



FUNDAMENTAL RIGHT TO EDUCATION

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THE FRAMERS of the Indian Constitution took a bold step in granting the right to vote to every citizen who is not less than 21 years of age at a time when over two-thirds of the population was poor and illiterate. The decision was taken by the members of the Constituent Assembly. After due deliberation, Alladi Krishnaswamy Aiyar, a member of the drafting committee, in his Srinivasa Sastri Memorial Lecture, articulated the reasons for adopting universal adult franchise in the Constitution. He said:¹

If democracy is to be broad-based and the system of government that is to function is to have the ultimate sanction of the people as a whole, in a country where a large mass of people are illiterate, where the people owning property are few, the introduction of any property or educational qualification for the exercise of the franchise would be a negation of the principles of democracy. If any such qualification were introduced, that would have disenfranchised a large number of the depressed and labouring classes. It cannot, after all, be assumed that a person with a bare elementary education and with a knowledge of the three R's is in a better position to exercise the franchise than a labourer or a cultivator who may be expected to know what his interests are and choose his representatives. Possibly a large scale suffrage may also have the effect of rooting out corruption in elections.

Lord Bryce had cautioned long ago: "do not give to a people institutions for which it is unripe in the simple faith that the tool will give skill to the workman's hand". Having decided to empower almost every adult with the right to vote, the Constituent Assembly felt the urgency to equip the citizens with education on a war footing. There is only one article in part-IV of the Constitution — directive principles of state policy, which indicates a timeframe for implementation without any constraint of economic capacity or development of the state. Article 45 reads:

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1. "The Constitution & Fundamental Rights" 5-6 (1955).



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

Had this single provision been implemented in right earnest, today there would not have been a single illiterate person in the country and the provisions permitting reservations in favour of educationally backward classes in the matter of admissions to professional colleges and in public employment would have outlived their utility. The preamble of the Right to Education Bill, 2005, admits that “despite the original Article 45 of Directive Principles of the Constitution having made it the duty of the State to provide free and compulsory education to all children up to age fourteen in ten years (1960), the number of out of school children particularly from the disadvantaged groups and those engaged in labour and those receiving poor quality education has remained very large.”

In *Mohini Jain v. State of Karnataka*,² the Supreme Court after mentioning that “right to education” as such has not been guaranteed as a fundamental right under part-III of the Constitution, held that reading articles 21, 38, clauses (a) and (b) of articles 39, 41 and 45 cumulatively, it becomes clear that the framers of the Constitution made it obligatory for the state to provide education for its citizens. Relying on the preamble which promises to secure justice “social, economic and political” for the citizens and assures the dignity of the individual, the court observed : “An individual cannot be assured of human dignity unless his personality is developed and the only way to do that is to educate him.” Proceeding further the court declared: “The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. The state government is under an obligation to make endeavour to provide educational facilities at all levels to its citizens.” A larger bench in *J.P. Unnikrishnan v. State of A.P.*³ while reiterating that the right to education flows from article 21, limited its scope to children until they complete the age of 14 years. Thereafter, the right to education is subject to the limits of its economic capacity and development of the state. The court found no justification whatever for the state to flout the mandate of article 45 even after 44 years since the commencement of the Constitution as is evident from the following observations: “Does not the passage of 44 years – more than four times the period stipulated in Article 45 – convert the obligation created by the

2. (1992) 3 SCC 666, 677.

3. (1993) 1 SCC 645,765 para 226.



article into an enforceable right? In this context, we feel constrained to say that allocation of available funds to different sectors of education in India discloses an inversion of priorities indicated by the Constitution. The Constitution contemplated a crash programme being undertaken by the State to achieve the goal set out in Article 45. It is relevant to note that Article 45 does not speak of the “limits of its economic capacity and development” as does Article 41, which inter alia speaks of right to education. What has actually happened is – more money is spent and more attention is directed to higher education than to – and at the cost of – primary education.”

The National Commission to Review the Working of the Constitution suggested that it should be laid down in article 45 that the states shall make provision for education beyond the age of 14 years within the limits of its economic capacity and stage of development. The commission also recommended “..that an independent National Education Commission should be set up every five years to report to Parliament on the progress of the constitutional directive regarding compulsory education and on other aspects relevant to the knowledge society of the new century.”⁴

After the Supreme Court has unequivocally declared that right to free education until a child completes the age of 14 years is part of right to life, it was expected that Parliament and the governments would give effect to the law so declared. It did not happen. On the contrary, the response of Parliament in the shape of the Constitution (86th Amendment) Act, 2002 shows a negative attitude. The amendment has inserted three new provisions. First, article 21-A in part-III which reads :

21A. 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.

Next a new article 45 has been substituted for article 45 in part-IV. The new article reads :

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.

In addition, a new clause (k) has been added after clause (j) in article 51-A – Fundamental Duties in part IVA. It reads:

(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.

4. See, *Report of the National Commission to Review the Working of the Constitution* 214, para 23 (2008).



The Constitution (86th Amendment) Act shall come into force on such date as the central government may, by notification in the official gazette, appoint. It has not yet come into force. The reason for not bringing the amendment into force is not known. This amendment has an unsettling effect on the fundamental right to education. Article 21A has abridged the scope of the fundamental right to education which is part of the right to life guaranteed by article 21 which, in turn, is part of the basic structure of the Constitution.⁵ The right, if any, sought to be conferred by article 21A is only for citizens in the age group of 6 to 14 years. The children below the age of 6 years will have no fundamental right to education. The enforceability of even the truncated right to education for children in the age group of 6 to 14 years stands postponed till a law is made by the state indicating the manner in which free and compulsory education is to be provided for them. No such law has been made as yet. The new article 45, being a directive principle of state policy, cannot be enforced by any court.⁶ The new addition to the fundamental duties made by clause (k) of article 51A requires every parent or guardian to provide opportunities for education to his child or ward, as the case may be, between the age of 6 and 14 years. To that extent, it shifts the responsibility of the state to provide free and compulsory education for all children until they complete the age of 14 years in terms of article 45 to parents and guardians. All these three amendments to the Constitution made by the Constitution (86th Amendment) Act, 2002 are not in consonance with the fundamental right to education which is part of article 21 as declared in *Unnikrishnan*⁷ case. To the extent they are inconsistent with the law so declared by the constitution bench, they are liable to be struck down as violative of article 21 of the Constitution on the analogy of *People's Union of Civil Liberties v. Union of India*,⁸ wherein the Supreme Court declared section 33-B of the Representation of the People Act, 1951, which was inserted by the Representation of People (3rd Amendment) Act, 2002 as unconstitutional, in as much as section 33-B tried to nullify the effect of the Supreme Court judgment in *Union of India v. Association for Democratic Reforms*,⁹ wherein the court interpreted article 19 (1) (a) of the Constitution and declared that it includes the right of every citizen to know the criminal antecedents of every candidate contesting in an election, his assets and liabilities and educational qualifications. Article 13 of the Constitution does not permit

5. *M. Nagaraj v. UOI*, (2006) 8 SCC 212, 243 para.26; *I.R. Coelho v. State of T.N.*, (2007) 2 SCC 1, 108 para.141.

6. Constitution of India, Art.37.

7. *Supra* note 3.

8. (2003) 4 SCC 399.

9. (2002) 5 SCC 294.



the state to make any law which takes away or abridges the rights conferred by part III (fundamental rights). It further declares that any law made in contravention of this clause to the extent of contravention be void. In the writ petition No.231 of 2007, *Citizens for Equality v. Union of India & Ors.*, one of the writ petitions heard by the constitution bench in the batch reported as *Ashoka Kumar Thakur v. Union of India*,¹⁰ there was a specific challenge to the Constitution (86th Amendment) Act, 2002 on the above mentioned grounds. However, the court did not deal with this aspect at all.

Babu Mathew, Country Director, Action Aid India, in his foreword to the publication '*The Fundamentals*' of the *Fundamental Right to Education*, brought out by Centre for Child and the Law (UNESCO), commented:

Unfortunately the introduction of Article 21A watered down the Judgement of the Supreme Court in the celebrated Unnikrishnan Case. A Right which was available to all children up to the age of 14 years was reduced to a right for children in the age group of 6 to 14 only through the restrictive language of the Constitutional Amendment. Even more critical to the future of this right is the wording of Article 21A which finally leaves it to the State to provide 'in such manner as the State may, by law, determine'. After so much effort and the cumulative pressures generated from so many well-meaning quarters, what has the Indian State done in order to give effect to this Fundamental Right as enshrined in Article 21A?

The National Commission to Review the Working of the Constitution, referring to the Constitution (93rd Amendment) Bill which subsequently became the Constitution (86th Amendment) Act, 2002, observed:¹¹

The Commission feels that the constitutional commitment for free and compulsory education for all children until the age of fourteen should under no circumstances be diluted and the State should fulfill this solemn obligation to the nation. The responsibility for the universalisation of elementary education should be entrusted to Panchayats and local self government institutions. It is recommended that the relevant provisions in the Constitution (93rd Amendment) Bill, 2001 making the right to education of children from six years till the completion of fourteen years as a fundamental right should be amended and enlarged to read as under:- "30-C Every child shall have the right to free education until he completes the age of fourteen years; and in the case of girls and members of

10. (2008) 6 SCC 1.

11. *Supra* note 4, para 3.20.2.



the Scheduled Castes and the Scheduled Tribes, until they complete the age of eighteen years.

Parliament did not act upon this recommendation. The commission noted that “the national goal of universalisation of elementary education has still not been reached. Education for all remains an objective with the target date being pushed forward after every review. Increase in literacy rates to 72 per cent by 2007 and to 80 per cent by 2012, and universal access to primary education by 2007, have been set as goals in the approach paper to the Tenth Plan”. The commission suggested “it should also be laid down in Article 45 that the State shall make provision for education beyond the age of fourteen years within the limits of its economic capacity and stage of development.¹²”

The Sarva Siksha Abhiyan is a programme launched in 2001 for achieving universalisation of elementary education in a time bound manner. Its objectives include:

- (a) All children should attend school or an Alternative school such as an EGS centre or ‘Back-to-School’ camp, by 2003;
- (b) All children should complete five years of primary schooling by 2007;
- (c) All children should complete eight years of elementary schooling by 2010;
- (d) Focus on elementary education of satisfactory quality with emphasis on education for life;
- (e) Bridge all gender and social category gaps at primary stage by 2007 and at elementary education level by 2010;
- (f) Universal retention by 2010.

The progress made so far to realize the above objectives is a matter of common knowledge. The National Knowledge Commission in its response to the Right to Education Bill suggested central legislation at the national level to affirm the right to education and to require the states to enact Right to Education Bills within a specified time period and the primary financial responsibility for this resting with the central government. The commission further suggested that the state level legislation should specify the period within which universal education of reasonable quality is sought to be achieved, preferably, within three years, pointing out that the model bill does not provide any time frame for adoption and implementation of the provisions. The commission emphasized that school education must be provided to all including children of the disadvantaged, landless and minority

12. *Id.*, para 3.30.2 and 3.31.1.



communities who must be integrated along with children with disabilities or special needs and there should be no distinction made in the types of schooling provided within the government system for children from different social, economic and cultural backgrounds.

The framers of the Constitution realised the importance of education and directed the state to endeavour to provide, within a period of ten years, for free and compulsory education for all children until they complete the age of 14 years. The failure of successive governments to implement fully this directive so far is due to lack of commitment, bureaucratic inefficiency and widespread corruption in administration. Budget allocations rarely reach their destinations in full. Political interference at every level is not conducive to imparting value-based education. C.Rajagopalachari had the vision to anticipate the shape of things to come after Independence. In 1922, he wrote in his prison diary: "Elections and their corruption, injustice and the power and tyranny of wealth, and inefficiency of administration, will make a hell of life as soon as freedom is given to us. Men will look regretfully back to the old regime of comparative justice, and efficient, peaceful, more or less honest administration." He added: "Hope lies only in universal education by which right conduct, fear of God and love will be developed among the citizens from childhood."¹³ The University Education Commission (1948-49) which had S.Radhakrishnan as its chairperson recognized that "in a democratic society, the opportunity of learning must be open not only to an *elite* but to all those who have to carry the privilege and responsibility of citizenship. Education is a universal right, not a class privilege. The educational attainments of our people are far below what is necessary either for effective individual living or for the satisfactory maintenance of society. For the great majority of our boys and girls, the kind and amount of education they may hope to get depends not on their own abilities but on the economic status of their family or the accident of their birth." Noting that the backwardness of the backward communities is the result of a long period of unequal opportunity and it should be remedied as speedily as possible, the commission suggested providing them with additional assistance which will enable them to give their children equal educational opportunities with others in the nation.¹⁴ The Education Commission (1964-66) headed by D.S. Kothari underlined the need for social and national integration and suggested introducing a common school system of public education making social and national service an integral part of education at all stages and promoting national consciousness.¹⁵ The

13. Quoted by N.A. Palkhivala, *Selected Writings* (1999).

14. *Report of the University Education Commission* Ch. II paras 34 & 37 (1948-49).

15. *Report of the Education Commission* para 1.35 (1964-66).



commission noted:¹⁶

[I]nstead of promoting social and national integration and making an active effort to promote national consciousness, several features of the educational system promote divisive tendencies: caste loyalties are encouraged in a number of private educational institutions; the rich and the poor are segregated in schools, the former attending the better type of private schools which charge fees while the latter are forced, by circumstances, to attend free government or local authority schools of poor quality; and at a time when the need to cultivate a sense of moral and social responsibilities in the rising generation is paramount, education does not emphasize character-formation and makes little or no effort to cultivate moral and spiritual values, particularly the interests, attitudes and values needed for a democratic and socialistic society.

Without eradicating educational backwardness on a war footing, it is not possible to promote fraternity among all citizens assuring the dignity of the individual and the unity and integrity of the nation, which is an important constitutional goal. While the paramount need of the hour is to provide value based education to each and every child of the weakest members among the weaker sections of the people, the Union Government and Parliament appear to be keen on expanding reservations in admissions to professional colleges and in public employment for the benefit of educationally forward members among the scheduled castes, scheduled tribes and backward classes. The Constitution (Ninety-Third Amendment) Act, 2005 and the Central Educational Institutions (Reservation in Admission) Act, 2006 illustrate this attitude. Inversion of priorities continues. Till recently, successive constitution benches of the Supreme Court had accepted education up to secondary school leaving stage as the yardstick for measuring backwardness of a class. However, recently, in *Ashoka Kumar Thakur*, the Supreme Court upgraded the yardstick from school education to graduation. It takes just fifteen years of education to bring up members of backward classes to the level playing field of graduation so as to enable them to compete with members of non-backward classes on an equal footing, with dignity. Empowerment of citizens through universal education ought to receive priority in order to realize the constitutional aim of securing justice, social, economic and political. Is the state prepared to make the fundamental right to education a reality and banish educational backwardness altogether from the country within a decade or two?

16. *Id.*, para 1.18.