

Brown v. Unnikrishnan: A Tale of Two Landmarks

Dr. Suman Lata

Abstract

Rise in the powers of Judiciary and increasing dependence on courts for the declaration and promotion of socio-economic rights in democracies is a global phenomenon. Proactive role played by Judiciary in safeguarding rights of citizens through creative interpretation of the Constitutional tenets and adapting to the changing structures of society and rights discourse, has generated a debate about the role of Judiciary. It has earned all types of positive and negative titles ranging from saviour, pioneer, activist, over enthusiastic, usurper etc. Efficacy of judicial pronouncements, in the area of socio-economic rights, is a moot point getting mixed responses from scholars. This paper discusses the role of Judiciary, in the area of school education with specific reference to two landmark judgments by the Supreme Courts of the United States of America and India. It is an attempt to understand the significance of these two judgments in terms of their implementation and impact.

Key Words: Brown, Judicial Activism, RTE, Segregation, Unnikrishnan

Two developments in the area of school education in two countries, are vastly different in very many ways, which promised to change the way children would go to schools in these countries. One is an, undisputed super power and the other is a struggling nation with many challenges ahead to tackle poverty and backwardness. What is common between the two, however, is commitment to democratic ideals and a robust independent Judiciary. The most important thread that binds the two developments, discussed in the paper are, that both are the result of a proactive role played by a branch of the government that is not supposed to step into policy making, i.e., Judiciary. Both triggered a debate about the boundaries of the role of Judiciary in a democracy. Both also brought in to focus the efficacy or otherwise of judicially mandated policies. This paper discusses these two cases which ‘revolutionized’ school education in the United States of America and India, respectively. One is famously known as the Brown case and the other as Unnikrishnan case and will be referred to as such in the paper.

Brief History of the Cases

The Brown v. Board of Education of Topeka in the USA in 1954 is a landmark case in which the Supreme Court ruled against the prevalent racial segregation in schools. Prior to this judgment, it was a common and legally and socially acceptable practice in the USA to have separate schools for ‘white’ and ‘black’ children. Racial segregation in public utilities was a very common practice. In 1896, another famous or rather infamous case known as Plessy v. Ferguson (Plessy v. Ferguson 163 U.S. 537) challenged racial segregation in public services such as trains and buses. There were ‘white only’ and ‘black only’ trains and buses. A black man, Homer Adolf Plessy refused to vacate seat in the ‘white only’ compartment and was arrested and later fined. He appealed against his punishment citing ‘equal protection clause’ of the Fourteenth Amendment of the

Dr. Suman Lata, Assistant Professor, Gargi College, University of Delhi, New Delhi

Constitution that mandates all states to provide equal protection under law to all the people including non-citizen¹. His appeal was rejected by the court and later by the Supreme Court of Louisiana. If the facilities provided were at par, ruled the Court, then there was no violation of the principle of equality. 'Separate but equal' became a famous doctrine which legitimized segregation of blacks and whites in almost all spheres. This continued, till the Brown judgment overturned the Plessy judgment.

In the Brown case, Oliver Brown's daughter Linda Thompson Brown, along with others was denied admission in an all white elementary school in Kansas. Brown and others challenged the denial of admission in the Kansas court, but the state Supreme Court did not give them any relief. Plessy's 'separate but equal' plea was taken by the defendants that the other school for blacks had equal facilities and hence there was no violation of anybody's rights on the principle of equality. The judgment was challenged in the Supreme Court. Under the umbrella of NAACP (National Association for the Advancement of Colored People), five similar cases including that of Oliver Brown were brought before the Supreme Court of USA. The Court agreed to look into the matter and clubbed all such cases together as one case with the title, 'Brown v. Board of Education of Topeka'. It took about three years for the case to conclude. Finally, after lot of interesting debates and initial differences, a judgment overturning the Plessy judgment was unanimously passed by the Supreme Court. The Court declared that in the field of education 'separate but equal' had no place and made famous the new doctrine that 'separate is inherently unequal.' This judgment was hailed as a landmark judgment giving tremendous impetus to civil rights movement against segregation in other areas too. The Court continued to pass further orders to desegregate schools in the USA.

Unnikrishnan v. State of Andhra

Coming to the Unnikrishnan case in India, it all started when in 1991, Mohini Jain, a medical aspirant got admission in a medical college in Karnataka but was asked to pay much more than students admitted under 'government seats' and those belonging to state of Karnataka as per a notification issued by the government of Karnataka. Jain filed a writ petition in the Supreme Court challenging the notification of the government as a violation of her Fundamental Rights. (Mohini Jain v. State of Karnataka 1992 3 SCC 666) One of the issues among others that came up before the Court was whether education was a Fundamental Right under the Indian Constitution or not. Fundamental Rights, granted by the Constitution, are special rights as these are justiciable rights. It means citizens can approach the Judiciary in case of any type of violation of these rights by anybody. Courts can declare any legislation or policy as void if it violates Fundamental Rights. The Fundamental Rights mentioned in the Constitution did not include right to education as one. That was the plea taken by the defendants in the case. Educational rights figure in the Directive Principles of State Policy (DPSP), which are 'in the nature of guidelines' for the government and are non-justiciable. Citizens cannot approach the judiciary for the implementation of these Principles. In 1992, the Supreme Court passed the judgment in the case which is a classic example of ingenuity of the Court in interpreting Article 21 of the Constitution pertaining to life and liberty. Article 21 reads as under:

'No person shall be deprived of his life or personal liberty except according to a procedure established by law'.

Interpretation of Article 21 had already been expanded by the Judiciary in some earlier judgments to conclude that ‘Right to Life’ went beyond mere physical existence and meant right to be able to live with dignity. The Court reiterated those judgments and specifically pronounced:

The Right to Education flows directly from Right to Life. The Right to Life under Article 21 and the dignity of individual cannot be assured unless it is accompanied by the Right to Education. The State Government is under obligation to make endeavour to provide educational facilities at all levels to its citizens. The Fundamental Rights guaranteed under Part III of the Constitution of India including the right to freedom of speech and expression and other rights under Article 19, cannot be appreciated and fully enjoyed unless a citizen is educated and is conscious of his individualistic dignity. The “Right to Education”, therefore, is concomitant to the Fundamental Rights enshrined under Part III of the Constitution. The State is under a constitutional-mandate to provide educational institutions at all levels for the benefit of the citizens. (<http://india.lawi.asia/miss-mohini-jain-v-state-of-karnataka-and-ors-2/>)

The judgment, specifically the issue of declaring education at all levels as a Fundamental Right was hotly debated. This was quite a sweeping judgment as it declared Right to Education as a Fundamental Right at all levels of schooling as well as higher education. Some scholars found it to be flawed and impractical, while others hailed it. Again, the Supreme Court was called upon to have a re look at the judgment and the Court revised its own judgment in the landmark case of *Unnikrishnan J P & Others v. State of Andhra*. (*Unnikrishnan J.P. v. State of Andhra Pradesh* 1993 1 SCC 594, 603, 605, 645) In this case, the Supreme Court again examined the issue whether as per the Constitution; education at all levels was a Fundamental Right or not. This judgment is very important because of the way the Court interpreted the relationship between the Directive Principles and Fundamental Rights. The Court reiterated that Right to Education flowed from Article 21 but considering Article 45 of the DPSP, it declared that the responsibility of the State to provide free and compulsory education was up to fourteen years of age. So, it declared that education up to fourteen years of age, i.e., elementary education is a Fundamental Right as per the Constitution. The declaration by the Court necessitated Amendment to the Constitution and Right to Education was added to the list of Fundamental Rights.

Creative Interpretation by the Judiciary

How did the two cases come up before the Judiciary? Judiciary can take cognizance of certain situations on its own, i.e., suo motu. But both the cases were brought up before the Judiciary by the concerned parties. The Brown case was a class action suit, against the State, somewhat resembling our Public Interest Litigation. Mohini Jain and Unnikrishnan too were brought before the court by the affected parties for personal grievance redressal. Irrespective of how these cases landed in the courts, what matters is how the opportunity was used by the two Supreme Courts to interpret innovatively the existing Constitutional provisions. The judges went by what seemed to be just to the judges rather than what would have been purely a sterile interpretation of legal provisions which is ostensibly the mandate of the Judiciary. It would not be an exaggeration to say that the Courts first realised what justice demanded and then found a Constitutional way out. Both the judgments fall under the tag of ‘Judicial Activism’, a much explained, debated and still a controversial term. The two judgments generated lot of scholarship on the role of Judiciary as such.

Judicial Activism: Courts' Interpretative Creativity

Judicial Activism is a term that has many connotations, positive as well as negative. It has its critics and supporters. Traditionally the role of Judiciary is to interpret the Constitutional tenets and decide cases based on that. Many Constitutions, including Indian Constitution, have granted the Judiciary the power of 'judicial review'.² It means the Judiciary has the power to declare null and void any legislation or policy which goes against the spirit of the Constitution. Whenever a Judicial decision seems to be intruding into the domain of legislature and the executive, it is termed as Judicial Activism, i.e., the act of the Judiciary beyond its Constitutional mandate. Any such decision is either lauded or condemned depending upon the impact on the affected parties. World over in democratic countries, Judiciary is frequently stepping into the domain of other organs of the government because of a variety of reasons.

Both Brown and Unnikrishnan have the traces of Judicial Activism. Judicial Activism is generally understood as an act of Judiciary wherein, the judges, in order to protect or expand individual rights, go beyond 'the established precedent or are independent of or in opposition to supposed Constitutional or legislative intent'.³ In both the cases under consideration, the judgments contain strong reference to the significance of formal education in modern times. Being sensitive to the importance of the role of education in social upliftment, the judges were keen to safeguard the educational opportunities of citizens. It is worth quoting a little longer extract from the Brown judgment to appreciate sensitivity of the Court to the issue of educational opportunity:

"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe it does." (JUSTIA US Supreme Court)

Once convinced of the importance of real equal opportunity, the Court discarded the precedent to look for other evidence in favour.

In the Brown case, the Supreme Court of USA did not go by Plessy precedent though it was a similar case. Rather, the Court reversed the earlier verdict legitimizing segregation. Plessy case had declared that if the facilities and services provided are equal, then segregation does not violate the Constitutional provision of equal protection before law. Going by that precedent, Brown had no genuine claim in asking for desegregation or rather integration. That is why plaintiffs lost the case at the state level. Supreme Court could have done the same. Here the act of the Court of "overruling Judicial precedent" meets one of the strongest criteria of Judicial Activism as propounded by leading Constitutional scholar, David Strauss.⁴ Adapting to the changed environment, the Court went by sociological and psychological studies to overturn the precedent. The Court depended upon the famously known "dolls experiment" by Dr. Kenneth Clark and his wife. The couple had

conducted a number of tests using black and white toy dolls to study the impact of segregation on black children. Their study concluded that due to segregation black children developed a sense of inferiority and even internalized the negative attitude towards African Americans. (James 2014). The judgment observed:

Segregation of white and colored children has a detrimental effect on the colored children. The impact is greater when it has the sanction of law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregating with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system. (Brown, 347 U.S. at 494).

The final judgment refers to the findings of Clark couple in a foot note. The landmark judgment was celebrated among African Americans. At the same time, there were protests against the judgment.⁵ The judgment did not go down well with many legal scholars also who felt that the Court had gone beyond its Constitutional mandate by taking recourse to sociological evidence as against the established norms of following precedent. Some even questioned the validity and methodology followed by Clarks to reach the conclusions they did.⁶ After a year, in 1955, the Court delivered Brown ii verdict for clarifying the deadline and modalities of the desegregation process. The Court ordained that the desegregation should be implemented ‘with all the deliberate speed.’⁷

Similarly, in the Mohini Jain case (which is actually a precursor to Unnikrishnan), the Supreme Court of India like the Supreme Court of the USA, emphasised the importance of equal access to education. In the words of the Court:

The Preamble (Constitution of India) promises to secure justice “ social, economic and political” for the citizen...The objective flowing from the Preamble cannot be achieved and shall remain on paper unless the people in this country are educated. The three-pronged justice, promised by the Preamble is only an illusion to the teaming-millions who are illiterate. It is only the education which equips citizens to participate in achieving the objectives enshrined in the Preamble...The dignity of man is inviolable. It is the duty of the state to respect and protect the same. It is primarily the education which brings forth the dignity of a man...An individual cannot be assured of human dignity unless his personality is developed and the only way to that is to educate him”. (<https://indiakanoon.org/doc/40715>)

Thus, convinced of the need to provide education to the ‘teaming-millions’, the Court went about deliberating whether education is a Fundamental Right or not. Arguments put forward by the defendants that Indian Constitution did not recognize education as a Fundamental Right was quite self explanatory. A Judiciary confining itself to a conservative role of interpreting the Constitution would not even have discussed the issue. During the drafting of the Constitution, the Constituent Assembly had debated the issue and finally ‘free and compulsory education up to fourteen years of age’ was relegated to the Directive Principles of the State Policy and not the justiciable fundamental rights.⁸ It was not an act of omission. Rather it was a well thought out deliberate move on the part of Constitution framers. So where was the scope for any other interpretation? But since the judges were conscious of the three essential dimensions of justice as envisioned in the Preamble, they took the ‘activist’ route of innovative interpretation of the Constitution in sync with the need of the hour. Luckily, the Court had Judicial precedent of creative interpretation of Article 21 in the Fundamental Rights.⁹

Here, the Court combined the spirit of DPSP and the liberal interpretation of Article 21 together to bring the Right to Education in the 'justiciable' fold. The judgment explained:

Although a citizen cannot enforce the Directive Principles contained in Chapter iv of the Constitution but these were not intended to be mere pious declarations... The Directive Principles which are fundamental in the governance of the country cannot be isolated from the Fundamental Rights guaranteed under Part iii. These principles have to be read in the Fundamental Rights. Both are supplementary to each other. The state is under a Constitutional mandate to create conditions in which the Fundamental Rights, guaranteed to the individuals under Part iii, could be enjoyed by all. Without making Right to Education under Article 41 of the Constitution a reality, the Fundamental Rights under Chapter iii still remain beyond the reach of large majority which is illiterate.

Based on this line of interpretation and a strong conviction to equip citizens 'to participate in achieving the objectives enshrined in the Preamble', the Court came up with a sweeping judgment to declare education at 'all levels' including higher education a Fundamental Right. However, this was too broad a verdict and was challenged in the famous Unnikrishnan case. Once again, the Court was called upon to have a relook on the issue of education being a Fundamental Right along with a host of other related issues such as role of private enterprise in education and mainly the issue of capitation fee. This time the Court revised and 'corrected' its own judgment. Interestingly, the Court's stance on the role of education in a democracy remained unchanged rather sounded more passionate. The judgment waxed eloquent on the significance of education. Sample the following:

Victories are gained, peace is preserved, progress is achieved, civilization is built up and history is made not on the battlefields where ghastly murders are committed in the name of patriotism, not in the Council Chambers where insipid speeches are spun out in the name debate, not even in factories where are manufactured novel instruments to strangle life, but in educational institutions which are seed-beds of culture, where children in whose hands quiver the destinies of the future, are trained. From the ranks will come out when they grow up, statesmen and soldiers, patriots and philosophers, who will determine the progress of the land."(<https://indiakanoon.org/doc/1775396>)

In Mohini Jain case, the Court had focused on all the three Articles-41,45 and 46 in the DPSP¹⁰ and particularly on Article 41 which states:

The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

In Unnikrishnan Case, the Court maintained the expanded meaning of Article 21 but in deciding upon the relationship between DPSS and Fundamental Rights, particularly picked up Article 45 which stated:

The State shall endeavour to provide within ten years from commencement of this Constitution, for free and compulsory education to all children until they complete fourteen years of age.

The Court pointed out that this was the only Article in DPSS that had set a time limit of ten years and if 'endeavour has not been made till now to make this Article reverberate with life and articulate with

meaning, the Court should step in.’ Emphasizing on the complementary relationship between the DPSS and Fundamental Rights, the Court ordained:

“The right to free education is available only to children until they complete the age of 14 years. Thereafter, the obligation of the State to provide education is subject to the limits of its economic capacity and development.”

Incidentally, the judgment refers to the Brown judgment and the excerpt quoted above. This is how the ingenuity of the Court in interpreting the Constitution gave the children of this country a fundamental, justiciable right to elementary education. Just like the Brown judgment in the USA, this judgment activated the civil society that demanded legislation on the subject.

Impact of the Judgments

There is no doubt that the judgments were real milestones in the history of education in the two countries. Lot of effort and jurisprudential jugglery went into these. But the moot question is how effective the judgments have been in realizing their purported objectives of desegregation and universalisation of elementary education? The question brings forth the issue of effectiveness or otherwise of judiciary mandated socio-economic rights. A plethora of literature is available on the Brown verdict and its aftermath. In contrast, the Unnikrishnan verdict generated different type of debate. It is not much about questioning the role of Judiciary as such but mainly about how the judicial mandate was dealt with by the government.

Impact of Brown Judgment

Since Brown happened about more than six decades back, there has been enough time to examine the impact of judgment. While initially the verdict was celebrated as a big victory for the coloured people, a number of scholars who studied the impact of the judgment on desegregation and the civil rights movement later on, have commented on the inefficacy of the judgment in bringing about any major change in racial equality. Prominent among such scholars is Gerald Rosenberg, who has written extensively on the impact of the judgment and the role of U.S. Supreme Court in bringing about social change. The rhetorical title of his controversial book, ‘The Hollow Hope: Can Courts Bring About Social Change?’ published in 1991, began a debate on the issue with scholars either supporting him or thrashing him. In the second expanded edition of the book in 2008, not only did he respond to his critics but with further evidence proved his point that the U.S. Court being a ‘constrained’ court¹¹, was incapable of delivering effective social rights, rather as in the Brown case, it had the opposite effect because of the resistance to the verdict. Other prominent scholars to join the bandwagon are Klarman, Patterson and to some extent Tushnet¹² among others. They argue that in any case, the change would have occurred without the Court’s intervention and it was a waste of time and resources. Critics have also lamented that even after sixty years of the verdict, racial equality is a distant dream. In one of his articles, Patterson quotes Linda Brown Thompson, ‘the Brown of Brown v. Board’ as saying on the fortieth anniversary of Brown, “Sometimes I wonder if we really did the children and the nation a favor by taking this case to the Supreme Court. I know it was the right thing for my father and mother to do then but after nearly forty years we find the Court’s ruling unfulfilled”. She went on to suggest that it probably couldn’t or wouldn’t be, given the nature of American society.’ (Patterson 2001p. 10).

On the other hand, there are those who think that even if the Brown verdict did not lead to immediate or eventual integration in public schools, it still had other intangible positive impact in the sense of giving impetus to civil rights movement in general. (Neil G. Williams 2004). Then there are others who think that evaluating the impact of the verdict is a little complex. On the one hand, it stands as a 'landmark emblem of social justice' and at the same time it is a pointer to the 'limitations of the court led justice'. (Martha Minow 2014). Despite such contrasting views, there seems to be a consensus that the Court's verdict did not have any immediate impact and it has been a long and still- continuing journey towards racial equality and that Judiciary, even when working as a catalyst cannot achieve the desired objective without the active participation of government and civil society.

Impact of Unnikrishnan Judgment

Efficacy of Indian Supreme Court's decision in making Right to Education a reality has not been studied on the lines of Brown studies in U.S. that focus on a particular verdict and its impact. However, there are studies on the efficacy of the Supreme Court, in the area of socio- economic rights in general with passing references to Right to Education verdict. After the pronouncement of Unnikrishnan judgment, focus of activists and scholars was mainly on seeing to it that the verdict found its way in to the Fundamental Rights. But the very fact that it was only in 2002, almost nine years after the SC verdict that 86th Amendment to the Constitution included Right to Education in the list of Fundamental Rights shows that the Court's verdict did not have any immediate impact. The Amendment added to existing Article 21 on protection of life and personal liberty by inserting Article 21A which reads:

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.

Amendment also introduced corresponding changes in Article 45 of DPSP and Article 51 of Fundamental Duties.¹³

Amendment was criticized by activists (Anil Sadgopal 2001) for obvious reasons because instead of declaring Right to Free and Compulsory Education 'up to fourteen years of age' as mentioned in the original Article 45 and the Supreme Court judgment, it restricted the period from six to fourteen years. Moreover, it gave the State complete flexibility by adding 'in such manner as the State may by law determine.' Subsequent to the Amendment, draft for legislation on the Right remained pending for a long time with changes being introduced from time to time after protests. Finally, it was in 2009 that the Right to Free and Compulsory Education Act for children from six to fourteen years of age was passed. So, it took almost seventeen years after the Unnikrishnan verdict for official recognition of the Right! Even though, there are hardly any impact studies on the verdict, these basic facts are self explanatory.

Recently, there have been a few studies focusing on the role of Judiciary, specifically Supreme Court in advancing socio- economic rights in general. While referring to studies on Judiciary in other countries, the studies of Indian judiciary recognize the unique nature of Indian SC in ushering socio economic rights. Regarding Unnikrishnan or Right to Education, there is no equivalence of Rosenberg's deep disappointment as such, but there is not much sanguineness about Judiciary's path breaking judgment either. Skeptics have questioned the sagacity of turning to Judiciary for the promotion of socio-economic rights. ¹⁴Supreme

Court's jurisprudence in the matter of socio-economic rights has been variously termed as, 'declaratory rights' (S.Muralidhar(2002)', 'conditional social rights-a rare private law model of public adjudication' (Madhav Khosla 2010) and focusing on "the strength of rights rather than the remedies." (Shankar & Mehta 2008). Even the proponents of judicial intervention, in the area of socio- economic rights, believe that judicial intervention in itself is not sufficient to bring about desirable changes. Some scholars even wonder whether Unnikrishnan ruling has really been beneficial or detrimental to the cause of education. (Dam and Tewary: 2005)

Conclusion

So, where do we actually stand in terms of Judiciary mandated reforms in education with reference to Brown and Unnikrishnan? There is no doubt that such Court verdicts do generate a feel- good factor and add to the arsenal of activists with a potent weapon to press the government for their implementation or to attack it for non implementation. After the Unnikrishnan judgment, the demand for free and compulsory education became vociferous and after the enactment of RTE Act, number of petitions to seek implementation of various provisions increased manifold. Similarly, after Brown, segregation elsewhere and everywhere was challenged. But was it really worth spending so much time and effort on the part of petitioners and the Judiciary to gain these indirect effects? Would there have been the need to approach Judiciary for the realization of such basic social rights, had the other two branches done the needful on time? Can such issues be resolved without the corresponding changes in administration and societal attitude? Clearly, courts alone cannot resolve such complex issues unless supported by a willing government and enlightened citizenship.

P.S.

Linda Brown was in the news everywhere when she died at the age of seventy- five on March 25, 2018. Mohini Jain herself did not get the desired relief and J P Unnikrishnan was actually one of the petitioners who challenged the right of the State to regulate fee charged by the private institutions!

End Notes

1. Equal Protection Clause-A clause in the Fourteenth Amendment to the U.S. Constitution that declares that no state shall deny to any person within its jurisdiction the equal protection for the law. See Legal Dictionary at <https://legaldictionary.net/judicial-activism>.
2. The Constitution does not specifically mention the word 'judicial review' but this power conferred upon the Supreme Court and State High Courts is quite explicit due to many Articles in the Constitution. See Articles 13, 32, 131-136, 143, 145, 226, 242 and 376. However, the Courts examine the validity of any legislation or policy only when challenged or when the issue may arise during the course of hearing a case. It is also not applicable to 9th Schedule of the Constitution.
3. Merriam Webster dictionary. <https://www.merriam-webster.com/legal/judicial%20activism>
4. Other forms that Judicial Activism, according to Strauss can take are-the act of overturning laws as unconstitutional and ruling contrary to a previously issued constitutional interpretation. He cites the Brown case as a good example of Judicial Activism. See Legal Dictionary at <https://legaldictionary.net/judicial-activism/>
5. According to Rosenberg, the judgment rather 'energized civil rights opponents'. It had to 'confront a culture opposed to that change' and the 'American Judicial system, constrained by the need for both elite and popular support, was unable to overcome this opposition'. (Rosenberg 2005 p.810)

6. For example, Clarence Thomas questioned the psychological theory developed by Clarks that children in all black segregated schools suffered from inferiority complex. (Quoted by Patterson 2010 p.10.)
7. The Court asked schools to desegregate and ordained the local authorities to see that it took place 'with all deliberate speed'. Since no specific time limit was set for the purpose, schools took advantage and did not desegregate for a very long time. See J. Chen, With All Deliberate Speed: Brown ii and Desegregation's Children. Law and Inequality: A journal of Theory and Practice. Vol. 24, issue 1. 1-9
8. During drafting of the Constitution, sub- committee on Fundamental Rights had recommended that Right to Free and Compulsory Education should be in the list of Fundamental Rights which are justiciable i.e., for any violation of these rights, Judiciary could be approached. But the Advisory Committee put the right in the Directive Principles of State Policy which are non-justiable and are guiding principles for the State to follow. (righttoeducation.in/how-was-original-article-45-constitution-arrived)
9. Article 21 has been expanded too liberally by Judiciary to interpret all sorts of rights as part of right to life and liberty. Much before Mohini Jain and Unnikrishnan, the Supreme Court in Francis Coralie vs. Union Territory of Delhi had declared that Right to Life means more than mere physical existence. The right includes, 'the right to live with human dignity and all that goes along with it, namely the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and mixing and comingling with fellow human beings'. AIR 1978 SC 597.
10. All the three Articles of the DPSP focus on education. While Article 45 was about Free and Compulsory Education up to fourteen years of age, Article 46 reads, "The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."
11. According to Rosenberg, in order to be effective in promoting rights of the people, Courts need to be 'dynamic'. 'Constrained Courts' cannot be effective in the implementation of socio-economic rights and American Supreme Court, according to him falls in the category of Constrained Court and therefore it is a 'hollow hope' to expect Judiciary to promote and safeguard socio-economic rights of the people.
12. Michael J Klarman (1994, 2004) argued that racial change would have come regardless of Court's intervention and that Brown had only a token effect on desegregation. He believed that Supreme Court decisions could not 'fundamentally transform a nation.' Patterson (2001) too called the Brown judgment 'a troubled legacy' because of the backlash and ineffectiveness but he acknowledges its contribution to civil rights movement. Mark Tushnet (2004) too generally agrees with Rosenberg and believes that actual desegregation took place only when the government pitched in and the Congress enacted the Civil Rights Act in 1964 that denied funding to discriminating districts.
13. Since original Article 45 was shifted to Fundamental Rights with some changes, it was modified as 'The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.' Additional clause 'k' was added to Article 51 A containing Fundamental Duties: 'who is a parent or guardian to provide opportunities for education to his child, or as the case may be, ward between the age of six and fourteen years.'
14. For example, Shubhankar Dam & Vinay Tewary (2005) are very critical of the activist role of Judiciary in the area of socio- economic rights. According to them judiciary presumes that 'every problem of life could be remedied by writs, orders and directions...Every problem of life is not a problem of law.'

References

- Baxi, Upendra (1982). Who Bothers about the Supreme Court? The Problem of Impact of Judicial Decisions, *Journal of the Indian Law Institute*, Vol. 24:4 pp.848-862
- Dam, Shubhankar & Vivek, Tiwary (2005). Polluting Environment, Polluting Constitution: Is a polluted Constitution worse than a polluted environment? *Journal of International Law*, Vol. 17, No. 3 pp. 383-393. Doi:10.1093/jel/eqio29.

- Garrow, David J. (2004). "Happy" Birthday, Brown v. Board of Education? Brown's Fiftieth Anniversary and the New Critics of Supreme Court Muscularity. *Virginia Law Review*, Vol. 90, Issue 2 pp.693-729 Available at www.virginialawreview.org/...happy-birthday-brown-board-education-browns-fiftieth-anniversary-and-new-critics JUSTIA US Supreme Court <https://supreme.justia.com/cases/federal/us/163/537/case.html>
- Harvey, William B, Harvey, Adia M. & King, Mark. (2004). The Impact of Brown v. Board of Education Decision on Post Secondary Participation of African Americans. *The Journal of Negro Education*. Vol. 73, No. 3, Special Issue: Brown v. Board of Education at 50. Pp. 328-340
- James, Letitia. (2014). The Legacy of Brown v. Board of Education Available at https://huffingtonpost.com/letitia-james/the-legacy-of-brown-vs-bo_b_5339933.html
- Khosla, Madhav. (2009). Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate. *Hastings International Law & Comparative Law Review*, Vol. 32, Issue 1. Pp. 55-99 Available at SSRN:<https://ssrn.com/abstract=1394230>
- Klarman, Michael J. (1994). Brown, Racial Change, and the Civil Rights Movement. *Virginia Law Review*, Vol. 80, Issue7 PP. 1-94 Available at <https://wiki.duke.edu/...BROWN%20RACIAL%20CHANGE%20THE%20CIVIL%20RIGHTS%20MOVEMENT%20pdf>.
- Kmieć, Keenan D. (2004). The Origin and Current Meanings of Judicial Activism. *California Law Review*, Vol. 92, Issue5 Article 4. Pp. 14442-14477 Available at: <http://scholarship.law.berkeley.edu/californialawreview/vol.92/iss5/4> Legal Dictionary at <https://legaldictionary.net/judicial-activism/>
- Minow, Martha. (2014). Surprising Legacies of Brown v. Board. *Washington University of Law & Policy*, Vol. 16, pp. 11-42 Available at http://openscholarship.wustl.edu/law_journal_law_policy/vol16/iss1/3
- Nagasalia, D.& Suresh, V. (1992). Can Right to Education be a Fundamental Right? *Economic and Political Weekly*, Vol. 27, Issue No. 45, pp.2442-2443
- Patterson, James T. (2001). The Troubled Legacy of Brown v. Board. *African-American Studies at the Woodrow Wilson Center*. Pp. 1-13 Available at <https://www.wilsoncenter.org/sites/default/files/ACF236.pdf> Plessy v. Ferguson 163 U.S. 537(1896) <https://www.history.com/black-history/plessy-v-ferguson>
- Rosenberg, G. (2005). Courting Disaster: Looking for Change in All the Wrong Places, *Drake Law Review*, Vol. 54, pp. 795-829. Available at http://chicagounbound.uchicago.edu/journal_articles.
- Ruparelia, Sanjay. (2013). A Progressive Juristocracy?: The Unexpected Social Activism of India's Supreme Court. Working Paper 391. The Hellen Kellog Institute for International Studies. Pp.1-55 Available at <http://dx.doi.org/10.2139/ssrn.2807217>
- Sadgopal, Anil. (2001). Political Economy of the Ninety-Third Amendment Bill. *Mainstream*. December 22, 2001
- Sadgopal, Anil. (2008). Misconceiving Fundamentals, Dismantling Rights: Deciphering the neo-liberal assault on Right to Education. Available at www.educationforallinindia.com/CSS2.pdf
- Sathe, S.P. (1992). Supreme Court on Right to Education, *Economic and Political Weekly*, Vol. 27, Issue No. 35, Aug. 1992, pp.1847-1848.
- Tushnet, Mark (2004). Some Legacies of Brown v. Board of Education. *Virginia Law Review*. Vol. 90 pp. 1693-1720 Available at <http://scholarship.law.georgetown.edu/facpub/253> William, Neil G. (2004). Brown v. Board of Education Fifty Years Later: What Makes for Greatness in a Legal Opinion? Loyola University Chicago, School of Law, LAW e Commons. Pp. 177-199 Available at <https://lawecommons.luc.edu>