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RECOGNIZING EDUCATION RIGHTS IN INDIA AND THE UNITED STATES: ALL ROADS LEAD TO THE COURTS?

Ashley Feasley*

I. INTRODUCTION

THE RIGHT TO EDUCATION is a codified human right under the international law system. Recently, a right to education has been acknowledged by many nations, whether through express mention in a national constitution¹, a bill of rights,² or a separate/corresponding legislative act.³ That a right to education has recently found constitutional recognition demonstrates the value of public advocacy, national constitutional arrangements, and international supervision of treaty undertakings which lead to acknowledgement of the right.⁴

India has identified the right to education both domestically and internationally. India has also recognized a qualified right to education in its constitution and through its judiciary, and has attempted to enforce that right through legislation and judicial action. While India has acknowledged a fundamental right to education, the U.S. has not recognized a fundamental right to education federally or internationally. Despite the U.S.'s non-acknowledgment of the positive right to education, there are protections in place within the state constitutions (as

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¹ See, e.g., India CONST. art 21A, available at <http://lawmin.nic.in/coi/coiason29july08.pdf>.

² See, e.g., S. AFR. Const. Bill of Rights §29, 1996.

³ See, e.g., Educ. Act (1989) (N.Z.) (Section 3, Right to Free Primary and Secondary Education), available at <http://www.legislation.govt.nz/act/public/1989/0080/latest/whole.html#DLM177440>.

⁴ Philip Alston & Nehal Bhuta, *Human Rights and Public Goods: Education as a Fundamental Right in India*, 259 (NYU Law School CHRGJ, Working Paper No. 6, 2005), available at <http://www.chrgj.org/publications/docs/wp/Alston&Bhuta%20Human%20Rights%20and%20Public%20Goods%20-%20%20Education%20as%20a%20Fundamental%20Right%20in%20India.pdf>.

well as limited federal legal precedent relating to educational opportunity) to give qualified education rights in the U.S.

The American and Indian approach to the protection of the right to education differs despite both nations' acknowledgment of a conditional right to education. For the U.S., recognition of the right to education and of social and economic rights is problematic. The U.S. legal system does not recognize a federal fundamental right to education.⁵ Instead, the U.S. Supreme Court has recognized a right to equal educational opportunity through the Equal Protection Clause of the 14th Amendment of the Constitution.⁶ In the U.S. context, education rights and human rights are two different movements. Some note that this separate historical development has likely contributed to their unrelated treatment.⁷ The term "right to education"⁸ is rare, despite the fact that the U.S. was instrumental in securing the affirmation of economic and social rights in the Universal Declaration of Human Rights.⁹ The tendency to separate social and economic rights from other human rights can likely be attributed to U.S.'s promotion of civil and political rights over social and economic rights. Problems with effectively implementing the right to education and equal educational oppor-

⁵ See *San Antonio Indep. Sch. Dist. v. Rodriguez* (Rodriguez), 411 U.S. 1 (1973); see also Eric Lerum, Sheila Moreira, and Rena Scheinkman, *Strengthening America's Foundation: Why Securing the Right to an Education at Home is Fundamental to the United States' Efforts to Spread Democracy Abroad*, HUM. RIGHTS BRF., Spring 2005, at 13, available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1323&context=hrbrief> (discussing that despite American ideals and culture recognizing right to education the legal system has not recognized a fundamental right to education).

⁶ See e.g. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

⁷ Katarina Tomasevski, *U.N. Special Rapporteur on Right to Education*, Office of the High Commissioner for Human Rights, www.ohchr.org (2001), available at <http://www.ohchr.org/EN/issues/Education/SREducation/Pages/SREducationindex.aspx>.

⁸ U.N. Economic and Social Council, Economic, Social and Cultural Rights, E/CN.4/2002/60 (2001). Throughout her United States mission, the Special Rapporteur was asked what the right to education meant and provided explanations of what it entailed. The answers, summarized in her reports, define the right to education in part by governmental obligations to make education available, accessible, acceptable and adaptable.

⁹ Eleanor Roosevelt, Statement on the Draft Covenant of Human Rights (1951), available at <http://newdeal.feri.org/er/er34.htm> (addressing the importance of social and economic rights).

tunity have been stymied by race and wealth inequities, state and local government political battles over funding, and inconsistent federal policy regarding accountability and charter schools.

In contrast, India's judiciary has provided an activist role in relation to securing the right to education, primarily through its holdings in *Mohini Jain*¹⁰ and *Unni Krishnan*.¹¹ Both cases fashioned a justiciable constitutional right to education by attaching it to the right to life, a right already enumerated in the Indian Constitution.¹² Due in part to the Indian Judiciary's activism, a justiciable right to education was realized in the Indian Constitution in 2002.¹³ While the right has been formally recognized, the remedy has not yet been consistently implemented in India. Namely, there have been obstacles to implementing pertinent legislation, with opposition coming particularly from private unaided minority and majority schools.¹⁴ This has been exemplified by the challenge to the 2009 Right to Education Act in the recent Supreme Court case, *Society for Un-aided Private Schools of Rajasthan v. U.O.I.*¹⁵ Despite the obstacles, the Indian government has introduced some pro-education measures and seems to be moving forward to realiz-

¹⁰ *Mohini Jain v. State of Karnataka*, (1992) 3 S.C.C. 666, available at <http://www.indiankanoon.org/doc/40715/> <http://judis.nic.in/supremecourt/imgs1.aspx?filename=12349>.

¹¹ *Unni Krishnan & Others. vs. State of A.P. and Others.* 1993 (1) S.C.C. 645, AIR 1993 SC 2178, available at <http://judis.nic.in/supremecourt/imgst.aspx?filename=12220>.

¹² Madhav Khosla, *Making Social Rights Conditional: Lessons from India*, 8 Int'l J. Const. L. 739, 758 (2010) citing Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa* in *Designing Democracy: What Constitutions Do* 231 (2001); Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever*, 209-229 (2004).

¹³ See INDIA CONST. art. 21A, (2008), available at <http://lawmin.nic.in/coi/coiason29july08.pdf>.

¹⁴ See, e.g., Prasad Joshi, *Experts divided over decision to exempt unaided minority schools from RTE Act* *Indian Express*, (Jan. 09, 2013), available at <http://www.indianexpress.com/news/experts-divided-over-decision-to-exempt-unaided-minority-schools-from-rte-act/1056633>; see also Dilara Sayeed, *Hurdles in implementation of Right to Education Act in India*, *India Tribune*, available at http://www.indiatribune.com/index.php?option=com_content&view=article&id=7659:hurdles-in-implementation-of-right-to-education-act-in-india-&catid=30:opinion&Itemid=460.

¹⁵ *Society for Un-Aided Private Schools of Rajasthan v. U.O.I.*, Writ Petition (C) No. 95 of 2010, 12 April 2012, Section PIL & X.

ing the right for all children, such as free and compulsory education for children between ages of 6 and 14.¹⁶

The approaches of United States and India take disparate form: India has recognized the right to education and is attempting to implement the right, whereas the United States has not formally recognized the right to education itself but has acknowledged a limited right to educational opportunity, but has implemented some sort of right to education unequally by relying on the states to guarantee and implement some kind of remedy. This paper aims to evaluate the American and Indian approaches towards the right to education. Section II discusses the interrelatedness of social and economic and civil and political rights and the right to education in international law. Section III examines constitutionalism and the right to education. Section IV reviews the right to education in America. Section V examines the right to education in India.

II. EDUCATION RIGHTS IN INTERNATIONAL HUMAN RIGHTS LAW

A. *Distinctions Between Social and Economic and Political and Civil Rights*

The distinction between civil and political rights and social and economic rights is often explained as a difference of negative and positive rights.¹⁷ Civil and political rights are traditionally considered negative rights, and include the right to free speech and to vote.¹⁸ “These rights are negative rights because they offer protection against government action which interferes with their exercise, but do not impose an affirmative duty on government to make their exercise possible.”¹⁹ Social

¹⁶ The Right of Children to Free and Compulsory Education Act, (RTE) Act, Act No. 35 of 2009, available at http://mhrd.gov.in/sites/upload_files/mhrd/files/rte.pdf.

¹⁷ HENRY J. STEINER ET. AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 363-64 (2000).

¹⁸ *Id.*

¹⁹ Derrick Darby and Richard Levy, *Slaying the Inequality Villain in School Finance: Is the Right to Education The Silver Bullet* 20 KAN. J. L. & PUB. POL’Y 351, 355 n.5 (2011) (ruling that the right of privacy prevented the government from making abortion a crime (before the point of viability) but this did not create an affirmative duty on government to fund abortions—even when it funded comparable medical expenses for pregnancy and child-

and economic rights are considered positive rights and include the right to health, housing, and education.²⁰ As positive rights, these rights generally require government action and implementation.²¹

This way of categorizing rights inherently prioritizes civil and political rights over social and economic rights, in part due to the comparatively small expenditure necessary by the state to promote and protect civil and political rights versus the vast amounts of resources and government involvement needed to implement social and economic rights.²² Sometimes this “prioritization” of civil and political rights stems from an ideological leaning, in the case of the U.S. and liberalism²³, and other times the prioritization may be related to resource and infrastructure constraints, as in India.

B. Right to Education Under International Law

1. ICESCR

In the international legal system, the right to education is

birth.); *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977).

²⁰ STEINER, *supra* note 17, at 360-65; *see also* Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459, 1465-69 (2010) (discusses education as a positive right).

²¹ Madhav Khosla, *Making Social Rights Conditional: Lessons from India*, 8 INT'L J. CONST. L. 739, 758 (2010); *see also* CHARLES FRIED, RIGHT AND WRONG 110-114 (1978) (distinctions between negative and positive rights).

²² Frank Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973).

²³ *See, e.g.* Martin V. Totaro, *Legal Positivism, Constructivism, and International Human Rights Law: The Case of Participatory Development*, 48 VA. J. INT'L L. 719, 734 (2008) (“As a general matter, where the United States supported negative rights embodied in the ICCPR, the Soviet Union recognized positive rights found in the ICESCR.”); *see also* MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 582 (3d ed. 2005) (“Briefly, the schism in human rights is a product of the bipolar ideological confrontation between the East and the West immediately following the Second World War. While the Soviet Union and its socialist allies posed as champions of economic and social rights, the West touted the primacy of civil and political rights. Soon after the adoption of the UDHR in 1948, positions hardened and eventually the UN decided to develop two separate covenants for the two sets of rights, each with different institutional and enforcement mechanisms and strategies.”)

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recognized as a “human right and an indispensable means to realizing other human rights,”²⁴ as well as a necessary component for meaningful participation in “a free society.”²⁵ The right is principally codified in the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which India is a party and the U.S. is a signatory,²⁶ and the Convention on the Rights of the Child (CRC),²⁷ to which India is a party and the U.S. is a signatory.²⁸

Article 13 of the ICESCR requires parties to recognize that everyone has the right to free education and specifies standards regarding access to different educational levels.²⁹ The right to education in the ICESCR is “the most important formulation of the right to education in an international human rights agreement.”³⁰

The right to education is subject to progressive realization.³¹ Article 2 of the ICESCR puts an obligation on a state party “to take steps . . . to the maximum of its available resources, with a view to achieving the full realization of the rights in the Covenant by all appropriate means.”³² Notwith-

²⁴ Committee on Economic, Social and Cultural Rights, General Comment 13: The Right to Education, P 1 U.N. Doc. 12/1999/10 (1999), *available at* <http://www1.umn.edu/humanrts/gencomm/escgencom13.htm>.

²⁵ *Id.*

²⁶ International Convention on Economic, Social and Cultural Rights [hereinafter ICESCR] art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3. (India ratified the ICESCR in 1979, and the U.S. signed in 1977).

²⁷ Convention on the Rights of Child [hereinafter CRC], G.A. Res. 44/25, U.N. GAOR, 44th Sess., Nov.20, 1989, 1577 U.N.T.S. 3. (While ICESCR states the right to education applies to children and adults, the right applies to children under eighteen in the CRC); Comm. on Econ., Soci. and Cultural Rights, General Comment 13: The Right to Education, P 24 U.N. Doc. 12/1999/10 (1999), *available at* <http://www.unhchr.ch/tbs/doc.nsf/0/ae1a0b126d068e868025683c003c8b3b?Opendocument> [hereinafter *CRC Resolution*].

²⁸ India acceded to the CRC in 1992.

²⁹ ICESCR, *supra* note 26, at Art. 13.

³⁰ Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653, 1691 (2007) (quoting KLAUS DIETER BEITER, *THE PROTECTION OF THE RIGHT TO EDUCATION BY INTERNATIONAL LAW* 86, 341 (2006)); ICESCR, pt. III, art. 13, ¶ 2, at 51. Article 13(a) states: “[p]rimary education shall be compulsory, available, and free to all.”

³¹ ICESCR, *supra* note 26, at Art. 2.

³² *Id.* at Art. 2(1).

standing this progressive realization framework,³³ the ICESCR contains obligations that are short-range and immediate as well as long-range and continuous. In its General Comment 3, The Nature of State Parties Obligations, the Committee on Economic, Social and Cultural Rights (CESCR) confirmed that state parties have “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights”³⁴ enunciated in the Covenant, including “the most basic forms of education.”³⁵ In the context of article 13 and the right to education, this core obligation includes an immediate obligation by the state to provide primary education for all in accordance with ICESCR article 13(2)(a) and incrementally “adopt and implement a national educational strategy which includes the provision of secondary, higher and fundamental education in accordance with the Covenant.”³⁶

The ICESCR provides flexibility for states to choose the means that suit the “particularities of the legal and administrative systems of each state,”³⁷ but state parties must still identify methods that will produce results.³⁸ To that end, CESCR provides further guidance on the type and timing of specific requirements as a means to aid implementation of compulsory primary education in restraint-constrained countries, like India, through General Comment 11: Plans of Action for Primary Education.³⁹ Paragraph 1 of General Comment 11

³³ The progressive realization in the ICESCR of certain social and economic rights is different than the implementation provision in the ICCPR. ICCPR Art. 2(1) states: “[e]ach State Party to the present Covenant [ICCPR] undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights in the present Covenant.”). Whereas, with the ICESCR, the state is constantly attempting to implement rights and fulfill its obligations to citizens. ICESCR Art 2; *Cf* ICCPR Art. 2(1).

³⁴ Comm. on Econ., Soci. and Cultural Rights, General Comment 3: The Nature of State Parties Obligations, P 10 U.N. Doc. 12/1990/14 (1990), *available at* <http://www1.umn.edu/humanrts/gencomm/epcomm3.htm>.

³⁵ *Id.*

³⁶ *Id.*

³⁷ CESCR General Comment No. 9: The Domestic Application of the Covenant, ¶ 1, U.N. Doc. 1E/C.12/1998/24 ESCOR, (Dec.3, 1998), reprinted in *Compilation of General Comments and General Recommendations*.

³⁸ *Id.* ¶ 5.

³⁹ *See* Comm. on Econ., Soci. and Cultural Rights, General Comment 11: Plans of Action for Primary Education, U.N. Doc. E/C. 12/1999/4 (May 10, 1999), *available at* <http://www2.ohchr.org/english/bodies/cescr/comments.htm>.

specifically requires each State Party, not able to fully secure free compulsory primary education at the time General Comment 11 was issued (in 1999), to create and adopt within two years a detailed plan of action for the progressive implementation of primary education.⁴⁰ General Comment 11 also provides that these plans must contain an estimation of years by which the State Party plans to have achieved and implemented the goal of free compulsory primary education.⁴¹

2. CRC

The CRC is another core human rights treaty that addresses the right to education, but through a children's rights perspective. Article 28 of the CRC discusses States' obligations, with respect to children's rights to education,⁴² and mandates that "state parties recognize children's rights to an education."⁴³ The CRC requires States to provide all children with free primary education, and to provide a requirement to encourage children's regular school attendance.⁴⁴ The CRC Article 28 forbids ratifying countries from restricting citizen and non-citizen children access to education, and imposes affirmative duties on ratifying nations to promote education for all children.⁴⁵

General Comment 1 of the Committee on the Rights of a Child provides additional contouring of the right to education and implementation of the right as it applies to children. In the context of a country implementing national plans, the Committee calls upon all State Parties to make human and financial resources available to the greatest extent possible.⁴⁶ While the Committee acknowledges the government efforts to achieve compliance will require expenditures of human and financial capital, "resource constraints are not a justification for a State

⁴⁰ *Id.* ¶1.

⁴¹ *Id.* ¶¶ 1,8.

⁴² *See CRC Resolution, supra* note 24, at art. 28(1).

⁴³ *Id.*

⁴⁴ *Id.* at art. 28(1)(a),(e).

⁴⁵ *Id.* at art. 28(1)(d).

⁴⁶ Comm. on the Rights of the Child, General Comment 1: The Aims of Education, ¶ 28, U.N. Doc. CRC/GC/2001/1 (Apr. 17, 2001), *available at* <http://www2.ohchr.org/english/bodies/crc/comments.htm>.

Party's failure to take any, or enough, of the measures that are required."⁴⁷

III. CONSTITUTIONALISM AND THE RIGHT TO EDUCATION

A. *The United States*

The U.S. Constitution does not explicitly mention a right to education,⁴⁸ and the Supreme Court has declined to recognize a fundamental federal right to education.⁴⁹ The concept of fundamental rights is a relatively new concept in American constitutional law.⁵⁰ Today, the Supreme Court recognizes fundamental rights as those rights which are rooted in the nation's history and traditions.⁵¹ Despite claims that the right to education is a fundamental right that is well-established in the nation's history and traditions,⁵² the Supreme Court refuses to recognize a fundamental right to education, instead acknowledging a right to educational opportunity.⁵³ While there is no recognized fundamental right at the federal level, many state constitutions recognize a right to education.⁵⁴

Most constitutional rights in the U.S. are negative rights,⁵⁵ in the sense that they are rights that the state offers no affirmative guarantee to pursue or achieve, but instead that state offers a right to not take away or protect the right. A good example is the right to free speech. The government does not need to

⁴⁷ *Id.*

⁴⁸ *See generally* U.S. CONST.

⁴⁹ *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

⁵⁰ *Henne v. Wright*, 904 F.2d 1208, 1214 (8th Cir. 1990). *See Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (first usage by the Court of the term fundamental rights).

⁵¹ *Areto Imoukhuede, The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 U. FLA. J.L. & PUB. POL'Y 45, 54 (2011); Derek Black, *Unlocking the Power of State Constitutions With Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1409-10 (2010).

⁵² Imoukhuede, *supra* note 48, at 54; Black, *supra* note 48, at 1049-10.

⁵³ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁵⁴ Roger J.R. Levesque, *The Right to Education in the United States: Beyond the Limits of the Lore and the Lure of the Law*, 4 ANN. SURV. INT'L & COMP. L. 205, 2016-18 (1997), available at <http://digitalcommons.law.ggu.edu/annlsurvey/vol4/iss1/10>.

⁵⁵ Darby, *supra* note 19, at 355-356.

affirmatively act to implement the right; instead, it needs to protect against infringements on the right. While positive rights have achieved recognition in international law and in the constitutions of other countries,⁵⁶ they are generally not formally recognized in the interpretative constitutional law of the United States.⁵⁷ As Goodwin Liu, has observed, “the idea that our Constitution guarantees affirmative rights to social and economic welfare has for some time been out of fashion.”⁵⁸ Nevertheless, arguments for recognizing at least a child’s developmental right to education have been brought in American courts.⁵⁹ Children’s fundamental interest in education has been highlighted in cases brought by children against school authorities under many constitutional provisions, including the First Amendment and the Due Process and Equal Protection Clauses.⁶⁰ None of these approaches has ever resulted in the Supreme Court recognizing a fundamental right to education. However, there has been extensive recognition of the right to access education via the federal executive⁶¹ as well as educa-

⁵⁶ See, e.g., Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights* in *COMPARATIVE CONSTITUTIONAL LAW* (2008) (examining judicial enforcement of socioeconomic rights from comparative law perspectives).

⁵⁷ Darby, *supra* note 19, at 356; see Frank Michelman, *Socioeconomic Rights in Constitutional Law: Explaining America Away*, 6 INT’L J. CONST. L. 663 (2008) (offering explanations for why American constitutional law has not recognized socio-economic rights to the same degree as other countries); see also Goodwin Liu, *Education, Equality and National Citizenship*, 116 YALE L.J. 330, 336-7 (2006).

⁵⁸ Anne Dailey, *Children’s Constitutional Rights*, 95 MINN. L. REV. 2099, 2168 (2011) (quoting Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 204 (2008)).

⁵⁹ *Id.* at 2171; see also *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (examining “[t]he process of educating youth for citizenship in public schools”); *Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (“[T]he importance of public schools in the preparation of individuals for participation as citizens . . . long has been recognized.”); *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (“[S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our political system if we are to preserve freedom and independence.”); Amy Gutmann, *Children, Paternalism, and Education: A Liberal Argument*, 9 PHIL. & PUB. AFF. 338, 349 (1980) (“[A] child’s right to compulsory education is a precondition to becoming a rational human being and a full citizen of a liberal democratic society.”).

⁶⁰ Dailey, *supra* note 58, at 2171–72 (citing *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923), in which the Court considered whether a statute prohibiting instruction in a foreign language violated the Fourteenth Amendment.).

⁶¹ See Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat.

tion-rights related litigation at the state level.⁶²

B. India

The Indian Constitution does not categorize social rights as justiciable fundamental rights but as Directive Principles of government policy.⁶³ Despite this fact, the Indian judiciary has been innovative in its enforcement of social rights, namely with the Supreme Court of India, defining the most fundamental provision, the right to a dignified life, in Article 21 of the Constitution and tucking this right into most of the internationally recognized human rights.⁶⁴ Human rights in the Indian Constitution are divided into two separate parts. Part III of the Indian Constitution includes “Fundamental Rights,” which includes the right to life, equality and free speech, and basic first generation civil and political rights.⁶⁵ These fundamental rights are justiciable under the Constitution. Part IV includes the Directive Principles of State Policy which include social and economic rights, such as the right to livelihood, health, and free primary education.⁶⁶ A Directive Principle is the articulation of economic and social rights within the Constitution that help central, state and local governments form their policies that

241, 252 (codified at 42 USCS passim) (“No person . . . shall, on the grounds of . . . be excluded from . . . any program or activity receiving Federal financial assistance.”); *see also* Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703 (2006) (“No State shall deny equal educational opportunity to an individual on account of his or her race. . . .”); No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1001, 115 Stat. 1425, 1440 (2002) (addressing educational access rights of children with limited English proficiency).

⁶² *See, e.g.,* *Serrano v. Priest*, 557 P.2d 929, 951 (Cal. 1976) (holding that education is a fundamental interest and subjecting school financing systems based on wealth and inequities to strict scrutiny); *Pa. Ass’n for Retarded Children v. Commonwealth*, 334 F. Supp. 1257, 1259 (E.D. Pa. 1971); *Abbott v. Burke*, 20 A.3d 1018, 1041 (N.J. 2011).

⁶³ *See* DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA 311-12 (5th ed. 1965). *See* P. CHANDRASEKHARA RAO, THE INDIAN CONSTITUTION AND INTERNATIONAL LAW 125 (Ko Swan Sik ed., 1993) (quoting *A.B.S.K. Sangh (Rly.) v. Union of India*, A.I.R. 1981 S.C. 298, 335) (holding that “Directive Principles should serve the Courts as a code of interpretation” rather than as enforceable, justiciable rights).

⁶⁴ Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 THIRD WORLD LEGAL STUD. 107, 108 (1985), available at <http://scholar.valpo.edu/twls/vol4/iss1/6>.

⁶⁵ INDIA CONST. Part III.

⁶⁶ *Id.* at Part IV.

cannot be judicially enforced.⁶⁷ In the past forty years, the Indian Supreme Court has tied these two different parts of the Constitution, and types of rights, together by associating social and economic rights with the right to life and accordingly implementing a broad interpretation of civil and political rights.⁶⁸

IV. RIGHT TO EDUCATION IN AMERICA

Despite never acknowledging a fundamental right to education, the United States provides educational rights to its citizens.⁶⁹ While there are rights related to education, particularly access to public schools,⁷⁰ the refusal to acknowledge a fundamental right to education has prevented consistent and equal implementation of education rights and resources within the United States. The problem has been the quality of the education provided, not the access to education. In this sense, the U.S. jurisprudence is reversed from India, as America has engaged in ideological debate over the implementation of education (the remedy) without ever formally acknowledging the existence of the right. This tension can be seen by examining American case law addressing education rights.

A. *Brown v. Board of Education*

Brown v. Board of Education unanimously held that racial segregation of public schools violated the Equal Protection Clause of the Fourteenth Amendment of the Constitution.⁷¹ By the 1940s-1950s, activist groups pursued legal challenges to get the issue of racial segregation before the federal courts.⁷² That

⁶⁷ Katayoun Alidadi, *Opening Doors to Muslim Minorities in the Workplace? From India's Employment Quota to EU and Belgian Anti-Discrimination Legislation*, 23 PACE INT'L L. REV. 146, 177 (2011); see also Lisa Pruitt, *Human Rights and Development for India's Rural Remnant: A Capabilities-Based Assessment*, 44 U.C. DAVIS L. REV. 803, 857 n.14 (2011).

⁶⁸ See Mark Tushnet, *Constitution-Making: An Introduction*, 91 Tex. L. Rev. 1983, 2004 (2013); Unni Krishnan, (1) S.C.R. 594.

⁶⁹ See *Plyler v. Doe (Plyler)*, 457 U.S. 202, 227-30 (1982) (recognizing children of illegal immigrants' right to primary education).

⁷⁰ See *Brown*, 347 U.S. 483.

⁷¹ *Id.*

⁷² In the 1950s, activists brought class action lawsuits to challenge the separate but equal standard. See e.g. *Sweatt v. Painter*, 339 U.S. 629 (1950) (successfully challenging separate but equal doctrine with the University of

the chosen setting for fighting inequality was schools is not surprising. From a historical perspective, America's common school movement has been a driver for meritocracy and equal opportunity.⁷³ Given the place of education, the efforts of the civil rights movement to eliminate restrictions to equal opportunity have been predominately focused on educational institutions.⁷⁴ *Brown* was filed by a parent of a child who was denied access to all-white schools in Topeka, Kansas, claiming that black and white schools in Topeka were unequal, and accordingly violated the Equal Protection Clause of the 14th Amendment.⁷⁵ The case made its way to the Supreme Court, where the Court held that racial segregation in public schools violated the Equal Protection Clause.⁷⁶ In formulating its decision to strike the "separate but equal" standard, the Court noted the importance of public education in the 20th century.⁷⁷ Education, the Court posited "was required in the performance of the most basic public responsibilities, even service in the armed forces . . . [and the] very foundation of good citizenship."⁷⁸ In this context, the Court reasoned that it was "doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."⁷⁹ By tying education to civic duty, the Supreme Court admitted the need for equal educational opportunity.

After acknowledging the right to equal educational opportunity, the Supreme Court tackled the remedy. The Court's initial attempt at implementing a remedy was *Brown v. Board of*

Texas law school); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) (reversing a lower court decision upholding the efforts of the state-supported University of Oklahoma to adhere to the state law requiring African-Americans to be provided graduate or professional education on a segregated basis).

⁷³ Michael Rebell, *The Right to Comprehensive Educational Opportunity*, 47 HARV. C.R.-C.L. L. REV. 47, 58 (2012).

⁷⁴ See *Brown*, 347 U.S. 483; *San Antonio Indep. Sch. Dist. v. Rodriguez (Rodriguez)*, 411 U.S. 1 (1973); *Plyler*, 457 U.S. 202; see also *United States v. Virginia*, 518 U.S. 515 (1996) (overturning gender discrimination in military academy).

⁷⁵ *Brown*, 347 U.S. 483.

⁷⁶ *Id.*; see U.S. CONST. amend. XIV.

⁷⁷ *Brown*, 347 U.S. at 493.

⁷⁸ *Id.*

⁷⁹ *Id.*

Education of Topeka (“*Brown II*”) in 1955.⁸⁰ In *Brown II*, the Supreme Court considered arguments by schools requesting relief from the task of carrying out school desegregation.⁸¹ The Court delegated that the process for implementing school desegregation be overseen by district courts and held that desegregation should occur “with all deliberate speed.”⁸² With this ambiguous phrasing, the Court failed to deliver a remedy for educational inequality and, in effect, delegitimized the mandate of *Brown*. In *Brown II*, by designating district courts to oversee efforts without placing time-sensitive goals, the Court removed the onus on local schools and governments to implement immediate efforts to desegregate schools.

Brown, in many respects, represents a high point for federal education rights in the United States. While the reasoning in *Brown* employed an eloquent rights discourse, which labeled education as a necessary tool to undertake democratic citizenship, the opinion is largely remembered for its analysis of race. In this respect, while *Brown* was truly a progressive rights victory, it seems to have framed future issues regarding the right to education in social classification terms, such as race and citizenship, and eliminated the meaningful examination of social economic identifiers such as wealth.⁸³ The refusal to acknowledge social economic identifiers, like wealth, would affect the modern education rights discourse of the U.S. and stands in direct contrast to the approach of India, who acknowledges the socio-economic welfare of students and schools in its legislative program, the Right to Education Act of 2009.⁸⁴ While *Brown* removed one obvious barrier to equal ed-

⁸⁰ *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

⁸¹ *Id.* at 301-03.

⁸² *Id.*; Francis Thompson, *The Hound of Heaven* in FRANCIS THOMPSON, POEMS OF FRANCIS THOMPSON: REVISED EDITION (Leo Connolly ed., 2009). The phrase, “all deliberate speed” is attributed to Francis Thompson’s poem, *The Hound of Heaven*.

⁸³ This trend reflects American Constitutional law, as the Court, through Equal Protection Clause, identifies race and citizenship, but not wealth or poverty, as identifiable classes.

⁸⁴ See Right of Children to Free and Compulsory Education Act § 12(1)(g), No. DL—(N)04/0007/2003—09, , Acts of Parliament, 2010 (India), available at <http://mhrd.gov.in/rte> (requires various types of Indian schools to enroll socially-disadvantaged children in order to comprise at least 25% of classes).

ucation opportunities in America, it left in place another more indiscernible and pernicious obstacle: the difficulty of poor school districts to provide an education equal to that of wealthier school districts.⁸⁵

B. San Antonio Independent School District v. Rodriguez

In 1973, the Court heard another equal protection educational rights case, *San Antonio Independent School District v. Rodriguez*,⁸⁶ which addressed the issue of school funding and wealth-based barriers to equal educational opportunity. The major issue in *Rodriguez*, school funding, was an issue that the Court would end up revisiting many times.⁸⁷ In *Rodriguez*, the Supreme Court had two constitutional questions to address (1) whether education was a fundamental right and (2) whether wealth was a suspect class.⁸⁸ The Court said no to both and altered American education law, opening the door to state education measures.

The Court rejected categorizing education as a fundamental constitutional right in *Rodriguez*, interpreting that the Constitution neither explicitly nor implicitly recognized education.⁸⁹ In *Rodriguez*, a parent association sued public school districts in San Antonio and the state of Texas.⁹⁰ The plaintiffs in *Rodriguez* claimed that Texas's school financing model violated the Equal Protection Clause of the Fourteenth Amendment.⁹¹ They argued that education was a fundamental right and that differences in funding created discrimination in the provision of education.⁹² They asked the Court to consider the differences in the schools' wealth to be a suspect classifica-

⁸⁵ Jeffrey Sutton, Essay: *San Antonio Independent School District v. Rodriguez* and its Aftermath, 94 VA. L. REV. 1963, 1963 (2008).

⁸⁶ *Rodriguez*, 411 U.S. 1 (1973).

⁸⁷ See, e.g., *Plyler*, 457 U.S. at 227-30 (school funding for children of illegal immigrants); *Papasan v. Allain*, 478 U.S. 265 (1986) (school funding related to state revenues); *Horne v. Flores*, 557 U.S. 433 (2009) (funding for English Language Learner Programs).

⁸⁸ *Rodriguez*, 411 U.S. at 17-18.

⁸⁹ *Id.* at 18-22.

⁹⁰ *Id.* at 4-7.

⁹¹ *Id.* at 17.

⁹² *Id.* at 18.

tion.⁹³

In explaining why it declined to apply strict scrutiny to the right to education, the Court stated:

“Education, of course, was not among the rights afforded explicit protection under [our] Federal Constitution. Nor do we find any basis for saying it is implicitly so protected . . . [T]he undisputed importance of education will not, alone, cause this Court to depart from the usual standard for reviewing a State's social and economic legislation.”⁹⁴

Additionally, the Court found that education's individual importance, as well as its relationship in promoting other protected “political” rights such as the right to vote and free speech, were insufficient to transform education into a federally-protected fundamental right.⁹⁵

The Court declined to consider wealth a suspect class subject to strict scrutiny.⁹⁶ In explaining why wealth was not a suspect classification, the majority stated that Texas provided an education to children and that “relative differences in spending levels” did not amount to interference or impediment of fundamental rights.⁹⁷ Framed this way, in *Rodriguez*, “[a]t stake was not the denial of a government benefit on the basis of wealth, but the provision of a relatively worse public benefit.”⁹⁸

In his dissent, Justice Marshall, who was counsel in *Brown*, stated that education should be a fundamental right and wealth a suspect classification.⁹⁹ Marshall highlighted that the Court as an institution was effectively suggesting as a future policy “that only interests explicitly guaranteed by the Constitution are fundamental for purposes of equal protection analysis.”¹⁰⁰ Marshall, who quoted the portion of *Brown* which highlights the value of education as it relates to citizenry,¹⁰¹ believed that fundamental-right status was not solely about

⁹³ *Id.* at 25.

⁹⁴ *Id.* at 35.

⁹⁵ *Id.* at 35-36.

⁹⁶ *Id.* at 37.

⁹⁷ *Id.* at 37.

⁹⁸ Sutton, *supra* note 85, at 1969.

⁹⁹ *Rodriguez*, 411 U.S. at 111, 116-117 (Marshall, J., dissenting).

¹⁰⁰ *Id.* at 110-11.

¹⁰¹ *Brown*, 347 U.S. at 493.

whether the Constitution explicitly mentioned the right. Instead, Marshall argued that the obvious link between education and other constitutional guarantees should enable the Court to look at these factors and label education as fundamental.¹⁰²

The holding of *Rodriguez*, denying a fundamental right to education because it is not explicitly mentioned in the Constitution, contradicts the earlier opinions and rights analyses of the Court, particularly *Brown* and *Griswold v. Connecticut*. In *Brown*, the Court determined that the Equal Protection Clause required integration of schools, despite no express mention of integration in the Constitution.¹⁰³ In *Griswold*, the Court identified a right to marital privacy through the “penumbras” in the Bill of Rights of the Constitution.¹⁰⁴ In *Rodriguez*, the relational value of the right to education, as an aid in the realization of civil and political rights enumerated in the Constitution, is greatly diminished. The Court goes from recognizing that education is the “foundation of good citizenship”¹⁰⁵ in *Brown* to characterizing education as a right not enumerated in the Constitution¹⁰⁶ and therefore relationally inadequate to be afforded fundamental rights status in *Rodriguez*. In moving away from a rights-based analysis which connected benefits of social rights to the realization of civil rights, the Court created precedent that greatly limited further education rights challenges.

C. Since Rodriguez- Education Rights Activity at the State Level

Since *Rodriguez*, attempts to have education recognized as

¹⁰² *Rodriguez*, 411 U.S. at 111-14.

¹⁰³ *Brown*, 347 U.S. at 491-94 (noting that Congress, when drafting the Fourteenth Amendment in the 1860s, did not expressly intend to require integration of public schools nor did the Fourteenth Amendment prohibit integration either).

¹⁰⁴ *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

¹⁰⁵ *Brown*, 347 U.S. at 493.

¹⁰⁶ *Rodriguez*, 411 U.S. at 33 (“It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is ‘fundamental’ is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. . . Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.”).

a fundamental right by the Court have been mixed at best. In 1982, the Supreme Court granted undocumented children the right to receive the same educational rights as children who were citizens.¹⁰⁷ Shortly thereafter, the Court declined to recognize or deny a federal right to “minimally adequate” education.¹⁰⁸ While progress for educational rights has been limited at the federal level, some scholars believe *Rodriguez* opened the door to state action on education rights and funding.¹⁰⁹ States, post-*Rodriguez*, began drafting education rights into state constitutions and implementing school funding plans. By the mid-1970s, eighteen states had drafted school funding plans that articulated the “district power equalizing” funding approach advocated in *Rodriguez*.¹¹⁰ With the implementation of state education laws, education financing became the legal controversy surrounding state education rights. For example, in state court litigation challenging the Kansas funding system for primary and secondary schools, the Kansas Supreme Court ad-

¹⁰⁷ *Plyler v. Doe*, 457 U.S. 202, 227-30 (1982) (ruling that the Equal Protection Clause gave undocumented students the right to obtain the same basic education as other students. The Court reasoned that an “alien” or “undocumented” person is a person, and undocumented immigrants have long been recognized as persons guaranteed due process by the Fifth and Fourteenth Amendments).

¹⁰⁸ *Papasan*, 478 U.S. at 285 (“[N]ot yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review.”); see Matthew Brunell, *What Lawrence Brought for Show and Tell: The non-Fundamental Liberty Interest in a Minimally Adequate Education*, 25 B.C. THIRD WORLD L.J. 343, 367 (2005) (arguing that the Court’s unwillingness to strike down the “minimally adequate” standard signified progress towards education being identified as a fundamental right).

¹⁰⁹ *Rodriguez*, 411 U.S. at 41 n.85 (addressing the possibility of state funding and education policy as an alternative to federally-driven education policy and funding. The Court states the plaintiffs, “[O]ffer little guidance as to what type of school financing should replace it [the scheme they were asking the Court to strike down].” There is some interpretation that this was a call for state legislatures to address school financing themselves); see also *Rodriguez*, 411 at 133 n.100 (Marshall, J., dissenting) (stating, “[N]othing in the Court’s decision today should inhibit further review of state educational funding schemes under state constitutional provisions.”); see Sutton, *supra* note 82, at 1971 (arguing that Justice Marshall’s dissent greatly contributes to this idea by openly stating that nothing in the majority opinion prevents the state courts and legislatures from addressing the issue.).

¹¹⁰ Sutton, *supra* note 85, at 1972; Annette B. Johnson, *State Court Intervention in School Finance Reform*, 28 CLEV. ST. L. REV. 325, 328 (1979).

dressed educational rights under the Kansas Constitution and held the financing was inadequate.¹¹¹ In *Campaign for Fiscal Equity et al. v. the State of New York*, a lower New York court was asked to rule on a school funding case and ended up seeking clarification and subsequent overhaul of state education rights and school funding laws,¹¹² when the adequacy of the New York City school funding was claimed to be developed using a “sound basic education” standard.¹¹³ In examining the contours of the right to education in New York, the court considered the meaning of a “sound basic education.”¹¹⁴ The court developed its criteria in part by rejecting the claim that a “sound education” consisted simply of being capable to serve as a juror or exercise the right to vote.¹¹⁵ The case was subsequently remanded. In 2006, fallout from the case helped to spearhead a multi-billion dollar earmark by the New York legislature for educational improvements.¹¹⁶

In 2001, the No Child Left Behind Act (NCLB) was enacted

¹¹¹ *Montoy v. State*, 112 P.3d 923 (Kan. 2005) (relying solely on state constitutional provisions to conclude that the school funding system failed to comply with state constitutional requirements and sent the case back for the state legislature to remedy the funding shortfalls. The Kansas Supreme Court held that the funding system did not violate the federal Equal Protection Clause but instead found that the Kansas school funding system contravened the Kansas Constitution.). See Kansas Const. Art. VI § 1 (amended 1966). (stating, “[L]egislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools.”). See also Kansas Const. Art. VI §. 6(b)) (providing that the “[L]egislature shall make suitable provision for finance of the educational interests of the state.”). See also *Montoy v. State (Montoy III)*, 102 P.3d 1160 (Kan. 2005); *Montoy v. State (Montoy II)*, 62 P.3d 228 (Kan. 2003).

¹¹² *Campaign for Fiscal Equity v. New York*, 719 N.Y.S.2d 475, 477 (2001).

¹¹³ *Id.* at 485 (noting that “sound basic education” required by the state constitution comprised the foundational skills that students needed to become citizens capable of civic engagement and sustaining competitive employment).

¹¹⁴ *Id.* at 492-507 (deciding that the state had a duty to attempt to ensure that the following resources were available to public school students: (i) sufficient number of qualified teachers and personnel; (ii) appropriate class sizes; (iii) adequate and accessible school buildings; (iv) sufficient up-to-date books and technology; (v) suitable curricula; (vi) adequate resources for students with extraordinary needs; and (vii) a safe, orderly environment).

¹¹⁵ *Id.* at 484.

¹¹⁶ See *Campaign for Fiscal Equity, Inc. v State of New York*, 8 N.Y.3d 14, 19 (N.Y. 2006).

as a hopeful policy vehicle for meaningful education reform. NCLB represented to some (and still does) an acknowledgment of the right to education or comprehensive educational opportunity in America.¹¹⁷ The two stated purposes of NCLB were for all children to have a fair and significant opportunity to obtain quality education, and that all children reach proficiency on state academic assessments.¹¹⁸ Despite these goals, NCLB has been criticized for its inability to address the federal government and the states' inability to ameliorate the wealth disparities between school districts. Nonetheless, recent examples of state action have provided the most progressive realization of education rights in the America today. While a federally recognized right is a hopeful goal, recognition by the Supreme Court or by constitutional amendment seems unlikely. Currently, recognition of education rights by state constitutions and legislatures, as well as federal programs like NCLB, are the outer limits of the right to education in America.

V. RIGHT TO EDUCATION IN INDIA

India, the world's largest democracy, possesses a well-developed judicial system and has a history of constitutional rights litigation relating to the promotion of social rights, and specifically, the right to education.¹¹⁹ However, India is still a developing country with resource limitations. Unlike America, India has articulated and recognized the right to education but faces obstacles in implementation of its progressive realization of the remedy-universal primary schooling.

A. SAL and the Indian Judiciary

During the late 1970s into the 1980's, in reaction to the 1975-1976 Emergency,¹²⁰ the Indian Judiciary asserted the

¹¹⁷ See Michael A. Rebell, *The Right to Comprehensive Educational Opportunity*, 47 HARV. C.R.-C.L. L. REV. 47, 54-55 (2012).

¹¹⁸ 20 U.S.C. § 6301 (2006).

¹¹⁹ PHILIP ALSTON & NEHAL BHUTA, HUMAN RIGHTS AND DEVELOPMENT TOWARDS MUTUAL REINFORCEMENT 250 (Philip Alston and Mary Robinson eds., 2005) (citing Burt Neuborne, *The Supreme Court of India*, 1 INT'L J. OF CONSTITUTION L. 476 (2003)); see also Unni Krishnan, (1) S.C.R. 594.

¹²⁰ During the Indian Emergency (June 1975 – March 1977) the Indian President declared a state of emergency under the Indian Constitution, and

constitutional power of intervention, and invoked judicial remedies to ameliorate peoples' "miseries arising from repression, governmental lawlessness and administrative deviance."¹²¹ The courts were able to do this through "social action litigation" (SAL).¹²² SAL was different than its American counterpart, public interest litigation (PIL), as SAL focused on the rural poor and "counter[ed] government recklessness", rather than promote citizens' access to civic participation, which is a key feature of PIL.¹²³ PIL took from high-level civil rights and civil liberties groups, particularly the test-case strategy of the NAACP Legal Defense and Educational Fund as their inspiration.¹²⁴

SAL's most marked contrast from PIL was that SAL was primarily judge-led and sometimes judge-induced.¹²⁵ The judiciary-leading character of SAL affected how the court saw itself: as a grantor of rights, instead of an independent arbiter.¹²⁶ The Indian Judiciary applied this theory to identify the full spectrum of rights, civil and political, and social and economic.¹²⁷

Accordingly, the judiciary became more involved in Indian political affairs. The enhanced visibility of the judiciary enabled it to hear new types of rights-based claims, which deepened the tendency for judicial populism.¹²⁸ During this period, the judiciary effectively rewrote parts of the Indian Constitution. The right to life and personal liberty, (Article 21 of the

suspended elections and civil liberties.

¹²¹ Baxi, *supra* note 64, at 108.

¹²² *Id.*

¹²³ *Id.* at 108-09.

¹²⁴ Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights From Theory and Practice*, 36 *FORDHAM URB. L.J.* 603, 606 (2008), available at <http://ssrn.com/abstract=1425097>. MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987); See generally PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS (Burton A. Weisbrod et al. eds., 1978); Louise G. Trubek, *Crossing Boundaries: Legal Education and the Challenge of the "New Public Interest Law"*, 2005 *WIS. L. REV.* 455 (2005).

¹²⁵ Baxi, *supra* note 61, at 111.

¹²⁶ *Id.* (quoted in UPENDRA BAXI, *THE INDIAN SUPREME COURT AND POLITICS* 121-248 (1980); KUTTYIL KURIEN MATHEW, K.K. MATHEW ON DEMOCRACY, EQUALITY AND FREEDOM (1978)).

¹²⁷ Baxi, *supra* note 64, at 111.

¹²⁸ *Id.* at 107, 114-115.

Constitution)¹²⁹ was converted de facto and de jure into a due process clause, contrary to the intentions of the makers of the Constitution.¹³⁰ Article 21 subsequently encompassed a variety of social and political rights, including the right to bail, a speedy trial, and privacy.¹³¹

B. Mohini Jain v. State of Karnataka

In the 1990s, the Indian courts began to expand their jurisdiction to address an increasingly diverse range of issues and rights and to address social rights more aggressively. In 1992, the Supreme Court of India held that education was a fundamental right in *Mohini Jain v. State of Karnataka*.¹³² The case examined whether private medical colleges in Karnataka could charge a “capitation fee,” for certain students with the fee serving as additional consideration for admission of less-capable students.¹³³ The medical colleges argued that higher tuition could be charged to students who were less qualified.¹³⁴ The Supreme Court examined the treatment of “meritorious” and “non-meritorious” students as an equality-based challenge and struck down the capitation fees as an illegal violation of students’ educational rights.¹³⁵

In its analysis, the Court examined whether Article 21 included a right to education and whether the fee system set up by the medical colleges violated that right.¹³⁶ The Court held that the “right to education flows directly from the right to life,”¹³⁷ which included the right to live with dignity.¹³⁸ The Court linked concepts of life and dignity to education by holding that it was impossible to live a dignified life without being

¹²⁹ INDIAN CONST. art. 21A.

¹³⁰ Baxi, *supra* note 64 (quoted in Upendra Baxi, *The Indian Supreme Court and Politics*, 151-66 (1980)).

¹³¹ Upendra Baxi, *The Indian Supreme Court and Politics*, 233-245 (1980).

¹³² *Mohini Jain v. State of Karnataka*, (1992) 3 S.C.R. 658 (India), available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=12349>.

¹³³ *Id.* at 659.

¹³⁴ *Id.*

¹³⁵ *Id.* at 674.

¹³⁶ *Id.* at 661.

¹³⁷ *Id.*

¹³⁸ *Id.*

educated,¹³⁹ and that life could not be fully appreciated and enjoyed unless a citizen was educated and conscious of his individualistic dignity.¹⁴⁰

In *Mohini Jain*, the Court exhibited its willingness to connect social and economic rights with civil and political rights in order to achieve desired legal outcomes of greater rights recognition. The anchoring of less-defined social and economic rights to civil and political rights innovatively broadened the national rights obligation framework. The Indian judiciary was able to bolster social and economic rights and make and set the national agenda for education reform. Comparatively, this approach was taken up by the American judiciary particularly in *Brown*, but only achieved temporary permanence and success.

C. *Unni Krishnan v. State of Andhra Pradesh*

In 1993, the Supreme Court revisited the decision in *Mohini Jain* through *Unni Krishnan, v. State of Andhra Pradesh*.¹⁴¹ *Unni Krishnan*, like *Mohini Jain*, challenged the ability of professional schools in Andhra Pradesh to charge “capitation” fees from admission-seeking students.¹⁴² The Supreme Court again held that the right to education is a fundamental right which flows from Article 21 and declared the right to free primary education to be a fundamental right.¹⁴³ While upholding the fundamentality of education, *Unni Krishnan* partly overruled *Mohini Jain* and narrowed the applicability of the remedy - finding that the right to free education was only available to children age fourteen and under, and subsequently India’s obligation to provide further education would be subject to economic capacity and development limits.¹⁴⁴ The Court then outlined the contours of the right to education through the parameters of the Directive Principles from Article IV of the

¹³⁹ *Id.* at 660 (stating “An individual cannot be assured of human dignity unless his personality is developed and the only way to do that is to educate him.”)

¹⁴⁰ *Id.* at 661 (stating “The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education.”)

¹⁴¹ See *Unni Krishnan*, (1) S.C.C. 594

¹⁴² See *id.*

¹⁴³ *Id.* at 603.

¹⁴⁴ *Id.* at 605.

Indian Constitution. To understand the outer limit of the right granted, the Court discussed the limitations of available resources and Directive Principles Articles 41 and 45.¹⁴⁵ Article 41 provided that the State shall, within the limits of its economic capacity, make effective provisions to secure the right to work and to education.¹⁴⁶ Article 45 provided the State shall endeavor to provide, within a period of ten years from the commencement of the Constitution, free and compulsory education for all citizens under fourteen years of age.¹⁴⁷

Unni Krishnan was groundbreaking in two respects. First, the Court created a basis for a social right to be considered fundamental by characterizing of the right (to education) as “necessary” for the fulfillment of the right to life. Using this analysis, the Court was able to breathe life into a social right and make it fundamental, in effect, by stating that social rights were “as important” as civil and political rights and certainly necessary for the exercise of civil and political rights. To this end, the Court states “free and compulsory education under Article 45 is certainly as important as freedom of religion under Article 25. Freedom from starvation is as important as the right to life.”¹⁴⁸

Despite the broad language, the Court was careful not to over-extend the right, stating “it does not follow automatically that each and every obligation referred to in Part IV (of the Constitution) gets automatically included within the purview of Article 21.”¹⁴⁹ In this way, the Court maintained, in theory at least, the idea that only certain social rights could be considered justiciable. Furthermore, the Court narrowed and defined the element of the right that was justiciable, by declaring fundamental the right to primary education specifically.¹⁵⁰

Secondly, the Court used international and comparative law as part of the basis for the decision to articulate and recognize the right to education, by quoting foreign legal case law

¹⁴⁵ *Id.* at 601.

¹⁴⁶ INDIA CONST. art. 41.

¹⁴⁷ *Id.* at art. 45. (Article 45 exemplifies a deadline for progressive realization of a right); see *Kholsa*, *supra* note 21, at 750-51.

¹⁴⁸ *Unni Krishnan*, 1 S.C.R. 594 at 651.

¹⁴⁹ *Unni Krishnan*, 1.S.C.R. 594 at 661.

¹⁵⁰ *Id.* at 610-624.

and sources including *Rodriguez* and *Brown* and John Adams's *Desertation on Canon and Fuedal Law, 1765*,¹⁵¹ and defined the right to education as a fundamental right.¹⁵² The Indian Supreme Court's articulation of the right to education was an important instance of a national Supreme Court to use comparative law and language from other sources to articulate a constitutional basis for a social right to be a fundamental right.

After articulating a fundamental right to primary education, the Court addressed the issue of remedy, and examined the Indian state's resources available to implement the right.¹⁵³ The Court did not give orders on how to address the implementation.¹⁵⁴ Instead, the Court seemed to back-pedal a little, acknowledging the state's limited resources and left most aspects of implementation to the discretion of the state.¹⁵⁵ To this effect, the Court only asked the state to keep in mind the requirements of fulfilling the right to education within the ambit of Articles 45 and 46.¹⁵⁶ This mild request by the Court concerning implementation is in sharp contrast to the strong wording used to grant the right. After boldly asserting the right, the Court balked at suggesting a remedy.

The Court's tactics in *Unni Krishnan*, using a fundamental civil/political right to help bolster the declaration of a social right fundamental, is reminiscent of the U.S. Supreme Court's finding of a right to marital privacy in *Griswold v. Connecticut*.¹⁵⁷ While the right to education was not expressly articulated as a fundamental right in the Indian Constitution, the Indian Court's use of the fundamental right to life gave a platform for a right to education in *Unni Krishnan*. Similarly in 1965, in *Griswold*, the U.S. Supreme Court ruled that a state's ban on the use of contraceptives violated the right to marital privacy;¹⁵⁸ a right while not articulated in the Constitution, was found to be within the "penumbras" of the specific guarantees of the Bill of Rights, which are considered fundamental

¹⁵¹ *Id.* at 604, 617, 655.

¹⁵² *Unni Krishnan*, 1 S.C.C. at 617.

¹⁵³ *Unni Krishnan*, 1 S.C.C. at 682.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 617.

¹⁵⁶ *Id.* at 655-58.

¹⁵⁷ See *Griswold*, 381 U.S. 479.

¹⁵⁸ *Id.*

rights.¹⁵⁹

Griswold concerned a Connecticut law that criminalized the use of birth control.¹⁶⁰ The law provided measures to criminalize birth control and further provided that “any person who assists . . . counsels . . . commands another to commit any offense may be prosecuted and punished as if he were the principle offender.”¹⁶¹ Under the law, the director of Connecticut Planned Parenthood League was arrested and found guilty as an accessory to providing illegal contraception.¹⁶² The Supreme Court of the United States reviewed the case and ruled that the law violated the “right to marital privacy” and could not be enforced against married people.¹⁶³ In its reasoning, the Court contended that the Bill of Rights’ specific guarantees have “penumbras,” created by “emanations from these guarantees that help give them life.”¹⁶⁴ The Court reasoned that the “spirit” of the Bill of Rights, as applied against the states by the Fourteenth Amendment, creates a general “right to privacy” which cannot be unduly infringed.¹⁶⁵ In discussing the right’s “fundamental” status, the Court relied on the historical and sacred nature of marriage.¹⁶⁶ As a married couple’s use of contraception constituted a “fundamental” right (and therefore subject to strict scrutiny), the law was struck down because it was not “compelling.” After *Griswold*, and into the 1970s, the U.S. Supreme Court expanded this fundamental “right to privacy” to hold that states could not ban contraceptives¹⁶⁷ and that states could not ban most abortions.¹⁶⁸

The *Griswold* case and the string of individual privacy cas-

¹⁵⁹ *Id.* at 484.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 480.

¹⁶² *Id.* at 480.

¹⁶³ *Id.* at 481-86.

¹⁶⁴ *Id.* at 484.

¹⁶⁵ *Id.* at 485.

¹⁶⁶ *Id.* at 485-86 (“We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life Yet it is an association for as noble a purpose as any involved in our prior decisions.”).

¹⁶⁷ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

¹⁶⁸ *Roe v. Wade*, 410 U.S. 113 (1973).

es that followed are comparative to the Indian experience in that they highlight the one-time willingness of the U.S. Supreme Court to acknowledge a social right not articulated in the Constitution, in part by relying on an “ethos” or “penumbra” interpretation of fundamental rights.¹⁶⁹ In *Unni Krishnan*, the Indian Court used one fundamental right, the right to life, and interpreted that the full exercise of that right required the qualified right to education. While the right to family privacy, and how the U.S. Supreme Court came to recognize this right in *Griswold* is different than the Indian jurisprudence in *Unni Krishnan*, the effects were the same: both judiciaries used fundamental civil and political rights to recognize, promote, and protect a social right that had not been previously articulated as a fundamental right. This led to an undefined social right (the right to marital privacy in *Griswold* and the right to education in *Unni Krishnan*) being recognized as fundamental.

D. After Unni Krishnan- the RTE Act of 2009

The outcome in *Griswold* initiated a flurry of civil society activity in the late 1960s and early 1970, leading up to *Roe v. Wade*, where the United States Supreme Court applied the right to privacy articulated in *Griswold* to abortion rights. As with *Griswold* in America during the 1960-1970s, *Unni Krishnan* stimulated advocacy efforts of Indian civil society, culminating in an amendment to the Indian Constitution recognizing a qualified right to education. In 2002, the right to free primary education for children between the ages of six and fourteen was made a justiciable fundamental right under the Indian Constitution.¹⁷⁰

Since the constitutional acknowledgment of a qualified right to education, there has been litigation over the state’s efforts to implement the qualified right to education. Several post-2002 cases have challenged the legality of the Indian government’s ability to force unaided private schools to adhere to certain admission rules and quotas.¹⁷¹ The majority of these

¹⁶⁹ *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); see *Unni Krishnan v. State of Andhra Pradesh*, (1993) 1 S.C.R. 594.

¹⁷⁰ INDIA CONST. art. 21A.

¹⁷¹ See *T.M.A. Pai Found. v. State of Karnataka*, (2002) 8 S.C.C. 481 (India), available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename>

cases have centered around the constitutionally-mandated right to education (Article 21A),¹⁷² the right to practice any business or trade (Article 19(1)(g))¹⁷³, and the right of linguistic and religious minorities to establish and administer educational institutions (Article 30).¹⁷⁴ Two such cases challenging the legality of the Indian government's ability to force unaided private schools to adhere to inclusive admission rules and quotas were *T.M.A. Pai Foundation v. State of Karnataka* and *P.A. Inamdar v. State of Maharashtra*.

Pai, (which was decided in October 2002, two months before the constitutional right to education amendment was added to the Indian Constitution), examined whether non-state aided academic institutions run by linguistic and/or religious minorities had to comply with government-originated regulations on school quotas and whether these governmental regulations restricted their (minorities') rights to establish and administer educational institutions.¹⁷⁵ *Pai* held that "the right to establish an educational institution can be regulated; but such regulatory measures must, in general, be to ensure the maintenance of proper academic standards, atmosphere and infrastructure."¹⁷⁶ *Pai* also determined that: "once aid is granted to a private professional educational institution, the government or the state agency, as a condition of the grant of aid, can put fetters on the freedom in the matter of administration and management of the institution".¹⁷⁷ The Court in *Pai*, while carving out exceptions to the state's educational regulations, such as privately-funded schools, was careful to clarify that the right of religious and/or linguistic minorities to establish and administer educational institutions of their choice was not absolute as to prevent the government from implementing any regulations. Instead, the Court neatly framed the level of regulation around the level of state-assistance, acknowledging that many Indian educational institutions cannot operate without

=31313; see *P.A. Inamdar v. State of Maharashtra* (2005) 6 S.C.C. 537 (India), available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=30891>.

¹⁷² INDIA CONST. art 21A.

¹⁷³ *Id.* at art. 19, § 1, cl. g.

¹⁷⁴ *Id.* at art. 30.

¹⁷⁵ See *T.M.A. Pai Foundation*, 8 S.C.C. 481.

¹⁷⁶ *Id.* ¶ 54.

¹⁷⁷ *Id.* ¶ 72.

state aid, and accordingly, the autonomy of privately-aided institutions would be less than that of unaided institutions.¹⁷⁸

The judgment in *Pai* led to various contradictory state-level statutes and interpretations regarding the rights of unaided minority and non-minority schools, and the restrictions sought to be imposed by the Indian government upon these schools. As a result, in 2005, the Supreme Court heard *Inamdar and others v. State of Maharashtra and others*. *Inamdar* examined whether the Indian government could enforce admittance quotas of under-funded disadvantaged students upon unaided educational minority and non-minority institutions.¹⁷⁹ In *Inamdar*, the Indian court held that “once an educational institution is granted aid or aspires for recognition, the State may grant aid or recognition accompanied by certain restrictions or conditions which must be followed as essential to the grant of aid or recognition”.¹⁸⁰

In 2009, the Right of Children to Free and Compulsory Education Act (RTE Act) was enacted by the Indian Parliament. The legislation embodied the Indian state’s effort to implement the right to primary school education, and was created to provide free and compulsory primary school education to all children in India, with a particular focus on children from disadvantaged and politically-disenfranchised backgrounds.¹⁸¹ The RTE Act, which came into effect on April 1, 2010, placed an obligation on the state to provide and ensure the admission, attendance, and completion of elementary education of all children ages 6-14.¹⁸² One key regulation in the RTE Act is Section 12(1)(c), which requires government and aided schools, and unaided private schools to have at least 25% of every class enrolled consisting of neighborhood children from disadvantaged groups.¹⁸³ Sections 8(a) and 12(1)(a) also provides that the edu-

¹⁷⁸ *Id.* ¶¶ 60-72

¹⁷⁹ *Inamdar*, 6 S.C.C. 537 ¶ 3.

¹⁸⁰ *Id.*

¹⁸¹ The Right of Children to Free and Compulsory Education Act, 2009, No. 35, Acts of Parliament, 2009 (India), available at <http://www.indg.in/primary-education/policiesandschemes/right-to-education-bill/>; see also <http://www.indg.in/primary-education/policiesandschemes/free%20and%20compulsory.pdf>.

¹⁸² *Id.* at ch. II, §§ 3 (1), 3(2), 5(1).

¹⁸³ *Id.* at ch. III §8(a); IV § 12 (1)(a).

cation of these particular children be free until they reach the age of fourteen.¹⁸⁴ Each complying school is entitled to reimbursement of the costs incurred to educate each disadvantaged child to the extent of the per-child-expenditure incurred by the state, or the actual amount charged for the child, whichever is less.¹⁸⁵

Section 12(1)(c) of the RTE Act was challenged by an association of private unaided schools for violating the right of linguistic and/or religious minorities to establish and administer educational institutions (Article 30 of the Constitution¹⁸⁶) in *Society for Un-Aided Private Schools of Rajasthan v. Union of India and Another*.¹⁸⁷ What initially seemed to be a constitutional challenge on Article 30, ended up being a constitutional challenge of the validity of the RTE Act and the right to education in India under Article 21A.¹⁸⁸ In *Society for Un-Aided Private Schools*, the Supreme Court upheld the constitutional validity of RTE Act and the application of the RTE Act Section 12(1) to government and unaided private schools, excepting only unaided private minority schools.¹⁸⁹ This holding was a departure from the holdings in *Pai* and *Inamdar* in which the Court held that the application of state-ordered laws relating to educational rights were based on the level of aid the organization receives from the state.¹⁹⁰ To uphold the constitutionality of the RTE Act and to not overturn the prior precedents of *Pai* and *Inamdar*, the Court reasoned that *Pai* and *Inamdar* were inapposite because (1) both cases did not seek interpretation of Article 21A, but instead sought a clarification of Articles 19 and 30 respectively, the right to freedom of profession and the right for linguistic and/or religious minorities to administer their own schools, and (2) both cases dealt with higher education institutions instead of primary schools.¹⁹¹

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* ch. IV. § 12 (2).

¹⁸⁶ INDIA CONST. art 30.

¹⁸⁷ Soc'y for Un-Aided Private Schs. of Rajasthan v. U.O.I., (2012) 6 S.C.C. 1 (India).

¹⁸⁸ See generally, Soc'y for Un-Aided Private Schs. of Rajasthan v. U.O.I., (2012) 6 S.C.C. 1 (India).

¹⁸⁹ *Id.* ¶ 7.

¹⁹⁰ *Id.* ¶ 26-27.

¹⁹¹ *Id.* ¶ 26-27.

In its opinion, the Court noted that the RTE Act was enacted as the state's implementation of its guarantee of the right to primary education.¹⁹² Accordingly, the Court stated that the expansive provisions of the RTE Act are intended not only to guarantee the right to primary education to children, but also to enable the government to implement the remedy to all children through the creation of infrastructure and standards.¹⁹³

VI. CONCLUSION

India and the United States have both struggled with recognizing and implementing the right to education. Despite India's infrastructure and resource limitations, the Indian state and judiciary has strived to breathe life into the right to education and extend the implementation of the right throughout the country to every socio-economic group and geographic enclave through the RTE Act of 2009. Still, access to education issues also persist as the Indian government's infrastructure struggles to address the divergent demands of the nation. In sum, the Indian judiciary of the 1970s- 1990s provided a progressive means to address and recognize a fundamental right to education. Upon recognizing this right it ignited a wave of civil society activism and awoke the national community to the importance of education.

In contrast to India, limitations related to the hesitancy to formally recognize and grant social and economic rights within the United States as well as federalism have limited the U.S. federal government in formally recognizing a fundamental right to education but opportunities for rights recognition remain. While there has been increasingly less jurisprudence related to fundamental education rights at the federal Supreme Court level, states through their constitutions and judiciaries continue to attempt to codify the right to education.

¹⁹² *Id.* ¶17-23.

¹⁹³ *Id.*