
Right to Education in India: A Journey through Lenses of Judiciary

Dr. Tarkesh J. Molia¹, Dr. Vikash Kumar Upadhyay², Mr. Arpit Sharma³

¹Associate Professor, Institute of Law, Nirma University
ORCID Id: 0000-0003-4470-5056

²Assistant Professor, Institute of Law., Nirma University
ORCID Id: 0000-0001-7791-9590

³ Assistant Professor, Institute of Law. Nirma University
ORCID Id: 0000-0001-8883-260X

e-mail: tarkeshpatell@gmail.com, vgupadhyay@gmail.com, arpitt.sharmaa@gmail.com

Abstract

Education is very essential for the human development. The elementary education should be available to every citizens so they may be enlightened. The aim of the paper is to explore journey of elementary education in India through the lenses of law and judiciary. This paper has been divided in seven parts. The first part introduce the need of elementary education. Second part deals with the Constituent Assembly Debate on need of elementary education in constitution of India. Third part of this paper explore the pre-86th Constitutional Amendment Act, 2002. The fourth part deals situation with post 86th Constitutional Amendment Act, 2002. The fifth part explore the salient features of the ‘The Right to Free and Compulsory Education Act, 2009’. The sixth part deals the situation after the enactment of ‘Right to Free and Compulsory Education Act, 2009’. Last and seventh part has conclusion.

Keywords: *Right to Free and Compulsory Education Act, 2009, Directive Principle of State Policy, Supreme Court, Constitution, Fundamental Right.*

1. INTRODUCTION

Education plays very important role in the human development and make society as prosperous with the principles equity and justice. According to 2011 census, total literacy rate is 74.04%, for male and female are 82.14% & 65.46% respectively. However, the literacy rate has increased significantly from 2001 census. In 2001, the total literacy rate was 64.46%. The UNESCO outlines the literacy as “ability to identify, interpret, communicate, compute and use printed and written materials associated with varying contexts”. A citizen can enjoy the freedom only when he meaningfully understand the challenges to his fellow citizens and restraints from the Government. The citizen can understood this only when he has basic education. Therefore, the education must be compulsory at least to the elementary level for

poor weaker sections, dalits and tribes. The Preamble of the Constitution has goal to ensure a society with “social, economic and political justice”. The goals of Preamble cannot be achieved unless the citizens are not educated well to take write or wrong decisions. Therefore, the right to education [Hereinafter called as RTE] is very much essential for growth of the nation. The education helps to achieve the dignity of citizen, which is one important goal of Preamble. Therefore, founding fathers of Constitution kept directive principles for this under Art. 45.

2. CONSTITUENT ASSEMBLY DEBATE

Shri Lakshmi Kanta Maitra move the draft of Present Article 45 as Article 36 before the Constituent Assembly. The amendment, which was moved by Mr. L.K. Maitra had the provision that the State will incorporate mechanism in order to provide free and compulsory education to the children until they complete the 14 years within 10 years from the commencement of the Constitution.¹ The original draft of Art 45 contained the provision for free and compulsory education for primary education. Mr. Maitra had the opinion there is no need to confine the free and compulsory for only primary education. The education may be free until secondary stage also. Therefore, it is need not to confine only for primary education. This should be available to the children of 14 years of age, so the free and compulsory education can be given to the children who are up to the 14 years of old. However, Mr. Naziruddin was to make it only for the primary education. Mr. Biswanath Das never admired these directive principles, said these are only pious hope, and will put burden on the provincial and central government. He questioned on the medium of education whether it would in one language or two language or three languages because there may be province, which may has two or three kinds of people having distinct language. He gave the example of his home State Orissa where the Telgu speaking and Bangla speaking people also living. He had said that primary education must be imparted in mother tongue and no one should be compelled to get the primary education in any other language.²

3. PRE- 86TH CONSTITUTIONAL AMENDMENT ACT, 2002

Art. 45 had originally provision, which cast an responsibility to offer ‘free and compulsory education’ to all the children of the 14 years. It is not mandatory for becoming a right as fundamental right it must be written expressly in Part III of the Constitution. Fundamental Right (hereinafter FR) and Directive Principle of State Policy (hereinafter as DPSP) are complementary and supplementary to each other. However, the RTE was not written expressly in the part III of the constitution before 86th Constitutional Amendment Act, 2002 but it comes through the right to life and personal liberty ensured under Art. 21. The broad and expansive meaning of right to life and personal liberty embraces RTE. The RTE is very essential part of right to life, without this, the citizens cannot be enlightened. The objectives of Preamble can be achieved only when the citizens are educated otherwise the Constitution would fall. The RTE occurs in DPSP at three places viz., Art. 41, 45 and 46 which shows

² CAD vol. VII debate took on 23 Nov. 1948

that founding fathers of the Constitution knew the importance of this right. Even Art. 29 and 30 also talk about education. Art. 21 is written in negative terms but it has both negative and positive sides. The Art. 21 will not come in question only when the States makes a law taking away the right to education. The content of the right is not determined on by perception of threat of deprivation. The right to education is implicit in Art. 21 and State cannot deprive anyone from this fundamental right except in accordance with the procedure established by law. RTE in the context of Article 45 and 41 can be understood in two ways: one, every child of 14 years of age has a RTE; second, after a child complete 14 years the State will provide free education as per its economic capacity. The RTE, which comes from Art. 21 is not absolute and it should be in the light of DPSP. In a true democracy, the education is universal and it helps the citizen of that democratic country to understand what is good and what is bad for them and nation. In a democratic form of government, the sustenance of democracy depends upon the enlightenment of the citizens. The obligation under Art. 41, 45 and 46 can be discharged State either to establish new institutions or aiding/recognition of private educational institutions.³

The right guaranteed under Art.19 cannot be appreciated and fully enjoyed unless a citizen is educated and is conscious of his dignity. Right to life is the compendious expression for all those rights, which helps to enjoy a dignified life. A dignity of individual cannot be secured without the right to education. Every citizen of this country have right to education.⁴

We cannot overlook the ground reality of our country. The majority of our population belong to the category of poorer section, which cannot afford the fees to be paid. The attempt to enrol these students in educational institutions must not be only from governmental institutions but also from the private institutions. In the interest of general public more good quality, schools need to be established with more autonomy and non-regulations of the school administrations.⁵

India is a signatory of UDHR; this has also impact on the Constitution. Art. 26 of UDHR says that every human being has a right to education. This human right would be reflected under Art. 41 and 45 of Indian Constitution.

4. POST-86TH CONSTITUTIONAL AMENDMENT ACT, 2002

The Parliament with the help of Art. 368 inserted Article 21-A. This Article guarantees fundamental right to every children between the age of 6 years and 14 years for free and compulsory right to education. This amendment has also changed the language of Article 45 and gave directions to the State Government to provide early childhood care to the children of six years old. Once right to education has become a fundamental right expressly under Article 21A, the Parliament enacted a legislation to give free and compulsory education in 2009. The 86th Amendment Act, 2002 also inserted one more clause in Article 51-A which lays a fundamental duty on the parents or guardian to provide opportunities for education to

³ U. Krishann vs. St. of A.P. (1993) 1 SCC 645

⁴ Mohini Jain vs. St. of Karnt. (1992) 3 SC 666

⁵ T.M.A. Pai Foundation and Ors. Vs. St. of Kar. and Ors. (2002) 6 SCC 481

his child. Art. 45 has been substituted with the help of this Constitutional Amendment Act, 2002 and impose a duty on the State to provide early childhood care and education to children below the age of six years.

The Supreme Court after the insertion of Article 21-A said that the State Government must provide to all children irrespective of their place of inhabitation.⁶ In educational institutions, the teacher and students are complementary to each other and sine qua non for the educational institutions. Keeping this thought in mind the Supreme Court refused to allow the State to take services of teacher at polling stations. However, the democratic State must have election but the State should incarnate others for this because education is very important to make a learned citizen so he may take right decisions.⁷ In another judgement, the Supreme Court identified that RTE is more than a human or fundamental right. It is like a reciprocal agreement between the State and family, and impose a positive burden on all participants in our civil society.⁸

A writ petition was filed to Supreme Court for issuance of order and direction to the Central Government to take necessary action for the implementation of RTE. However, this writ petition was mainly filed for the constitutionality of the 93rd Amendment of the Constitution.⁹ Justice Dalveer Bhandari said if we want to remove the socially, educationally and economically backwardness, we need to earnestly focus on implementing Article 21-A. We must provide educational opportunity from the day one. Without the right to education, other fundamental right will be meaningless. Government should allocate more funds for the education. He draw the attention the annual reports of Human Resource Department and the Union Budget of 2008-09, where the funds for education was allotted very negligible in numbers. Justice Bhandari was very disappointed to see this that the expenditure on education is only 4% of GDP while in many countries they spend 6% to 8% of their GDP on the education. The Government should make effort for the development of the infrastructure in addition to this they should provide free books uniforms and other necessary facilities. The court was unhappy with the Central Government that the effort was not made as it was made for '*Sarva Siksha Abhiyan*' and till date no any legislation was passed by Parliament to ensure the fundamental rights given under Art. 21-A of the Constitution.¹⁰ The courts noticed that in India the compulsory education fails on two accounts: 1) the deterrent effect is very less on non-compliance; 2) the legislation was not implemented effectively because no police force was involved in the implementation of compulsory education. Most of the compulsory education has been on Statute book, no effort was made by the State Government and police agencies to implement it seriously. The Court stated that we find hardly any case where even fine has been imposed. The fine should be imposed effectively and also the years of imprisonment must be increased.¹¹ The court took the example of USA where the attendance

⁶ R.D. Upadhyay vs. State of A.P. AIR 2006 SC 1946: (2007) 15 SCC 337

⁷ Election Commission of India vs. St. Mary's School (2008) 2 SCC 390

⁸ Avinash Mehrotra vs. UoI (2009) 6 SCC 398

⁹ Article 15(5) was inserted.

¹⁰ Ashok Kr. Thakur vs. UoI (2008) 6 SCC 1

¹¹ Id. at paras 473, 475 to 480

officer is under liability for the implementation of compulsory education while in India the school official do not much take liability for the implementation of the compulsory education. The Court has taken the cognizance of poverty in India due to this parents send their children for work because they do not have any other option to bring food in home and food come first. Therefore, State should give extra income to parents as incentive to send their children to school for taking the education. If the State will not start the financial incentives programmes, the Government cannot expect the poorest of the poor to send their children to school.¹² We should encourage the financial incentive programme because it is better than punishment. This type of programme will help for long way in the enforcement of right to free and compulsory education under Art. 21-A. The Court gave direction to Central Government for the enactment of a legislation for the enforcement of the fundamental right given under the Article 21-A. This legislation must have the provisions for the imprisonment and fine. The legislation made by the Government must include children from the age group of six years to fourteen years for free and compulsory elementary education. The Government should allocate more funds for the education. Ideally, the Union of India must set a deadline to achieve the goal for implementation of right to education. However, when the Supreme Court was delivering the judgement a Bill named as 'Compulsory Education Bill 2006' was pending before the Parliament. Later it was passed as 'Right of the Children to Free and Compulsory Education Act, 2009'. [Herein after called Rt. To Edu. Act, 2009].

5. SALIENT FEATURES OF THE RIGHT OF THE CHILDREN TO FREE AND COMPULSORY EDUCATION ACT, 2009

- a) The Children between the age group of 6-14 years has right to access free and compulsory elementary education.
- b) The child who is pursuing the education need not to pay the fee and children suffering from disability have special protection.¹³
- c) The Act deals with the children who are above 6 years has not been admitted or admitted but could not complete the elementary education, he will be admitted in a class as per appropriate to his or her age. These children will have special training within limited time to reach the level of their classmates.¹⁴
- d) The child has right to transfer to any other school, in case he or she unable to complete elementary education to the school admitted.¹⁵
- e) The appropriate Government and local authority has duty to establish within three year from the commencement of this Act.¹⁶
- f) The Central Government and State Government both will share the financial burden to develop the mechanism free and compulsory elementary education.¹⁷
- g) It has provisions for 25% seat reservation for the children belonging to economic weaker sections in private school.¹⁸

¹² Id. at 468, 470 and 481

¹³ S.3 of Rt. to Edu. Act, 2009.

¹⁴ S.4 of Rt. to Edu. Act, 2009

¹⁵ S.5 of Rt. to Edu. Act, 2009

¹⁶ S. 6 of Rt. to Edu. Act, 2009

¹⁷ S.7 of Rt. to Edu. Act, 2009

- h) No school will collect capitation fee from the parents or guardians for admission in school, if any school or person does contravention to this will be liable for fine ten times to the capitation fee charged.¹⁹
- i) This Act prohibits the physical punishment and mental harassment.²⁰
- j) It makes a mandatory for the owner of the school to get a certificate for establishing the school.²¹
- k) It lays down provisions for qualifications and service conditions for teachers. It also states about the duties of the teachers.²² It also mention about the pupil-teacher ratio.²³
- l) The Act prohibits the deployment of teachers for non-educational purpose except population census, disaster relief or duties related to elections.²⁴ It also lays prohibition on teachers to engage in private tuition or private teaching.²⁵
- m) It says that the curriculum and evaluation procedure should for all round development of the children.²⁶
- n) The National Commission for Protection of Child Rights will take necessary actions for the protection of child rights of education.²⁷

6. POST- RIGHT OF THE CHILDREN TO FREE AND COMPULSORY EDUCATION ACT, 2009

The quality education can be ensured through proper trained teachers. Teacher plays very vital role in imparting the knowledge to the students. Stressing on this the Court said that ill-trained teachers from unrecognized educational institutions will be a detrimental effect to the interest of the nations. The teachers and educational institutions has very important role in nation building. The must proper trained and recognized by the Government and local authority.²⁸

Owing to importance of RTE the in another judgment the court said that the Constitution mandates for the right to free and compulsory education. If the Government does not provide education, it will be denial of life and personal liberty.²⁹

A writ petition was filed under Art. 32 in the light of grave violations and abuse of children who were forcefully detained in circuses and not able to access their families and victims of sexual abuses. The division bench of the Supreme Court while dealing with the questions of exploitation discuss about access to RTE to these children, as this fundamental right was not

¹⁸ S.12 of Rt. to Edu. Act, 2009

¹⁹ S.13 of Rt. to Edu. Act, 2009

²⁰ S.17 of Rt. to Edu. Act, 2009

²¹ S.18 of Rt. to Edu. Act, 2009

²² S.23 and 24 of Rt. to Edu. Act, 2009

²³ S. 25 of Rt. to Edu. Act, 2009

²⁴ S.27 of Rt. to Edu. Act, 2009

²⁵ S.28 of Rt. to Edu. Act, 2009

²⁶ S.29 of Rt. to Edu. Act, 2009

²⁷ S.31 of Rt. to Edu. Act, 2009

²⁸ St. of U.P. vs. B.N. Tripathi (2010) 13 SCC 203

²⁹ NG. Komon vs. St. of Manipur (2010) 6 Gau. 32

available to them. The Court directed to Central Government issue suitable notifications to prohibit the employment of children in circuses within two month of the order so these children avail the fundamental RTE guaranteed under Art. 21-A. The court further stated that it is necessary for the effective implementation of Rt. to Edu. Act, 2009 that National Commission for Protection of Child Rights, the State Government and Ministry of Women and Child Development must coordinate effectively.³⁰

A writ petition was filed to the Supreme Court on the ground for constitutionality of Rt. to Edu. Act, 2009. A question arose against the Act that it is unconstitutional in respect of its application to private unaided minority educational institutions. The Court held it would be incorrect to declare the 'Rt. to Edu. Act, 2009' is not applicable to unaided non-minority schools. One major purpose of Rt. to Edu. Act, 2009 to achieve the goal of Universal Elementary Education, which helps to make the social texture of democracy strong.

The purpose to provide elementary education to all is that the capitation fee should not be charged which is a hurdle to implement RTE to all children. The word 'fee' mentioned in the long title of Rt. to Edu. Act, 2009 has been used to remove the economic hurdles in the path of free and compulsory education.³¹ The word 'compulsion' shows that State and Parents are under compulsory duty to send children to school. The purpose of Rt. to Edu. Act, 2009 is to lay down the standard for infrastructure and schedule; non-compliance will lead towards non-recognition of the school. If any school will be closed then in the teachers and students will be transferred to the next neighbouring school.

The State has discretion to decide the manner of implementation of RTE, the court can decide only whether the impugned law is violating the fundamental rights or not. While determine the validating of the impugned law the court will take into consideration the DPSP. The Art. 21-A was inserted for the implementation of Art. 45, which was a part of DPSP. The Art. 21-A is a child centric fundamental right not the institution centric. The purpose of this Act of 2009 to remove all impediments in realization of fundamental rights. Among the impediments, the financial hurdle is major. To remove this Sec. 12 (1) (c) of Rt. to Edu. Act, 2009 has been introduced which says 25% in pvt. unaided school. Pvt. School authorities cannot take the plea of Art 19(1) (g) as it is subject to some restrictions also. Therefore the 25% reservation in pvt. unaided non-minority school cannot be called as unreasonable restriction.³² The protection to educational institutions are available due the charity character of educational institutions. If any educational institutions is going for commercialisation then it may not get the protection given under Art. 19 (1)(g).

Art. 19(1)(6) is a saving and enabling provisions. It empowers the Parliament to make a law for the restriction on fundamental right given in Art. 19 (1) (g). If the Parliament in the light

³⁰ BBA vs. UoI, [2011] INSC 403

³¹ Society for Unaided Pvt. Schools of Raj. vs. UoI (2012) 6 SCC 1

³² Id. at para 24

of this enabling make any law to allow State access, the private unaided non-minority educational institution to provide the elementary education it will be not unconstitutional.³³

The RTE is a unique fundamental right unlike other fundamental rights it places burden on the State and parents/guardian of every child provide elementary education to child. The RTE makes a reciprocal agreement between the State and the parents. The court finds that the Sec. 12 (1) (c) of the Rt. to Edu. Act, 2009 is a piece of reasonable classification as it allows the children belonging to s specific category who face the financial problem and not able to send their children to school for elementary education. Therefore, it is not violating the right to equality given under Art. 14 rather it strengthen the principles of right to equality.³⁴

Justice Radhakrishnan said as per tradition the right can be divided into the category ‘civil rights, political rights and socio-economic rights’. The civil and political rights are part of the first generation and socio-economic rights are the part of the second generation of rights. The civil and political right usually known as negative rights because it impose only duty and restrain on the State. The socio-economic right facilitates the value of social justice and equality and democracy and State plays a key role in the securing these goals. Justice Radhakrishnan finds the right to education as a socio-economic right and the Rt. to Edu. Act, 2009 has been enacted to fulfil this goal.³⁵

The Court found nexus between the municipal law and international law and said that Art. 21-A, 45 and 51-(A) (K) of the Constitution and Sec. 12(1)(c) of Rt. to Edu. Act, 2009 read with the various conventions³⁶ impose responsibility on the State and non-State actors for the enforcement of the rights of children in respect to RTE.³⁷

The court also took consideration for quality of education in government schools. The Court said the quality of education in government schools going down due to various reasons and it helps the private educational institution and private tuition to grow. The statics shows the government teachers are highly trained but the higher learning is in private schools. The Act does not cover the private educational institutions on the ground of lack of government aided educational institutions but on the principle of inclusiveness. The Government and local authority should supervise those schools, which are providing the quality education, and they should try to adopt in governmental institutions. The education should not be only free and compulsory but with quality education.³⁸ The Court directed to all State Governments to constitute the State Advisory Council as per Sec. 34 of Rt. to Edu. Act, 2009 within three months from the day of decision of the court.³⁹

The Supreme Court in very clear words said that the Rt. to Edu. Act, 2009 must apply to following categories of institutions:

³³ Id. at paras 35 and 36

³⁴ Id. at para 41

³⁵ Id. at para 136 and 138

³⁶ UDHR 1948, ICCPR 1966, ICESCR, 1966, UNCRC 1989

³⁷ Id. at paras 211, 212

³⁸ Id. at paras 298, 299 and 302 to 304

³⁹ Id. at paras 311(9) to 311(13)

- (a) School owned and controlled by the appropriate Government and local authority;
- (b) An aided school including aided minority school;
- (c) A school belonging to specific category;
- (d) Un-aided not minority school not receiving any kind of aid or grants to meet its expenses from the appropriate Government and local authority;

However, the Supreme Court has kept away the non-aided minority educational institutions from the application of Rt. to Edu. Act, 2009 and consequently applied the doctrine of severability on the Rt. to Edu. Act, 2009.⁴⁰

On the question, whether right to elementary education include the right to choose medium of instructions, the Supreme Court answered in negative and said right to free education under the Art. 21-A does not include right to choose the medium of instruction.⁴¹ Once a student had been admitted to a recognised school then the student must progress through various stages of elementary education in that school without any hindrance and without, being held in any class or expelled from the school until completion of secondary school.⁴² The detention of the student aged 12 years in standard VI on the ground of inadequate academic performance, would be improper. The student must be promoted to higher standard to pursue his elementary education.⁴³

7. CONCLUSION

The ideas enumerated in the Preamble cannot be achieved without the education. Education helps citizen to develop the personality with all faculties. The Constitution makers realized this fact and the put RTE in DPSP with a view in future government will ensure this as RTE. Only few State Government had the laws on right to provide free education. There was no any central legislation on this. The Supreme Court take cognizance of this and declare right to education as fundamental right under Art. 21. Later the Parliament passed 86th Amendment Act, 2002 to insert Art. 21-A to provide free and compulsory education. The amendment was brought in 2002 but there was no any law to enforce this fundamental right. Again the Supreme Court directed to Central Government to enact a legislation for the realization of this fundamental right. In 2009, the Parliament passed the Rt. to Edu. Act, 2009 to give elementary education to the children between the age group of six years to fourteen years. The Act of 2009 was called in question on the ground it violates fundamental right given under Art. 19(1) (g) of private un-aided non-minority. The Apex Court declared as Constitutional. The judiciary has interpreted various issues involved in free and compulsory elementary education from time to time and will continue in future as well.

⁴⁰ Id. at paras 64(i) to 644 (iv), 65 and 65-A

⁴¹ St. of Karnt. vs. Associated Management of P & S. Schools, AIR 2014 SC 2094.

⁴² Mrs. Kitty Sanil vs. St. of Ker. AIR 2015 NOC 997 (Ker.)

⁴³ Sobha George Adolfus vs. St. of Ker. AIR 2016 Ker. 175