

“THE ROAD LESS TRAVELLED”: ARTICLE 21A AND THE FUNDAMENTAL RIGHT TO PRIMARY EDUCATION IN INDIA⁺

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Introduction

In this essay, I endeavour to articulate an account of how the Supreme Court of India ought to interpret and enforce Article 21A¹ of the Constitution - the fundamental right to a free and compulsory education for children - in the coming years. Article 21A has only recently been brought into force,² and there is consequently minimal judicial guidance about the ambit of the fundamental right enshrined therein.³ Given that this therefore represents

⁺ The present essay was originally written for the Seminar on Socio-Economic Rights (Spring 2009, The University of Chicago Law School). It has since been updated to take into account certain significant recent developments. I am indebted to Ms. Rosalind Dixon, Assistant Professor of Law and course instructor for the Seminar, for her encouragement and advice, and for detailed critical comments on a previous draft. I also thank Mr. Brian Citro and Ms. Shibani Ghosh for helpful comments. Lastly, I am grateful to all participants in the Seminar for extremely useful comments and feedback on a presentation of a draft of this essay on 05.05.2009. It goes without saying that any mistakes or shortcomings are mine alone.

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1 Article 21A, Constitution of India, amended by The Constitution (Eighty-Sixth Amendment) Act, 2002 (brought into force on April 1, 2010), “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.”

2 *Id.* See Section 1, Constitution (Eighty-Sixth Amendment) Act, 2002,

“(1) This Act may be called the Constitution (Eighty-sixth Amendment) Act, 2002.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.”

The updated version of the various constitutional provisions having a bearing on education in India is available on the website of the Ministry for Human Resource Development, at <http://www.education.nic.in/constitutional.asp#Fundamental> (last visited on Dec. 25, 2010).

The fundamental right was brought into force with effect from April 1, 2010. While the legislation intended to operationalize the fundamental right – The Right of Children to Free and Compulsory Education Act, 2009 [Hereinafter Right to Education Act, 2009] - was enacted by Parliament in 2009, this statute itself was brought into force only with effect from this date, i.e. April 1, 2010. The text of the Act is available at <http://www.education.nic.in/Elementary/free%20and%20compulsory.pdf> (last visited on Dec. 28, 2010).

See generally, From today, every child has a right to education, The Times of India, Apr. 1, 2010, <http://timesofindia.indiatimes.com/india/From-today-every-child-has-a-right-to-education/articleshow/5749632.cms> (last visited on Dec. 26, 2010); Education is now a fundamental right, Ndtv, Apr. 1, 2010, <http://www.ndtv.com/news/india/education-is-now-a-fundamental-right-of-every-child-18878.php> (last visited on Dec. 26, 2010).

3 Even prior to the date on which Article 21A came into force - theoretically - as part of the text of the Constitution, there was some limited judicial *dicta* concerning the interpretation of the language of the provision. For an analysis of this interesting if slightly anomalous state of affairs, *see infra* Part III.A.

largely unchartered waters, and bearing in mind the difficulty of attempting to sketch its contours in the abstract, I draw on certain theoretical accounts of socio-economic rights. This scholarship captures the unique characteristics of these rights in the context of judicial enforcement, and highlights the dilemmas at play. It helps define more clearly the choices the Supreme Court will surely be confronted with, and lays the foundation for the analysis to follow. The hope is that these perspectives can shed some light on how the Indian Courts might enforce Article 21A in a principled yet workable manner; and, equally, that the choices and experiences of the Indian Constitution may enable us to revisit our basic assumptions about the justiciability of such rights.

It is impossible to conceptualize the significance of the right to education in India without some understanding of the historical roots of the deprivation of the right, and the constitutional response thereto. When India gained independence from the British in 1947, the drafters of the Constitution confronted the reality of a deeply poverty-stricken and overwhelmingly illiterate populace.

Article 45 of the Constitution, a Directive Principle of State Policy, as originally enacted, required the State to endeavour to provide free and compulsory education to all children within ten years.⁴ Directive Principles of State Policy are not “*enforceable by any Court*”, but the Constitution mandates that “*the principles therein laid down are nevertheless fundamental in the governance of the country*” and that “*it shall be the duty of the State to apply these principles in making laws.*”⁵ Furthermore, Article 45 was the only Directive Principle which had a built-in time frame for achievement, another indication of the great significance accorded to it by the framers of the Constitution.⁶

There can be little disagreement about the fact that the project of achieving universal access to education, in the first few decades after independence, was an abysmal failure. As late as 2001, the overall literacy

4 Article 45, Constitution of India (prior to the constitutional amendment brought into force on April 1, 2010), “The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.”

5 Article 37, CONSTITUTION OF INDIA, “The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”

6 See Vijayashri Sripathi & Arun K. Thiruvengedam, *Constitutional amendment making the right to education a Fundamental Right*, INT’L J. CONST. L. 150 (2004), available at <http://icon.oxfordjournals.org/cgi/reprint/2/1/148> (last visited on Dec. 25, 2010) [Hereinafter *Making the Right Fundamental*].

rate stood at a modest 65 percent.⁷ Specific to primary education, as late as the time period 2003-04 to 2004-05, over 10 percent of children enrolled in Grades I to V dropped out without completing primary education.⁸ The year 2001 was the first time that census figures showed the number of illiterate Indians to have declined in absolute terms, to 304 million from 329 million in 1991.⁹

It should not be surprising that – as with any other democracy – the very magnitude of the failure led to some degree of introspection and self-correction within the democratic branches of Government.¹⁰ Central Government expenditure on education has been increasing gradually, although slowly and irregularly. Expenditure on education exceeded 1 percent of the Gross Domestic Product [GDP] for the first time in 1955-56, and stayed between 1 and 2 percent until 1979.¹¹ A hugely significant development in 1976 was the constitutional amendment giving the Central Government concurrent legislative competence to act in the realm of education.¹² The Government has set a self-imposed target of expenditure on education to the tune of 6 percent of the GDP, although this has not yet been attained.¹³

Clearly, there has been significant progress towards the achievement of universal primary education in the last few years. This is often attributed to the national umbrella programme designed to achieve universal primary education - the *Sarva Shiksha Abhiyan* [National Campaign for Education for All] – introduced in 2000.¹⁴ Government statistics show that the total number of out-of-school children has reduced from 42 million at the beginning of the Tenth Five Year Plan to 13 million in 2005.¹⁵ Funds allocated for primary education increased by 56 percent from Rs. 57.5 billion in 2003-04 to Rs.

7 MILLENNIUM DEVELOPMENT GOALS INDIA COUNTRY REPORT 2007, Chapter II, available at http://mospi.nic.in/rept%20_%20pubn/ftest.asp?rept_id=ssd04_2007&type=NSSO (last visited on Dec. 25, 2010). It is necessary to complete a free registration on the website of the Ministry of Statistics & Programme Implementation, Government of India to gain access to this web link. [*Hereinafter Millennium Report*].

8 *Id.*

9 *Id.*

10 I elaborate on this conception – of all branches of Government making good faith, although inherently imperfect, make efforts to comply with the constitutional mandate - in Part III of the essay, and treat it as an underlying premise for the argument that follows.

11 *Making the Right Fundamental* at 151.

12 Constitution (Forty-Second Amendment) Act, 1976, available at <http://indiacode.nic.in/coiweb/amend/amend42.htm> (last visited on Dec. 25, 2010).

13 *See Millennium Report*.

14 *Id.*

15 *Id.*

89.8 billion in 2004-05, and a further 36 percent to 122.4 billion in 2005-06.¹⁶ A concrete step which has been taken towards resource-mobilization is a 2 percent cess on all major central taxes, the revenue from which is specifically reserved for primary education.¹⁷

Alongside this slow building of momentum in terms of budgetary allocations and programme implementation, it was also resolved to amend the Constitution to incorporate the right to education as a fundamental right. Ultimately, the enactment of the Constitution (Eighty-sixth Amendment) Act, 2002 led to the insertion of Article 21A, a justiciable fundamental right, in these terms: “*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.*” At the same time, the constitutional amendment also altered Article 45 of the Constitution to state: “*The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.*”

The amendment attracted a significant amount of criticism for this aspect, namely, the exclusion of early childhood care and education (for children younger than six years) from the ambit of the justiciable right.¹⁸ It is important to appreciate that this was clearly no oversight on the part of Parliament.¹⁹ The amendment of Article 45 demonstrates that the intent of Parliament was to shift the goalposts with respect to justiciability, in that the right to primary education becomes an absolute right, while the State still retains flexibility in relation to the mandate of providing early childhood care and education.

It is critical to bear in mind that the financial commitment on the part of the State which would be required to universalize primary education, while substantial, no longer appears to be entirely unrealistic. In the run-up to the insertion of Article 21A, for example, a Government-appointed expert committee initially estimated that an amount of 0.78 percent of the GDP

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Article 45 of the Constitution of India, as originally enacted, provided that it is the obligation of the State to “endeavour to provide” within 10 years “for free and compulsory education for all children until they complete the age of fourteen years”. This obligation, it is pointed out, is significantly broader in that it includes within its ambit all children below the age of fourteen years, and therefore presumably encompasses an obligation to provide age-appropriate education to children below the age of six too. See REPORT OF THE NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION, Paragraph 3.20, available at <http://lawmin.nic.in/ncrwc/finalreport/v1ch3.htm> (last visited on Dec. 25, 2010). See also *Making the Right Fundamental* at 155.

¹⁹ For an analysis of the criticism that the exclusion of early childhood education attracted, within Parliament as well as from civil society generally, See *Making the Right Fundamental* at 155.

would be required annually to universalize primary education.²⁰ At the time the constitutional amendment was tabled, however, the Government revised the estimated annual expenditure to 0.44 percent of the GDP. In the context of the gradually increasing budgetary allocations for education, and the government's self-imposed commitment of raising expenditure to 6 percent of the GDP, this financial requirement seems achievable.

In the backdrop of these historical developments, the long delay that ensued in bringing into force the fundamental right is particularly troubling. It also poses substantial questions of democratic accountability and constitutional law.²¹ It seems legitimate to inquire whether the delay of seven years does not defeat the intent of the democratic representatives of the people in enacting the Amendment? If the Courts have any scope to address the Executive's failure to notify the Amendment, even if that failure stretches to an unreasonable length of time? As intriguing as these questions are, they are not the focus of the present essay.²²

I now turn to the structure of the present essay. In Part II, I describe certain theoretical accounts of socio-economic rights as constitutional rights, focusing on Tushnet's analysis of "strong" and "weak" versions of these rights and corresponding remedies. In Part II, I attempt to present a bird's-eye view of Indian fundamental rights jurisprudence, and contend – in the realm of education as well as more generally – that the Supreme Court has tended towards broad, normative enunciations of positive rights without adequate regard to the feasibility of enforcing tangible remedies for their realization. The right to education – recognized as an implicit fundamental right in *Mohini Jain*²³ and *Unni Krishnan*²⁴ – is a good example of this trend. I also draw on

20 See Anil Sadgopal, Education for too few, FRONTLINE, November 22-December 05, 2003, available at <http://www.hinduonnet.com/fline/fl2024/stories/20031205002809700.htm> (last visited on Dec. 25, 2010).

21 It also has relevance, as will be explored in later sections of this essay, for our understanding of the judiciary's role in the implementation of this particular fundamental right.

22 This question has, however, been addressed by the Indian Supreme Court in a landmark Constitution Bench decision in *A.K. Roy v. Union of India*, AIR 1982 SC 710, where a central issue was whether the Supreme Court could issue a writ of Mandamus directing the Central Government to bring into force Section 3 of the Constitution (Forty-Fourth Amendment) Act, 1978. A majority of three Justices held that the Supreme Court could not issue such a direction, but two justices dissented strongly. In view of the divided nature of the judgment, the passage of time since that case was decided, the significantly greater delay which has ensued in the present case, and the crucial nature of the right in question here; it is not implausible to conjecture that the Supreme Court might have reconsidered this aspect of *A.K. Roy*, had the Central Government delayed much further in bringing the Amendment into force.

23 *Mohini Jain v. State of Karnataka*, AIR 1992 SC 1858 [Hereinafter *Mohini Jain*].

24 *Unni Krishnan J.P. v. State of Andhra Pradesh*, AIR 1993 SC 2178 [Hereinafter *Unni Krishnan*].

the *Godavarman* case²⁵ to argue that strong, rigid enunciations of rights raise democratic and institutional-competency concerns without necessarily achieving the instrumental goals desired by the Court.

In Part IV, I extend the logic of the previous discussion to contend that Article 21A presents the Supreme Court with a unique opportunity to aid the achievement of the constitutional mandate of primary education, without raising significant democratic or competency concerns. I argue that successfully rising to this challenge would require the Supreme Court to enforce Article 21A in a robust, yet pragmatic, manner. In Tushnet’s terminology,²⁶ the right would be defined in an intermediate manner, and relatively strong, coercive remedies would be enforced when necessary. I conclude Part III by developing a normative account of why such a construction of Article 21A would be satisfactory from a constitutional perspective, as also conducive to the speedy attainment of the constitutional goal. In the Conclusion, I summarize my vision of the Supreme Court’s role in enforcing Article 21A of the Constitution.

A final caveat before I proceed to the substantive argument; and this concerns an important limitation of the paper. I do not at all attempt to analyse the implementing statute – the Right to Education Act, 2009, either to evaluate its merit or to predict how Courts might interpret and enforce specific aspects of it.²⁷ A critic might assert that such an approach skirts the most vital issues, the difficult details of how the right is proposed to be actualized in practice. Such criticism would not be entirely devoid of merit. Nonetheless, the objective of the present essay is, in the same breath, more sweeping and (yet) more modest than of one which would narrowly scrutinize the implementing legislation. My aim is to articulate overarching principles determining the approach that the Supreme Court ought to adopt, while supervising the implementation of the fundamental right. These broad principles can then be utilized to critically evaluate, interpret and enforce the present legislation, or any legislative or executive measures that might be employed in the future. The scope of the present essay does not permit this latter exercise, which I leave for another time.

25 T.N. Godavarman v. Union of India, Writ Petition (Civil) No. 202 of 1995.

26 For Tushnet’s framework of analysis, see *infra* Part II.

27 Among the issues that I do not address in this essay is that of the constitutional challenge raised with respect to the amendment inserting Article 21A in the Constitution, as also to the implementing legislation. These constitutional claims have been referred to a Constitution Bench of the Supreme Court. See Ashish Singh, Petitions challenge constitutional validity of RTE Act, EDUCATION MASTER, Sept. 8, 2010, available at <http://www.educationmaster.org/news/petitions-challenge-constitutional-validity-rte-act.html> (last visited on Dec. 28, 2010).

A Theoretical Conception of Socio-Economic Constitutional Rights

The difficult questions pertaining to the judicial role in enforcing positive (social and economic) constitutional rights – in contrast to the historically more dominant category of civil and political liberties – have engendered a substantial body of scholarship. The scope of this essay does not permit a comprehensive review of this literature, and I do not claim to have undertaken the same here. Rather, I focus on a particular framework of analysis, developed by Tushnet, which encompasses many of the dilemmas at play, and thus appears to be a promising tool of analysis for my present purpose.

Tushnet's analysis of positive socio-economic rights proceeds in terms of a conceptual bifurcation of constitutional rights and remedies.²⁸ He argues that both the underlying constitutional right in question, as well as the remedy afforded by Courts (should a constitutional violation be established), can be classified into "strong" and "weak" categories.²⁹ Weak socio-economic rights are those types which, while embedded in the Constitution and justiciable, nonetheless do not (or do not necessarily) afford tangible protection to an individual plaintiff deprived of the right.³⁰ He classifies the right to housing in South Africa, in light of the judgment of the Constitutional Court in *Grootboom*³¹, as a weak substantive right to housing.³² On the other hand, the

Even though I have not analysed the constitutional challenges here, I must observe, *prima facie*, that the convergence of views of the three branches of government (which I have described in this essay), and the extraordinarily limited circumstances in which the Indian Supreme Court is prepared to strike down constitutional amendments, leads me to be greatly sceptical – both in a narrowly doctrinal and more realistic sense – of the overarching challenge posed to Article 21A itself. (The very topic of this essay is, of course, premised on the assumption that Article 21A will remain a part of the Constitution in the foreseeable future.) The challenge to the legislation may pose more difficult legal questions, and I refrain from commenting on the same.

28 Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895 [Hereinafter *Social Welfare Rights*].

29 *Id.*

30 *Id.* at 1902-1906.

31 *The Government of the Republic of South Africa v. Irene Grootboom*, (CCT11/00) [2000] ZACC 19, available at <http://www.saflii.org/za/cases/ZACC/2000/19.html> (last visited on Dec. 26, 2010).

In Paragraph 33 of the opinion of Yakob J., he observes as follows: "*The determination of a minimum core in the context of "the right to have access to adequate housing" presents difficult questions. This is so because the needs in the context of access to adequate housing are diverse: there are those who need land; others need both land and houses; yet others need financial assistance. There are difficult questions relating to the definition of minimum core in the context of a right to have access to adequate housing, in particular whether the minimum core obligation should be defined generally or with regard to specific groups of people. As will appear from the discussion below, the real question in terms of our Constitution is whether the measures taken by the state to realise the right afforded by section 26 are reasonable. There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable.*"

right to health in the South African context, at least in the context of the facts of the *Treatment Action Campaign* case³³, was construed to be a strong right.³⁴

Further, assuming a constitutional violation to have been established, the range of remedies that might be adopted by Courts could be classified as “weak” or “strong” too.³⁵ A strong remedy would be one that provided a redressal of the constitutional violation immediately, while a weak remedy would be one where the Court acknowledged explicitly or implicitly that a complete redressal of the violation would take time, and allowed for such flexibility in the relief decreed.³⁶ Tushnet gives the example of *Brown II*³⁷, where the Court ordered desegregation of schools “*with all deliberate speed*”, as an illustration of the possible co-existence of strong rights and weak remedies.³⁸ He points out that weak remedies might be ineffective but, for that very reason, are unlikely to generate significant political opposition.³⁹ Strong remedies might alter governmental behaviour more substantially but are likely to be intensely controversial.⁴⁰

In Paragraph 41, he proceeds to observe: “*The measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state’s available means. The programme must be capable of facilitating the realisation of the right. The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable. In any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.*”

32 *Social Welfare Rights* at 1903-1906.

33 See *Minister of Health v. Treatment Action Campaign*, 2002 (5) SA 721, available at <http://www.saflii.org/za/cases/ZACC/2002/15.html> (last visited on Dec. 26, 2010). In this case, the Constitutional Court interpreted the right to health enshrined in the South African Constitution as requiring “*the government to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their new born children to have access to health services to combat mother-to-child transmission of HIV.*” The Court further declared that “*[t]he programme to be realised progressively within available resources must include reasonable measures for counselling and testing pregnant women for HIV, counselling HIV-positive pregnant women on the options open to them to reduce the risk of mother-to-child transmission of HIV, and making appropriate treatment available to them for such purposes.*” The Court further granted mandatory injunctive relief along these lines. See Para 135.

34 *Social Welfare Rights* at 1906-1908.

35 *Id.* at 1909-1912.

36 *Id.*

37 *Brown v. Board of Education*, 349 U.S. 294, 301 (1955).

38 *Social Welfare Rights* at 1910.

39 *Id.* at 1912.

40 *Id.*

Dixon takes Tushnet's analysis forward, and outlines a theory regarding when Courts should compromise on the strength of the underlying right, and when they should instead dilute the strength (or degree of coerciveness) of the remedy.⁴¹ She argues that where such rights are left unfulfilled on account of legislative inertia, often an inescapable by-product of majoritarian politics, then the intervention of Courts with relatively strong remedies is called for.⁴² However, there is good reason for Courts to be cautious about defining the scope of positive socio-economic rights in broad and rigid terms, since they are institutionally ill-equipped to do so with any great degree of accuracy.⁴³

In the next section of the essay, I examine Indian constitutional jurisprudence relating to fundamental rights generally and the right to education in particular. I will then proceed to critically review the Supreme Court's approach in light of the theoretical framework outlined above.

The Indian Orthodoxy – Fundamental Rights, Education and Beyond

i. Fundamental Rights, Education and the Indian Supreme Court - A Brief Overview

It is beyond the scope of this essay to present a comprehensive review of fundamental rights jurisprudence in India. The brief overview below - of constitutional remedies for the breach of fundamental rights - is intended merely to contextualize the discussion that follows, and help explain why Article 21A presents a fundamentally distinct challenge for constitutional jurisprudence in India.

In the event of violation of any of the fundamental rights enshrined in Part III of the Constitution, Article 32 guarantees the right to directly approach the Supreme Court for redressal.⁴⁴ It is important to bear in mind the

41 Rosalind Dixon, *Creating Dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited*, 5 INT'L J. CONST. L. 391 [Hereinafter *Dialogue about Socioeconomic Rights*].

42 *Id.* at 411-415.

43 *Id.* at 410-411.

44 Article 32, CONSTITUTION OF INDIA,

"(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2)

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution."

extremely broad, indeed sweeping, nature of the powers of the Supreme Court to enforce the fundamental rights enshrined in Part III of the Constitution, wherein the Court has expressly been granted the power to issue all appropriate directions, orders or writs to enforce these fundamental rights.⁴⁵ Article 32 was described by Dr. B.R. Ambedkar, Chairman of the Drafting Committee of the Constituent Assembly, as the “*very soul*” of the Constitution.⁴⁶

Further, High Courts are also empowered to enforce fundamental rights in the exercise of original jurisdiction under Article 226 of the Constitution.⁴⁷ Appeals against judgments of High Courts in exercise of their powers under Article 226 lie to the Supreme Court, if it chooses to invoke its discretionary jurisdiction under Article 136 of the Constitution, and grant “*special leave to appeal*”. The Supreme Court has concluded that the power of judicial review vested in the High Courts under Article 226 and in the Supreme Court under Article 32, is “*an integral and essential feature of the Constitution*”, and part of its unamendable basic structure.⁴⁸

It is this structure of constitutional remedies that we must keep in mind as we turn to an overview of the Supreme Court’s record with respect to the enforcement of Part III of the Constitution.

In the Indian context, the black-letter jurisprudence surrounding Article 32 would raise serious questions about “strong” rights that nonetheless yield insubstantial remedies. It would appear at first glance that the assumption about a necessary connection between substantive rights and substantive remedies, which Tushnet considers to be flawed, is probably central to Indian constitutional jurisprudence.⁴⁹ Nevertheless, a closer analysis of Indian

45 *Id.*

46 CONSTITUENT ASSEMBLY DEBATES, VOL. VII, 953 in L. Chandra Kumar v. Union of India, AIR 1997 SC 1125, Paragraph 73, “*If I was asked to name any particular Article in this Constitution as the most important - an Article without which this Constitution would be a nullity—I could not refer to any other Article except this one. It is the very soul of the Constitution and the very heart of it and I am glad that the House has realised its importance.*”

47 Article 226, CONSTITUTION OF INDIA,

“(1) Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose...

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32.”

48 L. Chandra Kumar v. Union of India, AIR 1997 SC 1125.

49 The views of prominent constitutional scholar H.M. Seervai probably exemplify this assumption. Seervai was a vehement critic of what he regarded as the blurring of lines between judicially

fundamental rights jurisprudence reveals a more nuanced reality. A number of rights that have been judicially-interpreted to be implicit in other fundamental rights have remained grossly under-enforced.⁵⁰ There could potentially be some debate in particular instances about whether the under-enforcement was on account of a “weak” right being enunciated, or weak remedies being employed in aid of the right in question. As Tushnet acknowledges, the distinction does tend to blur.⁵¹

However, in the realm of education, the right - first detailed in *Mohini Jain* and substantially reiterated in *Unni Krishnan* - was formulated in fairly robust terms.⁵² One interpretation is that the Supreme Court had implicitly adopted the Irish model of declaring a constitutional violation, but abstaining from adopting a proactive stance to compel compliance.⁵³ Irrespective of whether the Supreme Court purposefully refrained from adopting strong remedies, or had initially intended to strengthen the remedy with the passage of time, it is undeniable that the practical import of the judgments was to leave the right - now recognized, at least theoretically, as a fundamental right - significantly under-enforced.

Since I have argued that the enactment of Article 21A mandates a much more robust involvement of the Supreme Court than was the case

enforceable negative rights, which limited the power of the State, and Directive Principles which did not so limit the State's power, and could not be the source of remedies under Article 32 of the Constitution. See H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY, 1934 (1996). “The question which must be answered when we are dealing with the governance of our country is: what happens if the duty imposed by the Constitution is ignored, violated or neglected? In respect of fundamental rights...the answer is simple. Failure to discharge the duty involves the invalidity of the law or executive action at the instance of the aggrieved party. But in respect of directive principles the answer is that the failure to discharge the duty involves no consequence: it may expose the defaulting government to public and political criticism; it may have some effect when fresh elections are held. But to tell people, for whose benefit the directive principles were formulated, that if governments do not discharge the duty of implementing the directive principles they violate the Constitution, must appear to the people, deprived of the benefit which the implementation of the directives were to confer on them, as a cruel mockery...”

50 See, for example, Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495.

51 See *Social Welfare Rights* at 1909.

52 *Mohini Jain* and *Unni Krishnan* both formulated the right to education in extremely broad terms, but did little to address the problem of enforcement. My view is that the Court's approach was unsatisfactory at many levels. First, because it is difficult to plausibly locate a right to education in Article 21 and past precedent. Second, because even if it were a plausible interpretation, the cases at hand, which concerned higher education, were singularly ill-suited to considering (and holding in favour of) a right to primary education. For a view similar to my own, see S.P. Sathe, *Supreme Court on Right to Education*, ECONOMIC AND POLITICAL WEEKLY, Aug. 29, 1992, available at <http://www.jstor.org/stable/4398806> (last visited on Dec. 25, 2010). But see D. Nagasaila & V. Suresh, *Can Right to Education be a Fundamental Right*, ECONOMIC AND POLITICAL WEEKLY, Nov. 07, 1992, available at <http://www.jstor.org/stable/4399101> (last visited on Dec. 25, 2010).

53 See, for example, *T.D. v. Minister for Education*, [2001] 4 I.R. 545.

with *Mohini Jain* or *Unni Krishnan*, I require possible analogies in prior Indian constitutional jurisprudence (for examples of the vigorous enforcement of positive fundamental rights). The model I intend to critically review is the *Godavarman* case.⁵⁴

ii. *The Godavarman Model – Lessons for the enforcement of Article 21A*

In the *Godavarman* case, popularly known as the ‘Forest Bench’, a writ petition was filed under Article 32 in 1995 seeking certain directions from the Supreme Court with respect to environmental conservation, specifically to protect a part of the Nilgiri forest from illegal timber felling.⁵⁵ What is unique about the *Godavarman* case is that the Supreme Court has retained jurisdiction over the matter for over fifteen years, appointed a number of eminent counsel to assist it as *amici*, and continued to issue a series of substantive and far-reaching directions on diverse issues relating to forest conservation.⁵⁶

In the last few years, the Central Government has raised increasingly pointed attacks on the legal basis for the Court’s retention of jurisdiction, and its overt intervention in the sphere of forest conservation.⁵⁷ While a number of environmental activists and conservationists continue to employ *Godavarman* as a forum for advancing their claims, it is interesting to note that a number of others have raised concerns about the long-term impact of the Court’s prolonged intervention.⁵⁸ Critics assert that the Court cannot – “constitutionally or practically” – manage India’s forests, and that it should

54 A useful online resource on the *Godavarman* case is <http://www.forestcaseindia.org/f2> (last visited on Dec. 25, 2010).

55 *Id.* On 12th December 1996, the Supreme Court issued the first of many landmark rulings in *Godavarman*, which held that all forests within the dictionary meaning of the term, irrespective of their technical status under the Forest Conservation Act, were legally protected forests.

56 *Id.*

57 *See, for example*, Dewan C. Vohra, FCA committee under government lens, THE FINANCIAL EXPRESS, Aug. 1, 2007, available at <http://www.financialexpress.com/news/fca-committee-under-government-lens/208069/> (last visited on Dec. 25, 2010); Sonu Jain, Centre withdraws forest plea, THE INDIAN EXPRESS, Sept. 21, 2007, available at <http://www.indianexpress.com/news/centre-withdraws-forest-plea/219592/> (last visited on Dec. 25, 2010).

The present author happened to be present in Court on one of these occasions, although he cannot recall the exact date. One of the Senior Counsel representing the State – Dr. Rajeev Dhavan – made an impassioned argument to the effect that the Court ought to convene a hearing simply for re-considering the jurisdictional question of whether the Court at all had the authority to issue such a wide-ranging series of directions on all aspects of forest conservation. One of the assertions he made was that the Supreme Court was invoking an understanding of its own jurisdiction, the scope and breadth of which was unknown to any constitutional court anywhere in the world.

58 *See* Armin Rosencranz & Sharadchandra Lele, *Supreme Court and India’s Forests*, ECONOMIC AND POLITICAL WEEKLY 11, Feb. 2, 2008, available at <http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/2525/11683.pdf> (last visited on Dec. 25, 2010), “*The Godavarman case offers strong evidence to*

stop at directing the State to fulfil its constitutional duty by developing appropriate programs.⁵⁹

Viewing *Godavarman* in terms of Tushnet's rights-remedies framework helps explain a lot. While *Godavarman* was – and is – certainly a case which can (at least often) be classified as strong on the remedies dimension – that is not what is truly controversial about it. In fact, it is the broad and inflexible delineation of the right to environmental protection that appears to have offended the Government most. Even assuming that environmental rights are implicit in the right to life, it is certainly not obvious that it has necessarily to be understood as a strong individually enforceable right.⁶⁰ It is likely that effective, time-bound relief with respect to a weaker right might not create 'separation of power' concerns to the same degree.⁶¹ Significantly, none of this touches the core concerns that motivated criticism of the *Godavarman* proceedings. In this analysis, therefore, *Godavarman* adopted a strong rights-strong remedies approach, and it is the judicial definition of the right that has attracted the most criticism. Perhaps ironically, this arguable judicial overreach has led to calls for the dissolution of the Forest Bench in its entirety,⁶² a timely reminder to the Indian Courts that when a political backlash occurs, it is not necessarily a proportionate or carefully-calibrated one.

Godavarman is a complicated topic deserving of more attention than I can give within the scope of the present essay. Nonetheless, I believe it does hold useful lessons for how the Supreme Court ought to approach the right

suggest that judicial overreach not only hurts the process of governance by undermining the role of the executive, but also the content of governance by producing flawed judgments, i.e., interpretations of the law that are both unsound and impracticable. This happens for several reasons, including inadequate application of mind in the hurry to produce "landmark" judgments, and the impossibility of a central court knowing the complexities of conditions and laws across such a diverse nation."

59 *Id.*, "The Supreme Court has played an important role in increasing awareness about the sorry state of forest governance in the country. But it cannot – constitutionally or practically – manage India's forests...The court should move towards closing down the *Godavarman* case and, if necessary, invoke the constitutional duty of the state (under section 48A) to prepare comprehensive legislation for a more decentralised, locally sensitive and sustainable use-oriented forest governance system."

60 Put differently, it is possible to conceive of a fairly robust environmental right implicit in the right to life, without concluding that the Court is required to adjudicate (say) every claim relating to illegal timber logging in protected areas, or every disagreement about whether members of Government-appointed statutory bodies possess the requisite expertise.

61 The efficacy of the remedy would flow from the retention of jurisdiction, the imposition of stricter timelines and reporting requirements and the refusal to accept financial constraints as a catch-all excuse for the failure to enforce the right. Further, from the fact that, at least theoretically, failure to comply with the Court's orders could result in contempt proceedings.

62 *See supra* note 57.

to education. At a minimum, the negative reaction to the Court’s robust intervention may hold a cautionary tale. However important the constitutional right in question, both the delineation of the underlying right and the choice of remedies must be nuanced and thoughtful in nature.

The proposed approach to Article 21A

i. The Beginnings of the Judicial Interpretation of Article 21A

I observed earlier that any attempt to define the contours of Article 21A necessarily involves entering uncharted waters. This is substantially, but not entirely, correct. In spite of the fact that Article 21A has only recently entered into force, there is already a limited amount of judicial *dicta* on its scope and meaning.

The most prominent example is the opinion of Bhandari J. in *Ashoka Kumar Thakur*,⁶³ arguably the most significant affirmative action case to be decided by the Indian Supreme Court in the last decade or more. On its face, *Ashoka Kumar Thakur* would appear to have little to do with primary school education. The constitutional question centred on whether the reservation of places in educational institutions for members of the Other Backward Classes (i.e. socially and educationally backward classes of citizens of India) was violative of the constitutional guarantee of equality.⁶⁴ The context for the *dicta* on the right to primary education appears to have been the Petitioner’s broad and overarching challenge to the rationality and *bona fides* of the Government’s Education Policy, of which the subset of reservations was the particular cause of injury to them.⁶⁵

In his separate opinion in *Ashoka Kumar Thakur*, Bhandari J. substantially joined the other justices in upholding the impugned affirmative action policies.⁶⁶ Nonetheless, there was a definite contrast in the tenor of

63 *Ashoka Kumar Thakur v. Union of India & Others*, (2008) 6 SCC 1 [Hereinafter *Ashoka Kumar Thakur*].

64 *Id.*

65 *See Id.* The Petitioners argued that the focus on the allocation of the “spoils” of University education to different societal groups and interests, at the expense of focusing on the worst-off in terms of educational access, disentitled the Government’s reservation policy to any deference. In response, the Solicitor General appears to have argued that the Government was not barred from fighting a battle on multiple fronts, with respect to the inequalities inherent in access to education at all levels. He submitted data to establish before the Court that the Central Government had in recent years substantially enhanced funding for primary education, and that it was fully cognizant of its constitutional responsibilities in that regard. However, the mere fact that there were admitted deficiencies and shortcomings with respect to the Government’s primary education program could not come in the way of its acting to correct disparities in access to higher education.

66 *Id.* Although it is not relevant for our purposes, it may be stated for the sake of accuracy that Bhandari J. (dissenting) would have struck down the impugned constitutional amendment to the

his judgment. He was sharply critical of the Government for prioritizing higher education (and, more particularly, affirmative action in higher education) over primary education, in what he considered to constitute an inversion of constitutional priorities. It is in this context that his opinion contains *dicta* on Article 21A. He envisaged a two-fold content for Article 21A; first, that all children in the requisite age group must compulsorily attend school, and second, that the education provided to them must constitute “*quality*” education.⁶⁷ This is a preliminary indicator that, when the question eventually arises in the context of concrete claims under Article 21A, the Supreme Court might be inclined to hold that a minimum core guarantee of quality is essential for satisfaction of the constitutional mandate.

How might that minimum core be defined? In *Avinash Mehrotra v. Union of India and Others*,⁶⁸ Bhandari J. observed that the broad and generous interpretation afforded to other fundamental rights by the Indian Supreme Court offered significant guidance to how Article 21A ought to be understood.⁶⁹ Educating a child required more than “*a teacher and a blackboard, or a classroom and a book*”.⁷⁰ While acknowledging that the case at

extent that it applied to unaided private educational institutions. The other judges did not find it necessary to resolve that particular issue in this case.

67 *Id.*, “*The Article seeks to usher in “the ultimate goal of providing universal and quality education.”...Implied within “education” is the idea that it will be quality in nature. Current performance indicates that much improvement needs to be made before we qualify “education” with “quality.” Of course, for children who are out of school, even the best education would be irrelevant. It goes without saying that all children aged six to fourteen must attend school and education must be quality in nature. Only upon accomplishing both of these goals, can we say that we have achieved total compliance with Article 21A. Though progress has been made, the Parliament’s observation upon passing Art 21A still applies: the goal of providing “universal and quality education” still remains unfulfilled.*” [Emphasis in original].

Bhandari J’s observations have some historical support too. As far back as 1964, the then Education Minister, M.C. Chagla observed as follows: “*Our Constitution fathers did not intend when they enacted Article 45 that we just set up hovels or any sort of structure, put students there, give them untrained teachers, give them bad textbooks, no playgrounds, and say we have complied with Article 45 and primary education is expanding. The compliance that was intended, as I said, by our Constitution fathers was a substantial compliance. They meant that real education should be given to our children between the ages of 6 to 14.*” See Jayati Ghosh, *Missing School*, FRONTLINE, Aug. 02-15, 2008, available at <http://www.hinduonnet.com/fline/fl2516/stories/20080815251604900.htm> (last visited on Dec. 25, 2010).

68 MANU/SC/0555/2009 [Hereinafter *Avinash Mehrotra*].

69 *Id.* at Paragraph 30, “This Court has routinely held that another fundamental right to life encompasses more than a breath and a heartbeat. In reflecting on the meaning of “personal liberty” in Articles 19 and 21, we have held that “that ‘personal liberty’ is used in the article as a compendious term to include within itself all the varieties of rights which go to make up the ‘personal liberties’ of man.” *Kharak Singh v. State of U.P.*, MANU/SC/0085/1962. Similarly, we must hold that educating a child requires more than a teacher and a blackboard, or a classroom and a book. The right to education requires that a child study in a quality school, and a quality school certainly should pose no threat to a child’s safety. We reached a similar conclusion, on the comprehensive guarantees implicit in the right to education, only recently in our opinion in *Ashoka Kumar Thakur v. Union of India*, MANU/SC/1397/2008.”

70 *Id.*

hand did not require (or perhaps even permit) the Court to detail the full contours of Article 21A, he opined that it was at least warranted to conclude that where clearly unsafe structures were employed to house schools, this could not be construed as constituting compliance with the mandate of Article 21A.⁷¹

Another possible constitutional challenge in the context of Article 21A could be to laws or policies that actively impede the achievement of the constitutional goal of universal primary education. An excellent example of the approach that might be adopted by the Supreme Court is provided by *Election Commission of India v. St. Mary’s School*⁷². Here, the Supreme Court was considering the policy of requisitioning school teachers to conduct elections during normal school hours.⁷³ The Court itself framed the issue in terms of how to resolve the conflict between two conflicting constitutional priorities. It recognized the paramount importance of free and fair elections in the Indian context, and the constitutional role of the Election Commission of India with respect thereto. Nevertheless, it held that the fundamental right to primary education could not be subordinated to this other constitutional priority.⁷⁴ It took note of the “*deplorable condition*” of primary education in India.⁷⁵ The operative portion of the Supreme Court’s judgment therefore provided that teaching staff should ordinarily be deployed for election duties only on holidays and non-teaching days.⁷⁶

71 *Id.* at Paragraphs 31 & 32. “The Constitution likewise provides meaning to the word “education” beyond its dictionary meaning. Parents should not be compelled to send their children to dangerous schools, nor should children suffer compulsory education in unsound buildings. Likewise, the State’s reciprocal duty to parents begins with the provision of a free education, and it extends to the State’s regulatory power. No matter where a family seeks to educate its children, the State must ensure that children suffer no harm in exercising their fundamental right and civic duty. States thus bear the additional burden of regulation, ensuring that schools provide safe facilities as part of a compulsory education.

In the instant case, we have no need to sketch all the contours of the Constitution’s guarantees, so we do not. We merely hold that the right to education incorporates the provision of safe schools.”

72 AIR 2008 SC 655.

73 *Id.*

74 *Id.* The Supreme Court referred to the judgments in *Mohini Jain* and *Unni Krishnan* which had located a right to education in Article 21 of the Constitution, and also to the insertion of Article 21A in the Constitution. It recognized that the right to education implicit in Article 21 of the Constitution was subject to reasonable limitations, but nevertheless refused to afford any significant degree of deference to the submissions of the Election Commission that the recruitment of teachers to monitor elections was necessary to the successful conduct of these elections.

75 *Id.*

76 *Id.*, “We, therefore, direct that all teaching staff shall be put on the duties of roll revisions and election works on holidays and non-teaching days. Teachers should not ordinarily be put on duty on teaching days and within teaching hours. Non-teaching staff, however, may be put on such duties on any day or at any time, if permissible in law.”

The Supreme Court's analysis substantially focussed on Article 21 of the Constitution which, at least textually, is framed as a negative procedural due process right protecting life and personal liberty. Evidently, the coming into force of Article 21A might only slant the constitutional balance further in favour of the outcome the Court reached in any case.

I will return to this line of cases in a later portion of the essay, when I develop my own account of how the Supreme Court ought to enforce Article 21A, now that it has - though belatedly - come into force.

ii. A critical analysis of the Strength of the Right

Viewing the fundamental right to education through the prism of Tushnet's classification, it is hard to escape the conclusion that the right contains at least a minimal substantive content. It cannot escape notice that the right in Article 21A is not premised on the availability of resources, nor is it phrased in terms of a progressive obligation on the part of the State.⁷⁷ The beneficiaries of the right are identified in clear-cut and precise terms, being children between the ages of six and fourteen years.⁷⁸ The word "*shall*" presumptively connotes a mandatory obligation, and there is nothing in the backdrop of the framing of the right which would suggest otherwise. In fact, an alternative, non-mandatory interpretation of the word "*shall*" would be oxymoronic in the context of Part III of the Indian Constitution, although it is of course possible to conceive of other formulations of the right that might curtail its scope and reach even within the context of Part III.

As a purely doctrinal matter, therefore, a core strength of the right (in terms of judicial enforceability) is clearly present, although the harder question of the deference to be afforded to Parliament in its choice of means still remains to be considered. The latter portion of Article 21A - i.e. "*in such manner as the State may, by law, determine*" - strongly suggests that the means to be adopted to fulfil the mandate of the fundamental right are to be within the domain of the State. This squares well with general concerns about the competence of Courts to adjudicate difficult matters of social and economic policy. Essentially, Article 21A implies that the end is no longer negotiable, but the Executive is certainly entitled to adopt the policies it thinks would best reach that end.

I now turn to the question of the "minimum core" of the right. While powerful arguments have been raised regarding both the difficulty and the

⁷⁷ See *supra* note 1.

⁷⁸ *Id.*

undesirability of a minimum core approach to socio-economic rights,⁷⁹ I believe that they are overstated, at least if applied in the present context. It is undoubtedly difficult to delineate the substantive content of Article 21A at this juncture. But that would be true of almost any newly inserted fundamental right; it is hard to appreciate why Article 21A is more than usually problematic. Strauss has argued that American constitutional jurisprudence can be best understood as a series of common law decisions in concrete factual scenarios, constrained by precedent but nevertheless constantly evolving.⁸⁰ I believe that the contours of Article 21A will be similarly defined in incremental common law fashion. Nevertheless, acknowledging that the right will evolve is distinct from asserting that, as it stands now, it has no identifiable core content. The latter is a claim I would certainly contest.

The first identifiable minimal component is that all children in the identified age group must attend school. In view of the statistical reality discussed earlier,⁸¹ this is far from a trivial irrelevance. Further, a meaningful opportunity to attend school must imply an opportunity without undue risk or discomfort, which would have implications for the maximum distance of schools that would be permissible (without the provision of transportation facilities).⁸² In view of the success of the midday meal scheme,⁸³ and the pivotal role played by the Supreme Court in its popularization,⁸⁴ it is quite plausible that provision of a midday meal would be considered mandatory, in spite of the fact that this does not necessarily flow from the text of the constitutional provision.

Why then would I classify the strength of the substantive right as only intermediate? I believe that as long as universal access to primary education is not achieved, the Supreme Court will – and ought to – focus on enforcing access at a baseline level, even if it urges for quality education in a general sense. A pre-occupation with the content of education – at the expense of assuring universal access – would raise familiar institutional competency

79 See, for example, Karin Lehmann, *In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the myth of the Minimum Core*, 22 AM. U. INT'L L. REV. 163.

80 David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877. See also DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

81 See *supra* notes 7-9.

82 Bhandari J's opinion in *Avinash Mehrotra* already points in this direction, *supra* note 68.

83 See Right to Food Campaign (Midday Meals: Introduction), available at http://www.righttofoodindia.org/mdm/mdm_intro.html (last visited on Dec. 25, 2010).

84 See *People's Union for Civil Liberties v. Union of India*, Writ Petition (Civil) No. 196 of 2001, available at <http://www.righttofoodindia.org/orders/nov28.html> (last visited on Dec. 25, 2010).

questions. Perhaps more significantly, judicial pre-occupation with quality at the margin might distract from the baseline goal. I believe that this is a pragmatic realization which the Supreme Court's enforcement will likely reflect. Therefore, while acknowledging that the substantive content of Article 21A will gradually evolve, and reiterating that it does contain a minimal substantive core, I conclude that an expansive interpretation of the underlying right should not be an immediate judicial priority.⁸⁵

iii. Remedies for the breach of Article 21A

Since this essay identifies governmental inertia to be a prominent cause of the imperfect realization of the constitutional goal of free and compulsory education, it is clear that the question of remedies probably requires greater attention than the contours of the underlying right itself.⁸⁶ I now turn to the types of remedies that the Supreme Court ought to consider, along with the potential benefits and pitfalls these might entail.

In *Ashoka Kumar Thakur*, Bhandari J. observed that it was essential that the Government revise budget allocations for education, and set a realistic target for fully achieving the right enshrined in Article 21A.⁸⁷ While acknowledging that this might require the judiciary to oversee government spending,⁸⁸ he stressed that the power of the purse was entrusted to Parliament, and that spending was consequently one area where the judiciary must not overstep its constitutional mandate.⁸⁹ Drawing an analogy to the jurisprudence developed by the Supreme Court in the realm of environmental law, he stressed that, in spite of these inherent limitations on the judiciary, it

85 Such an approach would parallel, in important respects, that of the South African Constitutional Court in the cases discussed above. Given the many similarities between the two countries (both being developing nations with vast economic and social disparities between different sections, to name just one), this would probably be more than mere accidental convergence. While the present essay has investigated South African constitutional jurisprudence only to a limited extent, it would certainly appear to be a fruitful area for future investigation by comparative constitutionalists in India.

86 See *Dialogue about Socioeconomic Rights*.

87 *Supra* note 63, "It has become necessary that the Government set a realistic target within which it must fully implement Article 21A regarding free and compulsory education for the entire country. The Government should suitably revise budget allocations for education. The priorities have to be set correctly. The most important fundamental right may be Article 21A, which, in the larger interest of the nation, must be fully implemented. Without Article 21A, the other fundamental rights are effectively rendered meaningless. Education stands above other rights, as one's ability to enforce one's fundamental rights flows from one's education. This is ultimately why the judiciary must oversee Government spending on free and compulsory education."

88 *Id.*

89 *Id.*, "At the same time, spending is an area in which the judiciary must not overstep its constitutional mandate. The power of the purse is found in Part V, Chapter II of the Constitution, which is dedicated to the Parliament. (See: Articles 109 and 117 for "Money Bills.")"

remained within its scope to enforce the fundamental right to education.⁹⁰

It is necessary to reiterate that *Ashoka Kumar Thakur* was not concerned in any sense with a constitutional claim regarding the denial of primary education. Hence, the discussion regarding the scope and import of Article 21A is *dicta*, and cannot perhaps be afforded the same significance as if it were squarely in the context of resolving a specific factual claim of denial of primary education. Nonetheless, these strongly worded observations in the opinion of Bhandari J. do represent an important starting point for our evolving understanding of Article 21A.

Perhaps the best elucidation of these observations is that the Judiciary will not dictate to the Government how much to spend or how to spend it, but will nevertheless hold it accountable for providing primary education to all. This would be enforced with strong remedies (much as Tushnet describes),⁹¹ with periodic reporting requirements, the refusal to easily accept withdrawal from past commitments, judicial censure and of course the threat of contempt of court as a last resort. This obviously points back to *Godavarman*, and I assert below that that case is indeed a fair model for the mode of enforcement that Article 21A demands.

iv. A Normative Account of the Proposed Approach

Do we have any reason to expect the Supreme Court to develop a distinct jurisprudence with respect to Article 21A, significantly different from what we have seen in (for example) *Mohini Jain* and *Unni Krishnan*? I argue here in the affirmative, both as a predictive and as a normative matter. Firstly, I argue that the Amendment Act itself takes primary education out of the realm of democratic debate, and therefore democratic objections to Courts enforcing the right do not retain much salience. In other words, the Constitution now commands that primary education is a non-negotiable right, irrespective of the priorities of transient political majorities.

90 *Id.*, “Nevertheless, it remains within the judiciary’s scope to ensure that the fundamental right under Article 21A of Part III is upheld. In *M.C. Mehta v. Union of India (vehicular pollution)* (1998) 6 SCC 63, this Court did not ignore the Article 21 right to life when deadly levels of pollution put the right at stake. Nor will this Court ignore the Article 21A right to education, when a dearth of quality schooling put it in jeopardy. The Government’s education programmes and expenditures, wanting in many respects, are an improvement over past performance. They nearly [nevertheless??] fall short of the constitutional mark. Lacklustre performance in primary/secondary schools is caused in part because Government places college students on a higher pedestal. Money will not solve all our education woes, but a correction of priorities in step with the Constitution’s mandate will go a long way.”

91 See *Social Welfare Rights* at 1911-1912.

I shall try to develop in the following paragraphs an account that may appear fanciful or exaggerated, particularly when expressed in the stark terms I invoke here, but which I believe contains an important core of truth. The Indian Parliament has, in substance, sent the Indian Judiciary a simple message – “*In the realm of primary education (and primary education ONLY), save us from ourselves.*”

This understanding of the Amendment (and surrounding circumstances) explains many things. It explains the apparent paradox that involves Parliament unanimously enacting the constitutional amendment in 2002, and successive governments being unable or unwilling to bring it into force, or to enact an implementing legislation, for almost eight years. It explains the substantial and progressively intensifying (although clearly insufficient) steps taken by governments over the past few decades to provide primary education to all children. It explains why Parliament responds fairly positively to the judgments of the Supreme Court in *Mohini Jain* and *Unni Krishnan*, in spite of the fact that these judgments were arguably questionable in many respects.⁹²

The explanation I put forward is also normatively compelling in the context of Indian constitutional jurisprudence because it assumes good faith and a desire to advance constitutional goals, on the part of all State actors, even while it takes account of their inherent failings too. In this view, Parliament, perhaps taking note of the fact that the nation is arguably within striking distance of achieving universal access to primary education (and that a justiciable right would not be an exercise in futility as it might have been in 1950), weighs in to bind whichever political majority might constitute the Executive at any given time.

My argument borrows something from Sheppele, in the sense that it is a “*pragmatic*” defence of social rights which is somewhat sceptical of the degree of self-determination that governments truly have.⁹³ It differs from her account in that I am not concerned with external limitations on sovereignty as much as internal ones, and that it does not require a view about the merits of a particular economic philosophy.⁹⁴ Further, the limitations I focus

92 See *supra* note 52.

93 See Kim Lane Sheppele, *A Realpolitik Defense of Social Rights*, 82 TEX. L. REV. 1921.

94 To the extent that I assume that primary education will have to be provided substantially by the State, and at no cost, it might be said that I at least assume that markets will not work in the context of primary education in India. That would hardly seem like a very bold assumption. See, for example, Amartya Sen, *The importance of basic education*, Speech to the Commonwealth Education Conference, Edinburgh (2003), available at <http://people.cis.ksu.edu/~ab/Miscellany/basiced.html> (last visited on Dec. 25, 2010), “*Indeed, contrary to claims often made, we have not observed any basic*

on are the imperfections perhaps inherent in any democratic process, but likely to be accentuated when the very deprivation in question hinders those deprived from effectively marshalling adequate political support.⁹⁵ Thus, the Executive has made modest progress in the realm of primary education over the past decade, but is often distracted by other issues that appear to have greater short-term political salience.⁹⁶

Seen in this light, the significance of a justiciable social or economic right might often be simply keeping the issue in question fairly high on the Government’s agenda. The justiciability of the right also becomes important when we recognize that there are conflicting interests and priorities within a single government. In this view, as Scheppele suggests in the context of Eastern Europe, constitutional courts can often be partners in a dialogue with the other branches of government, one that ultimately contributes to the realization of a constitutionally mandated right.⁹⁷

The Supreme Court does, in fact, have considerable institutional experience in enforcing, or attempting to enforce, strong judicial remedies with respect to implied fundamental rights.⁹⁸ Some of these interventions have been remarkably successful; others have been a significant failure.⁹⁹ The majority, though, have probably been in the all-too-common

reluctance by parents to send their children - daughters as well as boys - to school, provided affordable, effective and safe schooling opportunities actually exist in their neighbourhood. Of course, there are many obstacles in giving shape to the dreams of parents. The economic circumstances of the families often make it very hard for them to send their children to school, particularly when there are fees to be paid.

The obstacle of unaffordability must be firmly removed across the Commonwealth - indeed the world. I am, of course, aware that some champions of the market system want to leave school fees to the market forces. But this cannot but be a mistake given the social obligation to give the essential opportunity of schooling to all children. Indeed, Adam Smith, who provided the classic analysis of the power and reach of the market mechanism two and quarter centuries ago, wrote eloquently, sitting in Kirkcaldy (not far from here), why it would be wrong to leave this to the market...” [Emphasis Supplied].

Further, and even more significantly, to the extent that any claim is made about the importance of substantial State intervention in the realm of primary education (and, implicitly, about the inadequacy of market mechanisms) it is not one that is made by me, but by the Constitution itself.

95 For example, it has often been remarked that there has been a great deal of focus, both in terms of political debate as well as in actual budgetary allocations, on University and technical education, and much less on primary education. While there are certainly good reasons to focus on higher education, the comparative neglect of primary education does appear to involve a peculiar inversion of constitutional priorities. That is certainly the view taken by Bhandari J. in his opinion in *Ashoka Kumar Thakur*, *supra* note 63.

96 The controversy relating to reservations in education institutions, for example, might have been a significant factor in persuading the first United Progressive Alliance (UPA) government (2004-2009) that it did not retain enough political capital or budgetary flexibility to make a major push on the front of primary education.

97 See *supra* note 93.

98 See, for example, *supra* note 50.

99 *Id.*

intermediate zone of grey, and much disagreement about the propriety and efficacy of these remedies persists.¹⁰⁰ It could be considered that the Supreme Court, perhaps with laudable instrumental motives in mind, has been swimming against the current of the constitutional text and structure. The enactment of Article 21A offers the Court an opportunity to effectively enforce relatively stronger remedies to combat the political lethargy in this realm, without being accused of transgressing its proper role.

Conclusion

What lessons, then, for the judicial enforcement of Article 21A? First of all, for reasons I have given above, the example of *Mohini Jain* and *Unnikrishnan* is no longer apposite. It would be a clear abdication of the constitutional mandate – and indeed, profoundly disrespectful to democracy itself – for the judiciary to refrain from enforcing the right. The *Godavarman* model may represent the best route, with the caveat that the definition of the right should be undertaken with a greater degree of circumspection than has sometimes been the case with *Godavarman*. The cautionary note that needs to be struck with respect to the enunciation of the underlying right has a clear textual basis – “*in such manner as the state may, by law, determine*” – in Article 21A. It is clear that primary education must be provided, but it is unlikely that the Supreme Court will significantly constrain the Government with respect to the type of education that is considered to satisfy the constitutional mandate. Nor should the Court prioritize concerns about quality, at the margin, over effectively supervising the attainment of universal access at the earliest.

This means that while the substantive content of the right will undoubtedly evolve in common law fashion, the focus for the Supreme Court should be to enforce the right universally. The tension between Executive and Judiciary that *Godavarman* engendered is unlikely to be replicated here, for many reasons. The constitutional commitment to free and compulsory education is one voluntarily undertaken, and the Supreme Court would certainly be perceived, even by a Government traditionally suspicious of judicial overreach, to have the authority to oversee progress towards this constitutional goal. Enforcing Article 21A in a principled yet workable manner may well be the most consequential challenge the Indian Supreme Court faces in the coming decade. A delicate balance has to be struck, and the stakes for Indian democracy and constitutionalism could not be higher.

100 *Id.*