

Right to Education: A Constitutional Social Justice and Check Against Privatisation of Education

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ABSTRACT

In today's era where information in the form of education is an absolute essential for every individual, the right to have education and be educated is not merely a constitutional goal for a society but it is "social justice" without which mankind cannot survive. Therefore, education under our legal system has been established as a fundamental right, directive principles of state policy and one of the fundamental duties for every Indian citizen under Part III, IV and IV-A of our Indian Constitution, respectively and is considered as a justice which is social in nature.

The right to education initially was not present in our constitution when it commenced in 1950. It was added by the Constitution (Eighty-Sixth Amendment) Act, 2002 which came into force on 1 April 2010. Education which enlightens the human mind and empowers the destitute falls within the ambit of social justice, of which our Preamble to the Indian Constitution talks about. In order to provide providing universal and quality education to everyone it was necessary that right to education be established as a fundamental right in our Constitution. But the privatisation of education and influx of private players in the education sector has considerably threatened the noble goal of providing education to poor and weaker sections of society by the State. Thus, to overcome with this situation government has enacted "the Right of Children to Free and Compulsory Education Act, 2009" which is popularly known as "Right to Education, Act" or simply, "RTE".

KEYWORDS: RIGHT; EDUCATION; CONSTITUTION; SOCIAL JUSTICE; PRIVATISATION

INTRODUCTION

To begin with we must understand that the "State" has inseparable role in shaping of the fortune of the society and the nation. The word "State" has been defined in our Constitution of India under Article 12. This Article 12 reads as follows:

"Article 12 – In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

Thus, the term "state" is a very wider term. It includes the governments, the legislating bodies and other authorities of the Union and States. State is like a guardian of people of India and one of the very essential roles of the guardian is to provide education to all its children. The right to education is the basic human right and justice as in the absence of the education there can be no difference between human beings and animals. For the success of democratic system of government and welfare state,

education is one of the basic elements. The framers of the Indian Constitution realising the importance of education imposed a duty upon the state under Articles 41, 45 and 46 as one of the Directive Principles of State Policy, but it was unfortunate that State didn't took any concrete step for its implementation.

But, now with the insertion of "Right to Education" under Article 21-A as one of the fundamental right under Part III of our Constitution, the State is under a compulsion to provide free and compulsory education to all children between 6 to 14 years age group by enacting law in this behalf. For the compliance of this fundamental right, government in 2009 enacted a law namely, the Right of Children to Free and Compulsory Education Act, 2009 and thereafter in 2010, the Right of Children to Free and Compulsory Education Rules, 2010. Article 21-A, of our Indian Constitution is in the following words:

"Article 21-A. Right to Education – 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."

Similar, other provisions relating to "right to education" in our Indian Constitution are:

Article 41 – Right to work, to education and to public assistance in certain cases – 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.

Article 45 – Provision for early childhood care and education to children below the age of six years – The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.

Article 46 – Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections – 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.

Article 51-A – Fundamental Duties – (k) 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.

Thus, we can say that there are ample amount of provisions in our Indian Constitution dealing with the basic need of people i.e. education. Besides, for the proper enforcement of these provisions in 2009, the Right of Children to Free and Compulsory Education Act, 2009 and thereafter in 2010, the Right of Children to Free and Compulsory Education Rules, 2010 were enacted.

The concept of social justice is directly related to the right of education as it has been rightly said that education is the only weapon to, which can be used to attain all sorts of social justice because education makes a man aware and alert towards his or her rights, and social justice is our right. Education plays a great role in the life of everyone and getting it is very necessary just like food is necessary for healthy body. It develops personality of the people, provides physical and mental standard and transforms people's living status. It promotes the feeling of physical, mental and social well being by providing better life. Good education is constructive in nature which constructs our future forever. It helps a person to improve his/her status of mind, body and spirit. It provides us lots of confidence by giving us bulk of knowledge in many field. It is a single and vital way to the success as well as personal growth.

The more knowledge we get, we grow and develop more in the life. Being well educated never only means to earn certificates and good salary from the recognized and reputed organisation but it also helps us to determine whether something is good or bad for us. The first purpose of getting good education is being good citizen and then being successful in personal and professional life. We are incomplete

without a good education because education makes us right thinker and correct decision maker. In such a competitive world, education has become a necessity for human beings after food, cloth and shelter as it is the fundamental rights of everyone and capable of bringing any desired change and uplift in the human mind and society.

EDUCATION AS A CONSTITUTIONAL RIGHT UNDER INDIAN CONSTITUTION

The right to education under Constitution of India is given under Article 21-A which mandates State to 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. Thus, now with the insertion of “Right to Education” as one of the fundamental right under Part-III of our Constitution, the State is under compulsion to provide free and compulsory education to all children between 6 to 14 years age group. Thus, it is one of the primary scheme of our Constitution to provide education to all. This objective sought to be achieved by the Constitution of India echoes in its preamble which reads that the people of India have solemnly resolved to constitute India into a sovereign, socialist, secular, democratic and republic and to secure to all its citizens, justice, social, economic and political and liberty of thought, expression, belief, faith and worship and equality of status and of opportunity.¹

In *Golak Nath v. State of Punjab*² it was held that:

“It is an error to view our constitution as it was a mere organizational document by which the people established structure and mechanism of their Government. Our constitution is intended to be much more, because it aims at being a Social Document in which the relationship of society to the Individual and of Government to both and the rights of the minorities and the Backward classes are clearly laid down. This social document is headed by a preamble which epitomizes. The principle on which the Government is intended to function and these principles are later expanded into Fundamental Rights in part III and the Directive Principles of State Policy in part IV. The former represent the limits of state action and the latter are the obligations and the duties of the Government as good and Social Government.”

Thus, the Constitution of India is a historic Socio-Legal document embracing the aspirations of the people in which “right to education” is one of them belonging to a multifaceted heterogeneous society undoubtedly. It is the *volkgeist*, i.e., the spirit of the people of India and a social justice to achieve. The aim of the grund norm as in Kelsen’s pure law theory in the Constitution is the social justice of attaining education. Hence, the aim of the grund norm, the Constitution is establishment of an egalitarian policy well entrenched in social justice as engrained in the preamble.

Besides, the provisions regarding “right to education” in Part III of our Constitution, the provisions are also given under Part IV of our Constitution i.e. Directive Principles of State Policy and such provisions are Article 41, 45 and 46. Describing the Directive Principles of State Policy as important as Fundamental Rights, the Supreme Court in the celebrated case of, *Keshavanand Bharti v. State of Kerala*³, held that:

“The fundamental rights and directive principles are supplement to each other and aim at the same goal of about a social revolution and the establishment of a welfare state. The fundamental rights of our constitution are social justice. It is mentioned in the preamble itself- Justice: Social, Political, and

¹ R.G. Chaturvadi, *Natural and Social Justice* 465 (Law Book Company, the University of Michigan, 2nd edn., 1975).

² AIR 1967 SC 1643.

³ AIR 1973 SC 1461.

Economic. It the ideas of social justice were not to remain on paper, how do we give them concrete shape.”

The apex Court has number of times elaborated the importance of “education” in number of cases. Having regard to the significance of education in the life of individual the majority bench of the Supreme Court in, *Unni Krishnan v. State of A.P.*⁴, has held that:

“The right to education was a fundamental right under Article 21 and that it directly flows from the “right to life”, that its content and parameters have to be determined in the light of Articles 41 and 45.”

Article 21-A added by the Constitution (86th Amendment) Act, 2002 makes education for 6 to 14 years old, fundamental right, within the meaning of Part III of the Constitution which is popularly known as “primary or elementary education”.

Article 21-A may be read down with new substituted Article 45 and new clause (k) inserted in Article 51-A (Fundamental Duties) by the Constitution (86th Amendment) Act, 2002. While the new Article 45 obligates the State “to endeavour to provide early childhood care and education for all children until they complete the age of fourteen years”, Clause (k) inserted in Article 51-A imposes a fundamental duty on parent/guardian “to provide opportunities for education to his child or, as the case may be, ward, between the age of six and fourteen years”. The 86th Amendment has been enforced from a date to be notified by the Department of Education in the Ministry of Human Resource Development from 1st Apr 2010.

The right to education is also important to all communities also, whether it is in majority or minority. The right of minorities to establish and administer educational institutions has recognised under Article 30. Article 30 is in the following words:

Article 30 – Right of minorities to establish and administer educational institutions - (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

The term “minority” is not defined in the Constitution. Literally, it means a non-dominant group. It is a relative term and is referred to, to represent the smaller of two numbers, sections or groups. In re the Kerala Education Bill, the Supreme Court observed that while it was easy to say that the minority meant a community which was numerically less than 50% the important question was 50%, of what-the entire population of India or of a State or of a part thereof.⁵ Countries that have special provision for minorities include China, Canada, Germany, India, Russia and U.K. or the Frisians in the Netherlands. The word minority has not been defined in the Constitution. The Motilal Nehru Report (1928) showed a prominent desire to afford protection to minorities, but did not defined the expression. The Sapru Report (1945) also proposed, inter alia, a Minorities Commission but did not defined minority.

The right to education is not only a show case but it can also be enforced by the Courts in the events of

⁴ AIR 1993 SC 2178.

⁵ T.M.A. Pai Foundation v. State of Karnataka, AIR 2003 SC 355.

its violation by the State or by its any instrument or agency. This right can be enforced by way of writ under Article 32 before the Supreme Court. Article 32 confers one of the highly cherished rights which provides right to move the Supreme Court for the enforcement of the fundamental rights including the right to education. This right has been held to be an important and integral part of the basic structure of the Constitution and it cannot be abrogated by any Act. The power under Article 32 has been described as the “heart and soul” of the Constitution. It is because of this Article that the Supreme Court is declared “as the protector and guarantor of fundamental rights”. Similar right is also under Article 226 of our Indian Constitution, where High Courts have been empowered with issuing writs for the enforcements of the fundamental rights.

Thus, right to education in other way we can say that it is a universal entitlement to education. This is also recognized in the International Covenant on Economic, Social and Cultural Rights as a human right that includes the right to free, compulsory primary education for all, an obligation to develop secondary education accessible to all, in particular by the progressive introduction of free secondary education, as well as an obligation to develop equitable access to higher education, ideally by the progressive introduction of free higher education. The right to education also includes a responsibility to provide basic education for individuals who have not completed primary education. It is to rule out discrimination at all levels of the educational system, to set minimum standards and to improve the quality of education.

THE RIGHT OF CHILDREN TO FREE AND COMPULSORY EDUCATION ACT, 2009

To properly enforce the right to education an Act was enacted in the year 2009 by the Union Legislature, which is came to be known as “the Right of Children to Free and Compulsory Education Act, 2009”. It is an Act of the Parliament of India enacted on 4 August 2009 which came into force on 1 April 2010, ensuring free and compulsory education for children between 6 and 14 under its Section 3, which has been made as fundamental right under Article 21-A of the Indian Constitution. The present Act has its history in the drafting of the Indian Constitution at the time of independence, but it is more specifically related to the Constitutional Amendment of 2002 that inserted Article 21-A in the Indian Constitution making education a fundamental right. This constitutional amendment necessitated for a legislation to implement the fundamental right which further required the drafting of a separate Education Bill.

A rough draft of the Bill was composed in year 2005. The Rajya Sabha passed the Bill on 20 July 2009 and the Lok Sabha on 4 August 2009. It received the assent of the President on 26 August 2009 and came into force on 1 April 2010 as “the Right of Children to Free and Compulsory Education Act, 2009”. The Act provides for the statutory right of children to free and compulsory education till completion of elementary education (under Section 2 (f) “elementary education” means the education from first class to eighth class⁶). It clarifies that compulsory education means obligation of the appropriate government (under Section 2 (a) appropriate government means Central, State or Union Territory government⁷) to provide free elementary education and ensure compulsory admission, attendance and completion of elementary education to every child in the six to fourteen age group.

‘Free’ according to Section 3 (2)⁸ means that no child shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing elementary education. Besides,

⁶ The Right of Children to Free and Compulsory Education Act, 2009 (Act 35 of 2009).

⁷ The Right of Children to Free and Compulsory Education Act, 2009 (Act 35 of 2009).

⁸ The Right of Children to Free and Compulsory Education Act, 2009 (Act 35 of 2009).

under Section 13⁹ no school or person shall, while admitting a child, collect any capitation fee and subject the child or his or her parents or guardian to any screening procedure.

It makes provisions under Section 4¹⁰ for a non-admitted child to be admitted in a class appropriate to his age. It specifies the duties and responsibilities of appropriate Governments, local authority and parents and guardians under Sections 8, 9 and 10 in providing free and compulsory education, and sharing of financial and other responsibilities between the Central and State Governments under Section 7 of the Right of Children to Free and Compulsory Education Act, 2009.

For effective implementation of the Act¹¹ under Section 25 (1) it lays down the norms and standards relating to Pupil-Teacher Ratio. Under Section 25 (2) it provides for rational deployment of teachers by ensuring that the specified pupil teacher ratio is maintained for each school by not posting teachers for any non-educational purpose.

To maintain healthy Pupil-Teacher Ratio the Act also provides for prohibition of deployment of teachers for non-educational work, other than decennial population census, elections to local authority, state legislatures and parliament and disaster relief duties under Section 27¹². This Act securing the interest of pupils and ensuring that schools are exhibited as children friendly also prohibits the following things:

- Capitation fee and screening procedures for admission of children (Section 13);
- Holding back and expulsion of children (Section 16).
- Physical punishment and mental harassment to child (Section 17); and
- Private tuition by teachers (Section 28); and

Under Section 29, the RTE Act, 2009 provides for the development of curriculum in consonance with the values enshrined in the Indian Constitution and which would ensure the all-round development of the child, building on the child's knowledge, potentiality and talent and making the child free of fear, trauma and anxiety through a system of child friendly and child centered learning

The Act making education a right of every child between the ages of 6 and 14 years requires all private schools (except the minority institutions) to reserve 25% of seats for children belonging to weaker section and disadvantaged group in the neighborhood under Section 12¹³.

Education in the Indian Constitution is a concurrent issue under item number 25 in the concurrent list of Seventh Schedule and thus, both centre and states can legislate on the issue. The Act lays down specific responsibilities for the centre, state and local bodies for its implementation.

For implementation of the provisions of the RTE Act, 2009 in an effective manner a 15 members National Advisory Council (NAC) and State Advisory Council (SAC) under Section 33 and 34 of the Act¹⁴, respectively is to be constituted to advise the respective governments on the implementation of the provisions of the Act.

Although, this is a revolutionary Act with pious objective yet it has been criticised for its various reasons. The act has been criticised for being hastily-drafted, not consulting many groups active in education, not considering the quality of education, infringing on the rights of private and religious minority schools to administer their system and for excluding children after 14 years of age. Also the quality of education

⁹ The Right of Children to Free and Compulsory Education Act, 2009 (Act 35 of 2009).

¹⁰ The Right of Children to Free and Compulsory Education Act, 2009 (Act 35 of 2009).

¹¹ The Right of Children to Free and Compulsory Education Act, 2009 (Act 35 of 2009).

¹² The Right of Children to Free and Compulsory Education Act, 2009 (Act 35 of 2009).

¹³ The Right of Children to Free and Compulsory Education Act, 2009 (Act 35 of 2009).

¹⁴ The Right of Children to Free and Compulsory Education Act, 2009 (Act 35 of 2009).

provided by the government school system is not good while it remains the largest provider of elementary education in the country, forming more than 80% of all recognised schools, it suffers from shortage of teachers and infrastructural gaps.

RIGHT TO EDUCATION: A SOCIAL JUSTICE

The expression “social justice” carries with itself the idea that, every member or individual of the society get an equal privilege and advantages of the society. No one should be deprived of, avoided or neglected in having the equal claim over the fruits of the society. Its restricts the idea of giving the privileges and rights to handful persons in a society. The imminent importance of social justice enhances in a society which is divided into religion, race, caste and language as we are having in our country. Keeping in mind the social circumstances of our country, it is important for society to lay down the foundation of social justice in India. This object is only possible by import of right to education both, constitutionally and statutorily. For this it was of utmost importance that our Indian Constitution must have embedded the right to education as fundamental right and our legislature also enacts a law on the educational rights of children. Therefore, drafting a provision and law in a document of supreme nature which would be followed in times to come by generations is indeed milestone in the achievement of social justice.

Right to education together with social justice is a multi-dimensional concept which is a balancing wheel between haves and have not. Education is a great social justice and value in providing a stable society and in securing the unity of the country. Right to education as a social justice is the right of the weak, destitute, poor and other under-privileged persons.

Thus, the aim of education is to remove all kinds of inequalities and bring about equal distribution of the social justice and a balance between social rights and social controls. So education is a scheme of control of discrimination, arbitration and decentralisation of powers among every class of society. The concept of social justice has been very efficiently described by the apex court in, *Air India Statutory Corporation v. United Labour Union*¹⁵, in the following words:

“The concept of “social justice” consists of diverse principles essentials for the orderly growth and development of personality of every citizen. “Social justice” is then an integral part of justice in the generic sense. Justice is the genus, of which social justice is one of its species. It is a dynamic device to mitigate the sufferings of the poor, weak, dalits, tribals and deprived sections of the society and to elevate them to the level of equality to live a life with dignity of person.”

The constitutional concern of the right to education as an elastic continuous process is to accord social justice to all sections of the society by providing facilities and opportunities to get educated. It is a comprehensive tool to remove social imbalance by availing to right to education in the social structure by means of which alone it would be possible to build up a welfare state. Thus, in the light of the “right to education”, the social justice must be given an upper hand in any democracy.

RIGHT TO EDUCATION AND PRIVATISATION

A new evil of right to education has emerged in the name of “*privatisation of education*” which proves to be an obstacle in the way of access to right of education by all, and the inability and non-sensitiveness of government is playing a major role in this respect which is needed to be checked immediately.

¹⁵ AIR 1997 SC 645.

Private education refers to education that is provided by non-state entities, including private companies, religious institutions, non-governmental organisation and community based groups, trusts or private individuals. Privatisation is a process, which can be defined as the “transfer of services, management and responsibilities previously owned or carried out by the State to private actors. There are a number of models or ways by which privatisation takes place, such as public private partnerships (PPP) or through increasing private tutoring and by foreign aid/international run NGO schools.

In India, the privatisation of education has been taking place at the elementary school level without much resistance. But it has also made much dent into other educational levels. Privatisation in education has several drawbacks and it often become merely profit making business ventures with no social ideals or objectives and so if privatisation of education comes into conflict with the equity objective, state intervention is desirable. It is also necessary that state intervention be increased in private sector institutions to increase the quota of seats to the poor and deprived sections and help in promoting human resources development to keep pace with the emerging requirements. Origin of privatisation in the education sector is because the state sponsored schools not only in rural areas but even in urban areas have failed to provide quality education. Consequently, the development of educational institution has to be shouldered mainly by the State.

The expansion of the horizons of knowledge is taking place at a rapid pace all over the world and so education is no longer viewed just as a social service but it is considered a necessary economic input and as such private investment in education is treated as a factor contributory to human resources development. The growth of internet and the developments in computer technology have further escalated the information revolution. These technological developments have increased the requirements of highly educated and well-trained technical manpower. The public sector is hampered by lack of resources and cannot meet the needs of industry and other sectors of the economy. Therefore, the private sector initiated in the educational programmes to take advantage of hi-tech opportunities. Over the years, the public sector has failed to generate resources from the recipients of education.

The Right of Children to Free and Compulsory Education Act, 2009 under Section 2 (n) defines “school” which means any recognised school imparting elementary education and includes –

1. A school established, owned or controlled by the appropriate Government or a local authority;
2. An aided school receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority;
3. A school belonging to specified category; and
4. An unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority.

Above definition of school in the Act makes responsible to a large extent unaided and private educational schools to cure the evils of privatisation in education. Section 12¹⁶ makes provision that schools specified in sub-clauses (iii) and (iv) of clause (n) of section 2 shall admit in class I, to the extent of at least 25% of the strength of that class from children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion.

¹⁶ The Right of Children to Free and Compulsory Education Act, 2009 (Act 35 of 2009).

CONCLUSION AND SUGGESTION

To conclude I, can say that privatisation is the greatest barrier towards the achievement of “right to education” as an important “social justice.” Education is so important that without access to education, we cannot say that goal to set the “social justice” has been achieved. Education is the fundamental right of our Indian citizens and this has also been observed by the apex Court in several cases.

For instance, the Supreme Court in *Mohini Jain v. State of Karnataka*¹⁷ declared in 1992 that:

“The right to education was a fundamental right and that the charging of capitation fee was arbitrary, unfair and, therefore, violate of the fundamental right to equality contained in Article 14 of the Constitution. Mohini Jain, the petitioner in the case, was admitted to the medical college in Karnataka, but she could not take advantage of admission as she could not pay Rs 60,000 per year as capitation fee.”

The privatisation or increasing private schools sketched a dividing line between high class students & lower class students which is against the social justice. Article 41 and 45 of the Indian Constitution directs the State shall within the limits of its economic capacity and development, make effective provision for securing the right to education.

In the *Environmental & Consumer Protect Found v. Delhi Administration & Others*¹⁸, SC directed the state government to provide basic infrastructural facilities in schools & to remove the deficiencies and to fill up the posts of teachers expeditiously as possible.

In the case of *Unnikrishnan v. State of Andhra Pradesh*,¹⁹ SC held that:

“Though right to education is not stated expressly as a fundamental right, it is implicit in & flows from the right to life guaranteed under Article 21. Even in fully financed private sector institutions, as per the Supreme Court Judgment, education is a fundamental right and no institution can be permitted to charge capitation fees which deny admission on the basis of merit and permits higher education/professional education on the strength of money power.”

Therefore, the education is that heart which pumps the blood of life into the democracy by securing social justice for citizens. However, this is only possible if the government plays an active role in effectively ensuring that provisions of the Right of Children to Free and Compulsory Education Act, 2009 are implemented in letter and spirits.

The provision of reservation of 25% seats under Section 12²⁰ for children belonging to weaker section and disadvantaged group is required to be increased up to 40% and this shall be then subsequently actively supervised by the government that if it has been compliance or not. The number of government schools be increased along with their quality in management, staff and basic infrastructure.

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¹⁷ AIR 1992 SC 1958.

¹⁸ AIR 2012 SC 243.

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