradesh*,<sup>5</sup> is a landmark case on right to child education. The main question before the Supreme Court was, whether the right to primary education is a Fundamental Right under Article 21 of the Constitution which is Directive Principle under Article 45. Supreme Court while upholding the right to education as fundamental right said that, "every child of this country has a right to free education until he completes the age of 14 years. Thereafter his right to education is subject to the limits of economic capacity and development of the State". The Apex Court further observed "it is noteworthy that among the several Articles in Part IV only Article 45 speaks of time limit, no other article does. Has it not significance? Is it mere pious wish, even after 44 years of the Constitution"? Thus, the Supreme Court of India has not only treated the right to education as a Fundamental Right but also played an important role in transformation of Right to Education as Fundamental Right.

### ***The Right to Education Bill, 2005***

As a consequence of the judicial precedents, that the Constitutional amendment to make the right to education a fundamental

3. AIR 1992 SC

4. Asha Bajpai, Child Rights in India-Law, Policy and Practice, Oxford University Press, New Delhi 2006, P.332

5. AIR 1993 SC

right was made in the year 2002 by the 86th Constitutional amendment. Accordingly Article 21-A has been inserted in the Constitution of India which made Right to Education a Fundamental Right to children between six to fourteen years of age. State is now under the legal obligation to provide free and compulsory education to all the children between 6-14 years of age. The Government of India prepared *The Right to Education Bill* in the year 2005, which seeks to give effect to the 86th Constitutional amendment. The Bill provides for that, every child who has attained the age of 6 years shall have the right to free and compulsory education of equitable quality, and private schools shall admit at least 25 per cent of children from weaker sections and no fee shall be charged from such children. The Bill is ambiguous on its applicability to schools administered by minorities. And there is no proper definition for the term 'education of equitable quality'.

But the Bill moved from Centre to States, from Committee to Committee because of unanimous opposition from the State Governments mainly in respect of sharing of economic burden. After considering opinions given by several levels of Ministers, civil society, media and academicians the Cabinet has finally approved the text of Bill in October, 2008 revising the Right to Education Bill, 2005. The said Bill was renamed as "*The Right of Children to Free and Compulsory Education Bill, 2008*" and proposed to introduce in the Parliament in Budget Session of the year 2009, but it could not be materialized. No legislation is framed till date. Seven years after the 86th Constitutional amendment, guaranteeing free and compulsory education to children between 6 and 14 years was unanimously passed by the Parliament, the Right to Education promise is yet to translate into reality.

### Conclusion

It is needless to state that, the progress of a nation inevitably depends upon the

education imparted to the children by the State. It is sordid to note that, the child education and the scientific system of child education is still a far cry in the country. In spite of the fact that the Judiciary has taken the lead in proclaiming the Right to Education the State is lagging behind in its commitment and will. The sacred Directive Principles in the Constitution are yet to be realized and millions of children are still becoming the victims of exploitation and education is a distant dream for them.

Moreover the 86th Constitutional Amendment diluted the judgment of *Unni Krishnan* case, by ignoring the children in the age group of 0-6 years while the provision for 0-6 age group children has been included in Article 45 of the Directive Principles of State Policy. The new Article 21-A states, 'the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner *as the State may, by law, determine*'. It is pertinent to note that Article 21-A confers wide discretionary power on the State in determining the how and when and what of the free primary education, thus leaving everything to whims and fancies of the State.

Making education a Fundamental Right is surely a step in the right direction to address the disparities of elementary education in India. There is Constitutional right, but there is no enabling legislation or concrete policy to give effect to this Fundamental Right, without which such right would remain a dead-letter. Government of India should see that, the Right to Education Bill is enacted as a law at the earliest. Unless above mentioned pitfalls of Right to Education Bill is properly attended it is not possible to achieve the goals of elementary education for all children. The Right to Education which is the offshoot of Judicial Activism needs to be secured to the people in letter and spirit. It is the need of the hour for the State to initiate immediate measures to provide this basic right to millions of children who were deprived of the same,

by strengthening the existing infra structural facilities and improving the budgetary allocations. It is needless to state that, a Nation

which fails to provide at least the primary education to its future citizenry is bound to remain backward.

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## PHILOSOPHY AND DEVELOPMENT OF HUMAN RIGHTS – AN OVERVIEW

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Human rights are rights that are attached to human beings and function as moral guarantees in support of our claims towards the enjoyment of a minimum good life. In conceptual terms, human rights are themselves derivative of the concept of a right. In order to understand philosophical foundation of concept of human rights, the distinction between moral rights and legal rights are necessary to understand the basis and potential development of human right. Thus with this back-ground an attempt has been made to project philosophical and historical foundation of Human Rights in this article.

### *Concept and development of Human Rights : Philosophical approach*

In general, legal rights refer to all those rights found with in existing legal codes and it is a right that enjoys the recognition and protection of the law. Questions as to its existence can be resolved by simply locating the relevant legal instrument or piece of Legislator. On the other hand moral rights are not rights in the strict sense, but are better thought of as moral claims, which may or may not eventually be assimilated with in national or international law. For a legal positivist like *Jermay Bentham*,<sup>1</sup> there can be no such thing as human rights existing

prior to, or independently from legal codification. For a positivist determining the existence of rights is no more complicated than locating the relevant legal statute or precedent. Thus, moral rights are rights that exist prior to and independently from their legal counterparts. The existence and validity of moral rights is not deemed to be dependant upon the actions of Jurists and Legislators. One should believe that Fundamental Rights which may or may not have received legal recognition elsewhere, remained valid and morally compelling even in those countries whose legal systems have not recognized these rights. Therefore, it appears that human rights are best identified as moral rights.

Human rights certainly share an essential quality of moral rights because their valid existence is not depending upon their beings legally recognized. Human rights are meant to apply to all human beings everywhere, regardless of whether they have received legal recognition by all countries everywhere. Clearly, there remain numerous countries that wholly or partially exclude formal legal recognition to Fundamental Rights. Supporters of human rights in these countries insist that rights remain valid regardless, as fundamental moral rights. The universality as moral rights clearly lends greater moral force to human rights<sup>2</sup>. It would be a mistake to exclusively identify human

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1. See *Andrew Fagan's*. Essay on Human Rights, <http://www.iep.utm.edu/h/hum-rights.htm#H2>.

2. Ibid.