

Right to Education: Indian and International Practices

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1. Introduction

The right to education is recognised, promoted and protected at all levels from national, regional to international. Education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth.¹ The right to education is a fundamental human right. It is also central to realising other human rights. Education is an extraordinary tool of empowerment. It is essential for the promotion and protection of all human rights. However, too often at both the national and international levels not enough is done to ensure the effective implementation of the right to education. Achieving the right to basic education, as a fundamental human right, is one of the biggest development challenges faced by the international community today. Millions of children, youth and adults remain deprived of basic education.

Several international conventions, numerous writings and reports by United Nations (UN) bodies stress the importance of the fundamental right to education.² The right to education is codified in the Universal Declaration of Human Rights (UDHR)³, International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Convention on the Rights of the Child (CRC). The international community reaffirmed the right to education at the World Education Forum in 2000.⁴ The United Nations Educational, Scientific and Cultural Organisation (UNESCO) has, therefore, placed the right to education at the forefront of its activities and the Education for All (EFA) is high on its agenda. The Dakar Forum agreed on six goals, which were considered to be essential, attainable and

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¹ General Comment No. 13 on the Right to Education (Art. 13 of the Covenant) adopted by the UN Committee on Economic, Social and Cultural Rights at its 21st session in 1999.

² Article 26 of the UDHR; Articles XII and XXXI of the American Declaration on Rights and Duties; Article 18(4) of the ICCPR; Article 12(4) of American Convention on Human Rights; and Article 17(1) of the African Charter on Human and Peoples' Rights.

³ The right to education is one of the fundamental rights proclaimed in the UDHR under Article 26. It is considered by the Declaration not only as a right in itself but also as a means of promoting peace and respect for human rights and fundamental freedoms generally.

⁴ The World Education Forum, which took place in Dakar, Senegal, in April 2000, was the first and most important event in education at the dawn of the new century. By adopting the Dakar Framework for Action, the 1,100 participants of the Forum reaffirmed their commitment to achieving Education for All by the year 2015 and entrusted UNESCO with the overall responsibility of coordinating all international players and sustaining the global momentum. Available at <www.unesco.org/education/efa/wef_2000/>, visited on 13 May 2008.

affordable, given strong international commitment and resolve.⁵ The right to education is an integral part of UNESCO's constitutional mandate. The constitution of UNESCO expresses the belief of its founders in "[f]ull and equal educational opportunities for all". The *Dakar Framework for Action* committed governments to strengthening national and regional mechanisms to ensure that EFA was on the agenda, *inter alia*, of *every national legislature*. It also emphasised that at the national level concrete measures are to be taken so that legal foundations of the right to education are strengthened in national systems. To make poverty history the international community realised that there is a need to provide financial support to develop poverty stricken states for complete removal of poverty. A target has been fixed to achieve this goal by the UN General Assembly and the UN Millennium Declaration was adopted in September 2000⁶ in which states agreed to endeavour their best to eradicate poverty, promote human dignity and equality and, thereby, achieve peace, democracy and environmental sustainability.⁷ In particular, the international community committed, in the Millennium Development Goals, to cut extreme poverty by half by 2015 and to banish extreme poverty by 2025.⁸ The international community has set a target that by 2015 children everywhere, both boys and girls, will be able to complete a full course of primary schooling.

2. The Right to Receive an Education

At international level the ICESCR devotes two articles to the right to education, namely, Articles 13 and 14. Article 13 contains the longest provision in the ICESCR, and is the most wide-ranging and comprehensive article on the right to education in international human rights law. According to Article 13(1) of the ICESCR, states parties agree that all education, whether public or private, formal or non-formal, shall be directed towards the aims and objectives identified in Article 13(1). The Committee on Economic, Social and Cultural Rights in its General Comment⁹ observed that states parties are required to ensure that education conforms to the aims and objectives identified in Article 13(1), as

⁵ The six goals are as follows: (1) expanding and improving comprehensive early childhood care and education, especially for the most vulnerable and disadvantaged children; (2) ensuring that by 2015 all children, particularly girls, children in difficult circumstances and those belonging to ethnic minorities, have access to and complete free and compulsory primary education of good quality; (3) ensuring that the learning needs of all young people and adults are met through equitable access to appropriate learning and life skills programmes; (4) achieving a 50 per cent improvement in levels of adult literacy by 2015, especially for women, and equitable access to basic and continuing education for all adults; (5) eliminating gender disparities in primary and secondary education by 2005, and achieving gender equality in education by 2015, with a focus on ensuring girls' full and equal access to and achievement in basic education of good quality; (6) improving all aspects of the quality of education and ensuring excellence of all so that recognised and measurable learning outcomes are achieved by all, especially in literacy, numeracy and essential life skills. *The Dakar Framework for Action, Education for All: Meeting our Collective Commitments*, adopted by the World Education Forum (Dakar, Senegal, 26–28 April 2000), Paris, UNESCO, 2000, para. 7, available at <www.unesco.org/education/efa/monitoring/monitoring_2002.shtml>, visited on 13 May 2008.

⁶ 189 States adopted the UN Millennium Declaration. The Report is available at <www.undp.org>, 26 April 2005. General Assembly Resolution, A/RES/55/2, 55th session, 18 September 2000.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ General Comment No. 13, *supra* note 1, para. 4.

interpreted in the light of the World Declaration on Education for All,¹⁰ the Convention on the Rights of the Child,¹¹ the Vienna Declaration and Programme of Action,¹² and the Plan of Action for the United Nations Decade for Human Rights Education.¹³ While all these texts closely correspond to Article 13(1) of the ICESCR, they also include elements, which are not expressly provided for in Article 13(1), such as specific references to gender equality and respect for the environment. These new elements are implicit in and reflect a contemporary interpretation of Article 13(1).¹⁴

According to Article 13(2) of the ICESCR, the full realisation of this right envisages compulsory and free primary education for all, accessibility to secondary general education, including technical and vocational secondary education and higher education with progressive introduction of free education and liberty for parents to choose schools for their children.¹⁵ However, the precise and appropriate application of the terms will depend upon the conditions prevailing in a particular state party. In her preliminary report to the Commission on Human Rights, the Special Rapporteur on the right to education sets out “four essential features that primary schools should exhibit, namely availability, accessibility, acceptability and adaptability”:¹⁶

(a) *Availability* – The availability of the educational institutions and programmes have to be in sufficient quantity within the jurisdiction of the state party. All institutions and programmes are likely to require buildings with adequate facilities of sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computers and information technology.¹⁷

(b) *Accessibility* – The educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the state party. Education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination. The educational institution has to be within safe physical reach, by attendance at some reasonably convenient geographic location. Education has to be affordable to all. This dimension of accessibility is subject to the differential wording of Article 13(2) in relation to primary, secondary and higher education:

¹⁰ In 1990, delegates from 155 countries, as well as representatives from some 150 organisations, agreed at the World Conference on Education for All in Jomtien, Thailand, which was held from 5–9 March 1990, to universalise primary education and massively reduce illiteracy before the end of the decade and this was finally reflected in Article 1 of World Declaration on Education. Available at <www.unesco.org/education/efa/ed_for_all/background/jomtien_declaration.shtml>, visited on 25 April 2008.

¹¹ Article 29(1) of the UN Convention on the Rights of the Child.

¹² Part I, para. 33 and Part II, para. 80.

¹³ Para. 2.

¹⁴ General Comment No.13, *supra* note 1, para. 4.

¹⁵ V. Kartashkin, ‘Economic, Social and Cultural Rights’, in K. Vasak (ed.), *The International Dimension of Human Rights* (UNESCO, Paris, 1982), vol. 1, pp. 111–133.

¹⁶ Progress report of the Special Rapporteur on the Right to Education, Katarina Tomasevski, submitted in accordance with Commission on Human Rights resolution 1999/25, E/CN.4/2000/6 of 1 February 2000.

¹⁷ General Comment No. 13, *supra* note 1, para. 6.

whereas primary education shall be available “free to all”. States parties are required to progressively introduce free secondary and higher education.¹⁸

(c) *Acceptability* – The form and substance of education, including curricula and teaching methods, have to be acceptable to students and, in appropriate cases, parents; this is subject to the educational objectives required by Article 13(1) and such minimum educational standards as may be approved by the state according to Articles 13(3) and (4).

(d) *Adaptability* – The education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.

It is important for the states parties, while considering the appropriate application of these “interrelated and essential features”, to have the best interests of the student as a primary consideration.

3. Principle of Non-Discrimination

The fundamental obligation in the ICESCR is for the states parties to “take steps” towards realising the rights enumerated in the ICESCR. This obligation allows a great deal of scope for states to determine the measures they adopt in order to implement the ICESCR. Article 2(2) places special importance on legislative measures, but it clearly also envisages other measures which might include judicial, administrative, financial, educational and social implementation. Consequently, a lack of legislative measures does not necessarily entail a failure to implement the obligations imposed by the ICESCR because alternative measures may suffice and, indeed, in some circumstances, may be more appropriate. Nevertheless, some legislative measures will usually be necessary. Furthermore, legislative means may be desirable because their public nature leaves them open to effective scrutiny.

Article 2(2) requires states to guarantee the non-discriminatory enjoyment of economic, social and cultural rights, which necessitates a range of measures, but, in the wordings of the ICESCR, “the provision of some form of judicial remedy would seem indispensable”.¹⁹ The article proscribes discrimination “of any kind” and lists, non-exhaustively, various grounds of discrimination.²⁰ Therefore, discrimination on a ground not specifically mentioned, for example sexual orientation, old age or disability, must also be prevented. The government is required to refrain from exercising its powers in a discriminatory manner and to alter any discriminatory laws and practices. It is also required to take positive measures to prohibit discrimination by private persons and organisations in any field of public life. The ICESCR does allow for affirmative measures

¹⁸ *Ibid.*, para. 6.

¹⁹ *The domestic application of the Covenant: 3 December 1998*, General Comment No. 9, E/C.12/1998/24, 3 December 1998, para.9.

²⁰ Article 2(2) of the Covenant states that “the States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

to be taken to ensure the equal enjoyment of rights by particular groups or individuals who need special assistance to overcome structural disadvantages in order to enjoy equality. The ICESCR itself recognises that special measures are required to protect the rights of children and young people, and mothers for a reasonable period before and after childbirth.²¹ Such special measures are to be withdrawn once their objectives are achieved, but they provide an indispensable mechanism for addressing deeply embedded structural inequalities. Therefore, it is most unlikely that Article 2(2) has been fully implemented, despite its recognition as an immediately realisable obligation requiring judicial remedies.

The prohibition against discrimination enshrined in Article 2(2) ICESCR applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination.²² The principle of non-discrimination extends to all persons of school age residing in the territory of a state party, including non-nationals, and irrespective of their legal status. In some circumstances, separate educational systems or institutions for groups defined by the categories in Article 2(2) shall be deemed not to constitute a breach of the Covenant. In this regard, the Committee affirms Article 2 of the UNESCO Convention against Discrimination in Education (1960).²³ A similar provision is available under the Preamble and various articles of the Indian Constitution. Article 14 guarantees equality before the law in addition to equal protection of law.²⁴ Article 15(1) of the Constitution stipulates that there shall not be any discrimination against any citizen on the grounds of religion, caste, sex, race, or place of birth. Article 16(1) and (2) of the Indian Constitution affirms an equal opportunity for all citizens in matters relating to employment or appointment of any office under the state. Article 16(2) significantly speaks of government employment by providing that no citizen shall be ineligible only on the grounds of religion, race, caste, sex, descent, place of birth or any of them or discriminated against in respect of any employment or office under the state. Article 16(4) is an important provision which empowers the state to make reservations in appointments and posts in favour of any backward class of citizens which in the opinion of the state is not adequately represented in the services of the state. The stress is on backwardness of the citizens and inadequate representation in the services under the state.

²¹ Article 10(1) of the ICESCR.

²² The Committee interprets Articles 2(2) and 3 in the light of the UNESCO Convention against Discrimination in Education, the relevant provisions of the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child and the ILO Indigenous and Tribal Peoples Convention, 1989 (Convention No. 169).

²³ This Convention was adopted on 14 December 1960 and entered in force on 22 May 1962, in accordance with Article 14 of the Convention. The government of India is not party to the Convention.

²⁴ G. Austin, *The Indian Constitution: Cornerstone of a Nation* (Clarendon Press, Oxford 1969); P. M. Bakshi, *The Constitution of India: With Selective Comments* (Universal Law Publishing, Delhi, 2000); D. Basu, *Human Rights in Constitutional Law* (Prentice Hall, New Delhi, 1994).

4. The Right to Primary Education

According to Article 13(2)(a) of the ICESCR, primary education shall be compulsory and free to all. Primary education includes the elements of availability, accessibility, acceptability and adaptability, which are common to education in all its forms and at all levels. The Committee took guidance on the proper interpretation of the term “primary education” from the World Declaration on Education for All which states: “[T]he main delivery system for the basic education of children outside the family is primary schooling.”²⁵ Primary education must be universal, ensure that the basic learning needs of all children are satisfied, and take into account the culture, needs and opportunities of the community.²⁶ The Declaration further defines “basic learning needs” as “essential learning tools, such as literacy, oral expression, numeracy, and problem solving and the basic learning content such as knowledge, skills, values, and attitudes required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning”.²⁷

While primary education is not synonymous with basic education, there is a close correspondence between the two. As formulated in Article 13(2)(a), primary education has two distinctive features: it is “compulsory” and “available free to all”. The element of compulsion serves to highlight the fact that neither parents, nor guardians, nor the state are entitled to treat as optional the decision as to whether the child should have access to primary education.²⁸ The nature of this requirement is unequivocal. The right is expressly formulated so as to ensure the availability of primary education without charge to the child, parents or guardians. Fees imposed by the government, the local authorities or the school, and other direct costs, constitute disincentives to the enjoyment of the right and may jeopardise its realisation.²⁹

5. The Right to Secondary Education

Article 13(2)(b) applies to secondary education “in its different forms”, thereby recognising that secondary education demands flexible curricula and varied delivery systems to respond to the needs of students in different social and cultural settings. According to Article 13(2)(b), secondary education “shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education”. The phrase “generally available” signifies, firstly, that secondary education is not dependent on a student’s apparent capacity or ability and, secondly, that secondary education will be transmitted throughout the state in such a way that it is available on the same basis to all.³⁰ Progressive introduction of free education means that while states must prioritise the provision of free primary education, they also

²⁵ *Ibid.*, para.9.

²⁶ Article 5 of the World Declaration on Education for All, 1990.

²⁷ Article 1 of the World Declaration on Education for All, 1990.

²⁸ General Comment No. 11, Plans of action for Primary Education (art.14), E/C.12/1999/4, 10 May 1999, para. 6.

²⁹ *Ibid.*, para. 7.

³⁰ General Comment No. 13, *supra* note 1, para. 13

have an obligation to take concrete steps towards achieving free secondary and higher education.³¹

5.1. Technical and Vocational Education

Technical and vocational education (TVE) forms part of both the right to education and the right to work under Article 6(2) of the ICESCR. Article 13(2)(b) presents TVE as part of secondary education, reflecting the particular importance of TVE at this level of education. However, Article 6(2) does not refer to TVE in relation to a specific level of education; it comprehends that TVE has a wider role, helping “to achieve steady economic, social and cultural development and full and productive employment”. Also, according to Article 26(1) of the UDHR “technical and professional education shall be made generally available”. Accordingly, the Committee takes the view that TVE forms an integral element of all levels of education.³²

According to Article 1(a) of the UNESCO Convention on Technical and Vocational Education (1989),³³ TVE consists of “all forms and levels of the educational process involving, in addition to general knowledge, the study of technologies and related sciences and the acquisition of practical skills, know-how, attitudes and understanding relating to occupations in the various sectors of economic and social life”.³⁴ This view is also reflected in certain International Labour Organization (ILO) conventions.³⁵

The right to TVE includes the following aspects:

- (a) it enables students to acquire knowledge and skills which contribute to their personal development, self-reliance and employability and enhances the productivity of their families and communities, including the state party’s economic and social development;
- (b) it takes account of the educational, cultural and social background of the population concerned; the skills, knowledge and levels of qualification needed in the various sectors of the economy; and occupational health, safety and welfare;
- (c) provides retraining for adults whose current knowledge and skills have become obsolete owing to technological, economic, employment, social or other changes;
- (d) it consists of programmes, which give students, especially those from developing countries, the opportunity to receive TVE in other states, with a view to the appropriate transfer and adaptation of technology;
- (e) it consists, in the context of the Covenant’s non-discrimination and equality provisions, of programmes which promote the TVE of women, girls, out-of-school

³¹ *Ibid.*, para. 14.

³² *Ibid.*, para. 15.

³³ This Convention was signed on 10 November 1989 and entered into force on 29 August 1991, in accordance with Article 10. The government of India is not party to this Convention.

³⁴ General Comment No. 13, *supra* note 1, para. 15; K. Singh, ‘Right to Education and International Law: UNESCO’s Normative Action’, 44 *Indian Journal of International Law* (2004) pp. 488–520.

³⁵ A view also reflected in the Human Resources Development Convention 1975 (Convention No. 142) and the Social Policy (Basic Aims and Standards) Convention 1962 (Convention No. 117) of the International Labour Organization.

youth, unemployed youth, the children of migrant workers, refugees, persons with disabilities and other disadvantaged groups.³⁶

6. The Right to Higher Education

Article 13(2)(c) is formulated on the same lines as Article 13(2)(b). There are three differences between the two provisions. Article 13(2)(c) does not include a reference to either education “in its different forms” or specifically to TVE.³⁷ These two omissions reflect only a difference of emphasis between Article 13(2)(b) and (c). If higher education is to respond to the needs of students in different social and cultural settings, it must have flexible curricula and varied delivery systems, such as distance learning; in practice, therefore, both secondary and higher education have to be available “in different forms”.

The third and most significant difference between Article 13(2)(b) and (c) is that while secondary education “shall be made generally available and accessible to all”, higher education “shall be made equally accessible to all, *on the basis of capacity*”.

7. The Right to Fundamental Education

By virtue of Article 13(2)(d), individuals “who have not received or completed the whole period of their primary education” have a right to fundamental education, or basic education as defined in the World Declaration on Education For All.³⁸ Since everyone has the right to the satisfaction of their “basic learning needs” as understood by the World Declaration, the right to fundamental education is not confined to those “who have not received or completed the whole period of their primary education”.³⁹ The right to fundamental education extends to all those who have not yet satisfied their “basic learning needs”.⁴⁰ Fundamental education, therefore, is an integral component of adult education and life-long learning. Because fundamental education is a right of all age groups, curricula and delivery systems must be devised which are suitable for students of all ages.

7.1. A School System: Adequate Fellowship System shall be Established

The requirement that the “development of a system of schools at all levels shall be actively pursued” means that a state party is obliged to have an overall developmental strategy for its school system. The strategy must encompass schooling at all levels, but the ICESCR requires states parties to prioritise primary education. “Actively pursued” suggests that the overall strategy should attract a degree of governmental priority and, in any event, must be implemented with vigour. According to Article 13(2)(e) of the ICESCR the material conditions of teaching staff shall be continuously improved; unfortunately, in practice the general working conditions of teachers have deteriorated, and reached unacceptably low levels, in many states parties in recent years. Not only is

³⁶ General Comment No. 13, *supra* note 1, para. 16.

³⁷ *Ibid.*, para. 18.

³⁸ *Ibid.*, para. 22.

³⁹ *Ibid.*, para. 23.

⁴⁰ *Ibid.*, para. 23.

this inconsistent with Article 13(2)(e), but it is also a major obstacle to the full realisation of students' right to education. The relationship between Articles 13(2)(e), 2(2), 3 and 6 to 8 of the ICESCR, including the right of teachers to organise and bargain collectively, draws the attention of states parties to the joint UNESCO-ILO Recommendation Concerning the Status of Teachers (1966) and the UNESCO Recommendation Concerning the Status of Higher-Education Teaching Personnel (1997), and urges states parties to report on measures they are taking to ensure that all teaching staff enjoy the conditions and status commensurate with their role.

7.2. *The Right to Educational Freedom*

Article 13(3) has two elements, one of which is that states parties undertake to respect the liberty of parents and guardians to ensure the religious and moral education of their children in conformity with their own convictions. Article 13(3) permits public school instruction in subjects such as the general history of religions and ethics if it is given in an unbiased and objective way, respectful of the freedoms of opinion, conscience and expression. The second element of Article 13(3) is the liberty of parents and guardians to choose schooling other than public schools for their children, provided the schools conform to “such minimum educational standards as may be laid down or approved by the State”.⁴¹ This has to be read with the complementary provision, Article 13(4), which affirms “the liberty of individuals and bodies to establish and direct educational institutions”, provided the institutions conform to the educational objectives set out in Article 13(1) and certain minimum standards. These minimum standards may relate to issues such as admission, curricula and the recognition of certificates. In their turn, these standards must be consistent with the educational objectives set out in Article 13(1).

Under Article 13(4), everyone, including non-nationals, has the liberty to establish and operate direct educational institutions. The liberty also extends to “bodies”, *i.e.* legal persons or entities. It includes the right to establish and direct all types of educational institutions, including nurseries, universities and institutions for adult education. Given the principles of non-discrimination, equal opportunity and effective participation in society for all, the state has an obligation to ensure that the liberty set out in Article 13(4) does not lead to extreme disparities of educational opportunity for some groups in society.⁴²

8. Principle of Compulsory Education Free of Charge for All

Article 14 of the ICESCR requires that each state party which has not been able to secure compulsory primary education free of charge should adopt within two years a detailed plan of action for the progressive implementation of such. In spite of this obligation a number of states parties have neither drafted nor implemented a plan of action for free and compulsory primary education.⁴³ This obligation is a continuing one and states parties to which the provision is relevant by virtue of the prevailing situation are not absolved from the obligation as a result of their past failure to act within the two-year

⁴¹ *Ibid.*, para. 29.

⁴² *Ibid.*

⁴³ General Comment No. 11, *supra* note 28, para. 1.

limit. The plan must cover all of the actions which are necessary in order to secure each of the requisite component parts of the right, and must be sufficiently detailed so as to ensure the comprehensive realisation of the right. The right to education, recognised in Articles 13 and 14 of the ICESCR, as well as in a variety of other international treaties, such as the Convention on the Rights of the Child⁴⁴ and the Convention on the Elimination of All Forms of Discrimination against Women,⁴⁵ is of vital importance.

Plans of action prepared by states parties to the ICESCR in accordance with Article 14 are especially important as the work of the Committee has shown that the lack of educational opportunities for children often reinforces their subjection to various other human rights violations. For instance, these children, who may live in abject poverty and not lead healthy lives, are particularly vulnerable to forced labour and other forms of exploitation.

Article 14 contains a number of elements, which warrant some elaboration in the light of the Committee's extensive experience in examining state party reports. The element of compulsion serves to highlight the fact that neither parents, nor guardians, nor the state are entitled to treat as optional the decision as to whether the child should have access to primary education. Similarly, the prohibition of gender discrimination in access to education, required also by Articles 2 and 3 of the ICESCR, is further underlined by this requirement. It should be emphasised, however, that the education offered must be adequate in quality, relevant to the child and must promote the realisation of the child's other rights. The nature of this requirement is unequivocal. The right is expressly formulated so as to ensure the availability of primary education without charge to the child, parents or guardians. Fees imposed by the government, the local authorities or the school, and other direct costs, constitute disincentives to the enjoyment of the right and may jeopardise its realisation.⁴⁶

9. Indian Position

The importance of education was emphasised in the "*Neethishatakam*" by Bhartruhari (1st Century B.C.) as follow:

Education is the special manifestation of man;
 Education is the treasure which can be preserved without the fear of loss;
 Education secures material pleasure, happiness and fame;
 Education is the teacher of the teacher;
 Education is God incarnate;
 Education secures honour at the hands of the State, not money.
 A man without education is equal to animal.⁴⁷

Post-independent India inherited a system of education which was characterised by large scale inter- and intra-regional imbalances. The system educated a select few, leaving a wide gap between the educated and the illiterate. Educational inequality was aggravated

⁴⁴ Articles 28 and 29 of the CRC.

⁴⁵ Article 10 of CEDAW.

⁴⁶ General Comment No. 11, *supra* note 28, para. 7.

⁴⁷ *Ashoka Kumar Thakur v. Union of India and Ors*, Decision of 10 April 2008, para. 50, available at <www.judis.nic.in/>, visited on 23 April 2008.

by economic inequality, gender disparity and rigid social stratifications. Since independence, there has been a growing realisation that development would never become self sustaining unless it is accompanied by corresponding changes in the attitudes, values, knowledge and skills of the people as a whole and that the only way this change can be accomplished is through education.

The leaders of India's freedom struggle fully realised that in the new dispensation following political freedom, the people should have the fullest opportunities for advancement in the social and economic spheres and that the state should make suitable provision for ensuring such progress. The framers of the Indian Constitution borrowed the idea of enacting the Directive Principles of State Policy (DPSP) from the Irish Constitution. The Indian Constitution was adopted on 26 November 1949 by the Constituent Assembly and brought into force on 26 January 1950. The Preamble of the Indian Constitution⁴⁸ declares India a Sovereign, Socialist, Secular Democratic Republic⁴⁹ and sets out the main objectives of the Constitution to secure justice for all citizens, social, economic and political.⁵⁰ The Indian Constitution envisages a democracy, which ensures freedom under the law and the dignity of the individual. Part III of the Indian Constitution enumerates the fundamental rights, and Part IV sets out the Directive Principles of State Policy. While the former guarantees fundamental rights⁵¹ to the individual, the latter gives direction to the state to provide economic and social rights to its people in specified matters;⁵² together, they constitute the conscience of the Constitution. The justiciability of fundamental rights is itself guaranteed under the Indian Constitution.⁵³ In particular, by virtue of Articles 32 and 226 of the Constitution the responsibility for the enforcement of the fundamental rights lies with the Supreme Court

⁴⁸ P. M. Bakshi, *The Constitution of India: With Selective Comments* (Universal Law Publishing, Delhi, 2000) p. 1.

⁴⁹ Subs. by the Constitution (Forty-Second Amendment) Act, 1976, sec. 2, for "Sovereign Democratic Republic" (w.e.f. 3 January 1977).

⁵⁰ *Ibid.*

⁵¹ Articles 12 to 35 of the Indian Constitution deal with Fundamental Rights. The Indian Constitution groups the Fundamental Rights under several sub-heads: (a) Right to Equality (Articles 14 to 18); (b) Right to Freedom (Articles 19 to 22); (c) Right Against Exploitation (Articles 23 to 24); (d) Right to Freedom of Religion (Articles 25 to 26); (e) Cultural and Educational Rights (Articles 29 to 30); (f) Right to Constitutional Remedies (Article 32).

⁵² Articles 36 to 51 contain the Directive Principles of State Policy. Part IV of the Constitution covers the following rights: (a) State to secure a social order for the promotion of the welfare of the people (Article 38); (b) certain principles to be followed by the State, namely, equality of men and women, right to an adequate means of livelihood; and equal pay for equal work for both men and women (Article 39); (c) right to free legal aid (Article 39 A); (d) organisation of village panchayats (Article 40); (e) right to work, to education and to public assistance in certain cases (Article 41); (f) provisions for just and humane conditions of work and maternity relief (Article 42); (g) living wage (Article 43); (h) participation of workers in management of industries (Article 43 A); (i) uniform civil code for the citizens (Article 44); (j) provision for free and compulsory education for children (Article 45); (k) promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections (Article 46); (l) duty of the state to raise the level of nutrition and the standard of living and to improve public health (Article 47); (m) organisation of agriculture and animal husbandry (Article 48); (n) protection and improvement of environment and safeguarding of forests and wildlife (Article 48 A); (o) protection of monuments and places and objects of national importance (Article 49); (p) separation of judiciary from executive (Article 50); and (q) promotion of international peace and security (Article 51).

⁵³ D. D. Basu, *Human Rights in Constitutional Law* (Prentice Hall, New Delhi, 1994).

and the High Courts.⁵⁴ The 42nd Amendment of the Indian Constitution has added Part IV A, which deals with the fundamental duties of the citizen.⁵⁵ This separation of fundamental rights and the Directive Principles of State Policy emphasises the fact that they are in their nature and effect essentially different. The Directive Principles of State Policy enunciated in Part IV of the Indian Constitution are nothing but principles of *Raj Dharma* (duty of the state).⁵⁶ Article 37 of the Indian Constitution specifically echoes this when stating that the principles laid down are fundamental in the governance of the country; while in the same breathe stating that the provisions contained in this Part IV shall not be enforced by any court. Hence, while word “fundamental” in Part III of the Indian Constitution suggests that the “rights” are legally enforceable, the word fundamental in the governance of the country in Part IV of the Constitution has no such effect, and the Directive Principles of State Policy are left to the sense of the duty to those charged with the governance of the country.

Soon after the commencement of the Indian Constitution the question was raised regarding the Directive Principles of State Policy before the Court in *State of Madras v. Champakam Dorairajan*.⁵⁷ Das had expressed the view that the Directive Principles of State Policy have to conform and run subsidiary to the Part on fundamental rights. By this decision the implementation of economic, social and cultural rights received a setback. However, the Supreme Court in *M.H. Qureshi v. State of Bihar*⁵⁸ propounded the doctrine of harmonious construction, and the doctrine of integrated scheme in *I.C. Golak Nath v. State of Punjab*.⁵⁹ The Indian judiciary accepted the primacy of DPSP through the 25th Amendment of the Indian Constitution. Other agencies of the government, legislature and the executive rarely advocated the subordination of the DPSP to fundamental rights. It is now well known that Article 21 has both a negative and affirmative dimension. It is also well established now that the provisions of Parts III and IV are supplementary and complementary to each other.⁶⁰ Thus, the view that the DPSP are inferior to fundamental rights, relying on the views of the Constitution makers and Courts, is not correct. The Directive Principles of State Policy are now no way subordinate to the fundamental rights, which is firmly endorsed by the Indian judiciary subsequently and also equally recognised by the government.

Under the Indian Constitution, education is subject to concurrent jurisdiction, with responsibility shared between the central and state governments. The broad policies and guidelines for curricula and management practices are laid down by the central government developed through consultation with India’s 28 states and 7 union territories. States are free to frame their own educational policies within the broad national framework.

⁵⁴ The Supreme Court of India is the highest court in India and its subordinates are the High Courts in each state or group of states.

⁵⁵ Inserted by the Constitution (Forty-second Amendment) Act, 1976, sec. 11 (w.e.f. 3 January 1977).

⁵⁶ *Raj Dharma* includes varieties of activities of kings in Ancient India, including personal, character and his public relations.

⁵⁷ *State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226.

⁵⁸ *M.H. Qureshi v. State of Bihar*, AIR 1958 SC 731.

⁵⁹ *I.C. Golak Nath v. State of Punjab*, AIR 1967 SC 1943.

⁶⁰ *Unni Krishnan, J.P. and Ors. etc. v. State of Andhra Pradesh and Ors.*, 1993 AIR 2178.

10. Right to Education Jurisprudence in India

In India the judiciary has shown its deep concern for providing free and compulsory education to all children below the age of 14 years. The right to free primary education has now been declared as a fundamental right by the Indian Supreme Court. The theory of the complementary nature of rights declared in Part III and Part IV and the harmonious interpretation of these rights has been the foundation for the realisation of primary education being declared a fundamental right today in India. The Supreme Court of India in the *Bandhua Mukti Morcha*⁶¹ case held that the right to education is implicit in and flows from the right to life guaranteed by Article 21. That the right to education has been treated as one of transcendental importance in the life of an individual has been recognised not only in this country since thousands of years, but all over the world.

The issue of the scope and extent of right to education came up before the Supreme Court in *Mohini Jain*⁶² case. This case addressed the charging of capitation fees by professional colleges. The Court held that the charging of capitation fees was illegal and held that the right to education flows directly from the right to life. The right to life and the dignity of an individual cannot be assured unless it is accompanied by the right to education, and the fundamental rights guaranteed under Part III of the Constitution of India, including the right to freedom of speech and expression and other rights under Article 19, cannot be appreciated and fully enjoyed unless a citizen is educated and is conscious of his individual dignity.⁶³ Looking at the interdependence of the rights guaranteed in Part III and Part IV, the Court held that the Directive Principles, which are fundamental in the governance of the country, cannot be isolated from the fundamental rights guaranteed under Part III. These principles have to be read into the fundamental rights. Both are supplementary to each other. The state is under a constitutional mandate to create conditions in which all individuals can enjoy the fundamental rights guaranteed under Part III. Without making the right to education under Article 41 of the Constitution a reality, the fundamental rights under Part III shall remain beyond reach of a large majority which is illiterate.⁶⁴

The fundamental rights including the right to freedom of speech and expression and other rights under Article 19 cannot be appreciated and fully enjoyed unless the citizen is educated and is conscious of his individual dignity. Therefore, the right to education is concomitant to the fundamental rights enshrined under Part III of the Indian Constitution. Thus, the Supreme Court by its decision has elevated the right to education as part of fundamental rights and thus enforceable.

The enthusiasm demonstrated in the *Mohini Jain* case by the Court was clearly reflected further in the *Unni Krishnan*⁶⁵ case. In this case the Court held that the fundamental right to education flows from Article 21. The right to education which is implicit in the right to life and personal liberty guaranteed by Article 21 must be construed in the light of the Directive Principles in Part IV of the Constitution. While declaring the right to education as a fundamental right, it was held that it was not to be

⁶¹ *Bandhua Mukti Morcha, Union of India and Others*, 3 SCC 1984.

⁶² *Mohini Jain v. State of Karnataka*, AIR 1982 SC 1858.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Unni Krishnan v. State of AP and Ors.*, AIR 1993 SC 2178.

construed as an absolute right, and its content was defined by the parameters of Articles 41, 45 and 46 of the Directive Principles. It is in the light of these Articles that the content and parameter of the right to education have to be determined. The Court further held that the right to education, understood in the context of Articles 45 and 41 means, in other words, that every child/citizen has a right to free education up to the age of 14 years and thereafter the right would be subject to the limits of the economic capacity of the state. It was ruled that since more than four decades have elapsed, it was high time that the state must implement the Directive in Article 45. This was in the nature of waking up the state from hibernation so that it may be fully alive to its obligations under the Directive and provide an expansion of 'life' or 'liberty' in Article 21. In this case, interestingly the Court took the support of the right to education as laid down in the UDHR and Article 13 of the ICESCR and for the first time articulated it as a 'social' right. By holding the right to free primary education up to the age of 14 years, the Court was thus reminding the state to endeavour to fulfil the obligation under Article 45 within a prescribed time limit, which had expired long ago. This has been one of the first judgments where the Court has employed ICESCR language for progressive realisation of the right to higher education while declaring the fundamental right to free primary education. Following the judgments of the Supreme Court, a new Article 21-A has been inserted by the 86th Amendment to the Constitution and made primary education free for all children in the age group of 6 to 14 years. More specifically, Article 21-A states that "the State shall provide free and compulsory education to all children of the age of six to fourteen years in such a manner as the State may, by law, determine".⁶⁶ Further, this Amendment has inserted new clauses in Articles 45⁶⁷ and 51-A⁶⁸ of the Indian Constitution. Pursuant to the above, a Draft Bill on the Right to Education is approved by the Ministry of Human Resource Development and sent to the state governments for their comments.⁶⁹ States have demanded that additional expenses that would accrue in giving compulsory education to children of the 6–14 age group be borne by the Centre.⁷⁰ The Draft Bill on the Right to Education stipulates that free education be provided to at least 25 per cent of children of weaker sections by partially aided and unaided schools.⁷¹ The Draft Bill provides for establishment of a National Commission for Elementary Education (NCEE).⁷² Although, the Draft Bill has not been placed before the Parliament, the Bill is already facing the ire of a cross-section of the people especially from public

⁶⁶ Annual Report 2004–05, 'Overview', available at <www.education.nic.in/>, visited on 20 December 2005.

⁶⁷ According to the 86th Amendment, Article 45 of the Constitution, the following Article shall be substituted, namely: 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."

⁶⁸ Part IV A of the Constitution talks about the Fundamental Duties from Article 51 A (a) to (j). This Part has been added to the Indian Constitution by the 42nd Amendment of the Constitution. By the 86th Amendment a new clause has been added in Article 51 A of the Constitution, after clause (j), the following clause shall be added, namely: "(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."

⁶⁹ A Draft Bill on the Right to Education 2005, available at <www.education.nic.in/>, visited on 20 December 2005.

⁷⁰ A. Mukul, 'Arjun Approves Education Bill with No Change', *Times of India*, 11 November 2005.

⁷¹ *Ibid.*

⁷² *Ibid.*

schools. A PIL has been filed before the Supreme Court of India alleging that the Draft Bill does not have provisions to bring child labourers back to school.⁷³

Although the judiciary has made right to education a fundamental right, it is for the state to secure it to all the people. Therefore, the question of enforcement of this right is a significant part of the entire campaign to declare it as a fundamental right. With the Supreme Court declarations, and the recent constitutional amendment, the challenge on the ground level that remains to be seen is whether the state machinery is put to work to enforce the right, and also to implement the state level legislations which seek to provide free and compulsory primary education. Therefore, the issue would be one of enforceability and not one of justiciability. Without education, human rights cannot be secured to people and the basic objective set forth in the Preamble to the Constitution would fail.

11. Education Policy in India

With a view to realising the constitutional goals set for education, the government of India in 1964 appointed the Education Commission (1964–1966). The Commission was entrusted with the task of evolving a national system of education. It recommended a radical transformation in the prevailing education system and highlighted the need for the “common school approach” to promote equity and social justice. The first National Policy on Education (NPE), 1968 recommended free and compulsory elementary education and equalisation of educational opportunities especially for girls and children belonging to SCs and STs.⁷⁴ Another National Policy on Education (NPE–1986) was adopted and further updated in 1992. The NPE 1986 provides for a comprehensive policy framework for the development of education up to the end of the century and a Plan of Action (POA) 1992, assigning specific responsibilities for organising, implementing and financing its proposals.⁷⁵

11.1. Right to Education at Primary Level in India

For the first time in the history of education in India a Department for Primary Education has been opened in the Ministry of Human Resource Development at New Delhi. A new primary education policy has been launched under the scheme of Sarva Shiksha Abhiyan (SSA) at the district level throughout the country in 2001.⁷⁶ The assistance under the programme of SSA was on the basis of an 85 to 15 ratio sharing arrangement between the central government and the state government during the Ninth Plan, and at a 75 to 25 ratio during the Tenth Plan, and at 50 to 50 ratio thereafter.⁷⁷ The programme covers the

⁷³ A. Ghosh, ‘Draft Education Bill Upsets Schools’, *Times of India*, 17 December 2005.

⁷⁴ National Policy on Education, available at <<http://www.education.nic.in/>>, visited on 20 December 2005.

⁷⁵ *Ibid.*

⁷⁶ The following targets are set in SSA, all 6–14 age children in school/EGS centre/ bridge course by 2003; all 6–14 age children complete five year primary education by 2007; all 6–14 age children complete eight years of schooling by 2010; focus on elementary education of satisfactory quality with emphasis on education for life; bridge all gender and social category gaps at primary stage by 2007 and at elementary education level by 2010; universal retention by 2010.

⁷⁷ Annual Report 2004–05, ‘Elementary Education and Literacy’, available at <www.education.nic.in/>, visited on 20 December 2005

entire country, except the State of Goa.⁷⁸ The Ministry has also set up a National Mission for SSA under the chairmanship of the prime minister. The first meeting of the Governing Council of National Mission was held on 21 February 2005.⁷⁹ The planned allocations for elementary education have increased steadily but are still not quite adequate to fulfil the constitutional commitments. The period following the adoption of National Policy on Education (NPE) 1986 saw the introduction of a number of centrally sponsored schemes to cater to the specific needs of the elementary education sector.

11.2. Right to Education at Higher Level in India

The NPE 1986 underscores adult education for the eradication of illiteracy, particularly in the age group of 15–35.⁸⁰ A vast programme of adult and continuing education was implemented through various ways and channels, including the establishment of centres in rural areas for continuing education.⁸¹ A number of programmes taken up to impart adult education during the last four decades before launching of the National Literacy Mission in May 1988 could not be very successful on account of a number of inherent weaknesses such as the low levels of literacy, centre-based approach, lack of mass awareness and community participation.⁸² However, the government of India continues to pursue the mass literacy mission, which ultimately brought encouraging results. The number of illiterates during the decade 1991–2001 came down from 329 million in 1991 to 304 million in 2001. This was a welcome change in the depressing scenario.⁸³ The scheme of continuing education provides a learning continuum to the efforts of Total Literacy and Post-Literacy Programmes in the country. The main thrust is on providing further learning opportunities to neo-literates by setting up Continuing Education Centres (CECs) and Nodal Continuing Education Centres (NCECs), to serve a population of about 2000–2500 people by providing facilities of libraries, reading rooms, learning centres, sports and cultural centres and other individual interest promotion programmes. As a part of this strategy, there is stress on establishing rural libraries, which will provide reading and learning material to neo-literates in their own languages.⁸⁴ Wide acceptance of this programme is achieved by involving non-governmental organisations, voluntary agencies, social workers, and Panchayati Raj institutions in the planning and implementation of the scheme of continuing education.⁸⁵ Various development

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ Initial Report submitted by the Government of India concerning rights covered by Articles 13–15, to the Economic and Social Council, E/1988/5/Add.5, 14 April 1989.

⁸¹ *Ibid.*, para. 9.

⁸² Annual Report 2004–05, 'Adult Education', available at <www.education.nic.in/>, visited on 20 December

⁸³ *Ibid.*, p. 84.

⁸⁴ *Ibid.*, pp. 91–92.

⁸⁵ *Ibid.*, p. 96. The literacy rate in 2001 has been recorded at 64.8 per cent as against 52.21 per cent in 1991. The 12.59 percentage points increase in the literacy rate during the period is the highest increase in any decade. Rate of growth is more in rural areas than in urban areas. The gap in the male-female literacy rate has decreased from 24.84 per cent in the 1991 census to 21.6 per cent in the 2001 census. Female literacy increased by 14.41 per cent, from 39.3 per cent to 53.70 per cent whereas male literacy increased by 11.17 per cent, from 64.13 per cent to 75.3 per cent during the last decade. Gender equity and women's empowerment is also visible as about 60 per cent of participants and beneficiaries are women. During

departments, technical institutions, professional groups and the Directorate of Adult Education, Government of India provide the input needed by the programme. State Resource Centres (SRCs) and Jan Shikshan Sansthan join hands by giving the necessary resource and training support.⁸⁶ The social mobilisation generated by the literacy campaigns has had an enormous impact on other social sectors, most notably women's empowerment, health and population stabilisation along with environmental awareness. A framework for effective social action has been provided by the Panchayati Raj Institutions. The campaigns have served the cause of promoting equity and social justice in society and fostering of a scientific temper and a sense of belonging to India's great composite culture and consciousness of unity in diversity.

11.3. The Central Advisory Board of Education (CABE)

The Central Advisory Board of Education (CABE), the highest advisory body to advise the central and state governments in the field of education, was established in 1920 and dissolved in 1923 as a measure of economy.⁸⁷ It was revived in 1935 and the tenure of the last constituted CABE expired in March 1994. The government in July 2004 has reconstituted CABE. The Board consists of nominated members representing various interests in addition to representatives of the government of India, state governments and UT administrations, elected members from the Lok Sabha and the Rajya Sabha, *etc.* The first meeting of the reconstituted CABE was held on August 10 November 2004, and seven CABE Committees have been set up.⁸⁸

An ordinance was promulgated on 11 November 2004 to enable the setting up of a National Commission for Minority Educational Institutions⁸⁹ to advise the central government or state government on any question regarding the education of minorities, to look into complaints regarding violation of the rights of the minorities, and permit minorities to establish and administer educational institutions of their choice. The National Commission for Minority Education Act 2004 replaced the ordinance.⁹⁰

12. Conclusion

The ICESCR provides for progressive realisation and acknowledges the constraints due to the limits of available resources. It also imposes on states parties various obligations which are of immediate effect. States have a specific and continuing obligation "to move as expeditiously and effectively as possible" towards the full realisation of Article 13.

1991–2001, the population in 7+ age group increased by 171.6 million while 203.6 million additional persons became literate during that period. Kerala continues to have the highest literacy rate of 90.92 per cent and Bihar has the lowest literacy rate of 47.53 per cent. A significant decline has been achieved in absolute number of non-literates from 328.88 million in 1991 to 304 million in 2001.

⁸⁶ *Ibid.*, p. 92.

⁸⁷ Annual Report 2004–05, 'Overview', *supra* note 66.

⁸⁸ *Ibid.* The seven CABE Committees are: i) Free and Compulsory Education Bill and other issues related to Elementary Education; ii) Girls Education and the Common School System; iii) Universalisation of Secondary Education; iv) Autonomy of Higher Education Institutions; v) Integration of Culture Education in the School Curriculum; vi) Regulatory Mechanism for Text Books and Parallel Text Books Taught in Schools Outside the Government System; and vii) Financing of Higher and Technical Education.

⁸⁹ *Ibid.* The Commission has started functioning with a Chairman and two Members.

⁹⁰ *Ibid.*

States parties must closely monitor education including all relevant policies, institutions, programmes, spending patterns and other practices so as to identify and take measures to redress any *de facto* discrimination. Education operates as a multiplier, enhancing the enjoyment of all individual rights and freedoms where the right to education is effectively guaranteed, while depriving people of the enjoyment of many rights and freedoms where the right to education is denied or violated.

In the last 60 years the government of India has evolved very successful programmes in imparting primary education in the country. Primary education is now provided in the mother tongue or regional language in all the states and union territories (UTs). There has been substantial increase in access to elementary education, with reduced class, caste and sectional disparities. Despite substantial achievements, the task of universal elementary education (UEE) is far from complete. Enrolments in the schools have certainly increased but so have the number of out of school children. Sadly, the country today has one of the largest illiterate populations in the world. Caste, gender, class and regional disparities in UEE though reduced are still glaring and persistent. The educational administration in most states and UTs has yet to effectively tackle endemic problems concerning shortage of teachers, teacher absenteeism, inadequate and improperly designed school buildings, lack of teaching/learning equipment, need-based teacher training, and a curriculum related to real life requirements.

A traditional style of administration and the tendency for centralisation is impeding genuine people's participation and effective partnership with non-governmental organisations. Lack of transparency and rigid procedures have not facilitated confidence building measures necessary for the empowerment of women and the poor.⁹¹ By making elementary education a fundamental right of all children of 6 to 14 years is expected to spur the government and non-government sectors to take necessary measures to achieve UEE. It is hoped that with a clear vision, firm will, higher investments, greater dedication, rapid decentralisation and increased people's participation, the government of India will be able to fulfil the goal of providing a satisfactory quality of education to all children in the country within the next decade.

⁹¹ A. Singh, *Fifty Years of Elementary Education*, available at <www.un.org.in/Janshala/default.htm>, visited on 22 December 2005.