

Elementary Education as a Fundamental Right

The Issues

The backdrop to the proposal to make elementary education a fundamental right is provided by the country's dismal record in primary education and general literacy. Nor will mere amendment of the Constitution take us very far, as we know from the record of several other equally crucial constitutional amendments. Some issues for consideration if the fate of the move to make elementary education a fundamental right is to be different.

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The government has introduced the Constitution (Ninety-Third) Amendment Bill, 2001 in parliament to make free and compulsory elementary education for children of the age of 6-14 years a fundamental right. Earlier the United Front government had introduced the Constitution (Eighty-Third) Amendment Bill, 1997, on the same subject. The parliamentary standing committee had scrutinised the bill and made its recommendations. Unfortunately, it was not pursued. However, it is a good augury that a new bill has been introduced on the same subject. This is therefore the opportune time to take a close look at some of the more important issues in this context.

At the outset, attention may be invited to a few salient provisions of the Constitution pertaining to safeguarding the interests of children. Some of these are a part of the fundamental rights. Article 15 prohibits discrimination on grounds of religion, race, caste, sex or place of birth. But Article 15 (3) states that nothing in this article shall prevent the state from making any special provision for women and children. Article 24 states that no child below the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment. It is important to note that

the right to move the Supreme Court by appropriate proceedings for the enforcement of the fundamental rights is guaranteed by Article 32 which states that the Supreme Court shall have powers to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the fundamental rights.

By comparison, according to Article 37, the provisions pertaining to the directive principles of state policy contained in Part IV of the Constitution "shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws". Among the more important directive principles of the state policy, attention may be invited to Article 39 (e) and (f) which state that the state shall, in particular, direct its policy towards securing.

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected

against exploitation and against moral and material abandonment.

The directive principles also provide for free and compulsory education of children. Article 45 states that "the state shall endeavour to provide, within a period of 10 years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of 14 years" (emphasis added).

The Convention of the Rights of the Child adopted by the General Assembly of the United Nations on November 20, 1989, and ratified by India in 1992, inter alia, asks the "States Parties [to] recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all;

(b) Take measures to encourage regular attendance at schools and the reduction of dropout rates".

The Background

The Supreme Court observed in Mohini Jain case in 1992 that the directive principles which are fundamental in the governance of the country cannot be isolated from the fundamental rights guaranteed under Part III of the Constitution.¹ These principles have to be read into the fundamental rights. The two are supplementary to each other. The state is under constitutional mandate to create conditions in which all could enjoy the fundamental rights guaranteed to individuals under Part III. Without making right to education under Article 41 of the Constitution a reality, the fundamental rights under Chapter III shall remain beyond the reach of the large majority which is illiterate.

The court further held that 'right to life' is the compendious expression for all rights which the courts must enforce "because they are basic to the dignified enjoyment of life...The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual are not being assured unless it is accompanied by the right to education. The state is under an obligation to make endeavour to provide educational facilities at all levels to its citizens" (emphasis

added). 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 individualistic dignity.

The Supreme Court once again decided in 1993 that the right to education flows directly from right to life guaranteed by Article 21 of the Constitution. The court held that "the effect of holding that right to education is implicit in the right to life is that the state cannot deprive the citizens of his right to education except in accordance with the procedure prescribed by law".² The court further held that "the three Articles 45, 46 and 41 are designed to achieve the said goal, among others. It is in the light of these articles that the content and parameters of the right to education have to be determined...*The right to free education is available only to children until they complete the age of 14 years. Thereafter, the obligation of the state to provide education is subject to the limits of its economic capacity*" (emphasis added). To this extent, the earlier decision of the Supreme Court in Mohini Jain case stood modified.

The achievements of India in respect of adult literacy and primary education are dismal and make distressing reading. The adult literacy rate (1997) was only 54 per cent as compared with 71 per cent for the developing countries. The corresponding figures for male literacy were 67 per cent and 80 per cent respectively. For female literacy, the figures were 39 per cent and 63 per cent respectively. The percentage of children dropping out before grade 5 (1990-95) were 41 per cent and 25 per cent respectively. The children not in primary schools were as many as 28 million in 1997.³ Based on the data available up to 1998-99, the gross enrolment ratio (GER) for primary school children was 92.14 per cent in 1998-99. However, GER for the upper primary stage (class VI-VIII) was still low at 58 per cent.⁴

This is the background of the proposal to make elementary education a fundamental right. Though Article 45 of the Constitution contemplated that the state shall provide, within a period of 10 years of the commencement of the Constitution, for free and compulsory education for all children until they complete the age of 14 years, it has taken 50 years to come to a stage of even serious discussion on the

subject. It is necessary to underline that mere amendment of the Constitution on this subject is not going to take us far as has been seen in respect of many other equally crucial amendments of the Constitution. One outstanding example is that of the lack of follow up action after the 73rd and 74th amendments of the Constitution pertaining to democratic decentralisation and giving larger powers to panchayat raj and urban local bodies. Though nearly 10 years have elapsed since the amendment of the Constitution, there is hardly any effective and visible impact thereof in most of the states. The fate of the proposed amendment to make elementary education a fundamental right is likely to be no different unless concerted steps are taken to translate it into reality in the shortest possible time.

Below Six Years Too

We shall now turn to the contents of the proposed amendment and their pros and cons. The first issue for consideration is the ambit of the amendment. The main question is whether it should relate to all children up to the age of 14 years or whether it should be restricted only to the age-group of 6-14 years. As seen earlier, Article 45 as also the Supreme Court decisions cover the whole range of children up to the age of 14 years. The National Policy on Education, 1986, as modified in 1992, also stated that free and compulsory elementary education shall be provided to all children up to the age of 14 years before we enter the 21st century. The available data, which are very sketchy and incomplete, show that the facilities for creches and pre-primary education are minimal in the country. Though it is well established that the development of a child in the age-group of 0-6 is crucial to its further development and growth, this aspect has been totally neglected in our planning process so far. The record of work of aanganwadis is dismal. The Integrated Child Development Scheme (ICDS) has not even touched the fringe of the problem. It is therefore necessary that the education, nutrition and development of children below the age of six years is explicitly brought within the purview of the proposed amendment. It will be an empty gesture to cover the elementary education of children only in the age group of 6-14 years in the list of fundamental rights and to leave the education and development of children below the age of six years for

mention in the directive principles of state policy.

Once it is decided to cover all children up to the age of 14 years in the proposed amendment, Article 45 of the Constitution may be deleted altogether. This will also obviate the need to amend Article 45, as is contemplated in the new Bill, to read, "The state shall endeavour to provide early childhood care and education for all children till they complete the age of six years".

Suggestions are also being made by some organisations that the age limit for provision of free and compulsory education may be extended up to the completion of 18 years of age. This will mean inclusion of secondary education also within the purview of the proposed amendment. Looking to the provisions of Article 45 and the severe constraint of financial resources with the government, it would not be advisable to agree to the suggestion. Instead, the age group of 0-6 years may be included in the purview of the Bill.

The next question is whether the word 'compulsory' in the wording 'free and compulsory education' should remain in the proposed amendment. As brought out earlier, the word 'compulsory' appears in Article 45 of the Constitution as also in the UN Convention on the Rights of the Child. It is imperative that the word is retained to clearly indicate the ambit of the responsibility of the government and that of the society at large in the matter. It should not, however, be interpreted to cast penal liability on parents to send their children to schools as has been provided in certain state legislations which has led to prosecution of parents, particularly of low income and deprived sections of society. For the same reasons and based on the same logic, the proposal to amend Article 51 of the Constitution, pertaining to fundamental duties of the citizens, so as to cast the duty on the parent or guardian to provide opportunities for education to a child is sound and will go a long way to create a proper climate and mindset in the society for universalisation of elementary education. Over the last 50 years since independence, we, as a society, have got used to talking of the responsibilities of the government. It is time we talk equally eloquently of the responsibilities and duties of the citizens.

The Constitution (Eighty-Third) Amendment Bill, 1997, inter alia, referred to a clause as follows: "The right to free and compulsory education referred to in clause (1) shall be *enforced* in such manner as

the state may, by law, determine” (emphasis added). The word ‘enforced’ is likely to be misconstrued and misinterpreted. It is also not appropriate in the context of the fundamental rights of citizens. As brought out by the parliamentary standing committee in its report on the Constitution (Eighty Third) Amendment Bill, 1997, “A right is not given in a spirit of enforcement”. It is proposed that the word ‘enforcement’ may be substituted by the words ‘given effect’.

Attention needs to be invited to the word ‘free’ in the wording “free and compulsory education”. It is necessary to provide an explanation to make it clear that the word does not refer only to tuition fees but to all other expenses such as school uniform, textbooks, stationary, scientific aids and equipment, midday meal and transport. This would effectively mean that elementary education will be completely free and there will be no financial burden on the parent or guardian in sending his ward to a school.

Quality of Education

The Constitution (Ninety-Third) Amendment Bill, 2001 contains a provision that “the state shall provide free and compulsory education...in such manner as the state, may, by law, determine”. This will leave the door open for the states to compromise on quality and to implement low cost schemes purely with the intention of reducing the expenditure and thereby frustrating the very objective of the proposed amendment. It is, therefore, important to make an unequivocal commitment in the proposed amendment to provide elementary education of adequate quality and standards. The present situation in this behalf is distressing. For example, the findings of the *Public Report on Basic Education in India*, based on a sample survey primarily of the BIMARU (Bihar, Madhya Pradesh, Rajasthan and Utter Pradesh) states, makes stark and disturbing reading.⁵ A specific provision in respect of the quality of education in the proposed Constitution amendment will make it obligatory for the state to provide properly qualified manpower and adequate financial resources in terms of infrastructure, equipment, scientific aids, textbooks and so on. Thus, for example, considerable further work needs to be done to rewrite the textbooks which will make elementary education a rewarding and enjoyable experience for children. The large social,

economic and cultural gap in the urban and rural settings from which the students hail must be suitably taken into account in the preparation of the textbooks. A categorical mention of quality in the proposed amendment will also, to some extent, deter the states from implementing low cost schemes for primary education, on the lines of barefoot doctors in the health sector.

The next question for consideration is whether the right to free and compulsory education is to be given effect by a central legislation or through such legislations as may be passed by the states. In the 73rd and 74th amendments of the Constitution, it was left to the states to pass suitable legislations in the matter. But there are no such complexities in the present amendment. There are also not likely to be significant variations among the states insofar as the follow-up and other institutional arrangements are concerned. As stated earlier, the experience of the states in respect of the implementation of the 73rd and 74th amendments of the Constitution is far from satisfactory. We should learn from this past experience and not repeat the same mistakes again. In the light of the above, it is imperative that the constitutional amendment to make free and compulsory elementary education a fundamental right is given effect to by a central legislation, leaving it to the states to make such minor changes therein as may be necessary to suit the local conditions.

Private Schools

A conscious decision needs to be taken on whether private educational institutions not maintained by the state or not receiving aid out of state funds are also to be brought within the purview of the proposed amendment. It will not be advisable to take any ideological or rigid position on the subject. Wherever a parent or a guardian is financially in a position to send his ward to a private school and bear the burden thereof, there is no reason why the state should subsidise such expenditure out of its own meagre and already over-stretched resources. As the *Public Report on Basic Education in India* brings out, “Private schooling is often thought to be confined to urban areas but this is not the case. In many of the PROBE villages, private schools are a flourishing business...Among the PROBE sample households, 18 per cent of school-going children are enrolled in private schools, rising to 36 per cent in Uttar Pradesh. In other states [Bihar, MP,

Rajasthan and Himachal Pradesh], this proportion ranges from 5 to 11 per cent...It would be a mistake to think that private schooling is restricted to privileged families. Even among poor families and disadvantaged communities, one finds parents who make great sacrifices to send some or all of their children to private schools. Among PROBE children enrolled in private schools, one-fifth came from families where casual labour was one of the main occupations, and over one-half belonged to a ‘scheduled caste’ (14 per cent) or ‘other backward caste’ (39 per cent). Some poor families concentrate their efforts on sending one child (usually a boy) to a private school.”⁶ The private sector has also made a significant contribution in the education sector in Maharashtra. During 1990-91, about 4 per cent of the schools teaching classes either I to IV or I to VIII were in the private sector without receiving any form of aid. Another 3.9 per cent were in the private sector receiving some aid. Of the total number of children studying in elementary schools, 10.57 per cent were in the private aided schools and 7.36 per cent were in the private unaided schools.⁷

One of the principal tests of the efficacy of subsidies is whether the subsidies are transparent and well targeted to meet the requirements of really deserving sections of the society. As has been brought out later in this article, the proposed amendment will cast a very large and unsustainable burden on the state and central finances. It is therefore imperative to ensure that wherever any section of the society is able or prepared to bear the burden, it should not be taken over by the government. It is also necessary to underline that in the education sector itself, the requirements of resources of secondary, higher and technical education are enormous and we, as a country, can ill afford to fritter them away. In the light of the above, it is suggested that educational institutions not maintained by the state or not receiving any aid out of state funds should be excluded from the purview of the proposed amendment.

Making elementary education a fundamental right is not the panacea for all ills afflicting elementary education today. In fact, it can become an empty ritual unless some outstanding success stories in various states are examined closely and efforts are made to replicate them on a large scale. It is in this light that the schooling revolution in Himachal Pradesh must be studied

carefully. Literacy rates in Himachal Pradesh (21 per cent for males and 9 per cent for females as per the 1961 Census) were below the corresponding all-India averages. Since then, however, the state has been making spectacular progress in elementary education. In 1991, literacy rates in the 10-14 age group were as high as 94 per cent for males and 86 per cent for females. Further rapid progress has been achieved during the last few years, bringing the state very close to universal primary education. The only other states with higher rates of school attendance are Goa and Kerala.

As the PROBE report brings out, in several ways the progress of elementary education has been more impressive in Himachal Pradesh than in Kerala or Goa. First, the transition from mass illiteracy to near-universal primary education has taken place over a much shorter period of time in Himachal Pradesh. Second, educational expansion in Himachal Pradesh has been based almost entirely on government schools, with relatively little contribution from private institutions. Third, Himachal Pradesh has an unfavourable settlement pattern, with small villages scattered over

large areas (e.g., one-third of the rural population lives in villages with a population of less than 300). Fourth, child labour used to play an important role in Himachal Pradesh's economy, due inter alia to the dependence of many households on environmental resources and to the fact that a high proportion of adult women work outside the household. The PROBE team surveyed 48 villages in this state (located in seven different districts) and interviewed 154 households. Among 285 children in the sample households, only five had never been to schools, and the proportion currently attending school is as high as 97 per cent for boys and 95 for girls. As the report rightly underlines, the virtuous circle of state intervention and public response is likely to be consolidated as education levels among parents continue to increase rapidly in the near future.⁸

Financial Implications

Finally, let us turn to the financial implications of the proposed amendment. The financial memorandum given with the Constitution (Eighty-Third) Amendment Bill, 1997 had stated that the estimated

financial expenditure to implement the obligation of making elementary education a fundamental right was Rs 40,000 crore. The estimated annual expenditure was projected as Rs 8,000 crore. The Tapas Mazumdar Committee has estimated the annual financial requirement as Rs 14,000 crore. If the scope of the proposed amendment is expanded to include children in the age group of below six years, the expenditure will go up further substantially.

In this context, it is necessary to take a note of the fact that a great deal of statistics regarding enrolment and literacy figures as also school attendance and dropout rates are highly suspect. In reality, the number of children not in schools is much larger than what is estimated so far. Further, children belonging to several disadvantaged sections such as pavement dwellers and migratory labourers are often excluded from coverage. The overwhelming presence of child labour, particularly in rural and semi-urban areas, has a direct correlation with school attendance. There is thus a great deal of scope for an in-depth inquiry regarding the reliability of data in this sector. To the extent to which the size of the problem is found to be larger than

what has been projected so far, the financial impact will also be larger.

Currently, the total expenditure on education, including that on secondary, technical and higher education, is about 3.5 per cent of GDP. Of this, over 96 per cent is incurred by the states and the balance by the central government. The total central Plan allocation on education (including elementary education) has been raised from Rs 4,385 crore in 1999-2000 (RE) to Rs 5,449 crore in 2000-01. There are suggestions that the total expenditure on education needs to be stepped up to 6 per cent of GDP. The National Agenda for Governance as also the election manifestos of some of the leftist parties have made commitments to find such larger resources for education.

At present, the expenditure on primary education is about 50 per cent of the total expenditure on education. This percentage will have to go up substantially after elementary education becomes a fundamental right. Thus, for example, the Maharashtra State Plan of Action for the Universalisation of Primary Education has projected that if all the funding for universalisation of elementary education has to be provided by the state government, the expenditure on education, which accounts for 17 per cent of the budget, will have to be increased beyond 25 per cent of the budget. The Plan has estimated that, of the additional expenditure, 35 per cent will have to be on construction, 29 per cent on incentives (like midday meal), 22 per cent towards salary of teaching and non-teaching staff, 13 per cent towards equipment, and less than 1 per cent towards vehicles.⁹

It will be useful, in this context, to take a look at the subsidy element in the expenditure on elementary education as brought out in the study of subsidies undertaken by the National Institute of Public Finance and Policy (NIPFP). It is pertinent to note that elementary education is treated as a rightful claimant for merit subsidies. The per capita subsidy on elementary education in 1993-94 ranged from Rs 76.61 in Uttar Pradesh and Rs 78.68 in West Bengal to Rs 213.53 in Goa. The share of subsidies on education is much higher as compared to the other sectors. For 1993-94, for the states covered in the NIPFP study, the subsidies on general education amounted to Rs 18,620.2 crore, in a total of Rs 73,100 crore. Thus roughly, one-fourth of the state subsidies are on education. About 50 per cent of the total

educational subsidies go for elementary education, while the share of secondary and university education is 35 and 13 per cent respectively. The subsidy figures are in fact very close to the figures for revenue expenditure indicating that most of the government expenditure on education is revenue expenditure. The recovery rate as a whole in this sector is less than 1 per cent. The recovery rate even in the university sector is as low as 1.25 per cent. It is interesting to see that while, on an average, subsidies to elementary education form about half of the total subsidies on general education, the share of such subsidies is the lowest in the high income states and the highest in the low income states (Goa, Punjab and West Bengal actually give higher subsidies to secondary education than primary education). A negative correlation between the level of per capita income and the share of subsidies to elementary education is thus discernible. The simple correlation coefficients of per capita income with per capita subsidies on elementary and secondary education are 0.31 and 0.67 respectively.¹⁰

All this will have to undergo a change once elementary education becomes a fundamental right. It will then have to be the first charge on all government expenditure on the education sector. A reference may be invited to two relevant aspects in this behalf. First, the distinction between the Plan and non-Plan expenditure needs to be done away with at the earliest. This is most relevant to the elementary education sector since a large portion of this expenditure has become non-Plan. There is a common misperception that all non-Plan expenditure is non-developmental and therefore of low priority. As a result, non-Plan expenditure receives step-motherly treatment. Whenever the budget is under strain, cut in expenditure is invariably applied to non-Plan expenditure. If this is to be avoided, the classification of expenditure must be between developmental and non-developmental expenditure. Second, while opening new government schools, preference must be given to the areas in which Muslims reside in sizeable numbers, as otherwise the neglect of such areas will lead to proliferation of Madarasas.

Finally, it is not enough to talk only about the fundamental rights and fundamental duties of the citizens. It is equally necessary to give serious thought to the fundamental duties of the government. Article 47 of the Constitution, which is no doubt a part of the directive principles,

lays down the duty of the state to raise the level of nutrition and the standards of living and to improve public health. The article exhorts that the state shall regard these "as among its primary duties". Unfortunately, these very areas have been relegated as non-priority areas in our scheme of planning. As a result, even five decades after independence, India presents a picture of squalor, poverty, illiteracy, want and deprivation as compared with many other countries which started the process of planning and development much later. The government clearly does not have the resources to do everything under the sun. It is time the fundamental duties of the state are clearly defined. The discussions on the formulation of the 10th Five-Year Plan will be commencing shortly. We should make a new beginning and give up the 'Christmas Tree' or 'hold-all' approach to planning by making it the 10th version of the First Five-Year Plan and concentrate only on areas in which it is the government alone which will have to play a leading role. All other areas of economic and social endeavours can be left to the private, corporate and cooperative sectors and non-governmental organisations to handle. If the proposed amendment of the Constitution to make elementary education a fundamental right contributes to a focused debate and discussion on these larger issues, it would be a watershed in the governance of the country. **EW**

Notes

- 1 Ms Mohini Jain v State of Karnataka and others, AIR 1992, SC, 1858.
- 2 Unnikrishnan J P and others v State of Andhra Pradesh and others, AIR 1993 SC 2178.
- 3 *Human Development in South Asia 2000: The Gender Question*, Mahbub ul Haq Human Development Centre, Oxford University Press, p 208.
- 4 Government of India, *Economic Survey 2000-2001*, p 195.
- 5 Among the states surveyed by the report, Himachal Pradesh is refreshingly well managed educationally. See *Public Report on Basic Education in India*, the PROBE team in association with Centre for Development Economics, Oxford University Press, 1999.
- 6 *Ibid*, pp 102-03.
- 7 School Education Department, Government of Maharashtra, *State Plan of Action for the Universalisation of Primary Education and Literacy*, September 1993, pp 7, 60-61.
- 8 *Ibid*, pp 115-16, 127.
- 9 *Op cit*, pp 123-24.
- 10 D K Srivastava and Tapas K Sen, *Government Subsidies in India*, National Institute of Public Finance and Policy, New Delhi, 1997, pp 53, 80, 100.