

A Study of the Role of Persuasive Legal Instruments for Protection of Right to Education of Children in India

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Abstract

Education is one such element of life which is as much as important as food and shelter. It is one of the most vital ingredients for understanding life in general and to do away with all the evils of society. The betterment of the society depends on education as it helps to realise other rights. And when it is guaranteed and is made available as a basic right to an individual then only full realisation of it takes place. Education as a Fundamental Right under Part III of the Constitution of India was not there since its inception, it was provided under the Directive Principles of State Policy where it remained non-justiciable until the year 1992. There are various factors which has played important role in realising education as a fundamental right and making it universal in our country. Therefore, 1992 was the watershed year when right to education travelled from Directive Principle of State Policy to the realm of Fundamental Right. The present study examines the factors that persuaded the Supreme Court of India to dislodge right to education in DPSP and transplant it into Fundamental Right.

Keywords: *Right to Education, Constitution of India, Social Justice*

I. Introduction

Education has been considered central to human development and growth. It is also a pivotal factor to societal transformation. Yet this crucial factor of human civilisation has not been always available easily and freely. It is rightly said education begets knowledge and knowledge begets better human beings.

Post independence, “education” as a concept and right was relegated to the “Directive Principles of State Policy” which, though fundamental in governance, remained non-justiciable in any court and non accessible to many.

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II. Approach Towards Right to Education as a Fundamental Right

The right to education of children is paramount for their overall wellbeing and also it plays a key role in nation building. Children being future of a country it is the obligation of the nation to safeguard and protect their rights. Just as how important is food and shelter for the survival, education is equally important because it provides a means for the survival. Without education awareness regarding one's right, the ability to exercise it is not there. Having an education improves life of an individual, helps them tackle poverty, and helps people to access all of their other human rights. The education system in India as we find today is due to the changes that has been brought by the landmark judgment of *Unni Krishnan, J.P. v. State of A.P.*² wherein the court held that right to education is implicit in and flows from the right to life guaranteed by Article 21 of the Constitution of India although the insertion of Article 21A as a fundamental right took place in the year 2002. Hence, while making it universal and fundamental for all there are various factors that has played important role because education has its impact on social, cultural and economic wellbeing of a nation. And looking into the educational policy that stands today in our country, it would not have been possible without the dynamic role played by our Constitution through its judicial decision-making process by relying not only on binding authority but also due to use of non-binding national and foreign sources. The use of non-binding authority such as lower court judgments, obiter dicta, dissenting judgments, foreign judgments, international declaration, treaties, conventions, etc. has played vital role in bringing change in the status of education as a fundamental right. The realisation of relying on different sources for change in the society through our constitution was expressed by the former Prime Minister of India Jawaharlal Nehru on speaking of the Draft Constitution on 8 November 1948, in the following words:

“The Constitution is after all some kind of legal body given to the ways of Government and the life of the people. A Constitution if it is out of touch with the people's life, aims and aspirations, becomes rather empty: if it falls behind those aims, it drags the people down. It should be something ahead to keep people's eyes and minds made up to a certain high mark.... Remember this that while we want this Constitution to be as solid and as permanent a structure as

²AIR (1993) SC 2179-2254.

we can make it,... there should be a certain flexibility. If you make anything rigid and permanent, you stop a nation's growth, the growth of a living, vital, organic people."³ He further said that "A Constitution to be living must be growing; must be adaptable; must be flexible; must be changeable... Therefore, it is a desirable and a good thing for people to realize that this very fine Constitution that we have fashioned after years of labour, is good in so far as it goes, but as society changes as conditions change, we amend it in the proper way."

Also as rightly observed by Bhagwati, J, that the Supreme Court is the "ultimate interpreter" of the constitution. For instance, in *Pathumma v. State of Kerala*⁴ the court stated that Supreme Court while acting as a sentinel on the qui vive to protect fundamental rights guaranteed to the citizens of the country must try to strike a just balance between the fundamental rights and the larger and broader interests of society. The court added in *Pathumma* that in interpreting the Constitution, the judicial approach should be dynamic rather than static, pragmatic and not pedantic and elastic rather than rigid.

Thus, the justification for use of non-binding authority and foreign sources lies on the words of former PM Jawaharlal Nehru and of *Pathumma*'s case therefore it can be called persuasive instruments of law and it is justified term therein because it is vehemently instrumental in bringing social transformation in the society for which the roles it plays cannot be undermined. The reason for them being referred herein as persuasive legal instruments is because they are of great significance in the formulation of the guidelines although it has no binding effects. However, the impetus it provides in progress of transformation of law remains significant.

In Indian Constitution education of children was enshrined under Directive Principles of State Policy (DPSP). Though DPSP is fundamental to governance, it is not justiciable and hence it remains a persuasive policy statement till the state is able to implement it as a justiciable right. India recognised that education is a non-negotiable human right. Recognising this Supreme Court brought right to education within the purview of Article 21 as part of right to education

³<http://legallaffairs.gov.in/sites/default/files/chapter1.pdf> (Last visited Aug. 20, 2020, 1:23 PM).

⁴AIR (1978) SC 771-774

triggered by cases like Mohini Jain, Unni Krishnan etc. Both cases took cognizance of DPSP as persuasive legal instrument. The founding fathers of our Constitution provided education of children at different pedestal in the Part IV of the Constitution of India which provides that 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 want⁵, provides that the State shall endeavor 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 years⁶ and provides that 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 exploitation⁷ without realising how basic right it is and how it affects all other rights. The realisation of its importance in full manner took place only after the insertion of Article 21A by the 86th Amendment Act of the Constitution of India in the year 2002.

In *Unni Krishnan J.P. v State of Andhra Pradesh*,⁸ the Supreme Court held that the right to education flowed from Article 21 of the Constitution of India but the parameters of this right, which is not absolute, have to be determined in the light of directive principles contained in articles 45 and 41 of the Constitution. Furthermore, it held that the right to education till the age of 14 years is embraced within article 21 and thus it has been held to be a fundamental right. After that stage, the State's obligation to provide education is subject to its economic capacity and development.

In striking the balance between the Directive Principles of State Policy and the Fundamental Right the court in Unni Krishnan Case took cognizance of the decision of the U.S. Supreme Court in *Oliver Brown v. Board of Education of Topeka*⁹, wherein it was observed:

⁵INDIA CONST. art. 41.

⁶INDIA CONST. art. 45.

⁷INDIA CONST. art. 46.

⁸AIR (1993) SC 2179-2254.

⁹SCR(1953) 98 Law Ed 873 at pg 880(U.S.)

“Today education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”

The court also took cognizance of Universal Declaration of Human rights which has formally recognised education as a human right since its inception because education is essentially valuable tool for personal empowerment of humankind. Article 26 of the UDHR specifically focuses on three significant educational goals: (1) the full development of the human personality and the strengthening of respect for human rights and fundamental freedoms; (2) the promotion of understanding, tolerance and friendship among all nations, racial or religious groups; and, (3) the furthering of the activities of the United Nations for the maintenance of peace.

The right to education as a fundamental right in India is outcome of the roles played by various international and regional instruments and also India being signatory to these instruments and goals set up therein. The importance of education has been recorded in many international instruments. It has also been affirmed in numerous human rights treaties and recognised by governments as pivotal in the pursuit of development and social transformation.¹⁰ The goal of a human rights-based approach or human rights perspective to education is simple: to assure every child a quality education that respects and promotes her or his right to dignity and optimum development. Achieving this goal is, however, enormously more complex. The human right to education is a fundamental, but limited, right under international human rights law. The right to education is high on the agenda of the international community.

The right to education has been recognised in a number of international and regional legal instruments such as treaties, conventions, covenants, charters,

¹⁰ UNICEF, A Human Rights-Based Approach to Education for All (2007).

general comments, recommendations, declarations, and frameworks for action.¹¹ It is included in many documents and treaties including:

- The **Universal Declaration of Human Rights (UDHR)** is a milestone document in the history of human rights which was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A) as a common standard of achievements for all peoples and drafted by representatives with different legal and cultural backgrounds from all regions of the world for all nations. Since its inception it is one of the foremost declarations which gives volume to right to education as a basic human right for all by virtue of being a human.¹² It is the first global expression of universally protecting fundamental human rights. It sets out the right to education as a basic human right which is relative right to achieve other human rights.
- The **International Covenant on Economic, Social and Cultural Rights (1966)**, was adopted by the United Nations General Assembly resolution 2200A (XXI) of 16 December 1966 which came into force on 3rd January 1976 is a multilateral treaty. It was adopted considering the principles proclaimed in the Charter of the United Nations i.e., freedom, justice and peace in the world for the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family. Article 13 provides a comprehensive provision on right to education.
- **Convention on the Elimination of All Forms of Discrimination against Women (1979)**, adopted in 1979 by the UN General Assembly, is often described as an international bill of rights for women. It defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination.¹³ It requires States to eliminate discrimination against women by ensuring

¹¹<https://www.right-to-education.org/page/international-law>(Last visited Aug. 19, 2020,12:14 PM).

¹²<https://www.un.org/en/universal-declaration-human-rights/>(Last visited Aug. 19, 2020,12:14 PM).

¹³<https://www.un.org/womenwatch/daw/cedaw/>(Last visited Aug.19, 2020, 12:52 PM).

access to education to help to ensure the health and well-being of families, including information and advice on family planning among other things. The discrimination in education is a violation of rights enunciated in the declaration of UDHR.

- **UNESCO's Education for All (EFA) Declaration, 1990** considered education as a tool for development. EFA Declaration, 1990 sponsored by the UNESCO, UNDP UNFPA, UNICEF, the World Bank and NGOs at the World Conference on Education in Jomtien, Thailand aimed for global commitment to provide quality basic education for all children, youth and adults and pledged to reduce illiteracy by the end of the decade.¹⁴
- **Convention Against Discrimination in Education (1960)**, was adopted on the fourteenth December of 1960 at the general Conference of the United Nations Educational, Scientific and Cultural Organization taking into considerations concerning the different aspects of discrimination in education. This convention specifically provides that there should not be any kind of discrimination or distinction being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, or effect of nullifying or impairing equality of treatment in education. And of depriving any person or group of persons of access to education of any type or at any level; or of limiting any person or group of persons to education of an inferior standard; or of Subject to the provisions of Article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or of inflicting on any person or group of persons conditions which are incompatible with the dignity of man.
- The **United Nations Convention on Rights of Child**, or UNCRC, is the basis of all of Unicef's work. It is one of the most comprehensive convention on children's rights ever produced and is the most widely-ratified international human rights treaty in history. It has 54 articles that cover all aspects of a child's life and set out the civil, political, economic, social and cultural rights that all children everywhere are

¹⁴<http://lawcommissionofindia.nic.in/reports/Report259.pdf> Aug. 20, 2020, 9:41 PM.

entitled to. All the rights are linked and no right is more important than another. The right to relax and play (Article 31) and the right to freedom of expression (Article 13) have equal importance as the right to be safe from violence (Article 19) and the right to education (Article 28).¹⁵

- The **Dakar Framework for Action: Education for All (2000)**, a decade after the EFA Declaration 1990, the international community met again at the World Education Forum in Dakar, Senegal and agreed on the Dakar Framework for Action – Education for All: Meeting Our Collective Commitments (2000), which apart from reaffirming the commitment to achieve Education for All by the year 2015 identified six key measurable education goals to meet the learning needs of all children, youth and adults by 2015. It provides access to complete, free and compulsory primary education for all, improving all aspects of the quality of education and eliminating gender disparities in primary and secondary education and achieving gender equality in education.
- **Convention on the Rights of Persons with Disabilities (2006)**, UN General Assembly Resolution on the Right to Education in Emergency Situations (2010),¹⁶ etc has provisions for the right to education as a tool or basic necessity for achieving other rights. The realization of the right to education free from all such discrimination, equal access to education, free compulsory primary education, secondary and higher education, instruction in minority languages, discipline and corporal punishment, safe learning environment, rights of parents and legal guardians, health and education, and academic freedom are outcome of the aforementioned international legal instruments.¹⁷ Thus the above instruments have been persuasive in making education a fundamental right in India.

Therefore, under mounting pressure to consider right to education as fundamental right Justice M.N. Venkatachaliah Committee was set up. This

¹⁵<https://www.unicef.org/uk/what-we-do/un-convention-child-rights/>(Last visited Aug. 18, 2020, 8:52PM).

¹⁶ Id.

¹⁷<https://ijrcenter.org/thematic-research-guides/education/>(Last visited Aug. 16, 2020, 2:30 PM).

committee took up the matter of right to education as a fundamental right and therefore the 86th amendment to the Constitution of India in 2002, provided right to education as a fundamental right in Part III of the Constitution.

III. Conclusion

Education is an important tool which brings social transformation. The right to education in our country at present day is in full tune with the international instruments by virtue of the active role played by the judiciary. The whole right to education act which came into effect on 1st April 2010, incorporates and reflects the goals that has been set out in the constitutional mandate of many international instruments. The RTE act provides for right of the children to free and compulsory education till the completion of elementary education and obligation of the appropriate government to provide free elementary education and ensure compulsory admission, attendance and completion of elementary education to every child in the six to fourteen age groups. It provides for a non-admitted child to be admitted to an age appropriate class, specifies the duties and responsibilities of appropriate Governments, local authority and parents in providing free and compulsory education, and sharing of financial and other responsibilities between the Central and State Governments. It lays down the norms and standards relating inter alia to Pupil Teacher Ratios (PTRs), buildings and infrastructure, school-working days, teacher-working hours. It provides for rational deployment of teachers by ensuring that the specified pupil teacher ratio is maintained for each school, rather than just as an average for the State or District or Block, thus ensuring that there is no urban-rural imbalance in teacher postings. It also provides for prohibition of deployment of teachers for non-educational work, other than decennial census, elections to local authority, state legislatures and parliament, and disaster relief. It provides for appointment of appropriately trained teachers, i.e. teachers with the requisite entry and academic qualifications. It prohibits (a) physical punishment and mental harassment; (b) screening procedures for admission of children; (c) capitation fee; (d) private tuition by teachers and (e) running of schools without recognition. It provides for development of curriculum in consonance with the values enshrined in the 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.¹⁸Therefore, education is one such ingredient for human being which helps bring peace, eradicate poverty and agenda of the 21st century i.e., sustainable development all over the world. It is undeniably true that the right to education of the children and realisation of its importance as a fundamental right that we find today in India is the result of the influence of persuasive legal instruments. Therefore, it is international instruments and declarations which helps to mobilize the world communities in an effective and efficient ways to realise various social, economic, political, civil rights and human rights issues. Time and again the importance of persuasive legal instruments is reiterated in one way or the other. Furthermore, to meet the challenges of the everyday world the government has passed New Education Policy 2020. Recently the new education policy that has been passed by the Indian government is similar to the system prevailing in most of the educational institutes of USA.¹⁹ With the changing world, the change in the educational policy is the need of the hour in today's world. Taking into consideration of the persuasive legal instruments is prerequisite for global stance.

¹⁸<https://www.mhrd.gov.in/rte>, (Last visited Aug. 18, 2020, 7:03 PM).

¹⁹MS. SUJATHA RAMESH, DR. K. NATARAJAN, NEW EDUCATION POLICY OF INDIA: A COMPARATIVE STUDY WITH THE EDUCATION SYSTEM OF USA , INTERNATIONAL JOURNAL OF HUMANITIES AND SOCIAL SCIENCE INVENTION (IJHSSI),)||Volume 8 Issue 06 Ser. III || June 2019 || PP 01-09www.ijhssi.org (last visited Aug. 17, 2020, 3:28 PM).