

Education as a Fundamental Right in India: Promises and Challenges

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Education matters because it is a fundamental right and because it is intrinsically important in its own right. It opens new horizons and raises quality of life of the individual as well as the nation. The Universal Declaration of Human Rights is unequivocal on the right of education and proclaims 'Education shall be free, at least in the elementary and fundamental stages.' This is the legal foundation of the right to education. In principle, almost all the governments through out the world acknowledge this right. Under the terms for the Convention on the Rights of the Child, now signed by all but two of the world's governments, states are required to 'recognize the right of the child to education, and, with a view to achieving this right progressively and on the basis of equal opportunity.... they shall... make primary education compulsory and available free to all.'

Consequently the majority of countries around the world have enacted laws making schooling compulsory for at least up to the elementary level. Countries like Japan, China, Korea, erstwhile USSR, USA, etc. have successfully achieved the goal of compulsory education through strict enforcement of laws which ensure that each and every child of the relevant age group attends school. In the Dakar Summit (2000) more than 180 governments again endorsed the principle that education should be free and compulsory. Yet in reality, majority of them continue to tolerate a situation in which the poor are priced out of the opportunities for education, India being one amongst many such nations.

The present paper attempts to deal with the issues related to education as a fundamental right in India, especially in the context of recent judgment of the Supreme Court of India making this right justiciable in a court of law and subsequent steps initiated by the Indian Government to amend the Constitution in this regard. Finally the difficulties as regards the realization of the right of the child to education in India has been discussed in the paper.

Right to Education: Constitutional Mandate

The Constitution of India promulgated soon after the independence in 1947 accepted the crucial role of education in the development of the nation and provided a legal base to education. Based on the principles of 'Justice', 'Liberty', 'Equality' and 'Fraternity', the Constitution is designed at furthering the goal of social revolution. The core of commitment to this social revolution lies in Parts III and IV, i.e. the Fundamental Rights, and Directive Principles of the State Policy which may be termed as the conscience of the Constitution.

India being a signatory of the United Nations Universal Declaration of Human Rights (1948) reflects various concerns of UDHR through various articles of its Constitution. For instance, Article 26 of the Universal Declaration of Human Rights which reads 'Everyone has a right to education. Education shall be free at least in the elementary and fundamental stages...' finds an expression in the Indian Constitution under Article 41 and Article 45, under the Directive Principles of State Policy.

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Article 41 directs that the 'state shall within the limits of its economic capacity and development make effective provision for securing the rights to work, to education and to public assistance in case of unemployment, old age, sickness and disablement and in other cases of unreserved want'. The Constitution recognizes education as one of the pious obligations of the state. Article 45 directs the state to endeavour to provide within a period of ten years from the commencement of the Constitution free and compulsory education for all children up to the age of 14 years. However, the right to education under the Directive Principles is not justifiable in court of law and therefore, if denied or neglected, it cannot be challenged in any court of law in the country. A close scrutiny of Articles 41 and 45 reveals, that, while article 41 merely expects the state to make effective provision for securing the right to education and that too within the limits of its economic capacity and development, Article 45 makes a more stringent demand on the state to provide education to all children upto the age of 14 years 'within a period of ten years' regardless of the economic conditions of the state. The phrase 'endeavour to provide' in this article refers to time frame within which the goal of free and compulsory education was to be accomplished. But in view of the immense difficulties involved, i.e. lack of adequate resources, tremendous increase in population, resistance to the education of girls, large number of children of the backward classes, general poverty of the people and illiteracy and apathy of parents, it could not be made possible to make adequate progress in this direction, with the result that the directive envisaged in article 45 of the Constitution has remained unfulfilled even today though more than fifty years have already elapsed from the commencement of the Constitution.

Compulsory Education Laws in India

Legislation on compulsory education in India is predominately a post-independence phenomenon though many provinces of the country successfully implemented compulsory education in selective areas during the pre-independence period also. The most significant development during the post-independence period had been the enactment of Delhi Primary Education Act which came into force in 1960 as a model act resulting from a comparative study of existing acts in the country. This resulted in amendment and modernization of a number of existing compulsory education acts such as the Andhra Pradesh Primary Education Act (1961), Assam Elementary Education Act (1962), Gujarat Compulsory Primary Education Act (1961), Madhya Pradesh Primary Act (1961), Mysore Compulsory Primary Education Act (1960) to name a few. These acts incorporated the provisions of Directive Principles of State Policy enshrined in Article 45 of the Constitution and made it the duty of authority administering elementary education to introduce free and compulsory education doing away with the permissive character of earlier acts. This helped in fast expansion of education in the country in the early decades of independence. As education was a state subject in the Indian Constitution up until 1976 – the 42nd Constitutional Amendment in 1976 transferred education to the Concurrent List meaning thereby, that, both state and the central government can make law relating to education but in case of any conflict, the central law should prevail –, these laws equipped state governments with greater authorities in matters relating to free and compulsory education which is not seen in the acts passed during pre-independence period, where it was left to state's discretion to join hands with local bodies in the aim of providing compulsory education. It helped in augmenting the process of achieving universal compulsory education, as many states took initiatives to provide schooling facilities to children within walking distance and opened non-formal centers for out of school children.

Further, adopting the spirit of Constitutional mandate the provision of free and compulsory education has been applied uniformly to all children of the country-boys, girls and children belonging to various disadvantaged groups. These legislations have focused on educating public opinion, organizing enrolment drives through active community involvement in the management of schools and bring children to school through alternative incentive schemes like provision of school meals, free supply of uniform and textbooks, and scholarships for poor but meritorious students.

Besides legislation on education a number of acts enacted for providing legal protection to children in various occupations have also contributed towards children's education as they ensured prohibitive measures for children up to the age of 14 years being employed in hazardous occupations. These includes acts such Factories Act 1948; Mines Act 1952; Children(Pledging of Labour) Act 1993; Employment of Children Act 1938, Apprentice Act 1961; Contract Labour (regulation and abolition) Act 1970; and Prevention of Child Marriage Act, etc.

However, in spite of 19 states and Union Territories having committed their resolve on free and compulsory education, the country has yet not felt any need of bringing out a comprehensive central legislation which may

act as model for states to follow. This has resulted not only in proliferation of a number of acts in the country but also, often, a cause of complexity, ineffectiveness and non-enforceability of laws, effecting the uniformity of objectives, purposes and structures, etc. Besides, in the absence of any central legislation, the states have freedom to perceive the urgency of bringing out legislation on compulsory education. Consequently almost half the states of the country have yet to realize the need to bring out any such legislation. Even in the states where such legislation exists it is hardly applicable to all the areas uniformly and is implemented in restricted areas only.

Another limitation of existing legislation is their outdated nature as the majority of legislation in the country is decades old with colonial legacy, prescribing the procedure for the enforcement of compulsion which was drawn at a time when very little practical experience was available. These acts have remained unchanged inspite of explosion of knowledge in subsequent years, partly because states lacked the will and resources to seriously enforce compulsion, and partly because no attempt has been made to study the problem from the point of view of its administrative implications. Consequently there are numerous examples of elaborate procedures in these acts which remain unimplemented in its true spirit. For instance, many state education acts have the provision of house-to-house census of children liable to compulsory education, preparation of their list at least three to four months before each session, publication of names of children not attending schools, individual notices to parents, report of non-attendance, hearing of applications for exemption and prosecution of parents who fail to either send their children to schools or to comply with the attendance order. However, in practice these procedures remain underutilized. Consequently the country is still struggling to provide education to half of its child population and its literacy percentage remains low inspite of impressive efforts made by the states.

Judiciary as Custodian of the Right to Education

The Supreme Court of India has been assigned the role of ensuring and enforcing social justice as envisaged in the Preamble, Fundamental Rights, and Directive Principles of State Policy, along with the two other branches of the government – the executive and the legislative. It has played a very important role, ever since independence, to safeguard various constitutional provisions provided a sense of security to minority groups, and helped improving the status and service conditions of teachers. The decisions of various High Courts and the Supreme Court have paved the way for better educational opportunities for children, who are fighting for their survival under the burden of grinding poverty. The judiciary's response to the citizens' right to education has always been very positive. Through a number of significant judgments, the apex court has directed the government to provide adequate educational facilities, economic support and proper atmosphere to the children belonging to poor socio-economic status. This has helped them to derive the benefits of compulsory education. Through its judgment in *Mohini Jain* (1992), *Unnikrishnan* (1993), and many other similar cases, it has expressed its concern over non fulfillment of the promises made under Article 45 of the Constitution and held the opinion that the objectives of social justice cannot be achieved unless free and compulsory education is imparted to all those, who are illiterate.

In its landmark judgment in *Mohini Jain v. State of Karnataka* (1992) the Supreme Court observed that 'the directive principles, which are fundamental in governance of the country, cannot be isolated from the fundamental rights guaranteed under part III... The state is under a constitutional mandate, to create conditions in which 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 shall remain beyond the reach of large majority which is illiterate.' The 'right to education', therefore is concomitant to the fundamental right enshrined under part III of the Constitution. The court strongly observed that the state is under a constitutional mandate to provide educational institutions at all levels for the benefit of the citizens, since the opportunity to education cannot be confined to the richer sections of the society alone. The state may discharge its obligation through state owned or state recognized educational institutions. The court cannot be achieved unless free and compulsory education is provided to the masses which are illiterate.

Another landmark case, in the context of education as a fundamental right is, that of *Anand Vardhan Chandel v. University of Delhi*. The Delhi High Court, while pronouncing its judgment held, that, education is a fundamental right under the constitution. The Court observed: 'The law is, therefore, now settled that the expression of life and personal liberty in Article 21 of the Constitution includes a variety of rights though they are not enumerated in part III of the Constitution, provided that, they are necessary for the full development

of the personality of the individual and can be included in various aspects of the liberty of the individual. The right to education is, therefore, included in Article 21 of the Constitution.’

The most significant case, however, has been *J.P. Unnikrishnan v. State of Andhra Pradesh (1993)*. This case raised a basic question for the consideration of the apex court, whether a citizen had a fundamental right to education or not? Whether the right to primary education, is a fundamental right under Article 21? The Supreme Court, while discharging the case, held the view that the right to free and compulsory education under Article 45 was included within the ambit of Article 21. The court analyzed the language used in Article 45 and Article 49 of the Constitution, and suggested that whereas in Article 49 an ‘obligation’ was placed upon the state, what was required by Article 45 was ‘endeavour’ by the state. The court held that children of this country have a fundamental right to free education until they complete the age of fourteen years.

The Court emphasized that the ‘fundamental purpose of education is to transfigure the human personality into a pattern of perfection through a synthetic process of the development of the body, enrichment of mind, the sublimation of the emotions and the illumination of the spirit. Education is the preparation for a living and for life, here and hereafter.’ The Court further stressed, that in the context of a democratic form of government, which depends for its substance upon enlightenment of the populace, education is at once a social and political necessity.

This judgment has drawn the attention of the country toward enforcing free and compulsory education in its true spirit by making education a fundamental right of children. The present union government included it as one of the priority area in its Common Minimum Programme. Subsequently a committee comprising education ministers of 13 states and headed by Minister of State for Human Resource Development M.R. Saikia was constituted to examine and consider the legal, academic, administrative and financial implications of the proposal to amend the Constitution to make free and compulsory education a fundamental right. The committee made following suggestions:

- i The Constitution may be amended to make free and compulsory education a fundamental right.
- ii State governments should levy an educational cess to raise revenues and augment their resources for education and improvement of the facilities in schools.
- iii Since education is a state subject, there is no need to enact a ‘Central Legislation’ making elementary education compulsory. Instead states should either amend their existing legislation, or else, the centre should issue guidelines providing a broad framework for enactment of fresh legislation on compulsory education. The legislation to be enacted by states should provide for ‘permissive compulsion to enable state governments and local governments to enforce the law selectively in a phased manner.’
- iv While providing enough flexibility to states to formulate their own approach to education keeping in view the local conditions, the report emphasizes on the need to ensure uniformity. Free elementary education may include exemption from tuition fee, provision of free text books for all primary school children and girls up to primary level, and provision of essential stationery to all children in primary classes.
- v It is in this context that 83rd Constitutional Amendment Bill (1997) has been introduced in Parliament to incorporate education as a fundamental right up to 14 years of age. The 83rd amendment would make free and compulsory education justiciable in the court of law. This would ensure that provision of facilities for elementary education becomes legal binding for the state and parents would have obligation to send their children to school. Education as a fundamental right has been included in the Common Minimum Programme of the Union government and special assistance will be provided to the states for implementing the proposal to make elementary education a fundamental right. The scheme is proposed to be implemented as a part of ‘Sarva Shiksha Abhiyan’ Education for all.

The amendment of the Constitution to provide for compulsory education of children as a fundamental right would demonstrate the necessary political will and administrative resolve of the country to achieve universalisation of elementary education and to eradicate illiteracy.

However, making education a fundamental right has wider and serious implications for the central and state government on the one hand, and for parents on the other. As indicated earlier, the proposed fundamental right would make it obligatory for the states to provide necessary infrastructure and facilities for elementary education in a given time frame. The states will be required to enact legislation providing for ‘permissive compulsion’ to

enable state governments and local bodies to enforce the law selectively; grounds for exemption from compulsory school attendance; imposition of punishment for faulting parents; and establishment of primary schools within a distance of 1 to 1.5 kilometers, among others. A review of compulsory legislation provided in the preceding section reveals that such legislation already exist in a number of states and union territories in the country. However, unfortunately many educational administrators are not even aware of such laws. A study conducted by Juneja (1997) prior to the introduction of 83rd Constitutional Bill, indicated, that over 90 percent of the educational administrators were ignorant that their state had a compulsory education law. The existing legislation incorporates many of the suggestions put forth by the Saikia Committee, such as conducting regular surveys to identify school age children, notices to parents informing them that a seat has been allotted to their ward, rules for enforcing attendance norms, notices to parents in case of student's absenteeism, and penalty for parents in case of non-compliance. Had these rules been implemented in their true spirit, schooling facilities and incentives provided to all children, there would have been no need of the 83rd Amendment. It is therefore argued that the government should try to enforce the existing compulsory education acts in its true spirit and with full sincerity rather than amending the Constitution.

Issues related to education as a Fundamental Right

A number of issues need attention in the context of education as a fundamental right. These include an estimation about the number of children to be covered if education is made a fundamental right, the number of school buildings and teachers required and the financial requirements thereof.

The first basic issue is counting of the target population of out of school children in the country. There are varying estimates, for instance, the Saikia Committee estimated that nearly 6.3 million of children of the age group 6 to 14 years do not attend school, while the 1991 census estimated the number of such children to 7.54 million. In order to bring these children into the folds of compulsory education, approximately 104 thousand new primary schools and 221 thousand new upper primary schools would be needed. This will require, a large number of teachers, both at the primary and upper Primary level, putting tremendous financial constraints on states to bear.

The financial implications of making education a fundamental right have been discussed in the Majumdar Committee Report (1999), which estimated that an additional amount of Rs. 136,822 million (Rs. 1.36 trillion) would be required to achieve Universalization of Elementary Education (UEE) by the year 2007-2008. There may be variation in the opinion of experts, on the magnitude of financial requirements estimated in the report, however, it is quite obvious that making education a fundamental right will put enormous financial burden on the state exchequer, which it may find difficult to meet. Assuming a 5% of real growth of GDP per annum between 1996-1997 and 2007-2008, on an average, 0.7% of GDP would be additionally required per annum for achieving the target of compulsory education. Such increase has not taken place in recent years and may not be possible in the years to come. This may be overcome to some extent through utilization of cost effective strategies, optimal deployment of existing resources, and mobilization of funds from additional sources. As suggested by Aggarwal (2000), 'Planning process, both, at macro and micro level, will also have to undergo significant inter and intra regional imbalances in the quality of access, internal efficiency, and learning outcomes.'

Making education a fundamental right has much more serious implications for parents, especially those belonging to low socio-economic status, as it will make parents equal partners with the state in ensuring that all children up to the age of 14 years are attending schools. Critics express fear that it is likely to 'land more parents in jail than children in schools.' It is argued that the resolve has been taken in haste, to gain political mileage than the desire of bringing about social change; and it has not taken into account the problems which are likely to arise. The committee, however, has been conscious about this fact, that, the defaulting parents may be subjected to harassment by bureaucracy. Therefore, it has suggested on the need of fresh legislation to ensure that penalties ought to serve as deterrent and should be enforced only as a last resort. That too in a 'humane and compassionate manner, without losing the sight of the objective of the exercise, i.e. pressurizing and persuading recalcitrant parents to send their children to school.'

Still, another critique of the report is, that, while advocating the 83rd Amendment i.e. making education a fundamental right, as well as a fundamental duty of 'every citizen who is a parent', it rules out the need for central

legislation on compulsory education, which was strongly advocated by the Kothari Commission (1966). Rather, states have been entrusted with the responsibility to enact legislation on compulsory education. The experience of last five decades, however, reflects that in the absence of any central legislation, it is up to the state to analyse the need for such laws and decide whether it will enforce a compulsory act. The practical experience has been that this flexibility resulted in nearly half the states and Union Territories not passing any act. And even if the acts were passed, they were not comprehensive enough to encompass the whole state. All the existing compulsory legislation is limited to certain area only. According to existing legislation compulsion can be enforced in a local area through due process of notification only. Therefore, the need of a 'Central Legislation on Education' is strongly felt by some critics. It is also argued that people should be taken into confidence first, before any change in the status-quo, as the experience has shown that 'negative incentives' or 'coercive strategies' often prove counterproductive.

India has the dubious distinction of having largest number of child workers of any country in the world. The estimates of child workers in the country vary from 17 to 44 million. Poor parents hard pressed with economic depression prefer to avail themselves of the services of their children even at the risk of being fined, and how can one expect these people to send their children to school for a number of years and to bear the expenses of their children when they are unable to afford even two meals a day. Even if they do not have to pay fees, the price of books and other educational material are beyond their means. Besides in many places children are actively engaged in helping their parents in agricultural activities. The time required for their assistance depends upon the time needed for reaping or sowing of crops. When children go to school, their parents incur more than financial costs. The time and effort that children might otherwise have devoted to household tasks, production or income generation are also lost. The opportunity costs are often especially high to poor households which are heavily reliant on child labour. Household demand for child labour has also been considered as greatest barrier to education with children kept away from school by parents needing help at home. The PROBE Survey (1998) has concluded that unless family labour involves rigid work hours that consistently clash with school timings, it is likely to prevent children from attending school with reasonable regularity.

The existing compulsory education acts fail to adopt flexible approach to adjust school term times and holidays according to the local agricultural cycle which may help in reducing the opportunity costs associated with education in such cases. The example of programmes from Egypt and Colombia, which have adjusted school term and day to the seasonal labour patterns of local communities, have shown encouraging results in terms of increase in enrolment and decrease in drop-out rate of children, which may be experimented in our country also. A strong need is being felt to make provision in education acts where the educational bodies at the district or taluka level are empowered to sanction holidays according to local requirements subject to the maximum numbers of days to be granted each year, should not exceed the days fixed by rules and acts.

However, in spite of the apprehensions being expressed by various quarters, the 83rd Constitutional Amendment is a much-needed step. The advocates of compulsory education feel that India is a major exception in regard to enactment and implementation of effective compulsory education laws. Almost every country in the world has such laws. 85 percent of the developing countries, including many Asian countries, like Japan, Korea, Taiwan, and most of the socialist countries have enacted laws making schooling compulsory for an average of about 6-7 years. There is sufficient evidence to suggest that compulsory laws promote high level of enrolment, especially when adequate schooling facilities are available, and net enrolment ratios have moved up towards 90 percent. Simultaneously, measures to reduce cost of school attendance are necessary for children of poor families who are constrained to remain out of school due to inability of their parents to meet the direct or indirect costs of education. Special incentive schemes are required for girls, tribal and scheduled castes who are denied access to education due to social, economic and cultural constraints. Making education a fundamental right justiciable in a court of law will also indicate the political will in favour of mass education as the parliament will be bound to allocate funds and the means to ensure that such right is translated into reality.

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