Indian Constitutional goals and Fundamental Right to Education: A panoramic View

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Abstract

Fundamental Rights enshrined under Article 21A cannot be accomplished without laying emphasis on primary education. Over the years article 21 has been liberally interpreted so as to mean something more than mere survival and mere existence or animal existence. It therefore includes all those aspects of life which make a man's life meaningful, complete and worth living with dignity. It aims at good quality of life. The Supreme Court has implied 'Right to Education' as a fundamental right from Article 21. The word 'life' has been held to include 'education' because education promotes good and dignified life. If this provision is read cumulatively with Directive principle contained in Article 38,39(a),41 and 45, the court opined that "it becomes clear that the framers of the constitution made it obligatory for the state to provide education for its citizens." Therefore the Parliament in its 86th Amendment to the constitution in 2002 inserted article 21A to the constitution which enumerated that the state shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as may, by law, determine. Hence education became a fundamental for all children between the age of six to fourteen. As Article 21A created a need for a law to fulfil its objective. The Right Of Children to Free and Compulsory Education Act, 2009 was passed by the Indian Parliament. It aims to achieve universalization of primary education in India in line with UNESCO's education for all (EFA) goals and the Millennium Development Goals (MDG'S). The present paper study the evolution of the Right to education as a separate Fundamental Right emerging from Article 21 which guarantees the right to life & personal liberty of the individual. It aims to examine and investigate constitutional growth of Education, interwoven with aims to achieve the goal of equal opportunity to all and social justice as enshrined in the Preamble of the Constitution.

Introduction

India is a signatory to three key international instruments that guarantee the right to elementary education – Universal Declaration of Human Rights, 1948, the International Covenant on Economic, Social and Cultural Rights, 1966 and the Convention on the Rights of the Child, 1989. Historically, there has been a demand for a law on free and compulsory education (FCE) in India and there have been several aborted Central-level legislative

attempts towards this end. The last of such aborted attempts came in 2005–2006, i.e., the draft prepared by the Central Advisory Board of Education namely the Right to Education Bill, 2005. The chief opposition to this Bill came from private unaided schools that lobbied against a provision in the Bill that required a 25 per cent reservation for poor children in private unaided schools.[1] The opposition was so virulent that the Bill was modified to drop this provision. Subsequently, this altered version was circulated to all the States as a Model Bill for them to follow. The provision for reservation in private unaided schools is certainly laudatory and plays a crucial role in bridging the gap between private and public schools. However, one should also acknowledge that in order to strengthen the campaign against inequitable schooling, the first step is to prioritise and strengthen government schools across the country. The problem of education today is largely attributable to a complete loss of faith in the quality of existing government schools. Therefore, purely with a view to achieving a strategic interim victory in people's struggle for the implementation of the right to FCE, the crisis of public schools and the problem of 'public versus private schools' may have to be temporarily separated. This would ensure that the private schools' lobby does not derail the entire process of legislating. To this end, legislations for FCE should be divided into two stages. First, any legislation for FCE should be limited to addressing issues pertaining to public schools, i.e., government schools. At a later stage, the first law should be supplemented by another that addresses private schools and the problems of inequality created by 'public versus private' schools.

The Indian Constitution has recognized the importance of education for social transformation and is committed to social justice. The Preamble determines, to secure liberty of thought, expression, belief, faith and worship and equality of status and opportunity and to promote amongst the people a feeling of fraternity, ensuring the dignity of the individual and the unity of the nation. Literacy forms the foundation stone for making the provision of equality of opportunity a reality. The objective specified in the Preamble contains the basic structure of the Constitution, which cannot be amended, and the preamble may be invoked to determine the ambit of Fundamental Rights and Directive Principles of State Policy. The provisions frequently cited from the Indian Constitution are as follows:

Article 38 of the Indian Constitution which aims at the state to secure a social order for the promotion of welfare of the people and reads as follows:

[1] Sunil Chandiramani, Right to Education: role of the private sector,march 2012,available at http://www.ey.com/Publication/vwLUAssets/EY-Right-to-education/$FILE/EY-Right-to-education.pdf

The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

Article 39 provides that the shall, in particular, direct its policy towards securing-

(a) that the citizen, men and women equally, have the right to an adequate means of livelihood;

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good.

(f) that children are given opportunities and facilities to develop in a healthy manner and conditions of freedom and dignity and the childhood and youth are protection against moral and material abandonment.

Article 41 enshrined in Part IV of the constitution aims to provide the right to work, to education and to public assistance in certain cases: It reads as follows: The state shall, within the limits of its economic capacity and development, make effective provisions for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

Article 45 aims at providing 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.

Article 46 aims at promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections. It reads as follows: The state shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

Article 21A[2] provides that "The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

Article 51A(k) The 86th amendment further inserted making it a fundamental duty on part of a "parent or guardian to provide opportunities for education to his child or, as the case may

[2] 86th amendment (2002) Act

be, ward between the age of six and fourteen years." Even while fundamental duties in the Constitution are not in the nature of public duties and are thus unenforceable in a court of law by way of a writ of *mandamus* or otherwise, they are guiding principlesand are directory in nature and can be promoted by constitutional means

Compulsory education vs. freedom of religion

On the issue of compulsion and legal exceptions, one needs to examine the conflict between compulsory education and right to freedom of religion[3]. At the very outset it is important to clarify that all human rights instruments re-affirm parental choice with respect to education in accordance with their religious and moral conviction.[4] Article 25 of the Constitution guarantees freedom of religion. However, this is subject to the other provisions in Part III of the Constitution, which deals with fundamental rights. This would imply that the fundamental right to freedom of religion [Article 25] is subject to the fundamental right to FCE [Article 21-A]. Three types of conflicts may arise between education and religion[5]:

● Direct conflict where parents may want to provide purely religious education to their children. For example, where a child is inducted into the monastic order of a particular religion at the age of six and thereafter is being given religious instruction; the obvious question is whether such a practice should be exempted as a religious/cultural right or whether it may be viewed as violation of a child's fundamental right to primary education. In cases of such direct conflict, it may be argued that since Article 25 of the Constitution, is subject to Article 21-A, no parent would be in a position to choose religious education to the exclusion of free and compulsory formal secular education.

● Conflict, which has plagued many countries in recent times, revolves around the limits of religious expression in schools. For example, bans on wearing hijabs, schools displaying pictures of gods and goddesses of a particular faith, prayers conducted in a particular faith and so on. In such cases, there may be conflicts between a student's right to education, right to religion and the secular nature of the State especially in public schools.

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[3] Niranjanaradhya and Aruna Kashyap, The *'Fundamentals'* of the Fundamental Right to Education in India,available at http://www.ncpcr.gov.in/Acts.

[4] Article 26(3), UDHR, Article 13(3) ICESCR.
See also Article 18(3) of the International Covenant on Civil and Political Rights, 1966. It states as follows:
"3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."

[5] Supra note 3

● Conflict occurs where religious beliefs are opposed to the curriculum of education in government schools. The following case illustrates the need for clarity on the right to content of education, as part of the guarantee to FCE. The issue of parental choice and content regulation was dealt with by the European Court of Human Rights in the case of Kjeldsen, Busk Madsen and Pedersen v. Denmark.[6] The applicants were parents of children who were going to State primary schools in Denmark. As per the Danish Constitution, all children have the right to FCE in State primary schools.[7] The State had introduced compulsory sex education in State primary schools as part of the curriculum. This change in the curriculum was introduced by a Bill passed by the Parliament. There were guidelines and safeguards against a) showing pornography, b) teachers giving sex education to pupils when they were alone, c) giving information on methods of sexual intercourse and d) using vulgar language while imparting sex education. The applicants, who were parents of school going children, gave several petitions to have their children exempted from sex education in the concerned State schools. However, these requests were not met and all of them withdrew their children from the said schools. The applicants argued that the Denmark Government had violated Article 2 of Protocol No. 1 to the European Convention on Human Rights which states "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions."[8] The State argued that Article 2 would cover only religious instruction and not all forms of instruction. The Court rejected this argument and held that any teaching should respect parental' religious and moral convictions. However, the Court also held that article 2 would be violated only if while imparting sex education, the teachers advocated sex at a particular age or particular type of sexual behaviour. Moreover, the parents still had the freedom to educate their children at home to instill their own religious convictions and beliefs and therefore, imparting sex education per se was not a violation of the abovementioned Article 2. The Danish Case assumes importance in the Indian context because there have been several controversies regarding curriculum in schools in the context of religion. For instance, the saffronisation of education by the Bharatiya Janata Party and Indian government's policy of 'modernisation of Madrasas (religious schools of Muslims)' pose

[6] E.H.R.R. 737 (Application no. 5095/71; 5920/72; 5926/72), judgment dated on 7 December 1976,available at http://www.echr.org/
[7] Article 76 of the Danish Constitution as cited in para 15, Pedersen Case, id. .
[8] Article 2 of Protocol No. 1 to the European Convention on Human Rights as cited in para 49, Pedersen Case, id.

serious questions of curricular entitlements and safeguards. While these two examples raise several complex questions regarding curriculum, it also has a common thread – that of a right to secular education of all children, irrespective of their religion. The saffronisation of education combines content regulation with the need for social accountability of the Government. A combination of a positive and a negative right to curriculum may adequately guard against problems such as saffronisation. Every child should have a right to a core non-negotiable content in education that is coupled with a duty of the State to refrain from arbitrarily interfering with such content. In defining the core minimum content of curriculum, it is advisable to prescribe the non-negotiable minimum in terms of competencies that need to be achieved at the end of each grade. The advantage of defining the core minimum in terms of competencies is that it gives States and teachers the freedom to contextualise learning within a specific local setting by creating localised syllabus. As regards the negative right, given the nature and increasing evidence of polarisation based on religion in India, it may be stated that right to education should at least include certain safeguards against propaganda-driven curriculum or syllabus. Therefore, guarding against arbitrary alteration or revision of existing curriculum would necessitate the creation of a systematic process and procedures for developing and revising syllabus at all levels – Centre, State, District and so on. Therefore, the negative right is procedural right against arbitrary State intervention, whereas the positive right is a substantive right to minimum competencies. The case of madrasas raises the crucial question of balancing the interests of religious minority institutions and the right of the child to secular education. Madrasas are largely autonomous and therefore decide upon their curriculum, hours of study, duration of study and so on.[9] The Central Government's policy of modernising madrasas by introducing subjects such as mathematics and science has been criticised as being violative of not only Madrasas' autonomy but also doing injustice to children's right to secular education and free and compulsory full-time formal education. Without getting into the merits and demerits of modernising madrasas, it may be argued that while minority groups have the right to manage their own educational institutions, the same cannot be considered as having fulfilled the requirement of Article 21-A unless

- Certain core minimum in terms of competencies is adhered to
- There are procedural safeguards against arbitrary alteration of syllabus.

Compulsion and medium of instruction

[9] A U Khan et al. 'To Kill the Mocking Bird: Madarsah System in India: Past, Present and Future', available at http://www.indiachinacentre.org/bazaarchintan/pdfs/madarsas.pdf,

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Another controversial issue in the Indian context would be medium of instruction and right to education. For example, while defining the nature of the relationship between the parent and the State and also defining the scope of compulsion, the law should address whether a child should be compelled to attend a government school where the medium of instruction is completely alien to the child. Alternatively, the law should examine whether the right to education includes the right to be educated in a manner that is not alien to the child, i.e., where language is not a barrier to education. This issue has been examined by the European Court of Human Rights in the Belgian Linguistic Case.[10] The applicants were French-speaking Belgian nationals who were aggrieved that the Belgian Government had not set up any government school in their District whose language of instruction was French. It is important to note that there were other French-medium schools, which were not within the same District. The Court held that the State was under no obligation to respect the linguistic preferences of parents. This is because Article 2 of Protocol No. 2 to the European Convention on Human Rights states that the State "…shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions." The Court held that the phrase 'religious and philosophical convictions' does not include linguistic preferences. The Court further held that non-provision of education in a particular language of instruction does not amountto discrimination based on language.[11]

Even though it may be argued that lack of schools in a particular medium of instruction does not amount to discrimination, given the extent of migration and diversity in language in the Indian context, the latter may be a genuine barrier to school education. For example, in Manipur, several Naga children are being educated in a language and curriculum that is completely alien to them. As a result of this, the Naga underground movement has issued threats to the Manipuri schools demanding that the Naga population in these schools be taught in a manner that is acceptable to the Nagas. This is illustrative of the fact that in order to make elementary education an effective right, the law should necessarily address the language issue in such a manner that it enables all children to attend schools.

Understanding the significance of education as a concurrent list entry in the constitution

Education transferred from state List to concurrent list

[10] Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium, Application no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, judgment dated 23 July 1968, available at http://www.echr.org/

[11] Belgian Linguistic Case, ibid

Having clearly demonstrated that the State laws lack uniformity and are also clearly violative of the Constitutional mandate, the question that needs to be examined is how can we ensure uniformity in the enforcement of standards in elementary education? In order to answer this, it is important to briefly look into the legislative powers that are vested with the Centre and State with respect to elementary education. The Constitution, which is based on the principle of federalism, adopts a three-fold distribution of legislative powers. Different subjects for legislation find mention in one of the three lists, namely the Union List (List I), State List (List II) and Concurrent List (List III) in the Seventh Schedule to the Constitution. While the Parliament and State Legislatures have exclusive legislative power over entries in the Union List and the State List respectively,[12] both the Parliament and the State Legislatures have the power to legislate over entries in the Concurrent List.[13] The three identified rationales[14]underlining the placement of certain entries in the Concurrent List are:

- To secure uniformity in the main principles of law
- To guide and encourage local efforts
- To provide remedies for mischief arising in the local sphere, but extending, or liable to extend beyond the boundaries of a single province.[15]

Education, which was originally in the State List, was subsequently transferred to the Concurrent List by means of a Constitutional amendment in 1976. Entry 25 of the Concurrent List reads as follows: "Education, including technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour."

Purpose and implication of the transfer of education from state list to concurrent list

The significance of the 1976 amendment and its implications are discussed in the National Education Policy of 1986 and 1992. The Policy clearly refers to the 'substantive, financial and administrative' implications of the amendment. The Policy states as follows: "…the

[12] Art. 246 of the Indian Constitution. The Parliament has power to legislate over subjects under certain circumstances

[13] id

[14] See Para 51, Joint Committee on Indian Constitutional Reforms (1934) at 30–31, as cited in quoted in Mr Justice E S Venkataramiah and P M Bakshi, Indian Federalism – A Comparative Stud "Experience has shown, both in India and elsewhere, that there are certain matters which cannot be allocated exclusively either to a central or to a Provincial legislature and for which, though it is often desirable that provincial legislation should make provision, it is equally necessary that the central legislature should also have a legislative jurisdiction enable it, in somes cases to secure uniformity in the main principles of law throughout the country, in others, to guide and encourage provincial effort and in others, again, to provide remedies for mischief arising in the provincial sphere, but extending, or liable to extend beyond the boundaries of a single province".

[15]P M Bakshi, 'A Background Paper Concurrent Powers of Legislation under List III of the Constitution', available at lawmin.nic.in/ncrwc/finalreport/v2b3–3.htm

Union Government would accept a larger responsibility to reinforce the national and integrative character of education, **to maintain quality and standards** (including those of the teaching profession at all levels), to study and monitor the educational requirements of the country as a whole in regard to manpower for development, to cater to the needs of research and advanced study, to look after the international aspects of education, culture and Human Resource Development and, in general, to promote excellence at all levels of the educational pyramid throughout the country."[16] Therefore, clearly, the Department of Education (Government of India) envisaged standard-setting by the Centre as one of the outcomes of this amendment.

Interestingly, such an argument was even made at the time of drafting the Constitution, where Mr Frank Anthony strongly advocated for Central control over elementary education in order to build a strong uniform cohesive policy on education:[17]

"…I feel that my proposal for education throughout the country should be controlled from the Centre will have to approval and endorsement of eminent educationists, men of vision and of men with statesmanship. What is happening today? On the threshold of independence (I cannot help saying it) certain provinces are running riot in the educational field. Provinces are implementing not only divergent but often directly opposing policies. And it is axiomatic that a uniform, synthesised, planned education system is the greatest force to ensure national solidarity and national integration. Equally, divergent, fissiparous, opposing educational policies will be the greatest force for disintegration and the disruption of this country."

It may be inferred from the above discussion that the 1976 transfer from the State List to the Concurrent List had a specific purpose and significance. It created an avenue for the Centre's intervention in the field of elementary education.

Countering the defeat of the constitutional amendment of 1976

Having emphasised upon the purpose of this amendment, a question arises as to the legal tools that are available to the Centre for standard-setting, through which basic norms on FCE can be enforced in States. The only legally enforceable tool of standard-setting that is available to the Centre is that of enacting a Central legislation. Since education is in the Concurrent List, State Legislatures too have complete power to legislate on education. This power of the States is subject to Article 254(2) of the Constitution, i.e., in the event that the

[16] See para 3.13, National Policy on Education of 1986 (As Modified in 1992), Department of Education, Ministry of Human Resource Development, Government of India, 1998, available http://www.education.nic.in/NatPol.asp

[17] See the views expressed by Mr Frank Anthony, Constitution Assembly Debates, Volume 7, Part 2-A, 5th November 1948, available at http://parliamentofindia.nic.in/ls/debates/vol7p2a.htm

States enact a law, the provisions of the State law should not conflict with those of the Central law on the same subject. Where there is no Central law on a particular subject in the Concurrent List, the State Legislature is competent to legislate in that field.[18] Till date there has been no Central law on elementary education. Jammu and Kashmir, Meghalaya, Madhya Pradesh, Andhra Pradesh, Punjab, Sikkim, Delhi, Rajasthan, Kerala, Tamil Nadu, Karnataka, Bihar, Himachal Pradesh and West Bengal have enacted laws on the subject of elementary education within their respective States.

Judicial interpretation has brought alive many an Article of the Constitution, which if read literally may seem to be a colourless Article. Of relevance to literacy, for instance, is the wide interpretation given to the words 'personal; liberty'. In *Francis Coralie Mulin* v. *Administrator, Union Territory of Delhi*[19], Justice Bhagwati observed:

> *"The fundamental right to life which is the most precious human right and which forms the arc of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person. We think that the right to life includes right to live, with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about, mixing and co-mingling with fellow human beings."*

Again, the Supreme Court in its judgment in the case of Bandhua Mukti Morcha, etc. vs. Union of India,[20] specifically referred to the earlier judgments made in this connection as under: *"In Maharashtra State Board of Secondary and Higher Education v. K.S. Gandhi JT*[21]*, right to education at the secondary stage was held to be a fundamental right. In J.P.Unnikrishnan V. State of Andhra Pradesh*[22]*, a constitution Bench had held education upto the age of 14 years to be a fundamental right…. It would be therefore incumbent upon the State to provide facilities and opportunity as enjoined under Article 39 (e) and (f) of the Constitution and to prevent exploitation of their childhood due to indigence and vagary."*

[18] State of Karnataka v. M Madappa, (1996) 9 SCC 284.
[19] 1981 AIR 746
[20] 1997 (5) SC 285
[21] 1991 (2) SC 296
[22] 1993 (1) SC 474

Prevailing Laws relating to RTE is adequate or not to deal with the existing problems and their resolution is main concern. Moreover, to give suggestions relating to the Right to education. Now most of the nations of the world have also accepted their obligation to provide at least free elementary education to their citizens. Article 26 of the Universal Declaration of Human Rights declares: "*Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and Professional education shall be generally available and higher education shall be equally accessible to all on the basis of merit".*

THE Supreme Court has recently declared that right to education was a fundamental right and that the charging of capitation fee was arbitrary, unfair and therefore violative of the fundamental right to equality contained in article 14 of the Constitution. Since the decision of the Supreme Court is the law of the land,[23] the above decision has created a storm in the educational world. The immediate reactions have been hostile to the decision. Usual comments such as that the court has gone too far or that the decision is impractical have already come in. While we share the court's agony over the immoral practice of capitation fee in the new medical and engineering colleges, some wider propositions enunciated therein need careful examination. The purpose of this article is to examine the three leading propositions, namely (1) that every person has the right to education as part of his right to live with dignity included in article 21 of the Constitution; (2) that the practice of capitation fee is violative of the guarantee of equality enshrined in article 14 of the Constitution; and (3) that the state is under a constitutional mandate to provide educational institutions at all levels for the benefit of its citizens.

(1) *Is there a right to education in every person? Is such right a fundamental right?*

The court has obviously made a mistake in holding that there exists anything like right to education. There is certainly a right to equality of opportunities of education. The right to education may exist as a human right to the extent of primary or basic education. Such right is an essential precondition to the exercise of other rights of citizenship such as right

to vote or right to freedom of speech and expression. Such a right could be included within the fold of article 21 which guarantees right to life and personal liberty which has been held by the Supreme Court to include the right to live with dignity.[24] However, until the decision of the court in *Mohini Jain* case, article 21 was not held to include the right to primary

[23] Article 141, Constitution of India.

[24] ***Francis Cora lie Mullin*** **v** ***Administrator, Union Territory of Delhi*** AIR 1981 SC 746; ***Bandhua Mukti Morchav Bihar,***
AIR 1984, SC802

education. The fact that there is a directive principle of state policy which clearly enjoins upon the state to provide free and compulsory primary education for all children below the age of 14[25] clearly shows that even the right to primary education was not included as a fundamental right. This writer has submitted elsewhere that right to primary education must become a fundamental right.[26] The fact that the literacy rate in India even by 1991 census has not gone beyond 50 per cent shows clearly that such a right does not exist. If it exists in law but does not exist in life, it would be worse. But even if we succeed in making the right to education up to the primary level an enforceable right, can there ever be a right to become a doctor or an engineer or a lawyer? One can at the most claim that one has a right to compete for getting into these professions and in order that such competition should be fair, there should be equal opportunities. One may or may not get admission to a medical or engineering college. This will depend upon one's competitive merit and financial capacity. A person has no right to be admitted to such an institution though he has a right not to be denied admission on the ground of his religion, race, caste, place of birth and, unless the institution is exclusively for men or women, sex.[27] Further he has a right not to be denied admission except on the ground of merit. The only exception the Constitution makes is in respect of persons belonging to socially and educationally backward classes of people for whom seats are reserved in such educational institutions.[28]

The danger of declaring even right to primary education as a fundamental right is the same as that involved in declaring the right to shelter or the right to health care as fundamental rights. Unless the state pursues social and economic policies under which such rights could be secured, their mere judicial articulation would only widen the gap between the normative order and the social reality. This would cause erosion of the credibility of the court as an institution and ultimately adversely affect its social legitimacy. However, there cannot be any right to education at all levels. There is no doubt freedom to obtain education which one may do even without going to any educational institution. The right to live with dignity has to be understood in terms of securing irreducible minimum entitlements which are essential prerequisites of such living with dignity. It could be invoked in support of the right to primary education whereby one acquires the capacity to learn and pursue higher education but not with respect to the right to higher education. Higher education is a resource which must be used economically. Everyone may not need it and may not possess the capacity for it.

[25] Article 45.
[26] S P Sathe, ***The Right to Know*** (1991,Tripathi) p 4.
[27] Article 15(1), 16(2), 29(2).
[28] Article 15(4) and Article 16(4).

It should be available to those who need it and who have the capacity to take it. Therefore, equal opportunities are enough. To say that the right to education is a fundamental right would make the right so impracticable that it would lose all its force.

(2) *Capitation fee—is it violative of the right to equality?*

Capitation fees are charged by private educational institutions. These institutions cannot be called instrumentalities or agencies of the state within the meaning of that word as used in article 12 of the Constitution. They do not get any government grants. The government merely gives them affiliation to a university. Such affiliation gives them recognition. It is true that when such capitation fee colleges are opened, they provide additional opportunities to rich students as against the poor. But such disparity of opportunities is not only in respect of medical and engineering colleges. Our whole education system is based on segregation between the rich and the poor.

There are expensive schools in which only the rich people can afford to send their children. Since inequality is pervading all social spheres, education cannot become an island of equality. Mohini Jain, the petitioner in this case, was admitted to the medical college in Karnataka but she could not take advantage of the admission as she could not pay Rs 60,000 per year as fee. In fact fees chargeable in our state-run medical and engineering colleges are pitifully small and education of almost every student is subsidised by the state. The fee structure in our universities must be rationalised. But if every student were to pay for his education, very few would be able to take professional education. Although there is a case for upward revision of the fees in higher education, it must be understood that such upward revision has limits and in spite of it state support or subsidy for education cannot be dispensed with. The court objected to Rs 60,000 as fee because it was rather high. In the court's opinion it was a colourable device for capitation fee. The economics of higher education will have to be carefully worked out. Thosewho wish to start a medical college or an engineering college must collect enough corpus funds before their proposal for such an institution is considered by the government or the university. The institutions must also mobilise funds from alumni on a regular basis. If the fees are high, the government must provide for enough number of merit scholarships and loan scholarships to enable the poor but meritorious students, including those from the socially and educationally backward classes, to study these courses. The fee structure will depend upon the expenses that are required to be incurred for the course. They will be higher for courses in medicine, engineering and other science or technological disciplines than for courses in humanities and social sciences. The

policy of allowing private educational institutions to charge inordinately higher fees and even capitation fee means total abandonment by the state of its responsibility for higher education. The opening up of such private educational institutions which seek to trade in professional education is harmful to the nation in many ways. It doubtless aggravates social and economic inequality because the rich have greater access to professional education than the poor. Medicine and engineering are two professions most sought after by students in India because they are believed to offer sizeable earnings and high social status. If access to such professions is available on merit, respect for meritocracy is enhanced. On the other hand, if one can have access to these professions on money power, it would lead to further denigration of merit as a value. This would also mar upward social mobility and perpetuate the hold of the same elite on social structure. This would lead to social stagnation and produce social discontent which could ultimately jeopardise social stability. The state must therefore intervene to prevent this. This is usually the idea behind anti-capitation fee laws. The Constitution guarantees equality before the law and equal protection of the law. Although it does not forbid discrimination on the ground of wealth, as it forbids discrimination on the ground of religion, caste, race, sex, etc, wealth can be a criterion of discrimination only to give advantage to the poor. The Income tax Act imposes greater tax liability on the rich. The poor are given concessions in fees in education. -These are examples of discrimination on the ground of wealth or income. But any discrimination in favour of the rich and against the poor would not meet the test of reasonable classification which has to be the basis of differential treatment. After all, the Constitution clearly says that the state shall direct its policy towards securing "that the ownership and control of the material resources of the community are so distributed as best to subserve the common good" and that "the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment".[29] Justice Kuldip Singh was therefore right in holding that the capitation fee charged with the connivance or permission of the state amounts to violation of the right to equality. It is true that there are institutions which charge high fees even for school education and they act as a means of segregation between the rich and the poor students. Since the state in India has not brought the system of neighbourhood schools, such segregation is bound to prevail. Since such educational institutions do not receive any state grant, they could be treated as being outside the purview of the constitutional guarantee of equality. But even they should not be allowed to charge capitation fee. Higher fee has to be

[29] Article 39, clauses (b) and (c)of Indian constitution.

distinguished from capitation fee. But professional colleges in medicine and engineering which provide career opportunities and entrance to professions which are supposed to render valuable social services cannot be left to the commercial lust of a few educational entrepreneurs. Access to professional education determines the future distribution of material resources of the community. We must make a distinction between privatisation and commercialisation. Private effort in education has been the mainstay of our educational enterprise. It has had a long tradition beginning with Tilak and Agarkar and later followed by Maharshi Karve, Karmaveer Bhaurao Patil and B R Ambedkar. They started educational institutions with the aim of making education accessible to large number of people and particularly to those who had been denied it for generations. The new entrepreneurs are setting up institutions to take advantage of the present demand for professional education in medicine or engineering which has become a craze with upper middle class boys and girls. This has become an industry which requires minimum investment and assures enormous profits without any risk. It is bad not only because it further accentuates social inequality but also because it results in fall of educational standards and would ultimately lead to decline of professional standards also.

(3) *Must the state provide educational institutions at all levels?*

We are grateful to the court for emphasising the duty of the state to provide educational institutions at all levels. It does not mean that all such institutions should be run by the state. The state may allow private institutions to provide education but such institutions have to be subject to control of the state and have to conform to what the Constitution of India enjoins. There cannot be *laissez-faire* in education. The state must find resources for education. In fact the Plan allocation for education has always been meagre. The state cannot plead that because it has to provide for primary education it would now withdraw from higher education and allow private institutions to trade in it. Education, health and shelter need to be high priority subjects for state intervention. If we have not abandoned social justice as aim of our polity, the state cannot say that because it has no money it will allow education to suffer. If primary education is required for enabling people to live with dignity and therefore must be made a fundamental right, higher education will provide competent- manpower for performing various services for society. Society requires able administrators, efficient professionals like doctors, engineers, chartered accountants and lawyers, competent technologists and scientists and various social scientists and scholars of humanities who would maintain the high cultural level of societal life. The money spent on higher education is a good investment in human

development. No civilised state, much less a democratic state, would excuse itself from playing a pivotal role in providing excellence in education. The proper remedy is to find out how best its resources could be used for promoting excellence and how to avoid waste The system of education needs to be made more accountable. Where education is a prerequisite for practising a profession and the society grants monopoly to such licence-holders to practise that profession, it must decide how many and who should be admitted to the profession. The entitlement to practise must go by who deserves rather than who can afford. In deciding who deserves, social justice considerations are bound to come in but in such a way as not to dilute excellence. There is criticism in some circles against the Supreme Court's decision. We have Pointed out that the Court's use of article 21 for articulating the right to education could be faulted on doctrinal as well as practical considerations. However, the court's indictment of the capitation fee system has not come a day too soon. If some people think that the court has gone too far or has indulged in judicial adventurism, we could only say that to them the Constitution of India itself might sound "strange and irrelevant.