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LEGAL FRAMEWORK FOR FREE AND COMPULSORY EDUCATION IN INDIA: CONSTITUTIONAL PERSPECTIVE

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Introduction

There are certain necessities without which a man cannot live a life of his own. One of these is education. Education is the most powerful tool which can shape the destiny of an individual as well as the whole nation. The Greek philosopher Aristotle says that life is not merely living, but living well and living with dignity.³ Thus education is essential for every person, to live with basic human dignity. Education liberates man from ignorance, exploitation and oppression. It promotes freedom, progress and equal opportunities for all citizens.

The history of political thought points to persistent belief in man that States ought to guarantee to individuals the enjoyment of a certain basic human rights, which constitute essential conditions of “the good life.” Therefore, education has been looked upon as the most precious and meaningful investment for human development. The States are under the constitutional obligation to secure right to education to all citizens and for its equitable distribution in terms of opportunities.

Emile Durkheim defined education as, “the action exercised by the older generations upon those who are not ready for the social life. Its object is to awaken and develop in the child those physical, intellectual and moral states which are required of him / her both by his society as a whole and by the milieu for which he is specially destined.”⁴

International Perspective Relating to Right to Education

Article 26 of Universal Declaration of Human Rights also recognise right to education as basic human rights and states that:

“Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and

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³ Aristotle, *Nicomachean Ethics* (2004), ed. Hugh Treddenick. London: Penguin.

⁴ Emile Durkheim, *Education et. Sociologie* (1992) T.B. Bottomore, Society (1986) p. 262.

professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.”⁵

The right to education has also been recognized as a human right in a number of international conventions and documents, including the International Covenant on Economic, Social and Cultural Rights⁶ which recognises a 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. It is fundamental duty of every State to provide free and compulsory education to all especially children.

Constitutional Provisions Relating to Right to Education

Right to education is not new to Indian Constitution but has been provided even prior to 86th Amendment Act of 2002. Article 15(3),⁷ Article 24,⁸ Article 39 (f),⁹ Article 41¹⁰, Article 45¹¹ and Article 46¹² of Indian Constitution are important in this concern and further to promote the right to education Article 21A has been inserted to Indian Constitution by 86th Amendment Act, 2002. A corresponding duty was imposed upon parents/guardian under Article 51A (k). Article 29 and 30 further promotes educational rights of children of minorities.

Judicial Approach toward Right of Free and Compulsory Education

Supreme Court of India in number of judgment has recognised right to education as part of fundamental rights and basic human right for overall development of mankind. In case of *Mohini Jain vs. State of Karnataka*¹³ a resident of Uttar Pradesh state challenged a notification issued by the Karnataka government that permitted private medical colleges to charge higher fees to students who were not allocated 'government seats'. The Supreme Court of India held that the charging of

⁵ Dr. Sanjay Sindhu, “Fundamental Right to Education in India: An Overview”, Global Journal of Interdisciplinary Social Sciences, Vol. 3(5), September- October 2014, pp. 92-95, at p. 92.

⁶ Article 13 of International Covenant on Economic, Social and Cultural Rights

⁷ Article 15 (3) provides for power of State to make special provisions for women and children.

⁸ Article 24 prohibits employment of children below the age of 14 years in hazardous jobs

⁹ Article 39(f) recommends the protection of childhood against exploitation and moral and material abandonment. The founding fathers made these safeguards to protect interest of the weaker sections of the society.

¹⁰ The state shall, within the limits of its economic capacity and development, make effective provision for securing the right to education.

¹¹ State shall provide early childhood care and compulsory education for all children until they complete the age of six years.

¹² It requires the State to promote with special care the educational and economic interests of the weaker sections of the people, specially of the Scheduled Castes and Scheduled Tribes and to protect them from social injustice and all forms of exploitation.

¹³ (1992) 3 SCC 666

a 'capitation fee' by the private educational institutions violated the right to education, as implied from the right to life and human dignity, and the right to equal protection of the law. In the absence of an express constitutional right, the Court interpreted a right to education as a necessary condition for fulfilment of the right to life under Article 21 of the Indian Constitution. In addition, the Court held that private institutions, acting as agents of the State, have a duty to ensure equal access to, and non-discrimination the delivery of, higher education.

The right to education up to the age of fourteen years has been raised, by the decision of the Supreme Court, in *Unni Krishnan v. State of A.P.*¹⁴ to the level of fundamental right. And by this judgment, it became imperative for the Government to effect an amendment to the Constitution to provide for free and compulsory education to all those under the age of 14 as a clause within Article 21. The implication of the apex court's verdict in the Unni Krishnan case was that in the event of the state failing in its duty to provide the necessary infrastructure for primary education, there is ground for legal remedy. Such remedy can be sought under Article 32 or Article 226 (writ jurisdiction) by which the courts are vested with the power to direct the executive to do or to refrain from doing something. Such a remedy is not possible with the provisions of the Directive Principles.

The situation after *Unni Krishnan* led to the formation of an eleven-judge bench of the Supreme Court *TMA Pai Foundation v. State of Karnataka*¹⁵ to decide eleven questions which included (a) the validity of the scheme framed by *Unni Krishnan* and (b) the rights of non-minorities to establish and administer educational institutions under Articles 19(1) (g) and 21. The judgments of the Supreme Court since *TMA Pai Foundation* have protected the autonomy of private institutions in administration and in respect of fees, which has contributed to the increase in this number.

Prior to *TMA Pai* however, the Court's priority was to ensure that education was accessible to all. The autonomy of private institutions was a lesser concern and the Court even held that there was no fundamental right to set up educational institutions. In practice, this approach severely affected the growth of private institutions and also ran contrary to the policy of the government, which under Article 41 of the Constitution of India, has a duty, subject to economic capacity, to make effective provision for securing the right to education.

¹⁴ (1993) 1 SSC 645

¹⁵ (2002) 8 SCC 481

Although *TMA Pai* sought to put to rest all questions surrounding higher education and its regulation, there were still some ambiguities that arose from the judgment, especially in relation to the fixation of fees, the eligibility of institutions to fill all the seats according to their choice, and the admission procedure.

Five-judge bench in [*Islamic Academy v. State of Karnataka*](#),¹⁶ sought to iron out these creases. In answering these questions, the Court found that (a) fee structure can be fixed subject to the condition that there is no profiteering or capitation, (b) private institutions have full autonomy in administration so long as admissions are merit-based and merit can be satisfied through a common entrance test run by the state or by an association, and (c) the state can provide reservation in favour of financially or socially backward sections of society. In order to ensure transparency in admission and fee structure, the Court resorted to the setting up of two committees, one to give effect to the judgment in *TMA Pai* and to approve the fee structure and the other to oversee the tests conducted by associations of institutions.

The setting up of the committees in *Islamic Academy*, the extent of quotas and state reservation in private institutions, and the regulation of fees was once again challenged before the Supreme Court and a larger bench of seven judges was set up in [*PA Inamdar v. State of Maharashtra*](#),¹⁷ in order to clarify the ratio of the judgment in *TMA Pai*. Ten years after this judgment was delivered, one can conclusively state that this was the last in a long line of judgments that settled the questions surrounding private education and the rights of institutions.

Basic Features of the Right of Education Act (RTE), 2009

To give effect to this 86th Amendment Act to Constitution the Right of Children to Free and Compulsory Education Act (RTE) has been passed by Parliament in the year of 2009, which provides for free and compulsory education to children between 6 and 14 year of age. Basic features of the Act are:

- The RTE Act 2009 envisages quality and compulsory education to every child in the age group of 6-14 years in neighbourhood school till the completion of elementary education.
- No child is liable to pay any kind of fee or charges or expenses which may prevent the child from pursuing and completing elementary education.

¹⁶ (2003) 6 SCC 687

¹⁷ (2005) 6 SCC 537

- The Act also makes provisions for a non- admitted child to be admitted to an appropriate class.
- Action on the part of the government and local authority to establish a school within the limits of the neighbourhood, within a period of three years from the commencement of this Act: also to ensure and monitor admission, attendance and completion of elementary education by every child.
- With a view to prepare children above the age of three years for elementary education and to provide early childhood care and education for all children until they complete the age of six years, the appropriate government may make necessary arrangement for providing free pre- school education for such children.
- It stipulates that no school should refuse admission to any child on any grounds.
- Any school or person, while admitting a child shall not collect any capitation fee and subject either the child or his/her parents to any kind of screening procedure.
- The Act also provides for adequate number of qualified and trained teachers.
- All the schools to ensure proper infrastructure.
- Maintenance of teacher-student ratio as per prescribed norms, provision of necessary facilities in the schools, student friendly education etc.
- With an aim to promote inclusive growth, the Act also provides for 25% reservation for children belonging to marginalized sections of society.
- There are also provisions in the Act like prohibiting corporal punishment, detention and expulsion till the completion of elementary education.
- The Act provides for the development of curriculum in consonance with the values enshrined in the Constitution and for all round development of the child.
- The curriculum should provide for learning through exploration; building up child's knowledge, talent and potentialities; development of physical and mental abilities to the fullest extent; learning through activities, discovery and exploration in a child- friendly and child- centered manner; making the child free of trauma, fear and anxiety and helping the child to express views freely; comprehensive and continuous evaluation of child's understanding of knowledge.
- Making it a duty of parents/guardians to admit their child, in the neighbourhood school.

Implementation of Right to Education

After the enactment of RTE India now became one of 135 countries to make education as fundamental right. The government schools shall provide free education to all the children and the

schools will be managed by School Management Committees (SMC). Private schools shall admit at least 25% of the children in their schools without any fee. Billions were spent on education by centre and states on sharing basis since 2010 to fulfill the objectives of the Act. The ministry of Human Resources and Development set up a high level committee to look into the implementation of this Act.

The financial year 2015-16 saw a shocking cut in budgetary allocations for education, with a 29% cut in Sarva Shiksha Abhiyan (SSA) budget, reduced from 27,758 crores (2014-15) to 22,000 crores (2015-16). It is fact that in 2014 at least 3.77 crore children between the age of 6 to 14 years were not in schools.¹⁸

Issues with Implementation of Act

- Despite the enactment of the Right to Free and Compulsory Education Act, 2009 which guarantees free and compulsory education, several schools are charging capitation fees for education in pre-primary.
- The existing teacher's training and education programs are ill suited to meet the contemporary understanding of students' needs.¹⁹
- The no fail policy of the RTE Act, according to which no child from Class 1 to 8 will fail irrespective of how poorly he or she fares in exams - as under the Right To Education (RTE) Act it has become a mandatory to pass all students up to middle class.
- The present evaluation system in the higher education lays emphasis on the development of scholastic aspects at the cost of co-scholastic aspects. Unfortunately, the non-cognitive learning outcomes, which are equally important, are tested neither comprehensively nor continuously.
- Under the pressure to meet the national and international commitment, the progress towards universalisation of elementary education is being viewed unduly in terms of meeting quantitative targets.
- Reports of committee admit that millions of children remain out of school. The reason as to why the dropout rate has grown alarmingly after the implementation of the RTE Act and the dream associated with the ambitious RTE Act of bringing in the poor to share the common dream of quality education for children - two years after its implementation still

¹⁸ Anurag Bhaskar, "Status of Implementation of Right to Education Act, 2009: Reflections and Inferences from Uttar Pradesh" October 11, 2017, available at: www.livelaw.in

¹⁹ Mona Kaushal, Implementation of Right to Education in India: Issue and Concerns, Journal of Management and Public Policy, Vol. 4, No. 1, December 2012, pp. 42-48, p. 44.

remains elusive for the poor. Instead of imposing the vague concept of education on the children of the poor to show improve statistics, work should first be done to improve their living conditions, for children who lose the earning members of their family; concerns of survival precede the concerns of education.²⁰

- There are other shortcomings in schools and educational set up. Thus till date this Act fails to achieve its objectives and has not been implemented as it was expected.

Conclusion

In spite of the various steps by the government in India to promote right to education, right to free and compulsory education is still implemented in true sense. The governments have also consistently failed to provide adequate resources for the financing of the RTE. The public school system must step up and improve the quality of education it provides. Unless the RTE Act is not implemented in totality in letter and spirit, the “real education”, would not exist in practice. It is, therefore, important not just to count the existence of schools, but also to go into the running of schools, involving physical facilities as well as teacher participation. The poor implementation of the Act is only symbolic of lack of commitment on the part of our governments to make this world a better place for our children.

²⁰ “No Charity, Please! Education is a Social Commitment” *The Tribune* (2012).