

ACCESSING EDUCATION: LEGAL PERSPECTIVES

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BY

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DECLARATION

I do hereby declare that this work, “Accessing Education: Legal Perspectives” has been originally carried out by me under the guidance and supervision of Dr. G. Sadasivan Nair, Professor, School of Legal Studies, Cochin University of Science and Technology. This thesis has not been submitted either in part, or in whole, for any degree at any university.

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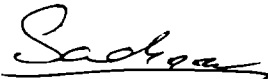
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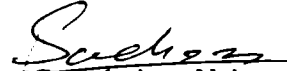
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This is to certify that the important research findings included in the thesis, "Accessing Education: Legal Perspectives" have been presented in a research seminar at the School of Legal Studies, Cochin University of Science and Technology on 2nd January, 2009.

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Anil R. Nair

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Abbreviations

A.P.	Andhra Pradesh
Admn.	Administration
AHRC	Asian Human Rights Commission
AICTE	All India Council for Technical Education
AIDS	Acquired Immune Deficiency Syndrome
AIIMS	All India Institute of Medical Sciences
AIR	All India Reporter
All.	Allahabad
Assn.	Association
CABE	Central Advisory Board of Education
CAD	Constituent Assembly Debates
CBSE	Central Board of Secondary Education
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CIA	Central Intelligence Agency
CJ	Chief Justice
CSO	Central Statistical Organisation
Del.	Delhi
DEO	District Educational Officer
DFID	Department For International Development of United Kingdom
DPEP	District Primary Education Programme
Dr.	Doctor
DRSC	Departmentally Related Standing Committees
EC	European Community
ed.	Edition
Ed.	Editor
Ed.s.	Editors
EEP	Education Exchange Programme
EFA	Education For All
FDI	Foreign Direct Investment
FIPB	Foreign Investment Promotion Board
GATS	General Agreement on Trade in Services
GDP	Gross Domestic Product
GER	Gross Enrolment Ratio
GNP	Gross National Product
GO	Government Order
HDI	Human Development Index
HIV	Human Immunodeficiency Virus
HSA	High School Assistant
ICSE	Indian Certificate of Secondary Education
IJIL	Indian Journal of International Law
ILO	International Labour Organisation
ILR	Indian Law Reports
ISCED	International Standard Classification of Education
J	Judge
JILI	Journal of Indian Law Institute
JILT	Journal of Indian Legal Thought
JJ	Judges
JT	Judgement Today

M.P.	Madhya Pradesh
MHRD	Ministry of Human Resource Development
MOU	Memorandum of Understanding
NAR	Net Attendance Ratio
NCERT	National Council of Educational Research and Training
NCPCR	National Commission for Protection of Child Rights
NCRWC	National Commission for the Review of the Working of the Constitution
NET	National Eligibility Test
NFE	Non Formal Education
NGO	Non Governmental Organisation
NMCME	National Monitoring Committee on Minority Education
No.	Number
NOC	No Objection Certificate
NPE	National Policy on Education
NRI	Non Resident Indian
NSS	National Sample Survey
OBC	Other Backward Classes
OECD	Organisation for Economic Co-operation and Development
p	Page
P & H	Punjab and Haryana
PG	Post Graduate
PGMEE	Post Graduate Medical Entrance Examination
Ph D	Doctor of Philosophy
POA	Programme Of Action
pp	Particular Page(s)
PPP	Purchasing Power Parity
Punj LR	Punjab Law Reports
R & D	Research And Development
SC	Scheduled Caste
SC	Supreme Court
SCC	Supreme Court Cases
SIDA	Swedish International Development Cooperation Agency
Sl.	Serial
ST	Scheduled Tribe
U.P.	Uttar Pradesh
UG	Under Graduate
UGC	University Grants Commission
UN	United Nations
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Social and Cultural Organisation
UNFPA	United Nations Population Fund
UNICEF	United Nations Children's Fund
UNO	United Nations Organisation
UT	Union Territory
WP(C)	Writ Petition (Civil)

Preface

The importance of education for the upliftment of the individual is universally acknowledged. It is a recognised fundamental human right. Education is an important tool for empowerment envisaged under the Constitution of India.

Universal access to education has been beset with problems. Certain fundamental issues are as yet unresolved on the question of universal access to education. Issues like the age of the pupil, the extent of fee, subsidies, choice of schools, language of education, etc are faced at the basic level. Higher education revolves around the questions of affordability, choice of courses, ability to impart education through institutions of choice, minority rights, reservations, etc.

International norms in this regard lay down the idealistic notions of the right to education. Ensuring this right to education depends upon the policy followed by different countries. Increased integration of the global economy has its own ramifications on the policies followed by different nations. India is not insulated in this global churning of political ideologies. Political philosophies that

were taken for granted at the time of independence no longer holds true in the India of the millennium. Providing education was earlier the preserve of the charitably minded. The socialistic philosophy of the government was reflected in its educational policy laid for an earlier era. Commercialisation of education is now a judiciously recognised reality though the courts have cautioned against profiteering. How does increasing reliance on private providers of education fare in ensuring access to education as a fundamental human right?

Access to education becomes an issue of equity with diverse claims from stakeholders justifying their rights based on perceptions of equity – both social and individual. In spite of the phenomenal increase since independence in the number of institutions imparting education and the number of beneficiaries, India being the second largest nation in terms of population of the young finds its resources spread thin in meeting the demand for education. Quality education comes at a premium in India whether it is provided in the private or in the public sector. Education seemingly enables the individuals, singly and collectively, to overcome the social barriers perpetuated by the caste system. Taken together, these unleash grave demands

on formulating equitable standards. It is in this context that identifying the deserving for favourable consideration becomes all the more important.

In this sea of claims and counter-claims, this thesis tries to identify the issues involved on the question of equitable access to education on the basis of the factual position in the field of education. Identifying the issues correctly provides the necessary impetus for framing the questions that provide meaningful answers. The objective of this research is to help formulate the policy guidelines governing the principles of equity that is needed to ensure universal access to education in India.

The thesis relies on data from a variety of primary and secondary sources. The primary sources include International Declarations, Conventions, and Protocols, the Constitution of India, various statutes dealing with educational rights, rights affecting children, women, weaker sections, etc. The secondary sources relied on include data available in the public domain from the census department and other government departments, information made available to Members of Parliament in response to questions put forth in the Houses of the Parliament, judicial decisions of the High

Courts of the States and the Supreme Court of India, reports of various Commissions and Committees that have addressed specific issues involving the right to education, research studies undertaken by other authors, etc. An empirical study for this topic was not attempted since it is unviable given that the issues involved are theoretical policy considerations based on the rights mentioned in various sources.

The thesis is divided into ten chapters. The first chapter on 'Education in India - Historical Evolution' traces the historical evolution of education in India from being a preserve of the few to the sustenance of the masses. The British policy on Indian education is also placed in perspective here. The second chapter on 'The State and Education' deals with the significant national policies in the field of education in post independence India. The third chapter looks into the role played by the Central Advisory Board of Education, the contributions of the various Commissions and Committees in the field and aspects of financing education. The fourth chapter titled 'Normative Right to Education' assesses the right to education as norms guaranteed under various national and international documents. The fifth chapter on 'Empowerment and

Education’ analyses education related issues of empowerment, equity, and the Kerala model of educational empowerment. The sixth chapter on ‘Access to Education’ enumerates and analyses the various barriers to accessing education. The seventh and eighth chapters analyses judgements of the Supreme Court on fundamental issues concerning education. The ninth chapter on ‘Judiciary and Social Equity’ scrutinises judicial dicta on balancing of social interests in education and related fields. The chapter identifies the judicial philosophy on the identification and interpretation of principles of equity in an individual and social context. The concluding chapter summarises the issues discussed earlier to provide recommendations and suggestions that could help to frame a sound policy for improving equitable access to education in India.

CHAPTER I

EDUCATION IN INDIA - HISTORICAL EVOLUTION

THE CONCEPTUAL ROLE OF EDUCATION

It has been stated by Redden that as a processual endeavour education is the deliberate and systematic influence exerted by the mature person upon the immature through instruction, discipline and harmonious development of physical, intellectual, aesthetic, social and spiritual power of the human being, according to individual and social needs and directed towards the union of the individual with his creator as the final end.¹

From the functional angle, education, a biological and sociological necessity, is the active aspect and the practical means of achieving the ideals of life. To Rousseau, the central aim of education is the autonomous development of the individual.² Sir Percy Nunn, agrees that there can never be any other aim of education, which can have universal acceptance.³ Education though

¹ John D. Redden and Francis A. Ryan, *A Catholic Philosophy of Education*, Bruce, Milwaukee (1956).

² Jean-Jacques Rousseau, *Emile*, translated by Barbara Foxley, <http://www.gutenberg.org/dirs/etext04/emile10.zip> [internet on 7th July, 2006.]

³ Sir Percy Nunn, *Education – Its Data and First Principles*, 3rd ed., Edward Arnold & Co., London (1943). He maintains that the primary aim of all educational effort should be to help boys and girls to achieve the highest degree of individual development of which they are capable.

an individual achievement is also a social process.⁴

From the society's point of view, a socially efficient individual implies the fullest development of his individuality within the means and bounds of the society so that it can utilise the individual's development for the promotion of its welfare. Education was accepted as a basic need in every civilised society from time immemorial. Rig Veda says that education is the source of all illumination.⁵ The Bhagvat Gita considers nothing on earth to be more purifying than knowledge.⁶

⁴ John Dewey, "Education is a social process. Education is growth. Education is, not a preparation for life; education is life itself." Oana-Magda Aruxandei, "The Role of Education in Creating a Knowledge-Based Economy - Comparison between European Provisions and Romanian Transformations", http://www.maccess.nl/files/2004_aruxandei_2035800.pdf [internet accessed on 10th December, 2008.] "Even if educating or being educated are based essentially on personal efforts, more and more, *education* surpasses the limits of individual involvement; today it is a societal matter, in terms of needs, processes and outcomes."

⁵ http://www.hinduwisdom.info/Education_in_Ancient_India.htm [internet accessed on 12th December, 2008.] "From the Vedic age downwards the central conception of education of the Indians has been that it is a source of illumination giving us a correct lead in the various spheres of life. Knowledge, says one thinker, is the third eye of man, which gives him insight into all affairs and teaches him how to act. (Subhishitaratnasandhoha, p. 194)." <http://etawah.nic.in/gaz/15.htm> [internet accessed on 12th December, 2008.] "From the Vedic age downwards the central conception of education has been that it is a source of illumination, giving us a correct lead in the various spheres of life. Infusion of a spirit of piety and religiousness, formation of character, development of personality, incucation of civic and social duties, promotion of social efficiency and spirit of national character may be described as the chief aims and ideals of ancient Indian education."

⁶ Chapter 4, verse 38 of the Srimad Bhagavad-Gita. <http://www.bhagavad-gita.org/Gita/verse-04-38.html> [internet accessed on 12th December, 2008.] The translation runs thus: "In this world there is nothing that exists as purifying in comparison with transcendental knowledge. One perfected by the science of uniting the

True education generates attitudes and socially useful behaviour patterns which contribute to mutual goodwill, tolerance, international understanding, cooperation and amity. It, in essence, is a potent means to dispel the darkness from within and to usher in sweetness and light all around. Education indicates the degree of civilisation attained by a society.⁷

To Plato, education is the capacity to feel pleasure and pain at the right moment and that it develops in the body and soul of the pupil all the beauty and all the perfection he is capable of.⁸ To John Locke, it is the creation of a sound mind in a sound body.⁹ Pestalozzi considers education as a natural, harmonious and progressive development of man's innate powers.¹⁰ To John Dewey,

individual consciousness with the Ultimate Consciousness automatically attains that knowledge in the self in course of time."

⁷ Dr. Shashi Nath Saraswati, *Right to Equality in the Indian Constitution – A Gandhian Perspective*, Concept Publishing Company, New Delhi, (2002), p. 356. "Education is the corner-stone of any civilised society and is the beacon-light of its rich and varied culture."

⁸ Rupert Clendon Lodge and Solomon Frank, *Plato's Theory of Education*, first published, 1947, Routledge, reprint, London (2000), p. 66. "The particular training in respect of pleasure and pain, which leads you to hate and love what you ought to hate and love, is called "education"."

⁹ John Locke, *Some Thoughts Concerning Education*, first published, 1914, NuVision Publications, LLC, Sioux Falls, South Dakota, USA (2007), p. 11.

¹⁰ Johann Heinrich Pestalozzi and Lucy E. Holland, *How Gertrude Teaches Her Children*, Kessinger Publishing, LLC, Montana (2008).

George Eduard Biber, *Henry Pestalozzi and his Plan of Education*, John Souter, London (1831), p. 174. "Whatever, therefore, man may attempt to do by his tuition, he can, at best, do no more than assist the child's nature in the effort which it makes for its own development; and to do this, so that the impressions made upon the child may always be

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education is the development of all those capacities in the individual, which enable him to control his environment and fulfil his possibilities.¹¹

Education is an end in itself as also a springboard to a vast world of opportunities and ideas. An educated population is instrumental in achieving higher standards of living, health and life expectancy. Female education, in particular, has been known to be the single decisive and progressive factor that can trigger a demographic transition.¹² Education empowers and through empowerment effects larger social progress.¹³ Education is expected to inculcate values and is meant to contribute to the all-round development of a person and does not merely mean specialist

commensurate to, and in harmony with, the measure and character of the powers already unfolded in him, is the great secret of education.”

¹¹ John Dewey, *Democracy and Education: An Introduction to the Philosophy of Education*, first published, 1920, NuVision Publications, LLC, Sioux Falls, South Dakota, USA (2007), p.43. “Education is not infrequently defined as consisting in the acquisition of those habits that effect an adjustment of an individual and his environment.”

¹² <http://www.ncbi.nlm.nih.gov/pubmed/7308537> [internet accessed on 13th December, 2008.] “...advancement in female education can be expected to influence fertility behaviour even without simultaneous changes in other factors such as increasing opportunity for participation in the paid labour force in the modern sector.”

¹³ See Kirit S. Parikh, *India Development Report 1999-2000*, Indira Gandhi Institute of Development Research, Oxford University Press, New Delhi (1999). See also Ramesh, “Compulsory Education: A Distant Dream to be Achieved”, [2000] C.U.L.R. 333.

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or professional training.¹⁴

Education, as the ability to read, write and acquire knowledge, is one of the three dimensions of well being recognised for the preparation of the Human Development Index by the UNDP.¹⁵ Apart from its intrinsic value, today, education is among the most important means for individuals to improve personal endowments, build capability levels, overcome constraints and in the process enlarge their available set of opportunities and choices for a sustained improvement in well-being. It is a critical means to empowerment and to bring about a social, economic and political inclusion of the marginalized segments in the mainstream of society.¹⁶

From the perspective of Indian Constitutional law, the “right

¹⁴ Gurveen Kaur, “Rethinking Schooling”, <http://www.india-seminar.com/2004/536/536%20gurveen%20kaur.htm> [internet accessed on 5th September, 2007]. “...Education is a holistic process and not only a training of the intellect. It is development of moral, social, aesthetic as well as rational capacity.”

¹⁵ *National Human Development Report 2001*, Planning Commission, Government of India, New Delhi (2002), p. 9. “For over a decade the UNDP, through its global Human Development Reports (HDRs), has been in the forefront of an effort to generate, in the contemporary development discourse, a policy focus on the broader attributes of human well-being. It has defined human development as a process of enlarging people’s choices, as well as raising the level of well-being. In principle, these choices can be infinite and vary over time and space. From among these, the HDRs identify the choice to lead a long and healthy life; the choice to acquire knowledge and be educated; and to have access to resources needed for a decent level of living as the three most critical and socially valuable.”

¹⁶ *National Human Development Report 2001*, Planning Commission, Government of India, New Delhi (2002), p. 10.

to life” is the compendious expression for all those rights, which are basic to the dignified enjoyment of life.¹⁷ It extends to the full range of conduct that the individual is free to pursue. The right to education flows directly from the right to life since the right to life as guaranteed under Article 21 of the Constitution and which is inherent in the dignity of the individual cannot be assured without a right to education. Taking this view the Supreme Court had opined that the State is under an *obligation* to make endeavours to provide educational facilities at all levels to its citizens.¹⁸

From the theoretical appreciation of the need for education to the practical aspects of provisioning for it, an understanding of the history of education in India is a necessity to comprehend its evolution during the course of previous centuries and its culmination in the present form. India has an independent history of education that contributed to the progress of mankind in a bye-gone era.

A HISTORICAL PERSPECTIVE ON EDUCATION IN INDIA

The decline of the Indian civilisation has been attributed to

¹⁷ *Mohini Jain v. State of Karnataka*, (1992) 3 SCC 666.

¹⁸ *Mohini Jain (Miss) v. State of Karnataka*, (1992) 3 SCC 666. This proposition was later overruled in *Unni Krishnan, J.P. v. State of A.P.*, (1993) 1 SCC 645.

its neglect of education brought about by keeping it a privilege of the few and denying it to the larger sections of the people thus jeopardising the prospect of liberal democracy and a just social order.¹⁹

The reasons for the decline of that civilisation, if understood correctly, could perhaps provide the solutions required to face the problems faced by the educational system currently prevailing in the country.

History books provide us with a glimpse of an ancient Indian educational system, which conceivably encouraged learning as an end in itself. With the *Guru Kula* of the Vedic ages,²⁰ the teacher student relationship enjoyed a rapport seen unparalleled these days in the lower stages of education but whose remnants can be traced in frontier areas of research where an almost symbiotic attachment exists between the guide and the scholar.

¹⁹ Dr. N.R. Madhava Menon, "Education, Equality and Social Justice", in *Dr. B.R. Ambedkar and the Indian Constitution*, Dr. S.G. Bhat, (Ed.), Journal Society, Dr. Ambedkar Government Law College, Pondicherry (2001), p. 1 at pp. 2.

²⁰ The system of education, prevalent during the Vedic ages necessitated the stay of the students at the residence of the teacher doing the household chores even while being taught orally till the Guru or teacher felt that the student had learnt enough. Starting at a young age, this helped the moulding of the pupil's character as desired by the Guru and what was taught to him would be according to his ability to use it for the common good. The Guru's Ashram as it was called grew in course of time to become full-fledged *Gurukuls* where more than one teacher taught.

The earliest historical finds in India denoting organised urban life is traced to the Indus Valley Civilisation or the Harappan Culture.

Indus Civilisation

With no written records of these times except the as yet undeciphered seals, not much is known about the Indus Civilisation save those that can be conjectured based on archaeological evidence. Radio-carbon dating of the archaeological evidence places this civilisation to a period before B.C. 1900.²¹ The various works of art and sculpture unearthed from the archaeological sites reveal the existence of an advanced and developed civilisation. The use of cotton fabric, metal utensils, scientific instruments, evidence of fortified walls, a centralised administration, dockyard, etc. obviously points to a civilisation where education must have been an integral part of life. Moreover, it denotes a system that promoted specialisation in avocations and hence points towards a formal system of education and standardisation in the area of craftsmanship. With a language and script that still eludes

²¹ <http://www.archaeologyonline.net/artifacts/harappa-mohenjodaro.html> [internet accessed on 16th February, 2010].

cognition, the pictographic writings of the Indus people shrouds the realities of their daily life and along with it their educational systems.²²

This period of urban life is seen gradually replaced by the rural, nomadic life of the Vedic period.

Early and Later Vedic Periods

Vedic ages were characterised by the *Guru Kula* system of education.²³ During the early Vedic period (before 1500 B.C.), the studies were based on Vedic literature which involved elementary geometry, astronomy and rituals associated with the Vedas.²⁴ The later Vedic period (1500-1000 B.C.) saw classification of Vedas into four²⁵ and consequent specialisation in the various aspects of

²² Romila Thapar, *Early India: From the Origins to AD 1300*, University of California Press, California (2004), pp. 79-84.

²³ Romila Thapar, *Early India: From the Origins to AD 1300*, University of California Press, California (2004), p. 126.

²⁴ The word *Veda* has at its root *Ved*, meaning 'knowledge': the *Vedas* are, hence books of wisdom. The *Brahmanas*, the *Upanishads*, the *Puranas*, the *Ramayana* and the *Mahabharatha* are the other sacred texts of the Aryans. Collectively known as the Vedic literature, these are the main source of information about the Aryans. <http://www.eaisai.com/baba/docs/veda.html> [internet accessed on January 4, 2006], <http://www.wsu.edu:8080/~dee/ANCINDIA/ARYANS.HTM> [internet accessed on January 4, 2006].

²⁵ The *Rig*, *Sama*, *Yajur* and *Atharva Veda*. The *Rig Veda* is the oldest of the *Vedas* having as its core the *Samhita* or a collection of 1028 hymns addressed to deities. The *Yajur Veda* contains hymns for *yajnas* (sacrifices) and explains the rituals associated with such sacrifices. The *Sama Veda* contains hymns giving a detailed account of rites associated with the *Soma* sacrifice and was meant to be a textbook for the priests. The *Atharva Veda* differs starkly from the other *Vedas*, is written at a much later date and is

knowledge they represented. There is a view that women enjoyed equal educational rights during this period, though later these came under restrictions influenced by the orthodoxy.²⁶

During these times the education of the child usually began in his fifth year. In rich families this was entrusted to tutors while the poor children were taught in village schools. Real education of this period meant Vedic studies, which commenced with the rite of *upanayana*²⁷ performed at the age of eight for Brahmin boys, at the age of eleven in the case of the Kshatriya and twelve in the case of the Vysya.²⁸ As followers of the caste system, the Vedic people allowed only the three higher *varnas* to study the scriptures.²⁹

Generally the position of women was secondary and deteriorated during the later Vedic period. Though girls were taught

mostly magical in content. <http://religion-cults.com/Eastern/Hinduism/hindu3.htm> [internet accessed on 4th January, 2006].

²⁶ See R.C. Mishra, *Women in India: Towards Gender Equality*, Authorspress, New Delhi (2006).

²⁷ A rite consisting of investiture of the boy with a sacred thread or *Yajnopavita* to be worn throughout life. <http://www.kamat.com/indica/culture/sub-cultures/sacred-thread.htm> [internet accessed on 4th January, 2006]. By Upanayana, the teacher, "holding the pupil within him as in a womb, impregnates him with his spirit, and delivers him in a new birth." The pupil is then known as Dvija, "born afresh" in a new existence, "twice born" (Satapatha Brahmana). <http://www.sciforums.com/Education-System-In-Ancient-India-t-16676.html> [internet accessed on 10th December, 2008.]

²⁸ Student life was the period of *brahmacharya*, indicating that it is a way of life or a system of practices.

²⁹ Romila Thapar, *Early India: From the Origins to AD 1300*, University of California Press, California (2004), p. 126.

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to sing and dance only, even during this period there are instances of women like Ghosa, Aditi, Apala, Atreyi, Indrani, Urvashi, Gargi and Maitreyi who maintained a superior position of respect due to their scholarship.³⁰

Age of the Upanishads, Buddhism and Jainism

The age of the Upanishads (1000 B.C. to 1 A.D.) saw the development of the art of writing. The curriculum included the study of grammar, medicine, shipbuilding, sculpture, etc. apart from the Vedas, fine arts, administrative training and military art.

The merchant and professional communities facilitated production and exchange of goods and services through the institution of *shreni*.³¹ The guilds also provided education although 'formal' education remained largely in the hands of the Brahmans and the Monks of Buddhist and other monasteries.³²

In later times, from the sixth century B.C., the growth of

³⁰ K.C. Singhal and Roshan Gupta, *The Ancient History of India, Vedic Period: A New Interpretation*, Atlantic Publishers & Distributors, New Delhi (2003), p. 147.

³¹ Romila Thapar, *The Penguin History of Early India: From the Origins to AD 1300*, Penguin Books, New Delhi, (2002), p. 248. "...the *shreni* was not identical with the European guild. The *shreni* was more in the nature of a group of professionals, merchants or artisans who worked in association, although it had some characteristics similar to the guild."

³² Romila Thapar, *The Penguin History of Early India: From the Origins to AD 1300*, Penguin Books, New Delhi, (2002), p. 257.

Buddhism provided some boost to female education as is seen from *Therigatha* or an anthology of verses composed by 100 nuns. Buddhism was an attempt at reforming the unequal social order of the Vedic times.³³

South India saw more pronounced influence of Jainism rather than North India with education provided by them pervading the urban sphere during the times of the early Pallavas. They developed centres for advanced instruction in religion near Madurai, Kanchipuram and at Shravan Belagola.³⁴

Universities and Other Centres of Learning

Renowned *Guru Kulas* often became centres of learning creating around them villages and towns. Though not in the stature or proportion of a modern university, these centres of learning nevertheless gained world recognition. Takshashila was one such

³³ Ian Mabbett, "Buddhism and Freedom" in *Asian Freedoms*, David Kelly & Anthony Reid, Ed., Cambridge University Press, Cambridge (1998), p. 19 at pp. 27, "However quickly Buddhism may have found a place within the structure of rural or urban society, it would be a mistake to overlook the continuing importance of its canonical values of a permanent reminder of the original message, inspiring movements of reform in later centuries. The Buddha's disciples deliberately rejected the claims and duties of life in society and all the restrictions imposed by inherited position; to go forth into such a life was in a sense a radical assertion of personal freedom from the bonds of family and social status." and at pp. 32, "There has always been material in the Buddhist teaching capable of validating the aspirations of those who sought freedom from perceived oppression."

³⁴ Romila Thapar, *The Penguin History of Early India: From the Origins to AD 1300*, Penguin Books, New Delhi, (2002), p. 344.

centre of learning of the *Vedic* age and was in existence even in the 7th century B.C. Another was Nalanda, which was of a later period and of much greater proportions employing teachers in the thousands. With no caste restrictions on the subjects taught, students of varied hue studied here. Subjects taught included medicine and surgery, commerce and accountancy, military arts and administration, along with the *Vedas*, philosophy, astronomy, magic, etc.

Famous ancient Indian universities³⁵ include those at Valabhi, Vikramashila, Ujjain, Sarnath and Ajanta apart from the ones at Takshashila and Nalanda. These universities are known to have specialised in particular fields. Takshashila University specialised in the science of Medicine, Ujjain in Astronomy, Sarnath in Religion, Ajanta in Art and Architecture, etc. Nalanda assumed great importance as a centre for all subjects and achieved pre-eminence during the reign of Harshavardhana in the seventh century A.D.

³⁵ See Sailendra Nath Sen, *Ancient Indian History and Civilization*, 2nd ed., New Age International, New Delhi (1999).

Pre-Mughal Islamic Period

Muslim rule made a new impact on the traditional system of education during this period. Since religion demanded of Muslims knowledge of the Holy Koran, it was considered imperative for Muslim children to learn at least those verses from the Koran needed for his daily prayer. The children were taught reading, writing and simple arithmetic along with the Koranic verses in primary schools attached to Mosques. Higher learning in arts, crafts, medicine, commerce, architecture, etc. developed mainly around royal patronage.³⁶

This system of patronage by the royalty and nobility continued during the succeeding rule of the Mughals.

Mughal Period

The Mughal period saw a consolidation of Persian as the royal language. The aim of education during these times was a blend of the sacred with the secular. Akbar established *Madrasas* even for Hindus, which imparted instructions in Hindu religion,

³⁶ See M.H. Syed, *History of Delhi Sultanate*, Anmol Publications, New Delhi (2004).

philosophy, literature and Persian.³⁷

Lower classes in general and women in particular were never imparted any kind of formal education in institutionalised enterprises, although, in exceptional cases, the womenfolk of royalty and upper classes were taught in private.³⁸

The decline of the Mughals paved way for the rise of the English and they left their stamp on the education system in the country.

Before the Charter Act, 1813

When the East India Company was consolidating its position in India through acquisition of territory, the Hindus and the Muslims had their own educational institutions. Hindu Pundits provided education for the Hindus in *Pathashalas* in Sanskrit and Muslim Maulavis taught theology in Persian in *Maqtabas* and *Madrasas* attached to mosques.³⁹ The East India Company on acquisition of territories did not interfere with the existing system probably on account of their being intrinsically linked with the major religions in

³⁷ Tara Patel, *Development of Education Among Tribal Women*, Mittal Publications, Delhi (1984), p. 36.

³⁸ See N. Jayapalan, *History of India*, Atlantic Publishers, New Delhi (2001).

³⁹ N. Jayapalan, *History of India - Vol.II*, Atlantic Publishers, New Delhi (2001), p. 132.

the country.

Without any attempt to teach English, the East India Company made some scattered efforts in the field of education during the time of Warren Hastings. In 1781 he established the Calcutta Madrasa to qualify the sons of Muslim elite for lucrative and responsible offices in the State. Theology, logic, grammar, philosophy, arithmetic, geography and astronomy were taught here. A similar institution to qualify Hindu assistants for British Judges was started in Banaras in the 1792. To pursue historical researches, Sir William Johns established the Bengal Asiatic Society in 1785 with the help of the Governor General.

When the Charter of the East India Company was to be renewed in 1793, Bishop Wilberforce moved a resolution emphasising the necessity of educating the Indians to suit the needs of the Company. His suggestion was to send missionaries and schoolmasters to India, but he faced considerable opposition in the House of Commons where it was maintained that the Hindus had "*as good a system of faith and morals as most people*".⁴⁰ It was felt

⁴⁰ Arthur Mayhew, *Christianity and the Government of India*, Faber & Gwyer, London (1929), p.17.

that it would not be proper to thrust upon them an alien system when they themselves possessed something equally good.

But the Christian religious zeal could not be held under leash for long and a few years later Charles Grant, one of the Directors of the East India Company came up with a memorandum lamenting on the low moral standards of the people of India. He wanted Indians to be taught English language under the initiative of the East India Company. Consequently, during the Viceroyalties of Warren Hastings and Cornwallis, the Baptist Missionaries like Carey, David Hare Marshman, Ward, Thomas, etc., translated the Bible into 26 Indian languages, and through the institutional set-up of the schools they founded, spread Christianity and English education in India. In 1811 Lord Minto regretted the neglect of literature and science in India and wanted progress in these fields through existing colleges in addition to the establishment of new ones.⁴¹

This led to greater efforts to anglicize the education system in India.

⁴¹ Satinder Kumar, *Educational Philosophy in Modern India*, Anmol Publications, New Delhi (2000), p. 14.

In the Period 1813 to 1854

After the Charter Act of 1813, which required the East India Company to spend an annual sum of at least one lakh rupees on the education of Indians, the educational policy of the Company changed significantly. Absence of consensus as to whether the amount was to be utilised for promoting western education in English or Indian education in Indian languages, led to this annual sum being accumulated for a period of over two decades. H.H. Wilson led the arguments of the Orientalists and Macaulay that of the Anglicists. In 1835 Lord William Bentick accepted the view of the Anglicists and thus the East India Company started backing western education in India through the medium of English. In 1844, Lord Hardinge announced that Indians educated in English would be given preference for government appointments.⁴²

Two considerations seemed to have tilted this decision in favour of the Anglicists. The East India Company run Government got clerks at a cheap rate and the spread of English education increased the acceptance and consequent demand for British goods.

⁴² Geraldine Forbes, *Women in Modern India*, The New Cambridge History of India, IV.2, Cambridge University Press, Cambridge (1998), p. 36.

The immediate consequence of this decision was the progressive decay of Indian learning. Subsequently this paved the way for English becoming the *lingua franca* for the educated elite class of Indians even at the time of the nationalist struggle. A positive development for Indians in learning English was the increased knowledge of western concepts in science and literature, which helped develop their mental horizons. It has also helped them to be in tune with the latest developments in the Western World.

The East India Company used other subtle efforts to increase the acceptability of western education in the country. The resolution of the Government under Lord Hardinge in 1844 providing preference in public employment to those educated in western science and who were familiar with English language was one such effort.⁴³ This economic incentive created a demand for western education in English language and drew in private initiative into the field. Raja Ram Mohan Roy started the Hindu College at Calcutta in 1817. Elphinstone started the Elphinstone College at Bombay in 1834 and yet another one at Poona.

⁴³ Geraldine Forbes, *Women in Modern India*, The New Cambridge History of India, IV.2, Cambridge University Press, Cambridge (1998), p. 36.

Meanwhile, the missionaries had already discovered that setting up educational institutions was an excellent means to encourage conversion.⁴⁴ The Danish missionaries opened a training institute for teachers in 1716. In 1717 they started two schools in Madras. In 1818, the Bishop of Calcutta started an institution to train Christian preachers at Calcutta. The institution was also used to teach English to the Muslims and the Hindus. The missionaries started the Wilson College at Bombay, the Christian College at Madras and the St. John's College at Agra. Missionary Colleges were set up at Masaulipatam, Nagpur, etc. and Bible classes were made compulsory in these institutions.

The growth of Anglicised education and heightened missionary activity led to greater interest being shown first by the Company and later by the Crown in the field of education in India.

From 1854 till Independence

In 1854 a comprehensive scheme of education was sent by the President of the Board of Control, Sir Charles Wood, styled the Despatch on Education to India (Wood's Despatch). It defined the

⁴⁴ Raj Bahadur Sharma, *History of Christian Missions: North India Perspective*, 2nd ed., Mittal Publications, New Delhi (2005), p. 194.

aim of education as the diffusion of Arts, Science, Philosophy and Literature of the West. European knowledge was to be diffused to the people and for this the study of Indian languages was to be encouraged with provision for teaching English according to the demand for it. Universities were to be established in India modelled on the London University. These were meant to be examining bodies only. The Universities were to be located initially at Calcutta, Bombay and Madras and thereafter they could be set up subject to availability of students for degree classes.⁴⁵ The Universities were to have a Chancellor, a Vice Chancellor and a Senate and professorships for different branches of learning. Institutions were to be started for training teachers. The number of Government schools and colleges were to be increased with greater stress towards imparting elementary education. A secular system of grants-in-aid was to be started to help private initiative in education. Scholarships to promote meritorious students, encouragement for female education,⁴⁶ etc. were envisaged. The Despatch also

⁴⁵ Suresh Chandra, *New Issues: New Approaches*, Anmol Publications, New Delhi (2002), p. 174.

⁴⁶ On the issue of female education, the despatch read: "The importance of female education in India cannot be overrated; and we have observed with pleasure the evidence which is now afforded of an increased desire on the part of many of the natives to give a good education to their daughters. By this means a far greater proportional impulse is

envisaged a Director of Public Instruction in every province to be assisted by Inspectors and Deputy Inspectors.

The major criticisms against Wood's Despatch was that it failed to come up with a solid scheme to run the schools it envisaged, that it failed to promote Indian languages, that it made Universities mere examination bodies instead of centres of teaching and excellence.⁴⁷

The universities were established soon after in 1857 at Calcutta, Bombay and Madras and later in Punjab, Agra and Lahore. The former are port cities and the latter business centres and this perhaps reflected the business motive of the government. The objective of these institutions was to produce bureaucrats to help the government to keep records and to run the administration.⁴⁸

The number of schools and colleges and correspondingly higher education grew in leaps and bounds during 1854 to 1882 with

imparted to the educational and moral tone of the people than by the education of men." [Footnotes omitted]. Geraldine Forbes, *Women in Modern India*, The New Cambridge History of India, IV.2, Cambridge University Press, Cambridge (1998), p. 40.

⁴⁷ G.N. Clark, *New Cambridge Modern History: The Zenith of European Power, 1830-70*, Vol. 10, Cambridge University Press, London (1971), p. 118.

⁴⁸ S.P. Malhotra, "Business Behaviour in Indian Higher Education System and its Impact on Equality", in Yazali Josephine, Compiler, *Globalisation and Challenges for Education*, National Institute of Educational Planning and Administration, Shipra Publications, Delhi (2003), p. 758 at pp. 759.

more than two million students receiving education in public institutions by 1882.

The Hunter Commission was appointed in 1882 by Lord Rippon to inquire how far the recommendations in the Wood's Despatch were carried out.⁴⁹ The Hunter Commission was also asked to suggest measures to further carry forward the policy laid down in the Wood's Despatch. The Commission came out with such suggestions including the gradual withdrawal of the State from the direct management of institutions of higher learning by entrusting it with the Indians after ensuring that the quality of education does not suffer. It recommended a system of grants to be made to colleges. It suggested for providing alternative courses in larger colleges, a rationalising of the fee structure and new regulations for scholarships. Special measures were suggested for improving education among the Muslims. By promoting elementary

⁴⁹ The Indian Education Commission 1882-83, the first in the series, was set up under the chairmanship of William Hunter to enquire into the manner in which effect had been given to the principles of the Despatch of 1854, with particular emphasis on elementary education. The primary education system was given an impetus by the Report of the Hunter Commission. The Commission also recommended, "Primary education be regarded as the instruction of the masses through the vernacular in such subjects as will best fit them for their position in life, and be not necessarily regarded as a portion of instruction leading up to University". The inquiry of the Commission led to a great educational awakening in India and its main findings agreed largely with the Despatch of 1854, which dominated the Indian educational policy. http://planningcommission.nic.in/reports/sereport/ser/edu_pune.pdf [internet accessed on 20th December, 2005].

education the development of the physical and mental faculties of the students was attempted. Periodic inspections by the officers of the education department were suggested. In short, the recommendations were aimed at encouragement of education in the Indian languages and a gradual withdrawal of the government with increased reliance on private enterprise.

In later years, Lord Curzon appointed the Raleigh Commission on education, which suggested an increase in the legal powers of the universities with a corresponding defining of their role in teacher education, a reorganisation of their power structure so that the Senate, the Syndicates and the faculties become more representative, an affiliation system guided by strict standards for colleges which were to have governing bodies and the ability to maintain discipline among students.

By passing the Indian Universities Act in 1904 the government accepted most of the recommendations of the Raleigh Commission. The Act made changes like a reconstitution of the governing bodies of the universities with increase in the number of members of the Senate to make it more representative. Statutory recognition was given to the Syndicate and adequate representation

was given in it to teachers. Rules for affiliation of colleges were laid down and the Governor General-in-Council was empowered to define the limits of the different universities. Apart from being examining bodies the universities were now to impart teaching as well. Recognition was now to be restricted only to such schools, which were run according to the rules of the education department or those of the universities. The principal aim of the Act was to increase governmental control over the universities. By reducing the number of elected members in the Senate, Lord Curzon ensured that the nominated members were in a majority. Although the Syndicates had professors as members they were few in number since only members of the Senate could become members of the Syndicate.

The Government Resolution on Education of 1913 spelt out the policy on higher education. New teaching and residential universities were to be established with a restricted area of jurisdiction for the universities. Accordingly new universities were established in Dacca, Banaras and Aligarh. Further, new affiliating universities were established at Patna, Nagpur and Rangoon. Banaras University was set up in 1916, Patna University in 1917,

Dacca and Lucknow Universities in 1920, the Allahabad University in 1921 and the Delhi University in 1921. The First World War delayed the implementation of this resolution.

The Government of India appointed the Sadler Commission in 1917 to look into the affairs of the Calcutta University. In its report submitted in 1919, the Commission recommended the separation of intermediate classes from the colleges to the secondary institutions and the establishment of a Board of Secondary Education to control secondary and intermediate education. It recommended three years duration for degree courses and suggested that responsibility for the University should vest with the Government of Bengal instead of the Government of India. The medium of instruction up to high school was to be in Indian languages and for higher education it was to be English.

Although the Government of India Act 1919 made the Department of Education a transferred subject, the policy of higher education was still controlled by the Government of India. The Government of India Act 1935 brought University education under the control of the Provincial Government. It spared only those Universities spread over two or more provinces from such control.

The Calcutta University Commission (1917-19)⁵⁰ first conceived the idea of a Central Advisory Board of Education. It felt that the Government of India could perform an invaluable function by defining the general aims of educational policy, by giving advice and assistance to local governments and to the development of educational ideas in the various provinces, and also elsewhere than in India. It was during this period that the Government of India Act, 1919 decided to make education mainly a provincial and a transferred subject and to minimise the 'control' of the Central Government over it. This changed the character of the Government of India from that of an executive to an advisory authority. The Secretariat Procedure Committee set up to implement the Government of India Act, 1919, recommended that the Government, *"in place of giving executive orders ... should tend more and more to become a centre of the best information, research and advice."*⁵¹ Based on this recommendation and that of the Calcutta University Commission, a Central Advisory Board of Education was set up in 1920 under the chairmanship of Education Commissioner to the

⁵⁰ Also known as the Sadler Commission.

⁵¹ <http://shikshanic.nic.in/cd50years/g/52/F9/52F90101.htm> [internet accessed on 4th May, 2004].

Government of India. Though it did commendable work, due to a financial crisis, it was abolished in 1923. There was no central body to advise the Government of India in educational matters for the next twelve years.

The Report of Hartog Committee in 1928 concluded that expansion in education was gained at the cost of quality and that consolidation of education was to be preferred to diffusion of mass primary education. The nationalist leaders saw in this a deliberate discriminatory colonial policy in creating a dichotomy between quality and quantity in education and this opposition later crystallised into the constitutional commitment to provide free and compulsory education to every child.⁵² The Hartog Committee also observed that the divorce between the Government of India and education had been unfortunate and this resulted in the revival of the Central Advisory Board of Education in 1935.⁵³

In 1937, the Zakir Hussain Report recommended a national

⁵² Anita Rampal, "Unpacking the 'Quality' of Schools", <http://www.india-seminar.com/2004/536/536%20anita%20rampal.htm> [internet accessed on 5th September, 2007].

⁵³ The first constitution of the Board was given in the Government of India (Education, Health and Lands Department) Resolution No.F.122-3/35-E dated 8th of August, 1935.

system of education.⁵⁴ Mahatma Gandhi convened a conference of several educationists at the non-governmental level at Wardha in 1937 to revamp the then existing basic educational structure that was too costly and unconnected with developing the personality of the child. The Wardha Scheme of Education as it came to be known later featured free and compulsory education in their mother tongue for children between the ages of 7 and 14 years. Education was to be a skill oriented one capable of making the child an independent human being. The scheme was structured to become a self-sufficient system of education in the long run.

In 1944, Sir John Sergeant, the Educational Advisor to the Government of India prepared a scheme, which came to be known as the Sergeant Scheme of Education. Its highlight was a Rs. 200 crore per annum programme for providing free and compulsory education for children between the ages of 6 and 14 years. It recommended a split of basic education into a junior stage of five years and a senior stage of three years. High school education was to be restricted to only those students who could profit by it and

⁵⁴ http://planningcommission.nic.in/reports/sereport/ser/edu_pune.pdf [internet accessed on 20th December, 2005].

there were to be similar restrictions on admission to colleges. Intermediate classes were to be included in high school course and the B.A. course was to be made a three year one. A National Youth Movement was to be started to develop young men to be able to serve the country.

Political change resulted in the shelving of the Sergeant Scheme of Education. Independence gave to India an opportunity to reform the educational system to suit its needs.

Independence and the First Few Years

After independence, the Government appointed a Commission in 1948 under Dr. S. Radhakrishnan as the Chairman to submit a report on university education.⁵⁵ The report submitted in 1949 recommended the setting up of the University Grants Commission and the establishment of rural Universities in India on the model of Shantiniketan and Jamia Millia. More funds were to be provided by the government for education. The number of scholarships and stipends were to be increased. It even recommended that a University degree need not be considered

⁵⁵ Radhakrishnan S., (Chairman), Report of the University Education Commission, 1948-49, Government of India, New Delhi (1949).

essential for administrative services.

In 1952, under the chairmanship of Lakshmanaswami Mudaliar the Secondary Education Commission was appointed. It greatly influenced the reorganisation of secondary education. The Commission recommended reduction of the total duration of the school course from 12 years to 11. It considered that the Indian youth would be mature enough to enter a university after completing their school course since they would be of about 17 years of age by that time.⁵⁶

Meanwhile, development of education in the native States progressed depending on the local conditions.

Other Parallel Developments

Though a major portion of the geographical territory that later became India was under direct British rule, there were a considerable number of local rulers who did not come under the close supervision of the British Empire in their internal administration. The system of education had a parallel, diverse and often unique development in such areas.

⁵⁶ http://planningcommission.nic.in/reports/sereport/ser/edu_pune.pdf [internet accessed on 20th December, 2005].

In the territory that later became the State of Kerala, there were distinct areas coming under direct British rule like that of the Malabar and those that came under the rule of local rulers like that of Cochin and Travancore. Some institutional arrangements in these areas are discussed here as an example of the diversity that could be found in various regions of India apart from what is already discussed in the previous pages.

The Sabha Mutts or Temple Universities of North and Central Kerala were the centres of Vedic education. The system of education conformed to the Gurukula ideal. Village schools also played an important role to satisfy the educational needs of the people. The Ezhuthupalli seems to have had its origin under the influence of the Buddhists. Each Kara had its Patasala or Ezuthupalli under the Ezuthachan or Asan. The formal ceremony of initiation (Vidyarambham) took place under solemn auspicious either in the third year of the child or not later than the seventh year. The Kalari was also an important place of education in ancient Kerala. Most prominent as a place for the imparting of martial arts, it supplied the local rulers with the best resources against

invasions.⁵⁷

An analysis of the above developments indicates that at independence, there was no uniform system of education prevalent throughout India. The need to get educated had not permeated to the masses and the ability to get educated was dependent on the economic and social class of the person. Formal education was mostly an urban affair and the jobs available for the educated class was almost all connected with the government.

The newly acquired independence gave the impetus to change the system of education. The first step in this regard was in recognising the important role that could be played by education in shaping the destiny of the new Nation and its citizens.

⁵⁷ <http://www.kerala.gov.in/knowkerala/profile.htm> [internet accessed on 12th April, 2006].

CHAPTER II

THE STATE AND EDUCATION

LITERACY, EDUCATION AND DEMOCRACY

“Literacy is not the end of education, not even the beginning. They are not related.”

- Mahatma Gandhi.

The single most important factor in economic growth could be education. It has more impact on economic growth than any other resource. The fundamental role of education in nation building was recognised even during India’s struggle for freedom from the colonial rule. Gandhiji had formulated a scheme of basic education that sought to harmonise intellectual and manual work in an attempt to make education directly relevant in life. For him National Education meant an education that would bring about a conscious effort on the part of the young to contribute to the development of his nation and society.¹

¹ Justice Chandrashekar Dharmadhikari, *Reflections on the Indian Constitution*, Sadhana Prakashan, Pune (1978), pp. 136-137. “What were the underlying ideas of National Education? An individual is indebted to the Society and the Nation in which he is born. A conscious realisation of this fact motivates him to work selflessly for the nation and the society at large. This is the basic attitude of National Education. National leaders strongly felt the need to impart such education as could prepare young Indians to do away with obstacles that came in the way of national development and create in them capacities to foresee future problems of the nation and solve them. National Education endeavoured to remove the mental slavery of students and imbibe in them the conviction that freedom and liberty were to be preferred to a life of leisure and comforts.”

“Almost everywhere in the world there is a growing recognition about the pivotal position which education occupies for the betterment of individuals and institutions. It is universally accepted that education is the best source of social mobility, equality and empowerment both at the individual and collective level, as such, imperative for the development of society in meaningful way. In recent times, education for peace, human rights and democracy, therefore get the utmost attention from the planners to create a world of harmony.”²

Education promotes respect for the concepts of peace, human rights and democracy by bringing to the people the wider world of civilisation.

The world over, education is now increasingly recognised as a right that can be enforced against the State though it is classified as a third generation human right.³ In India formal school education

² G.C. Pal, “Human Rights Education - Policies, Priorities & Prospects”, in Abdulrahim P. Vijapur & Kumar Suresh, Ed.s., *Perspectives on Human Rights*, Manak Publications, New Delhi (1999), p. 311 at pp. 311.

³ Dr. Sheeba Pillai, “Right to Education – A Jurisprudential Analysis”, *JILT*, Vol. 4, 2006, p. 187 at pp. 211. “.... education as a right has gained the status of an ‘enforceable right’ irrespective of its categorisation in the third generation of rights. ... the transition has been gradual and the status was raised to such a level, so as to emphasise its

is recognised as an enforceable fundamental right so far as children below the age of fourteen are concerned.⁴ There is even a corresponding fundamental duty on a citizen who is a parent or guardian to provide opportunities for education to his child/ward between the age of six and fourteen years.⁵

Literacy indicates the ability to read, to write and to understand the written word while education is a much wider concept. It involves the ability to utilise the benefits of learning as well. But literacy rather than education is the criteria used to calibrate the degree of human development. The educational component of the Human Development Index prepared under the aegis of the United Nations Development Programme is comprised of “adult literacy rates and the combined gross enrolment ratio for primary, secondary and tertiary schooling, weighted to give adult literacy more significance in the statistic.”⁶

importance in the future development of man and society. Hence a ‘basic’ right, education is now considered a vital part of human development which is a component of third generation rights. ...the growing emphasis on human development has focussed the world’s attention on the child as the significant future human resource and primary education as the fundamental part of education which in turn is component of development process.”

⁴ Article 21A of the Constitution of India.

⁵ Article 51A(k) of the Constitution of India.

⁶ <http://hdr.undp.org/en/statistics/indices/hdi/> [internet accessed on 22nd December, 2009].

It is a fact that the literacy level in India is low. Whether the low literacy levels affects democracy in India is a moot question. Rajiv Gandhi, when he was the Prime Minister of India, while addressing an audience in a developed country had this to say,

“... lack of literacy does not come in the way of genuine democracy. India’s experience amply demonstrates that illiteracy does not handicap the voter in knowing where his interest lies. The voter recognises that there is a choice. And that choice is a meaningful one. He exercises his options with an informed awareness of the issues. This political consciousness derives from the experience of generations who were swept up in the independence struggle. It is reinforced by a free press, the largest in the world, aggressive, investigative, unfettered. It is wisdom that matters, not literacy.”⁷

How illiteracy in any way would strengthen a free press was left unsaid, but it is a fact that it is wisdom that matters, not literacy. Yet, in this new global era of information, illiteracy usurps access to

⁷ Rajiv Gandhi, “Democracy: The Indian Experience”, in D. Sundar Ram, Ed., *Indian Democracy: Prospects and Retrospects*, Kanishka Publishers, New Delhi (1996), p. 35.

information and thereby wisdom.

Other social activists do not often agree to the opinion of the politician. To the social activist lack of education causes the disenfranchisement of the population which undermines democracy. Good governance becomes the casualty when non-democratic forces rule. This results in policies that perpetuate illiteracy and ignorance.

“With at least 50% of the population unable to even to read and write, and 40% of the population living below the poverty line, with the society highly stratified socially and economically, and with gross social and economic inequalities, the basic pre-requisites of democracy, have been wanting in this country from the beginning.”⁸

Education is treated as basic human right. Democracy is another. Development of both these rights in a holistic manner is a must for a modern society. As has been observed by Nani A. Palkhivala, the visionary statesman,

“In a democracy based on adult suffrage – which means the nose-counting method, the only way to achieve progress is to

⁸ P.B. Savant, “Constitution, Social Revolution and the People”, [2003] C.U.L.R. 1 at p. 5.

‘educate our masters’, to borrow the historic phrase of Disraeli. There must be a nationwide campaign to disseminate correct facts and right ideas among the public at large. The best charity which one can do in India today is to carry knowledge to the people. . . . Years of intensive mass education will be needed if the standards of rationality and fair dealing, of social justice and individual freedom, which are enshrined in our Constitution, are to be bred in the bones of our young men and women who are in their formative years and to whom the future belongs.”⁹

The Supreme Court has observed in the case of *Election Commission of India v. St. Mary's School*,¹⁰ thus:

“The Human Rights Conventions have imposed a duty on the contracting States to set up institutions of higher education which would lead to the conclusion that the citizens thereof should be afforded an effective right of access to them. In a democratic society, a right to education is indispensable in the interpretation of right to development as a human right.

⁹ Nani A. Palkhivala, *We, The People: India - The Largest Democracy*, Strand Book Stall, Bombay (1984), pp. 53-54.

¹⁰ MANU/SC/4627/2007, paragraph 30.

Thus, right to development is also considered to be a basic human right.”

Significant efforts have been initiated over the years to eradicate illiteracy. In fact, to some extent, the campaign for the right to education in India has been reduced to a farce in so far as it gets translated into only an effort for eradicating illiteracy. When the targets are set rather high, there is a pressure to show results on the ground and this often translates into mass literacy movements of short duration that gives everyone involved a feeling that something is being done, though practically nothing happens of any significance.

The Indian political ideal on education was shaped by the early struggle for independence from the colonial rule, the ideological fervour associated with the Non Aligned Movement and the understanding that too big a population becomes a burden on the government unless they are made self sufficient and empowered through education. National Policies on Education of 1968 and 1986, the Plan of Action 1992, together with the relevant Directive Principles of State Policy on education can be said to provide the

political ideal on education in India.¹¹

The international movement for better human rights has also influenced the Indian political ideal on education. Yet, it is doubtful whether the Indian political ideal on education has seen education in a realistic perspective.

“Education has been happily defined as the technique of transmitting civilisation. It is shocking that the country with the oldest and greatest civilization should be so lackadaisical about the technique of transmitting it.”¹²

The ideal, has either failed due to its inherent inadequacies or because it has been allowed to fail on account of a lack of committed political support for it through allocation of resources. An assessment of the policies followed in the field of education in India would show how far this political ideal is a success.

POLICY

Policy is an important component of good governance. Yet, policy has no statutory value. It is adopted by the Government, but

¹¹ See <http://education.nic.in/NatPol.asp> [internet accessed on 16th February, 2010].

¹² Nani A. Palkhivala, *We, The Nation: The Lost Decades*, UBS Publishers, New Delhi (1984), 15th Reprint 2000, pp. 237-238.

it has no legal structure or any binding effect.¹³ It is beyond judicial scrutiny or review or adjudication. Adopting a policy indicate the government's commitment towards a particular course of action. Once spelt out, it can provide the necessary political pressure to conform and achieve the goals set out. But there is no means other than the process of shaming¹⁴ to ensure government's commitment to stick to any policy.

After independence, with its vision of building the Nation, the Government viewed education as the vital ingredient in the nation's progress and security. This resulted in a variety of programmes that influenced education and educational programmes in India. These distributive programmes offer a multitude of schemes for upliftment of the downtrodden in India. But a paucity of useful information about their working undermines their utility by spreading the resources without any substantial tangible results. The single largest item among the distributive programs is education. It entails the highest expenditures and directly affects the

¹³ Dr. Amita Agarwal, *Human Rights for Survival of Civilisation*, Kalinga Publications, Delhi (2004), p. 11.

¹⁴ The term 'shaming' is used to mean 'to force by causing to feel guilty' in the sense of forcing democratically elected governments to act for the common good by the threat of exposure with regard to their incapacity or inability to keep their promises.

largest number of individuals.¹⁵ In spite of lack of specific data enabling a cost benefit analysis, the very existence of these programmes of education gives an indication of how celebratory the policies of the government in this field have been.

India has one of the largest higher education systems in the world. But the sheer numbers of its population dwarfs it to insignificance.¹⁶ A number of statutory bodies regulate professional education in the country.¹⁷ The quality and content of the education available within the country varies enormously even though in theory the regulatory bodies are there to assure a certain amount of standardisation among these.

Hence, it becomes important to identify not just the legal but also the factual position of education in India.

¹⁵ Marc Galanter, *Competing Equalities: Law and the Backward Classes in India*, Oxford University Press, Delhi (1984), p. 57.

¹⁶ India shelters roughly 17% of the world population and has the greatest number of illiterates in the world.

¹⁷ Professional Councils are responsible for recognition of courses, promotion of professional institutions and providing grants to undergraduate programmes and various awards. The statutory professional councils are: All India Council for Technical Education (AICTE), Distance Education Council (DEC), Indian Council for Agriculture Research (ICAR), Bar Council of India (BCI), National Council for Teacher Education (NCTE), Rehabilitation Council of India (RCI), Medical Council of India (MCI), Pharmacy Council of India (PCI), Indian Nursing Council (INC), Dental Council of India (DCI), Central Council of Homeopathy (CCH), Central Council of Indian Medicine (CCIM). <http://www.education.nic.in/htmlweb/higedu.htm> [internet accessed on 13th May, 2004].

POSITION OF EDUCATION IN INDIA

Often it is not the absence of legislation that lies at the root cause of the problem. It is a lack of political will. Even while the Constitution of India recognises education as essential for the development of children,¹⁸ the legislation in various States that govern the field purportedly to make primary education free and compulsory do not get implemented at all. There is no uniformity in these legislation and none actually makes education compulsory. They merely enable the State governments to make it compulsory. This is the sorry state of affairs even after sixty years of independence and with the largest number of illiterates in the world.

The situation is so worse that even while the local authorities can take the initiative to make education compulsory they have failed to do so despite the orchestrated campaigns for decentralisation. As has been observed by others,

“Even in the States where the Acts have been passed such as compulsory registration of name, date of birth, issuing

¹⁸ Article 45 of the Constitution of India. The provision states thus: “Provision for early childhood care and education to children below the age of six years - The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.”

notices to parents whose children are not attending a regular school etc.; they have not been implemented seriously and compulsion has not been enforced. There is no evidence of a single case of prosecution for the violation of the law.”¹⁹

Still, the cumulative efforts to provide education for all cannot be belittled. Statistically, in the time period 1950-1995, there has been a tremendous growth in sheer numbers of the teachers, institutions and of course the students as can be seen from the table.²⁰

	Institutions Primary/ Upper Primary	Number of Teachers	Gross enrolment Primary Stage	Gross enrolment Upper Primary Stage
1950-51	2.23 lakh	6.24 lakh	192 lakh	31 lakh
1994-95	7.44 lakh	28.36 lakh	1091 lakh	4003 lakh
Increase	319.31%	454.49%	568.23%	1291.29%

In the matter of education, the statistics are impressive as far

¹⁹ G.C. Pal, “Human Rights Education - Policies, Priorities and Prospects”, in Abdulrahim P. Vijapur & Kumar Suresh, Ed.s., *Perspectives on Human Rights*, Manak Publications, New Delhi (1999), p. 311 at pp. 313, quoting Mahbub ul Haq and Khadija Haq, *Human Development in South Asia*, Oxford University Press, Delhi (1998) and Mohan N. Shantha, *Compulsory Primary Education: A Right or a Privilege?* (1992), *Perspectives in Education*, Vol. 8, No. 3-4, pp. 171-77.

²⁰ S.R. Bommai, “Elementary Education for Empowerment”, in Dr. S. Subramanian, *50 Years of India's Independence*, Manas Publications, New Delhi (1997), p. 305 at pp. 306. “The number of institutions, both primary and upper primary, which stood at 2.23 lakh in 1950-51 has risen to 7.44 lakh in 1994-95. The number of teachers has increased from 6.24 lakh in 1950-51 to 28.36 lakh in 1994-95. The gross enrolment at the primary stage has risen from 19.2 million in 1950-51 to 109.1 million in 1994-95. The enrolment at the upper primary stage has risen from 3.1 million in 1950-51 to 40.03 million in 1994-95.”

as numerical growth is concerned. It is also outstanding as far as its reach is concerned.

“The elementary education system in India has succeeded in the gigantic task of providing access within a one kilometre walking distance to 8.25 lakh habitations covering 94 percent of its population. The growth in its enrolment has come to close to 100% at the primary level. To make education affordable, all State Governments have abolished tuition fees in the government, local bodies and the aided schools up to the upper primary level.”²¹

While the percentage of children enrolled for primary education was 42 percent in 1960, it had increased up to 69 percent in 1992. According to the National Family Health Survey - II, 1998-99, 80.2% boys and 67% girls in 11-14 age group attend schools, while the Sarva Shiksha Abhiyan, provides for eight years of elementary schooling by 2010.²²

²¹ S.R. Bommai, “Elementary Education for Empowerment”, in Dr. S. Subramanian, *50 Years of India's Independence*, Manas Publications, New Delhi (1997), p. 305 at pp. 306.

²² Government of India, Ministry of Human Resource Development, Department of Elementary Education and Literacy, Rajya Sabha unstarred question no. 1500, answered on 04.08.2000. <http://164.100.24.219/rsq/quest.asp?qref=17268> [internet accessed on 9th November, 2006.]

Though the number of children in school in India is low as compared to what is desirable, there has been considerable improvement considering the humble beginnings in this regard.

Gross Enrolment Ratio²³ (GER) over the years									
Year	Primary (I-V)			Upper Primary (VI-VIII)			Elementary (I-VIII)		
	Boys	Girls	Total	Boys	Girls	Total	Boys	Girls	Total
1950-51	60.6	24.8	42.6	20.6	4.6	12.7	46.4	17.7	32.1
2002-03*	97.5	93.1	95.4	65.3	56.2	61.0	85.4	79.3	82.5
Source: Selected Educational Statistics 2002-03, Ministry of HRD, *Provisional ²⁴									

As can be seen from the above table, the Gross Enrolment Ratio at the elementary stage has risen from 32.1 in 1950-51 to 82.5 in 2002-03. In terms of sheer numbers, this is no mean achievement. Yet, in early 2006 the Gross Enrolment Ratio in Higher Education in India was estimated at around 9 percent of the

²³ Gross Enrolment Ratio (GER), indicates the number of children actually enrolled in elementary schools as a proportion of child population in the 6-14 years age group.

²⁴ <http://www.education.nic.in/Annualreport2004-05/overview.pdf> [internet accessed on 12th January, 2006].

eligible age group of 18-24 years of the population.²⁵ This indicates a high drop-out rate which is an abysmal figure if higher education is an indicator of higher empowerment levels.

To address such problems faced by the education sector and to give it a positive direction, the Government of India had taken the initiative early itself by trying to frame a National Policy on Education.

GOVERNMENT AND NATIONAL POLICY ON EDUCATION, 1968

An educational policy for free India was first spelt out in 1968.²⁶ According to the Government, a consensus on the national policy on education has evolved as a result of the discussions on the Report of the Education Commission. Convinced that national integration, economic and cultural development and a socialistic pattern of society can be realised only through a radical reconstruction of education the Government has prepared a plan of action with a view to transform the system to relate it more closely

²⁵ Government of India, Ministry of Human Resource Development, Department of Secondary Education and Higher Education, Rajya Sabha unstarred question no. 773, answered on 27.02.2006. <http://164.100.24.219/rsq/quest.asp?qref=112705> [internet accessed on 14th November, 2006.]

²⁶ <http://www.education.nic.in/htmlweb/natpol.htm> [internet accessed on 25th April, 2003].

to the life of the people. The plan of action was prepared in 1992, after a progress evaluation done in 1986. But it is to be noted that post 1990, the economic liberalisation programme has adversely affected the fundamental scenario of a socialistic society in India.²⁷

In its resolution, the National Policy on Education, 1968, laid emphasis on the need to focus on the education of girls. It also stressed the need for quality improvement and a planned and equitable expansion of educational facilities.

The government resolved to promote the development of education in accordance with certain principles, which included:

- i. Free and compulsory education for all children up to the age of fourteen. Efforts were to be made to fulfil the guidance provided by the directive principle under Article 45 of the Constitution and to ensure that every child enrolled completes his course of study.

²⁷ Ved Prakash, "Trends in Growth and Financing of Higher Education in India", *Economic and Political Weekly*, August 4, 2007, p. 3249 at pp. 3249. "From 1950 to the late 1980s, the planning strategy in India was geared towards ensuring distributive justice, balanced regional growth and positive discrimination in favour of disadvantaged sections. However, with the adoption of new economic policies, since the early 1990s, the development approach has taken an about-turn with the enhanced role of the private sector and the diminishing role of the State. Such an approach appears to be threatening the goals of social justice, equity and cultural diversity."

ii. Protection of the academic freedom of teachers, a system to ensure their competence, suitable emoluments and service conditions for them to ensure them an honoured position in society. The most important role of the teacher on improving quality of education and its contribution to national development to be thus recognised.

iii. Steps to make regional languages the media of education at the university stage. The development of Indian languages and literature being the *sine qua non* to unleash the creative energy of the people, to raise the standards of education and to broaden the knowledge base. For this, the three language formula, development of Hindi as the link language, learning of Sanskrit in the context of Indology, study of English as the international language disseminating world knowledge, etc to be given importance.

iv. Correction of regional imbalances in the provision of educational facilities to ensure educational opportunity for all.

v. Without affecting the rights of minorities under Article 30 of the Constitution, the adoption of a Common School

System to promote social cohesion and national integration as recommended by the Education Commission. Improving the standard of education in general schools. Preventing segregation of social classes by requiring merit to be the criteria for admission in special schools like public schools with provision for free-studentships.

vi. Emphasising education of girls to accelerate social transformation.

vii. Intensive efforts to educate backward classes especially among the tribes.

viii. Integrated programmes to enable physically and mentally challenged children to study in regular schools.

ix. Systematic identification of talent at the earliest age to cultivate excellence.

x. Development of suitable programmes of mutual service and support as an integral part of education, to instil self-help, character formation and to develop social commitment.

xi. To accelerate national economic growth, science education and research to be given high priority with science

and mathematics to be made an integral part of general education till the end of the school stage. Establishment of at least one agricultural university in every State for special emphasis in the development of education for agriculture and industry.

xii. Technical education and research to be integrated with industry, encouraging the flow of personnel both ways and providing for continuous co-operation in the provision, design and periodical review of training programmes and facilities.

xiii. A continuous review of the agricultural, industrial and other technical manpower needs of the country to maintain a proper balance between the output of the educational institutions and employment opportunities.

xiv. Production of high quality and low priced textbooks for schools, avoiding frequent changes of textbooks, providing a few common basic textbooks throughout the country and providing university level books in regional languages.

xv. Examination reforms to improve the reliability and validity of examinations and to make evaluation a continuous

process aimed to help the student improve his level of achievement rather than at 'certifying' the quality of his performance at a given moment of time.

xvi. On the issue of secondary (and higher) education, the Government foresaw education opportunity at the secondary level as a major instrument of social change and transformation. Efforts to provide facilities to areas and classes denied these in the past were to be made.

xvii. The Government recognised the need to increase and diversify facilities for technical and vocational education with a view to make technical and vocational education at the secondary stage effectively terminal. For this the facilities were to conform to requirements of the developing economy and real employment opportunities.

xviii. On the question of university education the Government was of the opinion that new universities should be started only after an adequate provision of funds has been made for the purpose and due care has been taken to ensure

proper standards.²⁸ The laboratory, library and other facilities and the staff strength were to determine the intake of students to colleges or university departments. A small number of 'cluster of centres' aimed at the highest possible standards in research and training were to be established. Support to universities for research was to be increased and research institutions had to be as far as possible, functioning within universities or in intimate association with them.

xix. Part time education and correspondence courses were to be given the same status as full-time education to enable a smooth transition from school to work, to promote the cause of education and to provide opportunities to those who cannot educate themselves on a full-time basis.

xx. On the issue of literacy and adult education the Government's resolve was that liquidation of mass illiteracy was necessary for national development. Functional literacy being an absolute need, a lead in this direction had to come

²⁸ The 'National Knowledge Commission's Recommendations on Higher Education' <http://knowledgecommission.gov.in> provides a different picture. The Commission suggests the creation of some 1500 new universities of which around 50 needs to be national universities.

from public sector industries. Special emphasis was to be given to educate young farmers and to train youth for self-employment.

xxi. The rights of minorities were to be protected and their educational interests promoted in tune with the suggestions of the Conference of the Chief Ministers of States and Central Ministers held in August, 1961.

xxii. A uniform educational structure in all parts of the country was to be developed. The 10+2+3 pattern with higher secondary stage of two years being located in schools, colleges or both according to local conditions was to be the ultimate aim.²⁹

xxiii. The government resolved to progressively increase investment on education with the aim of reaching a level of expenditure of 6 per cent of the national income as early as

²⁹ "A uniform structure of school education, the 10+2 system has been adopted by all the States and Union Territories of India. However, within the States and the Union Territories, there remains variations in the number of classes constituting the Primary, Upper Primary, High and Higher Secondary School stages, age for admission to class I, medium of instruction, public examinations, teaching of Hindi and English, number of working days in a year, academic session, vacation periods, fee structure, compulsory education, etc.", <http://www.education.nic.in/htmlweb/natpol.htm> [internet accessed on 25th April, 2003].

possible.³⁰ But expenditure under the head of education includes the administrative expenses that form the major chunk.

xxiv. The Government of India would also assist the State Governments for the development of programmes of national importance where co-ordinated action on the part of the States and the Centre is called for.

xxv. Most importantly the Government of India will also review, every five years; the progresses made and recommend guidelines for future development.

Framed with high ideals the National Policy on Education suffered in its implementation.

IMPLEMENTATION OF THE NATIONAL POLICY ON EDUCATION, 1968

How the National Policy on Education of 1968 fared is best summed up in the words of Mr. Arjun Singh, the then Minister of

³⁰ "The total budgetary expenditure on Education by the Education Departments of the Centre and States has increased from Rs. 644.6 millions in 1951-52 to Rs. 300,000 millions in 1995-96. In terms of its share in total budgetary expenditure, it has increased from 7.9% in 1951-52 to 11.1% in 1995-96", <http://www.education.nic.in/htmlweb/natpol.htm> [internet accessed on 25th April, 2003].

Human Resource Development, who in his statement regarding modifications to the National Policy on Education, 1986 observes,

“The general formulations incorporated in the 1968 Policy did not, however, get translated into a detailed strategy of implementation, accompanied by the assignment of specific responsibilities and financial and organisational support.”³¹

The Plan of Action proposed in 1992 was on the basis of this assessment.

Children being the primary beneficiaries of education, the National Policy of Education, 1968 was followed in time by the National Policy for Children, 1974.

NATIONAL POLICY FOR CHILDREN - 1974³²

The National Policy for Children set out as early as 1974 envisages the reasonable achievement of its goals through judicious and efficient use of available resources. It sets out that the policy of the State shall be to provide adequate services to children, both

³¹ Statement made in Parliament on 7th May, 1992 while tabling the paper, 'National Policy on Education, 1986 - Revised Policy Formulations'.

³² No. 1-14/74-CDD, Rights of the Child, UNICEF India Country Office, Published for the Department of Women and Child Development, Ministry of Human Resource Development, Government of India, (1991).

before and after birth and through the period of growth, to ensure their full physical, mental and social development.

The most notable feature of the policy is the special concern shown towards children belonging to the weaker sections of the society.

“The National Policy for Children in 1974 had also affirmed the constitutional provisions and declared that, ‘it shall be the policy of the State to provide adequate services to children, both before and after birth and through the period of growth, to ensure their full physical, mental and social development. The State shall progressively increase the scope of such services so that, within a reasonable time, all children in the country enjoy optimum conditions for their balanced growth.’”³³

The Policy contemplates the setting up of a National Children’s Board as a forum for planning and review, and proper coordination for the multiplicity of services to meet the needs of the children. Boards were also to be set up at the State level for this

³³ Dr. Amita Agarwal, *Human Rights for Survival of Civilisation*, Kalinga Publications, Delhi (2004), p. 33.

purpose.

The Policy recognised the fact that wherever there was a rise in the standard of living, the basic needs of children were met to some extent.

The next major policy initiative on education was the National Policy on Education, 1986.

NATIONAL POLICY ON EDUCATION - 1986

A comprehensive policy framework to guide the development of education including higher education in the country till the end of the century was planned in the National Policy on Education, 1986.³⁴

It called for an overhaul of the system of planning and wanted the management of education to receive high priority and sought the induction of more women in the planning and management of education.³⁵ It also envisaged a pivotal role for the Central Advisory Board of Education in reviewing educational

³⁴ Government of India, Ministry of Human Resource Development, Department of Secondary Education and Higher Education, Rajya Sabha unstarred question no 1981, answered on 23.08.2004. <http://164.100.24.219/rsq/quest.asp?qref=92157> [internet accessed on 22nd November, 2006].

³⁵ <http://education.nic.in/cd50years/g/T/49/0T490A01.htm> [internet accessed on 17th February, 2010].

development, determining the changes required to improve the system and in monitoring its implementation.

The Policy recognised a schism between the formal system of education and the country's rich and varied cultural traditions and wanted it to be bridged.³⁶

It prescribed a common structure of education throughout India, the implementation of which has been completed throughout the country.³⁷

One of the primary concerns while striving for universalisation of primary education which is affirmed both by the National Policy on Education and the Millennium Goal of 'Education for All', is the formidable barrier to it in the form of child labour. The government has sought to address the issue of child labour by forming a National Policy on Child Labour.

NATIONAL POLICY ON CHILD LABOUR - 1987

A model document, the National Policy on Child Labour

³⁶ <http://education.nic.in/cd50years/g/T/49/OT490801.htm> [internet accessed on 17th February, 2010].

³⁷ Dr. Amita Agarwal, *Human Rights for Survival of Civilisation*, Kalinga Publications, Delhi (2004), p. 33. "The National Policy on Education as well as the goals for 'Education for All' in India (2000) reaffirmed country's commitment to universalisation of primary education."

aims to help children who are forced into work. The Policy adopts a gradual & sequential approach with a focus on rehabilitation of children working in hazardous occupations & processes in the first instance.³⁸

The Policy has generally found favour with activists due to its attempt to eliminate child labour through its efforts at employment generation to help parents support their children going to school.³⁹ But a major lacuna in the approach was the legislative recognition it gave to employability of children above the age of fourteen albeit in non-hazardous industry.⁴⁰

As per the Action Plan outlined in the Policy, in 1988, the National Child Labour Project Scheme was launched in nine

³⁸ <http://labour.nic.in/cwl/ChildLabour.htm> [internet accessed on 17th February, 2010].

³⁹ Dr. Amita Agarwal, *Human Rights for Survival of Civilisation*, Kalinga Publications, Delhi (2004), pp. 11-12. "Provisions in the National Policy on Child Labour, drawn from the Constitution, spell out measures for the elimination of child labour through employment generation (i.e., the government's attempts to provide employment to at least one member of one family by starting new works, such as constructing roads and other building operations), poverty alleviation, general development of rural and urban areas, extension of adequate facilities for both formal and informal education, free and compulsory education of children, "free tiffin" (i.e., in schools run by the government in remote, tribal areas government provides free lunch to children to encourage them to come to schools, parents also feel happy as they do not have to spend anything on their children's lunch), text books, exercise books, etc., and extension of coverage and social security, health schemes and welfare schemes."

⁴⁰ See The Child Labour (Prohibition and Regulation) Act, 1986.

districts of high child labour endemicity in the country.⁴¹ Under the Scheme, the District Collectors were provided funds for running special schools for child labour which were mostly run by the NGOs in the district. The coverage of the NCLP Scheme increased to 12 districts in 1988, 100 districts in the 9th Plan and to 250 districts during the 10th Plan.⁴²

The problem of child labour is inextricably linked with poverty and illiteracy and its solution may not be legislation alone. Only a holistic, multipronged and concerted effort to tackle it would bring in the desired results.

As contemplated under the National Policy on Education, 1986, a periodic review was conducted which led to a Plan of Action in 1992.

PLAN OF ACTION ON NATIONAL POLICY ON EDUCATION - 1992

In 1992, as an update on the National Policy on Education – 1986, a plan of action was prepared assigning specific responsibilities for organising, implementing and financing its

⁴¹ <http://labour.nic.in/cwl/ChildLabour.htm> [internet accessed on 17th February, 2010]. Under the Scheme, funds are given to the District Collectors for running special schools for child labour. Most of these schools are run by the NGOs in the district.

⁴² <http://labour.nic.in/cwl/NclpDistricts.htm> [internet accessed on 17th February, 2010].

proposals. In pursuance of Article 45 of the Directive Principles, this modified plan of action had the stated objective of providing free and compulsory elementary education of satisfactory quality to all children up to the age of 14 years before the dawn of the 21st Century. The Central Government was to augment the efforts of the State Governments towards achieving universalisation of Primary Education through Centrally Sponsored Schemes of Operation Blackboard, Teacher Education, Non-formal Education, National Programme of Nutritional Support for Primary Education⁴³ and District Primary Education Programme. The Working Group on Elementary Education for 9th Five Year Plan had recommended a tentative outlay of Rs. 79,260 crore in the Central Sector and Rs. 46,393 crore in the State sector with this purpose.⁴⁴

It can be seen that education is understood to be something more than mere literacy and the Indian State has recognised the need for getting its population educated. With this objective, it framed a National Policy on Education in 1968 and revamped it in 1986. It came out with a Plan of Action in 1992 and conducts periodic

⁴³ Commonly known as Mid-day Meals Programme.

⁴⁴ Government of India, Ministry of Human Resource Development, Rajya Sabha starred question no. 152, answered on 05.06.1998. <http://164.100.24.219/rsq/quest.asp?qref=72380> [internet accessed on 9th November 2006.]

reviews of the implementation of its policy. Understanding the problem of child labour in reaching universal education to all children, the government has framed a Policy on Children in 1974 and a Policy on Child Labour in 1988.

Apart from these policy initiatives the government has made incremental progress in the field of education through inputs obtained from the various commissions and committees it has created for specific issues. The role of the Central Advisory Board on Education and the inputs of the various commissions and committees are analysed in the next chapter.

CHAPTER III

CENTRAL BOARD, COMMISSIONS, COMMITTEES, PATTERN & RESOURCES

CENTRAL ADVISORY BOARD OF EDUCATION

The Calcutta University Commission had in 1917-19 suggested that the Government of India could define the general aims of educational policy and assist the local governments in the development of educational ideas. Around this time the Government of India Act 1935 transformed education into a mainly provincial subject and reduced the role of the Central Government to a minimum. The Secretariat Procedure Committee set up to implement the Government of India Act, 1919, wanted the executive authority of the Government of India to be a centre of the best information, research and advice rather than one which gave orders. In view of this, the oldest education advisory body of the Government of India, the Central Advisory Board of Education (CABE) was set up in 1920 with the Education Commissioner to the Government of India as its Chairman.¹

This institution was wound up in 1923 owing to a financial crunch. The Report of Hartog Committee in 1928 termed the

¹ The material relied on for information about the Central Advisory Board on Education is taken from <http://shikshanic.nic.in/cd50years/g/52/F9/52F90101.htm> [internet accessed on 5th May, 2004] and <http://www.education.nic.in/Annualreport2004-05/overview.pdf> [internet accessed on 12th January, 2006].

divorce between the Government of India and education as unfortunate and this led to the revival of the Central Advisory Board of Education in 1935. It functioned till March 1994 when its extended tenure expired.² After an inexplicable gap of ten years the Government reconstituted the CABE in July 2004.³

Functions delineated to the CABE by the Ministry of Human Resources include (i) the review of the progress of education from time to time; (ii) the appraisal of the extent and manner in which the education policy has been implemented by the Central and State Governments, and other concerned agencies, and to give appropriate advice in the matter; (iii) to advise on coordination between the Central and State Governments/UT Administrations, State Governments and non-governmental agencies for educational development in accordance with the education policy; and (iv) to advise, *suo motu*, or on a reference made to it by the Central

² Research Reference and Training Division, *India 2008 – A Reference Annual*, Publications Division, Ministry of Information & Broadcasting, Government of India, New Delhi (2008), p. 219.

³ <http://www.education.nic.in/Annualreport2004-05/overview.pdf> [internet accessed on January 12, 2006]. "The reconstituted CABE has formed seven Committees on the subjects of: i) Free and Compulsory Education Bill and other issues related to Elementary Education, ii) Girls Education and the Common School System, iii) Universalisation of Secondary Education, iv) Autonomy of Higher Education Institutions v) Integration of Culture Education in the School Curriculum vi) Regulatory Mechanism for Text Books and Parallel Text Books Taught in Schools Outside the Government system, and vii) Financing of Higher and Technical Education."

Government or any State Government or a Union Territory Administration on any educational question.⁴

In *Ms. Aruna Roy v. Union of India*,⁵ the Supreme Court had occasion to observe that,

“the main function of the CAGE as per the resolutions is to review the progress of education from time to time and to appraise the extent and manner in which the Education Policy has been implemented by the Central and State Governments and other concerned agencies and to give appropriate advice in the matter. It can also advise the Government regarding coordination between the Central Government and the State Government for educational development in accordance with the Education Policy. *Suo motu* also, it can advise on any educational question.”

At its 54th meeting in 2005, the CAGE considered and approved the National Curriculum Framework for School

⁴ By Resolution of the Department of Education, NO.F.1-2/90-PN (D.II) dated 19/10/1990.

⁵ 2002 ACT (S.C.) 1497 at <http://www.judgments-online.com/headnote.asp?ID=20026847&H=1> [internet accessed on August 24, 2005]. The Court made the observation in the context of a challenge against the non-consultation of the CAGE prior to framing of the curriculum when the National Curriculum Frame Work for School Education was published by NCERT in 2002.

Education, 2005, prepared by the National Council for Educational Research and Training (NCERT).⁶ It places the child at the centre of its proposals.⁷ It also lays emphasis on the need for Value Education.

The National Policy on Education, 1986 as revised in 1992 through its Programme of Action-1992 also lays considerable emphasis on value education with the aim of making education a significant tool for achieving social and moral values. A Central Sector Scheme of Assistance for Strengthening of Culture and Values in Education is under implementation for achieving the goals of the National Policy on Education.⁸

This includes inculcation of the basic values and an awareness of all the major religions of the country as one of the

⁶ <http://www.education.nic.in/cabe/CabeAgenda100209.pdf> [internet accessed on 18th February, 2010].

⁷ <http://www.indiatogether.org/2005/dec/edu-ncf2005.htm> [internet accessed on 18th February, 2010].

⁸ *India 2007 – A Reference Annual*, Publications Division, Ministry of Information and Broadcasting, Government of India, New Delhi (2007), p. 246. “Under this Scheme, financial assistance is given to Governmental and non-Governmental organisations, Panchayati Raj Institutions, etc., to the extent of 100 per cent of grant for the project proposals approved subject to a ceiling of Rs. Ten lakh for strengthening cultural and value education from pre-primary education system to higher education including technical and management education.”

central components.⁹

Apart from these, the CAGE has also laid down norms for foreign funding of financing education in India and as per the government external assistance for education in India has been considered only within the parameters laid down by it.¹⁰

The CAGE also instituted committees for specialised tasks. One such relates to the financing of higher and technical education.

**Committee on Financing of Higher and Technical Education,
2005**

Instituted by the Central Advisory Board of Education this Committee went into the aspects of financing higher and technical education. The main recommendations contained in its report are:

⁹ Government of India, Ministry of Human Resource Development, Department of Elementary Education and Literacy, Rajya Sabha unstarred question no: 2313, answered on 16.03.2001. <http://164.100.24.219/rsq/quest.asp?qref=42563> [internet accessed on 10th November, 2006].

¹⁰ <http://www.education.nic.in/cd50years/r/2Q/A2/2QA20601.htm> [internet accessed on 18th February, 2010]. "The external funding should be in addition to the resource for education. The project must be in total conformity with the national policies, strategies and programmes. The project formulation should be the responsibility of the Centre/State Government/other national agencies and that project formulation should be a process of capacity building. The project must be drawn up on innovative lines emphasising people's participation, improvement of quality and equality of education and a substantial upgradation of facilities. External assistance should be used for educational reconstruction which should go beyond conventional measures, such as, opening of new schools and appointing teachers and addressing issues of content, process and quality."

- “1. Preparation of a detailed perspective plan, giving detailed estimates, for the development of Higher and Technical Education.
- 2: Suggestion for sustained state funding - 25% of the budget of education for Higher and Technical Education;
3. Launching of a programme for restoring basic minimum facilities in all Colleges and Universities;
4. Enhancement of the allocations for research;
5. Strengthening of the scholarships scheme;
6. Evolution of a system of proper mix of block grant, matching grant and development grant;
7. Methods of making grants need to be based on transparent criteria & principles;
8. Curb on the rate of cost recovery of higher education;
9. Progressive taxation system to tax affluent class for financing higher education;
10. Preparation of detailed guidelines on admission criteria and fee structure for foreign students;

11. Setting up of a body for financing higher education (suggested name - Higher Education Finance corporation) for coordinating the student loan scheme of several banks as also to provide soft loan and scholarship by itself;
12. Restrictions in starting of Self-financing courses;
13. Discouraging the programmes and courses requiring laboratory and extensive library based courses through distance mode;
14. Stronger and effective linkages with industry;
15. Motivating philanthropic contribution and donations;
16. Check on the growth of private higher education with proper regulations to curb the tendencies of profit making and ensure quality education;
17. Regulating entry of foreign universities;
18. Proper allocation of the resources for academics activities, administration, maintenance and auxiliary services;

19. Building up a strong database on higher education.”¹¹

Apart from the CAGE, the Centre and the States in India have relied on other Commissions and Committees¹² to formulate aspects of their policy on education.¹³

COMMISSIONS AND COMMITTEES

Among these, the University Education Commission (1948-49) and the Secondary Education Commission (1952-53) have in particular, reviewed the problems of educational reconstruction. The development of science, technology and scientific research

¹¹ <http://164.100.24.219/rsq/quest.asp?qref=105749> [internet accessed on 14th November, 2006.]

¹² “A ‘Commission’ is a governmental agency created to perform a particular function such as special investigations or on governmental regulations of business. It is appointed mainly when it is thought that a matter involves some financial questions. The status of a ‘Committee’ is also the same as that of a ‘Commission’, but it does not possess as wide powers as are enjoyed by a Commission and has to limit itself to specific work assigned to it under its terms of reference. While arriving at decisions in the form of recommendations, a Commission or Committee ensures that such decisions are representative of interests of various types of people and also a safeguard against abuse of power.

The Chairman of a Commission is a person well-versed mostly in legal matters and is often a retired judge of a High Court or the Supreme Court of India...occasionally, a Member of Parliament is also appointed... On the other hand, the Chairman of the Committee is mostly a specialist in the subject of the Committee. He can be a Leader or a convenor also, if he heads a Panel, a Study group or a Delegation, etc.

The Members of a Commission, Committee, Panel, Study Group etc., are specialists in their respective fields and provide valuable guidance to the Commission or the Committee in making recommendations.” S.P. Agrawal, General Editor, *Committees and Commissions in India 1974*, Concept Publishing Company, New Delhi (1993), p 7.

¹³ Radhakrishnan Commission (1948), Second Education Commission (Chairman Lakshmanaswami Mudaliar), 1952, the Kothari Commission, 1964-66, Punayya Committee, Parthasarathi Shome Committee, Rammurthi Committee, 1990, Jarardan Reddy Committee, 1991, Ambani-Birla Committee, S.B. Chavan Committee on Value Based Education (1999), etc., are some examples.

received special emphasis under the Resolution on Scientific Policy crafted under the stewardship of Jawaharlal Nehru. At the end of the third five-year plan a comprehensive review of the educational system towards a fresh attempt at educational reconstruction was entrusted to the Education Commission (1964-66).

The Commission was to advise the Government on the national pattern of education and on the general principles and policies for the development of education at all stages and in all aspects.¹⁴ The report of the Education Commission of 1964-66 is popularly known as the Kothari Commission Report. The Kothari Commission proposed a revised uniform nomenclature for various stages of education when it noted the prevalence of different structures of elementary education in different states.

The Commission emphasised the need to create a climate of sustained hard work in all educational institutions and to ensure that available facilities are intensely utilised. It also suggested that the highest priority should be given for transforming the content of

¹⁴ <http://www.education.nic.in/cd50years/g/T/H5/0TH50C01.htm> [internet accessed on 18th February, 2010].

education.¹⁵

Reflecting on the state of affairs in the field of education and following up on the changes brought about in schooling, the government constituted a committee to examine its recruitment policy and selection methods. The recommendations of the committee provide a reality check on the actual quality in the education system prevailing at that point of time.

The Committee on Recruitment Policy and Selection Methods, 1974¹⁶

It was constituted to go into the system of recruitment to certain posts by the Union Public Service Commission (UPSC) and to recommend appropriate changes in the scheme of examinations and in the selection methods to give adequate emphasis to knowledge, skills and qualities appropriate to the role and functions of the service in the context of task of national development and

¹⁵ http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/36/57/f7.pdf [internet accessed on 18th February, 2010].

¹⁶ Chairman: Dr. D.S. Kothari; Members: Prof. S. Chakravarty, Dr. M.L. Dhar, Prof. M.V. Mathur and G. Parthasarathi; Secretary: D.R. Kohli; Under Secretary: S.K. Bose. Appointed by UPSC vide its Notice No. F. 26/21/72-E1(B) dated 6th February, 1974 to go into the existing system of recruitment to certain posts by the UPSC and to recommend appropriate changes, in pursuance of its Resolution dated 19th January, 1974. The analysis on this Committee is based on information contained in: 'Committee on Recruitment Policy and Selection Methods, 1974 – Report', in Virendra Kumar, et al, Compilers, *Committees & Commissions in India, 1974*, Vol. 12, Concept Publishing Company, New Delhi (1993), p 34.

reconstruction. The Committee recommended a comprehensive revamp of the Civil Services Examination for the recruitment to the All India and Central Services (Class I) and suggested a unified scheme of examination common to all services. The Committee recommended a continuing review by the Commission and the Personnel Department of the standard of recruitment and special steps to be taken by the UPSC and the government if there was a noticeable lowering of standards. The Committee also noted the need for widening the base of recruitment. The Committee laid emphasis on ensuring the merit of the candidates, but no concrete measures were suggested by the Committee for ensuring adequate number of recruits representing the less empowered classes of the society or of ensuring a continuous supply of meritorious candidates educated in the average educational institutions in the India as compared to the elite and costly educational institutions which produced the majority of such candidates.

With a view to revamping the organisational structure on higher education, the government constituted a review committee on the University Grants Commission through which the central funds were routed to institutions providing higher education.

Review Committee on University Grants Commission, 1974¹⁷

This Committee¹⁸ had as its terms of reference the reviewing of the functioning of the University Grants Commission (UGC), with particular reference to coordination and determination of standards of higher education and to make recommendations conducive to more effective discharge of its responsibilities.

In this report, the Committee notes in its introductory remarks that as a result of the radically diluted UGC Act, 1956 in place of the draft Universities (Regulation of Standards) Bill, 1951, a *laissez faire* in the growth of universities and colleges in India occurred. The UGC was left as a hopeless spectator when the number of universities grew from 33 in 1956 to 111 in 1975; the number of colleges grew from 1004 in 1956 to 4388 in 1975 and the number of teachers grew from 36000 in 1956 to over 150000 in 1975 while the teacher student ratio worsened from 1:18 to 1:20. The Committee further noted that even the Planning Commission

¹⁷ The analysis on this Review Committee is based on information contained in 'Review Committee on University Grants Commission, 1974 – Report', in Virendra Kumar, et al, Compilers, *Committees & Commissions in India, 1974*, Vol. 12, Concept Publishing Company, New Delhi (1993), p 208.

¹⁸ Chairman: V.S. Jha; Members: R.C. Mehrotra, Dr. B. Date (replaced by G.C. Pande); Member Secretary: S.N. Pandita. Appointed by Government of India to review the functioning of the University Grants Commission on 31.08.1974 in pursuance of the recommendation made by the Public Accounts Committee of Parliament in its 114th Report.

could do little to attempt a methodical planning of higher education in the country and that its targets for the increase in university and college enrolment in arts, science and commerce subjects were not related to any definition or purposes of this sector of education. In its opinion, the Planning Commission found it difficult to relate enrolment in higher education to manpower forecasts. The Committee notes that a cautious enrolment policy¹⁹ aimed at consolidation and improvement rather than expansion of higher education with a better utilisation of funds for betterment of standards was found to be politically unacceptable, since the Parliamentary Committee on Education believed that efforts needed to be made to provide admission to institutions of higher education to all eligible students who desired to study further. The Review Committee considered this to be an open door policy without any standard for standards and costs and saw the constitutional amendment placing education in the Concurrent List²⁰ as an enabling measure opening up possibilities of rationalisation, planning and control with due regard to national priorities.

¹⁹ As suggested by the Education Commission (1964-65).

²⁰ Based on the recommendations in its interim report of 4th May, 1976.

In its Report, the Review Committee recommended the formation of a high level coordinating body with heads of different organisations dealing with higher education and research like the University Grants Commission,²¹ National Centre for Software Technology,²² Council of Scientific and Industrial Research,²³ Atomic Energy Commission,²⁴ Indian Council of Social Science Research,²⁵ Indian Council of Historical Research,²⁶ Indian Council of Agricultural Research,²⁷ Indian Council of Medical Research²⁸ and All India Council for Technical Education²⁹ as well as senior representatives of the ministries of education, health and agriculture and the Planning Commission as its members to deal with matters of policy regarding coordination of activities and sharing of resources between areas of teaching and research involving universities falling

²¹ www.ugc.ac.in.

²² Now it is the Centre for Development of Advanced Computing (C-DAC).

²³ www.csir.res.in. It promotes the development of indigenous technologies and resources.

²⁴ www.aec.gov.in. It is the apex body in the department of atomic energy.

²⁵ www.icssr.org. It was established to promote research in social sciences in the country.

²⁶ <http://www.ichrindia.org>. It brings historians together and provides a forum for exchange of views between them to give a national direction to an objective and scientific writing of history and to have rational presentation and interpretation of history.

²⁷ www.icar.org.in. It is the apex body for coordinating, guiding and managing research and education in agriculture including horticulture, fisheries and animal sciences.

²⁸ www.icmr.nic.in. It is the apex body for the formulation, coordination and promotion of biomedical research.

²⁹ www.aicte-india.org. It is the advisory and statutory body established for proper planning and co-ordinated development of technical education system throughout the country.

within the purview of the UGC, higher educational institutions outside the purview of the UGC and non-university research organisations.

On the question of establishment of new colleges, the Review Committee recommended that they should be set up only after a joint survey by the affiliating university, the UGC and the State Government concerned regarding their need, location, courses of study, staff, limits of intake, assured adequate minimum financial support and other relevant factors.

Further the Committee recommended increased financial support to the universities, to the UGC, etc., increase in the strength of the UGC to make it more representative in character with more experts from the field of education.

The Committee further recommended that the Annual report of the UGC should also present to Parliament its assessment of problems and perspectives of higher education and of the state of coordination and standards in universities apart from the mandated true and full account of its activities in the previous year.

After the National Policy on Education was reframed in 1986 and a plan of action was proposed in 1992, calls for universalisation

Cochin University of Science & Technology

of primary education intensified. The policies of liberalisation, privatisation and globalisation initiated by the government in the 1990s, the increasing demands for higher education, the growth of self-financing educational institutions and the decisions of the Supreme Court also called for strengthening the primary education sector. It became imperative for the government to address the demand for universalisation of education not just at the policy level but also at the practical level.

The Saikia Committee, 1996

This was a Committee of Ministers set up by the Department of Education on 29 August 1996. Shri Muhi Ram Saikia, then Minister of State for Human Resource Development, chaired it. The mandate of the Saikia Committee was to examine and consider the legal, academic, administrative and financial implications of the proposal to amend the Constitution to make the right to free and compulsory education a fundamental right and to suggest suitable statutory measures to enforce it. The Committee in its report submitted to the Government in January 1997 made the following

major recommendations:³⁰

1. The Constitution of India be amended to make the right to free and compulsory education upto 14 years of age a fundamental right and a fundamental duty;
2. States should either amend their existing legislation or enact fresh legislation to give effect to the proposed Constitutional Amendments;
3. Additional requirement of funds would be Rs. 40,000 crore over a period of five years mainly for providing elementary education to out of school children;
4. The Department of Education should have these estimates carefully studied in consultation with experts who may also identify the possible source for additional funds.

Once the Saikia Committee's recommendations were accepted in principle it became necessary to assess the financial requirements for putting it into practice.

³⁰ Government of India, Ministry of Human Resource Development, Rajya Sabha unstarred question no: 1964, answered on 12.03.1999. <http://164.100.24.219/rsq/quest.asp?qref=1507> [internet accessed on 10th November, 2006].

The Majumdar Committee, 1997

In pursuance of the recommendation of the Saikia Committee, the Department of Education constituted on 18th June 1997, a Group of Experts, to examine the financial requirements of the States/Union Territories to implement the proposed legislation on compulsory education. It was intended to identify the existing financial requirement and to suggest measures for mobilising additional resources. The group was also to determine a suitable arrangement between the Central and State Governments to share the financial requirements. Prof. Tapas Majumdar who chaired the Group, submitted its report in February, 1999. The major recommendations of the Group include:³¹

1. Requirement of an additional estimated amount of Rs. 1,36,822 crore over a period of ten years to achieve the goal of the universalisation of elementary education.
2. Enhancement of Government allocations for Education to 6% GDP assuming an annual growth rate of 5% in real terms over this period.

³¹ Government of India, Ministry of Human Resource Development, Rajya Sabha unstarred question no: 1964, answered on 12.03.1999. <http://164.100.24.219/rsq/quest.asp?qref=1507> [internet accessed on 10th November, 2006].

3. Provision of additional resources for achieving Universalisation of Elementary Education through augmentation of tax revenues, increase in non tax revenues and restructuring of government expenditure in favour of education.

At the beginning of the new Millennium, the government constituted a Review Commission to examine as to how the Constitution could respond to the changing needs of efficient, smooth and effective system of governance and socio-economic development of modern India within the framework of Parliamentary democracy, and to recommend changes, if they were required to the provisions of the Constitution without interfering with its basic structure or features. An aspect looked into by this Commission was education.

**National Commission to Review the Working of the
Constitution, 2000**

In its Consultation Paper on Literacy in the context of the Constitution of India, the NCRWC opined³² that education is

³² <http://lawmin.nic.in/ncrwc/finalreport.htm> [internet accessed on 11 May, 2005].

viewed as an integral part of national development. It saw development as not only economic growth but also as opportunities to all people for a better life with 'man as end of development and instrument'. It perceived education and development to be linked in a variety of ways.

The Review Committee treated education as a human right, the exercise of which is essential for individual development and fulfilment. It understood that the capacity of an individual to contribute to societal development is made possible and enhanced by his or her development as an individual and hence saw education to be a basic need. It recognised education to be a means by which other needs, both collective and individual, are realized. Thus, the Review Committee in its consultation paper found education to be the instrument by which the skills and productive capacities are developed and endowed. It noticed the interrelationships of education and development to be inseparable from the conception of educational policies.

In its final report submitted to the Government of India on 31st March 2002, the NCRWC felt that the constitutional commitment for free and compulsory education for all children until

the age of fourteen should in no circumstances be diluted and that the State should fulfil this solemn obligation to the Nation. It recommended the entrustment to the Panchayats and the Local Self Government institutions the universalisation of elementary education.³³

The constitutional guarantees afforded to minority communities came under increased challenge in the context of admissions to higher education. It was felt necessary to assure the minority communities that their fundamental rights in the field of education would be adequately protected. The government also felt the need to balance the concept of social equity in access to education even within the minority communities.

**National Commission for Minorities Educational Institutions,
2004**

The National Commission for Minorities Educational Institutions (NCMEI) was established in November, 2004 primarily to advise the Central and State Governments on protecting the constitutional rights of the minorities to establish and administer

³³ Report of the NCRWC, Vol. 1, Universal Law Publishing Co. Pvt. Ltd., New Delhi (2002), p.65.

educational institutions of their choice.³⁴ The National Commission for Minorities Educational Institutions (Amendment) Act, 2006 further delineated the powers of the Commission.

Meanwhile, finding the representation of the backward communities in the educational institutions to be very low and bowing to political considerations, the government reserved twenty-seven per cent of the seats in higher educational institutions run by the Central Government. In order to minimise the adverse political fallout of this from the sections of the society who would suffer a loss of seats, a committee was constituted to monitor the implementation of a proportionate increase in seats to counter the loss of merit seats on account of reservation.

Veerappa Moily Committee, 2006

The Oversight Committee on the Implementation of the New Reservation Policy in Higher Educational Institutions headed by Sri. Veerappa Moily, Chairman on the Administrative Reforms Commission submitted its report in September 2006.

The Committee was set up to monitor the implementation of

³⁴ <http://education.nic.in/scst/SCST-NCMEI.asp> [internet accessed on 3rd December, 2009.]

twenty seven per cent reservation of seats for OBCs in the institutes of higher learning within a period of three years from 2007-08 and for this purpose to assess the infrastructure in the institutions across India.³⁵ The Committee recommended that all institutes of higher learning should fully implement the quota within the maximum period of three years and all such Institutes which have capacity to implement it within a lesser time should do so without taking recourse to the three-year time frame.³⁶

The Committee observes in its final report,

“Justice relates to the society and Liberty relates to the individual, the former paves the way to establishing an inclusive society and the latter finds the path for the individual in pursuit of excellence.”³⁷

³⁵ The Oversight Committee was constituted under the orders of the Prime Minister on 27th May 2006 to look into the following aspects and submit its report. 1. Implementation of 27% reservation for the OBCs in institutes of higher learning and 2. Assessment of additional infrastructure and other requirements for increasing the overall availability of seats to a level so that the present level of seats available to the general category students does not decline.

³⁶ *Final Report of the Oversight Committee on the Implementation of the New Reservation Policy in Higher Educational Institutions*, Planning Commission, Government of India, http://planningcommission.nic.in/reports/genrep/resedu/rep_resedu.pdf [internet accessed on 17th February 2009], p. 30.

³⁷ *Final Report of the Oversight Committee on the Implementation of the New Reservation Policy in Higher Educational Institutions*, Planning Commission, Government of India, http://planningcommission.nic.in/reports/genrep/resedu/rep_resedu.pdf [internet accessed on 17th February 2009], p.6.

The Veerappa Moily Committee was able to successfully supervise the execution of a proportionate increase in seats consequent to the reservation of twenty seven percent seats for the backward classes in the central universities. Its success lies in the change being conducted in a peaceful manner without any violent social upheavals.

India's growth as a superpower is dependent on its ability to integrate into the global economy. Recognising India's strength as an information processing centre in the world and to realise its full potential, the government set up the National Knowledge Commission.

The National Knowledge Commission, 2005

A high-level advisory body to the Prime Minister of India, the National Knowledge Commission was formed in 2005 with the objective of transforming India into a knowledge society. It submitted around 300 recommendations on 27 focus areas during its three and a half year term. Though its term came to an end, implementation of its recommendations are still underway at the Central and State levels.

The National Knowledge Commission identified the

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provision for providing universal access to quality school education as a cornerstone of development and a minimum necessary condition for any progress towards making India a knowledge society. For this it called for a central legislation affirming the right to education and a financial provision requiring the central government to provide the bulk of the additional funds needed for realising it. It suggested that the legislation should also lay down minimum standards of quality in school education. It called for the responsibility of the different levels of government to be recognized and made justiciable.³⁸

As a follow up on the recommendations of the National Knowledge Commission, the Right of Children to Free and Compulsory Education Act, 2009 was enacted. A Scheme for Universal Access and Quality at the Secondary Stage was started with efforts to set up 6000 high quality Model Schools with at least one school in each Block. Under its first phase 2500 public funded schools with 2000 in the model of Kendriya Vidyalayas and 500 in the model of Navodaya Vidyalayas were to be started in the

³⁸ <http://www.knowledgecommission.gov.in/focus/rte.asp> [internet accessed on 27th January, 2010].

educationally backward Blocks with significant scheduled caste, scheduled tribe, other backward classes and minority population.

About 2500 schools were to be established through public-private partnership in other Blocks with emphasis on geographic, demographic, gender and social equity.

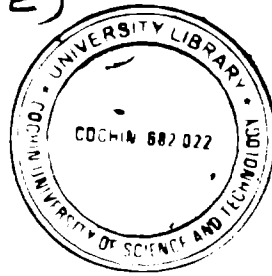
Influenced by the recommendation of the National Knowledge Commission, for the expansion, redesign and quality enhancement of Vocational Education and Training in the country, a three tier structure was constituted in July 2008 under the National Skill Development Mission. This three tier structure consists of:

a) National Council on Skill Development, which functions under the Prime Minister to lay down policy objectives, strategies, financing and to make a governance model to promote skill development.

b) National Skill Development Coordination Board which would enumerate strategies to implement decisions of the Prime Minister's National Council on Skill Development. Its function is to develop operational guidelines and instructions for meeting larger objectives of skill development needs of the country and to suggest appropriate practical solutions and strategies to be adopted by the

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Union and State Governments.

c) National Skill Development Corporation which would function with the aim of developing a system of institutionalising measures to achieve the expansion, redesign and quality enhancement of Vocational Education and Training.

In the field of higher and technical education, acting on the recommendations of the National Knowledge Commission, the Government sanctioned the setting up of fifteen new Central Universities and fourteen new Universities based on world-class standards to expand capacity and improve quality of higher education.

The Government also initiated the process of setting up eight Indian Institutes of Technology, ten National Institutes of Technology, twenty Indian Institutes of Information Technology as far as possible in the public-private partnership mode, three Indian Institutes of Science Education and Research, seven Indian Institutes of Management and two Schools of Planning and Architecture.

Yet another initiative is the National Mission on Education through Information and Communication Technology which tries to leverage the potential of technology in the teaching learning

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process. It aims to enhance the Gross Enrolment Ratio in Higher Education by 5 percent by the end of the XI Plan. The Mission proposes to provide connectivity to 20,000 institutions of Higher Education and nearly 10,000 University Departments. The estimated cost of the Mission is Rs. 4612 crore.

The success of the National Knowledge Commission would lie in how quickly and effectively its recommendations are implemented by the government. To ensure that the governmental efforts at ushering in change reach the children in an effective manner, there has to be a mechanism to safeguard their rights.

National Commission for the Protection of Child Rights, 2007

Established under the Commissions for the Protection of Child Rights Act, 2005, the National Commission is formed to ensure that all laws, policies, programmes, and administrative mechanisms are in consonance with the child rights perspective as enshrined in the Constitution of India and also the United Nations Convention on the Rights of the Child.³⁹ The Commission started functioning from March 2007. For the purposes of the Commission

³⁹ <http://ncpcr.gov.in/> [internet accessed on 31st January, 2010].

a Child is defined as a person up to the age of eighteen.

The Commission has the power to influence the development of child rights jurisprudence in India in a big way given its mandate. From the perspective of increasing access to education, the Commission can use the following mandate very effectively:⁴⁰

(1) Examine and review the safeguards provided by or under any law for the time being in force for the protection of child rights and recommend measures for their effective implementation;

(2) Inquire into complaints and take *suo motu* notice of matters related to: (i) Deprivation and violation of child rights, (ii) Non implementation of laws providing for protection and development of children, (iii) Non compliance of policy decisions, guidelines or instructions aimed at mitigating hardships to and ensuring welfare of the children and to provide relief to such children or take up the issues arising out of such matters with appropriate authorities; and

(3) Inquire into violation of child rights and recommend initiation of proceedings in such cases.

⁴⁰ http://www.ncpcr.gov.in/mandate_commission.htm [internet accessed on 31st January, 2010].

The effectiveness of the National Commission is not yet discernable, it perhaps being too early to assess it.

One of the steps taken by the government is a periodic review of the condition of higher education system in the country. Such a review was also recommended by the earlier commissions that dwelt on the sector of education. Criticism about the style and functioning of the apex bodies like the University Grants Commission and the All India Council for Technical Education prompted the government to think towards a revamp of the current institutional structure in the field of higher and technical education.

Committee to Advise on Renovation and Rejuvenation of Higher Education, 2008.

The Committee for Rejuvenation and Renovation of Higher Education was set up for the review of UGC/AICTE as a result of suggestions by the National Knowledge Commission. It was constituted under the Chairmanship of Prof. Yash Pal, former Chairman, University Grants Commission in February, 2008 to review the role of statutory bodies like the University Grants Commission and the All India Council for Technical Education in the context of changes in higher, professional and technical

education in the country and demands of a new knowledge economy.⁴¹

The Committee submitted an interim report in March 2009 where it identified problems faced by the higher education sector in India.⁴² The Committee found an urgency for reform in the higher education system since the sector hardly saw any major reform in the previous forty years. The Committee felt that higher education in India continued to operate in the old policy frame though the world had changed dramatically. The Committee recommended for a paradigm shift in the sector.

The Yash Pal Committee report seeks to reconstruct the basic idea of a university with the objective of fostering quality and excellence so as to develop a creative and innovative human resource base. In this it has also considered and addressed

⁴¹ The Committee was asked to, "a) review the functioning of the UGC and the AICTE and, b) critically assess their role and preparedness in providing institutional leadership to the emerging demands of access, equity, relevance and quality of higher education/technical education and the university system. The terms of reference also included assessment of the role that the UGC and the AICTE play in determining and enforcing standards of higher/technical education in state universities and looking into the possibilities of introducing a system of incentives and disincentives so that national standards of higher education/technical education are not compromised or diluted. The committee was also mandated to examine UGC's mechanisms in coordinating standards of higher education vis-à-vis the functional role of other statutory agencies such as AICTE, MCI, DCI, NCI, NCTE, DEC, etc."

⁴² <http://www.academics-india.com/Yashpal%20Committee%20Report.doc> [internet accessed on 28th January, 2010].

concomitant issues of access, equity and social justice while recognising that higher education is primarily a state responsibility though with a substantial role for the private sector.

The two major recommendations of the Committee in respect of ensuring equity and access to education are:⁴³

(i) Undergraduate programmes to be restructured to enable students to have opportunities to access all curricular areas with fair degree of mobility; and

(ii) Expansion of the higher education system to be evaluated and assessed continuously to respond to the needs of different regions in India in order to ensure not only equity and access but also quality and opportunity of growth along the academic vertical.

As a result of these developments and due to the globalisation of the Indian economy, to properly address its constitutional requirements even while upholding its treaty obligations, major legislations for restructuring the field of education is now pending in the Parliament.

⁴³ *Interim Report of the Committee to Advise on Renovation and Rejuvenation of Higher Education System in India*, pp. 41-42. <http://www.academics-India.com/Yashpal%20Committee%20Report.doc> [internet accessed on 28th January, 2010].

An analysis of the commissions and committees would not be complete without giving due recognition to the role played by the standing committees in the Parliament.

Departmentally Related Standing Committees of the Parliament

The Departmentally Related Standing Committees (DRSCs) of the Parliament are a useful tool for research and recommendation. Changes in the major societal systems and arrangements have been brought in by the DRSCs, which have played a crucial role in influencing legislation, long term policies, budgetary allocations and programme content of various developmental activities, besides securing accountability of the executive. A major change in educational system that was initiated at the instance of a DRSC is the emphasis laid on value education in the National Curriculum Framework 2005 framed by the NCERT.⁴⁴

⁴⁴ S. Bal Shekar, "The Functioning of Departmentally Related Standing Committees: An Evaluation", in K.V. Kesavan, *Parliamentary Committees in Japan and India: Their Functions and Relevance*, Manak Publications, New Delhi (2003), p. 106 at pp. 124-125. "The DRSC on Human Resource Development in their 81st Report on 'Value Based Education' had emphasised the need for a concerted and co-ordinated effort on the part of all the implementing agencies to ensure that all plans and strategies chalked out for making the present education system a value oriented one became successful. The Committee felt that certain universal core values, which had a national applicability, should be incorporated in a National Programme to be adopted by all States to propagate Value Based Education. However, the Committee felt that there should be some flexibility in the scheme to enable the States to include certain values relevant to their society in their respective education programmes. The government accepted the

An understanding of the Policy induced changes in the field of education would not be complete without a look at the pattern of education followed in India.

PATTERN OF EDUCATION IN INDIA

The schooling pattern in India comprises the following stages:

Primary:	I to IV / V
Upper Primary:	V/ VI to VII/ VIII
Secondary:	VIII/ IX to X
Higher Secondary:	XI to XII

As early as in 1993 the Supreme Court had declared that education up to the age of fourteen is a fundamental right. Though not followed uniformly in all the States and Union Territories, the National Policy of Education envisages a uniform pattern of school education which divides elementary education into two with the

recommendations of the DRSC and set up a Group of Experts under the Union Secretary for Secondary Education and Higher Education to review the position and to recommend the strategy for the introduction of education in human values on a time bound basis at all levels of education. This Group would provide a co-ordinated approach and action for the future, as desired by the Committee. In pursuance of the recommendations, a National Research Centre in NCERT for School Education System had been launched. For the Colleges and Universities, the UGC would be the National Resource Centre. The All India Council for Technical Education (AICTE) would be the Nodal Organisation for value education in engineering and management institutions. The state governments had been advised to set up their Group of Experts on the lines of the one in the Central Government."

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lower primary schooling covering the first five years and the upper primary schooling covering the next three years. Elementary education is imparted in primary and upper primary schools under the first two stages of the schooling pattern. Children in the age-group of 5-10/ 11 years attend the primary school while those in the age-group of 11/12-14/15 years attend the upper primary school. Constitutionally assured free and compulsory education to all children up to fourteen years of age is hence confined to elementary education.

The States are free to decide their own schooling pattern since education is a subject on the concurrent list making it the responsibility of both the Central Government and State Governments. In eleven States, I to IV standards are covered in lower primary schools and V to VII standards are covered in upper primary schools. In the other twenty-four States and Union Territories the lower primary schools cover I to V standards and the upper primary schools cover VI to VIII standards.

Hence, though elementary education in India is available as a fundamental right to all children between the age of six and fourteen as a fundamental right, this may be completed in seven or eight

years of schooling depending upon the State or Union Territory the child get his education in.

Ten years of schooling is required to complete the secondary stage and two years of schooling thereafter for completing the higher secondary stage. Though the officially prescribed age for entry to standard I is VI, in many States and Union Territories children above the age of five years are also admitted. Hence a child can complete elementary education anytime between twelve to fourteen years of age. Within a State or Union Territory, the schooling structure is uniform in all its districts or divisions.

In most of States and Union Territories, the upper primary section is attached to the lower primary section and functions within the same school itself. In some States, the upper primary section is attached to the high schools also. In most urban private schools, the lower primary, upper primary and secondary sections function in one school, which is called a high school.⁴⁵

The Central Government determines the major policy relating

⁴⁵ http://planningcommission.nic.in/reports/sereport/ser/edu_pune.pdf [internet accessed on 20th December, 2005].

to higher education in the country.⁴⁶ It provides grants to universities and affiliated colleges through the University Grants Commission. The Central Government also establishes central universities in the country. It has the power to declare institutions as 'Deemed to be University' under Section 3 of the University Grants Commission Act on the recommendation of the University Grants Commission. State Governments have the power to establish State Universities and colleges providing plan grants for their development and non-plan grants for their maintenance.⁴⁷

As per the government, reforms in higher education are carried out as a continuous process with the object of making higher education an effective promoter of sustainable human development that can meet challenges of the future. To fulfil its constitutional responsibility for maintaining the standards in higher education, the Central Government/University Grants Commission issues necessary regulations, directions and circulars from time to time.

The major thrust is to improve the quality of education and

⁴⁶ Education is on the 'Concurrent list' or List III, but is subject to Entry 66 in the Union List or List I of the Constitution. This provides the Central Government exclusive legislative power to co-ordinate and determine standards in institutions of higher education or research and scientific and technical institutions.

⁴⁷ <http://www.education.nic.in/uhe/uhe-overview.asp> [internet accessed on 3rd December, 2009].

research in the institutions of higher learning, and to increase access with equity.⁴⁸

While the University Grants Commission (UGC) is responsible for coordination, determination and maintenance of standards, release of grants, etc., the professional councils are responsible for recognition of courses, promotion of professional institutions and providing grants to undergraduate programmes and institution of various awards.⁴⁹

It has been observed that, though in 1950 there were only 25 universities in India, it had increased to 431 universities including 25 Central universities, 230 State universities, 113 deemed universities and 28 private universities by mid-2008 with over 5 lakh teachers and 11.6 million students enrolled in 20,677 colleges

⁴⁸ Government of India, Ministry of Human Resource Development, Rajya Sabha unstarred question no: 1998, answered on 12.12.2005. <http://164.100.24.219/rsq/quest.asp?qref=109548> [internet accessed on 14th November, 2006].

⁴⁹ The statutory professional councils are: All India Council of Technical Education (AICTE), Medical Council of India (MCI), Indian Council for Agricultural Research (ICAR), National Council for Teacher Education (NCTE), Dental Council of India (DCI), Pharmacy Council of India (PCI), Indian Nursing Council (INC), Bar Council of India (BCI), Central Council of Homeopathy (CCH), Central Council for Indian Medicine (CCIM), Council of Architecture, Distance Education Council, Rehabilitation Council, State Councils of Higher Education.

under these universities.⁵⁰

The pattern of education followed in India gives an indication of the huge and varied institutional requirements needed for ensuring the success of a system of formal education that envisages ten years of schooling and at least another five years of study to obtain a degree. The major functional constraint faced by the government in implementing this system efficiently lies in its financing.

RESOURCES

Civilisation has been oligarchic rather than democratic, with the power concentrated in the hands of a few and their undeserving descendants.⁵¹ Everyone dreams of emancipation at a fast pace for a

⁵⁰ *Interim Report of the Committee to Advise on Renovation and Rejuvenation of Higher Education System in India*, pp. 27-18. <http://www.academics-India.com/Yashpal%20Committee%20Report.doc> [internet accessed on 28th January, 2010].

See Appendix for Table 6: Growth of Higher Education in India.

⁵¹ Arnold J. Toynbee, *Democracy in the Atomic Age – The Dyason Lectures*, Oxford University Press, Melbourne (1956), p. 29. “During the five thousand years that have passed between the dawn of Civilisation and our own time, Civilisation, so far, has always been oligarchic, not democratic, in its constitution. It has been created, maintained and advanced by a small minority of the members of Society, and, in return for the service that it has performed for a Society at large, this minority – and also its less deserving descendants – have enjoyed privileges. They have had a monopoly of power and have taken advantage of this to monopolise the amenities of life – not only leisure (which is one of the sources of power, besides one of its rewards) but also luxuries.”

single lifetime is too small a period to enjoy the fruits of empowerment.⁵² For a nation to achieve progress there needs to be proper allocation of resources for empowerment at the optimum pace. The pace of emancipation must not be so slow as to make the majority revolt against the minority, and thereby lose the chance to profit from the experience of the minority. The pace must not be so fast that the majority loses the power to effectively exercise its rights.⁵³

Education is a major means of achieving empowerment at the optimum pace. The learning process provides the experience

⁵² Arnold J. Toynbee, *Democracy in the Atomic Age – The Dyason Lectures*, Oxford University Press, Melbourne (1956), pp. 30-31. "Today, everyone who has had a taste of emancipation, or who has awoken to the possibility that he might have a taste of it, has become impatient of delay. He wants to see himself, his class, his nation, completely emancipated within his own lifetime. This is human, because a human being has only his own single lifetime for attaining and enjoying anything for himself. At the same time this impatience is very awkward, because a single lifetime is a very brief allowance of time for acquiring social experience. It takes, not just one lifetime, but at least three generations, for a family effectively to change its social class, nationality or religion. It takes still longer for members of a society to make the transfer of their political loyalty from local states (e.g. city-states or nation states) to a 'world empire' like the Roman Empire or the Chinese Empire. So one lifetime is a very short measure of time for carrying through the process of emancipation from start to finish."

⁵³ Arnold J. Toynbee, *Democracy in the Atomic Age – The Dyason Lectures*, Oxford University Press, Melbourne (1956), p. 31. "The pace must not be so slow as to make the majority demanding emancipation revolt against the minority in power; for if once this happens, the breach is not easy to close, and the majority will lose all further chance of profiting by the minority's experience. On the other hand, the pace must not be so fast as to outrun the majority's power of effectively exercising the rights that are being nominally conferred on them. Rights cannot be exercised effectively unless one has acquired the necessary amount of experience, and rights that one cannot exercise effectively are illusory. Worse than that, they will be exercised in their nominal possessor's name, by some adventurer: a demagogue or a dictator. In fact, emancipation, when it is merely on paper, is not genuine emancipation, it is just a fin sounding name for a change of masters."

required to gain from the assets built up by the reining minority. Mass empowerment through education requires mobilisation of collective resources, which is best done by the State.

In the National Policy on Education of 1968, a target was set at increasing the expenditure on education to at least 6 per cent of the national income. Though this amount would include the expenditure incurred on administration apart from infrastructure development and funding for research, the Government has not been able to make any progress in this regard. In fact, the expenditure has declined in real terms as the years go by. This decline is seen more in the case of funding higher education.⁵⁴

But government expenditure on education is not the only factor that can determine the literacy rates. Private initiatives in the education sector provide the single largest source of funds.⁵⁵

⁵⁴ As per Report of the Central Advisory Board of Education. (CABE) Committee on Financing of Higher and Technical Education, in 1993-94 prices, the expenditure on higher education per student declined from Rs.7676/- in 1990-91 to Rs. 5500/- in 2002-03 (Budget Estimates), due mainly to lower allocations for libraries, laboratories, scholarships, faculty improvement programmes, faculty salaries. Government of India, Ministry of Human Resource Development, Department of Secondary Education and Higher Education, Rajya Sabha unstarred question no. 1469, answered on 08.08.2005. <http://164.100.24.219/rsq/quest.asp?qref=105749> [internet accessed on 14th November, 2006.]

⁵⁵ Asha Gupta, "Divided Government and Private Higher Education Growth in India", http://www.bc.edu/bc_org/avp/soe/cihe/newsletter/News35/text008.htm [internet accessed on 10th December 2008.] "Central government's share of total higher education

It has been observed in this context that,

“The fact that private educational institutions have a vital role to play in the realisation and actualisation of the right to education in this country is evident from the fact that while the number of government maintained professional colleges have more or less remained stationary, more and more private colleges have been established in different parts of the country.”⁵⁶

Yet, in the absence of a successful effort to ensure compulsory education, the funds that otherwise would have been used in providing education gets invested elsewhere. Poverty is not a justifiable excuse to be used to prevent educating one’s children. Studies have indicated that inadequacy of income does not of itself determine the will to send the child to school.

“There is no clear relationship between literacy and per capita income because there are so many Asian countries

income in 1950–1951 was just 49 percent. Although its funding rose to approximately 80 percent during the 1980s, since the 1990s government has resorted to cutbacks in higher education in the wake of structural adjustment, paving the way for the rapid expansion of self-financed private higher education. ... central government provides only one-quarter of the funding for higher education, with much of the rest coming from the states.”

⁵⁶ B. Errabbi, “The Constitutional Conspectus of the Right to Higher Education in India: Judicial Perception”, INLR (2003) 30 at p. 32.

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which achieved higher literacy rates even before their rapid economic growth. If India spends 3.7 per cent of its GNP on education during last few years, Burma spends 1.6 per cent, China 2.7 per cent, Indonesia 2 per cent and Sri Lanka 3.5 per cent. But all these countries have higher literacy rates than India. Countries like China, Vietnam, Taiwan and South Korea, even Sri Lanka can establish compulsory education when their per capita income are no different from that of India. . . . Even one of the Indian states, Kerala has a literacy rate of about 90 per cent despite the fact that its per capita income is not higher than that of the rest of the country. In contrast, Punjab having more than double the per capita income of Kerala, has a literacy rate of 58 per cent. These experiences demonstrate that poverty of national income is no barrier to the spread of basic education. While income is important, it is not decisive. What is decisive is the political commitment behind many education campaigns, a commitment that has remained both faint and fragile.”⁵⁷

⁵⁷ G.C. Pal, “Human Rights Education - Policies, Priorities and Prospects”, in Abdulrahim P. Vijapur & Kumar Suresh, Ed.s., *Perspectives on Human Rights*, Manak

Recent trends indicate a shift in policy from government responsibility in social service sectors to privatisation of services. Done in the name of efficiency, these pro capitalist reforms have increased the burden of the have-nots. Education is one sector where this policy of privatisation has started to usurp the fundamental human right to education by making it increasingly costly and available only to the rich elite.

In its attempt at finding resources for financing education, the government of India has sought the help of international lending agencies. In 1996, the World Bank provided credit for three Basic Education Projects in the country. The Primary Education Projects funded by the World Bank were in furtherance of the national commitment for universalisation of Elementary Education. The Uttar Pradesh Basic Education Project was started in 1993 with a World Bank credit of US \$ 165 million. The District Primary Education Programme (DPEP) was initiated in 1994 to cover 23 districts in 6 States with World Bank credit of US \$ 260 million. Its success prompted the World Bank to agree to provide a second

Publications, New Delhi (1999), p. 311 at pp. 315 quoting Mahbub ul Haq and Khadija Haq, *Human Development in South Asia*, Oxford University Press, Delhi (1998).

credit of US \$ 425 million to further expand the District Primary Education Programme.⁵⁸

By 2000, various international agencies, namely the World Bank, European Community (EC), Department For International Development of UK (DFID), UNICEF and the Government of Netherlands were providing assistance for the primary education sector through the Centrally Sponsored Scheme of District Primary Education Programme in 248 districts of 18 States. The Swedish International Development Cooperation Agency (SIDA) had earlier provided assistance for the implementation of Lok Jumbish and Shiksha Karmi Projects in the field of primary education in Rajasthan. These projects were now funded by DFID, UK. A community based primary education programme, JANSHALA was launched in 8 States in collaboration with five UN agencies namely, UNDP, UNICEF, UNESCO, UNFPA and ILO. UNICEF and UNESCO were also providing assistance for certain projects relating to research studies and other interventions in the field of elementary education. A total external assistance of Rs. 3223.00

⁵⁸ Government of India, Ministry of Human Resource Development, Rajya Sabha unstarred question no 719, answered on 19.07.1996. <http://164.100.24.219/rsq/quest.asp?qref=30278> [internet accessed on 9th November, 2006].

crore was tied up for DPEP, Uttar Pradesh Basic Education Project, Lok Jumbish Project, Shiksha Karmi Project and JANSHALA Programme during the period 1997-98 to 1999-2000. Expenditure during the said period was Rs. 2714.91 crore and reimbursement by the external funding agencies was Rs. 2337.01 crore. This external assistance was utilised for the development of primary education through various interventions like construction of school buildings and additional classrooms, providing drinking water/toilet facilities, teacher training, appointment of additional teachers, school mapping exercises, community based initiatives, capacity building, institutional development, etc.⁵⁹

Though the use of this aid for such measures is commendable, the objectives prompting these agencies to offer aid is not always to the advantage of the poor in India. For example, the aid programme of the World Bank is prompted by a vision of gradually weaning away the government from spending on the area of education. The World Bank seeks to promote private initiative in education consistent with an envisaged realigned role of state

⁵⁹ Government of India, Ministry of Human Resource Development, Department of Elementary Education and Literacy, Rajya Sabha starred question no 493, answered on 22.12.2000. <http://164.100.24.219/rsq/quest.asp?qref=35426> [internet accessed on 9th November, 2006].

involvement in elementary education.⁶⁰ In simple terms, this means that once the State starts to depend on external aid for its social commitments, it will find it difficult to resist the forces of privatisation once the aid is stopped and it is unable to meet the expenses.

Privatisation in India is not enriching for the majority of the population for the simple factor that there has not been an equitable distribution of resources even though the Nation achieved its independence, presumably for this purpose from its colonial masters. Privatisation without equitable distribution of resources to ensure a level playing field only promotes concentration of wealth in the hands of the privileged classes.

Commenting on this aspect in the context of a collective failure on all fronts, especially land reforms, which is one reason why there has not been an equitable redistribution of the net national resources, it is observed thus:

“The problem of depriving the rural poor of livelihood through the failure to implement land reforms has been

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<http://lnweb18.worldbank.org/sar/sa.nsf/0/3436a2c8a70b8463852567ef0066a42e?OpenDocument> [internet accessed on 26th December, 2006].

aggravated by the withdrawal of the state from social sectors. Education, health, water supply and sanitation are prime examples. While crucial elementary education has been a fundamental right under Article 21-A of the Constitution since 2003, there is still no clarity as to who is responsible to ensure this right. Is it the Centre, the State, the Panchayat/municipality or the parent who is duty-bound to protect the right of the child? In the meanwhile, signs of state withdrawal from the educational scene is everywhere.

Private schools are mushrooming not only in the cities and towns but also in rural areas, especially in the prosperous regions of educationally backward States. A common refrain is that the state schools are non-functional. They are good for the children of the 'marginalised' only. Hardly ever are questions raised as to why they are non-functional, how they can be made functional, and so on. The idea of 'common schooling', which is practised in most of the democratic countries, is not even seriously taken up in the public discourse. The minimum public expenditure on

education of six percent of the GDP recommended by the Kothari Commission in 1966 is still a distant dream.”⁶¹

It is not enough if the allocation of resources is enhanced from its current position of around 3% of the GDP to 6% of the GDP recommended by the Kothari Commission⁶², but a substantial portion of this has to be spent for strengthening primary education. Else, the resources of the government will only be used to provide for the needs of miniscule numbers of the elite sections of the population who in return contribute to the brain drain phenomena facing the country in higher technical and professional sectors.⁶³

Strengthening primary education requires a lower per capita

⁶¹ N.J. Kurian, “The State Withdraws – at What Cost?”, *The Hindu*, Kochi Edition, November 8, 2005, p. 10.

⁶² John Samuel, “Growth without Development: Rhetoric and Deprivation”, in *The Impact of Globalisation in the World*, Social Watch 2002 - Report No.6, Montevideo - Uruguay (2002), p. 112 at pp.113. “The Kothari Commission Report (1964-66) prescribed 6% of GDP for education, but public expenditure on education has been around 3%.”

⁶³ From Brain Drain to Brain Gain, *Education Today*, No. 18, October 2006 - January 2007, UNESCO, p. 4 at pp. 5, <http://unesdoc.unesco.org/images/0014/001477/147739e.pdf> [internet accessed on 18th January 2010]. “...Since the early 1990s, some 900,000 highly skilled professionals - mainly ICT workers from India, China and the Russian Federation - have migrated to the United States under its temporary H1B visa programme. This was created specially to allow the recruitment of foreign professionals for a period up to six years.”

Joel H. Spring. *Globalisation of Education: an Introduction*, Routledge, New York (2009), p. 186 - 187. “In the 1970s, 31 percent of the graduates of one of India’s most prestigious schools, Indian Institute of Technology Mumbai, migrated overseas. The overseas migration rate for graduates from India’s most prestigious medical school, All India Institute for Medical Sciences, was 56 percent between 1956 and 1980 and 49 percent in the 1990’s. This represents a tremendous loss of talent and educational investments for India.”

allocation of resources and provides a disproportionately larger gain for the society as compared to the spending for higher education or for professional or technical education.⁶⁴ Constitutional policy is in favour of reaching education to children during their early childhood.⁶⁵ Yet another significant factor that contributes to the increasing gestation period for providing quality primary education, as a fundamental right to the targeted sections, is the subsidy granted to the higher education sector. Generally, those who can actually afford to pay for their higher education get the benefit of this subsidy, since those who cannot, never reach this stage at all.⁶⁶ This misallocation of resources contributes to the resource crunch faced by the primary education sector in the country and thereby delays total empowerment.

Moreover, the Constitutional mandate on the State is not for

⁶⁴ D.D. Aggarwal, *History and Development of Elementary Education in India - Principles and Practice of Elementary Education in India*, Vol.3, Sarup & Sons, New Delhi (2002), p. 38. "Primary schooling offers the greatest economic and social returns, followed by secondary schooling."

⁶⁵ Article 45, Constitution of India provides for 'Provision for early childhood care and education to children below the age of six years' and states thus: "The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years."

⁶⁶ http://are.berkeley.edu/~atuu/Writing/who_paid.html [internet accessed on May 15, 2004]. "We subsidize higher education. That is also not that great a crime. The problem is that we differentially subsidize higher education and neglect primary education. The beneficiaries of this 'caste' system is that higher education is only available to upper socio-economic classes."

spending huge sums for the already privileged but for the distribution of wealth in an equitable manner.⁶⁷ Social equity demands that the sums that the government spends on education benefit the largest number of people.⁶⁸ If at all allocation of finances is to be made for the promotion of technical and professional education it has to be balanced with the net benefit it would derive to the society as a whole.

An equitable means for finding the funds for allocation to the primary education sector would be to tax those who utilise the resources allowed to the higher and technical education sectors and leave the country without contributing their time or effort for the betterment of the Nation. It is not that emigration is per se bad. Governmental initiative to gain from the experience of emigrants from India returning to serve the Nation has not been quite satisfactory.⁶⁹

⁶⁷ Article 39, Constitution of India provides for 'Certain principles of policy to be followed by the State'. Article 39(c) states thus: "The State shall, in particular, direct its policy towards securing - that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment."

⁶⁸ Article 39(b), states thus: "The State shall, in particular, 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."

⁶⁹ http://www.pondiuni.edu.in/journals/ssas/8_babu_anuratha.pdf [internet accessed on 24th January, 2010]. "... despite the motivational rhetoric taken by the government of India in welcoming back the migrants, it is yet to have a clear vision on how best to

Having committed the Nation to accepting right to education as a fundamental right, the country cannot go back. India has been a party to various international treaties and conventions that accepts the notion of right to education as a basic human right. When right to education is a basic human right and a fundamental right, the country cannot fail to provide quality education on the premise of lack of funds.⁷⁰

But, even in the higher education sector, the subsidy element is now less as compared to the previous decades because of increasing government withdrawal from the sector.

“If it was one percent of the GDP in 1971, it fell to 0.8 percent in the eighties, to 0.6 percent in the nineties and now hovers around the 0.4 percent mark.... The thinking in the UGC and among academics is that this figure should be raised to at least 1.5 percent.”⁷¹

accommodate them into the mainstream fabric of the society or how best to utilize their learning and experience.”

⁷⁰ Parmanand Singh, “Hunger Amidst Plenty: Reflections on Law, Poverty and Governance,” 48 *JILI* (2006) 57-77 at pp. 77 - “Social rights to food, education, health, shelter, and so on recognised by the Supreme Court as human rights will have little meaning in the absence of sufficient public spending to realise these rights by coherent and properly implemented public policies along with transparency in governance.”

⁷¹ G. Mahadevan, ‘Dwindling Numbers, Growing Concern’, *The Hindu*, Education Plus, Kerala edition, Tuesday, January 10, 2005, p 1.

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As the article indicates, this has resulted in

“about 1300 vacancies for teachers in Government and aided colleges in Kerala, 2000 vacancies in Assam, 2500 in Tamil Nadu, 3000 in Andhra Pradesh, 6000 in Bihar... .”

Scarcity of financial resources affecting the number of teachers appointed is one reason for the lowering of the quality of education provided. This also adversely reflects in the empowering capability of education.

The public expenditure on education including expenditure by all Ministries during 1998-99 was 3.75% of GDP. The investments of the private unaided sector in elementary education come in addition to this. The Central Plan Outlay for Elementary Education in 2001-2002 stood at Rs.3800 crore. This was substantially higher than what the Central Govt. had been spending in previous years.⁷²

In 2002-03, Government of India approved plans of 592 districts for a total outlay of Rs. 5441 crore under the Sarva Shiksha

⁷² Government of India, Ministry of Human Resource Development, Department of Elementary Education and Literacy, Rajya Sabha unstarred question no: 2313, answered on 16.03.2001. <http://164.100.24.219/rsq/quest.asp?qref=42563> [internet accessed on 10th November, 2006].

Abhiyan with the aim of universalisation of Elementary Education.⁷³

These figures however pale when compared to the estimated resources advised to be set apart for education by expert groups constituted for this by the government. The Saikia Committee (1997) estimated an additional requirement of Rs. 8000 crore per year. The Tapas Majumdar Committee (1999) assessed an average annual additional requirement of Rs.13700 crore.⁷⁴ Though these figures fall under 3% of GDP, spending would have to be increased many fold to cover the deficit in resource allocation in the previous years.

For example, the Saikia Committee had estimated an additional requirement of Rs. 40,000 crore over a period of five years mainly for providing elementary education to out of school children as and when the right to education was made a fundamental right to children between the ages 6-14. This was when the entire Ninth Plan (1997-2000) outlay for the Department of Education was

⁷³ Government of India, Ministry of Human Resource Development, Department of Elementary Education and Literacy, Rajya Sabha unstarred question no: 1781, answered on 07.03.2003. <http://164.100.24.219/rsq/quest.asp?qref=81964> [internet accessed on 9th November, 2006].

⁷⁴ Government of India, Ministry of Human Resource Development, Department of Elementary Education and Literacy, Rajya Sabha unstarred question no: 2313, answered on 16.03.2001. <http://164.100.24.219/rsq/quest.asp?qref=42563> [internet accessed on 10th November, 2006].

Rs. 20,381 crore.⁷⁵

Resource generation for the sector of education is a thrust area of the government. It even collects an education cess for the same. That this attempt is a partial success is evident from the governmental figures which indicate that with the imposition of the education cess it became possible to increase the budget estimate 2005-06 for elementary education by Rs.6492 crore over the budget estimate of 2004-05.⁷⁶

The Five Year Plans formulated by the Central Government provides for intensive allocation of resources to achieve specific targets within a short period. Accordingly, under the Ninth Plan, education was treated as a crucial investment in human development. The Planning Commission recognised that education strongly influences improvement in health and demographic profile and hence in the third year of the Ninth Plan, the schemes of Education Sector were implemented, with the aim of achieving, total

⁷⁵ Government of India, Ministry of Human Resource Development, Rajya Sabha unstarred question no: 1963, answered on 12.03.1999. <http://164.100.24.219/rsq/quest.asp?qref=1506> [internet accessed on 10th November, 2006].

⁷⁶ Government of India, Ministry of Human Resource Development, Department of Secondary Education and Higher Education, Rajya Sabha unstarred question no 2732, answered on 22.08.2005. <http://164.100.24.219/rsq/quest.asp?qref=105798> [internet accessed on 13th November, 2006].

eradication of illiteracy and improving quality of education at all levels from primary school to universities.

Various steps were taken by the Department of Education and by the Planning Commission to rationalise/ converge the schemes. The Sarva Shiksha Abhiyan is a major initiative to ensure that the schemes of elementary education are implemented in a holistic manner as a step towards achieving the objective of universalisation of elementary education in a Mission Mode Form.⁷⁷

Sarva Shiksha Abhiyan is a National Programme for Universal Elementary Education to provide eight years of elementary education to all children in the 6-14 years age group by 2010. The vision of Sarva Shiksha Abhiyan is to provide useful and relevant elementary education of satisfactory quality for all by 2010 bridging all social and gender gaps, with the active participation of the community in the affairs of the school. According to the Ministry of Human Resource Development, the goals of Sarva Shiksha Abhiyan are:⁷⁸

⁷⁷ <http://planningcommission.nic.in/plans/annualplan/ap2021pdf/ap2021ch5-3.pdf> [internet accessed on 20th December, 2005].

⁷⁸ Government of India, Ministry of Human Resource Development, Department of Elementary Education and Literacy, Rajya Sabha unstarred question no 1435, answered

1. All children in school, Education Guarantee Centre, Alternate School, 'Back to School' camp by 2003;
2. All children complete five years of primary schooling by 2007;
3. All children complete eight years of schooling by 2010;
4. Focus on elementary education of satisfactory quality with emphasis on education for life;
5. Bridge all gender and social category gaps at primary stage by 2007 and at elementary education level by 2010;
6. Universal retention by 2010.

The estimated additional requirement to provide universal elementary education to all children in the age group 6-14 years was Rs.98000 crore for a ten year period till 2010 to be shared by the Central and the State Governments on the pattern of sharing under Sarva Shiksha Abhiyan, i.e., 85:15 in the Ninth Plan, 75:25 in the Tenth Plan and 50:50 thereafter.⁷⁹ The annual expenditure for

on 03.08.2001. <http://164.100.24.219/rsq/quest.asp?qref=54196> [internet accessed on 9th November, 2006].

⁷⁹ This needs to be compared with another set of figures released by the same Ministry at an earlier point of time. In 2001, in a reply to another unstarred question it was stated thus: "The Saikia Committee in 1997 made an assessment of additional Rs.40,000 crore

achieving the target of universal elementary education depends on the requirements assessed by States through District Elementary Education Plans, based on habitation level planning, as well as the pace of implementation.⁸⁰

The allocation of plan resources for higher education by the Planning Commission is subject to availability of financial resources and approval of the budgetary provisions by Parliament. The approved size of the Tenth Plan for higher education was only Rs.4176.50 crore. During the years 2002-2003, 2003-04 and 2004-05, an expenditure of Rs.619.14 crore, Rs.560.44 crore and Rs.789.95 crore respectively was incurred for higher education. During 2005-06, Rs.873.27 crore was approved at the revised

for elementary education over five years. The Tapas Majumdar Committee made an assessment of additional requirement of 1,37,000 crore for Universalisation of Elementary Education over a period of 10 years. By following cost effective and convergent approaches, it is likely that the requirement of funds would be lower than the assessment made by the Majumdar Committee. No separate assessment has been made for literacy. The IX Plan allocation for elementary education in the Central Plan was Rs.11,842 crore. Besides this, provision of Rs.4526.75 crore was made for the Mid Day Meal scheme. The allocation for year 2000-2001 has been fixed at Rs.3608.75 crore, which is 25% more than the expenditure for the year 1999-2000." Government of India, Ministry of Human Resource Development, Department of Elementary Education and Literacy, Rajya Sabha unstarred question no 712, answered on 28.07.2000. <http://164.100.24.219/rsq/quest.asp?qref=17001> [internet accessed on 9th November, 2006].

⁸⁰ Government of India, Ministry of Human Resource Development, Department of Secondary Education and Higher Education, Rajya Sabha unstarred question no 3793, answered on 25.04.2003. <http://164.100.24.219/rsq/quest.asp?qref=80112> [internet accessed on 13th November, 2006].

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estimates stage.⁸¹

In its Mid-Term Appraisal of the Tenth Five Year Plan, the Planning Commission observed that in order to provide more resources for increasing access and improving quality, apart from a substantial increase in public funding, increasing the fees paid by students was equally necessary. On the other hand, the Committee of the Central Advisory Board of Education on Financing of Higher and Technical Education,⁸² recommended increase in public investments in higher education and observed that students fees as a percentage of revenues of higher educational institutions should not be above a threshold level of twenty per cent so as to make higher education affordable.⁸³ This dichotomy in views arises out of a difference in perception on which segment of education the government must concentrate on. When different faces of the

⁸¹ Government of India. Ministry of Human Resource Development, Department of Secondary Education and Higher Education, Rajya Sabha unstarred question no 140, answered on 20.02.2006. <http://164.100.24.219/rsq/quest.asp?qref=110103> [internet accessed on 14th November, 2006].

⁸² The Central Advisory Board of Education had in August, 2004 constituted a Committee on Autonomy of Higher Education Institutions and a Committee on Financing of Higher and Technical Education. Government of India, Ministry of Human Resource Development, Department of Secondary Education and Higher Education, Rajya Sabha unstarred question no 1981, answered on 23.08.2004. <http://164.100.24.219/rsq/quest.asp?qref=92157> [internet accessed on 22nd November, 2006].

⁸³ Government of India, Ministry of Human Resource Development, Department of Secondary Education and Higher Education, Rajya Sabha unstarred question no 578, answered on 31.07.2006. <http://164.100.24.219/rsq/quest.asp?qref=118170> [internet accessed on 14th November, 2006].

government speak with different voices, one cannot expect an efficient use of resources. This further hinders the successful resolution of problems in ensuring access to education and the goal of empowerment through education remains a distant dream.

Even while there is the dismal situation of large-scale deprivation in the education sector in the rural India, there is indication that the people have understood the importance of education and the significant change it can bring in their lives. As indicated by the figures in the National Sample Surveys,

“...as far as non-food consumption goes, there's been a significant increase in the real per capita expenditure on education. In 1993-94, the average per capita spend on education in rural India was Rs. 128, or 1.5% of total expenditure. By 2001-02, it was Rs. 245 or 2.5% of total spending, measured in constant prices. For the top 5% of rural households, the increase in real expenditure of

education has been quite spectacular - from Rs. 575 in 1993-94 to Rs. 1,158 per person per year.”⁸⁴

Even as the government steps away from the higher education sector and leaves the ground free for the private players, once the need for education is realised by the people of India, the demand it generates would have to be met. Since non-agricultural income has gained importance due to fragmentation of land holdings, inadequate distribution of land and various other factors, income generation for the people is to be made available from the services and the manufacturing sectors, both of which demands skills that can be imparted through formal avenues of education.

The realisation of this is only possible with improved provisioning for quality education. Quality education, both in the governmental or in the non-governmental sectors would be available only when there is a demand for it. The data provided by the

⁸⁴ Omkar Goswamy, *Changing Contours of Rural India*, http://www.financialexpress.com/fe_full_story.php?content_id=68671 [internet accessed on 8th July, 2005]. This study by Omkar Goswamy, Vishal More and Sameer Narang provides evidence on rural consumption expenditure based on household-level data from three rounds of National Sample Survey (NSS), and some evidence from the Census of India, 2001. The three NSS rounds on consumer expenditure are the 50th round (for 1993-94), 55th round (for 1999-2000), and the 57th round (2001-02). The 50th round consists of a sample of 69,206 rural households; the 55th has 71,385; and the 57th (a ‘thin’ sample) takes into account 25,505 households. The Census data are for the entire rural population. The study reveals that according to the 50th round, the main source of livelihood of over 33% of rural households was not from agriculture.

National Sample Survey from rural India shows that people have started to spend more for education. In other words, there is now a demand for education. It will not be long before that the less quality conscious among the education service providers would be weeded out.

Statistics often conceals more than what it reveals. Even though the data provided by National Sample Survey from rural India shows that people have started to spend more for education, it does not reveal the reason for such increased expenditure. An increased awareness or a demand for education could be one reason. An equally important possibility is the inadequacy of resources offered by the governments in the educational sector and the consequent higher financial demands made by the private players who fill the vacuum created by the withdrawal of the State from the education sector.

There has been an increase in the allocation of resources to the University Grants Commission (UGC). The Plan Allocation to the University Grants Commission was increased to Rs. 1269.80 crore during 2006-07 from Rs.786.30 crore during the year 2005-

06.⁸⁵ But the UGC allocates funds only to eligible universities and colleges and not to State Governments/NGOs.⁸⁶ This could also drive the rural poor to spend more for their education, which is increasingly provided by non-State actors. This is even more so in the case of quality higher and technical education.

It can be seen that while the expert reports always emphasised improvement in quality of education, the political policy gave importance to increase in the enrolment rate. Perhaps this is best reflected in the end result of literacy rates becoming the benchmarks for grading the success of educational policy in India rather than the employment rate, which would have offered a better gradation of empowerment.

Another significant aspect is the progressive alienation of the economically weaker sections of the citizenry from the benefits of governmental aid in financing their educational aspirations. The reservation system in vogue uses a complex criteria of economic

⁸⁵ Government of India, Ministry of Human Resource Development, Department of Secondary Education and Higher Education, Rajya Sabha starred question no: 579, answered on 31.07.2006. <http://164.100.24.219/rsq/quest.asp?qref=118171> [internet accessed on 14th November 2006].

⁸⁶ Government of India, Ministry of Human Resource Development, Department of Secondary Education and Higher Education, Rajya Sabha starred question no: 208, answered on 08.08.2005. <http://164.100.24.219/rsq/quest.asp?qref=105298> [internet accessed on 14th November 2006].

and social backwardness to determine the eligibility for reception of government aid. Though it is never the case that both cannot co-exist, the criteria when applied on the basis of the caste system as it has been in practise, operates as a devise for segregation of castes rather than as one for their integration. Moreover, the absence any meaningful criteria for targeting the economically weaker sections amongst the caste groups results in the relatively better off among the caste groups cornering a disproportionately greater share of the subsidies.

With ever decreasing governmental allocation and initiative for improving the infrastructure or the setting up of new educational institutions catering to professional/vocational education, the number of quality governmental institutions imparting professional education is abysmally low compared to the eligible population in India. Further, the competition for the limited seats where the fee is subsidised in institutions for higher professional education ensures that only those capable of investing heavily for achieving a reasonable rank in the entrance examinations gets to pursue it. This results in India becoming probably the “only country where the rich enjoy the benefits of socialism while the poor are fully exposed to

the vagaries of capitalism”.⁸⁷

The encouragement given to the minority communities due to historical and constitutional reasons for the establishment of educational institutions has resulted in a heavily skewed system in their favour with the growth of minority educational institutions claiming protection under the Constitution. These thrive on account of their near monopoly status due both to governmental apathy in establishing comparable institutions and due to the absence of any incentive or resources with the majority community to establish them. The fact of minority status enables such institutions to utilise the resources of other communities by admitting those students from these communities who have low merit and high financial capability. Thus, the money which may otherwise go for establishing educational institutions by the majority community is spent for financing the institutions run by the minorities. The role of Constitutional, political and historical factors for this state of affairs are undeniable. Though there is nothing *per se* wrong with the establishment of educational institutions, a skew in ownership

⁸⁷ P. Tandava Krishnan, 'Extend Reservation to Those Who Need it Most', *The Hindu*, Sunday, August 28, 2005, p. 14.

patterns brings in suspicion and inevitable communalisation.

When many of the institutions claiming protection under the Constitution are established and run on commercial terms with political patronage, it is easy to understand why the successive governments have not done anything to either ensure adequate social control over such institutions or to promote sufficient governmental institutions with quality.

The government policy on education is lost in the multitude of Commissions and Committees set up to revamp the institutions. The recommendations of such Commissions and Committees are seldom implemented in full, mainly due to lack of political will and often because of the enormity of the task set out and the absence of corresponding financial capabilities.

It is a valid problem that India lacks a consensus as to what the true aim of education is and as to whose responsibility it is to provide the same. The Union, State and the local governments, the private educational providers and the civil society are all involved in this enterprise. The government though lacking the funds to provide for quality education remains simultaneously suspicious of private initiative invoking rules and regulations to scuttle any meaningful

attempt to provide the same.⁸⁸

Funding remains the single greatest stumbling block for the full-scale implementation of the grandiose ideals set out in the national education policies. Lack of motivated personnel to man the educational institutions in the rural areas is mainly due to the poor infrastructure and the insufficient remuneration doled out. Both require financial capabilities of a high order for any meaningful dissemination of education that would result in empowerment. When the subjects taught and the knowledge imparted does not prove enough to sustain one, both the system and the teacher becomes suspect. This could be one reason for the high drop-out rate. When the subjects taught in school cannot bring in economic prosperity without further costly material inputs and when the existing system (including that of the government) fails in providing cheap credit to high risk individuals, there ends the entrepreneurial spirit and any attempt at empowerment through education.

This kind of education without any support for utilising it would only result in migration of skilled, educated individuals to

⁸⁸ http://www.india-seminar.com/2006/565/565_the_problem.htm [internet accessed on 5th September, 2007].

places with potential for utilising their knowledge. Thus the migration of the rural poor to the urban environs becomes a result of the inadequately drafted governmental educational policy as well.

Denying primary education whether by design or otherwise, citing whatever excuse, not only destroys productivity and efficiency, but also diminishes the worth of individuals as human beings.⁸⁹ Reduced self-esteem coupled with ignorance disables the citizen from enjoying the full value of our Nation's hard won independence and perpetuates serfdom in the hands of new masters.⁹⁰

Only political will and commitment can bring in path breaking results.⁹¹ Pious declarations without any concrete ideas to back it up will not bring in empowerment through education. Inadequacy of resources can never be a just excuse in a country that

⁸⁹ "Denial of access to primary education is not only denial of access to higher levels of education, it has also a denial of basic human right", G.C. Pal, "Human Rights Education - Policies, Priorities and Prospects", in Abdulrahim P. Vijapur & Kumar Suresh, Ed.s., *Perspectives on Human Rights*, Manak Publications, New Delhi (1999), p. 311 at pp. 318.

⁹⁰ "The main cause of human rights violation in India has been as much the tyranny of the oppressor as the ignorance of the oppressed", G.C. Pal, "Human Rights Education - Policies, Priorities and Prospects", in Abdulrahim P. Vijapur & Kumar Suresh, Ed.s., *Perspectives on Human Rights*, Manak Publications, New Delhi (1999), p. 311 at pp. 329.

⁹¹ Dr. Amita Agarwal, *Human Rights for Survival of Civilisation*, Kalinga Publications, Delhi (2004), p. 12. "In spite of all these provisions (both legal and voluntary), little has been achieved by way of protecting children's rights due to wide spread corruption and lack of political will."

does not think twice about enhancing the pay packages of the legislators or has the money to be the biggest market for weapons among the developing countries. What India needs are not weapons of mass destruction but the weapon of mass instruction - education - to empower its citizens. Lack of empowerment has subjected more people in India to misery than external aggression. Yet, India has the resources to spend a quarter of its income on defence as compared to less than 3 per cent for education.

Gandhiji's vision on basic education was one of self sustenance⁹², but the one followed in India is one of dependence on governmental aid which is never adequate nor released in time. This may be the reason for the goal of universal primary education being never met in spite of the plethora of plans.

Still, there is hope. The age structure of population during 1997-2002 shows a decrease from 37.23% to 33.59% for persons of the group 0-14 years and an increase from 56.07% to 59.41% for

⁹² Dr. Shashi Nath Saraswati, *Right to Equality in the Indian Constitution – A Gandhian Perspective*, Concept Publishing Company, New Delhi, (2002), p. 355 - "Even in his concept of basic education, the basis of self-support was induced to keep the system free of governmental control."

persons of the group 15-59.⁹³ This implies that even by retaining the current level of spending on education, the per capita benefit is set to go up as the age structure of the population gets skewed in favour of the people who are not of the school going age.

Progressive efforts are targeting the menace of child labour. The National Human Rights Commission is working towards eradication of child labour in specified fields. It has recommended immediate implementation of effective remedial measures in the Child Labour Act, while pointing out the Act's shortcomings.⁹⁴

The situation can be improved if the fact that the individual is the active subject of all social and economic development as laid down in Article 2 of the Declaration on the Right to Development, is taken into account while formulating the State policies for affirmative action.⁹⁵ Identification of social backwardness must be

⁹³ <http://planningcommission.nic.in/plans/planrel/fiveyr/9thvol1.zip> [internet on 19th July, 2005] Table 4.1 at p. 156.

⁹⁴ Dr. Amita Agarwal, *Human Rights for Survival of Civilisation*, Kalinga Publications, Delhi (2004), p. 12.

⁹⁵ Article 2 of the Declaration on the Right to Development reads thus: "1. The human person is the central subject of development and should be the active participant and beneficiary of the right to development. 2. All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development. 3. States have the right and the duty to formulate

rooted in individuals rather than in social groupings. Otherwise, the relevance and objective of such policies would be lost sight of.

Though factually the reach of the schooling system has shown a progressive increase after independence the rate of growth is not at the desired level.

Decadal Growth in Primary / UP Schools or Sections					
Year	Primary Schools	Decadal Growth in %	UP Schools/ Sections	Decadal Growth in %	Primary Schools per UP School
1950-51	209,671	-	13,596	-	15.4
1960-61	330,399	57.6	49,663	265.3	6.6
1970-71	408,378	23.6	90,621	82.4	4.5
1980-81	494,503	21.1	118,555	30.8	4.2
1990-91	560,935	13.4	151,456	27.7	3.7
1999-00	641,695	14.4	198,004	30.7	3.2

(Source: MHRD Annual Report, 2000-01)⁹⁶

There has been a 300 percent increase in the primary schools in the last five decades, with the growth of Upper Primary schools being 1450 percent. In 1950-51, there was only one Upper Primary School for 15 Primary schools. Though this ratio became 4.5 by 1970-71 and further improved to 3.2 by 1999-2000, it is far from the stipulation of one Upper Primary School for every two Primary

appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom."

⁹⁶ http://planningcommission.nic.in/reports/sereport/ser/edu_pune.pdf [internet accessed on 20th December, 2005].

schools envisaged in the Programme of Action of 1992.⁹⁷ This means that there is still a long way to go before the fundamental right to education is made meaningful.

The policies, recommendations, pattern of education, finances and the factual reality of demand for education being inadequately met indicate that rhetoric and reality do not match in the field of education. This could be due to the non appreciation of education as a fundamental human right. This aspect of education is dealt with in the next chapter.

⁹⁷ http://planningcommission.nic.in/reports/sereport/ser/edu_pune.pdf [internet accessed on 20th December, 2005].

CHAPTER IV

NORMATIVE RIGHT TO EDUCATION

EDUCATION AS A RIGHT

Education serves some basic goals which determine the quality and quantum of individual educational requirements. As observed by the Report of the Committee of Enquiry into the Education of Handicapped Children and Young People (of the United Kingdom),

“We hold that education has certain long term goals, that it has a general point or purpose, which can be definitely, though generally, stated. The goals are twofold, different from each other, but by no means incompatible. They are, first, to enlarge a child’s knowledge, experience and imaginative understanding, and thus his awareness of moral values and capacity for enjoyment; and secondly, to enable him to enter the world after formal education is over as an active participant in society and a responsible contributor to it, capable of achieving as much independence as possible. The educational needs of every child are determined in

relation to these goals.”¹

Education ranks first among the means of empowerment because it is the single most important one that enables access to the other means. Though an individual right, it is also a social investment as pointed out by the illustrious utilitarian jurist Bentham:

“...when education is considered as an indirect means of preventing offences, an essential reform is evidently needed. The class most neglected ought to become the principal object of its cares. The less the parents are capable of discharging their duty in this respect, the more necessary it is that the government should make up for their deficiencies. Not only should attention be given to orphans left in indigence, but also to children whose parents are not of a character to be trusted; to those who have already committed some offence; and to those who, being destitute of protectors and resources, are a prey to all the seductions of want. These classes, so absolutely neglected in the

¹ *Special Educational Needs: Report of the Committee of Enquiry into the Education of Handicapped Children and Young People*, H.M. Warnock, Chairman, Her Majesty's Stationary Office, London (1978), p. 5.

greater number of states, become, in consequence, the pupils of crime.”²

When the uneducated is educated it benefits the society. It helps in promoting self-sufficiency and confidence among the populace resulting in better productivity, greater employment opportunities and lower incidence of blue-collar crimes. The role of the State in educating its people becomes all the more important when dealing with the deprived classes of the society.

Education is the most important input for empowering the people. It not only equips them to be better citizens of a democracy but also helps economic development and quickens social change.³ In the modern context, the complementary role of the executive and judiciary is well brought out by S.P. Sathe in the following words:

“The right to education, right to work or the right to adequate means of livelihood can become enforceable rights only when the state invests enough resources for their realization.

The court can declare right to education as a

² Jeremy Bentham, *The Theory of Legislation*, Lexis-Nexis Butterworths, 6th Reprint 2004, p. 274.

³ S.P. Sathe, “The Unfinished Agenda: The Constitution at the Crossroads”, 42 JILI (2000) 171 at p. 178.

fundamental right but it cannot set up schools, it cannot appoint teachers, it cannot provide blackboards and other infrastructure.... ...conversion of a directive principle into a fundamental right merely downgrades the importance of the directive principles. The right to education, like the right to work, is a programme right and could be realized only through appropriate economic policies, resource allocation and networking of the educational institutions.”⁴

Perhaps, the main motivation for education comes from its ability to create material wealth. As noted in a Study by the World Bank,

“Combined with sound macroeconomic policies, education is fundamental for the construction of globally competitive economies and democratic societies. Education is key to creating, applying, and spreading new ideas and technologies which in turn are critical for sustained growth; it augments cognitive and other skills, which in turn increase labour productivity. The expansion of educational

⁴ S.P. Sathe, “The Unfinished Agenda: The Constitution at the Crossroads”, 42 JLI (2000) 171 at p. 185.

opportunity is a 'win-win' strategy that in most societies is far easier to implement than the redistribution of other assets such as land or capital. Ultimately, education builds what Amartya Sen (1999) calls 'human capabilities' - the essential and individual power to reflect, make choices, seek a voice in society, and enjoy a better life. In short, education is one of the most powerful instruments known for reducing poverty and inequality and for laying the basis for sustained economic growth, sound governance, and effective institutions."⁵

Human rights can be implemented only in the social context. Society requires human rights to base its morally justified economic, political and social manoeuvres. Man is dependent on the society for his physical and mental development. Since the adoption of the Declaration on the Right to Development by the General Assembly of the United Nations in December 1986, the concept of development itself has come to be reinterpreted in light of the human rights system.

⁵ http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/09/06/000094946_03082204005065/Rendered/PDF/multi0page.pdf [internet accessed on 10th September, 2004].

Education as a Developmental Right

Article 8(1) of the Declaration on the Right to Development provides that:

“States shall undertake, at the national level, all necessary measures for the realisation of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income.”⁶

As agreed during a general discussion by the United Nations Committee on Economic, Social and Cultural Rights on the Right to Education in 1998, the four elements that define the core content of the right to education are:⁷

1. No one shall be denied a right to education;
2. Everyone is entitled to basic (primary) education. This includes basic education for adults. Primary education must be compulsory and free. No one may withhold a child from primary education. A State has an obligation to protect this

⁶ Also see Muniruddin Qureshi, *Education and Human Rights*, Anmol Publications, New Delhi (2004), p. 333.

⁷ Muniruddin Qureshi, *Education and Human Rights*, Anmol Publications, New Delhi (2004), pp. 192-193.

right from encroachment by third persons;

3. There is a free choice of education, without interference by the State or a third person;

4. The minorities have the right to be taught in the language of their choice, in institutions outside the official system of public education. International instruments also establish State duty concerning human rights education.

Whether these core contents of the right to education are available or indeed could be made available depends on the laws of the land and the political resolve and the State sensitivity to enforce it. As Bentham visualised it,

“Good laws are possible only where lawmakers – that is, parliamentarians and judicial and administrative functionaries, who together constitute officialdom – understand what it means to describe legislation as a public service and to describe public servants as responsible.”⁸

The objective of any law concerning the right to development

⁸ Nancy L. Rosenblum, *Bentham's Theory of the Modern State*, Harvard University Press, Massachusetts (1978), p. 119.

must enhance the access to basic resources to increase equity in the opportunities for development.⁹ The utilitarian legislation, being a continual process, does not begin and end with the statutory expression of a sovereign's will.¹⁰ Legal process must be a part of the larger social process and must be in harmony with it for effectiveness and to prevent the spirit of the law being fettered by the letter of law.¹¹

Education increases equality. Educational inequality often results in income inequality. With increasing development, education is generally seen to have an income levelling effect.¹²

Education, by itself, is a creator of content. It changes the vision of the receiver and allows the transformation of mere

⁹ S. Rajendra Babu. "Human Rights Agenda: A Perspective for Development", 45 JILI (2003) 157-162 at p. 162 – "...the right to development was elaborating on a concept of development that did not deny the importance of growth of income and output which enhanced the expansion of basic resources and the opportunities for development. But it had to be realized in a manner that ensured a fair distribution and equality in access to the resources and expanded the fundamental freedoms of the individuals."

¹⁰ Nancy L. Rosenblum, *Bentham's Theory of the Modern State*, Harvard University Press, Massachusetts (1978), p. 118.

¹¹ Janaki Nair, *Women and Law in Colonial India – A Social History*, Kali for Women, New Delhi (1996), p. 6 – "... a wholesale rejection of the legal juridical framework would only be counterproductive in the long run. It is more worthwhile to be conscious of the limits of the legal process and to work within them, recognising all the time that the legal remedies must be part of, and given meaning within, wider social movements. It is necessary too that women's rights be given meaning through programmes of legal literacy."

¹² http://www.kerala.gov.in/dept_planning/er/chapter20.pdf [internet accessed on 18th January, 2007].

information into knowledge that can change lives.

“Education is an exercise for understanding, assimilating, creating and disseminating knowledge. It is a powerful means of influencing and bringing attitudinal changes in the citizens in general and among members of professional groups in particular.”¹³

Recognising the importance of education in human development the Supreme Court of India has observed in the context of establishment of high schools that,

“Imparting education is the primary duty of the State. Although establishment of High Schools may not be a constitutional function in the sense that citizens of India above 14 years might not have any fundamental right in relation thereto but education as a part of human development, indisputably is a human right.”¹⁴

Like all tools, education as a tool is dependent on the persons

¹³ D.R. Karthikeyan, *Human Rights-Problems and Solutions*, Gyan Publishing House, New Delhi (2005), p. 44.

¹⁴ *State of Bihar v. Project Uchcha Vidya, Sikshak Sangh*, MANU/SC/0054/2006, Paragraph 39.

behind it for its utility. Education can be both a constructive and destructive force at the same time. In its constructive manifestation it can empower people and transform society for the betterment of the most. In this embodiment, education is the harbinger of social change. Education can also be used as a tool to retard progress and to stagnate the society into orthodoxy.

“There are two major approaches to judging the function of education in a societal perspective. While one perspective identifies education as an agent of socialisation, a channel of mobilisation, and an instrument of social change, the other perceive it as instrumental in creating social distinctions and perpetuating oppression.”¹⁵

Legal education contributes to the process of empowerment and hence holds a special place in the concept of education as a developmental right.¹⁶

A good education system is one of the biggest social levellers in the modern state, and unlike others it levels upwards rather than

¹⁵ Chinna Rao Yagati, *Dalits' Struggle for Identity - Andhra and Hyderabad: 1900-1950*, Kanishka Publishers, New Delhi (2003), p. 57.

¹⁶ Bathula Venkateswara Rao, “The Process of Legal Aid in India”, AIR 1993 Journal 65 at pp. 69-70.

downwards.¹⁷

Perhaps the right perspective of the position of education in the modern society is summed up best in the words of Chief Justice Warren in the celebrated and epoch making case of *Brown v. Board of Education*.¹⁸

“Today, education is perhaps the most important function of State and local government... . It is required in the performance of our most basic responsibilities. It is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training and in helping him to adjust normally to his environment. In these days, it is doubtful any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity where the State has

¹⁷ Arvind Sivaramakrishnan, “British Universities and Globalisation”, *The Hindu*, Kochi edition, November 25, 2006, p. 10. Here the author speaks about the role of governmental grants to British Universities that lifted “substantial proportions of school leavers from the working classes to the professional ranks in under a generation, and demonstrating, as many sociologists note, that a good education system is one of the biggest social levellers in the modern state, levelling upwards rather than downwards.”

¹⁸ 347 US 483 (1953).

undertaken to provide it is a right, which must be made available to all on equal terms.”

A rights based approach to education can generate more meaningful efforts at resolving the challenging issue of providing quality primary education.¹⁹ It lays bare the rights and responsibilities of both the individual and the State.²⁰

In *Maharashtra State Board of Secondary and Higher Secondary Education v. K.S. Gandhi and Ors*²¹, the Supreme Court had occasion to observe that the right to education is a fundamental right that can be used to overcome the native endowments of men

¹⁹ Sujata Manohar, “Human Rights Agenda: A Perspective for Development”, 45 JILI (2003) 163 at p. 170. “The advantage of a rights based approach to shape the future is that the language of rights clearly brings out rights and obligations not just of the individuals, but of the State and of the society to respect human rights of individual members and to so organise itself and its activities that these rights are not violated, and if violated, the violator is punished. The recent doctrine of State accountability in international law is based on this premise. The State is accountable not only for its actions that result in violations of human rights. It is also accountable for deliberate inaction that results in gross violations of such rights when such violations could have been prevented by the State. ...human development through human rights based approach in India is the official doctrine embodied in the Constitution. In addition, several international treaties, declarations and covenants have placed human rights at the centre of human development. ...In the case of *Vishaka v. State of Rajasthan*, the Supreme Court of India has further held that the courts in India can enforce international treaties, declarations and conventions, which are not inconsistent without laws.”

²⁰ Article 51A, Constitution of India, on Fundamental Duties provides under Clause (k) that, “It shall be the duty of every citizen of India - who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.”

²¹ MANU/SC/0583/1991; (1991) 2 SCC 716.

which are not equal.²²

This attitude towards education is in tune with the world outlook on a 'right to education.'

Educational Guarantees in International Documents

The Universal Declaration of Human Rights imposes a moral obligation on all States to realise social and economic rights.²³ Most nations of the world have accepted their obligation to provide at least free elementary education to their citizens. Making primary education available to every child is now an accepted goal of the international community.²⁴ As Article 26 of the Universal

²² <http://www.manupatra.co.in/nxt/gateway.dll/sc/1980-2000sc/sc1991/s910583.htm> [internet accessed on 5th March, 2009], Paragraph 12 - "Education means a process which provides for intellectual, moral and physical development of a child for good character formation; mobility to social status; an opportunity to scale equality and a powerful instrument to bring about social change including necessary awakening among the people. Education promotes intellectual, moral and social democracy. Education lays foundation of good citizenship and is a principal instrument to awaken the child to intellectual and cultural pursuits and values in preparing the child for later professional training and helps him to adjust to the new environment. Education, therefore, should be co-related to the social, political or economic needs of our developing nation fostering secular values, breaking the barriers of casteism, linguism, religious bigotry and should act as an instrument of social change. Education kindles its flames for pursuit of excellence, enables and enables the young mind to sharpen his or her intellect more with reasoning than blind faith to reach intellectual heights and inculcate in him or her to strive for social equality and dignity of person."

²³ Muniruddin Qureshi, *Education and Human Rights*, Anmol Publications, New Delhi (2004), p. 259.

²⁴ http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/09/06/000094946_03082204005065/Rendered/PDF/multi0page.pdf [internet accessed on 10th September, 2004]. "The 1990 World Conference on Education for All in Jomtien, Thailand set this goal to be achieved by 2000. The World Education Forum in Dakar in 2000 reaffirmed and extended the Jomtien commitment, bringing a welcome emphasis

Declaration of Human Rights declares:

- “1. 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.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.”²⁵

Article 2 of the International Covenant on Economic, Social

on schooling quality while acknowledging that universal primary completion had not yet been reached... Universal primary completion and gender equity in primary and secondary education were affirmed again in that same year as Millennium Development Goals... ”

²⁵ *Global Sourcebook on Human Rights - Part I*, P.C. Sinha, (Ed.), Kanishka Publishers, New Delhi (2000) at p. 92.

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and Cultural Rights, imposes legally binding obligations on the State Parties to take steps, to the maximum of their available resources, to achieve progressively the full realisation of economic and social rights mentioned therein.²⁶

The right to education is seen as a guaranteed right in the American Convention, the African Charter and the First Protocol to the European Convention on Human Rights.²⁷

This basic right is seen repeated in the United Nations Declaration of the Rights of the Child²⁸ when it seeks, under Article 28, to ensure,

“Right to free and compulsory education at least in the elementary stages and education to promote general culture,

²⁶ The full text of Article 2, International Covenant on Economic, Social and Cultural Rights reads thus: “1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. 2. The State Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination as to any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, birth or other status. 3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals.”

²⁷ A.H. Robertson and J.G. Merrills, *Human Rights in the World*, 4th ed., Universal, Delhi (1996) at pp. 252-253.

²⁸ Ratified by Govt. of India on 20th November, 1989. For an insight into how the Supreme Court processes this Declaration to provide meaning and content to the Constitutional Rights, see *Bandhua Mukti Morcha v. Union of India*, (1997) 10 SCC 549.

abilities, judgment and sense of responsibility to become a useful member of society and opportunity to recreation, and play to attain the same purpose as of education".²⁹

That empowerment is a major thrust area is clear from Article 29 of the UN Declaration of the Rights of the Child when it states that the child's education shall be directed to develop the child's personality, talents and mental and physical abilities to their fullest potential.³⁰

²⁹ <http://www.unhchr.ch/html/menu3/b/k2crc.htm> [internet accessed on 5th November, 2005]. The full text of Article 28 reads thus: "1. States Parties recognize 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) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need; (c) Make higher education accessible to all on the basis of capacity by every appropriate means; (d) Make educational and vocational information and guidance available and accessible to all children; (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates. 2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention. 3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries."

³⁰ <http://www.unhchr.ch/html/menu3/b/k2crc.htm> [internet accessed on 5th November, 2005]. The full text of Article 29 reads thus: "1. States Parties agree that the education of the child shall be directed to: (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential; (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations; (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own; (d) The preparation of the child for

The International Covenant on Economic, Social and Cultural Rights emphasises the importance of education and advocates its use for the full development of the human personality. It considers education as the tool to strengthen respect for human rights and fundamental freedoms and the means that enable all persons to participate effectively in a free society. It recognises the power of the parents to choose the education that is to be provided to their children even while acknowledging the right of the State to ensure the quality of education provided in its territory.³¹

responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; (e) The development of respect for the natural environment. 2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.”

³¹ Article 13 of the International Covenant for Economic, Social and Cultural Rights reads thus: “The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right: Primary education shall be compulsory and available free to all; Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by ever appropriate means, and in particular by the progressive introduction of free education; Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education; Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education; The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system

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Yet, facts show that these rights still remain beyond the reach of a vast number of the population.

“The Progress of Nations, (1998) Annual Report of UNICEF, reports that almost one billion adults, two-third of them women, are illiterate in underdeveloped countries. As per the Reports, 130 million children of primary school age in the developing world, 70 million of girls and 40 million of them in India, are denied the right to basic and quality education, leaving aside the assimilation of life-building, and character-making aspects of education.”³²

The UNESCO Convention against Discrimination in Education, 1960 contains undertakings to eliminate and prevent discrimination in education based on race, colour, sex, language and

shall be established, and the material conditions of teaching staff shall be continuously improved. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions; No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.”

³² G.C. Pal, “Human Rights Education - Policies, Priorities and Prospects”, in Abdulrahim P. Vijapur & Kumar Suresh, Ed.s., *Perspectives on Human Rights*, Manak Publications, New Delhi (1999), p. 311 at pp. 311-312, quoting UNICEF, *The State of the Children*, Annual Report, 1999, and the *Progress of Nations*, Annual Report, 1998, New Delhi.

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other grounds. It endorses the need to make education a basic human rights as well as a priority for development.³³

But even then, some consider these as affording only limited protection as far as minorities are concerned.³⁴ This conception is mainly due to the fact that these treaties recognise the social pressures under which multi cultural, multi ethnic, multi racial and multi religious countries function. Minority rights cannot exist in such countries in isolation and in confrontation with the rights of other communities. Such confrontation strains the existence of peace and the territorial integrity of countries as political entities.

Article 5 of the UNESCO Convention provides thus:

“It is essential to recognise the right of the members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use of the teaching of their own languages, provided however:

³³ Articles 3, 4, and 5.

³⁴ See A.H. Robertson and J.G. Merrills, *Human Rights in the World*, 4th ed., Universal, Delhi (1996), p.290. The United Nations commitment to the protection of minorities is limited by Article 5 of the Convention Against Discrimination in Education adopted by the General Conference of the UN Educational, Scientific and Cultural Organisation at its eleventh session on December 14, 1960, and Article 27 of the International Covenant on Civil and Political Rights adopted by the General Assembly of the UN on December 16, 1966.

- (i) That this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudice national sovereignty;
- (ii) That the standard of education is not lower than the general standard laid down or approved by the competent authorities; and
- (iii) That attendance at such schools is optional.³⁵

Some conceive this Article as not affording adequate freedom to the minorities to exercise their basic human right of preserving their identity since the rights of the majority circumscribe it.³⁶

Article 27 of the International Covenant for Civil and Political Rights reads thus:

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall

³⁵ For text see, UNESCO, Proceedings of the Eleventh Session of the General Conference, Vol. II C/Resolutions, Paris, 1960.

³⁶ See Moses Moskowitz, *The Politics and Dynamics of Human Rights*, Oceana Publications Inc., New York (1968),p. 155.

not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”³⁷

This provision is also considered to be of limited reach since the right can only be exercised as part of a distinct community and individuals acting alone are thus discouraged from exhibiting or promoting their minority culture, language or religion.

Apart from the right to learn, the right to education is intimately associated with the right to teach. Unless there is an environment for development of teaching as a recognised fundamental facet of the right to education, there can be no meaning or content in the right itself.

“The right to education is a fundamental human right and recognises the essential role of teachers in educational

³⁷ *Global Sourcebook on Human Rights - Part I*, P.C. Sinha, (Ed.), Kanishka Publishers, New Delhi (2000) at p. 110. For text see, U.N.G.A. Res. 2200 (XXI), 16 December 1966.

advancement and the importance of their contribution to the development of man and modern society.”³⁸

Though India has acted in conformity with the international ideals in its Constitutional scheme, often its laws have not specifically included many of these obligations. Ideally, these international ideals ought to have the power of domestic laws since Constitutional guarantees ought to be automatic from a human rights perspective.

But even if there is no automatic obligation for incorporating international norms into the Indian municipal laws, it is heartening to notice that the judicial thinking is for such incorporation.

In *C. Masilamani Mudaliar v. Idol of Sri Swaminathaswami Swaminathaswami Thirukoil*,³⁹ the Supreme Court considered discrimination against women in the context of property and observed that law is both an instrument of social change as well as

³⁸ Muniruddin Qureshi, *Education and Human Rights*, Anmol Publications, New Delhi (2004), p. 193. The author quotes from the preamble of the Recommendation Concerning the Status of Teachers adopted in an intergovernmental conference convened by UNESCO, with the participation of the ILO in 1966.

³⁹ (1996) 8 SCC 525.

the defender for social change. Article 2(e) of CEDAW⁴⁰ was considered to enjoin the Supreme Court to breathe life into the dry bones of the Constitution, international conventions and the Protection of Human Rights Act and the Hindu Succession Act to prevent gender based discrimination and to effectuate right to life including empowerment of economic, social and cultural rights to women. The Court commented that by virtue of the Protection of Human Rights Act the principles embodied in CEDAW and the concomitant right to development became integral parts of the Indian Constitution and the Human Rights Act and became enforceable. It even went to the point of observing that Article 5 (a) of CEDAW to which the Government of India had expressed reservation, does not stand in its way and in fact Article 2(f) denudes its effect and enjoins to implement Article 2(f) read with its obligation undertaken under Articles 3, 14 and 15 of the Convention *vis-à-vis* Articles 1, 3, 6 and 8 of the Convention of Right to Development.⁴¹

⁴⁰ CEDAW (Vienna Declaration on the Elimination of all Forms of Discrimination against Women) is ratified by United Nations Organisation on December 18, 1979 and by the Government of India on June 19, 1993 and acceded to on August 8, 1993.

⁴¹ This same idea and almost the same words that the provisions of CEDAW became a part of the municipal law of India had been expressed by K. Ramaswamy, J, in his

“The gender equity in education was one of the main goals established at the World Conference on Education for All, at Jomtien, Thailand, and was reiterated at the Beijing World Conference on Women in 1995, and at the Hamburg International Conference on Adult Education in 1997. At the World Education Forum held in Dakar, Senegal, in 2000, the goal was reaffirmed with precise targets: “eliminating gender disparities in primary and secondary education by 2005, and achieving gender equality in education by 2015, with a focus on ensuring girls’ full and equal access to, and achievement in basic education of good quality.” On that occasion the United Nations Secretary General, launched the 10-year United Nations Girls’ Education Initiative. It set five core strategic objectives. They are: i) Build political and resource commitments for girls’ education; ii) End the gender gap in attendance and completion; iii) Eliminate gender bias within national education systems; iv) Support girls’ education in areas

dissent in the earlier judgement of *Madhu Kishwar v. State of Bihar*, (1996) 5 SCC 125. Bench Strength 3, Coram: Kuldip Singh, M. M. Punchhi I and K. Ramaswamy, JJ. Date of decision: April 17, 1996.

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affected by, or recovering from, armed conflict, natural disasters or external shocks; v) Eliminate social and cultural discrimination that limits the demand for girls' schooling."⁴²

Mere acknowledgement of the existence of a globally recognised right to education means nothing unless it gets converted into an enforceable legal right. It is hence important to understand the legal status of education in India.

Legal Status of Education

There are a number of provisions dealing with education under the Constitution. Some are contained under Part III dealing with Fundamental Rights and some others are under Part IV dealing with the Directive Principles of State Policy. The Preamble and Fundamental Duties also contain provisions related to and relevant to education. Since 'education' falls under the Concurrent List, besides these Constitutional provisions, there are a number of statutes in the field of education.⁴³

⁴² Usha Sharma, *Gender Mainstreaming and Women's Rights*, Authorspress, Delhi (2004), p. 1.

⁴³ Allahabad University Act, (3 of 1921); Bihar Education Code; Bihar University Act, 1960; Darbhanga Sanskrit Viswavidyalaya Act, (21 of 1965) Bihar; Gujarat University

The importance of statutes in protecting the right to education is critical. When their international commitments make the right to education an obligation on the parts of governments, only legislation can convert the right into a meaningful reality for the citizens. Commenting on the nexus of legislation and the global goal of 'Education for All' that came out of the summit at Dakar it has been observed thus:

“Providing the right to education is an obligation of governments and requires that they translate their international commitments into legislation which provides for its citizens legal recourse. Without legislation it is difficult to monitor and enforce obligations, so mobilising

Act, 1949; Intermediate Education Act, 1926; Kerala University Act, 1969; Kurukshetra University Act, (12 of 1965); Orissa Education Code; Osmania University Act, (19 of 1956); Poona University Act, (20 of 1948); Punjab Local Authorities (Aided Schools) Act, 1959; Punjab University Act, 1947; The Kerala Education Act, 1968 and the Kerala Education Rules; The University Grants Commission Act 1956; University of Agricultural Sciences Act, (22 of 1973); University of Rajaputana Act, (1946); Gauhati University Act, (16 of 1947); Aligarh Muslim University Act; Delhi University Act, (8 of 1922); Jawaharlal Nehru University Act; Cochin University of Science & Technology Act; Mahatma Gandhi University Act; Calicut University Act; Kannur University Act; Orissa Education Act, (10 of 1953); Indian Institute of Technology (Kharagpur) Act, 1956; Indian Institute of Technology (Madras) Act; Mysore University of Agricultural Sciences Act, (22 of 1963); Magadh University Act, 1961, (4 of 1962). Bihar; Bihar State Universities (University of Bihar, Bhagalpur and Ranchi) Act, (14 of 1960); M.P. Secondary Education Act, (12 of 1951); H.P. Board of School Education Act, (14 of 1968); Indian Medical Council Act, 1956; etc are some in the field.

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governments to develop and modernise national legislation is a critical element of implementing the Dakar."⁴⁴

Legislation in India traces its legality to the basic structure of the Constitution of India and its legitimacy to the noble ideals governing the spirit of the Constitution.

EDUCATION UNDER THE CONSTITUTION

The various Constitutional provisions in the field of education include Articles 15, 21, 21A⁴⁵, 26⁴⁶, 28⁴⁷, 29(2)⁴⁸, 30⁴⁹,

⁴⁴ Kishore Singh, "Right to Education and International Law: UNESCO's Normative Action", 2004 IJIL 488 at p. 513 quoting EFA Global Monitoring Report 2002, *Education for All: Is the World on Track?*, UNESCO, (2002), p. 30.

⁴⁵ Article 21A - Right to education - 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.

⁴⁶ Article 26 - Freedom to manage religious affairs - Subject to public order, morality and health, every religious denomination or any section thereof shall have the right - (a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law.

⁴⁷ Article 28 - Freedom as to attendance at religious instruction or religious worship in certain educational institutions - (1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds. (2) Nothing in clause (1) shall apply to an educational institution, which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution. (3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

⁴⁸ Article 29 - Protection of interests of minorities - (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same. (2) No citizen shall be

and 350A⁵⁰ of the Constitution of India. The content of these constitutional provisions have been subject to progressive and liberal interpretation by the courts.

The powers, rights and duties of the State instrumentalities, educational institutions and the citizens have been subjected to tremendous change from time to time. Though subjected to amendments, the key to the understanding of the Constitution is still its Preamble.

The Preamble

The Preamble provides the general purpose behind the

denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

⁴⁹ Article 30 - Right of minorities to establish and administer educational institutions - (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice. (1A) In making any law providing for the compulsory acquisition of any property of any educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause - [Inserted by the Constitution (Forty-fourth Amendment) Act, 1978, s. 4 (w.e.f. 20-6-1979)]. (2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

⁵⁰ Article 350A - Facilities for instruction in mother-tongue at primary stage - It shall be the endeavour of every State and of every local authority within the State to provide adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups; and the President may issue such directions to any State as he considers necessary or proper for securing the provision of such facilities.

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several provisions of the Constitution.⁵¹ With the inclusion of the high ideals of socialism, equality, justice, liberty and fraternity as the driving force that holds the key to the interpretation of the Constitution, the Preamble indicates that only the individual who can uphold these ideals can be receptive of the rights, duties and privileges that are available through it. Hence, the Preamble also conceives that the citizen makes himself suitable to achieve the high ideals that govern the spirit of being an Indian governed by the Constitution. In other words, a citizen has to exert himself to achieve empowerment. The State promises him allocation of its resources in an equitable manner and Rule of Law for the same.

The use of the word 'justice' in the Preamble to the Constitution envisages the trinity of the Preamble, Fundamental Rights and the Directive Principles to usher in an egalitarian social order.⁵² As was observed by the Supreme Court,

“The word ‘Justice’ envisioned in the Preamble is used in a broad spectrum to harmonize human rights

⁵¹ Also see Dr. Durga Das Basu, *Shorter Constitution of India*, 11th ed., Prentice Hall of India, New Delhi (1994), p. 2.

⁵² Phiroza Anklesaria, Scope of the Expression “Public Policy” in Domestic and Foreign Awards, *Indian Bar Review*, Vol. XXXII (1 & 2) 2005, 11-50, at p. 48.

with general welfare of the society. Justice in the Preamble implies equality, consistent with competing demands between distributive justice and cumulative justice. Justice promotes general wellbeing of the community and individual excellence.”⁵³

Quality education being made available to all citizens to promote their individual excellence and for the collective wellbeing of the community is hence a means for achieving justice as conceived in the Constitution.

The repository of fundamental rights not specifically mentioned under the Constitution of India is Article 21 and was initially the shelter under which the right to education got recognition as a fundamental right.

Article 21 as the Depository of Right to Life

Under Article 21 of the Constitution, the Supreme Court of India has through progressive interpretation, established a wide variety of rights to empower the citizen with basic human rights for

⁵³ *Dalmia Cement v. Union of India*, (1996) 10 SCC 104.

a full and fruitful life with human dignity.⁵⁴ The numerous innovative reasons put forward by the Supreme Court to enlarge the scope of Article 21 in its wide variety of decisions leads to the conclusion that the Article merely recognises the right to life, which is inherently available to all humans and does not create any new rights as such.

The right to education flows directly from this right to life. Right to livelihood, is an integral facet of the right to life⁵⁵ and in the modern civilisation this can be guaranteed only through education. Before incorporation as a restricted fundamental right under Article 21A, the right to education had a wider ambit encompassing all of the populace since it was first read in as a facet of Article 21.

Even though 'right to life' is the compendious expression for all those rights which are basic to the dignified enjoyment of life, the incorporation of a specific right to education for all children below the age of fourteen under Article 21A, denies it to all other

⁵⁴ See *P. Nalla Thampy Thera v. Union of India*, AIR 1984 SC 75, *Francis Coralie v. Union Territory of Delhi*, AIR 1981 SC 746, *M.C. Mehta v. Union of India*, AIR 1987 SC 965, *Dr. B.L. Wadhwa v. Union of India*, (1996) 2 SCC 594, *Unnikrishnan v. State of Andhra Pradesh*, (1993) 1 SCC 645, etc.

⁵⁵ *Narendra Kumar v. State of Haryana*, JT (1994) 2 SC 94.

citizens as a fundamental right.

When the egalitarian society contemplated by the framers⁵⁶ with the right to equality guaranteed to all the citizens is still not in existence in spite of the plethora of government policies providing for protective discrimination in admission to educational institutions, public employment and even the representation to legislatures,⁵⁷ the onus could again fall on the courts to oblige the State to provide educational facilities to all its citizens rather than a restricted age group and it may do so only by resorting to Article 21.

In *Francis Coralie Mullen v. Administrator, Union Territory of Delhi*,⁵⁸ Justice Bhagwati commented upon the wide nature of the rights guaranteed under compendium of right to life, thus:

“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

⁵⁶ The Preamble to the Constitution of India, contemplates securing “to all its citizens EQUALITY of status and opportunity”.

⁵⁷ G.B. Reddy, “Fifty Years of Indian Constitution – Agenda for 21st Century”, 43 JILI (2001) 252 (264). Paper presented at the National Seminar on “50 Years of the Indian Constitution- Experiences and Expectations”, 19-20 August 2000 at Dept. of Law, Osmania University, Hyderabad.

⁵⁸ AIR 1981 SC 746.

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 necessities 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.”

Though it is a wider right, the right to education as originally contained in the Constitution gets the status of a fundamental right in the specific contexts of religion, language and culture.

Religious Rights & Education

The Constitution recognises as a Fundamental Right, the freedom of conscience and free profession, practice and propagation of religion under Article 25. It allows the establishment and maintenance of institutions by every religious denomination or any section for religious and charitable purposes, which implicitly include educational institutions, subject only to public order,

morality and health.⁵⁹

Perhaps the most significant religious freedom in the field of education is the freedom as to attendance at religious instruction or religious worship in certain educational institutions guaranteed under Article 28. Though the first clause of the Article provides that no religious instruction shall be provided in any educational institution wholly maintained out of State funds, the second clause to the Article dilutes it by ousting its application from educational institutions administered by the State but established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

In practice, the State thus maintains out of its funds educational institutions, which imparts religious instruction, only because the State for historical reasons and for protection of interests of teachers, students and workers, has had to administer them, even though they were established under an endowment or trust requiring religious instruction to be imparted. This could create an atmosphere for the promotion of particular religions in educational institutions initially established by a religious group and

⁵⁹ Article 26.

presently administered by the State.

This exalted protection afforded to religious groups is to be read in the context of protection afforded to minorities in general in the field of education.

Issue of Minority Communities

No foolproof definition is available for the term “minority”. The concept varies contextually. Generally, it means any numerically smaller group that is different from the rest on the basis of a definite criterion. The defining criterion could be religion, race, language, etc. Usually, in the context of a nation the defining criteria would be those over which the subject has no control or choice.

The United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, in its *Year Book on Human Rights* defined minorities thus:

“The term minority includes only those non-dominant groups in a population which possess and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population; (ii) such minorities should properly include

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a number of persons sufficient by themselves to preserve such traditions or characteristics; and (iii) such minorities must be loyal to the state of which they are nationals.”⁶⁰

In the Indian context, the Constitution guarantees certain class rights to the minorities broadly designed to protect their cultural, religious and linguistic distinctiveness. Educational freedom is recognised as a means to preserve their distinct identity.⁶¹ State protection extends to the point that minority educational institutions are exempt even from the ambit of social justice and social responsibility.⁶² In matters of admission even the private unaided educational institutions are exempt from the ambit

⁶⁰ *Year Book on Human Rights*, (1950), p. 490.

⁶¹ Rakesh Kumar Singh, “Constitutional Mandate and Rights of Linguistic Minorities”, 48 JILI (2006) 271 at p. 274. “According to Article 29(1) any group having distinct language script or culture of its own has the right to conserve the same. This right can be realized under Article 30(1) which accords right on the minorities to establish and administer educational institutions of their choice. Thus it makes provision for the display of group initiative and freedom and tacitly recognize the role of educational institutions in preserving language and culture.”

⁶² Swami Agnivesh, “Why Exempt Minority Institutions?”, *The Hindu*, Kochi ed., Friday, December 23, 2005. p. 13, Col. 3-6. “Thanks to the 104th Constitution Amendment, Article 15 of the Constitution now carries an enlarged space for the advancement of socially and educationally backward classes or Scheduled Castes and Scheduled Tribes. This is a timely corrective to the unwitting misdirection the Supreme Court imparted to education, in an effort to minimise state interference. The prime purpose of this amendment is to heed the cry for social justice in respect of education. Exempting private unaided educational institutions from providing reservation on the ground that the taxpayers’ money is not involved is unfair to the needy. Surely there is more to education than receiving or not receiving aid. For that reason, I am also disappointed that minority educational institutions have been exempted from the ambit of social justice and social responsibility.”

of Article 15. One or the other the minority community establishes the majority of such institutions. The result is that the protection afforded by the Constitution is effective in the educational field overwhelmingly only to the privileged economic minority even among the minority communities.⁶³

To counter this state of affairs, there are attempts to legislate in the principles of equity in admissions to such institutions. The State of Kerala enacted the Kerala Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-Exploitative Fee and other Measures to Ensure Equity and Excellence in Professional Education) Act, 2006⁶⁴ regulating admission to professional courses. One of the objectives of the legislation is to ensure social equity even among

⁶³ Swami Agnivesh, "Why Exempt Minority Institutions?", *The Hindu*, Kochi ed., Friday, December 23, 2005, p. 13, Col. 3-6. "The rationale for minority rights to preserve language and to propagate education is the numerical disadvantage the minority communities suffer vis-à-vis the majority community. It is right and proper that the disabilities are addressed; but they need to be addressed right across the board. Disabilities can have no discriminatory labels. A disability is a disability, and needs to be treated as such. Illiterates and dropouts of all communities suffer disability and degradation equally. ... The purpose in giving special rights to religious and linguistic minorities is not to indulge them, but to neutralise their handicaps. It is to empower them to empower others and to serve the nation more effectively. ... there are institutions, no doubt founded by members of the minority communities, where profit and prestige are the dominant interests. These institutions are apathetic, even hostile, to the educational needs of the underprivileged in their own communities. In Andhra Pradesh, for instance, over 9,000 engineering seats in various minority colleges remained vacant in the last academic year simply because rich enough buyers could not be found."

⁶⁴ Act 19 of 2006. Published as Extraordinary Gazette Notification No.11510/Leg.Uni.3/06/Law dated 2nd July, 2006.

the members of the minority community.⁶⁵

But whether the Constitutional guarantees are designed to eternally preserve the cultural, religious and linguistic distinctiveness at the cost of national integration is debatable.

“...the rights mentioned in Articles 29 and 30 have been conferred on the minorities in the hope that they may not feel isolated and separate and that in due course they will assimilate themselves with the majority. If the reservation of seats by the minorities in their institutions is upheld it would obstruct the process of assimilation of the minority with the majority community. Obviously, it would be in the best interests of the nation as a whole that the minorities should join the mainstream of the country.”⁶⁶

That the minority communities are also an integral part of the nation is not in doubt. The facilities afforded to the minority

⁶⁵ This part of the Preamble of the Act reads thus: “AND WHEREAS, keeping in mind the above formulation of the Supreme Court on minority rights and also the unique socio-economic and demographic complexion of the State in the context of the need and commitment to protect and strengthen the secular ethos and the long tradition of equitable sharing of the opportunities for education among different communities prevailing in the State, it is necessary to ensure that the benefits that accrue from minority rights be equitably shared among different sections, including weaker sections, within the minority community to which the particular college or institution belongs.”

⁶⁶ Anil Kaushik, “Minority Educational Institutions”, 38 JILI (1996) 106 at 114.

communities are the nation's way of ensuring integration of the minority communities with the mainstream society. While it is an acknowledged international principle that minority communities are allowed to retain their distinct identity, no nation can afford to allow preservation of such distinct identities at the cost of national integration.

“Minorities are as much part of the nation as the majority, and anything that impinges upon national interest must necessarily in its ultimate operation affect the interests of all those who belong to the majority or minority sections of the population. It is therefore, as much in the interest of minorities as that of the majority to ensure that the protection afforded to minority institutions is not used as a cloak for doing something which is subversive of national interest.”⁶⁷

Hence, even while acknowledging the need to protect the distinct identities of the minority communities, stress must be laid towards ensuring that the Nation's common interests are protected.

⁶⁷ *Ahmedabad St. Xavier's College Society v. State of Gujarat*, (1974) 1 SCC 717.

“Minority rights should be interpreted within the constitutional framework. ...National interest should be paramount and regulations may provide that no anti-national activity would be permitted in educational institutions.”⁶⁸

While minority interests are protected under the Constitution of India through guarantees in the form of fundamental rights, these rights in the field of education, although very wide in itself, need nevertheless be subject to certain limitations in the interests of the nation. Obviously, information and education is to be utilized as instruments of prophylaxis, rather than as tools for manipulation and indoctrination.⁶⁹

The means adopted for this varies. The National Monitoring Committee on Minorities Education functions in this field to ensure a proper integration of the minority communities. It has recommended quota in higher educational institutions like IIM, IIT,

⁶⁸ Anirudh Prasad, *Social Engineering and Constitutional Protection of Weaker Sections in India*, Deep & Deep Publications, New Delhi (1980), p.168.

⁶⁹ Clarence J. Dias, “Democracy and Human Rights: The Challenge of Ethnicity and Inclusive Democracy”, 47 *JILI* (2005) 7 at p. 28.

etc.⁷⁰ Due to socio-economic reasons minorities have a low presence in these institutes. Schemes for remedial coaching to students of minority communities and for their training to appear in competitive examinations like NET and for services are also implemented by the Government and its agencies in a constant effort at integration and empowerment.

The religious minorities have both their cultural and educational rights protected under the Constitution.

Cultural and Educational Rights

Under Part III of the Constitution of India, Articles 28, 29 and 30 guarantees the fundamental rights concerning educational institutions. The text of Article 28 reflects an underlying fear that State funds may be used for the promotion of any religion and it tries to pre-empt any attempt in this direction by forbidding religious instruction being imparted in any educational institution 'wholly maintained out of State funds'.

Under 'Cultural and Educational Rights', Article 30(1) deals

⁷⁰ Government of India, Ministry of Human Resource Development, Department of Secondary Education and Higher Education, Rajya Sabha unstarred question no: 1217, answered on 05.12.2005. <http://164.100.24.219/rsq/quest.asp?qref=109833> [internet accessed on 14th November, 2006].

with the right of minorities to establish and administer educational institutions. Though this right is subject to the regulatory power of the State and the article is not a charter for maladministration,⁷¹ the Courts through interpretation has denied it to the majority community in India thus making these rights privileged and exclusive to minorities.⁷²

While affirmative action as understood under the Constitution of India is with respect to the reservation given to the backward classes and the Scheduled Caste and Scheduled Tribe communities, the fundamental rights granted exclusively to the minority communities have now become special privileges elevating the educational institutions started and managed by these communities into supra national entities. Whether the ambit of these specific fundamental rights can be widened to enable such an exalted position to all educational institutions irrespective of their contribution towards the preservation of the culture and linguistic heritage of the minorities is suspect.

⁷¹ *Virendra Nath v. Delhi*, (1990) 2 SCC 307.

⁷² *Arya Samaj Education Trust, Delhi & Others v. The Director of Education, Delhi Administration, Delhi & Others*, AIR 1976 Delhi 207. At p. 211 the Court observes thus, "No section or class of Hindus was ever referred to as a minority. In Article 30(1), therefore, the word "minority" cannot apply to a class or a section of Hindus."

That the Constitution places the affirmative action intended for the upliftment of the backward classes on an equal footing with the right of the minorities to preserve their distinct identity is doubtful. Since the term minority is not defined in the Constitution, it will remain unsettled whether the term 'minority' in the context of these fundamental rights denotes minorities at the international, national and state level or whether it could be even localised to districts, taluks or panchayats. Since India is such a vast country, the euro-centric human right definition of minority, if applied on a national scale would spew more inequities than that can be redressed.

In the given situation, no stretch of imagination can conclude that the Constitution envisages fundamental rights to the minorities, as a means of ensuring their upliftment through affirmative action. Analysing it from the perspective of special representation allowed in legislatures for the members of the Scheduled Castes and Scheduled Tribes, it has been observed,

“Does the protection given to the minorities by Article 30 fall in the same class? The question could not possibly be answered in the affirmative, for ... the same person who

while living in one city is a member of a linguistic minority becomes a member of the linguistic majority on coming back to his forefathers' land. Thus the label of "minority" and "majority" is not permanently affixed to a person: it depends on his current abode and on the latest political boundaries pertaining to that abode. Surely a Tamilian or a Bengali while living in New Delhi does not become relatively backward compared to his kith and kin in his home state. It cannot therefore be contended with any justification that the minorities were favoured by way of affirmative action in order to make them equal to others who were better placed educationally."⁷³

Although commonly Art. 29(1) is assumed to relate to minorities, its scope is not necessarily so confined, as it is available to "any section of citizens resident in the territory of India". This may well include the majority, as Ray, C.J. pointed out in *Ahmedabad St. Xavier's College Society v. State of Gujarat*.⁷⁴

The Constitution being one document, the fundamental rights

⁷³ K.N. Goyal, "Majorities' Right to Establish and Administer Educational Institutions", 38 JILI (1996) 283 (285).

⁷⁴ AIR 1974 SC 1389.

guaranteed therein must also be read with the provisions relating to the Fundamental Duties and the duty of governance as laid down under the Directive Principles of State Policy.

Directive Principles of State Policy and Fundamental Duties

One of the true functions of a Welfare State could be empowerment of its citizens. An empowered citizenry reduces the economic and social burden on the State in its welfare measures. Further, it helps the State to utilise its resources optimally. Under the Constitution empowerment through State action is best described in Part IV. The Directive Principles of State Policy is a Constitutional mechanism that guides the social agenda of the State. Though the directives are specifically made unenforceable through Courts, Courts have interpreted legislation to advance the directives⁷⁵.

Article 39(f)⁷⁶ has been described as having the object of

⁷⁵ *Jacob v. Kerala Water Authority*, (1991) 1 SCC 28. Here, the Court interpreted a statute so as to advance Article 41.

⁷⁶ Article 39 - Certain principles of policy to be followed by the State - The State shall, in particular, direct its policy towards securing -....(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.

securing a Welfare State.⁷⁷ It may be utilized for interpreting the Fundamental Rights.

The capacity for improving his surroundings is dependent on man's ability to earn his livelihood. No man can earn without working. Workers' rights are crucial for empowerment. The Constitution makers pilot the State to protect workers' rights by incorporating necessary provisions under Articles 41⁷⁸, 42⁷⁹, 43⁸⁰ and 43A⁸¹.

Article 45, which is the provision for free and compulsory education for children, originally provided that,

“The State shall endeavour to provide, within a period of ten

⁷⁷ *Keshavananda Bharati v. State of Kerala*, (1973) 4 SCC 228.

⁷⁸ Article 41 - Right to work, to education and to public assistance in certain cases - The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

⁷⁹ Article 42 - Provision for just and humane conditions of work and maternity relief - The State shall make provision for securing just and humane conditions of work and for maternity relief.

⁸⁰ Article 43 - Living wage, etc., for workers - The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

⁸¹ Article 43A - Participation of workers in management of industries - The State shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organisations engaged in any industry.

years from the commencement of the Constitution, for free and compulsory education for all children until they complete the age of fourteen years.”

After the Eighty-sixth Amendment Act of the Constitution of India in 2002, the provision now reads as,

“The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.”

Article 46, which is the provision for the promotion of educational and economic interests of Scheduled Castes, the Scheduled Tribes and other weaker sections, provides that,

“the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.”

Under Part IVA dealing with Fundamental Duties, Article 51A(h), provides for the Fundamental Duty to develop scientific temper, humanism and the spirit of enquiry and reform. Where the constitutionality of an Act is challenged, Court may look at this

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Article to uphold it.⁸² Further, it can be used for interpreting ambiguous statutes.⁸³

A close reading of this Chapter indicates that empowerment is not just a duty cast on the State or a right in favour of the citizen. There is also a mandate on the citizen to empower himself. It is in the form of a fundamental duty cast on the individual as well as on the State and the community cumulatively. The important and exact nature of this duty is yet to be interpreted by the courts.

After the Eighty-sixth Constitution Amendment Act of 2002, by virtue of the Article 51A(k) of the Constitution of India, parents and guardians are now duty bound to provide educational opportunities to their children or wards.⁸⁴ The duty that was exclusively the State's is now shared by the parent and the guardian.

An analysis of the provisions of the Constitution relating to education is incomplete without an understanding of the structure for sharing power between the Centre and the States.

⁸² *Mohan v. Union of India*, (1992) Supp 1 SCC 594.

⁸³ *Head Masters v. U.O.I.*, AIR 1983 Cal. 448.

⁸⁴ Article 51A (k), Constitution of India reads thus: "It shall be the duty of every citizen of India - who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years."

Lists under Schedule VII

Under the list system for federal governance, the field of education comes under Entry 25 of the Concurrent List enabling both Centre and the States to legislate,⁸⁵ but subject to Entries 63,⁸⁶ 64,⁸⁷ 65⁸⁸ and 66⁸⁹ of List I.

Since education comes under the Concurrent List it brings it under the test of repugnancy thus allowing a legal solution for any conflicting legislation by the States and the Centre in the same field. When the issue becomes a matter for political control of the educational sector as in recent times, unfortunately, the Supreme Court has had to set up Larger Benches and still Larger Benches without being able to resolve the problem. It shakes the confidence of the society in the judiciary and adds confusion all around.

⁸⁵ List III, Entry 25 - 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.

⁸⁶ List I, Entry 63 - The institutions known at the commencement of this Constitution as the Benares Hindu University, the Aligarh Muslim University and the Delhi University; the University established in pursuance of article 371E; any other institution declared by Parliament by law to be an institution of national importance.

⁸⁷ List I, Entry 64 - Institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament by law to be institutions of national importance.

⁸⁸ List I, Entry 65 - Union agencies and institutions for - (a) Professional, vocational or technical training, including the training of police officers; or (b) The promotion of special studies or research; or (c) Scientific or technical assistance in the investigation or detection of crime.

⁸⁹ List I, Entry 66 - Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions.

Perhaps the reason for the confusing decisions lies in the attempt by the judiciary to address the larger question of empowerment, through the narrow route of interpretation of the specific questions of minority rights brought before it. Political questions defy judicial logic and require comprehensive legislation. Entry 25 gives the power and Part IV the vision for such legislation.

Apart from all these provisions there are others in the Constitution that affects the realisation of the right to education.

Other Constitutional Provisions

Article 280 empowers the Finance Commission to suggest measures to augment the Consolidated Fund to supplement the resource of the Panchayat in the State as also of the Municipalities. There can be true empowerment only if the citizen has access to the resources needed. In the apparatus of the State, it is the local self-government machinery that has the most direct access to the citizen.

Article 340 empowers the President to appoint a Commission to investigate the conditions of backward classes. The Centre has constituted a National Commission for the Socially and the Economically Backward Sections among the Religious and Linguistic Minorities. The Commission is to suggest criteria for the

identification of the socially and economically backward sections among religious and linguistic minorities and recommend measures for their welfare, including reservation in education and government employment. It would also suggest the necessary constitutional, legal and administrative modalities, as required for the implementation of its recommendations and present a report of its deliberations.⁹⁰ The Commission is empowered to decide disputes regarding affiliation between University and minority education institutions.⁹¹

Educational grants for the benefit of Anglo-Indian community, covered under Article 337 are a successful instance of a constitutional instrument achieving comparative success.

Language, being the tool for communication, becomes an

⁹⁰ "National Commission for Backward Sections constituted", *The Hindu*, Kochi Edition, March 18, 2005, p. 9.

⁹¹ <http://www.education.nic.in/Annualreport2004-05/overview.pdf> [internet accessed on 12th January, 2006]. "An Ordinance was promulgated on November 11, 2004, to enable setting up of a National Commission for Minority Educational Institutions to advise the Central Government or any State Government on any question regarding the education of Minorities, to look into complaints regarding violation of the rights of the Minorities, to establish and administer educational institutions of their choice and to permit a Minority educational institution to seek direct affiliation with a scheduled Central University. The Commission has started functioning with a Chairman and two Members. It is expected that the Commission will give a greater focus to the issue of Minority education as also make the implementation of the constitutional provisions in these regard more effective. The Commission will also decide disputes regarding affiliation that may arise between a university and Minority education institutions. The National Commission for Minority Educational Institutions Act, 2004 (No. 2 of 2005) to replace the ordinance has since been enacted."

integral part of the empowerment process. Literacy gets covered under Article 350A which provides for facilities for instruction in mother tongue at primary stage⁹².

In addition, there have been specific amendments to the Constitution affecting education, as can be seen in 42nd, 73rd, 74th and 83rd Amendment Acts. These amendments pertain to provisions to enable education being included in the Concurrent List, devolution of powers including power to administer primary schools to local bodies and making elementary education a Fundamental Right formally (from its earlier status of recognition through judicial interpretation).

An analysis of these provisions takes us to the question of what exactly is the Constitutional goal on education.

Constitutional Goal on Education

Though the Directive Principles of State Policy under the Constitution of India does not confer any enforceable rights, they

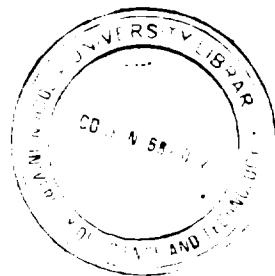
⁹² Article 350A - Facilities for instruction in mother-tongue at primary stage - It shall be the endeavour of every State and of every local authority within the State to provide adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups; and the President may issue such directions to any State as he considers necessary or proper for securing the provision of such facilities.

have been described as inalienable human rights and forerunners⁹³ to the United Nations Convention on Right to Development. A consideration of Articles 41, 45 and 46 clearly indicates that the Constitutional goal on education is to provide education to all sections of the society including the minorities and to ensure access to education to the deprived sections, the weaker sections and in particular, to the Scheduled Castes and the Scheduled Tribes.

Apart from the recognition afforded under the Constitutional provisions, statutory provisions are necessary for the effective realisation of the various facets of the right to education.

STATUTORY PROVISIONS

⁹³ *Air India Statutory Corporation v. United Labour Union*, AIR 1997 SC 645 para 38. "The Directive Principles in our Constitution are fore-runners of the U.N.O. Convention on Right to Development as inalienable human right and every person and all people are entitled to participate in, contribute to and enjoy economic, social cultural and political development in which all human right, fundamental freedoms would be fully realised. It is the responsibility of the State as well as the individuals, singly and collectively, for the development taking into account the need for fuller responsibility for the human rights, fundamental freedoms as well as the duties to the community which alone can ensure free and complete fulfilment of the human being. They promote and protect an appropriate social and economic order in democracy for development. The State should provide facilities and opportunities to ensure development and to eliminate all obstacles to development by appropriate economic and social reforms so as to eradicate all social injustice. These principles are imbedded, as stated earlier, as integral part of our Constitution in the Directive Principles. Therefore, the Directive Principles now stand elevated to inalienable fundamental human rights."



**National Commission for Minority Educational Institutions Act,
2004**

The National Commission for Minority Educational Institutions was first established through an Ordinance on 11th November, 2004. The Ordinance was replaced by the National Commission for Minority Educational Institutions Act 2004 (2 of 2005) which was notified on 6th January 2005. The Act provided for constitution of the Commission and the key objective is to ensure that the true amplitude of the educational rights enshrined in Article 30(1) of the Constitution is made available to the members of the notified religious minority communities.⁹⁴ This entails, *inter alia*, addressing all issues that pertain to the denial, deprivation or violation of the constitutional rights of the minorities to establish and administer educational institutions of their choice, including all issues related to grant of NOC, minority status certificates and affiliation to universities, wherever applicable.

⁹⁴ <http://pib.nic.in/release/release.asp?relid=46487&kwd=education> [internet accessed on 10th February, 2009].

The Central Educational Institutions (Reservation in Admission) Act, 2006.

This is an Act to provide for the reservation in admission of the students belonging to the Scheduled Castes, the Scheduled Tribes and the Other Backward Classes of citizens, to certain Central Educational Institutions established, maintained or aided by the Central Government.

The major feature of this legislation is that it provides for reservation of seats in admission and its extent in a Central Educational Institution which is comprehensively defined.⁹⁵ The Act lays down the manner of providing such reservation thus, “(i) out of the annual permitted strength in each branch of study or faculty, fifteen per cent. seats shall be reserved for the Scheduled Castes; (ii) out of the annual permitted strength in each branch of study or faculty, seven and one-half per cent. seats shall be reserved for the

⁹⁵ Section 2(d), Central Educational Institutions (Reservation in Admission) Act, 2006 defines ‘Central Educational Institution’ to mean “(i) a university established or incorporated by or under a Central Act; (ii) an institution of national importance set up by an Act of Parliament; (iii) an institution, declared as a deemed University under section 3 of the University Grants Commission Act, 1956, and maintained by or receiving aid from the Central Government; (iv) an institution maintained by or receiving aid from the Central Government, whether directly or indirectly, and affiliated to an institution referred to in clause (i) or clause (ii), or a constituent unit of an institution referred to in clause (iii); (v) an educational institution set up by the Central Government under the Societies Registration Act, 1860”.

Scheduled Tribes; (iii) out of the annual permitted strength in each branch of study or faculty, twenty-seven per cent seats shall be reserved for the Other Backward Classes.”⁹⁶

The Act also provides for increase in the number of seats in such educational institutions to offset the reduction in the number of seats otherwise available to the non-beneficiaries of reservation.⁹⁷

Another salient feature of the Act is the provision for a Schedule to name and exclude the institutions of excellence, research institutions, and institutions of national and strategic importance from the purview of the reservations.⁹⁸ The Schedule

⁹⁶ Section 3, Central Educational Institutions (Reservation in Admission) Act, 2006.

⁹⁷ Section 5, Central Educational Institutions (Reservation in Admission) Act, 2006, reads thus, “Mandatory increase of seats - (1) Notwithstanding anything contained in clause (iii) of section 3 and in any other law for the time being in force, every Central Educational Institution shall, with the prior approval of the appropriate authority, increase the number of seats in a branch of study or faculty over and above its annual permitted strength so that the number of seats, excluding those reserved for the persons belonging to the Scheduled Castes, the Scheduled Tribes and the Other Backward Classes, is not less than the number of such seats available for the academic session immediately preceding the date of the coming into force of this Act.

(2) Where, on a representation by any Central Educational Institution, the Central Government, in consultation with the appropriate authority, is satisfied that for reasons of financial, physical or academic limitations or in order to maintain the standards of education, the annual permitted strength in any branch of study or faculty of such institution cannot be increased for the academic session following the commencement of this Act, it may permit by notification in the Official Gazette, such institution to increase the annual permitted strength over a maximum period of three years beginning with the academic session following the commencement of this Act; and then, the extent of reservation for the Other Backward Classes as provided in clause (iii) of section 3 shall be limited for that academic session in such manner that the number of seats available to the Other Backward Classes for each academic session are commensurate with the increase in the permitted strength for each year.”

⁹⁸ Section 4, Central Educational Institutions (Reservation in Admission) Act, 2006.

can be amended from time to time by the Central Government.

An excellent effort by the Parliament, the legislation tries to address the issue of lack of adequate representation for the targeted population of students in the Central Educational Institutions. The legislation is noteworthy for the fact that it tries to balance the interests of the sections of the population on either side of the reservation divide thus deriving greater political legitimacy.

The legislation is also indicative of the extent to which purposive governmental intervention can increase access to education for many.

The Right of Children to Free and Compulsory Education Act, 2009.

Framed with the objective to provide free and compulsory education to all children of the age of six to fourteen years, the Act received the assent of the President of India on the 26th of August 2009. The Act defines elementary education to mean education upto the eighth class⁹⁹ and makes it the right of every child between the

⁹⁹ Section 2(f), The Right of Children to Free and Compulsory Education Act, 2009, defines "elementary education" to mean "the education from first class to eighth class."

age of six to fourteen to obtain it in a neighbourhood school¹⁰⁰ through free and compulsory education.¹⁰¹

Since the child is a minor, this would cast a duty on the guardian that could be enforced with the might of the State.¹⁰² The Act also provides for Central assistance to the States for creating the necessary infrastructure to fructify the fundamental right.¹⁰³ Neighbourhood schools are envisaged under the Act for children to pursue compulsory education which would be elementary education.¹⁰⁴

The Act conceives School management Committees for effective implementation of its provisions at the local level.¹⁰⁵ It entrusts the National and State Commissions for Protection of Child Rights to inquire into complaints in relation to the implementation

¹⁰⁰ Section 2(n), defines "school" to mean "any recognised school imparting elementary education and includes - (i) a school established, owned or controlled by the appropriate Government or a local authority; (ii) an aided school receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority; (iii) a school belonging to specified category; and (iv) an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority."

¹⁰¹ Section 3.

¹⁰² Section 10, The Right of Children to Free and Compulsory Education Act, 2009 reads thus: "It shall be the duty of every parent or guardian to admit or cause to be admitted his or her child or ward, as the case may be, to an elementary education in the neighborhood school."

¹⁰³ Section 7.

¹⁰⁴ Section 8.

¹⁰⁵ Section 21.

of the Act as also to review and suggest measures for the improved functioning of the Act.¹⁰⁶

An analysis of these Constitutional and statutory provisions indicate that a right to education is established and given recognition to in India. But mere establishment and recognition of a right to education is not enough to determine the actual content of such a right to education. For this it is necessary to identify the real nature and function of this right to education as is contemplated in the Indian scenario. The next chapter addresses the empowering role of education and its relevance as a constitutionally recognised tool for empowerment.

¹⁰⁶ Section 31.

CHAPTER V

EMPOWERMENT AND EDUCATION

RETURNS TO EDUCATION

Without education human personality has no means to strive towards excellence and a creative life distinct from that of mere animal existence. Apart from the various international documents that act as norms for the international community to guarantee access to primary education as a basic right, the Constitution of India too guarantees primary education as a fundamental right. The political and judicial system too has favoured the establishment of primary education as a fundamental right.

Education is not just primary education alone. But without primary education no further development is possible. The true spirit of citizenship can be imbibed and expressed only through education, whether formal or informal.

Education, being a means for life with dignity, is also a powerful tool of social change. Real education enhances the dignity of a human being and increases his or her self-respect.¹ Education lays the foundation for economic growth and social development. It

¹ Dr. A.P.J. Abdul Kalam, Address to the Nation on the Eve of the 58th Independence Day, 2004, <http://education.nic.in/Elementary/Policyel/presidentspeech-14082004.asp> [internet accessed on 12th September, 2009.]

is the principal means of improving the welfare of individuals. In a knowledge economy, higher education is a prerequisite for competitive success.² Marginalised groups, being deprived of material means of production require higher education even for survival. For this modern formal education is a prerequisite. Higher education is not only a means of seeking better economic opportunities but also an effective instrument for social liberation for the marginalised sections of the society. Higher education is thus significant for its intrinsic value and for its instrumental role.³

Dr. B.R. Ambedkar, in a speech in the Bombay Legislative Council, connected the returns to education for backward classes thus:

“We may forego material benefits of civilisation, but we cannot forego our right and opportunity to reap the benefits of the highest education to the fullest

² Michael Peters, “National Education Policy Constructions of the Knowledge Economy: Towards a Critique”, <http://www.education.unisa.edu.au/JEE/Papers/JEEVol2No1/paper1.pdf> [internet accessed on 10th December, 2008.] “The Organisation for Economic and Cultural Development (OECD) and the World Bank have stressed the significance of education and training as keys to participation in the new global knowledge economy for the development of ‘human resources’; for upskilling and increasing the competencies of workers; and for the production of research and scientific knowledge.”

³ A. Abdul Salim, “Opportunities for Higher Education: An Enquiry Into Entry Barriers”, Kerala Research Programme on Local Level Development, Centre for Development Studies, Thiruvananthapuram (2004), p. 5.

extent... Backward classes have just realised that without education their existence is not safe.”⁴

The returns to education are twofold:

1. The likelihood of gaining employment increases in proportion to the level of education.
2. Increase in income from employment varies directly with the level of education.

The main results of a study by Laveesh Bhandari and Mridusmita Bordoloi, based on data available from the ‘National Data Survey on Savings Patterns of Indian’ which was overseen by the Invest India Economic Foundation and conducted by AC Nielson in 2004-05 sponsored by the Ministry of Finance, Government of India is extracted here for the purpose of analysing the reality in returns of education in India.

“The key results are as follows:

Non-education Characteristics

- Individuals from SC and ST households are likely to

⁴ As quoted by Dr. N.R. Madhava Menon, “Education, Equality and Social Justice”, in *Dr. B.R. Ambedkar and the Indian Constitution*, Dr. S.G. Bhat, (Ed.), Journal Society, Dr. Ambedkar Government Law College, Pondicherry (2001), p. 1 at p. 11.

have about 10 percent lower income than those from non-SC/ST households everything else remaining the same.

- Women's incomes are likely to be about a third lower than males having the same household and educational characteristics. They are also much more likely to be unemployed than males.
- Those who are currently married are likely to have higher incomes and higher likelihood of being employed.
- Knowledge of English language has a significant impact on incomes. Incomes of those who have knowledge of the language are between 18 and 22 percent higher depending upon whether they can merely understand or converse in it.

Education Characteristics

- Compared to illiterates those who have completed primary school have 50 percent greater incomes, those who have completed middle school have incomes greater by 75 percent, those who have completed schooling have incomes greater by 172 percent, graduates by 278 percent and professional courses by 356 percent.

- After correcting for household and individual characteristics and state effects, compared to illiterates those who have completed primary have 31% greater incomes, those who have completed middle school by 45%, those who have completed schooling by 89%, graduates by 136% and professionals by 171%.
- In other words, we find that returns to greater education increases significantly as the level of education increases. This would be fine if the returns at the lowest level were high. However, that is not the case and maybe an important reason behind the high dropout rate. We also find evidence that there are significant rigidities in the labour market in the sense that household and gender factors explain a significant part of the variance in the incomes. With greater education one may be able to break these rigidities, however, that requires children to remain in school.

For educational policy the message is quite clear: Quality of delivery, and content that enables flexibility in later occupational choice. This will ensure that rational children

can expect to gain from the benefits of formal education, and therefore also remain in school longer.

The above results throw up three different insights for education policy:

(i) Improve quality of education services – quality not necessarily in terms of school facilities (though they do need to be improved) but as assessed by the consumers, and in its ability to generate higher incomes.

(ii) Ensure that quality is maintained such that students especially from poorer and underprivileged sections are able to access primary school and remain in school through higher levels of schooling.

(iii) Greater focus on development of skills and professional expertise.

The results also show that those traditionally considered to be underprivileged do have lower incomes – scheduled castes and tribes, and females; but greater education has the potential to counter the inherent disadvantages. A greater focus on schooling is essential not only from a growth and

efficiency perspective, but also equity. One of the more positive results was related to the low impact of the household economic status on an individual's income. With improvements in access to schooling, and improvements in school achievement, the equity objective (however it may be defined) is achievable."⁵

Given this scenario, it is obvious that there should be no occasion to deny access to whatever be the education that is provided by the State as part of its obligation to the citizen. Further, it may not be enough for the State to provide the necessary infrastructure in the form of a school building and a teacher; it would also be necessary to ensure that the citizen accesses it and performs his Constitutional duty to educate himself.

Clearly, education offers returns and those returns tend to improve with the quality of education that is received. One of those returns of education could be its use as an empowering tool.

EDUCATION AS AN EMPOWERING TOOL

⁵ Laveesh Bhandari, Mridusmita Bordoloi, "Income Differentials and Returns to Education", *Economic & Political Weekly*, Vol.XLI, No. 36, September 9, 2006, p. 3893 at pp. 3899-3900.

Empowerment has many implications. Essentially it implies a state of mind and attitude of a person. The means of empowerment varies depending upon the individual and the group to which he belongs. Generally, the means of empowerment are factors such as, (1) education, (2) health and nutrition, (3) economic independence, (4) legal awareness, (5) organisational support, and (6) intervention programmes.⁶

It is said that education is the key for empowerment, since it is through education alone that a society can move towards true equality.⁷

The International Commission on Education for the Twenty First Century, in its Report to the UNESCO stated thus:

“Basic education is the first step in attempting to attenuate the enormous disparities affecting many groups – women, rural populations, the urban poor, marginalised ethnic

⁶ See also N. Jayapalan, *Women and Human Rights*, Atlantic Publishers, New Delhi (2001), pp. 190-191.

⁷ Dr. N.R. Madhava Menon, “Education, Equality and Social Justice”, in *Dr. B.R. Ambedkar and the Indian Constitution*, Dr. S.G. Bhat, (Ed.), Journal Society, Dr. Ambedkar Government Law College, Pondicherry (2001), p. 1 at p. 6.

minorities and the millions of children not attending school and working.”⁸

Sociologists have emphasised the role of empowerment in social upliftment and personal development. An excellent analysis on the basis of human rights can be seen in the following words of Elisabeth Reichert,

“Two interdependent and interactive dynamics characterize empowerment. Personal empowerment resembles the clinical notion of self-determination, whereby clients give direction to the helping process, take charge and control of their personal lives, get their ‘head straight’. Learn new ways to think about their situation and adopt new behaviours that give them more satisfying and ‘rewarding outcomes’. Personal empowerment also relates to opportunity, for without opportunity the process of self-determination becomes difficult. ...The social empowerment dynamic recognises that an individual’s

⁸ Kishore Singh, “Right to Education and International Law: UNESCO’s Normative Action”, 2004 IJIL 488 at p. 496 quoting The International Commission on Education for the Twenty First Century: the Report of the Commission presented to the UNESCO, ‘*Learning: The Treasure Within*’, UNESCO (1996), p. 118.

characteristics cannot be separated from the context in which the individual exists. An individual's behaviour or traits are connected to those of others through social involvement. An individual with resources and an opportunity to play an important role in his or her own environment can more easily shape outcomes. ... Personal empowerment and social empowerment are mutually inclusive. When an individual achieves personal empowerment, that individual also achieves social empowerment. Assisting individuals and groups to empower themselves to overcome inequitable treatment forms a key part of the social work profession. This empowerment tradition goes hand in hand with the achievement of human right, which center on equitable treatment for everyone, regardless of status.”⁹

The role of empowering the weaker sections of the society for nation building has been recognised by the political leaders of India. As had been observed by the former Prime Minister Mr.

⁹ Elisabeth Reichert, *Social work and Human Rights – A Foundation for Policy and Practice*, Rawat Publications. Jaipur (2003), pp. 229-230.

Rajiv Gandhi in his letter dated August 29, 1985 to the Council of Ministers,

“National integration is best protected by ensuring that every citizen, irrespective of caste, creed, language or religion, is able to fully participate in all spheres of national activity without any discrimination. ... Rapid social and economic advance of minorities is the key to the strengthening of the social fabric.”¹⁰

In the context of the sectarian impulses prevalent in India, former Prime Minister Smt. Indira Gandhi expressed the need for uplifting the minority communities as a means of ensuring the integrity of the Nation. For this she advocated the use of exclusive efforts in the field of education to overcome their peculiar difficulties. In her letter dated 11 May, 1983 to the Home Minister and all Members of her Council of Ministers on the problems faced by the minorities, she observes,

“In many areas recruitment is done through competitive examinations. Often minority groups have been

¹⁰ Indira Gandhi, ‘Prime Minister’s 15-Point Programme on Minorities 1983’, *Communal Riots – The State and Law in India*, Iqbal A. Ansari, Ed., Institute of Objective Studies, New Delhi (1997), p. 503 at p. 506.

handicapped in taking advantage of the educational system to compete on equal terms in such examinations. To help them to overcome these handicaps, steps should be taken to encourage the starting of coaching classes in minority educational institutions to train persons to compete successfully in the examinations.”¹¹

It is obvious that when circumstances beyond their control create inequity between citizens, the State must step in with programmes that ensure a level playing field. This is especially so in the field of education since it acts as the stepping-stone for future progress of the citizen.

SOCIAL BACKWARDNESS AND EMPOWERMENT

The question of social backwardness is not only a matter of education but also a question of the relative ability of the individual to corner the available resources for his betterment. One can have superior education and still lack material possessions. If the lack of worldly possessions is by choice, there is still empowerment.

¹¹ Indira Gandhi, 'Prime Minister's 15-Point Programme on Minorities 1983', *Communal Riots – The State and Law in India*, Iqbal A. Ansari, Ed., Institute of Objective Studies, New Delhi (1997), p. 503 at p. 504.

Unfortunately, social backwardness lacks any uniform nature and defies standardised attempts at identification. Factually, this could be a reason for the present closely communal identification associated with backwardness. This approach finds justification from the following observation:

“Illiteracy is a curse. It produces results of far-reaching consequences. One of the consequences is of cultural backwardness. Without property there is no life and without education there is no culture. Both are equally important for the development and fulfilment of the individuals. Both tests of educational and economic backwardness must be conjunctively satisfied for the purpose of identifying a particular class as “backward class” of the citizens. The word ‘citizens’ in Article 15(4) and 16(4) of the Constitution of India cannot be ignored. The citizenship is individual. It is not communal, nor is it casteist. The word “backward classes” are to be read conjunctively backward on the basis of class. Class, which is backward. It is therefore submitted that educational backwardness and poverty can be taken as the determinants to identify

backward classes. And accordingly reservation should be given to the backward classes.”¹²

Commenting on the concept of ‘backward class’ under the Constitution in the *Mandal Commission* case¹³, Sahai, J., opined thus:

“Different streams of thought may appear from various decisions but none has accepted caste as the sole criterion for determination of backwardness. ‘Backward class’ in Article 16(4) thus cannot be read as backward caste. What is the scope then? Is it social backwardness, educational backwardness, economic backwardness, social and economic backwardness, natural backwardness etc.? In absence of any indication expressly or impliedly any group or collectivity which can be legitimately considered as ‘backward’ for purposes of representation in service would be included in the expression ‘backward class’. Word ‘any’ is indicative of (fact) that the backward class was not visualised in singular. When the Constitution was framed

¹² D.N. Sandanshiv, *Reservations for Social Justice - A Socio-economic Approach*, Current Law Publishers, Bombay (1986), p. 88.

¹³ *Indira Sawhney v. Union of India*, AIR 1993 SC 477.

the anxiety was to undo the historical backwardness. Yet a word of wider import was used to avoid any close-door policy. ... Backwardness which the Constitution makers had to tackle by making special provision, due to social and economic condition, was different but that does not exclude backwardness arising due to different reasons in new set-up. ... A State is not bound to grant reservation to every backward class. In one State or at one place or at one point of time it may be historical and social backwardness or geographical and habitational backwardness and at another it may be social and educational or backwardness arising out of natural cause."¹⁴

The very concept of a society based identification of backwardness negates the individual centric notion that empowerment actually is. A society's state of being is a result of various complex features incapable of being precisely identified to make any meaningful corrective action because they are interrelated and interwoven. Sociologists and Judges concur on the same point

¹⁴ Surendra Malik, *Supreme Court Mandal Commission Case, 1992*, Eastern Book Company, Lucknow (1992), at pp. 299-300.

which is visible from the following observation:

“We accept the *Balaji*¹⁵ formula that while educational backwardness is statistically ascertainable, social backwardness may be due to poverty, occupational position, social status, habitational conditions, caste, etc., and in a traditional society like in India these are integrated factors.”¹⁶

Within any society, the relatively better off will corner any benefits granted to the society as a whole. This is due to the hierarchical nature of power sharing in any social body. Hence, specific targeting of individuals is a must for any meaningful attempt at empowerment. Justice P.B. Sawant observes:

“The entry of the backward classes in the administration through the opening given by the reservations in the State employment has not helped and is not going to help the situation more than marginally. As it is, the implementation of the reservation policy is in the hands of the elite and even the meagre representation of these classes expected to

¹⁵ *Balaji v. State of Mysore*, AIR 1963 SC 649.

¹⁶ V.P. Bharatiya, “No Reverse Discrimination: Egalitarian Differentiation for Job Reservations”, 33 JILI (1991) 76 at p. 86.

trickle down in the administration, has not seen its way as expected, during the last more than 50 years.”¹⁷

While affirmative action may provide economic advantages and from it political domination, the crutches of State aid cannot provide empowerment worth human dignity and requirement.

While socialisation, provided by class identity and integration into a class structure initiates an unquestioning way of life, it is education that provides the power of critical evaluation and from it, emancipation in the truest sense.¹⁸

While affirmative action in the form of reservation of seats in educational institutions and for jobs has been popular measures for inclusive development of the various socially disadvantaged groups, there is a great deal of difference in the objective behind such policies.¹⁹ The object of reservation for the Scheduled Castes and Tribes is to bring them into the mainstream of national life while for

¹⁷ P.B. Savant, “Constitution, Social Revolution and the People”, [2003] C.U.L.R. 1 at p. 21.

¹⁸ V.C. Pandey, (Ed.), *Value Education and Education for Human Rights*, Isha Books, New Delhi (2005), p. 4. “Socialisation, we suggested, is the uncritical initiation of students into a tradition, a way of thinking and acting. Education, by contrast, requires critical distance from tradition, exposure to alternatives, informed and reflective deliberation about how to think and live.”

¹⁹ Ajit Singh Chahal, “Protections for Scheduled Castes, Scheduled Tribes and Backward Classes: Under Indian Constitution”, X M.D.U.L.J. (2005) 268, p. 280.

the Backward Classes the objective is to remove their social and educational handicaps.²⁰

While there is a policy framework to help the depressed classes, it is often not fully utilised by the classes themselves due to a lack of awareness about the programmes or the need for the same.

DEPRESSED CLASSES AND CRITICAL CONSCIOUSNESS

Awareness is a prerequisite for socio-economic development. A vision of the future must be based on the awareness of the present. Literacy is the most essential factor contributing to this awareness. It provides the ability to read, write and perceive; to comprehend developments beyond the community or the immediate neighbourhood; to discuss and judge what is good and what is not.

As Paulo Frieire, the Brazilian proponent of social activism stated:

“Literacy per se, and even adult education at a fairly advance stage, may not lead to a radical or qualitative change in the

²⁰ *Chattar Singh v. State of Rajasthan*, AIR 1997 SC 303 at pp. 309-310. Since the objectives are different they are always treated dissimilarly and they do not form an integrated class for the purpose of Article 16(4) or 15(4) of the Constitution and the Court cannot declare Backward Class alike Scheduled Class and Tribes by a process of interpretation.

lives of individual learners. It may not lead to an end of the status of landlessness, assetlessness and bondage; but it can certainly be a tool of “critical consciousness” and in that sense can be an important tool to induce or stimulate change - social, economic, cultural and even political.”²¹

After fifty years the illiterate population of India has exceeded the total population of the country at the time of independence. An undue emphasis on higher education has resulted in the meagre resources allocated to the education sector being consumed largely by universities and technical institutions. This translates into India being among the top nations in technical manpower, while accommodating the largest number of illiterates. The worst sufferers in this regard are the disadvantaged.

Real empowerment of the population can only be through the elimination of illiteracy and not through the creation of technical manpower that gravitate to other developed nations.

²¹ As quoted by R.V. Pillai, “Development Issues in Human Rights with reference to the Scheduled Castes and Scheduled Tribes”, in Abdulrahim P. Vijapur & Kumar Suresh, Ed.s., *Perspectives on Human Rights*. Manak Publications, New Delhi (1999), p. 152 at p.154.

“Any social revolution in this country worth its name must begin with the upliftment and empowerment of women and the scheduled castes, the scheduled tribes and the other backward classes. While women constitute roughly 50% of the population, the SC’s and ST’s together constitute about 22.5% of the population. The OBC’s are no less than 60% of the population, thus the socially, educationally and economically backward population of this country is no less than 82.5%. If we add to this number the women from the socially and economically forward classes, who have been denied education on account of the social taboos, the number of unempowered population is no less than 85%. These figures by themselves are sufficient to indicate the gigantic task of any social revolution aimed at the empowerment of the individuals, to develop their capacities to the full, and to help them to contribute their might to the development and progress of the country.”²²

²² P.B. Savant, “Constitution, Social Revolution and the People”, [2003] C.U.L.R. 1 at p. 28.

Though there are other functions attributed to education,²³ it is widely regarded as the prime instrument for improving the condition of the backward and the elevation of the backward is seen as one of the most important social products of education.²⁴

India has seen the growth of political parties gaining strength on the platform of social justice by forging alliances of communities generally perceived to be outside the sphere of influence of the governing elite and hence backward. The ideologues of these parties identify education as the primary means used by the elite classes to keep the backward classes at bay.

As has been observed by a political commentator,

“The Indian State, according to Kanshi Ram,²⁵ under the control of Brahmanical leaders, propagates its ideology through its educational system, socialising the younger generation of Dalits, teaching them to accept the system and,

²³ See Chinna Rao Yagati, *Dalit's Struggle for Identity - Andhra and Hyderabad: 1900-1950*, Kanishka Publishers, New Delhi (2003), p. 57.

²⁴ Marc Galanter, *Competing Equalities: Law and the Backward Classes in India*, Oxford University Press, Delhi (1984), p. 58.

²⁵ Sudha Pai, *Dalit Assertion and the Unfinished Democratic Revolution: The Bahujan Samaj Party in Uttar Pradesh*, Cultural Subordination and the Dalit Challenge, Volume 3, Sage Publications, New Delhi (2002), p. 116. “Kanshi Ram has been the chief ideologue of the BSP. According to him Brahminism, which occupies a central position within Hinduism, is the root cause of the present day unequal social structure. This social structure is described as Aryan in origin and based upon *Sanatan Dharam* and the theory of *Karma*, an antihumanitarian and one that propagates an unequal order.”

thereby, ensuring the continuation of the unequal system. All leaders and political parties the country has produced are Brahmanical or manuvadi. This is a major stumbling block to social change.”²⁶

Statistical data reveals that the literacy rates among the constitutionally acknowledged backward classes are abysmally low. According to the 1991 Census, while the literacy rate was 52.2 percent for the whole population, it was 37.4 percent among the scheduled castes.²⁷ The literacy level among the Scheduled Tribes was 29.6 percent for the country as a whole.²⁸

Literacy Rate of General Population and Scheduled Castes Population, 1961-2001						
Year	General			Scheduled Castes		
	Male	Female	Total	Male	Female	Total
1961	34.44	12.95	24.02	16.96	3.29	10.27
1971	39.45	18.70	29.45	22.36	6.44	14.67
1981	46.89	24.82	36.23	31.12	10.93	21.38
1991	64.1	39.3	52.2	49.91	23.76	37.41
2001	75.3	53.7	64.8	66.64	41.90	54.69

²⁶ Sudha Pai, *Dalit Assertion and the Unfinished Democratic Revolution: The Bahujan Samaj Party in Uttar Pradesh*, Cultural Subordination and the Dalit Challenge, Volume 3, Sage Publications, New Delhi (2002), p. 117.

²⁷ National Human Development Report 2001, “Educational Attainments and Well Being”, Planning Commission, Government of India, New Delhi, (2002), p. 52.

²⁸ See R.V. Pillai, “Development Issues in Human Rights with reference to the Scheduled Castes and Scheduled Tribes”, in Abdulrahim P. Vijapur & Kumar Suresh, Ed.s., *Perspectives on Human Rights*, Manak Publications, New Delhi (1999), p. 152 at p. 155.

*Source: Census of India*²⁹

As can be seen from the Table above, the 2001 census data shows a disproportionate rise in the literacy levels for the Scheduled Castes as compared to the General population during the decade 1991-2001. Though literacy rate of 54.69 is still on the lower side, it perhaps reflects the result of successful programmes of the government, greater awareness among the members of the targeted section and greater access to political power due to increased representation in legislative bodies as a result of reservation of electoral seats. The decade is also to be noted as the period of liberalisation, globalisation and privatisation which increased opportunities for all sections of the population.

Studies have often pointed out that it is often the capture of political power that results in higher educational levels for a community rather than any other event. Commenting on the position of Dalits, Chinna Rao Yagati points out that,

²⁹ http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11_v1/11v1_ch6.pdf [internet accessed on February 17, 2009]. The tabulation is re-produced from Chapter VI titled Social Justice: Scheduled Castes, Scheduled Tribes, Other Backward Classes, Minorities, and Other Vulnerable Groups, p. 105.

“...social transformation in South India in general, and Andhra and Hyderabad in particular, in the twentieth century unquestionably came from the rise and growth of power and status of Dalits, which in turn came significantly through political and little by way of social reform.”³⁰

It must be noted that social reforms are the result of enlightenment through education while political empowerment can happen even without education. Higher literacy levels as a consequence of capture of political power may indicate the improved opportunities available in the government to the politically affluent classes and hence the incentive to get educated.

Policies of positive action by the State include the concept of reservations in sectors enjoying governmental patronage for those classes of persons who are considered to be disadvantaged. Since the positive action by the State is not confined to reservations but could also include other means like a lowering of the required standards, special incentives, scholarships, etc., the term affirmative action could be more suitable to describe action on the part of the

³⁰ Chinna Rao Yagati, *Dalit's Struggle for Identity - Andhra and Hyderabad: 1900-1950*, Kanishka Publishers, New Delhi (2003), p. 94.

State for ensuring equity among the various classes of its people.

AFFIRMATIVE ACTION

In a democratic society, social action must favour a just order for democracy to succeed in an atmosphere of rule of law. Absence of or denial of social justice might impair political freedoms.³¹ Since a just order demands equitable distribution of power and wealth, inequity, be it social, political or economical, calls for the creation of a level playing field. This brings in the principle of redress that is fundamental to any issue of distributive justice, which holds that for genuine equality of opportunity more attention must be given to those with lesser assets or skills.³²

“Affirmative action refers (to) any effort taken to expand opportunity for women or racial, ethnic and national origin

³¹ H.R. Khanna, *Making of India's Constitution*, Eastern Book Company, Lucknow (1981), p. 55.

³² V. Loganathan, “Affirmative Action in Higher Education”, *University News*, Vol. 44, September 04-10, 2006, p. 182 at pp. 182. “In any discussion on distributive justice, the principle of redress merits consideration. This is the principle that undeserved inequalities call for redress; and since inequalities of birth and natural endowments are undeserved, these inequalities are to be somehow compensated for (Spiesellers, -1944; Raphael, -1950-51). Thus the principle of redress holds that in order to treat all persons equally to provide genuine equality of opportunity, society must give more attention to those with fewer native assets and to those born into less favourable social positions.”

minorities by using membership in those groups that have been subject to discrimination as consideration...”³³

Thus the principle of redress is reflected under the Constitution of India in its choice of the social policy of affirmative action as a means to overcome the significant inequities in participation present amongst various sections of Indians.³⁴

The principle of redress is antithetical to social efficiency and technocratic values and the affirmative action policies as envisaged under the Constitution are meant to be purely temporary, short term and effective measures. Though this goes against the spirit of merit, meritocracy would only favour the already advantaged and cannot bring justice in an uneven field. As John Rawls envisaged it,

“The ideal of equal opportunity ceases to be the right to leave the less fortunate behind and hence the callous aspect of a meritocratic regime are avoided.”³⁵

³³ V. Loganathan, “Affirmative Action in Higher Education”, *University News*, Vol. 44, September 04-10, 2006, p. 182 at pp. 182 quoting Stephanopoulos and Edley, (1996).

³⁴ Vimal P. Shah & Binod C., *Policy Programmes and Issues*, Agrawal Rawat Publications, Jaipur (1986), p. 153. “Reservation which is one of the ways of protective discrimination is a social policy of the State enshrined in the Constitution to ensure a certain amount of participation of the traditionally neglected social groups.”

³⁵ John Rawls, *A Theory of Justice*, Harvard University Press, Cambridge, Massachusetts (1967), p. 339.

By emphasising that talent and ability depends upon individually dissimilar social circumstances and cautioning against the stress on merit as a sole criterion for any selection, Rawls speaks of the need of the social institution to take positive measures to ensure fairness in competition.³⁶

Affirmative action by way of communal reservation has been criticised and variously looked at. The political outlook in India is in favour of affirmative action for the empowerment of the depressed sections of the Indian society. This is highlighted by the series of Constitutional Amendments that have occurred in the recent past which have provided for affirmative action. Almost all of these related to relaxation in eligibility norms in favour of the depressed classes like the Scheduled Castes, the Scheduled Tribes and the Backward Classes.

The Supreme Court ruled on November 16, 1992 that the total reservations under Article 16(4) cannot exceed 50%.³⁷ The 76th Constitutional Amendment Act was brought in 1994 to enable the Government of Tamil Nadu to continue its policy of 69 per cent

³⁶ Sheema S. Dhar, "Reservation of Jobs – Rationale and Justification", 31 Ac.L.R. 2007 33-80 at p. 48.

³⁷ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217.

reservation in Government Services and for admission in educational institutions for the Scheduled Castes, the Scheduled Tribes and the Backward Classes.³⁸

The 77th Constitutional Amendment Act in 1995 added Article 16 (4A) to provide reservation in promotion for the Scheduled Castes and the Scheduled Tribes. In 1999, by the 79th Constitutional Amendment Act, reservation in seats in the Lok Sabha and the Rajya Sabha for the Scheduled Castes, the Scheduled Tribes and the Anglo Indians were extended till 2009. The 81st Constitutional Amendment Act in 2000 provided that the unfilled vacancies of a year reserved for the Scheduled Castes and the Scheduled Tribes kept for being filled up in a year as per Article 16, should be considered separately for filling vacancies in the succeeding year and the previous list would not be considered for filling the 50% quota of the respective year. The 82nd Constitutional Amendment Act, also in 2000, provided that nothing in Article 355

³⁸ <http://indiacode.nic.in/coiweb/amend/amend76.htm> [internet accessed on 19th February, 2010]. The Amendment Act allowed for the placement of the Tamil Nadu Backward Classes, Schedule Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointment or Posts in the Services under the State) Act, 1993 in the Ninth Schedule to the Constitution of India thus protecting it from a challenge based on inconsistency with the fundamental rights. See *Manorama Year Book 2003*, Malayala Manorama, Kottayam (2003), p. 567.

shall prevent the State from making any provisions in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks with respect to examination, jobs or promotion. The Constitution (93rd Amendment) Act, 2005 enables the State to make provisions by law in matters of admission, to all educational Institutions, for the weaker sections of the Society, including the Other Backward Classes.³⁹

In spite of these powerful provisions in the Constitution, the backwardness of the depressed classes has not been successfully removed. This has called into question the fundamental assumptions behind affirmative action on the basis of communal reservation. The constitutional law expert and famous lawyer P.P. Rao, observes thus:

“The most backward sections among the backward classes have not been able to avail the benefits of reservations for want of education and poverty. Except the satisfaction of figuring in the list of backward classes, in real terms most of

³⁹ Even though the provisions were incorporated on 15th May, 2005 no decision to give reservation to OBCs in higher educational institutes had been taken by the Central Government even after one year. Government of India, Ministry of Human Resource Development, Department of Secondary Education and Higher Education, Rajya Sabha unstarred question no: 3053, answered on 15.05.2006. <http://164.100.24.219/rsq/quest.asp?qref=114502> [internet accessed on 14th November, 2006].

them do not derive any appreciable benefit. Notwithstanding the theoretical possibility of exclusion of the creamy layer from backward classes as mandated by the Supreme Court in the Mandal case, the ground reality is that the dominant sections among the backward classes continue to corner the reservations because the weakest and the most oppressed members of the backward classes cannot compete with them. The leaders who swear by reservations for immediate electoral gains with no commitment at all to the Constitutional goals cannot be expected to implement the directive principles of state policy seriously and raise the level of the weaker sections as a whole. The tardy implementation of land reforms is a clear pointer. Even after the Supreme Court declared that the right to education up to fourteen years is a fundamental right in 1993, there is no perceptible effort on the part of the State to open more schools and take measures to ensure that every child belonging to a backward family attends the school regularly.”⁴⁰

⁴⁰ P.P. Rao, “Right to Equality and the Reservation Policy”, 42 JILI (2000) 193 at p. 200.

The lack of executive will as identified above is particularly strange given India's system of government. The executive in India is closely identified with the legislature. If there is indeed a legislative will as shown by the Constitutional Amendments, then presumably there ought to be an executive will as well.

Or it could be either of two issues that explain the real reason for the apathy shown by the administration. Firstly, the legislative initiative could only be mere platitudes thrown up by a vested political class that is actively disinclined to change the *status quo*. Since the majority in the legislature is also the executive, it explains the lack of initiative on the part of the executive. Secondly, the problem could lie in the entrenched bureaucracy that actually governs India. The gross under representation of the depressed classes in the bureaucratic structure could be the reason for the policy initiatives not bringing forth the promised success in implementation.

Perhaps a strong combination of these two reasons could explain the situation. Since bureaucracy anywhere cannot stop the governmental initiative, but can only delay matters, it might also explain why the Indian situation demands such a prolonged period

of affirmative action.

But, affirmative action is not altogether without its opponents. In fact, the reservation policies in India has brought forward strong posturing from either sides of the divide.

Paul Lansing and Sarosh Kuruvila after analysing the problem arrived at the following conclusions:

“It cannot be denied that the reservation system in education tends to provide inferior quality of professionals. In the employment area, India needs able administrators at all levels of government, and the reservation system does tend to detract from the required quality. Bearing in mind that the backward classes need uplifting, what appears to be necessary is increased concentration on education and financial assistance to backward classes. The purpose of the approach should be to bring these backward classes to the stage where they will fare well in competition with others in both education and employment.”⁴¹

The reasons cited are relevant and can only be ignored at the

⁴¹ Paul Lansing and Sarosh Kuruvila, “Job Reservations: A Functional Analysis”, 13 *Indian Bar Review* (1986), 178.

Nation's peril. In fact, it could also offer one explanation for the failure in governance where the executive fails to keep pace with the legislative policy.

“Reservations are like first aid, not a permanent cure to the massive problem of backwardness. Palliatives cannot solve problems. To continue the reservations indefinitely, neglecting implementation of the directive principles of state policy is the surest way to keep the backward classes permanently backward. Continued indefinitely, reservations promote caste consciousness among all castes, creates a vested interest in remaining backward and result in perpetuating caste distinctions.”⁴²

When the disastrous consequences that await a directionless policy of affirmative action that continues indefinitely is so obvious, why has there not been any corrective steps? The absence of any collective action by the political class could be explained by the political economy of reservations itself. In spite of overwhelming evidence that the actual persons who are targeted by the affirmative action policy do not gain quantitatively and qualitatively to the

⁴² P.P. Rao, “Right to Equality and the Reservation Policy”, 42 JILI (2000) 193 at p. 203.

desired extent by it, if the political class still persist with the same system, then it could only mean that either they cannot change the system or that they stand to gain from it.

“The reservation policy was envisaged simply as a means to an end, the end being social justice. ... The state thinks, its supreme and solemn responsibility is over once it meets the growing demands for reservation from the diverse groups, quite unmindful of the injury to the social system. It does not realize that thereby it sets in the vicious cycle of poverty. It only testifies, what Gunnar Myrdal said, “a country is poor because it is poor”. Unwittingly, it is promoting what Oscar Lewis termed the “culture of poverty”. With complete disregard for the “maintenance of efficiency of administration”, the Indian system is increasingly becoming a big ‘drag’. Such enunciations as ‘sacrifice of merit’ for ‘social justice’⁴³ tend to convey as if

⁴³ In the case of *Indira Sawhney*, the Supreme Court has held that sacrifice of merit may have to be made for social justice. See, *Indira Sawhney v. Union of India*, (1992) Supp (3) SCC 217.

‘merit’ and ‘social justice’ are incongruent. Are they?
Should not we look and locate our lost perspective!”⁴⁴

Even as the opponents of the affirmative action policies of the State continue to question the efficacy of the measures, the government has consistently maintained that inter-se merit within each category of equals was the criteria in higher and technical education.⁴⁵ Socio-political acceptance of affirmative action is seen to be dependent on its projection as an aid and not as a policy for reverse discrimination.

SOCIAL ACCEPTANCE OF REVERSE DISCRIMINATION

It was the differences between the castes that became sharper during the British rule on the Indian subcontinent, which created the right atmosphere for questioning the social hierarchy on the basis of the principles of equality. Independence created the proper conditions for an equitable distribution of the common resources of the community including State patronage. Even the proponents of

⁴⁴ Jyotica Pragya Kumar, “Policy of Reservation: Its Envisioned Perspective”, 39 JILI (1997) 330 at p. 337.

⁴⁵ Government of India, Ministry of Human Resource Development, Department of Secondary Education and Higher Education, Rajya Sabha unstarred question no: 581, answered on 31.07.2006. <http://164.100.24.219/rsq/quest.asp?qref=118173> [internet accessed on 14th November, 2006].

the affirmative action policies had not envisaged a system of perpetual State patronage since that would only create a new social hierarchy to replace the historically wrong one.⁴⁶

By not achieving its specific goals within the span of time originally envisaged, the temporary measure of affirmative action has created misgivings in the minds of the other communities.⁴⁷ Policy of reservation is now so closely identified with communalisation of politics that voting patterns among different sections of the people have changed depending upon the perceived benefits of political patronage.⁴⁸ Affirmative action does not reach

⁴⁶ Mohan Dass Namishray, *Caste and Race – Comparative Study of B.R. Ambedkar and Martin Luther King*, Rawat Publications, Jaipur (2003), pp. 139-141. "Realising that actual equality would be compromised and full interaction would not be possible if equal rights and respect and self sufficiency for these communities is not kept as the one and only goal, both King and Ambedkar did not favour the policy of preferments. In the case of Ambedkar, though he was the major force behind the introduction of reservation policy in the constitutional agenda, he knew that the implementation of the policy would provide some relief to the downtrodden but it was not a lasting solution. That is why most of the persons having higher posts were not interested to provide the facilities to the Dalits. And Ambedkar personally opted for religious conversion and encouraged his followers to do the same, his view being that equality of right and status with the upper castes was not possible for the untouchables within the Hindu religion with its inherent caste structure."

⁴⁷ Bhagat Oinam and D.A. Sadokpam, "Problems of Generalisation", <http://www.india-seminar.com/2005/549/549%20b.oinam,%20d.a.sadokpam.htm> [internet accessed on 5th September, 2007]. "The aversion created by the reservation policy enforcing division along the lines of caste or tribe is not a healthy development. Reservation of jobs, if at all is a means of social and individual emancipation, must give way to new innovations. New ways must be found to reach the goal of emancipation without creating disenchantment with others."

⁴⁸ Christophe Jaffrelot, "Why Should We Vote? The Indian Middle Class and the Functioning of the World's Largest Democracy", in Christophe Jaffrelot & Peter van der Veer, (Ed.s), *Patterns of Middle Class Consumption in India and China*, Sage

the really needy mainly due to the affluent sections of the targeted classes cornering all benefits. Perhaps the original goal of empowering the individual has been lost sight of in this increasingly communal battle of quotas and freebies.

There have been indications that the constitutionally envisaged affirmative action policies have now been superseded by a politically dictated reservation agenda with increasing calls for communal representations based on sheer numbers and consequent political clout rather than anything else.

“In democratic politics of the modern India the numerical strength of caste has become a decisive factor. It seems the list of backward classes of various States reveal that instead of backwardness of a class it is dominance of caste that ultimately determines inclusion of a particular caste into the lists of backward classes. Caste has thus become a rallying point in democratic politics of India, as a result of which, as

Publications, New Delhi (2008), p. 47. “Caste politics is, therefore, largely responsible for the growing indifference of the middle class towards elections.”

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it appears caste instead of losing vigour and pernicious effects is becoming a powerful force in politics.”⁴⁹

The absence of correct assessment of numerical strengths of communities in the population has fuelled competitive assertions of backwardness on this basis. In fact, in modern India, competitive social backwardness and numbers increases political clout. This need not be a bad thing for increased political clout could increase educational levels and consequently social advancement.

When affirmative action degenerates into a system of communal reservations, the original ideal of the Constitution Makers is lost sight of. Bereft of the support of an ideology based on ideals, the system of affirmative action attracts fierce criticisms.

“No major political party in India is opposed to the strong movements demanding large caste quotas in public-sector jobs and higher education for backward castes, in addition to those stipulated in the Constitution for the Scheduled Castes and Tribes. As the expansion of the public sector over the years created more opportunities for secure jobs,

⁴⁹ D.N. Sandanshiv, *Reservations for Social Justice - A Socio-economic Approach*, Current Law Publishers, Bombay (1986), p. 87.

and not infrequently, for the associated extra, illicit income of the jobs was regulatory in nature, more and more mobilized groups in the democratic process have started using their low-caste status for staking a claim to the loot."⁵⁰

The above observations reflect strong resentments against the abuse of reservation system envisaged in the Constitution for legitimate goals. A share in the loot, by itself may be legitimate, but when it retards progress and scares away investment, then one need not go far to know the reason why the affirmative action policies have not been able to demolish the social barriers or empower the weak. Must a community's ability to loot raise its status in the social hierarchy?

The object of job reservations is not to establish job quotas for different communities, groups or classes. It is envisaged as the means to provide income avenues to the socially, educationally and economically underprivileged so that the vistas of education, income, job experience are opened for them. It is to empower them

⁵⁰ Pranab Bardhan, "The Political Economy of Reform in India", in Zoya Hasan, Ed., *Politics and the State in India, Readings in Indian Government and Politics - 3*, Sage Publications, New Delhi (2000), p.167 at pp.169.

to come up to the mark of the general fellow citizens in future competitions, and in term of contemporary Indian social status, improve upon their social backwardness. Educational backwardness generally results in social backwardness and the educationally advanced class is generally socially advanced.⁵¹

Andre Beteille observes:

“Today, job reservation is less a way of solving age-old problems than one of buying peace for the moment. ... in assessing any scheme of reservations today, we have to keep in mind the distinction between those schemes that are directed towards advancing social and economic equality, and those that are directed towards maintaining a balance of power. Reservations for the Scheduled Castes and Scheduled Tribes are, for all their limitations, directed basically towards the goal of greater equality overall. Reservations for the Other Backward Classes and for religious minorities, whatever advantages they may have, are directed basically towards a balance of power. The

⁵¹ V.P. Bharatiya, “No Reverse Discrimination: Egalitarian Differentiation for Job Reservations”, 33 JILI (1991) 76 at pp. 79-80.

former are in tune with the spirit of the Constitution; the latter must lead sooner or later to what Justice Gajendragadkar has called a 'fraud on the Constitution'.⁵²

Is it possible to place the blame for social inequality solely at the doorstep of past injustices done in the name of social hierarchy and thus justify affirmative programs on a communal basis? An answer may perhaps be found from the following keen observation of Eric Rakowski on the matter:

"The abilities with which people are born do differ, and these differences frequently affect people's initial successes, which in turn often influence the amount of satisfaction they take in accomplishment and their consequent desire - and over time, their capacity - to strive and succeed. In addition, some are better conditioned to the demands of certain occupations, or to the roomier set of rigours the overcoming of which we ascribe to effort, than are those deprived of similar training at home, in school, or elsewhere through no

⁵² Cited in *Indira Sawhney v. Union of India*, AIR 1993 SC 477, para. 371, quoting Prof. Andre Beteille, *The Backward Classes in Contemporary India*, Oxford University Press, New Delhi (1992). Andre Beteille, an Indian sociologist and writer, is particularly well known for his studies of caste in South India.

fault of their own. ... Although a lack of desire or concentration can often be ascribed to a slovenly or easy going disposition somebody allowed himself to develop and now regrets, it appears that sometimes people simply cannot work as hard as they would like, for in spite of their best attempts their attention lapses, distractions prevail, or their determination evaporates. To the extent that a person's capacity for prolonged or unswerving exertion may be stunted by a comparative dearth of natural ability, or to the extent that determination and focussed endeavour are the products of a disciplined upbringing or of ambitious and a global optimism that owe more to the influence of parents, social environment, schooling, and restricted occupational opportunity than to choices for which individuals can claim credit, differences in effort should be classified with differences in endowments as instances of bad brute luck."⁵³

In the political consensus in India on the issue of caste based reservations there also lies the reality of the political process in the

⁵³ Eric P. Rakowski, *Equal Justice*, Clarendon Press, Oxford (1991), p. 110. Eric P. Rakowski writes mainly on issues relating to taxation, distributive justice, health care, and moral philosophy. He was a visiting professor at Harvard Law School during the 1998-99.

Indian society. Under the pattern of politics followed in Indian States,

“Caste versus caste and sub-caste versus sub-caste political groups, formations and leaders compete against one another with electoral victory being ensured by championing the benefits for specific castes aligned to a specific leader or group.”⁵⁴

This factor negates the influence of national parties which have to align with caste specific sectional, regional and sectarian political groupings on their terms for contesting elections. This political consensus on reservation institutionalises complete fragmentation of society on the basis of caste. It victimises by neglect the real poor, a social category which cuts across religion, caste or region.

An attempt to understand what education means as a tool for empowerment has to focus on its position among the vulnerable groups of the women, children and the backward communities.

FOCUS GROUPS

⁵⁴ C.P. Bhambhri, “Divide to Rule”, *Economic & Political Weekly*, Vo. XLIII, No. 9, March 1, 2008, p. 77-79 at p. 78.

WOMEN

India has one of the lowest rates of literacy among women in Asia. The many effects of such a dismal picture include health, nutritional and empowerment aspects.⁵⁵ Illiterate women are less likely to have husbands sharing their expectations of fertility than educated women resulting in lesser control over their lives.⁵⁶

Women in India are not able to contribute their best to the development of the society, because they are backward in education, social, economic and political spheres. The high incidence of illiteracy among women constitutes one of the greatest barriers to their development limiting their scope for development.⁵⁷

⁵⁵ <http://www.census.gov/ipc/prod/wid-9801.pdf> [internet accessed on 25th December, 2005]. "In 1991, less than 40 percent of the 330 million women aged 7 and over were literate, which means today there are over 200 million illiterate women in India. This low level of literacy not only has a negative impact on women's lives but also on their families' lives and on their country's economic development. Numerous studies show that illiterate women have high levels of fertility and mortality, poor nutritional status, low earning potential, and little autonomy within the household. A woman's lack of education also has a negative impact on the health and well being of her children. . . . Additionally, the lack of an educated population can be an impediment to the country's economic development."

⁵⁶ See Alaka Malwade Basu, "Women's Education, Marriage and Fertility in South Asia: Do Men Really Not Matter?", in *Critical Perspectives on Schooling and Fertility in the Developing World*, Caroline H. Bledsoe, et al, (Ed.s.), National Academy Press, Washington (1999), p. 267.

⁵⁷ N. Jayapalan, *Women and Human Rights*, Atlantic Publishers, New Delhi (2001), p. 190. "The reasons for women not joining the mainstream of development include, lack of recognition of women's special needs for education, training, technology, communication and access to resources, lack of information about women's role, caste, etc. All these stand as obstructions in integrating women into the mainstream programmes."

Gender discrimination in education is a social evil. Societal attitude is typically reflected in the following observation of Justice V.M. Tarkunde:

“In most families, boys receive a better education than girls. This is particularly so when the available financial resources are limited. The boy is trained as a potential bread earner and the girl as a potential wife and mother. In later life, the superior earning capacity of men, their higher education and their wider experience give them a much higher status than women. A man is honoured for his earning capacity and for his educational and other attainments. A woman is honoured if she is a devoted wife and a loving mother. With such a social division of labour, women do not get adequate opportunities for the development of their abilities and talents.”⁵⁸

There exist cultural and social barriers to women’s education. The practice of dowry introduces further, hidden costs of female

⁵⁸ V.M. Tarkunde, *Radical Humanism: The Philosophy of Freedom and Democracy*, Ajanta Publications, Delhi (1983), p. 175. Justice V.M. Tarkunde was the father of the movement for civil liberties and human rights in India. In 1976, during the Emergency, People’s Union for Civil Liberties and Democratic Rights was set up with Jaya Prakash Narain as President and V.M. Tarkunde as Working President.

education. Where men expect to marry women less educated than them, parents have to pay more dowry to marry their daughter to more educated men. The need to save up resources for a girl's dowry may take away resources, which might otherwise be available for a girl's education or oblige her to enter the labour market to save towards marriage.⁵⁹

Illiteracy or inadequate education for the women in society has far-reaching adverse consequences. Even primary education is not enough in actual empowerment of women.⁶⁰ A considerable part of the child's education takes place at a very early age in life. If the mother is ignorant and superstitious, the child grows in orthodoxy and conformism.⁶¹

⁵⁹ Also see, Usha Sharma, *Gender Mainstreaming and Women's Rights*, Authorspress, Delhi (2004), p. 38.

⁶⁰ <http://www.census.gov/ipc/prod/wid-9801.pdf> [internet accessed on 25th December, 2005]. "Although there are numerous studies demonstrating a link between education and a variety of demographic indicators (i.e., fertility, infant and child mortality and morbidity), more recent studies are finding that there is a minimum threshold of education (more than 5 or 6 years) that must be achieved before there are significant improvements in female autonomy [Autonomy is defined as decision making power within the home, economic and social self-reliance, confidence in inter-acting with the outside world (Jejeebhoy, 1995)], particularly in a highly gender-stratified society such as India (Jeffery and Basu, 1996; Jejeebhoy, 1995). Of the literate women in India, 59 percent have only a primary education or less. ... This level of education may not be sufficient to meaningfully improve the status of these women. Only 41 percent of the literate population, or 13 percent of all Indian women, have more than a primary education."

⁶¹ Also see, V.M. Tarkunde, *Radical Humanism: The Philosophy of Freedom and Democracy*, Ajanta Publications, Delhi (1983), p. 175.

Lord Dalhousie, the Governor General of British India from 1848 to 1856, had as early as those times declared that no single change was likely to produce more important and beneficial consequences than female education.⁶²

Among women, the lot of Dalit women is even more precarious. They did not gain materially from the initiatives in education for women before independence. The situation is well described by Chinna Rao Yagati in the following words:

“Women were recognised as an entity to be reformed and educated in the late nineteenth and early twentieth centuries. As a result many caste Hindu women achieved high status in political, educational and professional fields. With few exceptional cases Dalit women remained uneducated and excluded from schooling system during the period under study. The available sources reveal that education did not do much to alleviate the economic status of Dalits. Even the census reports do not indicate professional mobility in any field. However, education produced the intelligentsia,

⁶² Geraldine Forbes, *Women in Modern India*, The New Cambridge History of India, IV.2, Cambridge University Press, Cambridge (1998), pp. 40-41. [Footnotes omitted].

social reformers, politicians, writers, who in turn fought for Dalit rights and such rights were the subject of legislation only in the post colonial society.”⁶³

The Constitution guarantees equality of opportunity before the law for both the sexes. Therefore, the *de jure* position is that girls and boys have equal access to education. But what is the *de facto* position?

Today the total number of girl students enrolled in the upper primary education are much better because of many policy interventions on behalf of the girl child, such as the Report of the National Committee on Women’s Education (1958-9), the Kothari Commission Report (1964-5) and above all the National Policy on Education (1968) and the National Policy on Education (1986), which stressed the need for empowering women, that is making them capable of guiding their own destiny and becoming self reliant through exposure to education and survival skills, including income

⁶³ Chinna Rao Yagati, *Dalits’ Struggle for Identity – Andhra and Hyderabad: 1900-1950*, Kanishka Publishers, New Delhi (2003), p. 94. Chinna Rao Yagati has been a Charles Wallace Visiting Fellow at the Centre for South Asian Studies and the Institute for Advanced Studies in the Humanities, the University of Edinburgh, Scotland and works at Educational Record Research Unit, School of Social Sciences, Jawaharlal Nehru University, New Delhi.

generation.⁶⁴

The Government of India's Country Report for the Beijing Conference in 1995 admits that,

“The overall picture of girl's and women's education is one of limited opportunity, numerous obstacles and questionable quality and relevance. Available evidence suggests that an explicit policy focus on female education is amply justified on the basis of equality, economic productivity and social benefits.”⁶⁵

Gender discrimination in legislation still remains and is a hindrance to the vision of empowerment that guides governmental pronouncements.

Empowerment in the larger sense includes the ability of the individual to use the available resources. When the availability of resources is itself denied by the law, the ability to educate oneself

⁶⁴ Also see, Padma Ramachandran, “Gender Discrimination in School System”, *The Hindu*, December 18, 2001, in *Documentation on Women, Children and Human Rights*, Oct-Dec 2001, Library and Documentation Centre, All India Association for Christian Higher Education, New Delhi, p. 20-22 at pp. 20.

⁶⁵ Government of India, Country Report for Beijing Conference, New Delhi (1995) as quoted in Padma Ramachandran, “Gender Discrimination in School System”, *The Hindu*, December 18, 2001, in *Documentation on Women, Children and Human Rights*, Oct-Dec 2001, Library and Documentation Centre, All India Association for Christian Higher Education, New Delhi, p. 20-22 at pp. 22.

and the incentive to use education as an option for the betterment of oneself is lost. Gender discrimination in the personal laws is in some cases adversely affecting the ability of women to improve their self worth.

In the case of the Hindu Succession Act, even while it treats the male and the female equally, devolution of co-parcenary property is treated at a different footing under section 6. It is argued that gender gap in the ownership and control of landed property is the single most important factor to the lower social status of women in our country.⁶⁶

Even the legislative safeguards prove to be ineffective simply because the law does not often come to the aid of the 'ineek and the sleeping'. The persistence of discrimination against Indian women in society is an expression of the unevenness that marks access to the legal system. With low levels of education and a generally low economic status, women are unable to translate legal provisions into practice, or challenge and change some of the provisions.⁶⁷

⁶⁶ Also see, Subhash Chandra Singh, "Equal partnership in Marriage and Family Relations", AIR 1999 Journal 64 at p. 68.

⁶⁷ Janaki Nair, *Women and Law in Colonial India – A Social History*, Kali for Women, New Delhi (1996), p. 5.

Perhaps the fact of being the voiceless economic force hampers the social development of women in the Indian society. The Report of the Committee on the Status of Women in India (1974) found that some teenage girls were supporting entire families of sick and unemployed parents and siblings on their sole earnings. The Report found that girls constitute a higher proportion of the unpaid family workers throughout the country which was a major reason for their exclusion from schools. It observed the fear of alienation of girls from their environment to be another factor for not sending girls to school.⁶⁸

The fear of women breaking out of the social moulds to which their religions and customs confine them prevents the patriarchal society in India from any vigorous attempts to bring about empowerment of women through education. At the same time, some attitudinal change also has started taking roots in the society, which is visible from the following observation:

⁶⁸ Also see, Padma Ramachandran, "Gender Discrimination in School System", *The Hindu*, December 18, 2001, in *Documentation on Women, Children and Human Rights*, Oct-Dec 2001, Library and Documentation Centre, All India Association for Christian Higher Education, New Delhi, p. 20-22 at pp. 20.

“As more and more women go to schools and colleges they not only get the education and training necessary for jobs, they also become socialised to want or need to break out of the traditional mould. Many educated women today assess their self worth and their value in the eyes of the community more in forms of occupational achievement than in terms of home based role performance.”⁶⁹

Societal mores and economic incapacity could also contribute to women’s education. Occasionally, educating the girl child may be seen as a substitute for dowry, and therefore represent a good investment from the parents’ point of view, rather than a hidden cost. This is more likely among urban and middle class families, where women are increasingly expected to be wage earners.⁷⁰

Nani Palkhivala rightly observes that,

“It is only through female education at all levels and the private initiative of well educated women, that this country will ever be transformed into what our Constitution intended

⁶⁹ Subhash Chandra Singh, “Equal Partnership in Marriage and Family Relations”, AIR 1999 Journal 64 at p. 69.

⁷⁰ Also see, Usha Sharma, *Gender Mainstreaming and Women’s Rights*, Authorspress, Delhi (2004), p. 38.

it to be.”⁷¹

That empowerment through education can bring with it certain other unique problems for a woman is not forgotten here. In a study on domestic violence against women, the following observation was made:

“The educational background of the victim wives indicates that those who have low educational attainment or higher educational attainment has over representation as compared with those who had moderate level of education. There is a progressive decrease in the percentage of the victims from illiterate educational category up to graduation with the exception of those who had higher education. This curvilinear distribution of victims of violence indicates that women who have no education or have higher educational attainment are more prone to physical violence by their husbands.”⁷²

The reason for such violence offers a critical view on the role

⁷¹ Nani A. Palkhivala, *We, The Nation: The Lost Decades*, UBS Publishers, New Delhi (1984), p. 238.

⁷² Arunima Barua, *The Soft Target: Crime Against Women*, Kilaso Books, New Delhi (2004), p. 95.

system engendered by the society for men and women. At the same time, it is also an acknowledgement of the empowering nature of education. As the researcher observes,

“The woman with low education resign to their complete dependency because with low educational background they will not be able to have economic independence or would be engaged in occupations with low economic returns and low prestige. In the case of those who have higher education, they may be in a better position to gain economic independence and with the higher education they may start questioning the dominant position of their husbands. Such a threat is not tolerated by the husbands and they use violence as their ultimate resource to maintain their dominant position in the family.”⁷³

The study indicates further that,

“it is not the working status *per se* which provides women freedom from physical violence of their husbands but it is the nature of the occupation and associated prestige and

⁷³ Arunima Barua, *The Soft Target: Crime Against Women*, Kilaso Books, New Delhi (2004), pp. 95-96.

economic returns which facilitate women to be free from physical abuse.”⁷⁴

The ideal of gender justice is now universally accepted. Indian policy makers have acknowledged that women’s literacy is the key to women’s empowerment and gender equity.⁷⁵

This recognition of the need to empower women through education is seen from the commitment of the Government of India. The IXth Plan provides thus:

“To ensure easy and equal access to education for women and girls through the commitments of the Special Action Plan of 1998; to initiate steps to eliminate gender bias in all educational programmes; to institute plans for free education for girls up to college level, including professional courses; to equip women with necessary skills in the modern upcoming trades which could keep them

⁷⁴ Arunima Barua, *The Soft Target: Crime Against Women*, Kilaso Books, New Delhi (2004), p. 97.

⁷⁵ Also see, S.R. Bommai, “Elementary Education for Empowerment”, in Dr. S. Subramanian, *50 Years of India’s Independence*, Manas Publications, New Delhi (1997), p. 305 at pp. 309.

gainfully engaged besides making them economically independent and self-reliant.”⁷⁶

The main objective of this Plan for 1997-2002 was ‘Empowering Women as the Agents of Socio-Economic Change and Development.’

After women, the next group that needs to be studied on the empowering aspect of education is that of the children. Being the most vulnerable, the rhetoric favours them, but a lack of voting power affects the actual realisation of their rights.

CHILDREN

The role of education in the development of the personality of the child is noteworthy. Moreover, the society has an equally important stake in the fulsome development of the child. Education helps a child develop cognitively, emotionally and socially and also helps nurture a child’s best qualities, which can be a boon to the entire civil society.⁷⁷

⁷⁶ <http://planningcommission.nic.in/plans/mta/mta-9702/mta-ch13.pdf> [internet accessed on 20th December, 2005].

⁷⁷ Dr. Amita Agarwal, *Human Rights for Survival of Civilisation*, Kalinga Publications, Delhi (2004), p. 27.

The mandates of the UN Declaration and the Constitution of India notwithstanding, children still suffer the consequences of poverty and an insensitive society. The progress towards the achievement of their rights is rather dismal.⁷⁸

As per the National Family Health Survey 1998-99, based on 90,000 household samples, 79% of the 6-14 age children are attending schools. This would imply that nearly 21% of the children in 6-14 age group are out of school.⁷⁹ Child labour is a significant factor encroaching on the educational, cultural and social development of the child.

According to the 1991 census estimates, some 11.3 million

⁷⁸ Anoop G. Chaudhari, "Right of a Child – A Human Rights Perspective", in P.H. Parekh, Ed., *Human Rights – Yearbook 1997*, International Institute of Human Rights Society, New Delhi (1997), p. 53 at pp. 54. "In spite of the hallowed mandate contained in the UN Declaration and the Constitution of India, the progress made, towards achieving the objective of protecting the child against exploitation or preventing violation of his rights is rather dismal. Although there are a plethora of laws enacted pertaining to children covering the field of guardian ship, maintenance, adoption, suppression of immoral traffic, prevention of beggary, etc., yet these laws are followed less in observance and more in beach. The National Committee on Child Labour set up in 1979, opined that poverty resulting in insufficient family income and the want to supplement it, forces the children to work and even though education for children is free and or compulsory the parents are wary of educating their children in the lower economic strata of the society, because an educated child becomes a liability not only in the form of an additional expenditure on the child's education, however insignificant, but also in the form of loss of income due to the child's inability to work during the period of education. Constitutional and statutory objectives of prevention and control of child labour get frustrated because children on many occasions, due to socio-economic reasons, are forced to work, for their very existence."

⁷⁹ Government of India, Ministry of Human Resource Development, Department of Elementary Education and Literacy, Rajya Sabha unstarred question no 1568, answered on 09.03.2001. <http://164.100.24.219/rsq/quest.asp?qref=41985> [internet accessed on 9th November, 2006].

children out of 200 million between ages 5 and 14 are engaged in child labour.⁸⁰ A major stumbling block in empowerment through education is the social acceptance of child labour. It prevents children from getting educated and earning a better livelihood. Though there are adequate statutory safeguards⁸¹ the social commitment is suspect.⁸²

According to the National Sample Survey in 1991 there were 11.3 million child labourers in India. But this figure is an improvement over the 16.3 million child labourers reported in the survey of 1981. At least three types of child labour exist. There is non-monetary domestic labour, which is done mostly by the girl children who do most of the domestic work. Then, there is monetary

⁸⁰ D.R. Karthikeyan, *Human Rights-Problems and Solutions*, Gyan Publishing House, New Delhi (2005), p. 106.

⁸¹ U.N. Gupta, *The Human Rights: Conventions and Indian Law*, Atlantic Publishers, New Delhi (2004), p. 235. "In India, various legislative enactments are in place: (1) Various Acts prohibit child labour in different avocations and also fix the minimum age for employment, if at all, of children in that profession. For example, section 3 of the Child Labour (Prohibition and Regulation) Act, 1986, prohibits employment of children in defined occupations and processes in organised employment sectors, like, factories, companies, government employment, etc., other than private employers; section 21 of Motor Transport Workers Act, 1961 or section 45 of Mines Act, 1952, completely disallow employment of children in any capacity; section 109 of Merchant Shipping Act, 1958, disallows employment of persons below the age of fifteen years; section 67 of the Factories Act, 1948, prohibits employment of children below the age of fourteen years in a factory; or section 109 of the Plantation Labour Act, 1951, sets the minimum age of children for employment at twelve years."

⁸² Dr. Amita Agarwal, *Human Rights for Survival of Civilisation*, Kalinga Publications, Delhi (2004), p. 11. "The National Policy on Child Labour 1987, is a model document, but in the absence of implementation, has not been able to help children forced into labour."

labour, which is non-domestic, where children are employed as wage labourers in organised and unorganised sectors, both in rural and in urban areas. Thirdly, there is bonded labour, where the parents pledge their children. Child labourers are employed primarily in agricultural sectors as workers. Besides, they also work in industries including leather factories, hosiery units, carpet factories, glass factories, textile units, match factories, and plastics industries. Some work as servants in private homes while some work as bonded labourers and sex workers.⁸³ According to the UNDP Position Paper on Child Labour, India accounts for the largest number of child workers in the world.⁸⁴

The Jomtien Declaration called countries for early childhood care and initial education, to be provided through appropriate arrangements involving families, communities, and institutional programmes. This goal of expanding and improving comprehensive early childhood care and education, especially for the most

⁸³ See D.R. Karthikeyan, *Human Rights-Problems and Solutions*, Gyan Publishing House, New Delhi (2005), p. 107.

⁸⁴ D.R. Karthikeyan, *Human Rights-Problems and Solutions*, Gyan Publishing House, New Delhi (2005), p. 107.

vulnerable and disadvantaged children was reflected at Dakar.⁸⁵

One of the reasons mentioned for the establishment of avenues for non-formal education is the existence of child labour whereby such children can learn at their own pace.⁸⁶

Certainly, non-formal education goes a long way to educate deprived sections of the society. But when the concept is encouraged it could also fuel child labour rather than prevent it.

In 1986, M.C. Mehta brought before the Supreme Court a major public interest litigation⁸⁷ complaining that thousands of children were employed in match factories in Sivakasi, Tamil Nadu. Fatal accidents occurred frequently in the manufacturing process of matches and fire-works were these children worked. The Court directed the State Government to enforce the Factories Act and to provide facilities for recreation, medical care and basic diet to the children during working hours and facilities for education. The Court also advocated a scheme of compulsory insurance for both

⁸⁵ Usha Sharma, *Gender Mainstreaming and Women's Rights*, Authorspress, Delhi (2004), p. 8.

⁸⁶ S.R. Bommai, "Elementary Education for Empowerment", in Dr. S. Subramanian, *50 Years of India's Independence*, Manas Publications, New Delhi (1997), p. 305 at pp. 308. "We need to come up with a variety of alternatives which cater to the varying needs of out-of-school children who should be facilitated to learn at their own pace."

⁸⁷ *M.C. Mehta (Child Labour Matter) v. State of T.N.*, (1996) 6 SCC 756.

adults and children employed in hazardous industries. Every employee had to be insured for a sum of Rs. 50,000. A committee was appointed to monitor the judicial directions.

Though this decision is hailed as a landmark intervention on the part of the Supreme Court, its social effectiveness is suspect. It is rather surprising that although the Child Labour (Prohibition and Regulation) Act 1986 has banned the employment of children in manufacture of matches, yet the Court in this case permitted the child labour in the process of packing because “tender hands of the young workers were more suitable to the task”. The Court here failed to recognise that manufacture and packing of matches are inseparable. In a sense, in this case the response of the Court on child labour was superficial.³⁸

As Justice Leila Seth has observed,

“The key notion in the child labour policy in India is ‘amelioration’ not ‘abolition’ and in education ‘incentive’ not

³⁸ See Parmanand Singh, “Protection of Human Rights through Public Interest Litigation in India”, 42 JILI (2000) 263 at p. 275.

compulsion.”⁸⁹

In *Bandhua Mukti Morcha v. Union of India*,⁹⁰ the Supreme Court acknowledged after verifying as true a public interest litigation alleging employment of children aged below 14 years in the carpet industry in the State of Uttar Pradesh, that child labour could only be eradicated progressively and not all on a sudden.

Though the lack of strict implementation of the legal provisions by the Court in its judgement is a failure to appreciate properly the concept of Rule of Law, the lip service paid to the ideals involved reveal a lack of will rather than anything else. The Court observes that an immediate ban of child labour would be both unrealistic and counter-productive. It reasons that the ban of employment of children must begin from most hazardous and intolerable activities like slavery, bonded labour, trafficking, prostitution, pornography and dangerous forms of labour and the like. Obviously, to the Court, cheaper carpets are more important than lost childhoods.

⁸⁹ See J.V. Vilanilam, *Human Rights and Communication: Towards Alternative Systems of Development and Education*, National Institute of Social Work and Social Sciences, Bhubaneswar (2000), p. 34.

⁹⁰ (1997) 10 SCC 549.

But the case is important for the other observations made by the Apex Court as concerning the status of education as a powerful force for empowerment. The Court observes that illiteracy has many adverse effects in a democracy governed by Rule of Law. It believes that only a free, educated citizen could meaningfully exercise his political rights, discharge social responsibilities satisfactorily and develop a spirit of tolerance and reform. Therefore, education must be compulsory.

The Court goes on to observe that primary education to the children, in particular, to the child from poor, weaker sections, Dalits and Tribes and minorities is mandatory. It wanted basic education and employment oriented vocational education to be imparted to enable such children to retrieve themselves from poverty, develop basic abilities, skills and capabilities to live a meaningful life for economic and social empowerment.

The Court herein observes that compulsory education to these children is one of the principal means and primary duty of the State for stability of the democracy, social integration and to eliminate social tensions. It is hoped that such ways of thinking would ultimately lead to stricter enforcement of the welfare

legislations in the field.

Forms of discrimination other than child labour also prevent proper empowerment of children and their integration into the national fabric. Education in India has often been an instrument for differentiating children according to social division. The most pressing development need is educating children without any discrimination for Nation building on the basis of an unjust and unequal system of education is harmful to the nation's future.⁹¹

Though education is generally accepted to be an important tool to fight poverty and almost all countries in Asia profess universal education in a formal school system. Yet, in practise, this system does not work out for the poor. The poor are trapped by the social conditions that accompany poverty: unemployment or instability of employment, drinking fathers, abused mothers, malnourishment, diseases, etc. Children who grow up in these chaotic conditions lack a learning environment. When these children go to school, most of them do not pass the grade; they become

⁹¹ See J.V. Vilanilam, *Human Rights and Communication: Towards Alternative Systems of Development and Education*, National Institute of Social Work and Social Sciences, Bhubaneswar (2000), p. 34.

dropouts and are more frustrated than before.⁹²

Such issues can hopefully be addressed by the National Commission for the Protection of Child Rights.

The third group that needs to be focussed on to understand problems related to educational empowerment is that of the Dalits.

DALITS

Mystery shrouds the details of the origin of untouchability and the racial, ethnic composition of the Scheduled Caste population. Perhaps none ranks weaker than them save the Adivasis. A variety of nomenclatures designate them, such as untouchables, harijans, depressed classes, Dalits, servile classes, weaker sections, panchamas, adisudras, avarnas and antyajas and Scheduled Castes. Those whose touch or proximity was considered polluting by the caste Hindus came to be represented under the broad term 'depressed classes'. This term was used first by Dr. Annie Besant in the *Indian Review*, February 1909 with the caption "the uplift of the depressed classes". The term 'Dalits' denotes poverty and oppressed

⁹² See Asian Human Rights Commission, *Eradication of Poverty is a Basic Human Rights Issue*, The Final Document of the Workshop on 'Poverty as a Basic Human rights Issue', Asian Human Rights Commission, Hong Kong (1995), pp. 16-17.

conditions. The 'servile classes' phrase was used to denote the servile nature of their working relations with the higher castes and the depressed nature of work with which they were involved like scavenging and sweeping, etc. D.G. Tendulkar preferred the term 'Harijan' to Antyaja used by the Saint Narasimha Mehta. Later, it became a catch-word-cum-brain child of Gandhiji who popularised the concept.⁹³

“Untouchability is a unique Hindu social institution which emerged in the remote past. The so called untouchables have been suffering the stigma of untouchability followed by servitude, illiteracy and guiding poverty.”⁹⁴

Untouchability, though banned by statute,⁹⁵ is so interred into the social mindset that its subtle forms are practised where the long arm of the law fails to reach.

Though caste hierarchy is a uniquely Hindu phenomenon, the fact that casteism as a social institution is beyond the pale of religion is evident from the fact that converts to other religions from

⁹³ See Dr. M.N. Sivaprakasam, *Dalits and Social Mobilisation*, Rajat Publications, New Delhi (2002), pp. 1-2.

⁹⁴ Dr. R.K. Kshirsagar, *Untouchability in India: Implementation of the Law and Abolition*, Deep & Deep Publishers, New Delhi (1989), p. 9.

⁹⁵ The Protection of Civil Rights Act, 1955.

Hinduism also faces the same social disadvantages that are faced by those inside it.

“Contrary to what some historians and thinkers maintain, it is difficult to blandly suggest that there exists abstract and natural antipathy among different racial and caste groups which is responsible for tensions amongst them. ... The Rig Veda does not indicate development of a strict caste hierarchy in Aryan society. Caste rigidity became a feature of the Aryan society in later times when attempts to bypass the caste system were seen as sacrilegious especially as the inflexible system had been authenticated by Hindu sacred scriptures including the *Puranas*, the epic literature and the *Dharmashastras*.”⁹⁶

Social hierarchy exists outside of the caste system with the same social disabilities having to be faced by the Dalit whether he is within or outside the Hindu religion. This brings forth the argument that the label of Hinduism is only an afterthought to justify a social inequity.

⁹⁶ Mohan Dass Namishray, *Caste and Race - Comparative Study of B.R. Ambedkar and Martin Luther King*, Rawat Publications, Jaipur (2003), pp. 138-139.

“The probability seems to be that in Vedic times the Varnas were classes rather than castes, and that post-Vedic scholars, looking for authority for the caste system in the earliest Vedas, have interpreted the nature of the Varnas in terms of the caste system as they knew.”⁹⁷

The complex social and political history of India has strengthened caste identities progressively rather than suppress it.

“It was the expectation that the political and economic factors that emerged with the growth of civilisation, the rise of big cities and prosperous trade and commerce activities could lessen the caste system, but the so-called modernity played a major role in strengthening of the caste system. It was in the interests of the Brahmins to keep another group - the Sudras - suppressed in society to ensure their social and economic superiority. Under the British, in the Indian subcontinent, the caste system became clear cut, with each

⁹⁷ Dr. M.N. Sivaprakasam, *Dalits and Social Mobilisation*, Rajat Publications, New Delhi (2002), p. 4. [Footnote omitted].

caste having its place in the caste hierarchy; and so, caste differences became sharper and more easily questionable.”⁹⁸

Even independent India has functioned along the same lines. Caste identities have strengthened in India because it has been used to determine social, economic and political privileges. The Indian social and political hierarchy has ensured that State patronage is made available only through an elaborate and complex bureaucracy which functions broadly without accountability and beyond public scrutiny.

“The essence of the caste system lies in the creation and perpetuation of the exclusively privileged class. That is achieved by controlling all the sinews of power, and by preventing by all means any attempt to dislodge the privileged class from the control. A care is therefore taken on the one hand to command all the principal activities of the society - the education, administration, judiciary, the media, the police, the army, the finance, the trade, industry and business, the professions, the literature and the art - and

⁹⁸ Mohan Dass Namishray, *Caste and Race – Comparative Study of B.R. Ambedkar and Martin Luther King*, Rawat Publications, Jaipur (2003), p. 139.

on the other, to keep the rest divided with animosities and conflicts deliberately generated and fomented amongst them. That is why, in spite of the passage of more than half a century after the Constitution, the vital institutions of the society from which both the pelf and power flow, continue to be dominated by the elite which belong in this country to the higher castes.”⁹⁹

There is no denying that some positive efforts have been made to ameliorate the socio-economic condition of the so-called untouchables. The Constitution of India provides them with certain educational facilities under Article 15(4) and 46, reservations in the employment under Articles 16(4) and 335 and reservations in the Central and State Legislatures under Article 330(1) and 332(1) respectively. Other concessions and facilities are also given by the State Governments. The Planning Commission too provides for their socio-economic development.

How far these have resulted in benefits is suspect. So far as the matter of reservations is concerned, it is regrettable to note that

⁹⁹ P.B. Savant, “Constitution, Social Revolution and the People”, [2003] C.U.L.R. 1 at p. 15.

except in the political sphere, the reservations in the educational and employment spheres remain unfulfilled. Irrespective of efforts in that direction, the economic condition of Dalits has not improved significantly. As compared to the magnitude of the problem, the success of the efforts made by the Government in ameliorating the socio-economic condition of the ex-untouchables, were very insignificant.¹⁰⁰

But whatever is done, some things will remain the same. This is particularly so with respect to bringing change in a tradition bound society. The situation is well diagnosed by Rene David as follows:

“The legislature can with a stroke of the pen, abolish the whole caste system, authorise inter-caste marriages and substitute village panchayats to the place of the traditional caste panchayats. But this work, even if it is necessary to the country’s development, cannot from one day to the next, change the habits and outlook of centuries linked as they are to religious beliefs. 80% of the Hindus, living in rural

¹⁰⁰ See Dr. R.K. Kshirsagar, *Untouchability in India: Implementation of the Law and Abolition*, Deep & Deep Publishers, New Delhi (1989), pp. 9-10.

areas, will continue to live as their ancestors did; they are governed by the institutions they have always known and are judged through means outside the official organs. Legislation is not in itself sufficient: a patient process of re-education is also needed. And the success of this work is intimately linked to the development of a modern Indian economy. The evident difficulty here is to escape from a vicious circle: economic development itself is considerably retarded by the country's structures, the people's religious beliefs and behaviour, all of which have been created by an ancient and venerated tradition"¹⁰¹

An analysis of these aspects relating the women, children and Dalits indicate that it is not a lack of legislation as such that is the main reason for the lapses in education being used as the functional tool for empowerment of these classes. The malady lies in the social and bureaucratic acceptance of the reforms initiated at the legislative level. It is seen that all of the stated rights on education appear only on paper and does not become a reality on the ground.

¹⁰¹ Rene David, *Major Legal Systems in the World Today*, John E.C. Brierly, Ed., 3rd ed., Stevens & Sons, London (1985), p. 500.

The determinant role of the society in ensuring empowerment through the use of education as the tool is seen from the experience of Kerala, which has successfully translated the right to education into a reality by ensuring access to education for almost all of its population.

KERALA MODEL OF EDUCATIONAL EMPOWERMENT

The State of Kerala shows a high literacy rate¹⁰² and a standard of living comparable to that of many developed countries. It is often regarded as a model state for health and education in India.¹⁰³ The State's human development index¹⁰⁴ indicates that its

¹⁰² <http://www.education.kerala.gov.in/statsindex.htm> [internet accessed on 13th December, 2008.] "Kerala is the most literate State in India. As per 2001 Census, the effective literacy rate was 90.92% while it was 89.81% in 1991, 78.85% in 1981, 69.75% in 1971 and 55.08% in 1961."

¹⁰³ Ellen Carm, et al, *Education and its Impact on Society: An Initial Exploration of the Evidence*, LINS, The International Education Centre, Oslo University College, Oslo (2003), <http://www.lins.no/db/pdf/report200307.pdf> [internet accessed on 23rd February, 2007].

¹⁰⁴ United Nations Development Programme, *Human Development Report 2007-2008*, Palgrave Macmillan, New York (2007), p. 240. "The human development index (HDI) is a composite index that measures the average achievements in a country in three basic dimensions of human development: a long and healthy life; access to knowledge; and a decent standard of living. These basic dimensions are measured by life expectancy at birth, adult literacy and combined gross enrolment in primary, secondary and tertiary level education, and gross domestic product (GDP) per capita in Purchasing Power Parity US dollars (PPP US\$), respectively. ... While the concept of human development is much broader than any single composite index can measure, the HDI offers a powerful alternative to GDP per capita as a summary measure of human well-being."

social achievements are well beyond its resource base.¹⁰⁵ The State shows outstanding achievements in the health and the education sectors and is ranked first among the States in the Indian Union as per the National Human Development Index for more than three decades since 1981 (See Table).¹⁰⁶ The fact that empowerment of citizenry is achievable through education is seen here.¹⁰⁷

Human Development Index for India - Combined

States/UTs	1981	1981	1991	1991	2001	2001
	Value	Rank	Value	Rank	Value	Rank
Andhra Pradesh	0.298	9	0.377	9	0.416	10
Assam	0.272	10	0.348	10	0.386	14
Bihar	0.237	15	0.308	15	0.367	15
Gujarat	0.360	4	0.431	6	0.479	6
Haryana	0.360	5	0.443	5	0.509	5
Karnataka	0.346	6	0.412	7	0.478	7
Kerala	0.500	1	0.591	1	0.638	1
Madhya Pradesh	0.245	14	0.328	13	0.394	12
Maharashtra	0.363	3	0.452	4	0.523	4
Orissa	0.267	11	0.345	12	0.404	11
Punjab	0.411	2	0.475	2	0.537	2
Rajasthan	0.256	12	0.347	11	0.424	9
Tamil Nadu	0.343	7	0.466	3	0.531	3

¹⁰⁵ *Globalisation, Development Paradigms and Beyond Development – Volume I*, Vijay Kumar, et al, Ed.s, Institute for Sustainable Development, Lucknow and Anmol Publications, New Delhi, (2003), p. 263. "HDI is more important than per capita income to judge the level of development of any country."

¹⁰⁶ *National Human Development Report 2001*, Planning Commission, Government of India, New Delhi (2002), p. 25.

¹⁰⁷ <http://www.education.kerala.gov.in/> [internet accessed on 13th December, 2008.] "The state has achieved a human development index comparable to the developed countries of the World. Prof. Amartya Sen has attributed these achievements largely to the priority which the state has accorded to high literacy among all Indian states and education for a long time. The society attaches so much importance to education that the school in Kerala is really the nucleus of the social microcosm. Better education kindles the aspirations of the people and the main concern is on how to improve the quality of education."

Uttar Pradesh	0.255	13	0.314	14	0.388	13
West Bengal	0.305	8	0.404	8	0.472	8
All India	0.302		0.381		0.472	

The State of Kerala came into being on November 1, 1956.¹⁰⁸

It houses 3.43% of the total population of India on 1.18% of the total land area. Land is at a premium in the State. Agriculture has been commercialised.¹⁰⁹ With a long coastline, it accounts for a third of India's marine exports. A leader in communications it was the first State in India in April 1997 to have an internationally connected public telephone in every one of its villages. In April 1998, Kottayam district of Kerala became the first in the country to have complete computerisation of its taluk offices connecting them with the district head quarters. In February 2010, Palakkad District in Kerala became the first district in the entire country to be fully electrified.

Kerala has universities and institutions which are deemed to be universities.¹¹⁰ The first fully literate municipal town (Kottayam,

¹⁰⁸ The region of Kerala was comprised in three administrative units when India got independence. The Princely States of Travancore and Cochin were merged on July 1, 1949 to form the State of Travancore-Cochin. This State was later merged with the erstwhile British administered region of Malabar which remained a part of the Madras Province on independence.

¹⁰⁹ Kerala is the largest producer in India of rubber, banana, ginger, coconut, tapioca and lemon grass oil.

¹¹⁰ Kerala University, Calicut University, Cochin University of Science & Technology, Mahatma Gandhi University, Kannur University, Sree Sankaracharya University of

1989) and district (Ernakulam, 1990) in India are in Kerala. It became the first fully literate State in India in 1991. It retains this position with a literacy rate of 90.86 as per the census of 2001.

The infant mortality rate in Kerala is 16 per 1000 live births, and life expectancy is 71.3. It was declared the first 'baby friendly' State in the world in 2002.

The urban-rural divide in Kerala is among the least in India.¹¹¹ Rural consumption patterns in Kerala compare very favourably with that of the top States in India.

“In Haryana, Punjab and Kerala, 85% of the rural population spend more on milk, vegetables and the like than on cereals.”¹¹²

Sanskrit, National University of Advanced Legal Studies, Kerala Agricultural University, Centre for Development Studies, Kerala Kalamandalam, Sri Chitra Thirunal Institute for Medical Sciences and Technology, National Institute of Technology, Calicut, Amrita Institute of Medical Sciences & Technology, etc.

¹¹¹ National Human Development Report 2001, “State of Human Development”, Planning Commission Government of India, New Delhi (2002), p. 20. “Kerala’s impressive achievements on social indicators both in urban, as well as in rural areas come out very clearly in its development radar. It can be seen that rural-urban disparities in most of the indicators are, perhaps, among the least in the country.”

¹¹² Omkar Goswamy, *Changing Contours of Rural India*, http://www.financialexpress.com/fe_full_story.php?content_id=68671 [internet accessed on 8th July, 2005]. This study by Omkar Goswamy, Vishal More and Sameer Narang provides evidence on rural consumption expenditure based on household-level data from three rounds of National Sample Survey (NSS), and some evidence from the Census of India, 2001. “...there seems to be a significant shift away from ‘necessary foods’ like cereals, cereal substitutes and pulses, in favour of ‘luxury foods’ such as milk, vegetables, fruits, eggs, meat and fish. In 1993-94, only the top 10% of rural India spent more on the latter than

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The social development and quality of life in Kerala have been favourably commented upon by social scientists of repute. Prof. Amartya Sen has attributed these achievements largely to the priority which the State has accorded to high literacy among all Indian states and education for a long time.¹¹³ Education is accorded an exalted position by being made the focus of the social microcosm. Better education kindles the aspirations of the people and their main concern turns to improving the quality of education.¹¹⁴

Literacy, and in particular female literacy,¹¹⁵ is seen as

the former; by 2001-02, this was so for the top 25%. Of course, the cross-over points vary hugely across states.”

¹¹³ Amartya Sen, *Inequality Re-examined*, Oxford University Press, New Delhi (1999), p. 128. “The explanation of Kerala’s success in the important space of basic capabilities has to be sought in the history of public policy involving education (including female literacy) and health services (including communal medical care), and to some extent, food distribution (including the use of public support of food consumption of the rural as well as the urban population), in contrast with the rest of India. There are also other factors involved, including a more favourable position of women in property rights and in inheritance among a substantial and influential section of Kerala’s population, and the greater public activism connected with educational campaigns as well as politics in general. The history of public action in Kerala goes a long time, with remarkable literacy campaigns in the native states of Travancore and Cochin in the nineteenth century.”

See Ashok R. Chandran, “The Importance of being Amartya Sen in Kerala”, *Indian Express*, Tuesday, December 26, 2000, <http://www.expressindia.com/news/ie/daily/2000/1226/ian26053.html> [internet accessed on 20th August, 2009].

¹¹⁴ See also www.education.kerala.gov.in. This is the official website of the General Education Department of Government of Kerala. The department administers school education from pre-primary level to the secondary level and also teacher training. [internet accessed on 6th July, 2006].

¹¹⁵ <http://www.kerala.gov.in/education/index.htm> [internet accessed on 13th December, 2008.] “Kerala achieved the highest literacy rate of 90.92% among the states in India.” The female literacy rate was 87.86% and male literacy rate was 94.20% in 2001.

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perhaps the single most significant factor in Kerala's development achievements.¹¹⁶ Traditionally education has had a high demand in Kerala with social reformers influencing people across communities to send their children to school.

Significant contribution for the progress of education came from the earlier ruling dynasties in Kerala even before it came into existence.¹¹⁷

Apart from royal patronage, temples, mosques and churches also provided religious instructions through its *Sabha Mutts*, *Kalaris*, *Ezuthupallis*, *Madrasas* and *Seminaries*. Their role continues in the modern times through expansion in providing secular education as well.¹¹⁸

The beginning of Western education in Kerala is associated

¹¹⁶ Jean Drèze and Amartya Sen, (ed.s.), *Indian Development – Selected Regional Perspectives*, Oxford University Press, Delhi (1997), at p. 255.

¹¹⁷ <http://www.kerala.gov.in/knowkerala/profile.htm> [internet accessed on 12th April, 2006]. During the 13th century, Kollam the capital of Venad, which later became a part of Kerala, became a great centre of learning and culture under Ravi Varma Kulasekhara (1299-1314). Other kingdoms like Tekkumkur and Vadakkumkur also patronized education and learning. Calicut became one of the reputed centres of learning in South India under the Zamorins. In the 14th and 15th centuries North Kerala became a centre of enlightenment and culture under the Kolathiri Rajas. The Travancore court of the 18th century became a centre of attraction for scholars and men of letters. Marthanda Varma (1729-1758) and his successor, the Dharma Raja (1748-98), were equally famous as patrons of learning and brought Travancore distinction in the field.

¹¹⁸ The Christian Missions, the Nair Service Society, the Sree Narayana Trust and the Muslim Educational Society have a chain of colleges and schools under them.

with the work of Christian missionaries.¹¹⁹ Promotion of English education led to the establishment of institutions offering professional and technical courses as well as those devoted to the promotion of oriental studies and fine arts.

Education became an important issue in the post independence era due to the integral involvement of economic, social and religious reforms in a highly political society.¹²⁰ Education movement in Kerala has seen considerable public involvement and has even been a determinant factor in state politics. Since the 1950s there has been a considerable increase in the enrolment of girl students with 87 per cent of girls attending primary

¹¹⁹ <http://www.kerala.cc/keralahistory/index36.htm> [internet accessed on 20th August, 2009]. "The Portuguese missionaries introduced printing in Kerala besides opening several theological seminaries for the education of the clergy. ... The Protestant missionaries from Germany and England laid the foundations of western education in Kerala by opening English grammar schools, high schools, and colleges."

¹²⁰ Filippo Osella and Caroline Osella, *Social Mobility in Kerala: Modernity and Identity in Conflict*, Pluto Press, London (2000), p.140. "Since the mid-nineteenth-century opening of the first missionary schools, 'Western' education (in particular English-medium) has been seen as the key to achievement or economic success. Among Hindu castes in particular this perception was fuelled by the growing success of Christians who, by reason of religious allegiance, had privileged access to missionary schools and could find employment and do business with British companies. At the turn of the century, among the programmes of the two most powerful caste organisations in the state (NSS and SNDP) construction of independent schools and colleges was given priority. ... When, with independence and absorption of the Travancore-Cochin and British Malabar into the Indian Union, Malayalis (Nayars and Christians) found good employment opportunities outside the state, the economic benefits of education became even more apparent."

school in the late 1950s.¹²¹ In 1991, the literacy rate in Kerala was 89.81 per cent, compared to the all-India average of 52.21 per cent. The female literacy rate was only slightly lower at 86.1 per cent.¹²²

The progressive withdrawal of the State from the field of education is also evident in Kerala. The State that has pioneered attempts at providing affordable education on a universal basis and achieved much progress in this regard has relied very heavily on non-State actors for the same. By providing for the salaries of the employees and staff of the educational institutions that opted for governmental aid in return for universalising admission to it for all students, the government left the establishment and management of the educational institutions to the private entrepreneurs.

This scenario coupled with the historical contributions of the missionaries has seen religious and other communal entities establishing the largest number of educational institutions. The role of the political formations that have ruled the State since its inception may have contributed to this end due to the fact that

¹²¹ Robin Jeffrey, *Politics, Women and Well-Being: How Kerala became a Model*, Macmillan, Basingstoke (1992), at p. 55.

¹²² M.H. Suryanayana, "Public Policies, Social Development and Poverty Reduction: The Kerala Model", in Halvorson-Quevedo, Raundi and Hartmut Schneider, (Ed.s.), *Waging the Global War on Poverty. Strategies and Case Studies*, OECD, Paris (2000), pp. 157-185.

parties identifying themselves with protection of minority rights have enjoyed a disproportionately long period of control over the Ministry of Education.

Yet, the lack of adequate support for maintaining its institutions and the relatively poor quality of education provided therein has seen governmental educational institutions been deserted by almost all sections of the society who could afford it.¹²³ Even while governmental educational institutions generally showed a decline in their standards there have been notable exceptions also. The decline of standards is the result of incompetence as well as a failure of the government's educational policy as far as sustainability is concerned.

School education in Kerala is in a significant manner 'free'. This free education extracts a high cost on the society owing to the peculiar system of schooling prevalent in Kerala. The government foots the recurring expenditure bill of school education imparted by private sector agencies under the aided system. Consequently, the State expenditure on education has been around 40 per cent of its

¹²³ The usage of the words 'relatively poor quality' to describe standards in government institutions is to be noted in perspective. Government educational institutions in Kerala are relatively superior in quality than what is seen elsewhere in the country.

annual budget for the past several decades. Yet, the private managements, which provide a better result at the higher and senior secondary examinations, fleece the students in the name of numerous fund raising programmes aimed at improving the quality of their own infrastructure. The government finds itself unable to upgrade the infrastructure of its own schools due to lack of funds, since the major portion of the governmental budget goes for paying the recurring expenditure of the aided privately owned schools. The net result is a decline in the standards of the governmental institutions and an unhealthy growth in the number of privately owned aided institutions.

It has been observed that the net result of lack of resources, deficiency in close monitoring by the local self-government agencies, absence of active involvement by the parents, non-challenging syllabi, etc., has considerably brought down the standards of education in Kerala. As per a study by the National Council for Educational Research and Training, Kerala ranks below 17 other States in respect of the levels of learning achieved by school students. This has to be seen in the context of reports that the annually recorded pass percentage of around 50 at the Secondary

School Leaving Certificate examinations, is the result of a process called 'moderation' which raises it from the actual pass percentage of less than 20.¹²⁴

In the field of professional medical and allied education the costs are prohibitive and the absence of positive governmental measures compounds the miseries of the ordinary people who want to educate their children. The high private cost of professional education acts as an entry barrier to medical and paramedical courses. The students from rural areas who have studied in government and aided schools and belonging to poor social and economic background face several formidable barriers to entry into these courses. Facts indicate that professional education accentuates the social and income divide. Upward social and occupational mobility is also rendered difficult for the vast majority of the population.¹²⁵

School education in Kerala is covered by the Kerala

¹²⁴ See P.R. Gopinathan Nair, 'School Education in Kerala: Performance and Problems', in *Quality of School Education in Kerala: Dimensions and Determinants*, Kerala Research Programme on Local Level Development, Centre for Development Studies, Thiruvananthapuram (1999), p. 1.

¹²⁵ N. Ajith Kumar, *Private Cost of Medical and Para-Medical Education in Kerala*, Kerala Research Programme on Local Level Development, Centre for Development Studies, Thiruvananthapuram (2004), pp. 38-39.

Education Act which is one of the foremost legislations in the field in the country.

THE KERALA EDUCATION ACT, 1958

A pioneering piece of legislation, the Kerala Education Act, 1958 is framed with the object of providing for the better organisation and development of educational institutions in the State of Kerala. It was assented to by the President of India on the basis of the decision of the Supreme Court in *Re, Kerala Education Bill*.¹²⁶

From the perspective of access to education, the pioneering provision in the Act is Section 20, which provides that no fee is to be charged from pupils of primary classes.¹²⁷

The Act seeks to ensure quality in education by providing for qualifications for teachers in schools and by prescribing measures to improve their service conditions. The Act provides for its provisions to be implemented to the greatest possible extent by using the financial clout of the Government. By giving aid to schools the Act brings in Governmental control and discipline over a large majority

¹²⁶ AIR 1958 SC 956.

¹²⁷ The Kerala Education Act, Section 20 reads thus: "No fee shall be payable by any pupil for any tuition in the primary classes in any Government or aided school."

of schools.

The Act contains provisions for compulsory schooling following the earlier legislations prevailing in Kerala before its Statehood. Part II of the Act which contains these provisions has not been brought into force. As per these unenforced provisions, a child¹²⁸ between the ages of six and fourteen at the beginning of the academic year is to be provided with free and compulsory education within a period of ten years from the commencement of the Act.¹²⁹

It is significant to note that the achievement of Kerala in respect of near universal literacy rates is in spite of the unenforced provisions of Part II of the Kerala Education Act, 1958.

As was noted by a study team on rural employment,¹³⁰ the

¹²⁸ Section 22(ii) defines a child to mean "a boy or girl between the ages of six and fourteen at the beginning of the academic year."

¹²⁹ Section 23 reads thus: "State to provide free compulsory education of children - The Government shall provide for free and compulsory education of children throughout the State within a period of ten years from the commencement of the Act."

¹³⁰ Study Team on Rural Employment, 1975, instituted by the Government of Maharashtra, had as its terms of reference the mandate to obtain first hand information on the implementation of Employment Guarantee Scheme of Maharashtra, its organisational pattern, wage rates and operational, administrative and financial aspects with a view to suggesting necessary measures for ensuring that at least one adult person in every rural family is provided gainful employment as an unskilled labourer for about 250 days in a year on productive works for the creation of durable community assets within a radius of not more than 4 to 5 km of his village on wages which may equal to or is slightly lower than the average wage for unskilled labour prevailing in that area. The Team mainly recommended better coordination and planning at the Central, State and district levels with the responsible involvement of all the specialised governmental agencies and voluntary organisations of known repute in implementation of the

success of schooling has also led to significant levels of unemployment and under employment in Kerala.¹³¹

Professional education in Kerala has been under tremendous strain during the past few years on account of increasing self financing institutions and competing claims of equity from the management and the students. There have been legislative interventions on this account in this area.

LEGISLATION AND PROFESSIONAL EDUCATION

Kerala had introduced a statute regulating professional education to bring in a sense of equity in the extent of access afforded to all sections of the society.¹³² The Act tries to utilise the resources mobilised through private initiative for the benefit of its entire people irrespective of communal and other sectarian

programmes. The analysis on this Study Team is based on information contained in 'Study Team on Rural Employment, – Report – July 28, 1975 – November 25, 1975', in Virendra Kumar, et al, Compilers, *Committees & Commissions in India*, 1975, Vol. 13, Concept Publishing Company, New Delhi (1993), p 96.

¹³¹ A significant general observation made by the Study Team was the problem of unemployment and under employment of educated or semi-educated youth found in Kerala and the obvious inappropriateness of traditional special works programmes as an answer to this. The Study team observed that the long range solution of providing gainful and suitable employment to educated youth lies in organising small industries, village crafts, agro-based industries and agro services on a massive scale.

¹³² The Kerala Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-Exploitative Fee and other Measures to Ensure Equity and Excellence in Professional Education) Act, 2006 (Act 19 of 2006). It repealed the Kerala Self Financing Professional Colleges (Prohibition of Capitation Fee and Procedure for Admission and Fixation of Fees) Act, 2004.

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considerations.¹³³ The Act confines itself to professional higher education and tries to make it accessible to the economically less privileged sections of the society.¹³⁴

The salient features of the Kerala Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-Exploitative Fee and other Measures to Ensure Equity and Excellence in Professional Education) Act, 2006 (hereinafter the Kerala Professional Colleges Act 2006) are:-

It records in its preamble the 'legislative fact' of mal-administration of the earlier entrance test held by the Consortium/Association of Private Professional Colleges in the State.

In consideration of the statutory recognition of the fact of mal-administration of the entrance test, it requires all institutions of the same or similar type, whether minority or non-minority to mandatorily fill their seats on the basis of merit determined through

¹³³ A discussion of this statute and the rules made there under is also done in Chapter VIII in the context of judicial intervention in the post *Inamdar* era.

¹³⁴ The avowed objective of the Act is "to provide for prohibition of capitation fee, regulation of admission, fixation of non-exploitative fee, allotment of seats to Scheduled Castes, Scheduled Tribes and other socially and economically backward classes and other measures to ensure equity and excellence in professional education and for matters connected therewith or incidental thereto.

a single common entrance test followed by centralized counselling by the State Commissioner for Entrance Examinations.

It justifies the determination of religious and linguistic minorities for the purposes of Article 30 to be considered State-wise since the reorganization of the States in India was made on linguistic lines and since these two minorities are put at par in Article 30.

It seeks to ensure that the benefits that accrue from minority rights are equitably shared among different sections, including weaker sections, within the minority community to which the particular college or institution belongs.

It envisages the setting up of a Higher Education Scholarship Fund for providing scholarship to the socially and economically weaker students and for this it seeks to utilize the excess funds generated from Non-Resident Indian 'privilege' seats for benefiting students such as students from economically weaker sections of society.

Under section 3, it regulates the admission of students in all professional educational institutions to all seats except Non-Resident Indian seats through a Common Entrance Test to be conducted by the State followed by centralised counselling through

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a single window system in the order of merit by the State Commissioner for Entrance Examinations in accordance with procedure specified by the Government from time to time.

Under section 4, it creates an Admission Supervisory Committee to regulate admission in unaided professional colleges and institutions. Under section 4(4), the Act excludes persons associated with unaided professional institutions from membership of the Admission Supervisory Committee. Under section 4(7), the Act empowers the Admission Supervisory Committee to recommend to the government a fine of upto rupees ten lakh in complaints against institutions found violating provisions for admissions. Section 4(7) also mandates the cancellation of the examination results by the University concerned of students admitted in violation of the admission procedures.

Section 12(3) provides that such fines shall contribute towards the corpus of the Higher Education Scholarship Fund to be created by the Government for providing scholarship to socially and economically backward students admitted in professional colleges

or institutions on merit cum means basis.¹³⁵

Section 6 provides for a Fee Regulatory Committee to determine fees in unaided professional educational institutions. Section 6(5) provides that the fee fixed by the Committee for an institution is binding on it for a period of three years. Section 6(6) of the Act excludes persons associated with unaided professional institutions from membership of the Fee Regulatory Committee. Section 6(7) empowers the government to remove any member of the Fee Regulatory Committee for conduct unbecoming of such member.

Section 7(9) read with section 9(2) provides for freeship¹³⁶ for 50% of the students admitted.

Section 8 provides a novel means for recognition and

¹³⁵ Section 12(1), Kerala Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-Exploitative Fee and other Measures to Ensure Equity and Excellence in Professional Education) Act, 2006.

¹³⁶ Section 2(g) defines 'freeship' to mean 'full or partial remission of tuition fee awarded to Scheduled Caste and Scheduled Tribe and other socially, educationally and economically backward students on merit-cum-means basis by an unaided professional college or institution as may be prescribed.'

It may be recalled that the Supreme Court had in *Unnikrishnan's* case formulated a scheme with such ingredients that all admissions to the professional colleges should be through a Common Entrance Test and allotment of admission should be through a Single Window System by the State, 50% of the seats would be free seats and the remaining 50% seats would be payment seats, free seats means rate of fee would be as in Government College. the fee payable would be decided by the State, there would be no management quota and there should be no capitation fee.

conferment of the status as an un-aided minority professional college or institution on the basis of conditions of demographic equivalence between the minority community to which the college belongs and the non-minority community of the State taken as a single unit.

Section 10 provides different quotas for filling up of seats. As per this section 18% of the total seats will be made available on the sole criterion of merit while 88% of the total seats in an institution will be distributed on the basis of other claims. Among the different claimants based on factors other than merit, their claims inter se are determined on the basis of their rank in a common entrance examination.

With 50% of the seats in every professional higher educational institution in the State to be made available as freeship seats, the social acceptance of the Act is a logical conclusion on the face of it. The statute was unique in being passed without dissent in the State Legislature.

The Act was challenged in *Pushpagiri Medical Society v.*

State of Kerala.¹³⁷ The following were noted by the Court to be the five areas of disputes raised by the petitioners against the Act:

“(1) In the areas of redefining ‘minority’ and imposing conditions to satisfy the tests of ‘minority’, which are unheard of in the Judicial History;

(2) Laying down a condition that admissions are possible only from the rank list of the Commissioner for Entrance Exam in the CET, and that all allotments will be done by the Commissioner, except for NRI seats;

(3) 50% seats will be mandatorily ‘freeship’ seats, thus bringing back the ‘Unnikrishnan’s Scheme’ which was held unconstitutional by the Supreme Court;

(4) Has brought in the principles of reservation in minority unaided institutions also, which is expressly prohibited under the 93rd amendment of the Constitution;

(5) Fees will be fixed by a Fee Regulatory Committee, only.”¹³⁸

¹³⁷ WP(C) No. 18899 of 2006(Y) of the Kerala High Court decided on January 4, 2007.

¹³⁸ *Id.* Para 5 of the judgement.

The High Court upheld the challenge¹³⁹ and the appeal preferred by the State of Kerala is pending consideration of the Apex Court.

Even while the High Court of Kerala had upheld the challenge to the Act on the basis of stifling minority rights it upheld the right of the State to protect and provide for the weaker sections (SC/ST and other backward classes) in every educational institution.¹⁴⁰

The situation that prompted the legislation is worth considering. Access to primary education till the age of fourteen is a fundamental right. It being a fundamental right the onus is on the State to provide quality education to children under the age of fourteen. That the State has failed to do so is evident from the

¹³⁹ The High Court ruled in favour of the petitioners holding that the provisions contained in Section 3, 7, 8(b) and (c), and 10 of the Act of 2006 and Rules 10 and 11 of the Rules to be invalid and *ultra vires* the Constitution. The provisions were found to be opposed to Article 14 and violating the fundamental rights of the petitioner-institutions under Articles 19(1)(g), 26(a) and 30 of the Constitution of India. The case is analysed in detail under Chapter V.

¹⁴⁰ The Court observes thus: "The reservation for SC/ST and other backward classes is permissible. As mentioned above, there cannot be any exception to the same, subject to the validity of Article 15(5). The Government would be well within its rights to provide reservation for classes as mentioned above and may do even now but the same has to be done after taking into consideration the factors as enumerated above. The Government may even now take steps to redraft the Section, provide for such reservation even by an Ordinance or such other measures as may be permissible till such time Section 10 is suitably substituted keeping in view the parameters of providing quotas as determined by the Supreme Court from time to time as also keeping in view the upper limit of reservation." (paragraph 90).

number of students getting admission in competing aided and unaided institutions where the fees are rather high. While the majority of government educational institutions become unviable due to absence of students and an unrealistic fee structure incapable of generating the necessary funds.

This situation in Kerala is reflective of what is happening in the country as a whole. Lack of infrastructure and absence of teachers resulting in poor quality of education being imparted in governmental schools drives the parents who seek a better future for their children through education to those institutions competitively run by non-State actors.

Typically such educational institutions are established either by minority entities claiming protection under the Constitution or by commercial enterprises. When driven by religious or linguistic interests or by commercial considerations these institutions become incapable of providing a wholesome nationalistic attitude to the future generation.

The result is either a brain drain propelled by the economics of education or chauvinism whether religious or linguistic, which is antagonistic to nationalism. Even these are available only to the

elite in the society who can afford to send their children to such institutions.

On the other hand those who cannot afford to get this kind of education becomes increasingly aware of their marginalised status in the system as a whole and do not look kindly upon the political order of the day that allows the Nation to be so. Either way the pattern of educational institutions that is replacing the governmental sector whether by design or not has the potential to destabilise the political contours of India. It breeds mediocrity at one level and promotes an elitist culture at the other. When the elite migrates to greener pastures after sponging the cream of what is available, the mediocre steps in to fill the vacuum thus created.

Such situations have to be managed through centralised interventions by way of Policy initiatives. Following the recommendations of the National Policy on Education 1986, the University Grants Commission had in 1988 recommended the establishment of State Higher Education Councils as effective machinery for planning and coordination of Higher Education at the State level and the coordination of State level programmes with

those of the UGC.¹⁴¹

KERALA HIGHER EDUCATION COUNCIL ACT, 2007

The Kerala State Higher Education Council Act, 2007 was framed to establish the Kerala State Higher Education Council as “a collective of the Government, Universities, academics, experts and people’s representatives in order to forge a synergic relationship among them by occupying an operational space in between the Government and Universities and between Universities and apex level regulatory bodies, with the objects of (i) ensuring the autonomy and accountability of all institutions of higher education in the State, (ii) promoting academic excellence and social justice by providing academic input to the State Government for policy formulation and perspective planning, and (iii) guiding the growth of higher education in accordance with the socio-economic requirements of the State.”¹⁴²

The Act enables the Council to achieve the above said objectives by empowering it (i) review and coordinate the implementation of policies in all higher education institutions in the

¹⁴¹ <http://kshcec.kerala.gov.in/legislations.htm> [internet accessed on 2nd February, 2010].

¹⁴² Preamble, Kerala State Higher Education Council Act, 2007.

State including Universities, research institutions and colleges, (ii) network various programmes in higher education undertaken and promoted by the Central and State Governments and by national level regulatory bodies including the University Grants Commission, All India Council for Technical Education, National Council for Teacher Education, Medical Council of India, Bar Council of India and other similar statutory bodies, (iii) undertake independent work for the generation and dissemination of new ideas in higher education, (iv) provide common facilities for all Universities, research institutions, colleges and other centres of higher education, (v) provide for the generation and optimum utilization of funds for the expansion and development of higher education and (vi) undertake such other programmes for promoting the objectives of social justice and excellence in education.

In accordance with the Kerala State Higher Education Council Act, 2007, the Government of Kerala constituted the Council in 2007.

KERALA HIGHER EDUCATION COUNCIL

The Kerala State Higher Education Council has the following general responsibilities and functions, namely:-

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(a) to render advice to the Government, Universities and other institutions of higher education in the State; (b) to coordinate the roles of the Government, Universities and apex regulatory agencies in higher education within the State; (c) to evolve new concepts and programmes in higher education; and (d) to provide common facilities in higher education without impinging upon the autonomy of other institutions of higher education.¹⁴³

From the perspective of access to education and social justice, the Council specifically tries to (i) evolve schemes for providing equitable opportunities for higher education and scholarships and freeships and financial assistance to the needy students and coordinate implementation of Scheduled Castes and Scheduled Tribes and other eligible backward classes welfare programmes of the Central and the State Governments and other Central and State Level Funding Agencies; and to review periodically the Statutes, Ordinances and Regulations of the Universities in the State and suggest appropriate improvements for the realisation of the objectives of social justice and academic excellence in education and suggest the framework for new Statutes,

¹⁴³ <http://kshec.kerala.gov.in/aboutus.htm> [internet accessed on 2nd February, 2010].

Ordinances, or Regulations for existing Universities or other institutions of higher education or new Universities or other institutions of higher education.¹⁴⁴

As part of its efforts in reforming higher education in the State, the Council formulated the scheme of cluster colleges which enables the sharing of resources by neighbourhood colleges on a voluntary basis.¹⁴⁵ This would result in bringing down the cost of establishing infrastructure and hopefully the students would benefit from this leading to increased access to education. Apart from sharing resources, the Clusters are intended to provide opportunities for teachers to develop and offer new courses and for students to gain by exposure to experts in different institutions. This provides an opportunity to open up new areas of knowledge and thereby improve access to such areas for the students.

Two clusters of colleges were established at Ernakulam and Thiruvananthapuram in Kerala on the basis of the scheme formulated by the Council.¹⁴⁶

¹⁴⁴ <http://kshec.kerala.gov.in/functions.htm> [internet accessed on 2nd February, 2010].

¹⁴⁵ http://kshec.kerala.gov.in/TSCC_II.htm [internet accessed on 2nd February, 2010].

¹⁴⁶ <http://kshec.kerala.gov.in/downloads/cluster1.pdf> [internet accessed on 2nd February, 2010].

EQUITY & SOCIAL JUSTICE

An equitable system of education must offset those accidents of birth that would otherwise keep some children from having an opportunity to function fully in the economic and political life of the community.¹⁴⁷

Access to education of quality can only be ensured if the government exercises the political will to engage itself in providing it to the people. Education being a fundamental necessity will be provided by those with lesser vision if not supplied adequately by the government. Government being the depositary of the 'social will', it needs to act in consonance with what ought to be the best option available to the Nation.

The ultimate goal of social justice is to ensure that the least privileged and the most deprived within a marginalised group possess equal chance and capability to compete with the rest of the

¹⁴⁷ Robert Berne and Leanna Stiefel, "Concepts of School Finance Equity: 1970 to the Present", in *Equity and Adequacy in Education Finance: Issues and Perspectives*, Helen F. Ladd, Rosemary Chalk, and Janet S. Hansen, (Ed.s), Committee on Education Finance, National Research Council, National Academy Press, Washington (1999), p. 20 at pp. 20.

already privileged.¹⁴⁸

Hence the need of the times is to stop the lowering of standards as is seen done in our government educational institutions. The efforts have to start at the primary level. If the primary education is of good quality, students who pass out would be empowered enough to access higher levels of education without any need for dilution of standards.

In this context, the Judiciary must act in consonance with the social objectives enshrined in the Constitution rather than on the basis of principles of exclusion and exotic notions of minority rights. While testing the constitutionality of legislations regulating the establishment and administration of educational institutions, it cannot run counter to the popular will and uphold unintended minority privileges. Minority rights are preserved only if the Nation is healthy and vibrant and cannot be construed against the Nation's progress or at the expense of social equity.

The judicial notion of justice must combine social justice and

¹⁴⁸ Bhagat Oinam and D.A. Sadokpam, "Problems of Generalisation", <http://www.india-seminar.com/2005/549/549%20b.oinam,%20d.a.sadokpam.htm> [internet accessed on 5th September, 2007].

legal justice within it.¹⁴⁹ The judiciary must be careful to prevent creating the illusion of dichotomy between the two in its decisions.

When the Judiciary fails to interpret laws and temper its decisions on the touchstone of the popular will, it risks alienating itself from the legitimacy afforded to it as the upholder of the Rule of Law in the eyes of the people. Judicial exclusivity and its identification with the haves of the society does not augur well for its legitimacy. The decision of the Supreme Court in *Inamdar* and the judicial vacillation seen in deciding the constitutionality of the Kerala Act on professional higher education of 2006¹⁵⁰ putting into uncertainty the admission process for the engineering and medical

¹⁴⁹ G. Sai Ramani, "Jurisprudence of Competing Interests – An Indian Experience", X M.D.U.L.J. (2005) 281-284 at pp.282. "Much ink has flown to explain the dichotomy between legal justice and social justice. This dichotomy is sometimes identified with the classical distinction between commutative justice and distributive justice. But looked at more closely, this distinction doesn't hold much ground because, what we usually call "legal justice" is either an application of the more fundamental notion of "social justice" to legal rules and decisions or is not a matter of justice at all. In other words, the only correct uses of the notion of legal justice are derived from the notion of social justice and, hence, the alleged conflicts between criteria of social and legal justice, are but a result of misunderstanding of the concept of justice. Legal justice is a vehicle to ensure social justice, the job it performs is to translate the postulates of social justice into the language of legal rules and judicial decisions. Indian judiciary, for a major part of its existence in the last five decades, has been applying this principle of a non-dichotomous standard of justice. The juristic thinking recognises the 'dynamic character of the role of law'."

¹⁵⁰ The Kerala Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-Exploitative Fee and other Measures to Ensure Equity and Excellence in Professional Education) Act, 2006. Though the High Court had held certain sections of the enactment as unconstitutional, the Supreme Court has neither stayed the operation of the judgement nor given a decision as of end February 2007 thus jeopardising admission for the year 2007-08.

streams in the State for the year 2007, are such instances.

An analysis of all these aspects show that though education is an empowering tool envisaged under the Constitution and is treated as such a tool by the various governmental initiatives in this regard, the content of education varies when it reaches its intended beneficiaries. The most vulnerable sections of the population like the women, children and the Dalits, though empowered on paper cannot access the education that can make them truly empowered. Lack of social recognition and acceptance to the empowering role of education results in a denial of the Constitutional and statutory rights in this regard.

The success of Kerala on the educational and related fronts has been due to a long history of societal acceptance of the importance given to education starting from a period even before independence. Even in Kerala, the access to education has been ensured by the significant role played by the Government which has successfully financed a substantial part of the infrastructure created through private initiatives. People's participation in the creation of infrastructure held by the private players has led the society to demand access to such facilities as stakeholders and this leads to a

greater sense of empowerment.

The Kerala model of education and the historical foundations for it is kept in mind while considering the issue of access to education in India which is attempted in the next chapter.

CHAPTER VI

ACCESS TO EDUCATION

RIGHT TO EDUCATION AND ACCESSING EDUCATION

When we use the term fundamental right, it has to be understood as a positive right with obligation placed on the State to ensure its receipt by the right holder. Article 21A cannot exist in the Constitution of India as a dead letter with absolutely no obligation on the State to make the right to education a meaningful reality.

Following the recommendations of Saikia Committee, the government introduced the 83rd Constitutional Amendment Bill in Parliament in 1997 to make right to education from 6-14 years a fundamental right.¹ The Constitution Eighty-Sixth Amendment Act, 2002 provided for not just Article 21A, but also for substitution of Article 45 and for amendments to Article 51A.²

While realism prevails in the Constitution Eighty-Sixth Amendment Act, 2002 with respect to the delineation between what is a fundamental right, what is a directive principle and what is a

¹*Felix Tamba v. The State of Jharkhand and Ors.*, <http://www.manupatra.co.in/nxt/gateway.dll/HighCourt4/Jharkhand/2001-2003/jhr2008/2080953.htm> [internet on 26th February, 2009.]

² Article 21A mandates the State to “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 45 is replaced with the “State shall endeavour to provide early childhood care and education for all children until they complete the age of six years,” and Article 51A has a new clause (k) that requires “a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.”

fundamental duty, it requires something more than all these together to reach education to the required persons. A right of access to education is thus fundamental to the success of the Constitution Eighty-Sixth Amendment Act, 2002.

The fundamental right to education now gets positive content with the enactment of the Children's Right to Free and Compulsory Education Act 2009.³ Even with a right to education, access to education is beset with a variety of barriers some of which are significant enough to deny education to many.

ACCESSING EDUCATION AND BARRIERS

There is no denial that access to education is a basic right to human beings. Access to education should include not only physical access, but also financial, social and legal access. If a child cannot physically reach the school due to its remoteness, then there is a physical barrier to education. If a family cannot afford to support a child's education then there is a financial barrier. If the child is neglected or its family ostracised for attending the school then there is a social barrier. If a child is limited by regulations from accessing

³ Discussed earlier in Chapter III. As on 19th February, 2010, when this thesis is going into print, the Act has not been notified.

a school or education of his choice then there is a legal barrier. Any barrier whatsoever, which denies access to education, indicates a failure on the part of the State to fulfil its obligation to provide free primary education.

Access to education does not merely mean the right of entry into an institution for obtaining education. It means the ability of the system to provide a legal right to such entry and the necessary provisions to ensure the meaningful utilisation of that right by the individual. Access is measurable by the capacity of the system to retain the individual for the completion of the purpose for which he or she entered the institution. If the system lacks an inherent capacity to retain the individual in the educational institution, that also is a barrier to access education in that system.

In India, the presence of physical, geographical, financial, social, cultural, and legal barriers plague access to education undermining the fundamental human right to education. These factors are analysed to find solutions to ensure access to education.

Economic Incapacity

Poverty is an economic barrier that prevents access to education. Depending on the social conditions, the economically

deprived sections of the society vary. The laws may alleviate the social conditions that create poverty, but poverty as such can be an insurmountable barrier to provide effective access to education.

Economic incapacity is one reason for the high drop-out ratio among primary school going children.⁴ Lack of a school offering the next higher level of education nearer to home is one factor for many to drop out due to lack of economic capacity to reach the far off school. Moreover, poverty often forces a child to drop out of the school as soon as he is able to look after himself and earn his keep.

Class disparity between the teacher and the taught could also impair delivery of school education to the most vulnerable sections of the society who are deprived both on economic and social terms.⁵

The scheme funded by the Central Government for providing food to children undergoing primary education aims to improve the

⁴ Steady growth in enrolment is noticed, both for Lower Primary and Upper Primary levels. However, enrolment at the Upper Primary level is just about one third of that at Lower Primary level, thus pointing to heavy drop-outs between the two levels. http://planningcommission.nic.in/reports/sereport/ser/edu_pune.pdf [internet accessed on 20th December, 2005].

Gross Dropout rates in Class I-V for the year 1998-99 (provisional) was 39.74% as per the Annual Report of the Department of Elementary Education and Literacy, 1999-2000. Government of India, Ministry of Human Resource Development, Department of Elementary Education and Literacy, Rajya Sabha unstarred question no. 305 answered on 23.02.2001. <http://164.100.24.219/rsq/quest.asp?qref=40907> [internet accessed on 9th November, 2006].

⁵ Amartya Sen, *The Argumentative Indian - Writings on Indian Culture, History and Identity*, Penguin Books, London (2005), p. 218.

nutritional status of school-going children and to improve the enrolment/ retention at primary stage. This takes into account the conditions of poverty in existence in the country and tries to overcome this barrier to education. As per the guidelines of the scheme, local bodies were expected to develop institutional arrangements for providing cooked/ pre-cooked food within a period of two years from the date of commencement of the programme in the local areas and this decentralisation has in the majority of cases improved the involvement of the local population in the activities of the primary schools.⁶ Linking the availability of free food to schooling and making it available to all the students increases the retention rate.⁷ Having the same food together helps the teachers and

⁶ Government of India, Ministry of Human Resource Development, Department of Elementary Education and Literacy, Rajya Sabha unstarred question no 2039, answered on 07.12.2001. <http://164.100.24.219/rsq/quest.asp?qref=60333> [internet accessed on 10th November, 2006]. "However, in the interim period, as a prelude to the provision of cooked/ pre-cooked food in the schools, food grains at the rate of 3 kilograms per student per month may be distributed to all children of classes I to V subject to a minimum attendance of 80 per cent. In 1998, Gujarat, Kerala, Chhattisgarh (Tribal Blocks), Madhya Pradesh (Tribal Blocks), Orissa, Tamil Nadu, Pondicherry and Lakshadweep were distributing cooked meals. In Delhi, processed food was being distributed. Other States/ Union Territories were still continuing with distribution of food-grains as they were not able to mobilise resources due to financial constraints."

⁷ Eric Edmonds & Nina Pavcnik, *The Effects of Trade Liberalisation on Schooling in India*, http://www.realclearmarkets.com/articles/2008/05/the_effects_of_trade_liberaliz.html [internet accessed on 4th September, 2009]. "Policies that make schooling more affordable or truly free can help break the link between poverty and schooling, perhaps giving poor families a new capacity to help break out of poverty itself." The article relies on a study that finds trade liberalisation in India to have imposed significant costs of adjustment on communities with industries that lost tariff protection and consequently their educational attainment to lag behind the rest of India due to the intersection of trade

the children to learn to live in an atmosphere of brotherhood. This helps to break down sectarian barriers and promote national integration and unity.⁸

Even then, government needs educate the bureaucracy to appreciate the importance of education as a prime responsibility of the government. Accountability in governance is the need of the hour that can prevent wastage of the resources allocated. The fact that food for such programmes got stopped once due to non-payment to the Food Corporation of India shows that bureaucratic obduracy can sabotage even the best of governmental schemes.⁹

adjustment, poverty, and schooling costs. The article speaks favourably of government assistance to improve schooling and to overcome effects of poverty. "In the community located in a state with school feeding programs, girl scholarships, and overall lower schooling costs, the adjustment process appears to have no impact on schooling. That is, schooling costs appear to be the reason why there is a link between poverty, schooling, and Indian tariff reform."

⁸ <http://www.thehindu.com/2005/01/09/stories/2005010900161400.htm> [internet accessed on 24th January, 2010]. Amartya Sen observes that, "One of the objections had come from 'upper' caste parents who did not want their children to have meals with 'lower' caste children. While this has often been seen as a criticism of the mid-day meal scheme, the fact is that the other side of the story is very positive. If one actually insists on providing meals of this kind, the system adjusts. People get used to eating together, get used to eating food cooked by someone whose caste you do not know, I think that is a positive thing from the point of view of cohesion of society."

⁹ Government of India, Ministry of Human Resource Development, Department of Elementary Education and Literacy, Rajya Sabha unstarred question no 2039, answered on 07.12.2001. <http://164.100.24.219/rsq/quest.asp?qref=60333> [internet accessed on 10th November, 2006]. "During July to September 1998, the supply of food grains by FCI had been temporarily suspended in States/UTs due to problems relating to reconciliation of lifting figures and non-release of funds to FCI which was subsequently restored."

Child Labour

Societal insensitivity to the issue of child labour encourages parents to keep their children out of school and this effectively acts as a barrier that denies the child access to education. Child labour feeds on poverty to cause poverty.¹⁰ Lack of proper enforcement machinery and inadequate financial deterrence to the employers of child labour contributes to this menace. Census data on child labour indicates its overwhelming continuation in India thus depriving educational opportunities to a very large number of children.¹¹ The menace of child labour affects the girl child more than the boy child. As can be seen from the labour force participation rate, unlike the case between women and men¹², the rate for urban girls increased from 4.6% in 1971 to 10% in 1991 while that of urban boys

¹⁰ Dhurjati Mukherjee, "Child Labour: A lot More needs to be Done", http://www.infa.in/index.php?option=com_content&task=view&id=277&Itemid=42 [internet accessed on 24th December, 2009]. "Not only is child labour an effect of poverty, it is also a major cause of poverty. In a study by the World Bank in 1998, it was found that countries with an annual per capita income of US\$500 or less (at 1987 prices) the labour force participation rate of children aged 10-14 was 30-60 per cent compared to only 10-30 per cent in countries with an annual per capita income of \$500-1000. India has the largest number of child workers in South Asia."

¹¹ See Appendix for Table 7 on State-wise Distribution of Working Children according to 1971, 1981, 1991 and 2001 Census in the Age Group of 5-14 Years. From 10753985 child workers in the age group of five to fourteen years in 1971 the census data shows that it increased to 12666377 child workers in 2001 thereby showing an increase of seventeen percent in the population of child workers.

¹² <http://www.fao.org/sd/WPdirect/WPre0108.htm> [internet accessed on 24th December, 2009]. In 1991, the labour force participation rate of women was 22.7%, less than half of the men's rate of 51.6%. Urban female participation rate was 9.7% as compared to rural female participation rate of 27.2%.

decreased from 11.7% in 1971 to 10.1% in 1991. The rate is calculated without factoring the domestic labour which almost wholly is shouldered by womenfolk. These rates read with literacy levels indicate a shift from the boys to the girls of unskilled labour.

Inferior Quality of Primary Education

A basic right is a right that is so integral to human existence that a human being cannot exist without it with the dignity befitting a human being. Education is such a basic right and its quality should assure the student a life with dignity after being empowered with it.

Different qualities of education are made available in India for the same stage of examination depending upon the paying capacity of the parents. This creates inequality among the citizens although every child is entitled to a fundamental right to education at least up to the age of fourteen as per the Constitution.¹³ When it is a Constitutional mandate on the State to provide education up to the age of fourteen, its failure to ensure equality in quality of the education provided by it or on its behalf through other agencies is

¹³ Article 21 A.

tantamount to an abdication of its Constitutional duty.¹⁴

Where the primary education provided is of a low quality there is no sense in complaining that the child is not in school. If the time spent by the child in school could be better utilised in other productive activities that both feeds him and empowers him materially, then it implies that the poor quality of education is the barrier that denies access to education.

Quality of education has to promote self-sufficiency and empowerment of individuals by the time they complete primary education.¹⁵ The artificial dichotomy created between “access” and “quality” ends in quality being relegated in the quest for improving access to education. The result is that what passes off as primary education in most rural schools does not serve any meaningful purpose.¹⁶ One reason for the children not being send to school by their parents could be the systemic deficiencies in the available

¹⁴ Sheeba Pillai, “Equalling Educational Opportunities – A Need of the Hour”, JILT, Vol. 2, 2004, 212 at pp. 220 - “The most condemnable form of inequality in education is the graded provisions of different qualities of education to students with different abilities to pay. This is not only a violation of right to education envisaged under Articles 21 and 21A, but also violation of principles of equality under Article 14 on account of arbitrary classification without a reasonable cause or object.”

¹⁵ Klaus Schwab, Ed., *Global Competitiveness Report 2009-2010*, World Economic Forum, Geneva (2009), p.16. India was ranked 101 for Health and Primary Education.

¹⁶ Anita Rampal, “Unpacking the ‘Quality’ of Schools”, <http://www.india-seminar.com/2004/536/536%20anita%20rampal.htm> [internet accessed on 5th September, 2007].

schools. As observed by the Union Minister for Human Resources Development at the National Conference of State Ministers of Education in 1996,

“... if many parents are not inclined to send their children to school, the reason perhaps lies in the poor content and process of education.”¹⁷

To overcome this barrier of lack of quality, there are Governmental initiatives like the District Primary Education Programme (DPEP). The DPEP is a programme sponsored by the Central Government for ensuring quality primary education and an atmosphere conducive for the retention of the maximum number of students in the schools. Different external funding agencies like the IDA of World Bank, European Commission (EC), Government of Netherlands, Department for International Development of U.K. (DFID) and UNICEF had committed assistance of Rs.6254 crore for the various phases of this programme.¹⁸

¹⁷ S.R. Bommai, “Elementary Education for Empowerment”, in Dr. S. Subramanian, *50 Years of India's Independence*, Manas Publications, New Delhi (1997), p. 305 at p. 308.

¹⁸ Government of India, Ministry of Human Resource Development, Department of Elementary Education and Literacy, Rajya Sabha unstarred question no 2207, answered on 10.08.2001. <http://164.100.24.219/rsq/quest.asp?qref=55062> [internet accessed on 10th November, 2006]. “The terms of this assistance vary. Of this about Rs.1338 crore is an outright grant and does not have to be repaid. Credits received from the IDA carry

While the objective of the programme is laudable, it comes with extra financial burden for the future generations.¹⁹

Low Societal Expectations

Related to the issue of lower numbers accessing primary education is the larger picture of low social expectations on education in India. Even the University Grants Commission projects a miniscule 0.6% of the undergraduate students to enrol for Ph.D. in 2010-12 and only 10% of the graduates to go for post graduate

no interest charges and are repayable in 35 years including a grace period of 10 years. However, a service charge of 0.75% on the principal amount withdrawn and outstanding and a commitment charge of 0.5% on the principal amount not withdrawn is payable on the credit.”

¹⁹ Government of India, Ministry of Human Resource Development, Rajya Sabha unstarred question no: 1893, answered on 12.06.1998. <http://164.100.24.219/rsq/quest.asp?qref=47895> [internet accessed on 10th November, 2006]. “Major terms and conditions of Loan/aid for DPEP: Term and condition of loan/aid for DPEP are regulated by the DPEP Guidelines evolved by the Government of India, which been accepted by the World Bank and other external funding agencies. Procurement of various items and repayment in the standard terms and conditions agreed to between the Government of India and Funding agencies. In respect of Project implementation the Funding agencies have agreed with our strategies, which are in keeping with the National Policy on Education. The broad terms and conditions of loans aid include the following:- (a) For IDA Credit, Government of India shall pay a service share at the rate of ¾ of 1% per annum on the principal amount of the credit withdrawn and outstanding. Commitment charge on the amount not withdrawn shall also be payable at a rate exceeding 1/2 of 1% per annum. The repayment period is 35 years with a 10 years grace period. (b) The concerned DPEP State are required to maintain expenditure on elementary education in real terms at base year levels. (c) Government of India shall ensure that the State Implementation Societies receive project funds on a six monthly basis for anticipated expenditures under their approved annual work plans. (d) Agreed time schedules for various studies and implementation programme would be followed. (e) There will be joint Supervision Mission to the project areas to assess the progress of programme implementation. These Missions will have representatives of the Government of India and International Funding Agencies.”

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studies reflect this low level of social expectation from education.²⁰

Dr. Gangan Prathap argues this to be so since Indian science and higher education have settled comfortably into a low-level equilibrium groove, driven by the tyranny of low expectations.²¹

The net result of this situation being still lower incentive for many to even try to receive any education at all.²²

That low social expectations are a major factor hampering a right to education can also be seen from the fact that improved family income does not automatically increase the probability of children being sent to school as has been observed:

“Projects to improve self-generated income have tended to increase child labour than making it possible for children to attend school.”²³

²⁰ *Higher Education in India: Issues Related to Expansion, Inclusiveness, Quality and Finance*, University Grants Commission, New Delhi (2008), <http://www.ugc.ac.in/pub/report/12.pdf> [internet accessed on 30th January, 2010]. “In 2011–12 there are expected to be 11,671,000 students at the UG level, 1,116,000 students at the PG level and only 78,000 students at the Ph D level. That is, only 0.6% of the students go on to the Ph D level.”

²¹ <http://www.ias.ac.in/currsci/may252009/1294.pdf> [internet accessed on 30th January, 2010].

²² Mathew T. George, “Kalahandi: Hungry for Education”, *The Week*, January 31, 2010, p.32 at pp. 33. The author point out that sometimes economic self-sustainability becomes a disincentive for parents to send their children to school and for children to pursue school education.”

²³ G.C. Pal, “Human Rights Education - Policies, Priorities and Prospects”, in Abdulrahim P. Vijapur & Kumar Suresh, Ed.s., *Perspectives on Human Rights*, Manak

The solution therefore lies in mandating compulsory education of quality taking away the freedom of choice now available with the parents.

Non Completion of Primary Education

It is generally understood that completion of universal primary education and gender equity in education can bring in other benefits associated with empowerment. Studies elsewhere points out that it would decrease poverty levels, increase economic growth, and provide for a more equitable redistribution of wealth.²⁴

Primary education has been an area of concern for India. Sustained governmental and non-governmental efforts have seen increased enrolment of students at both primary and upper primary

Publications, New Delhi (1999), p. 311 at 314. Also see Mohan N. Shantha, Compulsory Primary Education: A Right or a Privilege? *Perspectives in Education*, Vol. 8, No. 3-4, 1992, pp. 171-77.

²⁴ http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/09/06/000094946_03082204005065/Rendered/PDF/multi0page.pdf [internet accessed on 10th September, 2004]. "More equitable distribution of education is correlated with lower poverty and inequality and faster economic growth (Birdsall and Londoño 1998). Greater education for girls has strong positive impacts on the health of infants and children, immunization rates, family nutrition, and the next generation's schooling attainment (World Bank 2001). New data from Africa show that education for girls and boys may be the single most effective preventive weapon against HIV/AIDS (World Bank 2002b). Primary education also contributes to better natural resource management, including conservation of the tropical rain forest (Godoy and Contreras 2001). Increasingly, however, research suggests that many of these positive externalities associated with primary education require that a minimum threshold of five or six years of schooling be attained - hence the importance of ensuring primary school completion, and not just primary school access."

levels as indicated by the official figures reproduced below.

Growth in School Enrolment (in Millions)						
Year	Primary			Upper Primary		
	Boys	Girls	Total	Boys	Girls	Total
1950-51	13.8	5.4	19.2	2.6	0.5	3.1
1960-61	23.6	11.4	35.0	5.1	1.6	6.7
1970-71	35.7	21.3	57.0	9.4	3.9	13.3
1980-81	45.3	28.5	73.8	13.9	6.8	20.7
1990-91	57.0	40.4	97.4	21.5	12.5	34.0
1998-99	62.7	48.2	110.9	24.0	16.3	40.3
1999-00	64.1	49.5	113.6	25.08	16.98	42.07

(Source: MHRD; Selected Educational Statistics, 1999-2000)²⁵

As can be seen from the table above, the enrolment in Upper Primary schools is only one-third of the enrolment at the Primary level though ideally it is expected to be more or less equal to that at Primary level. This implies that there is a high failure and drop-out rate between these two levels.

More than fifty percent of the children who attend the first standard never reach the high school (eighth standard)²⁶ which is far from the ideal situation.²⁷ The remedial measures suggested to

²⁵ http://planningcommission.nic.in/reports/sereport/ser/edu_pune.pdf [internet accessed on 20th December, 2005].

²⁶ The drop-out rate of children in Classes I to V for the year 1996-97 was 38.95. Government of India, Ministry of Human Resource Development, Rajya Sabha unstarred question no. 1946, answered on 12.03.1999. <http://164.100.24.219/rsq/quest.asp?qref=1489> [internet accessed on 10th November, 2006.]

²⁷ http://planningcommission.nic.in/reports/sereport/ser/edu_pune.pdf [internet accessed on 20th December, 2005]. "An ideal situation would be that near 100 percent boys and girls in the relevant age-group (11- 14) attend the UP school. However, according to official estimates, the Net Attendance Ratio (NAR) for the UP school works out to only 43 in 1995-96, which is much below the ideal level. (Even for the Primary school the

contain dropouts include improving physical infrastructure of schools, provision of teaching and learning equipment, scholarships and incentives to children from weaker sections of society and girls, regular training of teachers, a contextually relevant curriculum and greater involvement of parents and local communities in the functioning of schools.²⁸

According to the 42nd Round of the National Sample Survey, the main reasons for children dropping out from school include economic constraints, lack of interest in education and further studies, domestic chores, gender discrimination and failure.

As per its United Nations Millenium Development Goals, India has to achieve universal primary education and fifty percent adult literacy by 2015.²⁹ To bridge the gap for at least meeting the target set by the Programme of Action 1992, of 'Education for All' by the year 2006-07, there was to be a forty percent increase in the

NAR is reported to be 71 in 1995-96). The retention rate is also quite depressing, being 45 percent in 1999-2000. In other words, out of the 100 children enrolled in Std. I in 1992-93, only 45 reached Std. VIII in 1999-2000, the remaining 55 having left the school on the way."

²⁸ Government of India, Ministry of Human Resource Development, Rajya Sabha unstarred question no. 1946, answered on 12.03.1999. <http://164.100.24.219/rsq/quest.asp?qref=1489> [internet accessed on 10th November, 2006.]

²⁹ [http://www.ifc.org/ifcext/edinvest.nsf/AttachmentsByTitle/NewsletterNov08/\\$FILE/Newsletter_India_Nov08.pdf](http://www.ifc.org/ifcext/edinvest.nsf/AttachmentsByTitle/NewsletterNov08/$FILE/Newsletter_India_Nov08.pdf) [internet accessed on 30th November, 2009.]

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rate of net additional enrolment from that of the year 1999-2000.³⁰ Though the goal of universal education is a straightforward one, linking it to quality of education, elimination of child labour, poverty alleviation programmes, peace and security and above all good governance makes it a difficult one to achieve.³¹

The National Family Health Survey 1998-99, based on a sample of 90,000 households, reports that 79 % children in the 6-14 age group attends school and the Census 2001 reveals that the literacy rate is 65.38%.³² This indicates the further scope for making universal primary education a compulsory affair even while it is made affordable as a fundamental right.

Absence of Motivated Teachers

Perhaps the most important barrier to education is the absence of the required number of teaching personnel across the country. Inadequacy of teaching staff makes schools mere feeding

³⁰ http://planningcommission.nic.in/reports/sereport/ser/edu_pune.pdf [internet accessed on 20th December, 2005]. "There will have to be a net additional enrolment of 62.49 million children by the year 2006-07 if the country's declared objective of EFA is to be attained. This is by no means a small target to achieve, in as much as it involves almost 40 percent step-up over the current (1999-2000) enrolment of 155 million children."

³¹ <http://iccle.org/images/india-report.pdf> [internet accessed on 30th November, 2009.]

³² Government of India, Ministry of Human Resource Development, Department of Elementary Education and Literacy, Rajya Sabha unstarred question no. 1435, answered on 03.08.2001. <http://164.100.24.219/rsq/quest.asp?qref=54196> [internet accessed on 9th November, 2006].

places under the noon meal scheme or shelters during natural calamities. A good teacher provides enough motivation to the student to take the trouble to go to school and aspire for a life better than what he enjoys at the moment. Quality teaching personnel can be attracted only when the service conditions are good enough. Lack of infrastructure, non-payment of salaries, non-permanency in appointments, etc., act as barriers that deny access to quality education to the students.

Lack of Quality Teaching Aids

Teaching is best done if communication is done in a language understood by the student. There is a singular lack of good teaching aids including scientific textbooks in the local languages in India. Hindi and English are not the languages that cover the geographical spread of India. The lopsided language promotion policy followed by the Government of India not only suppresses creative writing in other languages but also skews the polity in favour of Hindi. Lack of adequate textbooks in local languages also makes it difficult for students of limited means to pursue higher education in the absence of special coaching.

Class Timings

The class timings can act as a barrier to access formal education. Agriculture is the mainstay of the majority of Indians. Manual labour is a must and each individual in a rural agricultural setting would be expected to give a helping hand. In the case of students coming from the rural areas, typical government school hours are a barrier to education. The barrier is more pronounced in the case of girls who are expected to finish their domestic chores before attending school.³³

Social Roles

Men and women are traditionally assigned certain roles by the society. Child rearing and managing the home are the roles assigned by the traditional society to women. Women who successfully manage both are considered virtuous and are projected as role models. This kind of gender identification with roles that

³³ Tariq Thachil, "Bridging the Divide: An Analysis of Indian Education", <http://www.stanford.edu/class/e297c/Bridging%20the%20Divide%20-%20An%20Analysis%20of%20Indian%20Education.doc> [internet accessed on 24th December, 2009]. "Government schools are fixed to run in the mornings. These timings are particularly unsuited to girls living in rural areas, because many of their allotted chores must be done during set school hours. This has been one of the biggest problems of exporting an essentially urban model of schooling to Indian villages. *Harijan* girls in particular, suffer, because they work longer hours than upper-caste girls (whose families can often afford for their daughters not to work) and *Harijan* boys (whose chores are mostly done in the evening)."

require lower formal education levels encourage society to deny higher education to the girl child and thus goes to deny her access to education.

Middle Class Values

The prevalent education system promotes the values of the middle class. At present it is only aimed at creating employees rather than independent individuals. The majority of the Indian population comes from a class structure that belongs to a class lower than the middle class. The organised sector either in the industry or in the services field that utilises the products of the school system does not account for the dominant majority of the workforce in India. The lack of utility for the education dished out by the schools in earning one's daily bread acts as an effective deterrent and a barrier that denies access to education by being non-synchronous with the societal needs.

Bias and Prejudices in the Curriculum

The middle class mores are reflected in the gender bias

projected in the curriculum as well.³⁴ Present textbooks are likely to have the following flaws: predominance of male characters/male authors, men in lead roles, and few women in service roles, more in menial and assisting roles.³⁵ All social prejudices when projected and reinforced in the academic curriculum negatively affect the intention of empowerment of the weakest sections, including women, Scheduled Castes, Scheduled Tribes, minorities, etc.

Lack of Adequate Female Teachers and Girls' Education

Inadequate number of female teachers, except perhaps in a few States that has achieved higher levels of literacy, is another potential barrier to girls' education. Girl students are more likely to continue attending school in the presence of female teachers rather than male teachers.³⁶

³⁴ <http://www.census.gov/ipc/prod/wid-9801.pdf> [internet accessed on 25th December, 2005]. "As long ago as 1965, the Indian government agreed to rewrite textbooks so that men and women would not be portrayed in gender stereotyped roles. However, a study of Indian textbooks done in the 1980s found that men were the main characters in the majority of lessons. In these lessons, men held high-prestige occupations and were portrayed as strong, adventurous, and intelligent. In contrast, when women were included they were depicted as weak and helpless, often as the victims of abuse and beatings (Kalia, 1988). These depictions are strong barriers for improving women's position in society."

³⁵ Dr. Sheeba Pillai, "Educational Content and Right to Education", *JILT*, Vol. 5, 2007, 178 at p. 189.

³⁶ <http://www.census.gov/ipc/prod/wid-9801.pdf> [internet accessed on 25th December, 2005]. "Girls are more likely to attend school and have higher academic achievement if they have female teachers. This is particularly true in highly gender-segregated societies

Parental Education

Only when the parent knows and understands the full utility of getting the child educated can the child ever hope to go to school. Absence of basic education in the parent often acts as a barrier that denies access to education.³⁷

Alien Concepts and Culture as a Denial of Access

The groups located in northern areas dominate the politics of India. This brings about a cultural invasion of concepts and values from the Hindi belts of India into the text materials promoted by the government agencies. This can also alienate large sections of the population who do not identify with the culture promoted by the government schools and in the absence of alternate arrangements, keeps them away from the schools.

such as India (Bellew and King, 1993; King, 1990). Currently, women account for only 29 percent of teachers at the primary level (MHRD, 1993). The proportion of teachers who are female is even lower at the university level, 22 percent of instructors (CSO, 1992). These proportions reflect the historic paucity of women with the educational qualifications to be teachers. However, the proportions are likely to change in the future as women currently account for nearly half of those being trained as teachers. Again there are differences among the states; the states with the highest literacy rates are also the states with the highest proportion of female teachers.”

³⁷ The rural parents in general believe that a couple of years' schooling is sufficient to acquire reading and writing capabilities and bit of arithmetic and that was enough to face life. They do not seem to bother about relapse into illiteracy when the child drops out at the early stage. http://planning.commission.nic.in/reports/sereport/ser/edu_pune.pdf [internet accessed on 20th December, 2005].

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Language as a barrier that Denies Access

Language is a great barrier in communication. Although specifically protected under the Constitution as a fundamental right, it may not be feasible for communities to always establish educational institutions of their choice wherever it is needed. Although Article 350A provides for local authorities in every State endeavouring to provide for instruction in the mother tongue of linguistic minority groups, unless the minority community is strong enough politically, this seldom translates into adequate facilities.

Lack of facilities for education in their mother tongue discourages many a migrant parent from sending their wards to school. Hence, inadequate facilities for imparting primary education in the mother tongue acts as a barrier to access education.

Gender Discrimination

The Nation recognises that discrimination in its negative forms violates the basic features of the Constitution. Though India has not yet ratified the Convention against Discrimination in Education, the essence of the Convention is reflected in the protection afforded by the judicial pronouncements certifying

towards the enforceability of the Convention's principles.³⁸ Yet, there are certain discriminative features rooted in the psyche of the Nation that defies a legalistic solution. Despite the increase in recent years of enrolment of girls in schools it remains a depressing fact that 62% of all girls drop out before the completion of their elementary education.³⁹

Stereotyping within Family

Research elsewhere conducted by Oxfam reveals that girl students are frequently required by their families to tend for their family members who fall sick.⁴⁰ Girl students miss out on education on account of this basic stereotyping of women as the caring members of the family.

Lower Age of Marriage as a Denial of Access

The age at which a girl is married often acts as a barrier that denies her access to education thus leaving her open to exploitation. In the patriarchal society that is India, a married woman is expected to look after her husband and children. Formal education involves

³⁸ See Kishore Singh, "Right to Education and International Law: UNESCO's Normative Action", 2004 IJIL 488.

³⁹ <http://www.unicef.org/india/LITERACY-AND-EDUCATION.pdf> [internet accessed on 27th Decemocr, 2008].

⁴⁰ Kevin Watkins, *The Oxfam Education Report*, Oxfam Publishing, Oxford (2000), p.40.

systematic study, which is possible only if the student is able to focus her concentration and abilities in the pursuit of education. Work pressure at home or childbirth often prevents women from continuing their education during the prime period of their student life. With the official all India average marriage age of women being just 18.3 years according to the 2001 census and with it being as low as 16.6 years in its largest state of Rajasthan,⁴¹ the early age of marriage for women in India is a barrier denying access to education.⁴²

Dowry System

Marriage generally takes place between persons of equal class. The parents of girls with higher education have to spend more on dowry to find husbands with equivalent or higher education than them. This deters parents of girl children to provide higher education to the girl child though more often higher education fetches an equal or better educated husband for the woman. Thus Indian customs acts as barriers that deny access to education.

⁴¹ <http://www.unicef.org/india/AGE-AT-MARRIAGE.pdf> [internet accessed on 27th December, 2008]. "In Rajasthan 41% of adolescent girls aged between 15 and 19 are married."

⁴² <http://www.unicef.org/india/AGE-AT-MARRIAGE.pdf> [internet accessed on 27th December, 2008]. "Girls who marry at a very young age are also more vulnerable to domestic violence, sexual abuse and are less likely to complete primary education."

Infrastructural Limitations

Infrastructural inadequacies create physical and emotional barriers to attend the school. Lack of water, sanitation and enough space to accommodate the students are barriers to accessing education. They tend to keep the student out of the education system.⁴³ Even for the fundamental right to primary education to be a reality, there has to be an adequate number of lower primary and upper primary schools to cater to the children aged 6-14 years, which simply is not available in India.⁴⁴

India has one of the largest higher education systems in the world with an average yearly growth rate of 5.5%.⁴⁵ Studies have indicated that a favourable teacher-student ratio is one factor that determines the completion of primary education by a student. India

⁴³ <http://www.census.gov/ipc/prod/wid-9801.pdf> [internet accessed on 25th December, 2005]. "Another barrier to education in India is the lack of adequate school facilities. Many states simply do not have enough classrooms to accommodate all of the school-age children. Furthermore, the classrooms that are available often lack basic necessities such as sanitary facilities or water. In Uttar Pradesh, a recent survey found that 54 percent of schools did not have a water supply and 80 percent did not have latrines (The World Bank, 1997). Lack of latrines can be particularly detrimental to girls' school attendance."

⁴⁴ http://planningcommission.nic.in/reports/sereport/ser/edu_pune.pdf [internet accessed on 20th December, 2005]. Over the last five decades (1950-51 – 1999-2000) there has been 300 percent and 1450 percent increases in the number of Lower Primary and Upper Primary Schools / Sections. In 1950-51 there was an Upper Primary School / Section for every 15 Primary Schools. This ratio has improved to 3.2 by 1999-2000. The national norm (PoA, 1992) is one Upper Primary School for two Lower Primary Schools.

⁴⁵ See Sheetal Sharma, "Do We Have Enough Jobs?", *University News*, 44(38), September 18-24, 2006, p. 17 at pp.17.

has a skewed ratio in this respect with some States having favourable and others having a very unfavourable ratio.⁴⁶ Efforts are needed in this area to identify the reasons for the wide variation and corrective measures are needed to improve the ratio.

The only consolation is that the government is aware of these constraints and ongoing efforts are there to increase the infrastructural facilities. In its *Analytical Report 2004-05 on Elementary Education in India* based on data supplied by States and Union Territories for 581 districts covered under the District Information System for Education (DISE), the National University of Educational Planning & Administration points out that 98122 government primary school buildings had one classroom. Under the Sarva Shiksha Abhiyan Programme, 97986 school buildings and 468803 additional classrooms were sanctioned for 2005-06 and 2006-07 to States and Union Territories.⁴⁷

Initiatives like Operation Blackboard have been undertaken

⁴⁶ http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/09/06/000094946_03082204005065/Rendered/PDF/multi0page.pdf [internet accessed on 10th September, 2004]. "In India, ... while the national average is 52 pupils per teacher, the pupil-teacher ratio is as low as 30:1 in some States and as high as 60:1 in others, reflecting serious disparities in education access and quality across the country."

⁴⁷ Government of India, Ministry of Human Resource Development, Department of Secondary Education and Higher Education, Rajya Sabha unstarred question no 1982, answered on 14.08.2006. <http://164.100.24.219/rsq/quest.asp?qref=118135> [internet accessed on 13th November, 2006].

by the government to improve basic infrastructure.⁴⁸

Remoteness of the Schools

Another major drawback that keeps education from reaching the needy is the lack of quality schools within accessible distance of the child's residence.⁴⁹ This becomes more of a barrier to the girls rather than on the boys. Society does not encourage girl children to travel long distances to attend school and no parent can be blamed for not sending a girl child to a school located far away for fear of her physical security. Though government measures claim to have succeeded in providing primary schools within a two-kilometre radius to each inhabited village these are often one-teacher schools with no infrastructure worth the name. Geographical barriers thus act to deny access to education.

The use of technology can be utilised in a cost effective

⁴⁸ http://planningcommission.nic.in/reports/sereport/ser/edu_pune.pdf [internet accessed on 20th December, 2005] A scheme called "Operation Blackboard" was implemented to counter conditions seen as constraints on retention and learning: the large number of single-teacher schools, the lack of female teachers, and the inadequacy of teaching-learning materials and aids. The scheme provided grants to states to construct an additional classroom and post an additional teacher in single teacher schools, requiring further that half the teachers posted be women. It also provided grants to finance the purchase and distribution by the State of a predetermined, standardized package of teaching materials and aids.

⁴⁹ http://planningcommission.nic.in/reports/sereport/ser/edu_pune.pdf [internet accessed on 20th December, 2005]. In 1993, almost 15 percent habitations did not have a Lower Primary school within a reach of one kilometre, while 24 percent habitations did not have an Upper Primary School / Section within 3 kilometres.

manner to overcome this barrier. The reach of non formal education can be advanced with a proper use of indigenously available technology.

“The availability of thousands of classes over the internet enables learners to select their own learning choices from the offerings of many sites they want and to pursue the outcomes that are important to them.”⁵⁰

Increased use of the tools of the knowledge economy would ensure penetration of technological advancements into areas that lack other basic infrastructure to sustain and motivate teachers in all subjects. It thereby increases the potential for students to pace their studies in accordance with their abilities and needs rather than by the dictates of social efficacy.

Lack of Cost Effective and Adequate Public Transportation

Rural India is not well connected by roads and often there will not be adequate means of public transport for children to attend school in a cost effective manner. Children of primary schools may not be physically able enough to travel long distances to school

⁵⁰ Beena Shah, “Technology, Values and Quality Education: A New Paradigm”, *University News*, Vol. 46, June 02-08, 2008, p. 1 at pp. 1.

using inadequate public transports without adult supervision. Hence the absence of schools imparting primary education near their homes coupled with inadequate transportation becomes a formidable barrier in accessing education thus hampering empowerment.

Irrationally Centralised Uniformity in Syllabi

The pattern of education followed and promoted in India is too centralised to take into account the huge variations in social life across the country.⁵¹ Uniformity in syllabi acts as a deterrent. A syllabus far removed from the reality of life, being academic and non-practical, crammed with concepts that the average person would never ever utilise in life, frightens the child away from schools.⁵² The syllabi followed either at the CBSE, ICSE or the State Board levels have a lot of scientific concepts that are difficult to comprehend and serve only those who go on to compete for the cream positions in society. A society is not made up of leaders. No

⁵¹ <http://www.cbse.nic.in/welcome.htm> [internet accessed on 21 October, 2009]. The Central Board of Secondary Education which is the largest such body in India had as on 31.03.2007, 8979 schools including 141 schools in 21 countries. There were 897 Kendriya Vidyalayas, 1761 Government Schools, 5827 Independent Schools, 480 Jawahar Novodaya Vidyalayas and 14 Central Tibetan Schools following the very same syllabus.

⁵² <http://infao5501.ag5.mpi-sb.mpg.de:8080/topx/archive?link=Wikipedia-Lip6-2/1585320.xml&style> [internet accessed on 21st October, 2009]. "The CBSE has often been criticised for a strictly-defined and rarely updated syllabus. It is also notorious for being too pressurising, where the focus is on rote learning rather than application. It has also been said to be too centralised."

society can be. In the mad pursuit to create doctors and engineers and other technical professionals, the average student who cannot understand and neither needs to understand scientific principles feels disheartened and drops out.⁵³ Such a syllabus creates a feeling of inferiority and frustration and does not ever prompt the person to continue education in a formal setting.

Assessment System as a Barrier

The present system of assessment does not provide a means to assess the true ability of the individual. All that it actually tests is the ability of the individual to learn by rote what is being taught. Being only a memory retention test, it does not assess other abilities or provide any feedback to the differently endowed persons in a class. Such assessments only serve to develop a sense of inferiority by placing a uniform scale to measure what are distinct and different. Schools thus develop a fear complex in students and the system thus becomes a barrier to accessing education.

⁵³ For a critical article on the system of education introduced by the British and continued in similar manner by the Indian government see Neeru Nanda, "The School System in India - A critique", in *The Cultural Dimension of Education*, Baidyanath Saraswati, Ed., Indira Gandhi National Centre for the Arts, New Delhi (1998).

Lack of Alternatives

The requirement of getting educated at affiliated institutions and for obtaining their recognised degrees, diplomas, or certificates for getting gainful employment in the organised sector forces students of different abilities to mould themselves to a centrally devised standard of testing. Those weak or differently-abled individuals thus effectively lose their access to education under the prevailing system. In India, this is a significantly large number of potential students.

Absence of a Right to Higher Education

35% of India's population in age group of 20-25 aspires for higher education but the present enrolment into higher education, is only 9% to 11% as against 45% - 85% in the developed countries.⁵⁴ Higher education is seen accessed by "around 8-10 percent of the population of the age-group 17-24 years" which is a very small section of the society and a significant factor for this is the high dropout rates at the primary and secondary levels which prevents

⁵⁴ Final Report of the Oversight Committee on the Implementation of the New Reservation Policy in Higher Educational Institutions, p. 3, http://planningcommission.nic.in/reports/genrep/resedu/rep_resedu.pdf [internet accessed on 17th February, 2009].

mobility to the higher level of education.⁵⁵ Since, there is no fundamental right to higher education there exist no financial support by the State and there is no major public initiative to develop sufficient infrastructure to cater to demand for higher education. Hence, left to private initiative, the opportunities for higher education becomes cost prohibitive for most aspirants.

Ineffective Policies of Affirmative Action

The laudable policy of reservation in educational institutions often operates in a vacuum without inputs for improvement sought from its beneficiaries. By lowering the qualifying marks needed for entry into educational institutions, it often forces the students who are weakly empowered to compete with the best talents in the country who also have access to better social facilities. Without adequate supportive mechanisms to improve their performance, the outcome is often disastrous to the students who lose their morale, self-esteem and confidence and drop out of the course altogether. The percentage of students dropping out of the professional education sectors is alarmingly higher among those who are

⁵⁵ K.R. Shah, "Traditional Sources of Financing Higher Education", *Economic & Political Weekly*, Vol. XLIII, No.7, February 16, 2008, p. 74-76 at pp. 75.

beneficiaries of the affirmative action policies of the government. Such populist policies do not address the real issue of empowerment of the weaker sections and only serves to deny effective access to education.

This is in addition to the actual reality of unfilled positions which points towards the non-effective implementation of policies of affirmative action. Professor R.K. Kale observes that the enrolment of SC and ST students in the Central Universities is very low compared to the share of such communities in the population of India as well as their enrolment in higher education at the national level.⁵⁶

“Even with the special provision of 50% reservation for SC and ST in 4 universities and 33% in another one, there is high deficit as far as SC and ST students are concerned in Central Universities which come under the control of UGC and MHRD. With the exception of one or two, it could be inferred that the Central

⁵⁶ R.K. Kale, “Enrolling or Rolling Out: SC and ST Students in Central Universities”, Part II, *University News*, Vol. 46, No. 22, June 02-08, 2008, p.6 at p. 9.

Universities have failed to implement the reservation policy for SC/ST effectively in admission.”⁵⁷

Such damning indictment based on statistical data sourced from the UGC as well as from the MHRD indicates the failure of the institutional mechanisms to implement the reservation policies designed to advance the targeted segments. This is a serious issue that requires immediate attention for planned affirmative action to succeed.

Disconnect between Curriculum and Reality

Further, in the spiritual land that is India, modern secular educational curriculum serves economic purposes only and thus militates against the very ethical and spiritual culture of the society. Ingrained social mores clash with the concept of education promoted by the powers that be and creates a dichotomy in the application of what is learnt with what is practised. This non-connection between the theoretical and practical aspects of education for promoting a way of life is a barrier to the use of

⁵⁷ R.K. Kale, “Enrolling or Rolling Out: SC and ST Students in Central Universities”, Part II, *University News*. Vol. 46, No. 22, June 02-08, 2008, p.6 at p. 10.

education as a tool for empowerment. The inability of the present educational curriculum to provide the necessary wherewithal to the students to face difficult choices in life thus denies access to education as a tool for empowerment in the most fundamental sense.⁵⁸

Absence of Proper Enforcement Measures

Even though primary education is compulsory there is a remarkable indifference to the legal enforcement measures to implement the same. Though it is a Constitutional right and a duty, there is no statute which makes it a crime if a child is not sent to school. Not even a single case has been reported where any body was prosecuted for preventing a child from attending school. It is unbelievable that children are not prevented from attending school in India given the reality of child labour. Absence of prosecution is

⁵⁸ *Value Education and Education for Human Rights*, V.C. Pandey, Ed., Isha Books, New Delhi (2005), pp. 2-3. "The overall shape of the curriculum is morally loaded by virtue of what it requires, what it makes available as electives, and what it ignores. ...for more than a century, there has been a powerful movement to make schooling and the curriculum serve economic purposes. Religion and art, by contrast, have been largely ignored. As a result, schooling encourages a rather more materialistic and less spiritual culture – matter of some moral significance. ...although all universities offer courses in ethics, usually in departments of philosophy or religious studies, very few public schools have such courses. Unlike either values clarification or character education programs, the major purpose of ethics courses is usually to provide students with intellectual resources drawn from a variety of traditions or schools of thought that might orient them in the world and help them think through difficult moral problems. As important as we all agree morality to be, it is striking that schools do not consider ethics courses an option worth offering."

thus indicative of lax enforcement and unenforceability rather than anything else. The lack of deterrence prevents many from sending their children to school and thus denies access to education to their unfortunate children.

Policy Barriers

The Governmental policy changes may also result in barriers to education just as it would also eliminate barriers. While the policy of providing for free midday meals would encourage schooling,⁵⁹ the policy of making education universal and compulsory only up to the age of fourteen acts as a barrier to education to those children above the age of fourteen. Policy barriers are often ideologically dogmatic and difficult to challenge before a court of law and are hence more formidable.

Equality under the Constitution can be understood to mean horizontal as well as vertical equity. Horizontal equity implies that individuals situated in the same horizontal plane should receive the same treatment. Vertical equity implies treating individuals on

⁵⁹ For a view which questions the success of mid-day meals as a tool for checking the drop-out rates of Dalit children see Chandra Bhan Prasad, "Midday Meals don't Work for Dalit Children", <http://infochangeindia.org/200503106326/Other/Analysis/Midday-meals-don-t-work-for-dalit-children.html> [internet accessed on 1st December, 2009.]

different planes but with similar needs in such a manner so as to compensate for their planar differences.

These two equity principles can be placed under the head distributional equity the criteria for assessment of which are “the extent to which it distributes resources according to need rather than factors such as income and social status.”⁶⁰ The State programmes for this which seeks to equalise opportunity is largely compensative of inequality in economic background and is mostly bestowed on the Scheduled Castes and Tribes.⁶¹

That there is no functional distributive equity⁶² in allocation of resources by the government is a factor that contributes to schools becoming unviable for lack of students⁶³ even while students drop

⁶⁰ Levacu as quoted by Choudhary Kameshwar, *School Based Management: Issue of Equity and Community Participation in Case of India, Perspective in Education*, January 2000, p.25, as quoted by Sheeba Pillai, *Equalising Educational Opportunities – A Need of the Hour*, JILT, Vol.2, 2004, 214 at p. 220.

⁶¹ Sheeba Pillai, “Equalising Educational Opportunities – A Need of the Hour”, JILT, Vol.2, 2004, 214 at p. 220.

⁶² Sheeba Pillai, “Equalising Educational Opportunities – A Need of the Hour”, JILT, Vol.2, 2004, 214 at p. 221. “Perusal of Levacu’s principles show that India has not attained Distributional equity in the educational system. There is no individualisation of schools or pupils. Fund allotment do (sic) not follow the norms of either vertical or horizontal equity, and this perhaps is the reason for the yawning gap between the privileged and underprivileged schools.”

⁶³ M.G. Radhakrishnan, *Class Dismissed*, <http://archives.digitaltoday.in/indiatoday/20020415/states3.html> [internet accessed on 1st December, 2009.] “The ruling United Democratic Front (UDF), as part of its cost-cutting measures, has decided to close down 2,650 ‘uneconomic’ schools - 993 government and the rest government-aided private schools. Of these, 105 schools had already been sent notices to hand over their keys by March 31. According to the Kerala Education Rules, a school is considered unviable if

out of schools due to factors including lack of facilities or quality in education. Schools with more facilities outside the governmental sector within the aided and unaided sectors attracts more students but charge more fees which forces many a student to drop out on account of economic incapacity.

This state of affairs can be mitigated by distribution of resources to schools according to their individualised needs. The participation of Panchayati raj institutions in this regard as envisaged under the decentralisation of power policy in the Constitution would be an ideal means for the same.⁶⁴ But then all the Panchayati raj institutions do not command the same control over resources and often the neediest ones will not have the resources to spend on the education sector. Moreover, entrusting the running of schools to local politicians need not necessarily improve anything on the ground since it is a collective failure of the political

its student strength is less than 25 per class. Unfortunately, in the state which enjoys the distinction of having the highest literacy rate in the country - 89.81 per cent against the national average of 52.21 per cent-the number of uneconomical schools rose from 170 in 1992 to 2,200 in 2000."

⁶⁴ Sheeba Pillai, "Equalising Educational Opportunities – A Need of the Hour", JILT, Vol.2, 2004, 214 at pp. 221-222. "... Distributional equity entails a very close scrutiny of the school system, individualising the schools and treating them as independent entities. Each school must be acknowledged as a separate identity so as to understand their due requirement. This can be undertaken with the active participation of the Panchayati Raj Institutions."

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class on a larger plane that has brought about the current state of affairs and there is nothing to suggest that the fate would be any different at a micro level.

There is a view that the economic goal of education should be superseded by the social, cultural and political goals of education at the primary level.⁶⁵ If social equity and quality can be achieved at the primary level, then its attainment at the higher levels of learning can be a smooth affair leading to inclusive economic growth and social cohesion.⁶⁶

Too Much Focus on Formal Education

Indian education now remains shackled in formal institutions completely devoid of any touch of reality. It has to be brought out of these formal systems and made an integral part of the daily living and working environment. Education is a life-long process that

⁶⁵ K.R. Shah, "Traditional Sources of Financing Higher Education", *Economic & Political Weekly*, Vol. XLIII, No.7, February 16, 2008, p. 74-76 at p. 75.

⁶⁶ K.R. Shah, "Traditional Sources of Financing Higher Education", *Economic & Political Weekly*, Vol. XLIII, No.7, February 16, 2008, p. 74-76 at p. 75. "The notion of "option value" of education (completion of one level of education allows one to proceed and benefit from the next level of education) has limited applicability in India at present. It is confined to the privileged section. ... It is the expensive school education that poses a bigger barrier to the children of poor families. In this sense, the fundamental right to basic education for the Indian poor appears a distant dream. ...Socially inclusive economic growth is mainly dependent on broadening the option value at the primary education level itself thus permitting the majority from diverse socio-economic backgrounds to go to higher levels."

cannot end with so many years of schooling.

The current pattern of education must be restructured to make it the core of sustainable living and people centred development.⁶⁷ An absence of such restructuring will take the life force out of our system of education.⁶⁸

Yet, sustained efforts have not been oriented through the official machinery to achieve this purpose. Nani Palkhivala has noted as follows:

“The Indian psyche remains today wholly untouched by any thought of the need for wider and more value based education. Education has never been a high-priority item in any Indian political party’s manifesto. The subject, which should have galvanised the nation into action forty years ago, is still kept in cold storage. Without the guidance, which can be derived from liberal education, a whole

⁶⁷ V.P. Kharbanda, “Facilitating Innovation in Indian Small and Medium Enterprises: The Role of Clusters”, *Current Science*, Vol. 80, No. 3, 10 February 2001, p. 343 at pp. 343-344. <http://www.ias.ac.in/currensci/feb102001/343.pdf> [internet accessed on 17th January, 2010]. “India has nearly three million SMEs, which account for almost 50 per cent of industrial output and 42 per cent of India’s total exports. It is the most important employment-generating sector and is an effective tool for promotion of balanced regional development. These account for 50% of private sector employment and 30 - 40% of value-addition in manufacturing.”

⁶⁸ J.V. Vilanilam, *Human Rights and Communication: Towards Alternative Systems of Development and Education*, National Institute of Social Work and Social Sciences, Bhubaneswar (2000), p. 159.

generation has grown up which is content to see crime and violence, casteism and communal frenzy, become the order of the day. ... Elementary education is “free” in theory; but many one-room schools in rural areas are today without even a blackboard and chalk. “Compulsory” it is not, even in theory. Men in public life have always looked upon Article 45 as a pious platitude, which is not calculated to give any mileage either to the politician or to his political party.’⁶⁹

An education system that promotes ability and confidence in self-sustenance, when made accessible as a basic right at the primary level may be able to ensure empowerment.

“In developing countries the challenge is not only to facilitate access to school, but also to ensure that pupils receive an education of quality, and one which is in harmony with their social and cultural environment. It is also necessary for the system to work as efficiently as possible, to avoid wastage of the limited resources available to meet the demand for

⁶⁹ Nani A. Palkhivala, *We, The Nation: The Lost Decades*, UBS Publishers, New Delhi (1984), p. 238.

education. Repetition is considered an important aspect for both the quality of education and, along with school survival, of the internal efficiency of the education system. A high proportion of repeaters in a class is likely to lower the quality of the education provided.”⁷⁰

The Non Formal Education programme of the government started in 1979-80 and catering in a significant manner to promote the girl child can be improved with better supervision for uniformity in quality to remedy this barrier to education.⁷¹

Subversion of Right to Education to Perpetuate Vested Interests

Systematic subversion of the educational system for the perpetuation of upper caste or ruling class dominance is yet another

⁷⁰ Usha Sharma, *Gender Mainstreaming and Women's Rights*, Authorspress, Delhi (2004), p. 20.

⁷¹ <http://www.census.gov/ipc/prod/wid-9801.pdf> [internet accessed on 25th December, 2005]. “The Non-formal Education (NFE) program was created by the Indian Government in 1979-80 to reach children that were not in the formal education system, particularly girls and working children. Classes are held at times that are convenient for the students, and the curriculum is adapted to their needs. The teacher is a local person who has been trained to run the NFE center and the classes are held either in the teacher’s home or after hours in already existing schools. In 1994, there were 255,000 centres serving 6.4 million children. Approximately 40 percent of the centres are exclusively for girls (The World Bank, 1997b). While the NFE program has the potential to solve many of the problems with access to education, as with any type of education program, the quality varies from location to location (Rugh, 1994).”

barrier to accessing education.⁷² This leads to disproportionate representation in governmental and other institutions. Inadequate representation results in further deprivation of opportunities to the disadvantaged classes. Such opportunities are often gained only through access to formal education.

In the light of what has happened elsewhere in the world we can see that subversion of the right to education by the ruling classes can perpetuate ignorance or promote an ideology that freedom is divisible and exclusionary.⁷³

Another deterrent is a policy outlook that wants to promote persuasion as the means of promoting mass education rather than

⁷² <http://www.ambedkar.org/research/CasteBased.htm> [internet accessed on 13th February, 2010]. One of the examples cited by champions of equity is the disproportionate dominance of upper castes in elite educational institutions in the country resulting in policies of admission and evaluation which discriminates against persons from the lower castes.

⁷³ R.S. Saini, *Apartheid, Fundamentalism and Humane Global Governance*, Authorspress, Delhi (2005), p. 5. "The Afrikaner votaries of apartheid, the European-Americans who under the rubric of Manifest Destiny claimed a God given right to occupy the Continental United States and conquer, confine, expel, or kill those in the war, and extended those ideas across the oceans - these are all illustrations of the ideological school that freedom is divisible and exclusionary. This concept of freedom is based on inequality for which a variety of earthly and divine sanctions have been invented. It creates choice, prosperity and mobility for some, at the cost of limiting or reducing it for others, generally with some rationalising and moralistic cover. We might call this the apartheid school of freedom. The care of any form of apartheid, whether local or global, is the assertion of power by the privileged, under the guise of superiority, for the overall purpose of securing unequal benefits, often with the accompanying rationalisation that it is, after all, for the benefit of those who are being dominated. Such privilege cannot long be maintained without the threat and use of violence, intimidation, and fear that creates exclusion by race, caste, nationality, or gender."

compulsion. This view is promoted consciously by vested interests that want a greater allocation of funds for subsidising higher and professional education that benefit a few than on primary and secondary education that benefit the masses.⁷⁴

ACCESS AND OPPORTUNITIES IN EDUCATION

Though barriers to education exist denying access to education in a meaningful manner there have been concerted efforts to identify and overcome these barriers. Some of such efforts are assessed here.

IMPARTING LOCALLY RELEVANT VOCATIONAL TRAINING

In India, under the National Skills Development Council chaired by the Prime Minister, vocational education programmes are

⁷⁴ Anita Rampal, "Unpacking the 'Quality' of Schools", <http://www.india-seminar.com/2004/536/536%20anita%20rampal.htm> [internet accessed on 5th September, 2007]. "...soon after the first decade of independence was over and it was clear that commensurate financial commitments to ensure the constitutional promise were not forthcoming, state policy strategically shifted focus from compulsion to persuasion. This consciously promoted the belief that only some genuinely wanted education while most others, who also contributed to 'wastage' by dropping out of schools without learning much, were unwilling. J.P. Naik, former Educational Advisor to the Government of India, candidly wrote about the vested interests demanding greater financial allocations and subsidies for higher education meant for the privileged social groups at the cost of funds for mass primary education. 'We were in fact called fools who try to educate those who do not want to come to school and do not want to learn. The first duty of a government, we were told, was to educate those who were willing to learn. The task of those who do not even want to learn should come later.'" [End notes omitted].

primarily the concern of the Ministry of Human Resource Development and the Ministry of Labour and Manpower. Vocational training is also dealt with by the other Ministries like that of Railways, Mines, Agriculture, Transport, Health and Family Welfare, Defence, etc.

Within the Ministry of Human Resource Development, under the Department of School Education and Literacy, there is a centrally sponsored scheme of Vocationalisation of Secondary Education at Plus Two level since 1988. It provides an alternative to those pursuing higher education. This Scheme has according to the *Annual Report 2005-06* of the Ministry of Human Resource Development provided for diversion of about ten lakh students at the Plus Two level. The funds released under the Scheme till 2005-06 was Rs. 758 crore and it has been utilised to create infrastructure, provide financial assistance to NGOs for implementing specific innovative projects for short term courses, etc.⁷⁵

The University Grants Commission has also made moves in the direction of providing relevant vocational training. The aim is to

⁷⁵ Department of Elementary Education and Literacy, Department of Secondary and Higher Education, Ministry of Human Resource Development, Government of India, *Annual Report 2005-06*, p. 244.

provide subjects that can provide a career option to the students undertaking such training. This is one significant means of empowering through education.⁷⁶

ESTABLISHMENT OF COMMUNITY COLLEGES

The concept of community colleges can increase access to the lesser privileged individuals by ensuring the participation of the local community to become self sufficient by training individuals to serve its needs. Thus gainful employment at the local level can ensure emancipation of larger sections of people. It will also ensure optimum utilisation of common resources. The aim and character of a community college is described thus:

The community college “is aimed primarily at empowerment of the socio-economically weaker and disadvantaged sections of society through skills development, thus providing education for a livelihood. The community

⁷⁶ <http://www.ugc.ac.in/relevance.html> [internet accessed on 28th April, 2003]. “To make education more relevant, the UGC has introduced Vocational Education in 35 subjects from the year 1994-95. The World Bank has also been approached for financial assistance to enable the Commission to expand the scheme. At the later stage of the scheme, several rural oriented schemes will be introduced so that relevant options are available to the students in the colleges in the backward rural, hilly and low rainfall areas of the country. It is planned to introduce flexibility in the scheme and to introduce more career oriented subjects in many more institutions so that a beginning impact may be felt on changing the curriculum structure.”

college is an alternative system of education aimed at helping the urban poor, rural poor, tribal poor, and women find gainful employment in collaboration with the local industry and the community.... It responds to the challenges of exclusion and elimination from the formal system, mismatch between education and employment capability, poverty, problems of unemployment, under-employment and unemployability, and school dropouts.”⁷⁷

It is also relevant in that since the education provided is for locally relevant needs, the persons who pursue it would also be local residents. This decreases the pressure on admissions to educational institutions and enables the genuinely interested persons to pursue education of their choice.

Access to education is also affected by the growing globalisation of the Indian economy which offers both challenges

⁷⁷ Xavier Alphonse, S.J., “Education for a Livelihood”, *The Hindu*, Kochi ed., Wednesday, December 21, 2005, p. 13, Col. 3-6. “The system is of the community, for the community, and by the community, to produce responsible citizens. The community college promotes job-oriented, work-related, skill-based, and life-coping education. The key attributes are access, flexibility in curriculum and teaching methodology, cost effectiveness, and equal opportunity. All this is in collaboration with the industrial, commercial, and service sectors of the local area, and responding to the social needs and issues of the local community. The results are internship and job placement within the local area, promotion of self employment and small business development, declaration of competence and eligibility for employment.”

and opportunities.

GLOBALISATION AND ACCESS TO EDUCATION

Some studies indicate that globalisation has had a greater effect in growing economies of Asia than anywhere else in the world resulting in increased educational opportunities and access to larger number of industries that have relocated to Asia.⁷⁸

In the field of higher education women's enrolment is only one third of the total enrolment in the country as compared to 65% in Australia and 90.2% in Sweden.⁷⁹ Though the proportion of girls enrolled in primary education increased from 84 to 96 percent between 1998 and 2002, more than half of Indian women in the age group of 15-19 years have had no primary education.⁸⁰

Globalisation has brought about a change in perception about the need for education. The General Agreement on Trade in Services adopted by the World Trade Organization in 1995

⁷⁸ United Nations Department of Economic and Social Affairs, *World Youth Report 2007*, United Nations, New York (2007), p. xvii.

⁷⁹ S.P. Malhotra, "Business Behaviour in Indian Higher Education System and its Impact on Equality", in Yazali Josephine, Compiler, *Globalisation and Challenges for Education*, National Institute of Educational Planning and Administration, Shipra Publications, Delhi (2003), 758-770 at p.766.

⁸⁰ United Nations Department of Economic and Social Affairs, *World Youth Report 2007*, United Nations, New York (2007), p. xvii.

classifies education as a tradable commodity.⁸¹ A greater integration of the world economy has transformed the way in which information is used commercially. This has resulted in a knowledge economy where the ability to gather information on time and on line decides the wealth of nations. Higher education is a prerequisite for survival in such an economy since increased opportunities as a result of growth of the global economy is directly proportional to the availability of highly skilled human capital.⁸² Knowledge economy thus provides a significant chance for success to the marginalised groups, since it is dependent wholly on modern formal higher education. Being independent of material means of production the have-nots have a greater chance of social mobility through education in the globalised economy than was available hitherto. Hence, globalisation provides a significant avenue for social liberation for the marginalised sections of the society, provided they obtain greater opportunities at receiving formal higher education.

The education that enables a person to learn to multitask

⁸¹ Article VII of the General Agreement on Trade in Services adopted by the World Trade Organization in 1995.

⁸² P. Geetha Rani, "Financing Education in India in the Macro Economic Reform Period", in Yazali Josephine, Compiler, *Globalisation and Challenges for Education*, National Institute of Educational Planning and Administration, Shipra Publications, Delhi (2003), 771-784 at pp.771.

would be more useful in a globalised economy where the market demands new skills constantly.⁸³ Globalisation brings with it the capitalist ideals of privatisation and withdrawal of the State from its traditional strongholds in socialist economies.

Since the 1980s, the conventional role of the State in financing education and more particularly higher education has come under severe attack. The balance of payment crisis that the Government of India faced in 1991 ushered in policy measures to reduce the level of subsidies in different sectors of economy. Higher education is now considered as a non-merit goods and has indirectly justified the gradual withdrawal of the State from this field citing lack of resources.⁸⁴ Privatisation is now advocated as the panacea for all ills in all areas of higher education. This has resulted in private managements being encouraged to start new courses with no financial commitment on the part of the State. Thus today, we find a rapid growth in the number of self-financing courses in private

⁸³ Martin Carnoy, *Globalisation and Educational Reform: What Planners Need to Know*, International Institute for Educational Planning, UNESCO, Paris (1999), p. 84, <http://unesdoc.unesco.org/images/0012/001202/120274e.pdf> [internet accessed on 30th November, 2009.]

⁸⁴ S.P. Malhotra, "Business Behaviour in Indian Higher Education System and its Impact on Equality", in Yazali Josephine, Compiler, *Globalisation and Challenges for Education*, National Institute of Educational Planning and Administration, Shipra Publications, Delhi (2003), 758-770 at pp.759.

colleges.

Indiscriminate privatisation threatens the very philosophy behind the Constitutional ideals safeguarding the right to education when it results in the closure of educational institutions due to non-viability brought about by inadequate funding by the State thus leaving the less financially endowed persons at the mercy of the private managements.

This is in spite of the fact that liberalisation pre-supposes structural changes that would adversely affect the already vulnerable sections of the population in the absence of adequate social security nets for them.⁸⁵ This could further decrease their chances of getting a proper education.⁸⁶

Another aspect of globalisation is the compulsion on India to open up its education sector to foreign players. Such educational

⁸⁵ Marc Bacchetta and Marion Jansen, *Adjusting to Trade Liberalization: The Role of Policy, Institutions and WTO Disciplines*, WTO Publications, Geneva (2003), p. 19. "...the gains from trade liberalization often are spread thinly across the economy, the adjustment costs tend to be focused on particular groups of workers, entrepreneurs and owners. In other words, adjustment costs that are very small for the economy as a whole can be very large for particular groups..."

⁸⁶ http://planningcommission.nic.in/reports/articles/ncsxna/art_poor.pdf [internet accessed on 24th January, 2010]. "India has been left behind in the field of basic education even by countries like Ghana, Kenya, Myanmar, Zimbabwe and Zambia, not to speak of the Asian Tigers who are far ahead of India in the field of primary education. Without a positive thrust towards the socio-economic transformation of the marginalised groups, growth may bypass the poor and safety net schemes may only remain short term palliatives. Thus economic growth *per se* is not the solution."

ventures concentrate in the higher education sector since it provides the highest and fastest returns on investment. Though the government has not yet freed the sector of education completely to the world, it has entered into many arrangements with foreign governments in the field of education.⁸⁷

The Government policy in this regard has not been very transparent. In an unstarred question raised in the Rajya Sabha on whether the government proposed to allow foreign direct investment (FDI) in the field of education, the Honourable Minister of State in the Ministry of Human Resource Development, Shri. M.A.A. Fatmi responded that there was no separate sectoral policy notified for the education sector. He went on to state that by virtue of Press Note 2 (2000 Series), FDI up to 100% was allowed on automatic route in the Education Sector, and in addition, as indicated in the same Press Note No.2 (2000 series), the investor could choose to make an

⁸⁷ The Government has signed Education Exchange Programmes (EEPs) / Memorandum of Understanding (MOU) with 20 countries in the Education sector. These EEPs/MOUs also incorporate collaboration in the area of Higher Education. The UK Government had announced that it had earmarked £10 million over a period of five years starting with financial year 2006-07 for the Education Plan announced by the Prime Minister of U.K. in September, 2005. The main aim would be to strengthen existing links in the education sector and to build sustainable academic linkages between India and U.K. Government of India, Ministry of Human Resource Development, Department of Secondary Education and Higher Education, Rajya Sabha unstarred question no. 1368, answered on 07.08.2006. <http://164.100.24.219/rsq/quest.asp?qref=117870> [internet accessed on 14th November, 2006].

application direct to the Foreign Investment Promotion Board (FIPB) without availing the automatic route. The Honourable Minister also stated that the AICTE had made regulations for entry and operation of foreign universities/institutions imparting/intending to impart technical education in India.⁸⁸

The Government had not taken a final view with regard to allowing the entry of foreign universities in the country in higher education sector as on 28.11.2005,⁸⁹ yet it had already allowed foreign direct investment in the sector from as early as 2000,⁹⁰ and allowed the AICTE to frame regulations for entry and operation of foreign universities/institutions imparting/intending to impart technical education in India on May 25, 2005.⁹¹ All these indicates

⁸⁸ Government of India, Ministry of Human Resource Development, Department of Secondary Education and Higher Education, Rajya Sabha unstarred question no 790, answered on 27.02.2006. <http://164.100.24.219/rsq/quest.asp?qref=112721> [internet accessed on 14th November, 2006].

⁸⁹ Government of India, Ministry of Human Resource Development, Department of Secondary Education and Higher Education, Rajya Sabha unstarred question no 467, answered on 28.11.2005. <http://164.100.24.219/rsq/quest.asp?qref=109882> [internet accessed on 14th November, 2006].

⁹⁰ FDI in the Education Sector (including higher education) is allowed under the automatic route as per policy guidelines of 11th February, 2000, of the Department of Industrial Policy & Promotion. Government of India, Ministry of Human Resource Development, Department of Secondary Education and Higher Education, Rajya Sabha unstarred question no 137, answered on 27.02.2006. <http://164.100.24.219/rsq/quest.asp?qref=112682> [internet accessed on 14th November, 2006].

⁹¹ The 'Regulations for Entry and Operation of Foreign Universities/Institutions Imparting Technical Education in India' was notified by the All India Council for Technical Education (AICTE) on May 25, 2005. Government of India, Ministry of Human Resource Development, Department of Secondary Education and Higher

that the government is either in two minds with regard to opening up the education sector to forces of globalisation or it is afraid of the political consequences and is shying away from a public debate on the issue before finalising its stance. Vacillation on such an important issue bodes ill for the educational security of the poor and would adversely affect their efforts at empowerment.

Even in the case of the primary education sector, where there is as yet no definite policy encouraging resource mobilisation from foreigners, globalisation has brought with it foreign direct investment.⁹² When primary education gets to be run under the influence of foreign capital, the Nation's very sovereignty is likely to be at risk.

The concern about the impact of globalisation in the educational sector is evident from the discussions in the Parliament. Even while the Ministry of Commerce had initiated discussions with the World Trade Organisation to allow foreign educational

Education, Rajya Sabha unstarred question no 137, answered on 27.02.2006. <http://164.100.24.219/rsq/quest.asp?qref=112682> [internet accessed on 14th November, 2006].

⁹² Government of India, Ministry of Human Resource Development, Department of Secondary Education and Higher Education, Rajya Sabha unstarred question no 2587, answered on 09.08.2002. <http://164.100.24.219/rsq/quest.asp?qref=71223> [internet accessed on 13th November, 2006].

institutions in the country to provide higher education,⁹³ the Ministry of Human Resources Development explained the government's view on this matter thus:

“The Government has been against any haste in opening the education sector to foreign participation under a multilateral regime without adequate safeguards and also would not like to let the education sector be used as a bargaining chip in obtaining any gains in other sectors. The role of the education sector in developing human resources to promote and sustain rapid economic and social growth cannot be over emphasized. It has been the considered view of the Government that India should retain all the options in the education sector to be exercised at a time most suitable in national interest.”⁹⁴

⁹³ Priya Vijayan, “General Agreement on Trade and Services: Implications on Higher Education in India”, [2006] C.U.L.R. 20-41 at p. 36. “India had submitted a Revised Offer in August 2005 which included educational services in its negotiations under GATS of the WTO.”

⁹⁴ Government of India, Ministry of Human Resource Development, Department of Secondary Education and Higher Education, Rajya Sabha unstarred question no 2430,

One of the objectives of the UGC scheme of 'Universities with Potential for Excellence' is to achieve excellence in education, training and research to face the challenge of globalization.⁹⁵

With privatisation being an inevitable component of globalisation, its immediate impact on access to education could be seen in the area of higher and professional education where the returns of investment are perceived to be high.

PRIVATISATION AND ACCESS TO EDUCATION

State withdrawal from higher and professional education is now an accepted and inevitable⁹⁶ reality. This is evident from the structural adjustment programmes initiated by the Central Government under the dictates of the external funding agencies.⁹⁷

answered on 21.08.2006. <http://164.100.24.219/rsq/quest.asp?qref=118012> [internet accessed on 13th November, 2006].

⁹⁵ Government of India, Ministry of Human Resource Development, Department of Secondary Education and Higher Education, Rajya Sabha unstarred question no 4851, answered on 09.05.2005. <http://164.100.24.219/rsq/quest.asp?qref=101825> [internet accessed on 22nd November, 2006].

⁹⁶ S.P. Malhotra, "Business Behaviour in Indian Higher Education System and its Impact on Equality", in Yazali Josephine, Compiler, *Globalisation and Challenges for Education*, National Institute of Educational Planning and Administration, Shipra Publications, Delhi (2003), 759-770 at p.770.

⁹⁷ Montek S. Ahluwalia, "India's Economic Reforms", <http://planningcommission.nic.in/aboutus/speech/spemsa/msa012.doc> [internet accessed on 17th January, 2010]. "The past three years have seen major changes in India's economic policies marking a new phase in India's development strategy. The broad thrust of the new policies is not very different from the changes being implemented in other developing countries and also all over the erstwhile socialist world. They aim at reducing the extent of Government controls over

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Not surprisingly, the phenomenon of privatisation and commercialisation of education that we see in India today had happened in the English speaking world in the not so distant past as a result of greater integration of their economies in tune with the economics of industrialisation.⁹⁸

The current debates on privatisation in the higher and professional education sectors focus on financing, fee structures and governmental regulations rather than on access or quality. Access is primarily dictated by economic capacity even now. Directly, it determines whether the student will pursue a particular stream or not. Indirectly, it determines whether a student gets to enjoy

various aspects of the domestic economy, increasing the role of the private sector, redirecting scarce public sector resources to areas where the private sector is unlikely to enter, and opening up the economy to trade and foreign investment.”

⁹⁸ Michael A. Peters, “Higher Education, Globalisation and the Knowledge Economy: Reclaiming the Cultural Mission”, http://www.acm.org/ubiquity/views/pf/v8i18_peter.pdf [internet accessed on 10th December 2008.] The transformation of higher education in Anglophone countries from a universal welfare entitlement into a private investment in ‘human capital’ established a similar pattern shared by a number of OECD countries. First, a transparent alignment of the university system to reflect the needs of an emerging ‘post-industrial’ economy, with increasing demands for highly trained, multi-skilled, tertiary-educated workers. Second, the introduction of new forms of corporate managerialism and the emulation of private sector management styles; the corporatization of the university system – an emphasis on so-called ‘clear accountability structures’ including the attempted simplification of goals or purposes, and the institution of new forms of delegated authority. Third, the introduction of corporate or strategic planning and the move to institute a form of ‘ownership monitoring’ in order, allegedly, to reduce the financial risk of the State. Fourth, under neo-liberalism, there was an attack on faculty representation in university governance and the general attempt to discredit democratic forms of university governance on ‘efficiency’ grounds. Finally, the introduction of user-charges, student loans, and the creeping privatisation of the system as a whole took place to varying degrees in countries like New Zealand, Australia, Canada and the United Kingdom.

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subsidised education or not.⁹⁹ In the current market circumstances the ability to corner the top ranks in any entrance examination is also linked to the preparation that a student is able to do outside of his regular stream of studies and this in turn is a measure of his economic capacity.¹⁰⁰

As the then President of India, Dr. A.P.J. Abdul Kalam, pointed out in his address to the Nation on the eve of the 58th Independence Day in 2004, “the preferred school concept is arising

⁹⁹ The decisions of the Supreme Court since *Unnikrishnan* have placed a premium on the rank one gets in the entrance examinations as the sole criterion for determining merit and hence the ability to study in a free seat at government rates is determined by the ability to get a higher rank which in turn is a test of how economically resourceful one is.

¹⁰⁰ Rekha Kaul, “Whither Equity?”, <http://www.india-seminar.com/2000/494/494%20rekha%20kaul.htm> [internet accessed on 5th September, 2007]. “The idea behind the Unnikrishnan judgement in devising the free and payment seat scheme was to provide enhanced opportunities to meritorious students who may otherwise not be able to pay the enhanced fee prescribed by the government for such colleges. Such a system would mean correspondingly greater financial burden on payment students; the rationale for the method being ‘that a candidate who is stealing a march over his compatriot on account of his economic power should be made to pay not only for himself but also for other meritorious students.’ This judgement, in its ‘social justification’ argument behind the 50% rule of free and payment seats, failed to recognize that merit based on a competitive examination is almost always likely to favour those with better quality schooling and consecutively the more affluent students. The students in the top bracket who qualify for the Common Entrance Test would have, in most cases, access to better coaching. They would also be allocated free seats. If a study were to be undertaken on the socioeconomic background of such students, their family-income profiles would, in most cases, also prove to be higher. Research proves that access to education is determined by one’s position in the socioeconomic hierarchy. Given the inability of the weaker sections to see their wards through school education, their elimination takes place well before they reach the level of higher education. When there is little equality at the elementary level, it is hard to conceive of equality at the higher levels of education. Here the rhetoric of equal opportunity can only benefit those sections who have already benefited from the state’s inegalitarian policies.”

because of differential quality and standards of teaching.”¹⁰¹ Privatisation of education is a symptom of state failure in the primary, secondary and higher education sectors. It may also result in lowering of standards and quality to accommodate the primary providers of private education which are based on caste and religion.

The mushrooming growth of such institutions may have created the irreconcilable position of quality education being denied to students on account of socio-economic incapacity.

Though the reservation policies have by and large created favourable conditions for the depressed classes to catch up with mainstream life it has not increased significantly the number of beneficiaries from among these classes in the areas where reservation is made available to them. This is true especially in the higher professional education sector where there has been a plethora of litigation for and against the reservation policies.¹⁰² The increase

¹⁰¹ <http://education.nic.in/Elementary/Policyel/presidentspeech-14082004.asp> [internet accessed on 12th September, 2009.]

¹⁰² Marc Galanter, *Competing Equalities: Law and the Backward Classes in India*, Oxford University Press, Delhi (1984), p. 64 - "...Virtually all of the litigation about the compensatory discrimination policies in education has been about reservations in medical and engineering colleges for the backward classes. Although it remains unclear just how much of the increase in education for the backward classes represents 'special treatment' over and above what is provided for the whole population, it is clear that compensatory discrimination provisions can be credited with securing the inclusion of these groups as beneficiaries of the educational explosion. And it has enabled them to

in litigation indicates entrenched economic interests but it can also be explained by the fact of increased awareness and empowerment among the beneficiary communities which is a good thing.¹⁰³

The political leadership in India is aware of the need to target the weakest sections, for any worthwhile attempt at empowerment through education.¹⁰⁴ But for this, there has to be increased spending towards ensuring quality primary education for all since it is the ultimate foundation for all future growth.¹⁰⁵ Though one can ensure an admission to a higher professional educational institution through

'catch up' to some extent. If 'catching up' is taken to mean greater percentages gains over a base line period for the backward than for others, there clearly has been catching up in this sense. But 'catching up' may also mean narrowing the gap (expressed, e.g., in percentages) between the backward and the rest of the population. Here, it seems, there has been substantial catching up at the lower educational levels, but not at the higher levels."

¹⁰³ Justice O. Chinnappa Reddy, *The Indian Legal System and Human Rights*, Centre for Socio-Legal Research and Documentation Service, Madras (1987), p. 38 - "...Transformation of the legal profession is an essential step if human rights are to be transformed from rhetoric to reality."

¹⁰⁴ S.R. Bommai, "Elementary Education for Empowerment", in Dr. S. Subramanian, *50 Years of India's Independence*, Manas Publications, New Delhi (1997), p. 305 at p. 307. From the speech of the Union Minister, Human Resources Development, at the National Conference of State Ministers of Education, New Delhi on August 10, 1996 - "The task of universalising elementary education cannot be accomplished unless we pay particular attention to girls, children from the scheduled castes, scheduled tribes, minorities and other disadvantaged groups."

¹⁰⁵ V.R. Krishna Iyer, An Elementary Problem, *The New Sunday Express Magazine*, July 23, 2006, p.2 - "Primary education ought to be universal in operation; illiteracy is our nation's *bete noire*. Never a single social soul should exist sans primary education. This is an inflexible fundamental. Whatever the cost to the exchequer, this value must come first. Industry is important, technology and research are great imperatives; communication, competitive production and efficient, decentralised progress freely accessible to the laity, and even judicial litigation and forensic efficiency with early finality, are high priorities. But never is basic education, in a broad ubiquity, second. All the natural resources must be devoted to quantitative and qualitative education to the lowliest and the last."

the reservation policy the successful completion of higher professional education is highly dependent on the quality of primary education that a person receives.¹⁰⁶ Though the progress has been slow, there is commitment on the part of the successive governments for increasing the availability of primary education.¹⁰⁷ Still, access to education can only be ensured by a vigilant community sensitised of the values behind the legislative policy of affirmative action.

Since commercialisation of education has already become a reality and private schools are found to offer equal if not better quality education than government schools¹⁰⁸ there is a need to

¹⁰⁶ N. Ajith Kumar, *Private Cost of Medical and Para-Medical Education in Kerala*, Kerala Research Programme on Local Level Development, Centre for Development Studies, Thiruvananthapuram (2004), p. 40 - "Upward mobility through higher education would be possible only if the huge disparities in school education are brought down. It is high time that the State considered ways to remove entry barriers to professional education."

¹⁰⁷ Kishore Singh, "Right to Education and International Law: UNESCO's Normative Action", 2004 *IJIL* 488 at p. 520. The author quotes the Statement by India's Representative to UNESCO's Executive Board during its 166th Session in April 2003 – Summary Records of the Executive Board, 166 EX/SR. (Paris, 11 July 2003), pp. 1-11 - "...India's Representative to UNESCO's Executive Board stated during its 166th Session in April 2003, "the fundamental right to education was enshrined in the Constitution of India, and the country had earmarked US \$ 20 billion for basic education upto 2010. That was an act of faith on the part of India's constitutional democracy to guarantee the fundamental right of every child to education and to launch a far-reaching initiative to eradicate illiteracy.""

¹⁰⁸ *T.M.A. Pai Foundation v. State of Karnataka*, (2002) 8 SCC 481 at p. 546. At para. 61 of the judgement, the Chief Justice observes that, "It is no secret that the examination results at all levels of unaided private schools, notwithstanding the stringent regulation of the government authorities, are far superior to the government maintained schools. There is no compulsion on students to attend private schools. The rush for admission is

ensure that education imparted by these institutions are regulated for the general welfare of the society. To regulate such institutions is the bounden duty of the government.¹⁰⁹ The extent of such regulations is always a matter of public policy and must balance the competing claims of social needs and individual rights both being components of social justice.¹¹⁰

An analysis of the above aspects would indicate that barriers to access education are formidable. The issues of poverty, infrastructure, quality, and uniformity require legislative intervention to ensure equitable access. Social acceptance of the utility of education is needed for surmounting the barriers due to gender, child labour, caste consciousness, lower marriage age, etc

occasioned by the standards maintained in such schools, and recognition of the fact that State run schools do not provide the same standards of education."

¹⁰⁹ *Aravinder Singh v. State of Punjab*, AIR 1979 SC 321. The Supreme Court pointed out that under the Constitution every instrumentality of the State must necessarily perform its own functions. Though non-essential functions may be delegated to other agencies, they must always retain their own authority and control. To do so otherwise 'amounts to betrayal of the Constitution'.

¹¹⁰ Arvind Sharma, *Reservation and Affirmative Action – Models of Social Integration in India and the United States*, Sage Publications, New Delhi, (2005), p.172 - "...the modes in which affirmative action in the USA and the reservation policies in India tend to be viewed are a function of the time-horizon under which they are viewed. ... the basic distinction turns on the individual and the group. ... Focus on the individual sets a particular set of consideration into motion, and focus on the group another. In the US the major tendency is to focus on the individual – in keeping with its traditions of individualism. In India the tendency is to focus on the group, in keeping with its traditions embodied in the institution of caste. ... it is relatively easy to correct one injustice by creating another. But justice, in order to be just, must be fair for all the parties concerned and not just for some."

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since legislations curbing their ill-effects are already there. Globalisation and resultant privatisation has raised the costs of education and governmental intervention through reservations and scholarships are needed for ensuring equitable access to education. State intervention is a must for providing equitable access though the means of intervention can be changed. Ways to provide direct subsidy to the individuals could be a more effective way to ensure better equity in access to education.

Policy formulations and legislative interventions would mean nothing without an adequate response from the judiciary. Being at the point where conflicts of interests are first noticed, the judicial policy on matters relating to education often determines the effectiveness and success of legislative interventions. A scrutiny of the judicial interpretations on the right to education is attempted in the next chapter.

CHAPTER VII

JUDICIARY ON RIGHT TO EDUCATION

SUPREME COURT IN THE FIELD OF EDUCATION

There are a number of decisions of the Apex Court on various aspects of education. It is necessary to trace the important decisions of the Supreme Court over the years to appreciate the complexities involved in the issue of access to education.

One of the foremost issues the Court has had to time and again determine relates to admission to educational institutions.

ISSUE OF DISCRIMINATION IN EDUCATIONAL ADMISSION

The Supreme Court had occasion to consider the nature of the fundamental right guaranteed under Article 29(2) in the context of a challenge against communal reservation in admissions. It ruled that the right under Article 29(2) was available to all citizens by virtue of their citizenship.

In *State of Madras v. Smt. Champakam Dorairajan*,¹ the principle of communal reservation followed in the State of Madras by which the limited seats for medicine and engineering were made selectively available to the aspirants was challenged. The Court found this communal reservation in admission to educational

¹ AIR 1951 SC 226.

institutions getting aid from the State to be a violation of Article 29(2).

The Court considered Article 29(2) and observed thus:

“It will be noticed that while clause (1) protects the language, script or culture of a section of the citizens, clause (2) guarantees the fundamental right of an individual citizen. The right to get admission into any educational institution of the kind mentioned in clause (2) is a right which an individual citizen has as a citizen and not as a member of any community or class of citizens.”²

Restriction placed on admission through governmental policies was again the subject matter of challenge on the basis of discrimination against the service provider. The challenge was rooted on the fundamental rights to preserve culture.

ISSUE OF ADMISSIONS AND CULTURAL RIGHTS

The Court considered Article 15 and held it to be quite general and wide in its terms and applied to all citizens, whether they belong to the majority groups, and gave protection to all

² AIR 1951 SC 226 at p. 227.

citizens against discrimination by the State on certain specific grounds. In *State of Bombay v. Bombay Education Society*,³ the Court determined the scope of the respective protection guaranteed under Articles 15 and 29(2) when the Society runs schools were asked by the Government to not admit students who were not Anglo-Indians or persons of non-Asiatic descent. Court held that Article 29(2) conferred a special right on citizens for admission into educational institutions maintained or aided by the State. The Court discounted any special privilege to the minorities under the provisions of Article 29(2), and went on to observe that,

“To limit this right only to citizens belonging to minority groups will be to provide a double protection for such citizens and to hold that the citizens of the majority group

³ AIR 1954 SC 561. In this case, the Inspector of Anglo-Indian Schools, Bombay State and Educational Inspector, Greater Bombay, informed the Headmaster of Barnes High School run by the Education Society of Bombay - a company incorporated under the Indian Companies Act, that in pursuance of government policy they could admit to their English medium classes only students belonging to 'section of citizens the language of which is English namely, Anglo-Indians and citizens of non-Asiatic descent.' Another circular informed that the government would consider whether a change was necessary in allocation of grant among different Anglo-Indian Schools in the interest of equity consequent to the new policy. The Bombay High Court cancelled the above orders. In the appeal the Supreme Court found the circular to violate Articles 29(2) and 337 of the Constitution. Article 29(2) so much so that the fundamental right to education of choice available to all citizens were violated and Article 337 in that it imposed additional obligations on the Anglo-Indian community for governmental aid, especially over and above the duty to have at least 40% of annual admissions to be made available to persons other than the Anglo-Indians.

have no special educational rights in the nature of a right to be admitted into an educational institution for the maintenance of which they make contributions by way of taxes. There is no cogent reason for such discrimination.”⁴

The nexus between Articles 29(1) & 30(1) on the right to impart instruction in the medium of choice came under the scrutiny of the Court. It observed that where a minority like the Anglo-Indian Community, based on religion and language, has the fundamental right to conserve its language, script and culture under Article 29(1) and has the right to establish and administer educational institutions of their choice under Article 30(1), then there must be implicit in such fundamental right, the right to impart instruction in their own institutions to the children of their own Community in their own language. Any other interpretation would deprive Article 29(1) and Article 30(1) of the greater parts of their contents. The Court proceeded to hold that the police power of the State to determine the medium of instruction must yield to this fundamental right to the extent it was necessary and could not be permitted to run counter to

⁴ AIR 1954 SC 561 at p. 567.

it.⁵

The issue of admissions was again the matter of concern when the State tried to dictate the medium of instruction. In *D.A.V. College v. State of Punjab*,⁶ the Court took the view that neither the University nor the State could provide for imparting education in a medium of instruction in a language and script which stifles the language and script of any section of the citizens. It vetted the issue on the touchstone of Articles 29 and 30 and held that such a course would trespass on the rights of those sections of the citizens who

⁵ The Court struck down clause 5 of the Government circular order No. SSN 2054(a), dated January 6, 1954 denying admission on ground of language on the ground of Article 29(2). The Clause stated thus, "subject to the exceptions hereinafter provided, no primary or secondary school shall from the date of these orders admit to a class where English is used as a medium of instruction any pupil other than a pupil belonging to a section of citizens the language of which is English namely, Anglo-Indians and citizens of non-Asiatic descent." The exception clause (7) says, "... these schools are advised to open progressively divisions of Standards using Hindi or an Indian language as the medium of instruction, starting from Standard I in 1954." It reasoned that even if a section of citizens other than Anglo-Indians and citizens of non-Asiatic descent whose language is English, may get admission under the impugned order, citizens whose language is not English were debarred by it from admission to a School where English is used as a medium of instruction in all the classes. The object of the impugned order did not obviate the prohibition of Article 29(2) because the effect of the order involves an infringement of this fundamental right, and that effect was brought about by denying admission only on the ground of language. Thus the impugned order offended against the fundamental right guaranteed to all citizens by Article 29(2).

⁶ *D.A.V. College v. State of Punjab*, (1971) 2 SCC 269: AIR 1971 SC 1737. In this case, the Arya Samajists objected to the compulsory re-affiliation of their college with the Guru Nanak University. Earlier it was affiliated to the Punjab University. The petitioners apprehended that since the Guru Nanak University was established to promote the Sikh religion and Punjabi language in Gurumukhi script, their compulsory affiliation to the University would violate their rights under Articles 29(1) and 30(1). The Court held that promoting the study of Punjabi or the study of a great Saint of India being the avowed objectives of the University would in no way infringe the fundamental right of the petitioners and hence declined to interfere.

have a distinct language or script, which they have a right to conserve through educational institutions of their own.

The issue of minority educational rights came up before the Supreme Court in the context of a right to establish and gain recognition for minority owned educational institutions.

RIGHT TO ESTABLISHMENT AND RECOGNITION OF EDUCATIONAL INSTITUTIONS

The Court considered whether State recognition of educational institutions was a fundamental right. In *Re, The Kerala Education Bill, 1957*,⁷ the majority view of the Supreme Court was that though the right of minorities, religious or linguistic, to get recognition for their institutions, was not implicit in Article 30(1), without such recognition, the rights under Article 30(1) could not be effectively exercised. It reasoned that even though there was no such thing as a 'fundamental right to recognition' by State, to deny recognition to the educational institutions except upon terms amounting to the surrender of their constitutional right of administration of the educational institutions of their choice was in

⁷ AIR 1958 SC 956.

truth and in effect to deprive them of their right under Article 30(1). It then held that the legislative power was subject to the fundamental rights and that the legislature could not indirectly take away or abridge the fundamental rights, which it could not do directly and that would be the result if the said Bill containing any offending clause became law.⁸

The majority view was that reasonable regulations might be prescribed by the State on the right to administer educational institutions. It held that reasonable regulations might be imposed by the State as a condition for aid or even for recognition.

The Court held that the language employed in Article 30(1) was wide enough to cover both pre-constitutional and post-constitutional institutions.⁹

⁸ On this point Venkatarama Aiyar, J., dissenting reasoned that the Constitution makes a clear distinction between State-maintained, State-aided and State-recognised educational institutions, and provides for different rights and obligations in relation to them. If the right of the minorities to establish and maintain educational institutions under Article 30(1) carries with it an implied right to be recognized by the State, then no law of the State can compel them to admit students free and therefore Article 45 can never become operative, since what it provides is free education for all children and not merely for children other than those who attend institutions falling within Article 39(1). The State is under a positive obligation to give equal treatment in the matter of aid or recognition to all educational institutions, including those of the minorities, religious or linguistic. The State is under a negative obligation as regards those institutions, not to prohibit their establishment or to interfere with their administration.

⁹ It reasoned that since Article 30(1) gives the minorities the rights to establish, and to administer educational institutions of their choice, the right to administer clearly covers

In relation to Articles 30(1) & 29(2), the Court reasoned that a minority community can effectively conserve its language, script or culture by and through educational institutions, and therefore, the right to establish and maintain educational institutions of its choice is a necessary concomitant to the right to conserve its distinctive language, script or culture and that what is conferred on all minorities by Article 30(1) is subject to Article 29(2).

The Court found that the Anglo-Indian Schools received aid from erstwhile Madras and Travancore-Cochin States and later from Kerala and hence came under the purview of 'aided schools'.¹⁰ It reasoned that the imposition of stringent terms as fresh or additional conditions precedent to the granting of aid to the Anglo-Indian educational institutions infringed their rights not only under Article

pre-Constitution schools just as Article 26 covers the right to maintain pre-Constitution religious institutions.

¹⁰ On the question of constitutionality of the Kerala Education Bill, 1957 (specifically clause 3(5), 7, 8(3) & 9 to 15 & 20, therein) the majority was of the opinion that although the word 'grant' was used in Article 337 and the word 'aid' was used in Articles 29(2) and 30(2), there could be no question that the word 'aid' in these two articles would cover the 'grant' under Article 337. The Court reasoned that since before the passing of the Bill the Anglo-Indian educational institutions received the bounty formerly from the State of Madras or Travancore-Cochin and after its formation from the new State of Kerala, the amount received by the Anglo-Indian institutions as grant under Article 337 was to be construed as 'aid' within the meaning of the said Bill and those Anglo-Indian educational institutions in receipt of this grant payable under Article 337 must accordingly be regarded as 'aided schools' within the meaning of the definitions in clause 2, sub-clauses (1) and (6).

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337 but also under Article 30(1).¹¹

There was, however, a strong dissent to this reasoning of the majority on the basis of disparity in treatment between the majority and minority communities.¹²

The Supreme Court in its majority view commented upon the general nature and scope of Article 30(1) whereby Article 30(1) gives certain rights not only to religious minorities but also to linguistic minorities. It asserted that the Article says and means that the religious and the linguistic minorities should have the right to establish educational institutions of their choice. The Article leaves it to the choice of the minorities to establish such educational institutions as will serve both the purpose of conserving their religion, language or culture, and also the purpose of giving a thorough, good general education to their children. The dominant

¹¹ Clauses 9, 11 and 12 being designed to give protection and security to the ill-paid teachers and to protect the backward classes, these were treated as permissible regulations which the State may impose on the minorities as a condition for granting aid to their educational institutions.

¹² Per Venkatarama Aiyar, J. (dissenting) There is no justification for putting on Article 30(1) a construction, which would put the minorities in a more favoured position than the majority communities. While recognised institutions of the majority communities will be subject to clause (20), similar institutions of minority communities falling within Article 30(1) will not be subject to it. The former cannot collect fees while the latter can. This surely is discrimination. ...As regards schools of the Anglo-Indian Communities, Article 337 provides for aid being given to them on the conditions and to the extent specified therein. That is outside Article 30(1) and independent of it, and the provisions of the Bill are, to the extent they affect or interfere with the right conferred by that article, bad.

word being 'choice' the content of Article 30(1) was to be as wide as the choice of the particular minority community.

The Court classified institutions under Article 30(1) into three categories, namely, (1) those which do not seek either aid or recognition from the State, (2) those which want aid, and (3) those which want only recognition but not aid.¹³

In *Milli Talimi Mission v. State of Bihar*,¹⁴ the Supreme Court once again considered the nature, scope and applicability of Article 30.¹⁵ After a review of the existing case law in this regard, the majority view was that:

¹³ Per Venkatarama Aiyar, J. (dissenting). The minorities should have the right to live, and should be allowed by the State to live, their own cultural life as regards religion or language. That is the true scope of the right conferred under Article 30(1), and the obligation of the State in relation thereto is purely negative. It cannot prohibit the establishment of such institutions, and it should not interfere with the administration of such institutions by the minorities.

¹⁴ AIR 1984 SC 1757. The issue in this case arose out of non-consideration of an application for affiliation filed by the Teachers Training College started by the Milli Talimi Mission of Bihar. This came out of a government order which mandated refusal by the University authorities of any application for affiliation by non-governmental Teachers Training Colleges, except those run by the minority community. An application was made claiming minority status, but only temporary affiliation was granted after three years and that too for a short period. In spite of the report of expert bodies appointed for the purpose recommending granting of affiliation the government refused it citing shortcomings in the infrastructure. Despite repeated instruction by the Court, the government failed to produce any material on which it based its decision. The Court took adverse inference and found that the "affiliation was refused without giving any sufficient reasons and such a refusal contravenes the provisions of Article 30 of the Constitution." AIR 1984 SC 1757 at p. 1765.

¹⁵ Although Justice Sabyasachi Mukharji in his concurring but separate judgement was of the opinion that since he found the action of the respondent to be arbitrary and unreasonable, "it was not necessary for him to express his views on Article 30 in this case." AIR 1984 SC 1757 at p. 1766.

(1) While Article 30 undoubtedly sought to preserve the religious freedom, autonomy and its individuality, there was no fundamental right under which an institution could claim either aid or affiliation as a matter of right. It was permissible for the State or the University, to lay down reasonable conditions to maintain the excellence of standard of education but for doing so, refusal to grant affiliation could not be made a ruse or pretext for destroying the individuality and personality of the said institution. Such an action would be wholly arbitrary and unreasonable and a violation of Article 30 because what could not be done directly would then be done indirectly.

(2) While the State or a University had an absolute right to insist on certain courses of study to be followed by institutions before they could be considered for affiliation, those conditions should not in any way take away the freedom of management or administration of the institution so as to reduce it to a satellite of the University or the State. This was wholly impermissible being directly violative of Article 30.

(3) While imposing conditions before granting affiliation, the State or the University could not kill or annihilate the individuality

or personality of the institution in question by insisting on following a particular kind of syllabus or a course of study which may be directly opposed to the aims, objects and ideals sought to be achieved by the institutions.

(4) There would be a very thin line of distinction between withholding of affiliation for a particular purpose on extraneous grounds so as to subject the institution to rigorous orders, edicts or resolutions which might run counter to the dominant purpose for which the institution had been founded, and insisting on genuine and reasonable conditions to be imposed in the larger interest of education.

These cases establish the extent of power available to the State to regulate admissions to institutions established by the minorities through the mechanism of recognition by its Universities.

**RIGHT TO ESTABLISH, MAINTAIN AND ADMINISTER
EDUCATIONAL INSTITUTIONS – ARTICLE 30(1)**

The ability to regulate admissions was once again questioned before the Supreme Court which examined the nature and scope of

Article 19 in comparison with Article 30(1) in *Rev. Sidhrajibhai Sabbai v. State of Gujarat*.¹⁶ The Court observed that unlike Article 19, the fundamental freedom under Article 30(1) was in absolute terms. All minorities, linguistic or religious have by Article 30(1) an absolute right to establish and administer educational institutions of their choice; and any law or executive direction which sought to infringe the substance of that right under Article 30(1) would to that extent be void. Still, it was open to the State to impose regulations. Regulations made in the true interests of efficiency of instruction, discipline, health, sanitation, morality, public order, etc. could be imposed. Such regulations were not restrictions on the substance of the right, which was guaranteed: they secured the proper functioning of the institutions in educational matters. The Court observes,

“The right is intended to be effective and is not to be whittled down by so-called regulative measures conceived

¹⁶ AIR 1963 SC 540; (1963) 3 SCR 837. In this case the issue before the Court was regulation imposed on a minority run Training College for Teachers established by the Gujarat and Kathiawar Presbyterian Joint Board, which stipulated 80% seats to be allotted to School Board teachers deputed by the government. Recognition and grant-in-aid were made subject to the compliance of the College with the regulation. The Supreme Court held this to be violative of fundamental right guaranteed under Article 30(1).

in the interest not of the minority educational institution, but of the public or the nation as a whole.”¹⁷

Regulations that may lawfully be imposed either by legislative or executive action, as a condition of receiving grant or of recognition had to be directed to making the institution effective as an educational institution even while retaining its character as a minority institution. Such regulation had to satisfy a dual test - the test of reasonableness and the test that it was regulative of the educational character of the institution and was conducive to making the institution an effective vehicle of education for the minority community or other persons who resorted to it.

*Azeez Basha v. Union of India*¹⁸ was another case filed for claiming protection of Article 30(1). That protection of Article 30(1) is available only to the minority communities is made evident here.

The status of Aligarh Muslim University as an institution capable of being protected under Article 30(1) was in question.¹⁹

¹⁷ AIR 1963 SC 540 at p. 547.

¹⁸ AIR 1968 SC 662.

¹⁹ See Iqbal A. Ansari, "Distorting the Reality of Aligarh Muslim University", *Economic and Political Weekly*, January 14-20, 2006, p. 101 for a critical opinion of this judgement. At p. 102, the author quotes H.M. Seervai thus: "this is the first case in which the Supreme Court has departed from the broad spirit in which it had decided cases on cultural and educational rights of minorities. ...In the present case the Supreme

The Central Legislature had established the Aligarh University by the Aligarh Muslim University Act, 1920. This Act of 1920 was passed as a result of the efforts of the Muslim minority.²⁰ The Court observed that this alone did not mean that the Muslim minority established the Aligarh University.²¹ As the Aligarh University was neither established nor administered by the Muslim minority there was no question of any amendment to the Act of 1920 made by the Amending Acts of 1951 and 1965 being unconstitutional under Article 30 (1) for that Article did not apply at all to the Aligarh University.²²

Court has on narrow technical grounds, which are erroneous, held that a minority community which had striven for, and obtained, the establishment of a Muslim university and endowed it with considerable property and money, had not established that university...It is submitted that the decision is clearly wrong and productive of public mischief and should be overruled."

²⁰ The Muslim community established Muhammadan Anglo-Oriental College, Aligarh, and Rupees Thirty Lakh collected predominantly by the Muslim Community was the basis of the Aligarh Muslim University as established by the Government of India.

²¹ AIR 1968 SC 662 at p. 668. The Court considers the Act of 1920 and concludes that there is nothing anywhere in any section of the Act which vests the administration of the University in the Muslim community. The Court also considered the fact that it was only the University Grants Commission Act, 1956 that prohibited the establishment of a University by a private individual or body. Nothing had prevented the Muslim community to establish a University in 1920. The Court acknowledged that the government might not recognise the degrees granted by such a University.

²² The government came out with the Aligarh Muslim University (Amendment) Act 1981 to overcome the politically difficult situation created by the Supreme Court by declaring the institution to be a non-minority educational institution. The 1981 amendment under section 2(1) defined the University as "an educational institution of their choice, established by the Muslims of India, which originated as the Muhammadan Anglo-Oriental College, Aligarh and which was subsequently incorporated as the Aligarh Muslim University". By section 5(2)(c) it empowered the University to "provide especially the educational and cultural advancement of the Muslims of India". This

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The Court, after considering Article 30(1) observes,

“The Article in our opinion clearly shows that the minority will have the right to administer educational institutions of their choice provided they have established them, but not otherwise.”²³

The Court then considered its earlier decision in *The Kerala Education Bill, 1957, In re*,²⁴ and observed thus:

“We are of the opinion that nothing in that case justifies the contention raised on behalf of the petitioners that the minorities would have the right to administer an educational institution even though the institution may not have been established by them. The two words in Article 30(1) must be read together and so read the Article gives the right to the minority to administer institutions established by it. If the educational institution has not been established by a

amendment was challenged and a single bench of the Allahabad High Court held that the institution was not a minority institution enjoying the protection of Article 30 and later a division bench also upheld this view on 5th January, 2006.

²³ AIR 1968 SC 662 at p. 670.

²⁴ AIR 1958 SC 956.

minority it cannot claim the right to administer it under Article 30(1).”²⁵

The Court considered the meaning of the term ‘to establish’ for the purpose of Article 30(1) and opined that it meant ‘to bring into existence’.²⁶

In *State of Kerala v. Very Rev. Mother Provincial*,²⁷ the Supreme Court struck down certain sections of the Kerala University Act, 1969 (9 of 1969) as *ultra vires* Articles 30(1) and 19.²⁸ On the question of establishment of Universities, the Court observed that Article 30(1) contemplates two rights, which are separated in point of issue. The first was the initial right to establish institutions of the minority's choice. Establishment in this context meant the bringing into being of an institution and it must be by a minority community. Next was administration of such an institution. Administration meant ‘management of the affairs’. The minority

²⁵ AIR 1968 SC 662 at p. 670.

²⁶ AIR 1968 SC 662 at p. 672.

²⁷ AIR 1970 SC 2079.

²⁸ Sub-sections (2), (4) and (6) of Ss. 48 and 49 are *ultra vires* Article 30(1) since these clearly vest the management and administration in the hands of two bodies with mandates from the University. Sub-sections (1), (2), (3) and (9) of S. 53, sub-sections (2) and (4) and S. 56, (S. 58) insofar as it removes disqualification which founders may not like to agree to) and S. 63 are *ultra vires* Article 30(1) in respect of minority institutions. The provisions (except S. 63) are also offensive to Article 19(1)(f) insofar as the petitioners are citizens of India both in respect of majority as well as minority institutions.

institutions could not be allowed to fall below the standards of excellence of educational institutions or be allowed to refuse to follow the general pattern under the guise of conclusive right to management.

In *Rt. Rev. Msgr. Mark Netto v. State of Kerala*,²⁹ the right of minorities to administer schools of their choice protected under Article 30 came under scrutiny in the context of refusal by the authorities to permit admission of girls to Christian community run boys' school on the ground of existence of a Muslim girls' school nearby. The Court held that the Rule³⁰ did not authorise such refusal and the Orders denying permission were held unconstitutional. The Court observed that the right conferred by Article 30 of the Constitution on religious and linguistic minorities to administer educational institutions of their choice was not an absolute right being subject to regulation. But, in the instant case, the Christian community was refused permission only in the interest of the existing Muslim girls' school. If the rule permitted such action, then it violated the freedom guaranteed to the minority to administer the

²⁹ AIR 1979 SC 83.

³⁰ Kerala Education Rules, 1959, R. 12(iii).

school of its choice.

The Supreme Court elaborated on the ambit and scope of Article 30(1) in *All Saints High School v. Govt. of A.P.*³¹ The Court relied on its previous decisions and tried to consolidate the position of the minorities in the field of administration of their educational institutions.³² The Court was of the opinion that where an outside

³¹ AIR 1980 SC 1042.

³² It purported to summarize the principles and propositions that emerge from the previous two decades of judicial rulings on the built-in safeguards, guarantees, scope and ambit of the fundamental right enshrined in Article 30(1), as follows: (1) That from the very language of Article 30(1) it is clear that it enshrines a fundamental right of the minority institutions to manage and administer their educational institutions which is completely in consonance with the secular nature of our democracy and the directives contained in the Constitution itself. (2) That although unlike Article 19 the right conferred on the minorities is absolute, unfettered and unconditional but this does not mean that this right gives a free licence for maladministration so as to defeat the avowed object of the Article namely, to advance excellence and perfection in the field of education. (3) While the State or any other statutory authority has no right to interfere with the internal administration or management of the minority institution, the State can certainly take regulatory measures to promote the efficiency and excellence of educational standards and issue guidelines for the purpose of ensuring the security of the services of the teachers or other employees of the institution. (4) The State or any university authority cannot under the cover or garb of adopting regulatory measures tend to destroy the administrative autonomy of the institution or start interfering willy nilly with the core of the management of the institution so as to render the right of the administration of the management of the institution concerned nugatory or illusory. Such blatant interference is violative of Article 30(1). (5) Although Article 30 does not speak of the conditions under which the minority educational institution can be affiliated to a college or university yet the section by its very nature implies that where an affiliation is asked for, the university concerned cannot refuse the same without sufficient reason or try to impose such conditions as would completely destroy the autonomous administration of the educational institution. (6) The introduction of an outside authority however high it may be either directly or through its nominees in the governing body or the managing committee of the minority institution to conduct the affairs of the institution would be completely destructive of the fundamental right guaranteed by Article 30(1) of the Constitution and would reduce the management to a helpless entity having no real say in the matter and thus destroy the very personality and individuality of the institution which is fully protected by Article 30 of the Constitution. Where educational institutions have set up a particular governing body or the managing committee in which all the powers vest, it is desirable that such powers should not be

higher authority is set up to supervise the teaching staff so as to keep a strict vigilance on their work and to ensure security of tenure for them, that authority must associate with the head of the institution or the senior members of the managing committee before coming to any decision which may be binding on the managing committee. The Court concluded that the head of the institution or the senior members of the managing committee should be allowed to have a positive say in the matter. It observed that where the outside authorities enjoy absolute powers in taking decisions regarding minority institutions without hearing them and those orders were binding on the institution, it directly interfered with the

curbed or taken away unless the Government is satisfied that these powers are grossly abused and if allowed to continue may reduce the efficacy or the usefulness of the institution. (7) It is open to the Government or the university to frame rules and regulations governing the conditions of service of teachers in order to secure their tenure of service and to appoint a high authority armed with sufficient guidance to see that the said rules are not violated or the members of the staff are not arbitrarily treated or innocently victimised. In such a case the purpose is not to interfere with the internal administration or autonomy of the institution but it is merely to improve the excellence and efficiency of the education because a really good education can be received only if the tone and temper of the teachers are so framed as to make them teach the students with devotion and dedication and put them above all controversy. But while setting up such an authority care must be taken to see that the said authority is not given blanket and uncanalised and arbitrary powers so as to act at their own sweet will ignoring the very spirit and objective of the institution. (8) Where a minority institution is affiliated to a university the fact that it is enjoined to adopt the courses of study or the syllabi or the nature of books prescribed and the holding of examination to test the ability of the students of the institution concerned does not violate the freedom contained in Article 30 of the Constitution. (9) While there could be no objection in setting up a high authority to supervise the teaching staff so as to keep a strict vigilance on their work and to ensure that security of tenure for them, but the authority concerned must be provided with proper guidelines under the restricted field which they have to cover.

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administrative autonomy of the institution and was not constitutionally permissible so far as minority institutions were concerned. The Court held that provision for an appeal or revision against the order of the authority by the aggrieved member of the staff alone or the setting up of an Arbitration Tribunal was also not permissible.³³ In other words, the Supreme Court wanted nothing to be done by the State that may run counter to the intentions of the founders of such institutions.

In *A.P. Christian Medical Educational Society v. Govt. of A.P.*,³⁴ the Court considered Article 30(1) on the question of the right to establish and administer medical college as a minority institution.³⁵ It held that the Government, the University and the Court could go behind the veil of a minority institution to see whether the institution is a genuine educational institution of the

³³ The Court reasoned that such a course of action introduces an arena of litigation, which could involve the institution to unending litigation and thus impair educational efficiency of the institution.

³⁴ AIR 1986 SC 1490.

³⁵ The court found it unnecessary to express any opinion on the question whether the policy decision of the Government of India and the Medical Council of India not to permit starting of new medical colleges amounted to denial of minorities' right under Article 30(1) since the Institution in question was found not entitled to claim such protection.

minorities.³⁶ Where the claim is a mere cloak or pretension and real motive is business adventure, protection under Article 30(1) is not available.³⁷ The court held that the object of Article 30(1) was not to allow bogies to be raised by pretenders but to give the minorities 'a sense of security and a feeling of confidence' not merely by guaranteeing the right to profess, practice and propagate religion to religious minorities and the right to conserve their language, script and culture to linguistic minorities, but also to enable all minorities, religious or linguistic, to establish and administer educational institutions of their choice. It laid down that there must exist some

³⁶ The appellant Society purported to establish and run a medical college as a minority institution falsely showing the Central Government had already accorded permission. There was nothing in the memorandum or the articles of association or in the actions of the Society to indicate that the institution was intended to be a minority educational institution. Neither the State Government granted permission to the establishment of the medical college nor the University granted affiliation to the institution. Despite the strong protests and warnings of the University, the Society even admitted or pretended to admit students to the medical college in the first year MBBS course without fulfilling any conditions for running a medical college and in total disregard of the provisions of the A.P. Education Act, the Osmania University Act and the Regulations of the Osmania University. The Society's writ petition before the High Court challenging the State Government's refusal to grant permission having been summarily dismissed, the present appeal by special leave was filed by it under Article 136. Some students who had been admitted to the medical college also filed writ petition before Supreme Court. The Court dismissed the Society's appeal with costs quantified at Rs 10,000 and dismissed the students' writ petitions without costs.

³⁷ The Government, the University and ultimately the Court have the undoubted right to pierce the 'minority veil', and to go behind the claim that the institution is a minority institution and to investigate and satisfy itself whether the claim is well-founded or not. In the present case the claim of the Society was ill-founded. The mere use of words in the memorandum of association of the Society that it intended to establish the institution "as a Christian minorities' educational institution" would not found a claim on Article 30(1). The society and the so-called institutions were started as business ventures with a view to make money from gullible individuals anxious to obtain admission to professional colleges.

real positive index to enable the institution to be identified as an educational institution of the minorities.

The protection under Article 30(1) again came under the scrutiny of the Supreme Court in *Y. Theclamma v. Union of India*.³⁸ It was in the context of statutory regulations for minority educational institutions under Section 8(4) of the Delhi School Education Act, 1973 whereby the Management's power to suspend its employee became subject to prior approval of Director of Education. The Court affirmed its earlier decision in *Frank Anthony Public School Employee' Association case*³⁹ and held Section 8(4) as not violative of Article 30(1)⁴⁰ and also held the earlier decision to be not in conflict with the Constitution Bench decision in *Lily*

³⁸ AIR 1987 SC 1210.

³⁹ *Frank Anthony Public School Employees' Association v. Union of India*, (1986) 4 SCC 707. While the right of the minorities, religious or linguistic, to establish and administer educational institutions of their choice cannot be interfered with, restrictions by way of regulations for the purpose of ensuring educational standards and maintaining excellence thereof can validly be prescribed.

⁴⁰ Regulations can be made for ensuring proper conditions of service for the teachers and also for ensuring a fair procedure in the matter of disciplinary action. Section 8(4) is designed to afford some measure of protection to teachers of the minority institutions without interfering with the management's right to take disciplinary action. However, where the management charges the employee with gross misconduct, the Director is bound to accord his approval to the suspension. The endeavour of the court in all the cases has been to strike a balance between the constitutional obligation to protect what is secured to the minorities under Article 30(1) and the social necessity to protect the members of the staff against arbitrariness and victimisation. Therefore, Section 8(4) cannot be said to have encroached upon the right of the minorities under Article 30(1).

*Kurian case.*⁴¹

All Bihar Christian Schools' Assn. v. State of Bihar,⁴² is another important decision in this context. In this case Section 18(3) of the Bihar Non-Government Secondary Schools (Taking Over of Management & Control) Act, 1981⁴³ was challenged as violating Article 30(1).⁴⁴ While dismissing the challenge the Court observed that the legislature had taken care to confer a limited power on the School Service Board for granting approval to appointment and dismissal of a teacher which was necessary in the interest of the educational need and discipline of the minority school itself.⁴⁵ Since the aided minority institutions received money from

⁴¹ *Lily Kurian v. Sr. Lewina*, (1979) 2 SCC 124. The decision of the Court in *Frank Anthony Public School* case with regard to the applicability of sub-section (4) of S. 8 of the Act to the unaided minority educational institutions is based on the view taken by the majority in *All Saint High School* case which, in its turn, was based on several decisions right from *In Re, the Kerala Education Bill, 1957* down to *St. Xavier*, including that in *Lily Kurian*. Therefore, the decision in *Frank Anthony Public School* case cannot be said to be in conflict with the decision of the Constitution Bench in *Lily Kurian* case and therefore, the former decision does not require reconsideration.

⁴² (1988) 1 SCC 206.

⁴³ Act 33 of 1982.

⁴⁴ Clauses (a) to (k) of S. 18(3) laid down terms and conditions for granting recognition to a minority school. These were considered as regulatory in nature which seek to secure excellence in education and efficiency in management of schools and do not confer any unguided blanket or veto power on any outside agency or authority to veto the decision of the management of the school.

⁴⁵ The terms and conditions applicable to a recognised minority school do not compel the management of a minority school to surrender its right of administration; instead the management is free to administer its school in accordance with the rules framed by it. The Court found them to be essential to maintain the efficiency in the administration of the institution, and do not interfere with right of administration.

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public revenues the State Government was entitled to issue instructions or frame rules for the maintenance of records and accounts and such instructions or rules could not be held to interfere with the minority right under Article 30(1).⁴⁶ However, where the State Government in exercise of its powers under Clause (i) issued instructions or framed rules, interfering with the minority right, such instructions or rules would be violative of Article 30(1).⁴⁷ The Court further observed that though a minority institution had the right to

⁴⁶ Minorities based on religion or language, have fundamental freedom to establish and manage educational institutions of their own choice, but the State has right to provide regulatory provisions for ensuring educational excellence, conditions of employment of teachers, ensuring health, hygiene and discipline and allied matters. Such regulatory provisions do not interfere with the minorities' fundamental right of administering their educational institutions; instead they seek to ensure that such institution is administered efficiently, and that students who come out of minority institutions after completion of their studies are well equipped with knowledge and training so as to stand at par in their avocation in life without any handicap. If regulatory provisions indirectly impinge upon minorities' right of administration of their institution, it would not amount to interference with the fundamental freedom of the minorities as the regulatory provisions are in the interest of the minority institutions themselves. A minority institution must also be fully equipped with educational excellence to keep in step with others in the State; otherwise the students coming out of such institutions will not be fully equipped to serve the society or the nation. While the State has every right to prescribe conditions for granting recognition or disbursing aid it cannot under the guise of that power prescribe onerous conditions compelling the minority institutions to surrender their rights of administration to the government.

⁴⁷ Clause (j) of S. 18(3) confers power on the State Government to issue instructions consistent with the provisions of Articles 29 and 30 for efficient management and for improving the standard of teaching and a minority school is required to comply with those instructions. The State Government has thus no unrestricted power to issue instructions. If instructions are issued for the better management of the minority schools, no grievance against their validity can be raised. Clause (k) of S. 18(3) confers a right on the management of the minority school to challenge any arbitrary exercise of power by an authority of the State in withdrawing recognition or withholding or stopping the disbursement of aid to the institution. Apparently clause (k) has been enacted by the legislature to safeguard the interest of the minority school and it does not in any manner violate Article 30(1).

administer its educational institution it had no right to maladministration and that any rule or instruction issued by the Government to prevent maladministration would be valid.

In *Bihar State Madarasa Education Board v. Madarasa Hanfia Arabic College*,⁴⁸ Section 3 of the Bihar State Madarasa Education Board Act, 1982 (32 of 1982), was challenged as violative of Article 30(1) on the ground that, on the constitution of the Board and appointment of its Chairman, the majority of members of the Board and its Chairman might not belong to the minority community. The Court concluded that Article 30(1) did not contemplate that only persons belonging to the minority community should constitute the autonomous Educational Board entrusted with the duty of regulating the aided and recognised minorities institutions.⁴⁹ The Court restated the scope of Article 30(1) and observed that the Article protected the minorities' right to manage and administer institutions established by them according to

⁴⁸ (1990) 1 SCC 428.

⁴⁹ In the instant case the constitution of the Board under Section 3 of the Act ensured that its members were only those who were interested in teaching and research of Persian, Arabic and Islamic studies. This provision fully safeguarded the interest of Madarasa of the Muslim community.

their choice,⁵⁰ but while seeking aid and recognition for their institutions there was no constitutional obligation that the Board granting aid or recognition or regulating efficiency in minority institution should consist of members exclusively belonging to minority communities.⁵¹

In *Board of Sec. Education & Teachers Training v. Jt. Director of Public Instructions*,⁵² the Court dealt with the scope of Article 30 in the context of the right of management of minority educational institution to appoint a Principal of its own choice and ruled that such right could not be taken away by any rules or regulations.⁵³

⁵⁰ In this context the Court struck down Section 7(2)(n) of the Act, which gave the Board right to dissolve Managing Committee of an aided and recognised Madarasa as being violative of Article 30(1). The Court reasoned under the guise of regulating the educational standards to secure efficiency in institution, the State is not entitled to frame rules or regulations compelling the management to surrender its right of administration. Though minority institutions cannot be allowed to fall below the standard of excellence on the pretext of their exclusive right of management but at the same time their constitutional right to administer their institutions cannot be completely taken away by superseding or dissolving Managing Committee or by appointing ad hoc committees in place thereof.

⁵¹ A minority institution seeking aid and recognition must be subject to regulatory provisions that are reasonable and consistent with Article 30(1) of the Constitution. A minority institution, which does not seek aid or recognition from the State or the Education Board, need not be subject to regulatory provisions.

⁵² (1998) 8 SCC 555.

⁵³ Teacher of the same school, qualified according to the rules prescribed by State Govt., preferred by the management for the post of Principal to the third respondent, also a teacher of the same school on the basis of seniority. Educational authorities refusing to approve the appointment and instead approving appointment of respondent.

In *N. Ammad v. Emjay High School*,⁵⁴ the Court again reiterated the right of management of minority, aided school getting protection under Article 30(1), in the appointment of Headmaster.⁵⁵ It held that the management had full freedom to appoint any person either from the staff of the same school or from outside,⁵⁶ subject to restriction as regards qualification prescribed under statute, rules or

⁵⁴ (1998) 6 SCC 674.

⁵⁵ When post of headmaster of the school fell vacant none of the teaching staff of the school including appellant who was senior most teacher of that school was qualified for that post - Nevertheless appellant temporarily appointed as Headmaster with approval of District Education Officer - Meanwhile appellant acquiring qualification (regarding length of service) and pressing the management to appoint him as a regular Headmaster - DEO also asking the management to "promote and appoint a qualified senior most HSA as Headmaster with immediate effect" - But management instead appointing Respondent 4, a more qualified teacher from another school under the same "educational agency" on transfer basis with approval of the department - He'd, management had the right to do so.

⁵⁶ The Court ruled that the right guaranteed under Article 30(1) is a right that is absolute and any law or executive direction which infringes the substance of that right is void to the extent of infringement. But the absolute character of the right will not preclude making of regulations in the true interests of efficiency or instruction, discipline, health, sanitation, morality, public order and the like, as such regulations are not restrictions on the substance of the right guaranteed by the Constitution. Selection and appointment of Headmaster in a school (or Principal of a college) are of prime importance in administration of that educational institution. The Headmaster is the key post in the running of the school. He is the hub on which all the spokes of the school are set around whom they rotate to generate result. A school is personified through its Headmaster and he is the focal point on which outsiders look at the school. A bad Headmaster can spoil the entire institution, an efficient and honest Headmaster can improve it by leaps and bounds. The functional efficacy of a school very much depends upon the efficiency and dedication of its Headmaster. The management's right to choose a qualified person as the Headmaster of the School is well insulated by the protective cover of Article 30(1) of the Constitution and it cannot be chiselled out through any legislative act or executive rule except for fixing up the qualifications and conditions of service for the post. The management of a minority school is free to find out a qualified person either from the staff of the same school or from outside to fill up the vacancy. If management of the school is not given very wide freedom to choose the personnel for holding such a key post, subject of course to the restrictions regarding qualifications to be prescribed by the State, the right to administer the school would get much diminished. Hence it is for the management of the minority educational institution to choose the modality for selecting the qualified persons for appointment.

regulations.⁵⁷

The restrictions that could be placed on minority institutions to ensure good administration came up for the Supreme court's scrutiny once it became accepted that in the interest of protecting the minority rights, the State could place reasonable restrictions under Article 30(1).

RIGHT TO RECOGNITION AND ARTICLE 30(1) - DUTY TO GOOD ADMINISTRATION

The fundamental question addressed by the Supreme Court in *Ahmedabad St. Xavier's College Society v. State of Gujarat*,⁵⁸ was whether the right of recognition or affiliation was part of the fundamental right under Article 30(1). The Court held that any law, which provided for affiliation on terms that abridge the right of linguistic and religious minorities to administer and establish educational institutions of their choice, would offend Article 30(1). However, affiliation being related to the academic and educational

⁵⁷ Management is not bound by R. 44(1) of Kerala Education Rules to appoint only the senior-most HSA of the same school and can choose the modality for selection of qualified person. The DEO could not compel the management to appoint any particular person as the Principal or Headmaster of the School. Rules 44, 44-A, 2(2), 11, & 13 of the Kerala Education Rules, 1959, and Section 14(9), 36, 2(2) and 2(5) of the Kerala Education Act, 1958 (6 of 1959) were considered.

⁵⁸ (1974) 1 SCC 717.

character of the institutions, the regulatory measures on the courses of study, the qualifications, appointment and conditions of employment of teachers, the health and hygiene of students, facilities for libraries and laboratories, were for affiliation, uniformity, efficiency and excellence in educational courses and hence did not violate any fundamental right of the minority institutions under Article 30(1).

In the opinion of Jaganmohan Reddy and Alagiriswami, JJ., the meaningful exercise of the right under Article 30(1) would and must necessarily involve recognition of the secular education imparted by the minority institutions. Where the educational institutions of a minority found it inconvenient or impossible to secure such a recognition even from outside the State in which they are established, then education including University education being a State subject and the legislative power of the State also being subject to Article 29(1) and Article 30(1), the minorities could insist on recognition to the educational qualifications awarded by them that conformed to the educational standards prescribed by the State even where affiliation was not provided for by the University statutes.

Khanna, J., opined that Article 30(1) was designed not only to prevent disabilities of the minorities but also to create positive rights for them. It was not permissible to exact from the minorities in lieu of the recognition or affiliation of their institutions a price that would entail the abridgement or extinguishment of the right under Article 30(1).

In the opinion of Mathew and Chandrachud, JJ., while no educational institution established by a religious or linguistic minority could claim total immunity from regulations by the legislature or the University if it wanted affiliation or recognition such regulations were permissible if they were relevant to the purpose of securing or promoting the object of recognition or affiliation.

Beg, J, opined that if the object of an enactment was to compel a minority institution, even indirectly, to give up the exercise of its fundamental rights, the provisions which had this effect would be void or inoperative against the minority

institution.⁵⁹

Dwivedi, J., was of the opinion that there was no express or implied grant of the right of affiliation in Article 30(1) and since Article 30(1) did not grant the right of affiliation, the State was not under an obligation to have an affiliating University. It was open to a State to establish only a teaching University.

Ray, C.J. and Palekar, J., were of the view that the right to administer consisted of four principal matters. First was the right to choose its managing or governing body. Second was the right to choose its teachers. Third was the right not to be compelled to refuse admission to students and fourth, the right to use its properties and assets for the benefit of its own institution. The right conferred on the religious and linguistic minorities to administer educational institutions of their choice was not an absolute right. Autonomy in administration meant the right to administer effectively and to manage and conduct the affairs of the institutions and this involved a correlative duty of good administration.

⁵⁹ The price of affiliation cannot be a total abandonment of the right to establish and administer a minority institution conferred by Article 30(1) of the Constitution. Right of affiliation is a statutory and not a fundamental right. It is open to the minority institution concerned to free itself from any statutory control or fetters if freedom from them is considered by it to be essential for the full exercise of its fundamental rights under Article 30(1) of the Constitution.

Khanna, J. opined that the right conferred by Article 30(1) being in absolute terms was not subject to restrictions as in the case of rights conferred by Article 19 of the Constitution. Provisions calculated to safeguard the interest of teachers would result in security of tenure and inevitably attracted competent persons for the posts of teachers. Regulations made for this purpose were in the interest of minority educational institutions and as such they would not violate Article 30(1).

Mathew and Chandrachud, JJ., were of the view that just because Article 30(1) was couched in absolute terms, it did not follow that the right guaranteed was not subject to regulatory laws which would not amount to its abridgement. Even if an educational institution established by a religious or linguistic minority did not seek recognition, affiliation, or aid, its activity could be regulated in various ways provided the regulations did not take away or abridge the guaranteed right.

Beg, J., was of the opinion that the essence of the right guaranteed by Article 30(1) of the Constitution was freedom to minority institutions to choose the pattern of education as well as of the administration of their educational institutions. Despite the

‘absoluteness’ of the terms used there was a power in the State to regulate the exercise of that freedom, but the degree of reasonably permissible control must vary from situation to situation.

In the view of Dwivedi, J., absolute words did not confer absolute rights, since the generality of the words might have been cut down by the context and the scheme of the statute or the Constitution.⁶⁰

On the question of whether Article 30(1) was to be read subject to Article 29(1) thus limiting the scope and ambit of the rights of religious and linguistic minorities to establish and administer educational institutions of their choice to establishing educational institutions only for conserving their language, script or culture, the Court’s opinion was expressed in the following manner.

Ray, C.J. and Palekar, J., considered Articles 29 and 30 to confer four distinct rights. (1) The right of any section of the resident citizens to conserve its own language, script or culture as

⁶⁰ A glance at the context and scheme of Part III of the Constitution would show that the Constitution-makers did not intend to confer absolute rights on a religious or linguistic minority to establish and administer educational institutions. Articles 29(3), 15(4) and 28(3) place certain express limitations on the right in Article 30(1). There are also certain implied limitations on this right. It is impossible for a member of a civilised community to have absolute rights. The right under Article 30(4) is also subject to regulation for the protection of various social interests such as health, morality, security of State, public order and the like, for the good of the people is the supreme law.

mentioned in Article 29(1); (2) the right of all religious and linguistic minorities to establish and administer educational institutions of their choice as mentioned in Article 30(1); (3) the right of an educational institution not to be discriminated against in the matter of State aid on the ground that it was under the management of a religious or linguistic minority as mentioned in Article 30(2), and (4) the right of the citizen not to be denied admission into any State-maintained or State-aided educational institution on the ground of religion, caste, race or language, as mentioned in Article 29(2). Their Lordships were of the opinion that it would be wrong to read Article 30(1) as restricting the right of minorities to establish and administer educational institutions of their choice only to cases where such institutions are concerned with language, script or culture of the minorities.⁶¹

⁶¹ The reasons are these. First, Article 29 confers the fundamental right on any section of the citizens which will include the majority section whereas Article 30(1) confers the right on all minorities. Second, Article 29(1) is concerned with language, script or culture, whereas Article 30(1) deals with minorities of the nation based on religion or language. Third, Article 29(1) is concerned with the right to conserve language, script or culture, whereas Article 30(1) deals with the right to establish and administer educational institutions of the minorities of their choice. Fourth, the conservation of language, script or culture under Article 29(1) may be by means wholly unconnected with educational institutions and similarly establishment and administration of educational institution by a minority under Article 30(1) may be unconnected with any motive to conserve language, script or culture. A minority may administer an institution for religious education which is wholly unconnected with any question of conserving a language, script or culture. The scope of Article 30 rests on linguistic or religious minorities and no other section of

According to Khanna, J., in order to invoke the benefit of Article 29(1), all that was essential was that a section of the citizens residing in the territory of India or any part thereof should have a distinct language, script or culture of its own. Once that was proved, those citizens had the right to conserve their language, script or culture irrespective of the fact whether they were members of the majority community or minority community.⁶²

Mathew and Chandrachud, JJ., concluded that while Article 29 did not deal with education as such, Article 30 dealt only with the establishment and administration of educational institutions. In a given case, the two articles might overlap, but Article 29(1) could

citizens of India has such a right. The whole object of conferring the right on minorities under Article 30 is to ensure that there will be equality between the majority and the minority. If the minorities do not have such special protection they will be denied equality. It is, therefore, not at all possible to exclude secular education from Article 30.⁶² Clause (1) of Article 29 and clause (1) of Article 30 deal with distinct matters, and it is not permissible to circumscribe or restrict the right conferred by clause (1) of Article 30 by reading in it any limitation imported from clause (1) of Article 29. It is difficult to subscribe to the view that educational institutions mentioned in Article 30(1) are only those which are intended to conserve language, script or culture of the minority. Clause (1) of Article 30 also contains the words "of their choice". These words which qualify "educational institutions" show the vast discretion and option which the minorities have in selecting the type of institutions which they want to establish. In case an educational institution is established by a minority to conserve its distinct language, script or culture, the right to establish and administer such institution would fall both under Article 29(1) as well as under Article 30(1). The minorities can, however, choose to establish an educational institution which is purely of a general secular character and is not designed to conserve their distinct language, script or culture. The right to establish and administer such an institution is guaranteed by Article 30(1) and the fact that such an institution does not conserve the distinct language; script or culture of a minority would not take it out of the ambit of Article 30(1).

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not limit the width of Article 30(1). The right guaranteed to a religious or linguistic minority under Article 30(1) was the right to establish any educational institution of its choice.

Beg, J., also echoed the same view. According to him, although, Articles 29 and 30 might supplement each other so far as certain rights of minorities were concerned, yet, Article 29 of the Constitution did not impose in any way a limit on the kind or character of education which a minority might choose to impart through its institution to the children of its own members or to those of others who might choose to send their children to its schools.

According to Dwivedi, J., the scope of Article 30(1), as regards both the content of the right and the beneficiaries of the right, was wider than that of Articles 25 and 26. Article 30(1) secured the right to a secular activity to a religious or linguistic minority. Such a minority might establish and administer institutions for imparting secular general education. While Article 29(1) gave security to an interest, Article 30(1) gave security to any activity. The words 'of their choice' merely made patent what was latent in Article 30(1). Those words were not intended to enlarge the areas of choice already implied in the right conferred by Article 30(1). The

right to establish an educational institution under Article 30(1) was not confined to the purposes specified in Article 29(1).

On the question of special rights to minorities and the equality clause with respect to Articles 29, 30 and 14 the Court held that the equality between members of the majority and of the minority must be effective, genuine equality,⁶³ not just in theory but also in fact,⁶⁴ and was nothing but juridical equality.⁶⁵

While there could not be too many additional conditions for recognition, there could not be oppression or exploitation of educational staff and maladministration. In *Frank Anthony Public*

⁶³ Jaganmohan Reddy and Alagiriswami, JJ., opines that equality of treatment of minority and majority or equality before law precludes discrimination. The equality between members of the majority and of the minority must be effective, genuine equality.

⁶⁴ Khanna, J., was of the view that the idea of giving some special rights to the minorities is not to have a kind of a privileged or pampered section of the population but to give to the minorities a sense of security and a feeling of confidence. The differential treatment for the minorities by giving them special rights is intended to bring about an equilibrium, so that the ideal of equality may not be reduced to a mere abstract idea but should become a living reality and result in true, genuine equality, an equality not merely in theory but also in fact.

⁶⁵ Mathew and Chandrachud, JJ., explained that the problem of the minorities was not really a problem of the establishment of equality because if taken literally, such equality would mean absolute identical treatment of both the minorities and the majorities. This would result only in equality-in-law but inequality-in-fact. So minorities can be protected not only if they have equality but also, in certain circumstances, differential treatment. Juridical equality postulates that religious minority should have a guaranteed right to establish and administer its own educational institutions where it can impart secular education in a religious atmosphere. Whatever spiritual mission of promoting unity the Government may have, it is conditioned by its primal duty of promoting justice, respecting guaranteed rights and ensuring equality of difference. A condition may be invalidated on the ground that denying a benefit or privilege because of the exercise of a right in effect penalize its exercise.

School Employees' Assn. v. Union of India,⁶⁶ which was an important case in this context, the Court considered the constitutionality of statutory measures regulating terms and conditions of service of employees of minority educational institutions for maintaining educational standards and excellence in the context of Articles 30(1) and 14 and held it as not offending Article 30(1).⁶⁷ It reasoned that since the maintenance of educational standard and excellence of the educational institutions would depend directly on the excellence of the teaching staff, and in turn, that would depend on the quality and the contentment of the teachers, the conditions of service pertaining to minimum qualifications of teachers, their salaries, allowances and other conditions of service which ensure security, contentment and decent living standards to teachers and which would consequently enable

⁶⁶ (1986) 4 SCC 707. The Court observed that the objection to the reference to an Arbitration Tribunal in *Ahmedabad St. Xavier's College Society case* was to the wide power given to the Tribunal to entertain any manner of dispute and the provision for the appointment of umpire by the Vice-Chancellor and the provisions for an appeal to the Syndicate was considered objectionable in *Very Rev. Mother Provincial case* as it conferred the right on the university.

⁶⁷ The regulatory measures under Ss. 8 to 11, except S. 8(2), of Delhi School Education Act for recognised private schools were held to be not violative of Article 30(1). S. 12 of that Act, which excluded the teachers and other employees of unaided minority schools from the beneficial provisions of Ss. 8 to 11, except S. 8(2) were held to be unconstitutional. The teachers and employees of Frank Anthony Public School, New Delhi, being a recognised unaided private minority school were held entitled to parity in pay scales and other conditions of service with those available to their counterparts in Government schools of Delhi.

them to render better service to the institution and the pupils could not be said to be violative of Article 30(1). The management of a minority educational institution could not be permitted under the guise of Article 30(1) to oppress or exploit its employees any more than any other private employee.⁶⁸ Oppression or exploitation of the teaching staff of an educational institution was bound to lead to discontent and deterioration of the standard of instruction imparted in the institution affecting adversely the object of making the institution an effective vehicle of education for the minority community or other persons who resort to it. The management of a minority institution could not complain of invasion of the

⁶⁸ Chapter IV of the Delhi School Education Act consisting of Ss. 8 to 12 deals with "Terms and conditions of service of employees of recognised private schools". But S. 12 excludes operation of Ss. 8 to 11 to unaided minority schools. As a result of this exclusion, (1) the Administrator may not make rules regulating the conditions of service of employees of unaided minority schools; (2) the prior approval of the Director need not be obtained for the dismissal, removal, reduction in rank or termination of service otherwise than by dismissal or removal of an employee of an unaided minority school; (3) against such dismissal, removal or reduction in rank, there is to be no appeal; (4) neither prior nor subsequent approval of the Director need be obtained to suspend any of the employees of an unaided minority school; (5) the scales of pay and allowances, medical facilities, pension, gratuity, provident fund and other benefits which may be given to employees are subject to no regulation except that they should be contained in a written contract of service and need not conform to the scales of pay and allowances etc. of the employees of the corresponding status in schools run by the appropriate authority as in the case of other recognised private schools. The Frank Anthony Public School New Delhi is a recognised private unaided minority school. The pay scales and other terms and conditions of service of the teachers and other employees of this school compared unfavourably with those of teachers and employees of Government schools. Since by virtue of S. 12, the beneficial provisions of Ss. 8 to 11 of the Act were inapplicable to this school, the Employees' Association of the school moved a writ petition before Supreme Court seeking a declaration that S. 12 was unconstitutional as being violative of Articles 14, 21 and 23.

fundamental right to administer the institution when it denied the members of its staff the opportunity to achieve the very object of Article 30(1), which was to make the institution an effective vehicle of education.

Commenting on the nature of the right under Article 30(1) in the context of the constitutionality of regulatory measures restricting such right the Court observed that the right as guaranteed to religious and linguistic minorities by Article 30(1) was twofold:- (1) to establish and (2) to administer educational institutions of their choice. It explained that the key to the article lied in the words 'of their own choice' and that these words indicated that the extent of the right was to be determined, not with reference to any concept of State necessity and general societal interest but with reference to the goal of making the minority institutions 'effective vehicles of education for the minority community or other persons who resort to them.' It held that the regulatory measures which were designed towards the achievement of this goal could not be considered to impinge upon the right guaranteed by Article 30(1) and that the question in each case was whether the particular measure was designed to achieve such goal, without nullifying any part of the

right of management in substantial measure.

In the context of minority rights the Supreme Court had occasion to compare the scope of Articles 29(2) and 30(1).

MINORITY EDUCATIONAL RIGHTS: COMPARISON OF THE SCOPE OF ARTICLES 29(2) AND 30(1)

The Supreme Court analysed the nature of rights conferred by Articles 30(1) and 29(2) and their comparative scope in *St. Stephen's College v. University of Delhi*.⁶⁹ The case related to the conduct of a non-transparent interview by the College for admission to its courses which was contrary to the directive given by its affiliating university, the Delhi University. The College defended its action based on its right under Article 30(1) while it was challenged as a violation of right under Article 29(2). The majority,⁷⁰ held that

⁶⁹ (1992) 1 SCC 558.

⁷⁰ Kasliwal, J. contra. *Per Kasliwal, J.* (dissenting) The right conferred on minorities to establish and administer educational institutions under Article 30(1) of the Constitution is not absolute and is always subject to reasonable regulations. If a minority had established and is administering educational institution without receiving any aid out of the State funds then clause (2) of Article 29 will not come into play. However, if such educational institution is receiving aid out of the State funds then it would be subject to the rigour of clause (2) of Article 29 and it cannot deny admission on grounds only of religion, race, caste, language or any of them. If such institution gives preference or makes reservations for the candidates belonging to its own religion, then it is bound to cause inequality and discrimination with a candidate belonging to another religion and it would be a denial of admission on the ground of religion and would be hit by Article 29(2). The right conferred under Article 30 is a general right granted to all minorities, but if any educational institution established and administered by such minority also gets

Article 30(1) was independent of and not affected by Article 29(2). It reasoned that while Article 29(2) dealt with non-discrimination and was available to individuals only, right to minorities under Article 30(1) was wider in scope and was intended to afford protective discrimination which permitted differential treatment that distinguished them from the majority.⁷¹ While Article 30(1)

the benefit of grant in aid out of the State funds then it has to fall in line equally with all other educational institutions in the matter of admitting students in such institution and cannot prefer or reserve any seats for students of its own religion. ...A minority can effectively conserve its distinct language, script or culture only if it has the right to establish educational institutions of its choice. However, the right under Article 30(1) is a separate right independent of the considerations under Article 29(1). The rights conferred on the minorities under Article 29(1) or Article 30(1) are enabling ones while clause (2) of Article 29 is a mandate that in the matter of admission in any educational institution maintained by the State or receiving aid all citizens would be treated equal and could not be denied admission on grounds only of religion, race, caste, language or any of them. The right guaranteed under Article 29(2) is a special right which would prevail over the general right guaranteed to the minorities under Article 30(1). Articles 15(4), 28(3) and 29(2) place express limitations on the right given to minorities in Article 30(1). ...Education is a strong factor to unite the entire country and it was considered necessary that where any educational institution is maintained by the State or receives aid out of State funds, which money comes from contributions by way of taxes from every citizen of this country, then such educational institutions run by the minorities had to fall in line with all other educational institutions and were not entitled to deny admission to any citizen on the ground of religion, race, caste, language or any of them. If, however the minorities, based on religion or language wanted to run any educational institution without any aid out of State funds, there was no restriction placed upon the minorities in the matter of admission in such educational institutions and they were free to admit students of their community. The aim of our Constitution is unity in diversity. It is to enrich the unity by making it assimilate the diversities, it is not to encourage fissiparous tendencies. The fundamental right guaranteed by Article 30(1) is not, therefore, to be extended so as to encroach upon other fundamental rights or to go contrary to the intentions of the Founding Fathers. It would be useful to consider the debates of the Constituent Assembly while considering these articles.

⁷¹ The minorities are not entitled to establish and administer educational institutions for the exclusive benefit of their community. The choice of institution provided in Article 30(1) does not mean conferment of such right on the minorities. If such was the aim, Article 30(1) would have been differently worded and it would have contained the words "for their own community". Even in practice, such claims are likely to be met with considerable hostility. It may not be conducive to have a relatively homogeneous society.

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extended to establishment of educational institutions for the purposes of religion only, the minority institutions, merely on getting State aid, would not be hit by Article 29(2) and lose their right under Article 30(1).⁷² The Court recognised the need for State aid in running educational institutions⁷³ and observed that minority

The fact that Article 29(2) applies to minorities as well as non-minorities does not mean that it was intended to nullify the special right guaranteed to minorities in Article 30(1). The rights in Article 30(1) are of wider amplitude. The width of Article 30(1) cannot be cut down by the considerations on which Article 29(1) is based. ... Article 29(2) deals with non-discrimination and it is available only to individuals. But the general equality by non-discrimination is not the only goal of minorities. The minority rights under the majority rule imply more than non-discrimination and indeed, it begins with non-discrimination. Protection of interests and institutions and advancement of opportunity are just as important. Differential treatment that distinguishes them from the majority is a must to preserve their basic characteristics. This appears to be the chief reason for which Article 30(1) was incorporated as a fundamental right.

⁷² The Constitution establishes secular democracy. The animating principle of any democracy is the equality of the people. But the idea that all people are equal is profoundly speculative. In order to treat some persons equally, they have to be treated differently. A fair degree of discrimination is to be recognised in favour of minorities. But it is impossible to have an affirmative action for religious minorities in a religiously neutral way. ...The same principle which is applied to socially and educationally backward classes, that is the principle of protective discrimination is applicable here also....The concept of equality before the law and the prohibition of certain kinds of discrimination do not require identical treatment. ...To treat unequals differently according to their inequality is not only permitted but required. Laws carving out the rights of minorities in Article 30(1) however, must not be arbitrary, invidious or unjustified; they must have a reasonable relation between the aim and the means employed. The individual rights will necessarily have to be balanced with competing minority interests. Though there is no entitlement to State grant for minority educational institutions, but under Article 30(2), the State is under an obligation to maintain equality of treatment in granting aid to educational institutions. Minority institutions ...are entitled to get the financial assistance much the same way as the institutions of the majority communities.

⁷³ The educational institutions are not business houses. They do not generate wealth. They cannot survive without public funds or private aid. With the restraint on collection of fees, the minorities cannot be saddled with the burden of maintaining educational institutions without grant-in-aid. They do not have economic advantage over others. It is not possible to have educational institutions without State aid. The minorities cannot therefore, be asked to maintain educational institutions on their own. The minorities cannot be treated in a religiously neutral way in the educational institutions established and administered by them. Article 30(1) was incorporated to secure to the minorities a fair

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institutions, like the majority institutions, could get State aid and were entitled to equality of treatment in that matter.⁷⁴ It also reiterated the inherent limits on 'management of the affairs of the institution' secured under Article 30(1) but allowed the writ petitioner's cause on facts⁷⁵ by a 4:1 majority.⁷⁶

The right of the State to prescribe the educational content was laid clear by the Supreme Court when it became a matter of challenge before it.

deal in the name of religion only. It should not be nullified by narrow judicial interpretation or crabbed pedantry. A meaningful right must be shaped, moulded and created under Article 30(1), while at the same time affirming the right of individuals under Article 29(2). There is a need to strike a balance between the two competing rights.

⁷⁴ The receipt of State aid does not impair the rights in Article 30(1). The regulation which may lawfully be imposed as a condition of receiving grant must be directed in making the institution an effective minority educational institution. The regulation cannot change the character of the minority institution. Such regulations must satisfy a dual test; the test of reasonableness, and the test that it is regulative of the educational character of the institution. It is thus evident that the rights under Article 30(1) remain unaffected even after securing financial assistance from the government.

⁷⁵ The standards of education are not a part of the management. It concerns the body politic and is governed by considerations of the advancement of the country and its people. The State as the controlling authority has right and duty to regulate all academic matters. Regulations, however, shall not have the effect of depriving the right of minorities to educate their children in their own institution. That is a privilege which is implied in the right conferred by Article 30(1). The right to select students for admission is an important facet of administration. This power also could be regulated but the regulation must be reasonable just like any other regulation. It should be conducive to the welfare of the minority institution or for the betterment of those who resort to it.

⁷⁶ *Per Kasliwal, J. (dissenting)* Administration means management of the affairs of the institution. The standards of education are not a part of management as such. The action of the College in applying the method of interview contrary to the direction given by the university is wholly arbitrary, wrong and illegal and violative of Article 14.

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**RIGHT OF STATE TO PRESCRIBE EDUCATIONAL CONTENT VIS-
À-VIS FUNDAMENTAL RIGHTS**

In *Naraindas Indurkhya v. State of M.P.*,⁷⁷ the Court considered the question of whether the State Government could prescribe textbooks to the exclusion of other textbooks on the subject for use in primary and middle school classes at the time when the Act of 1973⁷⁸ had not been enacted. The Court concluded that even though there was no statutory provision, like section 4(1) of the Act of 1973, the State Government was entitled to prescribe the 28 textbooks in exercise of its executive power under Article 162 of the Constitution, provided that in doing so it did not trench on the rights of any person.⁷⁹ As far as Government schools are concerned, the State Government could always, as the authority owning and conducting those schools, prescribe the textbooks to be used by the students in those schools. With regard to the private schools also the position is the same. Even though there is no law

⁷⁷ (1974) 4 SCC 788.

⁷⁸ M.P. Prathamik, Middle School Tatha Madhyamik Shiksha (Pathya Pustakon Sambandhi Vyavastha) Adhiniyam, 1973 (13 of 1973).

⁷⁹ No publisher has any right to insist that any of his books shall be accepted as textbooks by the State Government. He has merely a chance or prospect of any or some of his books being approved as textbooks by the State Government. Such chances are incidental to all trade and business and there can be no infringement of any right by an action of the State Government in prescribing 28 textbooks printed and published by the Textbooks Corporation to the exclusion of other textbooks on the subjects.

which confers power on the State Government to prescribe textbooks, the State Government can by virtue of the need of the private schools for recognition, prescribe textbooks for them and oblige them to use such textbooks.

An analysis of these decisions would indicate that the minorities have a fundamental right to establish and administer any educational institution of their choice and that though Article 30(1) was couched in absolute terms, the government could impose reasonable restrictions for the purpose of making the minority educational institutions effective vehicles of education for all sections of the society who use such educational institutions. The government cannot interfere to negate the right under Article 30(1) by imposing conditions for granting aid or affiliation or recognition. The Court has also held that Article 162 of the Constitution empowers the State Government to prescribe the textbooks for study. These cases indicate the extent of intervention possible by the government in educational institutions and its ability to influence the quality of education imparted by it. From the point of view of providing access to secular education, the Court has supported the efforts of the government to use its financial resources, mechanisms

for recognition and affiliation, etc., to open for the general public the infrastructure created and maintained by the minority communities. But the Court has resisted any attempts by the government to bring in a change in the minority character of such institutions.

The role of financial resources in the establishment and administration of educational institutions cannot be denied. The ability to raise resources and the means for the same has had a negative impact on ensuring access to education. In the next chapter the judicial role in determining educational financing is analysed.

CHAPTER VIII

JUDICIARY ON EDUCATIONAL

FINANCING

MINORITY RIGHTS AND RIGHT TO EDUCATION

The Supreme Court is witness to a disproportionate number of cases in the field of education involving the Constitutional right of the minorities to establish and administer educational institutions of their choice as compared to cases involving the individual's right to education.

RIGHT OF INSTITUTION TO RECEIVE AID FROM THE STATE

The Court considered the question of grant of aid to minority institution in the context of rights under Articles 30(1) and 337 of the Constitution. It found that such aid cannot be made conditional on the surrender of a part of right under Article 30(1).¹ In *Frank Anthony Public School Employees' Assn. v. Union of India*,² it observed that a minority institution receiving aid to which it is entitled, cannot be subjected to fresh or additional conditions precedent to enable it to obtain the grant since that would violate

¹ Section 12 of the Delhi School Education Act which makes the provisions of Chapter IV inapplicable to unaided minority institutions was held to be discriminatory and void except to the extent that it makes S. 8(?) inapplicable to unaided minority institutions.

² (1986) 4 SCC 707. The Court observed that the objection to the reference to an Arbitration Tribunal in *Ahmedabad St. Xavier's College Society case* was to the wide power given to the Tribunal to entertain any manner of dispute and the provision for the appointment of umpire by the Vice-Chancellor and the provisions for an appeal to the Syndicate was considered objectionable in *Very Rev. Mother Provincial case* as it conferred unfettered right on the university.

Articles 337 and 30(1). The Fundamental Right guaranteed by Article 30(1) cannot be surrendered, wholly or partly, and the authorities cannot make the grant of aid conditional on the surrender of a part of the Fundamental Right. Anglo-Indian schools which were entitled to receive grants under the Constitution and which received no more aid than that to which they were entitled under the Constitution could not be subjected to stringent terms as fresh or additional conditions precedent to enable them to obtain the grant.³ Such conditions would infringe their rights under Article 337 and violate their rights under Article 30(1).⁴

The Court explained the scope of the principle underlying Article 39-A and the combined effect of Articles 21 and 39-A in the context of a petition impugning the denial of grants-in-aid to government recognised private law colleges in *State of Maharashtra v. Manubhai Pragaji Vashi*.⁵ An important case in the context of the necessity for quality legal education systems in India, here the Court

³ S. 8(2) requiring prior approval of the Director for the dismissal, removal, reduction in rank or other termination of service of an employee of a recognised private school, was held to be objectionable, relying on the views of the nine-Judge Bench in Ahmedabad St. Xavier's College Society case. Thus S. 12 which makes Ss. 8(1), (3), (4) and (5), 9, 10 and 11 of the Act inapplicable to unaided minority institutions was found discriminatory and therefore unconstitutional to that extent.

⁴ Re, the Kerala Education Bill, 1957, AIR 1958 SC 956, explained.

⁵ (1995) 5 SCC 730.

recognised the necessity of State aid for improving the quality of legal education in the professional colleges. The Court pointed out the role of and expectations from legal education in a democratic polity and ruled that such denial cannot be justified on the ground of paucity of funds.⁶

⁶ Article 21 read with Article 39-A of the Constitution mandates or casts a duty on the State to afford grants-in-aid to recognised private law colleges, similar to other faculties, which qualify for the receipt of the grant. The aforesaid duty cast on the State cannot be whittled down in any manner, either by pleading paucity of funds or otherwise. (Para 17) The right to free legal aid and speedy trial are guaranteed fundamental rights under Article 21. Article 39-A provides "equal justice" and "free legal aid". The State shall secure that the operation of the legal system promotes justice. It means justice according to law. The principles contained in Article 39-A are fundamental and cast a duty on the State to secure that the operation of the legal system promotes justice, on the basis of equal opportunities and further mandates to provide free legal aid in any way - by legislation or otherwise, so that justice is not denied to any citizen by reason of economic or other disabilities. The crucial words are (the obligation of the State) to provide free legal aid "by suitable legislation or by schemes" or "in any other way", so that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. The above words occurring in Article 39-A are of very wide import. In order to enable the State to afford free legal aid and guarantee speedy trial, a vast number of persons trained in law are essential. Legal aid is required in many forms and at various stages, for obtaining guidance, for resolving disputes in courts, tribunals or other authorities. The requirement is of such a great dimension, that sizeable or vast number of dedicated persons should be properly trained in different branches of law, every year by providing or rendering competent and proper legal education. This is possible only if adequate number of law colleges with proper infrastructure including expertise law teachers and staff are established to deal with the situation in an appropriate manner. Lack of sufficient colleges called for the establishment of private law colleges. If the State is unable to start colleges of its own, it is only appropriate that private law colleges, which are duly recognised by the University concerned and/or the Bar Council of India and/or other appropriate authorities, as the case may be, should be afforded reasonable facilities to function effectively and in a meaningful manner. That requires substantial funds. Under the label of self-financing institutions, the colleges should not be permitted to hike the fees to any extent in order to meet the expenses to provide the infrastructure and for appointing competent teachers and staff. The private law colleges, on their own, may not afford to incur the huge cost required in that behalf. The "standard" of legal education and discipline is bound to suffer. It should not so happen for want of funds. The "quality" should on no account suffer in providing free legal aid and if it is not so, "the free legal aid" will only be a farce or make believe or illusory or a meaningless ritual. That should not be. It is in that direction the grants-in-aid by the State will

In *State of H.P. v. H.P. State Recognised & Aided Schools Managing Committees*,⁷ the Supreme Court considered the extent of public aid that is needed by the private schools. The Court ruled that it was the obligation of the State to supplement through aid to the recognised and aided private schools what was required by them to enable them to pay a salary to their teachers which was equal to that paid to teachers in government schools. The Court ruled that such obligation arose out of the Constitutional right to receive free education up to the age of 14 years.⁸

The Court reasoned that with the Kothari Commission's recommendations accepted by the State of Himachal Pradesh, it

facilitate and ensure the recognised private law colleges to function effectively and in a meaningful manner and turn out sufficient number of well-trained or properly equipped law graduates in all branches year after year. That will in turn enable the State and other authorities to provide free legal aid and ensure that opportunities for securing justice are not denied to any citizen on account of any disability. (Para 17) These aspects necessarily flowing from Articles 21 and 39-A of the Constitution were totally lost sight of by the Government when it denied the grants-in-aid to the recognised private law colleges as was afforded to other faculties. The State has abdicated the duty enjoined on it by the relevant provisions of the Constitution aforesaid. (Para 17)

⁷ (1995) 4 SCC 507.

⁸ The question before the Supreme Court was whether recognised and aided private schools were entitled to receive grants-in-aid to meet 95 per cent of the net expenditure to enable them to pay to the teachers employed by them salary equal to that being paid to the counterparts of such teachers in government schools. Rule 45-Q of the relevant rules provides for parity of pay between teachers of private schools and government schools. Rule 45-J requires the management of such schools to meet at least 5 per cent of the net expenditure. However, Rule 47(2) prescribes a maximum limit on the amount of admissible grants-in-aid. A Division Bench of the Himachal Pradesh High Court directed the State Government to pay grants-in-aid to meet 95 per cent of the expenditure incurred by the aided schools. H.P. Grants-in-Aid Rules, Rules 45-Q, 45-J & 47(2) was considered in the context of right to education under Articles 21, 14, 41 and 45 of the Constitution of India.

stood committed to give grants-in-aid to the aided schools to meet the expenditure incurred on payment of salaries to the teachers. Right to education being a fundamental right, the State of Himachal Pradesh was under a constitutional obligation to provide free education to children till they complete the age of 14 years. The obligation does not end thereafter, but is subject to the limits of its economic capacity and development. It reasoned that since a child joins school at the age of five years, all the children studying in the Middle Schools would be less than fourteen years of age and therefore, the State Government is under an obligation to provide free education to the children studying in aided non-government Middle Schools. Hence, the aided private Middle Schools were entitled to full grants-in-aid from the State Government. In the High Schools and Senior Secondary Schools, the State Government is again under an obligation to provide free education to the children studying in these schools who were fourteen years of age or less. The Court ruled that even in High Schools and Senior Secondary Schools up to 8th/9th class - the students being 14 or below - the State Government is bound to provide free education and as such bound to meet the total expenditure of the schools to that extent. The large majority of students, in the non-government schools,

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being fourteen years of age or below the contention of the State based on financial constraints was rejected.

In the case of *Chandigarh Admn. v. Rajni Vali*,⁹ the permission to open 11th and 12th classes in a school getting grant-in-aid from the State, was given on the condition that no grant-in-aid would be provided for additional staff.¹⁰ The teachers for the 11th and 12th standards claimed salary on a par with their counterparts working in privately managed recognised aided schools. Allowing this the Supreme Court held that the government could not shirk from its responsibility of providing primary and secondary education and grant-in-aid to private schools for efficient functioning of schools and maintaining standards of teaching. The Court rejected as not valid the Government's difficulty in bearing the additional financial burden.¹¹

⁹ (2000) 2 SCC 42.

¹⁰ The classes were started on the recommendation of the Director of Public Instructions and the institution was granted affiliation by the Central Board of Secondary Education, New Delhi, with effect from 1-5-1998. The corresponding classes in Dev Samaj Degree College, Chandigarh, were closed on the decision of the Chandigarh Administration that education in such classes would be given in schools.

¹¹ Para 6. Imparting primary and secondary education to students is the bounden duty of the State Administration. It is a constitutional mandate that the State shall ensure proper education to the students on whom the future of the society depends. In line with this principle, the State has enacted statutes and framed rules and regulations to control/regulate establishment and running of private schools at different levels. The State Government provides grant-in-aid to private schools with a view to ensure smooth

It can be seen that the court has consistently upheld the right of the educational institutions to receive aid from the government to run its courses. The reasoning of the Court in such instances was that education upto the age of fourteen being a fundamental right, paucity of funds could not be cited as a reason by the government to deny the financial wherewithal for allowing children of such age groups to study. Whether it be in State owned institutions or outside the State was expected to share the financial burden of providing education to children upto the age of fourteen. In the context of legal aid, the Court found that this burden extended to aiding law colleges without discrimination since right to legal aid was itself a fundamental right and hence cast a duty on the government to provide infrastructure and other resources to augment facilities for the same.

From the right of educational institutions to receive aid, we can see the Supreme Court being approached by individuals trying to obtain finances to secure access to educational institutions in pursuit of their right to education.

running of the institution and to ensure that the standard of teaching does not suffer on account of paucity of funds. Appointment of qualified and efficient teachers is a sine qua non for maintaining high standards of teaching in any educational institution.

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FINANCING RIGHT TO EDUCATION

The right to education is meaningless without sufficient access to education. The primary beneficiary being the student himself, it is but natural that the first recourse to financing education must then be from the beneficiary's own resources. The legal order must recognise this right and favour it.

In *Felix Tamba v. State of Jharkhand and Others*,¹² the notification of the Government of Jharkhand that no person who is a member of Schedule Tribe community could obtain loan for the purpose of education by mortgaging his land was challenged as being totally against the interest of the Schedule Tribe community. The notification sought to restrain all the banks in the entire State of Jharkhand from sanctioning loan to the members of Schedule Tribe community against the mortgage of their land for the purpose of construction of house and/or for the purpose of education.

The Jharkhand High Court observed that persons having sufficient means were availing education loan under the schemes floated by the nationalized banks and other financial institutions.

¹² MANU/JH/0955/2008.

Such banks and financial institutions were giving education loan to the candidates for their higher studies in different institutions in India and abroad by taking collateral security of land and the personal guarantee of parents.¹³ The Court was of the considered opinion that those persons belonging to the members of scheduled caste or scheduled tribe being also entitled to such financial assistance for higher education, and restraining the members of scheduled caste and scheduled tribe from availing education loan from the banks would amount to depriving them from their legal right to bring them and their children at the level of others who, by reason of higher education, have developed their standard of living. The Court found such restriction to be wholly unreasonable and unjustified.¹⁴

The right to education suffered a serious setback when the demand for higher professional education could not be met by the State resulting in the opening up of a large number of private self-financing educational institutions. Being private self-financing entities, the funds were raised by these educational institutions from

¹³ MANU/JH/0955/2008, para. 41.

¹⁴ MANU/JH/0955/2008, para 42.

its users by the method of capitation fee and donations. Coupled with stagnation in the infrastructure development in the governmental sector, this led to higher education becoming accessible only on the basis of paying capacity.

With the mushrooming of private providers of higher and professional education the Supreme Court has had to settle conflicts between claims of access to higher education and the right of the institutions to determine their fees to raise resources. This new era of conflicts has seen the judiciary trying hard to do a balancing act.

NEW ERA OF A FUNDAMENTAL RIGHT TO EDUCATION

*Mohini Jain v. State of Karnataka*¹⁵ was a historic decision of the Supreme Court regarding the right to education of the citizens. The issue was the charging of capitation fee for admission to educational institutions. The Court found the denial of admission to those unable to pay capitation fee as patently unreasonable, unfair and unjust and ruled the charging of capitation fee to be illegal and impermissible since it amounts to denial of citizen's right to

¹⁵ (1992) 3 SCC 666. Overruled in *Unni Krishnan, J.P. v. State of A.P.*, (1993) 1 SCC 645.

education and is arbitrary and against of Article 14.¹⁶

Relying on Articles 19, 21, 38, 39(a), (f), 41 and 45, the Court found that the “right to education” is concomitant to the fundamental rights enshrined under Part III of the Constitution.¹⁷ Elaborating on the content of Articles 21 and 41 in the context of right to life the court observed that such right includes right to education.¹⁸ The Court went on to observe that the State

¹⁶ The Court reasoned in this manner: Indian civilisation recognises education as one of the pious obligations of the human society. To establish and administer educational institutions is considered a religious and charitable object. Education in India has never been a commodity for sale. The Court went on to observe that the educational institutions must function to the best advantage of the citizens. The concept of ‘teaching shops’ is contrary to the constitutional scheme and is wholly abhorrent to the Indian culture and heritage. The Preamble promises and the directive principles are a mandate to the State to eradicate poverty so that the poor of this country can enjoy the right to life guaranteed under the Constitution. The State action or inaction which defeats the constitutional mandate is per se arbitrary and cannot be sustained. Capitation fee makes the availability of education beyond the reach of the poor. Restricting admission to non-meritorious candidates belonging to the richer section of society and denying the same to poor meritorious candidates is wholly arbitrary, against the constitutional scheme and as such cannot be legally permitted. Capitation fee in any form cannot be sustained in the eyes of law. The only method of admission to the medical colleges in consonance with fair play and equity is by ways of merit and merit alone. Therefore, charging capitation fee in consideration of admission to educational institutions, is a patent denial of a citizen’s right to education under the Constitution and is wholly arbitrary, violative of Article 14 and as such illegal and not permissible.

¹⁷ The directive principles which are fundamental in the governance of the country cannot be isolated from the fundamental rights guaranteed under Part III. These principles have to be read into the fundamental rights. Both are supplementary to each other. The State is under a constitutional mandate to create conditions in which the fundamental rights guaranteed to the individuals under Part III could be enjoyed by all. 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 large majority which is illiterate. The fundamental rights including the right to freedom of speech and expression and other rights under Article 19 cannot be appreciated and fully enjoyed unless a citizen is educated and is conscious of his individualistic dignity.

¹⁸ “Right to life” is the compendious expression for all those rights which the Courts must enforce because they are basic to the dignified enjoyment of life. It extends to the

Government was under an obligation to make endeavour to provide educational facilities at all levels to its citizens.¹⁹

In other words, the entire gamut of education was a fundamental right, whether primary, secondary or professional. But the Court in *Mohini Jain* never spoke of education at all levels being made available free of cost or at a subsidised rate.²⁰

Though the Court in *Mohini Jain* argued in favour of a fundamental right to education, this position was later overruled in

full range of conduct which the individual is free to pursue. The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education.

¹⁹ Every citizen has a "right to education" under the Constitution. The State is under an obligation to establish educational institutions to enable the citizens to enjoy the said right. The State may discharge its obligation through State-owned or State-recognised educational institutions. When the State Government grants recognition to the private educational institutions it creates an agency to fulfil its obligation under the Constitution. The students are given admission to the educational institutions - whether State-owned or State-recognised - in recognition of their "right to education" under the Constitution. This observation was later overruled in *Unnikrishnan*. Every citizen has a "right to education" under the Constitution. The State is under an obligation to establish educational institutions to enable the citizens to enjoy the said right. The State may discharge its obligation through State-owned or State-recognised educational institutions. When the State Government grants recognition to the private educational institutions it creates an agency to fulfil its obligation under the Constitution. The students are given admission to the educational institutions - whether State-owned or State-recognised - in recognition of their "right to education" under the Constitution.

²⁰ Dr. N.R. Madhava Menon, "Education, Equality and Social Justice", in *Dr. B.R. Ambedkar and the Indian Constitution*, Dr. S.G. Bhat, (Ed.), Journal Society, Dr. Ambedkar Government Law College, Pondicherry (2001), p. 1 at p. 10. "Some critics have misread the judgement as declaring that State-funded higher education be available to all at all levels free of cost or at subsidized cost. This is ridiculous and cannot be sustained. In case of higher education, all that the Court stated was a principle rejecting on ground of arbitrariness the commercialization of higher education through capitation fee system, which incidentally is what the Karnataka Act also wanted to achieve. The Court did not want to canvass a position to the effect that medical college admissions must be open to all at subsidized cost irrespective of merit."

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the case of *Unnikrishnan*.

ERA OF SCHEMES & PROGRESSIVE REDUCTION OF THE FUNDAMENTAL RIGHT TO EDUCATION

Unni Krishnan J.P. v. State of A.P.,²¹ overruled the major ratio of *Mohini Jain*,²² and limited the fundamental right to education to primary and secondary stages. The Court considered the scope of right to education secured under the Constitution in the light of the provisions of Articles 21, 19(1)(g), 41, 45 & 46 and 14 & 15 in the context of admissions to and charging of capitation fees in private unaided or aided recognised and affiliated educational institutions conducting professional courses and the extent to which, subject to conditions and regulations of the State, such aided institutions could charge a fee higher than that charged by govt. institutions.²³ The Court held such fee to amount to capitation fee

²¹ (1993) 1 SCC 645.

²² (1986) 4 SCC 707.

²³ In the context the court considered the Preamble and Sections 2, 3, and 4 of the Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, 1984 (37 of 1984), Sections 2 and 20-A of the A.P. Education Act, 1982 (1 of 1982), the Preamble and Sections 2, 3, 3-A, 4, 7 and 9 of the A.P. Educational Institutions (Regulation of Admission and Prohibition of Capitation Fee) Act, 1983 (5 of 1983), Preamble and Sections 2, 3, 4, and 7 of the Maharashtra Educational Institutions (Prohibition of Capitation Fee) Act, 1987 (6 of 1988), the Preamble and Sections 2, 3, 4, 5, 12 and 14 of the T.N. Educational Institutions (Prohibition of Collection of Capitation Fee) Act, 1992 (57 of 1992), Sections 3 and 10 of the All India Council for Technical Education Act, 1987, Sections 12, 12-A, 14, 22, 23 and 24 of the University Grants Commission Act,

only when it exceeds a maximum limit fixed by the State. The Court stressed the obligation of the State to lay down conditions for grant of recognition/affiliation and ruled that aided institutions would be governed by rules and regulations framed by the government, the right to recognition/affiliation being not a fundamental right.

In this case, the Supreme Court noted the significance of time limit provided under Article 45. As per Mohan, J., with regard to the general obligation to provide education, the State is bound to provide the same unless it could show that it was allocating its resources to some even more pressing programme and not deliberately starving its educational system. He reasoned that by holding education as a fundamental right up to the age of 14 years the Supreme Court is not determining the priorities, but reminding it of the solemn endeavour, it had to take, under Article 45, within a prescribed time, which time-limit having expired long ago.

Pandian and Jeevan Reddy, JJ., noted that of several articles in Part IV, only Article 45 speaks of a time-limit and that the Constitution contemplated a crash programme being undertaken by

1956, Sections 2, 11, 21, 27, 32 and 33 of the Medical Council Act, 1956, and the Andhra Pradesh Educational Institutions (Regulation of Admissions) Order, 1974.

the State to achieve the goal set out in Article 45. Article 45 does not speak of the “limits of its economic capacity and development” as does Article 41, which *inter alia* speaks of right to education. More money is spent and more attention is directed to higher education than to and at the cost of primary education.²⁴ Neglected more so are the rural sectors, and the weaker sections of the society referred to in Article 46. Their lordships clarified that they were not laying down the priorities for the Government but were only emphasising the constitutional policy as disclosed by Articles 45, 46 and 41.

The mandate under Articles 45, 46 and 41 for universal education was reasoned out by the Court. As per Pandian and Jeevan Reddy, JJ., a true democracy is one where education is universal, where people understand what is good for them and the nation and know how to govern themselves. 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.

²⁴ By primary education, their Lordships meant the education, which a normal child receives by the time he completes 14 years of age.

On the significance of recognition/affiliation by Universities as per S. 12-A of the University Grants Commission Act, 1956, read with Articles 14, 15, 41, 45 and 46 of the Constitution of India the Court was of the opinion that the State while granting recognition/affiliation to private educational institutions running professional courses was obliged to impose conditions for maintaining standards and ensuring fairness inter alia in respect of fees chargeable and admissions.

Pandian and Jeevan Reddy, JJ. with Sharma, C.J. and Bharucha, J. concurring, ruled that recognition may be granted either by the Government or any other authority or body empowered to accord recognition. Similarly, affiliation may be granted either by the University or any other academic or other body empowered to grant affiliation to other educational institutions and that the educational institution had no right to insist that the certificates or degrees awarded by such institution should be recognised by the State and no right to get the students trained by the institution admitted to examinations conducted by the University or by the Government or any other authority. The institution had to seek such recognition or affiliation from the appropriate agency and such

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recognition or affiliation was not a matter of course or a formality. No educational institution except a University could award degrees as per sections 22 and 23 of the University Grants Commission Act. Since the recognising/affiliating authority is the State, it is under an obligation to impose such conditions as are appropriate to ensure not only education of requisite standard but also fairness and equal treatment in the matter of admission of students as part of its duty under Article 14 of the Constitution. The State could not claim immunity from the obligations arising from Articles 14 and 15. If so, it cannot confer such immunity upon its affiliates. The Court ruled that no Government/University or authority is competent to grant recognition or affiliation except in accordance with the scheme framed by the Court.²⁵ The scheme constituted a condition of such recognition or affiliation, as the case may be, in addition to such other conditions and terms, which such Government, University or other authority may choose to impose.

Mohan, J. in his concurring judgement recognised the need for encouraging private colleges while having regulatory measures to ensure minimum standards and facilities. His Lordship opined

²⁵ At Paragraphs 206 to 210 of the judgement.

that the establishment of an educational institution may perhaps fall under the category of occupation provided no recognition is sought from the State or affiliation from the University is asked on the basis that it is a fundamental right. Admission within all groups and categories was to be based only on merit while allowing reservation of seats in favour of the weaker sections of the society and other groups, which deserve special treatment. The norms for admission were to be pre-determined, objective and transparent.

B.P. Jeevan Reddy, and Mohan, JJ., opined that the activity of establishing an educational institution could neither be a trade or business nor could it be a profession within the meaning of Article 19(1) (g). The content of the expression "occupation" had to be ascertained keeping in mind the fact that clause (g) employed all the four expressions viz., profession, occupation, trade and business. Their fields may overlap, but each of them had a content of its own, distinct from the others. Their lordships stated that imparting of education was not and could not be allowed to become commerce and a law ensuring against it would be a valid measure within the

meaning of clause (6) of Article 19.²⁶ Pandian, Jeevan Reddy, Bharucha, JJ. and Sharma, C.J. concurred on the point that imparting education was not covered by expressions 'trade or business', 'profession' or even 'occupation' as used in the context of "industry" under S. 2(j), Industrial Disputes Act, 1947. Their lordships were of the opinion that education had been treated as a religious duty, a charitable activity and making it commerce was opposed to the ethos, tradition and sensibilities of the nation.

The Court held that though Article 21 uses negative words, their use does not eliminate the positive right conferred by it, such as right to education. Pandian and Jeevan Reddy, JJ., were of the opinion that the content of right to life was not to be determined on the basis of existence or absence of threat of deprivation. The effect of holding that right to education is implicit in the right to life is that the State cannot deprive the citizen of his right to education except in accordance with the procedure prescribed by law. Mohan, J., opined that Article 21 did not positively confer a fundamental right to life or personal liberty like Article 19 because great concepts like liberty and life were purposefully left to gather meaning from

²⁶ AIR 1968 Bom. 91; AIR 1984 A.P. 251, and AIR 1986 Kant. 119, were overruled.

experience and that it is not correct to state that because the article is couched in a negative language, positive rights to life and liberty are not conferred. The right to life and liberty inhere in every man. There was no need to provide for the same in a positive manner.

On the question of the scope of Articles 21, 41, 45 and 46 in allowing private unaided recognised/affiliated educational institutions running professional courses to charge a fee higher than that charged by govt. institutions for similar courses, the Court held that such fee could not exceed the maximum limit fixed by the State and that the fee so charged does not amount to 'capitation fee'.

On the scope of Articles 21, 41, 45, 46 including the citizen's right to higher education after completion of age of 14 years the Court held it to be not absolute but subject to limits of economic capacity and development of the State. Limits of economic capacity depend on subjective satisfaction of the State. The obligations created by Articles 41, 45 and 46 of the Constitution could be discharged by the State either by establishing institutions of its own or by aiding, recognising and/or granting affiliation to private educational institutions. Sharma, C.J. and Bharucha, J. were of the opinion that in the limited question before them, it was enough to

state that there was no fundamental right to education for a professional degree that flows from Article 21.²⁷

Covering the scope of Articles 21, 45, 41 and 46 on the right to primary education it was held that every child citizen up to age of 14 years has a fundamental right to free education. The State is obligated to follow the directive in Article 45 and Article 21 is to be construed in the light of Articles 41, 45 and 46. The Court however, expressed no opinion as regards the role of private unaided recognised/affiliated educational institutions.

Sharma, C.J. and Bharucha, J., were of the opinion that the question whether the right to primary education, as mentioned in Article 45 is a fundamental right under Article 21 did not arise in *Mohini Jain* case and held that the finding given in *Mohini Jain* case on this question was not necessary in that case and was, therefore, not binding law.²⁸

Explaining the scope of Article 21, Pandian and Jeevan Reddy, JJ., held that though right to education is not stated expressly as a fundamental right, it was implicit in and flows from the right to

²⁷ *Mohini Jain v. State of Karnataka*, (1992) 3 SCC 666, partly overruled.

²⁸ *Mohini Jain v. State of Karnataka*, (1992) 3 SCC 666, limited.

life guaranteed under Article 21. The right to education was held to be one of transcendental importance with fundamental significance to the life of an individual and the nation. Without education being provided to the citizens the objectives set forth in the Preamble to the Constitution cannot not be achieved resulting in the failure of the Constitution. The fact that right to education occurs in as many as three Articles in Part IV viz., Articles 41, 45 and 46 showed the importance attached to it by the founding fathers. Even some of the Articles in Part III viz., Articles 29 and 30 speak of education. The court held that though Article 21 is worded in negative terms it has both a negative and an affirmative dimension. The effect of holding that right to education is implicit in the right to life is that the State cannot deprive the citizen of his right to education except in accordance with the procedure prescribed by law. Hence, the Court ruled that it would not be correct to contend that *Mohini Jain* was wrong insofar as it declared that 'the right to education flows directly from right to life'.²⁹

Their Lordships then held that the citizens could not demand that the State provide adequate number of medical colleges,

²⁹ *Mohini Jain v. State of Karnataka*, (1992) 3 SCC 666, affirmed on this aspect.

engineering colleges and other educational institutions to satisfy all their educational needs and though *Mohini Jain* seemed to say, yes, they could not agree with such a broad proposition. The right to education which is implicit in the right to life and personal liberty guaranteed by Article 21 was to be construed in the light of the directive principles in Part IV of the Constitution. Right to education, understood in the context of Articles 45 and 41, meant: (a) every child/citizen has a right to free education until he completes the age of fourteen years and (b) after a child/citizen completes 14 years his right to education is circumscribed by the limits of the economic capacity of the State and its development.

Though a realistic appreciation of the political will of the State, this judgement which limited the fundamental right to education to the age of fourteen is surely an under-estimation of the economic capacity of the State. Given the political will, the raising of resources to make the right to education a fundamental right should not be an insurmountable problem for a sovereign nation.

While the affirmation of a fundamental right to education upto the age of fourteen held sway as a result of the judgement in the *Unnikrishnan* case, the true content of that fundamental right

from the perspective of a denial of access to education came before the Supreme Court in the case of child labour in the match factories of Tamil Nadu.

EMPOWERMENT, EDUCATION AND ABOLITION OF CHILD LABOUR

In the case of *M.C. Mehta (Child Labour Matter) v. State of T.N.*,³⁰ the Court considered the question of abolition of child labour in the context of Articles 24, 39(e), (f), 41, 45, 47 and 32 and ruled that children aged below fourteen years could not be employed in any factory or mine or other hazardous work and they must be given education as mandated by Article 45 as interpreted in *Unnikrishnan* case.³¹ The Court observed that the employers must comply with the provisions of Child Labour (Prohibition and Regulation) Act and that they would be liable to pay compensation of Rs 20,000 for every child employed in contravention of those provisions.³² It ruled

³⁰ (1996) 6 SCC 756. Direction was given to the Secretary to the Ministry of Labour, Government of India to apprise the Supreme Court within one year about the compliance of directions given in the case.

³¹ *Unni Krishnan, J.P. v. State of A.P.*, (1993) 1 SCC 645. On discontinuation of the employment of the child, his education would be assured in suitable institution with a view to make him a better citizen.

³² Other provisions of Statutes & Conventions looked into by the Court include Sections 3 & 14 of the Child Labour (Prohibition and Regulation) Act, 1986, Section 67 of the Factories Act, 1948, Section 24 of the Plantations Labour Act, 1951, Section 21 of the

that the Government must either provide job to an adult member of a family *in lieu* of the child belonging to that family who has been employed in any factory, mine or other hazardous work or it must deposit Rs 5000 for each child.³³ Thus in case where such alternative employment was not made available, parent/guardian of the child was entitled to be paid per month the income earned on the corpus of Rs 25,000 for each child which amount was to be deposited in a Child Labour Rehabilitation-cum-Welfare Fund. Employment given or payment made would cease to be operative if

Motor Transport Workers Act, 1961, Section 3 of the Apprentices Act, 1961, Section 109 of the Merchant Shipping Act, 1958, Section 45 of the Mines Act, 1952, Section 24 of the Beedi and Cigar Workers (Conditions of Employment) Act, 1966, and Article 32 of the U.N. Convention on the Rights of the Child (concluded by U.N. General Assembly on 20-11-1989).

³³ The State owes a duty to come forward to discharge its obligation in this regard since the aforementioned constitutional provisions have to be implemented by the appropriate Government, as defined in Section 2(i) of the Child Labour (Prohibition and Regulation) Act. Strictly speaking a strong case exists to invoke the aid of Article 41 of the Constitution regarding the right to work and to give meaning to what has been provided in Article 47 relating to raising of standard of living of the population, and Articles 39(e) and (f) as to non-abuse of tender age of children and giving opportunities and facilities to them to develop in a healthy manner, for asking the State to see that an adult member of the family, whose child is in employment in a factory or a mine or in other hazardous work, gets a job anywhere, in lieu of the child. This would also see the fulfilment of the wish contained in Article 41 after about half a century of its being in the paramount parchment, like primary education desired by Article 45, having been given the status of fundamental right by the decision in *Unnikrishnan*. The court felt that it was not necessary to direct the State at that stage to ensure alternative employment in every case covered by Article 24, as Article 41 speaks about right to work "within the limits of the economic capacity and development of the State". Instead, the matter was left to be sorted out by the appropriate Government.

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the parent/ guardian failed to send the child for education.³⁴

Later in *Bandhua Mukti Morcha v. Union of India*,³⁵ a similar case involving child labour in the carpet making industry of Uttar Pradesh, the Supreme Court required the Government of India to evolve the principles of policies for progressive elimination of employment of the children below the age of fourteen years in all employments governed by the respective enactments mentioned in *M. C. Mehta case*; to evolve such steps consistent with the scheme laid down in *M. C. Mehta case*, to provide (1) compulsory education to all children either by the industries themselves or in coordination with it by the State Government to the children employed in the factories, mine or any other industry, organised or unorganised labour with such timings as is convenient to impart compulsory education, facilities for secondary, vocational profession and higher education; (2) apart from education, periodical health check-up; (3) nutrient food etc.; (4) entrust the responsibilities for implementation of the principles, and to supply a copy of such action taken to the

³⁴ Inspectors appointed under Section 17 of the Child Labour (Prohibition and Regulation) Act were to ensure compliance with the provisions of the Act. Article 45 mandates compulsory education for all children until they complete the age of 14 years; it is also required to be free. It would be the duty of the Inspectors to see that this call of the Constitution is carried out.

³⁵ (1997) 10 SCC 549.

Registry of the Supreme Court. The Supreme Court further observed that it was 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 childhood due to indigence and vagary.

Thus it can be seen that from *Unnikrishnan* onwards the Supreme Court has been unwilling to burden the State with financing access to education for children beyond the age of fourteen.

The subject of financing education threw up another challenge of competing equalities before the Supreme Court. The challenges on this account gained prominence in the field of access to professional education. Availability of seats in medical education in India is low and its availability for super speciality courses is still lower. With the setting up of medical colleges being a costly affair, the seats available in the government sector is subject to competing claims and consequent litigation. Government's efforts to regulate the field of professional education threw up the greatest number of cases in the medical education sector.

STATE ROLE IN THE REGULATION OF STANDARDS OF HIGHER AND PROFESSIONAL EDUCATION

As early as in 1984, the Supreme Court ruled that admission for 25% of the seats in postgraduate courses in Medical Colleges should be regulated on the basis of All-India selection in the case of *Dr. Pradeep Jain v. Union of India*.³⁶

In *Preeti Srivastava (Dr) v. State of M.P.*,³⁷ the Supreme Court had occasion to consider the limits of the right to education in higher and professional education in the context of the necessity to ensure quality. On the question of maintaining excellence in postgraduate medical education it was held per majority that

³⁶ (1984) 3 SCC 654.

³⁷ (1999) 7 SCC 120. The following issue arose for consideration before the Constitution Bench: "The question is whether apart from providing reservation for admission to the postgraduate courses in Engineering and Medicine for special category candidates, it is open to the State to prescribe different admission criteria, in the sense of prescribing different minimum qualifying marks, for special category candidates seeking admission under the reserved category." The issue arose in the background of the developments in the States of U.P. and M.P. in respect of admission to postgraduate degree/diploma courses in medicine through the Postgraduate Medical Entrance Examination (PGMEE). The States progressively reduced the minimum qualifying marks for reserved category candidates appearing in PGMEE and the constitutionality of the GO, Ordinance and Act concerned were impugned before the Supreme Court. As a result the Constitution Bench addressed itself to the issue whether for admission to the postgraduate medical courses it is permissible to prescribe a lower minimum percentage of qualifying marks for the reserved category candidates as compared to the general category candidates. Specifically, the Bench did not go into the issue whether reservations are permissible at the postgraduate level in Medicine. This issue was not debated before it and no opinion has been expressed on it (paragraphs 10, 62 and 75). The impugned Uttar Pradesh Post Graduate Medical Education (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1997 and GO dated 7-6-1997 of the State of Madhya Pradesh were set aside.

standards of education and admission criteria can be laid down under List I, Entry 66 and List III, Entry 25 by Central legislation and that State's competence under List III Entry 25 to control or regulate higher education is subject to the standards so laid down by Union of India.³⁸ States have competence to prescribe rules for admission to postgraduate medical courses so long as they are not inconsistent with or do not adversely affect the standards laid down by the Union of India or its delegate.³⁹ The Court considered the distinction between the terms "eligibility" and "qualifications" and ruled that it was for the Medical Council of India to determine reservation of seats, if any, to be made for SCs/STs/OBCs, the extent thereof and lowering of qualifying marks in their favour on the basis of proper balancing of public interests.⁴⁰

³⁸ Per Majmudar, J., Parliament by enacting Medical Council Act was competent to authorise Medical Council of India to prescribe basic standards of eligibility and qualifications for postgraduate courses. But States are fully competent to control admission to postgraduate medical courses, provide for reservation of seats, and lay down criteria for short-listing of eligible candidates for postgraduate courses under List III, Entry 25 in the absence of any Central legislation on these aspects.

³⁹ Fixing minimum qualifying marks for passing the entrance test for admission to postgraduate courses is concerned with the standard of postgraduate medical education and once minimum standards are laid down, States are competent to prescribe any further qualifications for selecting better students as that would not adversely affect the standards so laid down.

⁴⁰ On a conjoint reading of Entry 66 of List I and Entry 25 of List III, it was held that so long as Parliament does not occupy the field earmarked for it under Entry 66 of List I or by invoking its concurrent powers as per Entry 25 in the Concurrent List, the question of admission of students to any medical course would not remain outside the domain of the State Legislature. It is not in dispute that Parliament, by any legislative exercise either by

On the issue whether any special provision in the form of lower qualifying marks in Postgraduate Medical Entrance Examination could be prescribed for the reserved category, the Court held as per majority that in view of Entry 25, of List III of the

separate legislation or by amending the Indian Medical Council Act, 1956 has not legislated about the controlling of admissions of students to higher medical education courses in the country. Therefore, the only question remains whether the Indian Medical Council Act enacted as per Entry 66 of List I covers this aspect. If it covers the topic then obviously by the express language of Entry 25 of List III, the said topic would get excluded from the legislative field available to the State Legislature even under Entry 25 of the Concurrent List. Entry 66 of List I show that the legislation which can be covered by this entry has to deal basically with "coordination and determination of standards in institutions for higher education". Meaning thereby, the standards of education at the institutions of higher education where students are taking education after admission are to be monitored by such a legislation or in other words after their enrolment for studying at such institutions for higher education such students have to undertake the prescribed course of education evolved with a view to having uniform and well-laid-down standards of higher medical education. "Standards in the institutions" have been prefixed by two words, namely, "coordination and determination" of such standards as per Entry 66 of List I. So far as "coordination" is concerned, it is a topic dealing with provision of uniform standards of education in different institutions so that there may not be any hiatus or dissimilarity regarding imparting of education by these institutions to the students taking up identical courses of study for higher medical education in these institutions. That necessarily has a nexus with the regulations of standards of education to be imparted to already admitted students to the courses concerned of higher education. But so far as the phrase "determination of standards in institutions for higher education" is concerned, it necessarily has to take in its sweep the requirements of having a proper curriculum of studies and the requisite intensity of practical training to be imparted to students attaining such courses. But in order to maintain the fixed standard of such higher medical education in the institutions, the basic qualification or eligibility for admission of students for being imparted such education also would assume importance. Thus, the phrase "determination of standards in institutions for higher education" would also take in its sweep the basic qualifications or eligibility criteria for admitting students to such courses of education. It can, therefore, be held that the Indian Medical Council Act, 1956 enacted under Entry 66 of List I could legitimately authorise the Medical Council of India which is the apex technical body in the field of medical education and which is enjoined to provide appropriately qualified medical practitioners for serving the suffering humanity to prescribe basic standards of eligibility and qualification for medical graduates who aspire to join postgraduate courses for obtaining higher medical degrees by studying in the institutions imparting such education. The phrase "determination of standards in institutions" does not necessarily mean controlling standards of education only after the stage of entry of students in these institutions and necessarily not prior to the entry point. (Paragraphs 81 and 83).

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Seventh Schedule to the Constitution, both the Union as well as the States have the power to legislate on education including medical education, subject, inter alia, to Entry 66 of List I which deals with laying down standards in institutions for higher education or research and scientific and technical institutions as also coordination of such standards. Therefore, the State had the right to control education including medical education so long as the field is not occupied by any Union legislation.⁴¹ Secondly, the State cannot, while controlling education in the State, impinge on standards in institutions for higher education, because this is exclusively within

⁴¹ Having provided for the queue of basically eligible qualified graduate medical students for admission to postgraduate medical courses for a given academic year, the role of the Medical Council of India would end at that stage. Beyond this stage the field is covered by Entry 25 of List III dealing with education which may also cover the question of controlling admissions and short-listing of the eligible to a given course of study in institutions depending upon the limited number of seats available in a given discipline of study, the number of eligible claimants for it and also would cover the further question whether any seats should be reserved for SC, ST and OBCs as permissible to the State authorities under Article 15(4) of the Constitution of India. So far as these questions are concerned, Entry 25 of the Concurrent List read with Article 15(4) of the Constitution of India may simultaneously authorise both Parliament as well as the State Legislatures to make necessary provisions in that behalf. But so long as the Union Parliament does not exercise its legislative powers under Entry 25 of List III covering the topic of short-listing of eligible candidates for admission to courses of postgraduate medical education, the field remains wide open for the State authorities to pass suitable legislations or executive orders in this connection. (Paragraph 82).

The role of the Medical Council of India is exclusive in the field of laying down of basic qualifications of the taught and also the requirement of qualified teachers, their numbers and qualifications, prescribing the text and the requisite training to be imparted to students undertaking postgraduate medical courses. However, the only field left open by Parliament while enacting the Indian Medical Council Act, 1956 under Entry 66 of List I of Schedule VII is the solitary exercise of short-listing of the eligible taught for being admitted to such courses. That field can validly be operated upon by the State authorities so long as Parliament, in its wisdom, does not step in to block even that solitary field otherwise remaining open for State authorities to function in that limited sphere.

the purview of the Union Government.⁴² Hence, while prescribing the criteria for admission to the institutions for higher education including higher medical education, the State cannot adversely affect the standards laid down by the Union of India under Entry 66 of List I.⁴³ Further, from 1977, education, including, *inter alia*, medical and university education, being in the Concurrent List the Union can legislate on admission criteria also. If it does so, the State will not be able to legislate in this field, except as provided in Article 254.⁴⁴

Rules for admission are covered not only by Entry 25 of List

⁴² The Court observed that though the selection of right calibre students is essential in public interest lower qualifying marks for reserved categories viz. SCs, STs, OBCs for admission to postgraduate medical courses was permissible under Articles 15(4) and 14. However, there should not be a wide disparity in qualifying marks between reserved and general categories — Dilution has to be up to a reasonable extent only. Such reserved category candidates should be capable of reaching the required standards of excellence in their speciality. Fixation of 20% for reserved category and 45% for general category candidates as minimum qualifying marks affects standards of education and is contrary to public interest and Article 15(4) - The disparity should be minimal, certainly not more than for admission to MBBS - *K.L. Narasimhan* case, (1997) 6 SCC 285, overruled.

⁴³ Admissions must be made on a basis which is consistent with the standards laid down by a statute or regulation framed by the Central Government in the exercise of its powers under Entry 66 List I. In every case the minimum standards as laid down by the Central statute or under it, have to be complied with by the State while making admissions. It may, in addition, lay down other additional norms for admission or regulate admissions in the exercise of its powers under Entry 25 List III in a manner not inconsistent with or in a manner, which does not dilute the criteria so laid down. Thus once the minimum standards are laid down by the authority having the power to do so, any further qualifications laid down by the State, which will lead to the selection of better students cannot be challenged on the ground that it is contrary to what has been laid down by the authority concerned. But the action of the State is valid because it does not adversely impinge on the standards prescribed by the appropriate authority. Paragraphs 39 & 46. *Chitra Ghosh v. Union of India*, (1969) 2 SCC 228; (1970) 1 SCR 413, distinguished.

⁴⁴ Paragraph 35.

III. There can be rules for admission which are consistent with or do not affect adversely the standards of education prescribed by the Union in exercise of powers under Entry 66 of List I. But any lowering of the norms laid down can and does have an adverse effect on the standards of education in the institutes of higher education.⁴⁵

Further the Court clarified that the decision in *Lavu Narendranath*,⁴⁶ does not lay down that it is permissible not to have minimum qualifying marks in the entrance test prescribed by the State; nor does it lay down that every test prescribed by the State must necessarily be viewed as only for the screening of candidates. On the facts before it, the Court viewed the test as only a screening test for proper selection from amongst a large number of candidates. PGMEET is not just a screening test, but it assesses the relative merit of candidates who have taken different examinations from different universities in the State. It had the character of an eligibility test as also a screening test. In such a situation, minimum qualifying marks was necessary. The Court held that it was not possible to agree with

⁴⁵ Paragraph 36.

⁴⁶ *State of A.P. v. Lavu Narendranath*, (1971) 1 SCC 607.

the proposition that prescribing no minimum qualifying marks for admission for the Scheduled Castes and the Scheduled Tribes would not have an impact on the standard of education in the medical colleges.⁴⁷

Since the final pass marks in an examination indicates only the possession of minimum requisite knowledge for passing the examination, to promote excellence at postgraduate levels, the candidates qualifying, should be able to secure good marks while qualifying.⁴⁸ The Court opined that the common entrance examination under the regulations of the Medical Council of India for postgraduate medical education provided a uniform criterion for judging the merit of all candidates who come from different universities.⁴⁹ Since it was not a mere screening test, it required fixing of minimum qualifying marks for passing the examination

⁴⁷ Paragraphs 43, 44 and 46.

⁴⁸ The Court observed that if the final examination standard itself is high, even a candidate with pass marks would have a reasonable standard. It found that there was no single test for determining standards. It is the result of a sum total of all the inputs - calibre of students, calibre of teachers, teaching facilities, hospital facilities, standard of examinations etc., that will guarantee proper standards at the stage of exit. (Paragraph 48). *Ajay Kumar Singh v. State of Bihar*, (1994) 4 SCC 401; *Post Graduate Institute of Medical Education & Research v. K.L. Narasimhan*, (1997) 6 SCC 283; 1997 SCC (L&S) 1449, overruled. Per Majmudar, J, it is not possible to accept the majority view that fixing minimum qualifying marks for passing the entrance test for admission to postgraduate courses is concerned with the standard of postgraduate medical education. (Paragraph 77).

⁴⁹ Paragraphs 27 and 28.

which normally has to be uniform for all categories of candidates.⁵⁰ It was, however, for an expert body like the Medical Council of India to determine whether in the common entrance examination viz., PGMEET, lower qualifying marks can be prescribed for the reserved category of candidates as against the general category of candidates since it affected the standards of postgraduate medical education.⁵¹ The Court held it to be in public interest to have the most meritorious students at the stage of postgraduate education in medical specialities like super-specialities. In view of this supervening public interest which was to be balanced against the social equity of providing some opportunities to the backward who are not able to qualify on the basis of marks obtained by them for postgraduate learning, the Court left it to the expert body like the Medical Council of India, to lay down the extent of reservations, if any, and the lowering of qualifying marks, if any, consistent with the broader public interest in having the most competent people for specialised training, and the competing public interest in securing social justice and equality.⁵² The Court observed that such special

⁵⁰ Paragraphs 27 to 29 and 62.

⁵¹ Paragraph 29.

⁵² Paragraph 24.

provisions for SC/ST candidates at the speciality level had to be minimal and ruled out a big disparity in the qualifying marks for the reserved category of candidates and the general category of candidates at the postgraduate level.

The Court rejected the view that were the minimum qualifying marks raised in the case of the reserved category candidates, they would not be able to fill all the seats reserved for them. It observed that the purpose of higher medical education was not to fill the available seats by lowering standards; nor the purpose of reservation at the stage of postgraduate medical education merely to fill the seats with the reserved category candidates. The purpose of such permissible reservation was to ensure that the reserved category candidates having the requisite training and calibre to benefit from postgraduate medical education and rise to the standards expected of persons possessing such qualification are not denied that opportunity by competing with the general category candidates. The general category candidates do not have social disabilities preventing them from giving their best. The special opportunity provided by reservation cannot be made available to those substantially below the levels prescribed for the general

category candidates since such candidates would not fully benefit from the very limited and specialised postgraduate training opportunities, which are designed to produce high calibre well-trained professionals for the benefit of the public. It is also necessary in the public interest to ensure that the candidates at the postgraduate level have not just passed the examination, but they have profited from their studies in a manner which makes them capable of making their own contribution, that they are capable of diagnosing difficult medical conditions with a certain degree of expertise, and are capable of rendering to the ill, specialised services of a certain acceptable standard expected of doctors with specialised training.⁵³

The Court also overruled observations made in *Post Graduate Institute of Medical Education & Research v. K.L. Narasimhan*,⁵⁴ to the effect that the reservation of seats in the postgraduate and doctoral courses in Medicine would not lead to a loss of efficiency and would be permissible under Article 15(4) and that since all appear for the same final examination, there would be

⁵³ Paragraphs 59 and 58.

⁵⁴ (1997) 6 SCC 283.

no downgrading of excellence.⁵⁵

In *State of Punjab v. Dayanand Medical College and Hospital*,⁵⁶ the Court considered the question of lowering the minimum qualifying marks for postgraduate courses in the medical education sector and said that sanctity must be maintained.⁵⁷ Since Medical Council of India prescribes such marks in terms of Entry 66 of List I under Seventh Schedule of the Constitution, the Court held that Government or University could not unilaterally dilute them.

In appeal before the Supreme Court, on behalf of the State of Punjab it was primarily contended that the State and the University acting under its directions, both have a right under Article 15(4) of the Constitution to make reservations by executive orders; that the Medical Council of India, a statutory body, does not have the same right to exercise constitutional powers and also cannot hamper the State in exercising its constitutional powers. Partly allowing the appeal, the Court held that the power to be exercised under Article 15(4) by the States is a power arising under the Constitution and

⁵⁵ Paragraph 61.

⁵⁶ (2001) 8 SCC 664.

⁵⁷ Provision in notification issued by appellant State of Punjab lowering minimum qualifying marks to 40% for speciality subjects and doing away with them altogether for basic subjects, contrary to Regulation 9 of Medical Council Regulations which prescribed 50% minimum marks was held to be invalid.

though in a sense the Medical Council of India could also be a “State” for certain purposes, such a body would not be suited to make the necessary reservation in respect of socially and educationally backward classes in terms of Article 15(4) of the Constitution because of the need or the necessity for prescription, taking into account several considerations such as different levels of social, economic and educational development of the State or different regions in the State. Such considerations arise in the context of Article 16 as well. No exception could be taken to the provision for reservation made by the State of Punjab in respect of socially and educationally backward classes, because it is a prerogative and duty of the State to indulge in such an exercise in carrying out and implementing the constitutional policy declared in Article 46 of the Constitution armed with the enabling power under Article 15(4) of the Constitution. There was no decision on the point including *Dr Preeti Srivastava* case to the effect that the Medical Council of India could alone or should do so.

The Court observed that if in a given case, the prescription of reservation for weaker sections by the State was to such an enormous extent as to reduce the candidates to be selected on the

basis of merit in an examination from the general category to a very small number, then the Medical Council of India may have to take appropriate steps by stipulating specific standards for such reserved category candidates also and not otherwise.⁵⁸ A proper balance had to be struck both by the Medical Council of India and by the Government, Central and State, in exercise of their respective powers. The Medical Council of India, a creature of a statute, cannot be ascribed with such powers so as to reduce the State Governments to nothing on and in respect of areas over which the States have constitutional mandate and goal assigned to them to be performed. The Medical Council of India cannot also purport to arm itself with powers to prescribe a standard, which is impossible of attainment by a candidate belonging to a reserved category or for that matter even general candidates and whatever is fixed, must be realistic and within attainable limits. In conclusion, the finding of the High Court that the notification issued by the appellant State is invalid to the extent of making reservation in terms of Article 15(4) of the Constitution was set aside.⁵⁹

⁵⁸ Paragraphs 11 and 12.

⁵⁹ Paragraph 12.

The Court observed that the reasoning of the State of Punjab, which lowered of the marks to less than 50% with the twin objectives of safeguarding the interests of weaker sections of the Scheduled Castes and Backward Classes and to meet the constitutional obligation, as illogical. The Court reasoned that the entrance test was being held to select suitable candidates from amongst the eligible candidates. The Medical Council of India fixed a standard in terms of Entry 66 List I of the Seventh Schedule to the Constitution. It could not be diluted at all.⁶⁰ Therefore, it was not open to the University or the Government to dilute that standard by fixing marks lower than what was set out by the Medical Council of India. If they had any difficulty they ought to have approached the Medical Council of India for fixing of appropriate standards in that regard. The State Government could not unilaterally frame a scheme reducing the standard in violation of the terms of the Regulations framed by the Medical Council of India.⁶¹

Though the cases cited above relates to medical education, the judicial policy in higher professional education comes through

⁶⁰ Paragraph 17.

⁶¹ Paragraph 17. The Medical Council of India is the repository of the power to prescribe standards in postgraduate studies and it is subject to the control of the Central Government as envisaged in the Act constituting the Council.

as one which leaves it to the expert bodies in each field to determine the standards and to frown upon any effort to dilute such standards where the resources are scarce, the facilities are few and the Nation requires people of expertise.

The dawn of the new Millennium once again saw minority rights being pitted against a right to access to education. With perhaps a changed perception brought about by globalisation, liberalisation and privatisation, and wary of claims of social justice and equity from politically powerful classes, the judiciary is found to pronounce judgements that throw up more doubts than which they answer.

The battle between the competing claims of equity based on social justice and minority rights is to be analysed from the perspective of access as an inalienable facet of right to education.

CHANGING TRENDS: MINORITY RIGHTS UPSTAGING RIGHT TO EDUCATION

Starting from *T.M.A. Pai Foundation v. State of Karnataka*⁶²,

⁶² 2002 ACT (S.C.) 1630. This being a voluminous judgement with the Eleven Judges Bench standing divided and delivering 6 separate judgements, in subsequent cases there has been a novel and hitherto unheard attempt of lower Benches being constituted to

a trend is discernable in the approach of the Supreme Court of India whereby it's earlier thinking of the right to education as an essential aspect of life with human dignity is increasingly diluted. We see the human right to education getting pitted against the fundamental right of the minorities to preserve their identity. In the process we find the Supreme Court having to rule in favour of the fundamental rights of minorities to establish and administer the educational institutions of their choice, constrained as it is by the fact that it is a creation of the Constitution. The thought process of the Supreme Court and the peculiar circumstances that brings these cases before it has now ensured that the question of right to education and access to higher and professional education is now a question of rights of the minority versus education rights of the people.

In *T.M.A. Pai Foundation v. State of Karnataka*, the Supreme Court considered the question as to what extent professional education could be treated as a matter coming under minority rights under Article 30. It found that Article 30(1) gives religious and linguistic minorities the right to establish and administer educational

clarify the majority judgement. This has resulted in strange judgements that now forces a new central legislation and a constitutional amendment.

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institutions of their choice and that the use of the words 'of their choice' indicates that even professional educational institutions would be covered by Article 30.⁶³

On the question of regulating the admission of students, the Court found that the admission of students to unaided minority educational institutions, viz., schools and undergraduate colleges where the scope for merit-based selection is practically nil, cannot be regulated by the State or University concerned, except for providing the qualifications and minimum conditions of eligibility in the interest of academic standards.⁶⁴

The Court considered it the right of a minority institution to have its own procedure and method of admission as well as selection of students, provided they were fair, transparent, and provided for merit based selection of students in professional and higher education colleges. It was also opined that while giving aid

⁶³ *T.M.A. Pai Foundation v. State of Karnataka*, (2002) 8 SCC 481 at p. 587-88 (per majority through Kirpal, C.J.) and at p. 708 (per Variava, J.). "Article 30(1) gives religious and linguistic minorities the right to establish and administer educational institutions of their choice. The use of the words "of their choice" indicates that even professional educational institutions would be covered by Article 30."

⁶⁴ Paragraph 162. The Court, by majority, opined that "the right to admit students being an essential facet of the right to administer educational institutions of their choice, as contemplated under Article 30 of the Constitution, the state government or the university may not be entitled to interfere with that right, so long as the admission to the unaided educational institutions is on a transparent basis and the merit is adequately taken care of."

to professional institutions, it would be permissible for the authority giving aid to prescribe by-rules or regulations, the conditions on the basis of which admission will be granted to different aided colleges by virtue of merit, coupled with the reservation policy of the state qua non-minority students.⁶⁵

The Court considered the ratio laid down in *St. Stephen's*⁶⁶ case as incorrect. The new opinion of the Supreme Court is that once State aid is taken and Article 29 (2) comes into play, then no question arises of trying to balance Articles 29 (2) and 31. Article 29 (2) must be given its full effect.

The Court further held that it's decision in *Unni Krishnan J.P. v State of A.P.*,⁶⁷ (except where it holds that primary education is a fundamental right) and the scheme framed there under and the direction to impose the same, as unconstitutional. The Supreme Court further ruled that the principle that there should not be capitation fee or profiteering was correct and that reasonable surplus to meet cost of expansion and augmentation of facilities does not,

⁶⁵ Paragraph 71.

⁶⁶ *St. Stephen's College v. University of Delhi*, (1992) 1 SCC 558.

⁶⁷ (1993) 1 SCC 645.

however, amount to profiteering.⁶⁸

Further the Court held that the expression 'education' in the Articles of the Constitution means and includes education at all levels from the primary school level up to the post-graduate level and includes professional education. The expression 'educational institutions' meant institutions that impart 'education' as meant under the Constitution.

A significant observation of the Supreme Court in this case is its endorsement of higher education as a non-merit good.⁶⁹ This perception expressed by the Court strengthens those forces of globalisation that demand a decrease in subsidies in higher education.

The result of the Supreme Court's decision in *T.M.A. Pai Foundation v. State of Karnataka*⁷⁰ is that the right to establish and administer educational institutions is guaranteed under the Constitution to all citizens under Articles 19 (1) (g) and 26, and to

⁶⁸ Paragraph 162.

⁶⁹ (2002) 8 SCC 481 at p. 542. "The idea of an academic degree as a "private good" that benefits the individual rather than a "public good" for society is now widely accepted."

⁷⁰ The leading judgement was given by B.N. Kirpal, CJI, the other judges who heard the case were G.B. Pattanaik, V.N. Khare, S. Rajendra Babu, Syed Shah Mohammed Quadri, Ruma Pal, S.N. Variava, K.G. Balakrishnan, P. Venkatarama Reddi, Arijit Pasayat, and Ashok Bhan on 31.10.2002.

minorities specifically under Article 30. While the rights under Articles 19 (1) (g) and 26 will be subject to the provisions of Articles 19 (6) and 26 (a) there will be no such restriction on the rights under Article 30 save as otherwise provided in the judgement.⁷¹

Even before a year was over after its judgement in *T.M.A. Pai Foundation v. State of Karnataka*, a new Bench⁷² of the Supreme Court restated and clarified what was stated by the larger Bench. In its opinion given in the case of *Islamic Academy of Education and another v. State of Karnataka and others*,⁷³ the Court clarified that the government could not fix a rigid fee structure. Each institute had the freedom to fix its own fee structure taking into consideration the need to generate funds to run the institution

⁷¹ Paragraph 379.

⁷² The Bench strength was five while in *T.M.A. Pai*'s case it was eleven.

⁷³ <http://judis.nic.in/supremecourt/qrydisp.asp?tfnm=19336> [internet accessed on 25th August, 2005]. The judgement was delivered on 14th August, 2003 by V. N. Khare, CJI, who spoke for himself and S. N. Variava, K. G. Balakrishnan & Arijit Pasayat, JJ. S.B. Sinha, J, delivered a separate opinion where he opined that minority educational institutions do not have a higher right in terms of Article 30(1); the rights of minorities and non-minorities being equal. Article 30(1) confers 'certain additional protection' with the object of bringing the minorities on the same platform as that of non-minorities, so that the minorities are protected in establishing and administering educational institutions for the benefit of their own community, whether based on religion or language. As between minority and non-minority educational institutions, the distinction made by Article 30(1) in the fundamental rights conferred by Article 19(1)(g) was termed by the majority as 'special right' while it was considered not a right but only an 'additional protection' in the opinion of S.B. Sinha, J.

and to provide facilities necessary for the benefit of the students as well as generate a surplus to be used for the betterment and growth of that educational institution.

The Supreme Court provided a scheme in this case, which in its opinion would provide a reasonable fee structure for regulating admission to professional courses.⁷⁴

On the question of minority's right vis-à-vis the majority's right to establish and administer educational institutions, the Supreme Court quoted its own earlier decision in *St. Xavier's*

⁷⁴ <http://judis.nic.in/supremecourt/qrydisp.asp?tfnm=19336> [internet accessed on 25th August, 2005]. "As, at present, there are statutes/regulations which govern the fixation of fees and as this Court has not yet considered the validity of those statutes/regulations, we direct that in order to give effect to the judgment in T.M.A. Pai's case the respective State Governments concerned authority shall set up, in each State, a committee headed by a retired High Court judge who shall be nominated by the Chief Justice of that State. The other member, who shall be nominated by the Judge, should be a Chartered Accountant of repute. A representative of the Medical Council of India (in short 'MCI') or the All India Council for Technical Education (in short 'AICTE'), depending on the type of institution, shall also be a member. The Secretary of the State Government in charge of Medical Education or Technical Education, as the case may be, shall be a member and Secretary of the Committee. The Committee should be free to nominate/co-opt another independent person of repute, so that total number of members of the Committee shall not exceed 5. Each educational Institute must place before this Committee, well in advance of the academic year, its proposed fee structure. Along with the proposed fee structure all relevant documents and books of accounts must also be produced before the committee for their scrutiny. The Committee shall then decide whether the fees proposed by that institute are justified and are not profiteering or charging capitation fee.. The Committee will be at liberty to approve the fee structure or to propose some other fee, which can be charged by the institute. The fee fixed by the committee shall be binding for a period of three years, at the end of which period the institute would be at liberty to apply for revision. Once fees are fixed by the Committee, the institute cannot charge either directly or indirectly any other amount over and above the amount fixed as fees. If any other amount is charged, under any other head or guise e.g. donations the same would amount to charging of capitation fee."

*College*⁷⁵ case and affirmed that the essence of what has been laid down is that the minority educational institutions have a guarantee or assurance to establish and administer educational institutions of their choice. While the laws, rules and regulations cannot be such that they favour majority institutions over minority institutions, the non-minority educational institutions would not have the same rights as those conferred on minority educational institutions by Article 30 of the Constitution of India or the protection afforded by it.

The Court then further clarified that the judgement in *T.M.A. Pai's* case provides that national interest would prevail, even over minority rights. It was for this reason that in both minority and non-minority professional colleges, merit was been made the criteria for admission. However a further distinction was made between minority and non-minority professional colleges to provide for 'a certain percentage of seats' in cases of non-minority professional colleges to be reserved for admission by the management. The prescription of percentage was to be done by the Government according to local needs keeping in mind the provisions to be made

⁷⁵ (1974) 1 SCC 717: AIR 1974 SC 1389.

for the poorer and backward sections of the society. The Supreme Court went on to observe that in case of an unaided minority professional college, the need of that community, in the State, would be paramount *vis-à-vis* the local needs.

The Supreme Court then ruled that admission in unaided minority professional colleges, even of members of their community/language, must strictly be on the basis of merit except that in case of their own students it has to be merit *inter-se* those students only. If the seats could not be filled up from members of their community/language, then the other students could be admitted only on the basis of merit based on a common entrance test conducted by government agencies. It then laid down the procedure for a common entrance test to determine the *inter-se* merit of the students.⁷⁶

The Supreme Court then further clarified that its direction for

⁷⁶ "The words 'common entrance test' clearly indicate that each institute cannot hold a separate test. We thus hold that the management could select students, of their quota, either on the basis of the common entrance tests conducted by the State or on the basis of a common entrance test to be conducted by an association of all colleges of a particular type in that State e.g. medical, engineering or technical etc. The common entrance test, held by the association, must be for admission to all colleges of that type in the State. The option of choosing, between either of these tests, must be exercised before issuing of prospectus and after intimation to the concerned authority and the Committee set up hereinafter. If any professional college chooses not to admit from the common entrance test conducted by the association then that college must necessarily admit from the common entrance test conducted by the State."

setting up the two sets of Committees in the States was passed under Article 142 of the Constitution of India and that it would remain in force till appropriate legislation was enacted by the Parliament.

The Supreme Court's decision in *Islamic Academy of Education v. State of Karnataka* created more problems than what it settled and it had to clarify its earlier judgments in *T.M.A. Pai Foundation v. State of Karnataka* and in *Islamic Academy of Education v. State of Karnataka*⁷⁷. In *P.A. Inamdar & Ors. v. State of Maharashtra & Ors.*,⁷⁸ once again the Supreme Court clarified the position of the right to education under the Constitution.

That there has been a quantum change in the attitude of the Supreme Court is obvious when the majority opinion gives judicial recognition that "education used to be charity or philanthropy in good old times" and that it was now 'an occupation'. One can discern this change from the time of *T.M.A. Pai*'s judgement where in paragraph 26 the Eleven Judge Bench of the Supreme Court observes that Article 26(a) provides one of the sources of the right

⁷⁷ (2003) 6 SCC 697.

⁷⁸ <http://www.academics-india.com/SC-ruling.htm> [internet accessed on 25th August, 2005]. The judgement was delivered on 12th August, 2005 by R.C. Lahoti, CJI for himself and for Y.K. Sabharwal, D.M. Dharmadhikari, Arun Kumar, G.P. Mathur, Tarun Chatterjee & P.K. Balasubramanyan, JJ.

to establish educational institutions and that it is rooted in charity.⁷⁹

In *T.M.A. Pai*'s case the Court then went on to observe that it was an 'occupation' even though it was still not considered a trade or business.⁸⁰ Yet, in *Islamic Academy of Education v. State of Karnataka*, the Supreme Court allowed the generation of a reasonable surplus by the educational institution to cater to its future needs and development.

It is arguable, whether, in a socialist republic like ours, any trade or business would be allowed to generate anything other than a reasonable surplus. If not, then the judgement blurs the difference between education as a social charity and as a trade, for even trade is, in essence, a charity towards the society.

Later on the Supreme Court went on to observe in para 91 of *Inamdar* case that,

“The right to establish an educational institution, for

⁷⁹ 2002 ACT (S.C.) 1630. Paragraph 26. “The right to establish and maintain educational institutions may also be sourced to Article 26 (a), which grants, in positive terms, the right to every religious denomination or any section thereof to establish and maintain institutions for religious and charitable purposes, subject to public order, morality and health. Education is a recognized head of charity.”

⁸⁰ Paragraph 20. “Education is per se regarded as an activity that is charitable in nature [See *The State of Bombay Vs. R.M.D. Chamarbaugwala*, (1957) SCR 874: AIR (1957) SC 699]. Education has so far not been regarded as a trade or business where profit is the motive.”

charity or for profit, being an occupation, is protected by Article 19(1)(g) of the Constitution...”

This observation ensures that the right to establish and run an educational institution is a fundamental right guaranteed under Article 19(1)(g) of the Constitution. Article 19(6) of the Constitution, provides for reasonable restrictions to be placed on such a fundamental right. This enables the vetting of all restrictions placed on providers of education on the touchstone of reasonableness under Article 19(6).⁸¹

In *P.A. Inamdar & Ors. v. State of Maharashtra & Ors* the Supreme Court disapproved the interpretation of *T.M.A. Pai* given in *Islamic Academy of Education v. State of Karnataka* allowing for the government to provide for ‘a certain percentage of seats’ in cases of non-minority professional colleges to be reserved for admission by the management according to local needs keeping in mind the provisions to be made for the poorer and backward sections of the society. It observed that neither the policy of

⁸¹ *Modern Dental College v. State of Madhya Pradesh*, Orders in Interlocutory Application in Special Leave Petition (Civil) No. 13111/2009 dated 27 May, 2009. <http://courtnic.nic.in/supremecourt/temp/dc%201311109p.txt> [internet accessed on 30th September, 2009].

reservation could be enforced by the State nor any quota or percentage of admissions can be carved out to be appropriated by the State in a minority or non-minority unaided educational institution. Minority institutions were free to admit students of their own choice including students of non-minority community as also members of their own community from other States, both to a limited extent only and not in a manner and to such an extent that their minority educational institution status is lost. If they did so, they lose the protection of Article 30(1).

The Court spoke disapprovingly of any quota to be appropriated by the State, but allowed it for NRIs who were able to pay more.⁸² Further, the Supreme Court approved the establishment of the two Committees in the case of *Islamic Academy*, and clarified that minorities or non-minorities, in exercise of their educational rights in the field of professional education have an obligation and a duty to maintain requisite standards of professional education by

⁸² "A limited reservation of such seats, not exceeding 15%, in our opinion, may be made available to NRIs depending on the discretion of the management subject to two conditions. First, such seats should be utilized bona fide by the NRIs only and for their children or wards. Secondly, within this quota, the merit should not be given a complete go-by. The amount of money, in whatever form collected from such NRIs, should be utilized for benefiting students such as from economically weaker sections of the society, whom, on well defined criteria, the educational institution may admit on subsidized payment of their fee."

giving admissions based on merit and making education equally accessible to eligible students through a fair and transparent admission procedure and on a reasonable fee-structure.

While it is to be understood that the decision *Inamdar* has to be read with the need for educational institutions to raise resources⁸³ for their infrastructure and functioning, within the current social circumstances the decision could indicate the beginning of a distinct philosophical change in the outlook of the judiciary.

THE AFTERMATH OF *INAMDAR*

In *P.A. Inamdar & Ors. v. State of Maharashtra & Ors*⁸⁴ it can be seen that although the State provided the social necessities for the establishment of the communal educational institutions, it could not bring equity to the meritorious yet impecunious ordinary citizen who stood no chance in comparison to an Non-Resident Indian (NRI) who could pay hard cash. The State could not hope to seek from these educational institutions any social cost in the form of reservation for the backward class of its citizens. Article 30

⁸³ http://prayatna.typepad.com/education/law_and_judgements/ [internet accessed on 25th August, 2005].

⁸⁴ (2005) 6 SCC 537.

stands in the way and so the provision can be used to cheat the backward class of Indian citizens out of its legitimate right to a share in the collective social pie, which now would be available only to the minorities or to the rich NRIs.

Still, the Supreme Court cannot be blamed for its interpretation of the provisions of the Constitution. What the Court unequivocally lays down is that the State could no longer hope to ride piggyback on private initiative to fulfil its constitutional obligations. It was for the State to provide the necessary infrastructure needed for empowering people through education. Education was the prime responsibility of the State and it had to meet the requirement of all the sections of the people especially of those who have a fundamental right for it under the Constitution.⁸⁵

Having recognised the failure of the State to fulfil its mandate and the Supreme Court's interpretation of the situation as laid down in *Inamdar* case, it is worthwhile to reflect upon the earlier expressed views of the political scientist Dr. M.V. Pylee on

⁸⁵ <http://www.academics-india.com/SC-ruling.htm> [internet accessed on 25th August, 2005]. The decision throws up an opportunity for the government to establish and provide adequate educational facilities to ensure that all aspirants to education, whether primary or secondary or professional, get access to the education of their choice.

the fundamental right on education available to the minorities.

“The rights of the minorities, however cannot be absolute. They must be subject to restrictions in the interest of education as well as in pursuance of socio-economic objectives embodied in the Constitution. The purpose of the right was not to create vested interests in separateness of minorities but to maintain their individuality as well as distinct identity of their language and culture. But the preservation of such distinctiveness should not result in the minorities remaining isolated from the mainstream of national life. As the nation makes progress, the barriers that divide citizens into majority and minority compartments should gradually disappear and the tradition-bound, rigid society in India should become transformed into a composite, dynamic and progressive society cherishing common national ideals and aspirations. Educational and cultural institutions should become the agents of such

change rather than perpetuating narrow barriers between citizen and citizen.”⁸⁶

With due respect to the wisdom of the Supreme Court, the decisions in *Inamdar* and the cases that lead to it have forgotten this basic reason behind the institution of such a right in the Constitution. These decisions do not foster national integration but rather exclusion, separatism and inequity. In effect, the decision in *Inamdar* being contrary to social justice may also be an indication of a policy shift from socialism to capitalism.⁸⁷

In *Pushpagiri Medical Society v. State of Kerala*⁸⁸, which is a consequence of the decision in the *Inamdar* decision, the challenge was against the constitutionality of the State Government’s statute to

⁸⁶ M.V. Pylee, *India’s Constitution*, 7th ed., S. Chand & Co., New Delhi (1999), pp. 115-116.

⁸⁷ A. Raghunadha Reddy, “Role of Morality in Law-Making: A Critical Study”, 49 *JILI* (2007) 194-211 at p. 210 - “In *P.A. Inamdar v. Maharashtra* (AIR 2005 SC 3226) the court’s ruling was against social justice wherein quota system was done away within private educational institutions. This was neutralized by constitutional 93rd Amendment Act, 2005 in the same way when the first ever constitutional Amendment, 1951 was passed to undo *State of Madras v. Champakam Dorairajan*, (AIR 1951 SC 226). The legislative measure seeks to harmonise the claims of the citizen’s right to freedom with the obligation of the state to fulfill the promise of social justice to weaker sections. This clearly shows that there is a set-back to pro-poor interpretation of the Supreme Court inspired by value-oriented jurisprudence. Is it due to change in economic policy of the government? (For details see *Hombe Gowda Educational Trust v. Karnataka*, (2006) 1 SCC 430; *U.P. State Brass Ware Corporation Ltd. v. Uday Narayan Pandey*, (2006) 1 SCC 479). Does it augur well particularly when country’s economy is in transition? This will definitely lend its credence to the statement that the shift towards market economy does make social justice irrelevant.” [Footnotes bracketed.]

⁸⁸ WP(C) No. 18899 of 2006 (Y) in the High Court of Kerala, judgement of 4th January, 2007.

regulate admission to professional education.⁸⁹ The Kerala Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-Exploitative Fee and other Measures to Ensure Equity and Excellence in Professional Education) Act, 2006 (Act 19 of 2006) was avowedly to “provide for prohibition of capitation fee, regulation of admission, fixation of non-exploitative fee, allotment of seats to Scheduled Castes, Scheduled Tribes and other socially and economically backward classes and other measures to ensure equity and excellence in professional education and for matters connected therewith or incidental thereto”.

⁸⁹ The High Court observed that both the parties were culling stray sentences from the *Inamdar* decision in their favour and observed thus: “It may be recalled that a Constitution Bench of seven Judges was constituted in *Inamdar's* case, primarily with a view to clarify the law laid down in *T.M.A. Pai's* case and *Islamic Academy's* case. The educational institutions and the Government were interpreting these judgments in their favour. They were so interpreting these judgments in their favour as some observations were made in favour of both. It is interesting to note that even at this stage, when the Constitution Bench has rendered the judgment in *Inamdar's* case, both parties are relying upon the same judgment. It is thus clear that there are some sentences which may go in favour of the petitioners and others in favour of the State. The State appears to have picked up only such sentences or observations which go in their favour, be it *T.M.A. Pai's* case, *Islamic Academy's* case or *Inamdar's* case. However, while doing so, the State ought to have seen the reference and context in which such observations were made. It is for that reason that at the very outset the Constitution Bench in *Inamdar's* case mentioned that “it is dangerous to take one or two observations out of a long judgment and to treat the same as if they give the ratio decidendi of the said case”. The statements of law made in the Preamble around which the Act of 2006 has been hedged appear to be by making a vital mistake of taking one or two observations out of the long judgment and treating the same to be the ratio decidendi of the case.

The High Court divided the provisions of the Act into two main categories with one relating to procedure for admission, fixation of fee structure, determining factors of minority and quota and the other as an entirely separable part dealing with the constitution of the Admission Supervisory Committee as per Section 4, and Fee Regulatory Committee as per Section 6. The Court upheld the constitutionality of the second part and struck down the essential provisions relating to the former. It struck down as unconstitutional the provisions of the Act contained in Section 3⁹⁰, which related to the method of admissions, Section 7⁹¹, which

⁹⁰ The Kerala Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-Exploitative Fee and other Measures to Ensure Equity and Excellence in Professional Education) Act, 2006. Section 3 reads thus: "Method of admission in Professional Colleges or Institutions - Notwithstanding anything contained in any other law for the time being in force or in any judgment, decree or order of any Court or any other authority, admission of students in all professional colleges or institutions to all seats except Non-Resident Indian seats shall be made through Common Entrance Test conducted by the State followed by centralised counselling through a single window system in the order of merit by the State Commissioner for Entrance Examinations in accordance with such procedure as may be specified by the Government from time to time".

⁹¹ Section 7 reads thus: "Factors for determination of fee.—The Fee Regulatory Committee shall determine and fix the fee or fees to be charged by an unaided professional college or institution taking into consideration the factors, such as, - (a) the obligation on the part of all unaided professional colleges or institutions to provide freeship to a minimum of fifty per cent of the students admitted and the additional expenses, if any, required for the same over and above the excess funds generated from Non-Resident Indians, charity on the part of managements and contribution by the Government for providing freeship for scheduled caste or scheduled tribe students; (b) the nature of the professional course; (c) the available infrastructure; (d) the expenditure on administration and maintenance; (e) a reasonable surplus required for the growth and development of the college; (f) any other factor as the Committee may deem fit".

related to determination of fee, Section 8(b) and (c),⁹² which related to factors for according recognition and conferring status as un-aided minority professional college or institution and Section 10⁹³

⁹² Section 8 reads thus: "Determining factors for according recognition and conferring status as un-aided minority professional college or institution - A minority unaided professional college or institution established and maintained by any linguistic or religious minority shall be accorded recognition and conferred status as an un-aided minority professional college or institution only if it satisfies all the following conditions of demographic equivalence between the minority community to which the college belongs and the non-minority community of the State, taken as a single unit, namely: - (a) the population of the linguistic or religious minority community in the State which runs the professional college or institution shall be lesser than fifty per cent of the total population of the State. (b) The number of professional colleges or institutions run by the linguistic or religious minority community in the State to which the college or institution belongs shall be proportionately lesser than the number of professional colleges or institutions run by the non-minority community in the State. (c) The number of students belonging to the linguistic or religious minority community to which the college or institution belongs (and) undergoing professional education in all professional colleges or institutions in the State shall be proportionately lesser than the number of students belonging to the non-minority community undergoing professional education in all professional colleges or institutions in the State".

⁹³ Section 10 reads thus: "Allotment of seats - (1) In every professional college or institution other than a minority college, - (a) ten per cent of the total number of sanctioned seats shall be earmarked for the Scheduled Castes and Scheduled Tribes; (b) twenty-five per cent of the total number of sanctioned seats to the Other Socially and Educationally Backward Classes; (c) three per cent of the total number of sanctioned seats shall be earmarked for physically challenged persons ; and (d) twelve per cent of the total number of sanctioned seats shall be earmarked for the other sections of society not covered under items (a), (b) and (c) of this sub-section on merit-cum-means basis: Provided that in an unaided professional college or institution the provisions in item (c) and (d) shall apply in accordance with the consensus based on mutual agreement arrived at between the unaided professional college or institution and the Government and following such principles and in such manner as may be prescribed: Provided further that the admissions contemplated in items (b), (c) and (d) above shall be in compliance with the rules as may be prescribed. (2) In an unaided professional college or institution belonging to both minority and non-minority, upto fifteen per cent of the total number of sanctioned seats may be filled by candidates under the category of Non-Resident Indian seats. Seats not filled up under Non-Resident Indian seats shall be filled up from general merit seats. (3) In an unaided professional college or institution belonging to both minority and non-minority community, upto fifteen per cent of the total number of sanctioned seats may be filled by candidates under the category of privilege seats in the manner as may be prescribed. Seats not filled up under privilege seats shall be filled up from general merit seats. (4) In an unaided non-minority professional college or institution eighteen per cent of the total number of sanctioned seats shall be filled up from general merit seats. (5) In an unaided non-minority professional college or

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which related to allotment of seats. The Court also struck down Rule 10⁹⁴, which dealt with allotment of seats, and Rule 11⁹⁵, which

institution two per cent of the total number of sanctioned seats shall be filled up by students who have made outstanding contribution in the field of culture or sports, on the basis of criteria as may be prescribed. Seats not so filled up shall be filled up from general merit seats. (6) Where students of specified categories surrender the seats after selection, the same shall be filled by the candidates belonging to the same category from the merit list of the Common Entrance Test. (7) Where the seats specified for the Scheduled Castes or Scheduled Tribes and other Socially and Educationally Backward Classes are left unfilled due to non-availability of candidates from the same category, the seats shall be filled up by rotation from other categories within the specified seats as may be prescribed. Provided that any spillover thereafter arising shall be filled up from the general merit seats. (8) A minority unaided professional college or institution shall admit not less than fifty per cent of the students from within the State from the minority community to which the college or institution belongs. Fifty per cent of such seats may be filled up from among the socially and economically backward sections from within the minority community on merit-cum-means basis with the consent of the minority educational college or institution as prescribed and the rest in the order of merit in accordance with *inter se* merit, both from the rank list prepared by the Commissioner for Entrance Examinations, based on the common application prescribed in the appropriate prospectus published by the State Government. (9) A minority unaided professional college or institution may surrender upto eighteen per cent of the seats to be filled up by the Commissioner for Entrance Examinations from the specified seats and general merit seats in equal proportion. The first portion shall be filled up on the basis of merit-cum-means basis as prescribed. The second portion shall be filled up from the general merit seats. Any seats not surrendered shall also be treated as minority seats and filled up as such. (10) A minority unaided professional college or institution may surrender upto two per cent of the total number of sanctioned seats to be filled up by students who have made outstanding contribution in the field of culture or sports, on the basis of criteria as may be prescribed. Seats not so filled up shall be filled up from general merit seats”.

⁹⁴ Kerala Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-Exploitative Fee and Other Measures to Ensure Equity and Excellence in Professional Education) Rules, 2006. Rule 10 reads thus: “Allotment of Seats - (1) Allotment of seats in an un-aided professional college or institution shall be done college or institution wise; (2) In every Professional College or Institution other than a minority college or institution,- (a) The distribution of seats for Scheduled Caste and Scheduled Tribe students shall be as specified in the prospectus; (b) Identification of candidates belonging to item (b) and (c) under sub-section (1) of section 10 shall be made in the same manner as is being followed in Government college and allotment of seats will be made in each category on the basis of inter se merit taking into account the option exercise by the students. The identification of candidates under item (c) shall be subject to the conditions contained in the prospectus; (c) Allotment of seats to candidates under item (d) of sub-section (1) of section 10 shall be on inter se merit and subject to the limitation that the annual income of the family of the candidate does not exceed two lakhs fifty thousand rupees. (2) Every professional college or institution shall intimate their consent in writing or otherwise, for admission of candidates under item (c) and (d) of sub-section (1) of section 10, within the time limit specified for the same, by the

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Government. (3) In case the management does not convey their consent in writing or otherwise, within the time limit specified, it shall be deemed that consent has been duly given for treating such seats as seats under (c) and (d) above, and filled up accordingly. (4) The qualification for Non-Resident Indian students will be same as specified in the prospectus. (5) The management of each professional college or institution shall submit to the Commissioner for Entrance Examinations the list of candidates to be considered for admission under privilege seats at least three days before the date notified for the commencement of first year classes. (6) The un-aided professional colleges or institutions under the Institute of Human Resources Development, un-aided Colleges under the Lal-Bahadur Sastri Centre for Science and Technology, un-aided Colleges under the Co-operative Academy of Professional Education, un-aided Colleges under Mahatma Gandhi University, un-aided Colleges under University of Kerala, un-aided colleges under University of Calicut and un-aided Colleges under Centre for Continuing Education shall surrender the privilege seats and admission to such surrendered seats shall be made from general merit seats. (7) Ten per cent of the seats under privilege seats in the un-aided College under KSRTC may be filled by children/dependents of employees in the KSRTC on the basis of inter se merit from the list prepared by the Commissioner for Entrance Examinations. A minimum of five per cent seats under the same category shall be surrendered to be filled from general merit seats. Any seat unfilled under privilege seats shall be filled from general merit seats. (8) 2% of the total number of sanctioned seats in an unaided professional college or institution shall be filled up by students who have made outstanding contribution in the field of culture and sports in the ratio of 1:1. For allotment to MBBS/BDS courses only those candidates whose rank falls within 7 fold of the total number of MBBS/BDS seats in Professional Colleges or Institutions available for allotment through the single window system will be considered. The allotment shall be done by the Commissioner for Entrance Examinations based on the following principles, namely:- allotment under seats reserved for excellence in culture shall be based on inter se merit from among those who have obtained 'A Grade' in any item at the State Youth Festival or Higher Secondary Youth Festival conducted by the State Government; allotment under seats reserved for excellence in sports shall be based on inter se merit and in the manner specified in the prospectus. (9) All students belonging to the same religious minority community irrespective of denominational differences shall be treated as belonging to the same minority community for the purpose of allotment of minority seats. (10) Of the seats surrendered under sub-clause (9) of section 10, fifty per cent shall be filled up from general merit seats and the rest as specified under items (a), (b), (c) and (d) of sub-section (1) of section 10. (11) The principles of rotation specified under sub-section (7) of section 10 shall be the same as specified in the prospectus."

⁹⁵ Rule 11 reads thus: "Freeship and its disbursement - (1) All un-aided professional colleges or institutions, including minority and non-minority colleges or institutions shall provide freeship to a minimum of 50% of the students admitted in each college, subject to the stipulations regarding income limit. Full remission will be given to all SC/ST students, irrespective of their income, whether admitted under specified category or under general merit category. 40% of the students admitted shall also be given partial remission of fee. Students other than those admitted under SC/ST, privilege seats and Non-Resident Indian seats will be eligible for the partial remission of fee on merit-cum-means basis. The fee payable by them will be the same as prevailing in Government or Aided colleges or institutions for the same courses. Only those students whose annual family income does not exceed two lakhs fifty thousand rupees and who have applied for freeship with all relevant documents to support their claim will be considered for the

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dealt with distribution of freeships. The Court found these to be opposed to Article 14 and violating the fundamental rights of the petitioner institutions under Articles 19(1)(g), 26(a) and 30 of the Constitution of India.

The main reason for the striking down of these provisions was the stifling regulations that were placed by the government which the Court feared would choke and shut down the institutions even while their very presence was indicative of the failure of the State to provide quality education as needed for the society.⁹⁶ The Court also reiterated the power of the State to regulate and protect within Constitutional limits its obligations towards the weaker

grant of freeship. Initially, freeship will be awarded to in the ratio of seats allotted to other socially and educationally backward classes, physically challenged and to categories other than the two above. Where adequate numbers of claimants are not available under other socially and educationally backward classes or physically challenged categories, the same shall be granted to other categories.”

⁹⁶ We may also mention that Self Financing Educational Institutions which are imparting quality education or which may by regulations impart such education need to be encouraged. The State for variety of reasons and in particular, paucity of resources and funds, is unable to cater for the need of the Society. It is unable to provide quality education to all commensurate to the need of the Society. It is unable to provide quantitative and qualitative education to all. ...Unnecessary and unproductive regulations which may virtually amount to take over of such reputed institutions would be counter-productive. The day to day monitoring of the institutions and choking them financially may result in their closure. Such regulatory measures would do far more harm than the good they might be intended to do. Would closure of such institutions which are sharing the responsibility of the Government in imparting education in the Society not defeat the very requirement of education in the country is the question which has to be seriously pondered over (paragraph 92).

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sections⁹⁷ and under Article 15(5).⁹⁸

An analysis of these cases would indicate that progressive withdrawal of the State from financing education has brought claims for access to education from politically conscious sections of the society on the basis of equity. The Courts have had to arbitrate between competing claims of equity since the demands for equitable access to education is resisted on the basis of equitable rights of the minorities to establish and administer educational institutions of their choice. Competing claims of equity is again the basis for demands for affirmative action policies in the form of lowering of standards and reservation in admission and resistance in the form of claims based on merit and general public interest.

It is seen that the Courts have not yielded to demands in the field of educational rights based on social justice when there has been a competing claim of equity based on protection afforded to

⁹⁷ It is equally true that such strata of the society who may be socially or economically weak also deserves quality education (paragraph 92).

⁹⁸ The reservation for SC/ST and other backward classes is permissible. As mentioned above, there cannot be any exception to the same, subject to the validity of Article 15(5). The Government would be well within its rights to provide reservation for classes as mentioned above and may do even now but the same has to be done after taking into consideration the factors as enumerated above. The Government may even now take steps to redraft the Section, provide for such reservation even by an Ordinance or such other measures as may be permissible till such time Section 10 is suitably substituted keeping in view the parameters of providing quotas as determined by the Supreme Court from time to time as also keeping in view the upper limit of reservation (paragraph 90).

minority rights. Its role in managing the issue of reservations in the educational sector is at the most that of a final arbiter that checks and balances the power of the government.⁹⁹

How the Courts have dealt with the issue of affirmative action generally on the basis of claims of equity based on social justice when pitted against equitable claims of merit and national interest is studied in the next chapter.

⁹⁹ Santhosh Kumar V., *Social Justice and the Politics of Reservation in India: The Post-Mandal Phase*, Mittal Publications, New Delhi (2008), p. 124.

CHAPTER IX

JUDICIARY AND SOCIAL EQUITY

AFFIRMATIVE ACTION FOR SOCIO-ECONOMIC JUSTICE

The affirmative action policies have played an important role in the empowerment of the weakest sections. Education has been a significant tool in the use of affirmative action policies. The requirement for affirmative action in the educational sector indicates the absence of or the inadequacy of a practical right to education. Decisions of the Supreme Court in this context are a relevant indicator to the extent education has succeeded as a tool for empowerment.

The decisions of the Supreme Court in cases involving claims of socio-economic justice have a bearing on the availability of such claims in the field of education also since the right to education is to be exercised in the society and not in a vacuum. The concept and nature of the right of socio-economic justice was examined in *Panchayat Varga Sharmajivi Samudaik Sahakari Khedut Coop. Society v. Haribhai Mevabhai*,¹. The Supreme Court reaffirmed the right to socio-economic justice available to the Scheduled Castes

¹ (1996) 10 SCC 320. *Madhu Kishwar v. State of Bihar*, (1996) 5 SCC 125; *Dalmia Cement (Bharat) Ltd. v. Union of India*, (1996) 10 SCC 104; *Consumer Education & Research Centre v. Union of India*, (1995) 3 SCC 42; and *Murlidhar Dayandeo Kesekar v. Vishwanath Pandu Barde*, 1995 Supp (2) SCC 549, were relied on.

and Scheduled Tribes.² The State had to take affirmative action by providing them facilities and opportunities for their economic empowerment. The right to socio-economic justice in the trinity, the Preamble, Fundamental Rights and Directives is to make the quality of life of the disadvantaged people meaningful. Equal protection in Article 14, therefore, requires affirmative action by the State to those un-equals by providing facilities and opportunities.³

After considering the difficulties facing the otherwise abled in their struggle for empowerment, the Supreme Court in *D.N. Chanchala v. State of Mysore*,⁴ reaffirmed their right to protection under the Constitution. The Court affirmed the power of the State to provide preferential treatment to secure employment in public service to those categories of persons who did not stand a chance in the normal course. It ruled that the principle underlying Articles 15(4) and 16 (4) may be applied to those who are handicapped but

² The Court relied on the Preamble and Articles 21, 14, 46, and 39(b) of the Constitution of India.

³ The Preamble of the Constitution read with Articles 46 and 39(b) assure socio-economic justice to every citizen to provide dignity of person. Social democracy means a way of life that recognises liberty, equality and fraternity as principles of life. They are the trinity. Without equality, liberty would produce supremacy of the few over the many. Equality without liberty would denude the individual of his initiative to improve excellence. Without fraternity, liberty and equality would not nurture as their natural habitat. Social and economic justice is a constitutional right enshrined for the protection of the society.

⁴ AIR 1971 SC 1762.

who do not fall under Article 15 (4).⁵

The struggle for socio-economic justice has seen the formation of a loose political class of backward class citizens. The issue of membership in the legally recognised class of backward citizens has always been beset with problems since the use of affirmative action by the State raises claims of competing backwardness. Lack of education has been taken as one of the determining criteria for inclusion in the class of backward citizens.

DEFINING THE TERM 'BACKWARD CLASS OF CITIZENS'

The term 'backward' used in the context of reservation in the services of the State was much debated in the Constituent Assembly especially since it was introduced by the Drafting Committee after the Constituent Assembly had passed the clause without the word

⁵ Three basic principles regarding recruitment to state services are: The State has the power to lay down classification or categories of persons from whom recruitment to the public service may be made; the principle underlying Articles 15 (4) and 16 (4) is that a preferential treatment can validly be given because the socially and educationally backward classes need it, so that in course of time they stand in equal position with the more advanced sections of the society; and this principle may be applied to those who are handicapped but who do not fall under Article 15 (4). The State has power to lay down classifications or categories of persons from whom the recruitment is to be made. It secures employment in public service in a just proportion to those who were handicapped and who but for the preferential treatment given to them could not stand a chance against those who were not so handicapped and were, therefore, in a superior position.

after due consideration.⁶ Dr. B.R. Ambedkar justified it on the grounds that such a qualifying phrase was required to ensure equality of opportunity even as the demands of communities for adequate representation in the services is satisfied as also to prevent the rule of equality from being eaten up by the exception of reservation.⁷

⁶ Ramsingh, "Social Justice and Fundamental Rights", in *Dr. B.R. Ambedkar and the Indian Constitution*, Dr. S.G. Bhat, (Ed.), Journal Society, Dr. Ambedkar Government Law College, Pondicherry (2001), p. 55 at pp. 59-66.

⁷ CAD, Vol. VII, Proceedings of Tuesday, 30th November, 1948. While participating in the debates in the Constituent Assembly, Dr. B.R. Ambedkar stated thus: "Now, Sir, to come to the other question which has been agitating the members of this House, viz., the use of the word "backward" in clause (3) of article 10, I should like to begin by making some general observations so that members might be in a position to understand the exact import, the significance and the necessity for using the word "backward" in this particular clause. If members were to try and exchange their views on this subject, they will find that there are three points of view which it is necessary for us to reconcile if we are to produce a workable proposition which will be accepted by all. Of the three points of view, the first is that there shall be equality of opportunity for all citizens. It is the desire of many Members of this House that every individual who is qualified for a particular post should be free to apply for that post, to sit for examinations and to have his qualifications tested so as to determine whether he is fit for the post or not and that there ought to be no limitations, there ought to be no hindrance in the operation of this principle of equality of opportunity. Another view mostly shared by a section of the House is that, if this principle is to be operative - and it ought to be operative in their judgment to its fullest extent--there ought to be no reservations of any sort for any class or community at all, that all citizens, if they are qualified, should be placed on the same footing of equality so far as the public services are concerned. That is the second point of view we have. Then we have quite a massive opinion which insists that, although theoretically it is good to have the principle that there shall be equality of opportunity, there must at the same time be a provision made for the entry of certain communities which have so far been outside the administration. As I said, the Drafting Committee had to produce a formula which would reconcile these three points of view, firstly, that there shall be equality of opportunity, secondly that there shall be reservations in favour of certain communities which have not so far had a 'proper look-in' so to say into the administration. If honourable Members will bear these facts in mind - the three principles, we had to reconcile,--they will see that no better formula could be produced than the one that is embodied in sub-clause (3) of article 10 of the Constitution; they will find that the view of those who believe and hold that there shall be equality of opportunity, has been embodied in sub-clause (1) of Article 10. It is a generic principle.

In *Janki Prasad Parimoo v. State of J&K*,⁸ the Supreme Court observed that 'backward class of citizens' in Article 16(4) meant the same thing as the expression 'any socially and educationally backward class of citizens' in Article 16(4).⁹ The Court observed that both educational as well as social backwardness must be present to place a class as backward. Though social and

At the same time, as I said, we had to reconcile this formula with the demand made by certain communities that the administration which has now - for historical reasons - been controlled by one community or a few communities, that situation should disappear and that the others also must have an opportunity of getting into the public services. Supposing, for instance, we were to concede in full the demand of those communities who have not been so far employed in the public services to the fullest extent, what would really happen is, we shall be completely destroying the first proposition upon which we are all agreed, namely, that there shall be an equality of opportunity. Let me give an illustration. Supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70 per cent of the total posts under the State and only 30 per cent are retained as the unreserved. Could anybody say that the reservation of 30 per cent as open to general competition would be satisfactory from the point of view of giving effect to the first principle namely, that there shall be equality of opportunity? It cannot be in my judgment. Therefore the seats to be reserved, if the reservation is to be consistent with sub-clause (1) of Article 10, must be confined to a minority of seats. It is then only that the first principle could find its place in the Constitution and effective in operation. If honourable Members understand this position that we have to safeguard two things namely, the principle of equality of opportunity and at the same time satisfy the demand of communities which have not had so far representation in the State, then, I am sure they will agree that unless you use some such qualifying phrase as "backward" the exception made in favour of reservation will ultimately eat up the rule altogether. Nothing of the rule will remain. That I think, if I may say so, is the justification why the Drafting Committee undertook on its own shoulders the responsibility of introducing the word 'backward' which, I admit, did not originally find a place in the fundamental right in the way in which it was passed by this Assembly. But I think honourable Members will realise that the Drafting Committee which has been ridiculed on more than one ground for producing sometimes a loose draft, sometimes something which is not appropriate and so on, might have opened itself to further attack that they produced a Draft Constitution in which the exception was so large, that it left no room for the rule to operate. I think this is sufficient to justify why the word 'backward' has been used."

⁸ (1973) 1 SCC 420.

⁹ Backward classes, for whose improvement special provision was contemplated by Article 16(4), must be comparable to scheduled castes and scheduled tribes who are standing examples of backwardness, socially and educationally.

educational backwardness is associated with economic backwardness, poverty could not be made the sole test.

Even though education is available even in villages there still were sections of the population that show extreme apathy towards education due to age old customs and habits of living fostered by poverty, ignorance, superstition and prolonged social suppression, who had to be goaded into the social stream by positive efforts. The caste is not the determining factor. The Court ruled that in identifying backward classes, one had to guard against including therein sections, which are socially and educationally advanced because the whole object of reservation would otherwise be frustrated.

DETERMINATION OF THE 'BACKWARD CLASSES'

The Court clarified the law for the determination of "backward classes" and relied on its previous judgements in *Chhotey Lal Pandey v. State of U.P.*¹⁰ Accordingly, (1) The bracketing of socially and educationally backward classes with the Scheduled Castes and Tribes in Article 15 (4) and the provision in

¹⁰ AIR 1979 All. 135.

Article 338 (3) that the references to Scheduled Castes and Tribes were to be construed as including such backward classes as the President may by order specify on receipt of the report of the Commission appointed under Article 340 (1), showed that in the matter of their backwardness they are comparable to the Scheduled Castes and the Scheduled Tribes; (2) The concept of backward classes is not relative in the sense that any class, which was backward in relation to the most advanced class in the community, must be included in it; (3) The backwardness must be both socially and educationally and not either social or educational; (4) Article 15 (4) refers to "backward" classes and not "backward castes"; indeed the test of caste would breakdown as regards several communities which have no caste; (5) Caste is a relevant factor in determining social backwardness but is not the sole dominant test; (6) Social backwardness is in the ultimate analysis the result of poverty to a very large extent. Social backwardness which result from poverty is likely to be aggravated by considerations of caste to which the poor citizens may belong, but that only shows the relevance of both caste and poverty in determining the backwardness of citizens; (7) A classification based only on caste without regard to other relevant factors is not permissible under Article 15 (4); some castes are,

however, as a whole socially and educationally backward; (8) The occupations followed by certain classes (which are looked upon as inferior) may contribute to social backwardness; and so may the habitation of people, for in a sense, the problem of social backwardness is the problem of rural India; (9) The division of backward classes into backward and most backward classes is in substance a division of the population into the most advanced and the rest, the rest, being divided into backward and most backward classes and this is not warranted by Article 15 (4); and (10) Article 16 (4) does not confer any right on a person to require that a reservation should be made. It confers a discretionary power on the State to make such a reservation if in its opinion a backward class of citizens is not adequately represented in the services of the State. Mere inadequacy of representation of a caste or class in the services is, however, not sufficient to attract Article 16 (4) unless that class (including a caste as a whole) is also socially and educationally backward.

Though the Courts have generally treated education to mean formal education while considering the issue of backwardness, while dealing with the issue of representation for political purposes,

it has tried to avoid the concept for formal education from the debate.

EDUCATIONAL QUALIFICATION AND MEMBERSHIP OF LEGISLATIVE BODIES

In *G. Narayanaswami v. G. Pannerselvam*,¹¹ which dealt with the issue of educational qualifications of the candidate who wants to represent the Graduates' Constituency, the Supreme Court examined the difference between Sections 5 and 6 of the Representation of the People Act, 1951 and the scope of the sections under Article 171. The Court concluded that the use of the term 'electorate', in Article 171(3) did not by itself require that the person to be chosen must also be a member of the electorate or that the representative must also possess the very qualifications of those he represents.¹²

¹¹ (1972) 3 SCC 717.

¹² Article 171 appears to be designed only to give a right to choose their representatives to those who have certain types of presumably valuable knowledge and education. If the presumption of their better competence to elect a suitable representative is there, it would be for the members of such a constituency themselves to decide whether a person who stands for election from their constituency possesses the right type of knowledge, experience, and wisdom which satisfy certain standards. An important and very noticeable difference between qualifications prescribed by Parliament for the membership of a Legislative Assembly by S. 5 of the Representation of the People Act, 1951 and those for the membership of a Legislative Council by S. 6 is that, so far as member of the Legislative Assembly is concerned, he or she has to be an elector in the

The policies of affirmative action by the State has always been questioned before the Courts using the competing principle of equity contained in the concept of merit.

THE QUESTION OF MERIT AND AFFIRMATIVE ACTION

The Universal Declaration on Human Rights enunciates the criterion of merit as the basis for admission to the higher educational institutions. This is reiterated in the World Declaration on Higher Education for the Twenty First Century.¹³ The Supreme Court of India has upheld the role of merit in admissions to even educational institutions established and maintained by the minority communities.¹⁴

In *Janki Prasad Parimoo v. State of J&K*,¹⁵ the Supreme Court observed that it was implicit in the idea of reservation that a less meritorious person is to be preferred to another who is more meritorious. The Court was of the opinion that efficiency and public

constituency from which he or she stands, but a member of a Legislative Council in a State is not, similarly, required to be a member of the electorate. The language as well as the legislative history of Articles 171 and 173 of the Constitution and S. 6 of the Representation of the People Act, 1951, enables to presume a deliberate omission of the qualification that the representative of the graduates should also be a graduate.

¹³ Kishore Singh, "Right to Education and International Law: UNESCO's Normative Action", 2004 LJIL 488 at p. 512.

¹⁴ (2002) 8 SCC 481 at para. 162.

¹⁵ (1973) 1 SCC 420.

interest must always remain paramount. Hence, greater circumspection was required in affirmative action involving appointments and promotions to responsible public offices. State resources are not unlimited and the protection given by special reservation had to be balanced against the constitutional right of every citizen to demand equal opportunity.

The majority of the Court through Kania, C.J. and Venkatachaliah, Ahmadi and Jeevan Reddy, JJ., with Pandian, Thommen and Sawant, JJ. concurring, opined in *Indra Sawhney v. Union of India*,¹⁶ that though reservations were not anti-meritarian¹⁷ there were certain services and posts to which it was not advisable to make reservations. Those services/posts on account of their nature and duties attached called for the highest level of intelligence, skill and excellence¹⁸ had to be kept outside the purview of

¹⁶ 1992 Supp (3) SCC 217.

¹⁷ It cannot also be ignored that the very idea of reservation implies selection of a less meritorious person. At the same time this much cost has to be paid if the constitutional promise of social justice is to be redeemed. It is undeniable that nature has endowed merit upon members of backward classes as much as it has endowed upon members of other classes and that what is required is an opportunity to prove it. It may not, therefore, be said that reservations are *anti-meritarian*. (Para. 836)

¹⁸ These posts included those like the posts in defence services (including technical posts) and connected establishments, technical posts in R & D, posts in specialities and super-specialities in medicine, engineering, physical sciences, technical subjects and mathematics, teaching posts of Professors and above, pilots and co-pilots in Air India and Indian Airlines, scientists and technicians connected with atomic energy, space application and defence production, etc.

reservation keeping in view Article 335.¹⁹

The dilemma faced by the Court in determining the competing claims of equity between the need for reservations and the need for merit has meant that the Court has had to first move in direction and then in the opposite in subsequent cases when the Court has had the time to gauge the political and other implications of the matter. A classic instance is the earlier discussed issue of reservation in admission to postgraduate and doctoral courses in medicine, for Scheduled Castes and Scheduled Tribes first considered by the Supreme Court in *Post Graduate Institute of Medical Education & Research v. K.L. Narasimhan*.²⁰ While rejecting the contention of the general category candidates that such reservation would be detrimental to public welfare for being inconsistent with the maintenance of high degree of excellence in such highly specialised subjects, the Court observed that passage in

¹⁹ *Per Kania, C.J. and Venkatachaliah, Ahmadi and Jeevan Reddy, JJ.* The mandate of Article 335 is to take the claims of members of SC/ST into consideration, consistent with the maintenance of efficiency of administration. (Para 836). The lowering of minimum standard permissible under Article 15 would not be permissible under Article 16 to which Article 335 applies. (Paragraphs 836 and 837).

²⁰ (1997) 6 SCC 283. Bench Strength 3, Coram: K. Ramaswamy, S. Saghir Ahmad and G.B. Pattanaik, JJ. Date of decision: 2-5-1997. *Indira Sawhney v. Union of India*, 1992 Supp (3) SCC 217, explained and dissented from. *Jagdish Saran (Dr) v. Union of India*, (1980) 2 SCC 768, distinguished. *Ajay Kumar Singh v. State of Bihar*, (1994) 4 SCC 401, relied on.

the final examinations would ensure that general qualifying standards prescribed for all candidates is met and that would ensure public welfare. A five judge Bench in *Dr Preeti Srivastava v. State of M.P.* later overruled this reasoning of the Supreme Court.²¹ The Court observed that a pass mark was no guarantee of excellence and that if excellence were to be promoted at postgraduate levels, the candidates qualifying should be able to secure good marks while qualifying.

While this reasoning of the Supreme Court is an acknowledgement of the competing claim of merit, it does not in any way dilute the need for affirmative action. The reality is that the minimum standard prescribed for acquiring any educational certification is no guarantee for quality. If empowerment is not possible without quality, then the currently practised concept of assuring only primary education as a fundamental right betrays the constitutional demand on each citizen to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.²²

²¹ (1999) 7 SCC 120 at pp. 159-160.

²² Article 51A (j) of the Constitution on India.

Though generally a higher qualification in education implies a better suited person for a job, the claim of merit in the guise of classification based on higher educational qualifications is found to compete with other claims in the matter of promotions in government service.

EDUCATIONAL CRITERIA FOR PROMOTIONS

The Supreme Court permitted the restriction of promotion on the basis of higher educational qualification in government service, in *T.R. Kothandaraman v. T.N. Water Supply & Drainage Board*.²³ The Court went on to say that total restriction could not be imposed so as to block the chances of promotion. The court observed that while determining the validity of the classification, the historical background, efficiency in service, need for higher education and social justice have to be kept in mind and a proper balancing of the same made having regard to the object of the classification. The approach had to be in consonance with Articles 14, 16 and 21.²⁴

²³ (1994) 6 SCC 282.

²⁴ The following legal propositions emerge regarding educational qualification being a basis of classification relating to promotion in public service: (1) Higher educational qualification is a permissible basis of classification, acceptability of which will depend on the facts and circumstances of each case. (2) Higher educational qualification can be the basis not only for barring promotion, but also for restricting the scope of promotion.

Competing claims of equity came up before the Court in the case of a demand for entrance examination for pre-medical and pre-dental courses to be conducted in Hindi, one of the official languages of the country.

EDUCATIONAL TESTING AND REGIONAL LANGUAGES

In *Hindi Hitrakshak Samiti v. Union of India*,²⁵ which sought to compel the State to hold the entrance examination for pre-medical and pre-dental courses in Hindi and regional languages, the Supreme Court ruled that it was a matter of government policy not enforceable through the writ jurisdiction.²⁶ By conveniently holding

(3) Restriction placed cannot however go to the extent of seriously jeopardising the chances of promotion. To decide this, the extent of restriction must be reasonable. Even where in a case the classification would not be acceptable to the court on principle, it would, before pronouncing its judgment, bear in mind the historical background. While judging the validity of the classification, the court shall have to be conscious about the need for maintaining efficiency in service and also whether the required qualification is necessary for the discharge of duties in the higher post. Apart from the aforesaid propositions there are two other determinants viz. the call of social justice and importance of education. Court has to see whether Article 21 is offended in any way, while examining the provision on the anvil of Articles 14 and 16 of the Constitution. Even though social justice is not a fundamental right, it being a requirement of directive principles, had to be the desideratum in any case.

²⁵ (1990) 2 SCC 352.

²⁶ Article 32 of the Constitution of India guarantees enforcement of fundamental rights. It is well settled that the jurisdiction conferred on the Supreme Court under Article 32 is an important and integral part of the Indian Constitution but violation of the fundamental rights is the sine qua non for seeking enforcement of those rights by the Supreme Court. In order to establish the violation of a fundamental right, the court has to consider the direct and inevitable consequences of the action which is sought to be remedied or the guarantee of which is sought to be enforced. Judicial review, in order to enforce a fundamental right, is permissible of administrative, legislative and governmental action or non-action. The rights of the citizens of this country are to be judged by the judiciary

it to be a matter of policy, the Court failed to look into the aspect of empowerment through affirmative action and lost an opportunity to compel the teaching and testing of educational standards through the mother tongue, which incidentally is the norm the world over.

The balancing act that the Supreme Court does on issues concerning competing claims of equity is again highlighted in the matter of reservation in government posts where it has had to recognise such competing claims from even within the class of backward classes.

and judicial forums and not by the administrators or executives. But citizens of India are not to be governed by the judges or judiciary. If the governance is illegal or violative of rights and obligations, other questions may arise but whether, it has to be a policy decision by the government or the authority and thereafter enforcement of that policy, the court should not be, and would not be an appropriate forum for decision. The actions flowing from non-acceptance of any policy perspective, amount to direct and causal violation of the fundamental right of the citizens guaranteed under the Constitution of India. Court is not the forum to adjudicate upon the questions of the policy unless such a policy is the direct mandate of the Constitution. Proper and appropriate remedy in a situation where enforcement of the right depends upon the acceptance of a policy of examination for admission in any particular language to the institution on that basis is a matter of policy. In not holding entrance examination in any particular language, be it Hindi or regional language, does not amount to denial of admission on the ground of language. Every educational institution has a right to determine or set out its method of education and conditions of examination and studies provided these do not directly or indirectly have any causal connection with violation of the fundamental rights guaranteed by the Constitution. It may be that Hindi or other regional languages are more appropriate medium of imparting education to very many and it may be appropriate and proper to hold the examinations, entrance or otherwise, in any particular regional or Hindi language, or it may be that Hindi or other regional language because of development of that language, is not yet appropriate medium to transmute or test the knowledge or capacity that could be had in medical and dental disciplines. It is a matter of formulation of policy by the State or educational authorities in charge of any particular situation. Enforcement by Article 32 was not possible where the existence of a fundamental right has to be established by acceptance of a particular policy or a course of action for which there is no legal compulsion or statutory imperative, and on which there are divergent views. Article 32 cannot be a means to indicate policy preference.

Cochin University of Science & Technology

The Court has considered claims for recognising the class nature of caste in Hindu religion and for equating 'caste' with 'class' in determining backward classes for the purpose of identifying beneficiaries for affirmative action policies of the government.

IDENTIFICATION OF BACKWARD CLASSES FOR INCREASING REPRESENTATION IN GOVERNMENT

In *Indra Sawhney v. Union of India*,²⁷ the Court considered the desirability of caste as a criterion in the determination of 'social and educational backwardness' in the context of the demand for rejection of the Mandal Commission Report that based its findings on the caste-wise statistics of the 1931 census. The Court ruled that caste can be the basis for identification to start with and then the problem of identifying backward classes in other religions, communities, groups, classes or denominations could be resorted to.²⁸ There could be prescribed no single universally applicable method/procedure, since such criteria would vary from State to State, region to region and from rural to urban. The Court ruled that

²⁷ 1992 Supp (3) SCC 217.

²⁸ Per Kania, C.J. and Venkatachaliah, Ahmadi and Jeevan Reddy, JJ.

each commission/authority could adopt appropriate procedure that is fair and adequate. It found that identification without reference to caste may have to be used for certain occupations where caste is not relevant at all and since Article 16(4) is concerned with backwardness of classes and not individuals the survey of individuals was not covered. The Court ruled that caste-based identification under Article 16(4) would not violate Article 16(2).

In the opinion of Pandian, J., caste cannot be the sole criterion nor can it be equated with class and where considered it must satisfy the primary test of social backwardness as well as educational and economic backwardness.

Sawant, J., in his concurring opinion said that since caste was the historical cause of discrimination it could be used to remove it and so caste could be used for identification for Article 16(4). When members of an entire caste are backward, 'backward caste' and 'backward class' are synonymous.

In his dissent, Thommen, J. noted that caste, race, religion, sex, etc., cannot be the sole criterion but only a guide in the search of backwardness caused by historical discrimination and its continuing evil effects. Along with other criteria such as poverty,

illiteracy, disease, etc. the criteria in Article 15(1) or Article 16(2) may be used to identify backwardness caused by past inequities.

In his dissent, Kuldip Singh, J. opined that 'class' could not mean 'caste' and so backward classes could not be identified on the basis of caste. He opined that occupation with any other criteria could be used for identification.

In his dissent, Sahai, J. noted that 'class' is wider than 'caste' and in Article 16 'class' is not used as 'caste' and so 'backward class' cannot mean 'backward caste'. He suggested that the Court must lay down universally applicable principle covering all communities (subject to local conditions) and by which benefit reaches the needy. In his opinion an occupation based identification of those who are also socially and educationally backward irrespective of race or religion and satisfy the means test would be the best method and if any caste satisfies all these tests, it would be eligible.

In the majority opinion of Kania, C.J. and Venkatachaliah, Ahmadi and Jeevan Reddy, JJ., with Sawant, J. concurring and Pandian, J. contra, the Court ruled that the fixing of an income ceiling to remove the creamy layer is impractical but there could be

other means to exclude the creamy layer²⁹ for the benefits of affirmative action to reach the really backward among the Other Backward Classes.³⁰

The majority opinion expressed by Kania, C.J. and Venkatachaliah, Ahmadi and Jeevan Reddy, JJ., held that under Article 16(4) 'backward class of citizens' who were 'not adequately represented in the services under the State' being the basic condition for reservation these classes may be identified to the subjective satisfaction of the State. This opinion was subject to judicial scrutiny as per the principles applicable in other matters within the subjective satisfaction of an authority as laid down in *Barium*

²⁹ Per Sawant, J., for exclusion the criteria should be ability to compete with the forward classes. Per Thommen, J., exclusion of those who have attained a certain economic level was necessary and the economic level reviewed from time to time. He suggested the consideration of Article 46 also. Per Kuldip Singh, J., means test is imperative to skim off the affluent sections of the backward classes. Per Sahai, J., exclusion of creamy layer is constitutionally valid. The past injustice must be continuing on the date of reservation and the criteria for exclusion can be social, political and economic attainment.

³⁰ While Article 16(4) does aim at group backwardness and not individual backwardness, the exclusion of the socially advanced members will make the 'class' a truly backward class and would more appropriately serve the purpose and object of clause (4). (Para 792) Hence exclusion of 'creamy layer' must be on the basis of social advancement (such advancement as renders them misfits in the backward classes) and not on the basis of mere economic criteria. At the same time, income or the extent of property held by a person can be taken as a *measure* of social advancement and on that basis 'creamy layer' of a given caste/community/occupational group can be excluded to arrive at a true backward class. (Para 843) It is to be noted that this discussion is confined to Other Backward Classes only and has no relevance in the case of Scheduled Tribes and Scheduled Castes. (Para 792).

*Chemicals*³¹ case. Action of Government under Article 16(4) is a matter of policy subject to constitutional parameters and well-settled principles of judicial review. Pandian, J. concurred that opinion formed by the State on its subjective satisfaction was open to challenge on grounds of non-application of mind, formulation on collateral grounds, *ultra vires* or consideration of irrelevant and extraneous material. Thommen, J., opined that reservation under Article 16 must be exclusively for backward classes not adequately represented in the services. Sawant, J. concurred that since Article 16(4) aims at giving a due share in State power to those hitherto unrepresented in State services due mainly to social backwardness the whole class must be inadequately represented. Kuldip Singh, J. in his dissent stated that of the whole class having inadequate representation only the backward section of that class was eligible for the reserved posts and so reservation under Article 16(4) is not meant for backward classes but for backward sections of classes not adequately represented. In case of Scheduled Castes and Scheduled Tribes, the whole class backward. The condition precedent for a class to get benefit under Article 16(4) was not backwardness but

³¹ *Barium Chemicals Ltd. v. Company Law Board*. 1966 Supp. SCR. 311.

inadequacy of representation in State services. To Sahai, J., State action was restricted by two basic or jurisdictional facts. It must be based on firm evidence of clear and legitimate identification of backward class of citizens on constitutionally valid principles and secondly their inadequate representation in the services of the State. Both conditions must be satisfied on the date the reservation is made.

That the Supreme Court cannot give reasons in an unanimous voice indicates the difficulty faced by it while deciding matters relating to competing claims based on equity. Whether affirmative action policy of the government in the form of reservation is actually a policy of reverse discrimination was an issue that came up for determination before the Court.

RESERVATION AND REVERSE DISCRIMINATION

While considering *Ajit Singh II v. State of Punjab*,³² the Supreme Court held that a balance had to be struck between the

³² (1999) 7 SCC 209, per Dr. A.S. Anand, C.J. and K. Venkataswami, G.B. Pattanaik, S.P. Kurdukar and M. Jagannadha Rao, JJ. (Para 38). *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217; *M.R. Balaji v. State of Mysore*, AIR 1963 SC 649; *Post Graduate Institute of Medical Education and Research v. Faculty Assn.*, (1998) 4 SCC 1; *Ajit Singh Januja v. State of Punjab*, (1996) 2 SCC 715; *Richmond v. Croson and Co.*, 488 US 469, 493 (1989); and *Akhil Bharatiya Soshit Karamchhari Sangh (Rly.) v. Union of India*, (1981) 1 SCC 246, 286 were relied on.

individual rights under Articles 16(1) and 14 on the one hand and affirmative action under Articles 16(4) and 16(4-A) on the other, so that the affirmative action does not lead to reverse discrimination. The Court observed that reservations cannot lead to an 'overkill' and ruled that affirmative action stops where reverse discrimination begins.

The Supreme Court has recognised the vision of the Constitutional Framers towards harmonising the conflict between the egalitarian principle of social justice and the principle of merit. When faced with issues involving national interest, the Court has consistently held that affirmation policies must not lead to a dilution of the overall national interest.

RESERVATION AND NATIONAL INTEREST

The Supreme Court has understood the Constitutional scheme, as envisaged in Articles 14, 15 and 46 to mean the sacrifice of merit for the sake of giving benefit to certain historically disadvantaged sections. The Court has accepted that while Article 14 embodies the genus of equality, Article 15(4) provides for the specifics of the genus and is in the nature of an illustration of the general principle of equality. Even then, there is discernable

consistency in the thinking of the Supreme Court that the egalitarian principle of social justice must yield to the principle of merit where national interest dictates.³³

In *M.R.Balaji v. State of Mysore*³⁴, the Supreme Court examined the scope of Article 15(4) while it struck down a government order effecting 68% reservation in medical and engineering colleges in the State. Gajendragadkar, J. observed thus:

“... . The demand for technicians, scientists, doctors, economists, engineers and experts for the further advancement of the country is so great that it would cause grave prejudice to national interest if considerations of merit are completely excluded by whole sale reservation of seats in all technical, medical and engineering colleges or institutions of that kind.”³⁵

An aspect of the reservation policy which has not been commented upon with the importance that it merits is the increased

³³ B. Errabbi, “The Constitutional Conspectus of the Right to Higher Education in India: Judicial Perception”, I NLR (2003) 30 at pp. 35-37.

³⁴ AIR 1963 SC 649.

³⁵ AIR 1963 SC 649 at pp. 662-663.

national integration brought about by it. This view is in spite of the clashes that have been witnessed in different parts of the country during the riots that welcomed the implementation of the Mandal Commission recommendations. It is a fact that the marginalised communities of the other backward classes and the Scheduled Castes and Tribes have now a greater stake in the Indian Constitutional Scheme than they had at any other point in time.³⁶

The issue of competing equities within the classes claiming the benefit of affirmative action has now been read as a part of the scheme of equality envisaged under the Constitution.

RESERVATION AND THE CREAMY LAYER

In *M. Nagaraj v. Union of India*,³⁷ where the main issue concerned the 'extent of reservation', the Supreme Court reaffirmed the importance of the creamy layer principle in the scheme of equality under the Constitution. The Court found the creamy layer principle to be an important limit on state power under the Equality

³⁶ M.N. Panini, *From Equality to Social Justice: Vicissitudes of the Reservation Policy in India*, IV *Pol-Sym* (2007) 52-60 at pp. 59 – "In reviewing the twists and turns the reservation policy has taken since independence, it is possible to notice that an unanticipated consequence of the policy has been its contribution to national integration by making the hitherto marginal castes and communities stakeholders in the system."

³⁷ MANU/SC/4560/2006

Clause enshrined under Articles 14 and 16 the violation or dilution of which renders the state action invalid. The Court held that when the laws enacted by various States providing for reservation are challenged what is considered is whether the limitations on the exercise of power are violated. While the State is free to exercise its discretion of providing for reservation it is limited by the ceiling-limit of 50%, the concept of creamy layer and the existence of compelling reasons of backwardness, inadequacy of representation and overall administrative efficiency which are the constitutional requirements ensuring equality of opportunity under Article 16.

The Court observed that the State is not bound to make reservation for SC/ST in matter of promotions and that the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance of Article 335 to make any such provision. The Court clarified that even when the State has compelling reasons its reservation provision cannot lead to excessiveness so as to breach the ceiling-limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.

In *Nair Service Society v. State of Kerala*,³⁸ the challenge was against the terms of reference given by the State of Kerala to the Justice K.K. Narendran Commission which called for the maximum benefit to be given to backward classes while identifying the creamy layer among them as also the norms evolved by the Commission to identify the creamy layer. The terms of reference was found to be contrary to the direction given by the Supreme Court in *Indra Sawhney-I*,³⁹ since the attempt of the State was found to be not aimed at protecting only those who remain socially and educationally backward but also those who have ceased to be being the creamy layer. The Court also found fault with the way the Justice K.K. Narendran Commission was appointed when the earlier Report of the Justice Joseph Committee made pursuant to directions of the Supreme Court in *Indra Sawhney-I* was accepted by the State of Kerala. The Supreme Court had directed the Justice Joseph Committee Report to be implemented subject to certain modifications *in toto* forthwith in *Indra Sawhney-II*.⁴⁰ The Court noted that the Report of the Justice Joseph Committee was not

³⁸ MANU/SC/1126/2007; AIR 2007 SC 2891.

³⁹ 1992 Supp. (3) SCC 217, the case is as named by the Supreme Court in this instance.

⁴⁰ MANU/SC/0771/1999, the case is as named by the Supreme Court in this instance.

implemented forthwith in terms of the directions of the Court. The Supreme Court set aside the Report of the Justice K.K. Narendran Commission, kept in pendency the contempt proceedings and directed the State of Kerala to appoint a fresh Commission to look into the matter.

The increased withdrawal of the State as a source for employment generation has resulted in claims based on social justice being made against the private sector.

Since there are a larger number of institutions in the private sector as compared to the government sector in the field of education, any programme aimed at increasing the proportion of students from the depressed communities to match their representation in the population must necessarily include the private sector as well.

So far as educational institutions are concerned such attempts to extend reservation policies of the government to the private sector must find justification on social, legal and moral grounds to be considered just and legitimate. Otherwise, it would amount to nationalisation of education. All law stems from the will of the

political majority in a democracy. *Mandalisation*⁴¹ has contributed to lobbying based on caste interests, gaining legitimacy and respectability, notwithstanding the legal constraints on seeking votes explicitly on this foundation.

Many arguments are stated against extending reservations into the private sector apart from the aspect of nationalisation of education.⁴² In the era of globalisation, limiting the power of private educational institutions affecting the qualitative and quantitative aspects of their student intake is argued to be contrary to the elementary requirements of the liberalisation process. Such legislation in the education sector is comparable to existing social welfare legislations in the labour sector. Its success given the governments' track record of implementation, monitoring and regulation thereof, is certainly suspect.

The arguments against reservations in the private sector gains their strength on the basis of a perception that lowered efficiency in

⁴¹ See Arvind Sharma, *Reservation and Affirmative Action: Models of Social Integration in India and the United States*, Sage publications, New Delhi, (2005), p. 156 for a historical background on the development of this term.

⁴² Dr. D.K. Bhatt, Dr. P.C. Joshi, "Educational Reservation in Private Sector: Trends and Prospects", XII M.D.U.L.J. – I (2007) 46-63.

the public sector is due to the policy of reservation followed by it.⁴³

An analysis of the decisions of the Supreme Court in cases of competing equities indicates that the Court does not have a specific policy in this regard. It actually stumbles from one judgement to another. It is to be appreciated that deciding between claims of competing equities is actually a political one and hence a matter of policy which the Court is ill-equipped to determine. Moreover, the Court is constrained to act within the narrow fact situation even while addressing cases with larger policy ramifications.

Since there is a link between relative backwardness and the benefits of affirmative action it is to be studied whether there is an incentive to remain uneducated to reap the benefits of affirmative action. Education being a component for determination of membership in the list of legally recognised backward communities, any judicial recognition given to classification based on higher

⁴³ Bhagat Oinam and D.A. Sadokpam, "Problems of Generalisation", <http://www.india-seminar.com/2005/549/549%20b.oinam,%20d.a.sadokpam.htm> [internet accessed on 5th September, 2007]. "Mere reservation of jobs will not help. After more than fifty years, it is high time to examine the success and failure of the reservation policy: in terms of empowerment of the marginalised, equal and wider distribution of the reservation benefits to every section of the underprivileged, and finally, efficiency and productivity in the government sectors where reservation policy is implemented. The widening gap between the public and private sectors is clearly visible as of today. The fact that the private sector is performing far better than the public should be good enough reason to re-scrutinise the reservation of jobs. It needs to be seen if the failure results from flaws in the conception of the policy or in its implementation."

education for disempowerment to benefits of affirmative action would hence be counter-productive in promoting education as tool for empowerment.

CHAPTER X

CONCLUSIONS & SUGGESTIONS

CONCLUSIONS

A brief history of education in India, as discussed in the first chapter, shows that until the advent of the British model of education in India, formal education in the literal sense did not matter to the vast majority of the population. The upper echelons of the society practically pursued literary education as an occupational necessity. This is true of the priest classes who studied the religious texts and the merchant classes who concentrated on book keeping and accounting procedures. The artisans learned through practical experience and since occupations were mainly hereditary no formal institutionalised system was a necessity for them. The royalty learned for the pleasure of it and for this they found special tutors who could take care of their various needs. The agricultural and other labour classes never aspired for nor were assured of any kind of literary education. Even if they learned anything of literary value it did not in any way help in their occupational and hence survival needs. In short, education in India was decided by the class/caste in which one was born and his need for earning a livelihood. Since the caste system among the majority of the population prevented mobility in occupations, there existed a positive disincentive to

pursue a formal education of any literary kind.

Women were discriminated against in matters of education. Even among the upper echelons of society, women with any kind of formal education were a rarity. It can be seen that ancient Hinduism, with its mainly patriarchal society, actively discouraged their women folk from undergoing any formal kind of education. A change in perception occurred only at the zenith of Buddhism. It was restricted to the monks and did not percolate to the masses. The revival of Hinduism and later the advent of Islam in India destroyed all remnants of formal education for women.

The advent of the British system of education changed this, not out of any love for the Indians, but for the benefit of the East India Company and later the British Empire since it wanted cheap and educated clerical staff to man its vast and ever expanding operations. This was the beginning of the end of the traditional systems of education, which primarily catered to certain sections of society more on religious and community basis rather than universally on a secular basis in the contemporary sense.

The modern state of education has also been the bane of the Indian society in the sense that it is primarily aimed at the creation

of white-collar labour than a force for an expansion of the traditional sectors from where the life breath of India comes. Government policy has conclusively shifted in favour of liberalisation, privatisation and globalisation. Education which allows multitasking helps overcome the change induced trauma in the globalised economy. Modern school education must hence focus on enabling an empowering learning process rather than the mere teaching of any particular skill.

Moving from the narrower grounds of personal enrichment through education to the broader requirements of nation building, it can be seen that true democracy demands equal participation in governance from the people. All sections of the society can participate in a democracy only if they are politically and socially sufficiently empowered. Since the ability to influence opinion is a determinant factor that determines the beneficiaries of political patronage, it is all the more essential for a democracy to have its citizens sufficiently empowered to prevent an abuse of power and wastage of resources.

Without such empowerment, rule of the elite of the society attains divinity in the course of time and would result in the passive

acceptance of the majority that the rulers can enjoy certain privileges unavailable and unachievable by the ruled. Caste based apartheid thus leads to subversion of the right to education by the ruling classes to perpetuate their dominance.

True empowerment can only come with an ability to realise what is good for oneself and for the society, for in the context of man as a social animal, almost always the good of man is synonymous with the good of society. Hence it can be seen that quality education must lead to empowerment.

Justice would lead to an inclusive society and liberty allows the individual to tread the path towards excellence, as was observed by the Veerappa Moily Committee.

Since the citizen is an individual actor capable of acting beyond and above the needs of the society, justice places the onus on society to ensure that its needs are protected by suitably addressing the individual's need for liberty. One of the means available to any society is to provide formal education to its citizens in such a manner that the citizen is sufficiently empowered and suitably equipped to function for both his good as well as the good of the society.

Since formal primary education is available as a fundamental right in India, it is all the more important to provide it by the government in a manner that will attract the citizen and empower him in the process.

Foremost in the efforts to be made by the government is the allocation of resources specifically for the primary education sector. Currently it is abysmal when compared to the allocation of resources for other non-fundamental sectors. It is way behind the allocation in percentage of GDP terms when compared to that of developed countries.¹ Moreover, since the liberalisation of the Indian economy, the allocation towards education in real terms has steadily decreased. Structural changes brought about by liberalisation adversely affect the already vulnerable in the absence of adequate social security resulting in decreased access to education.

In this context it can also be seen that commercialisation of education has gained momentum after liberalisation of the Indian economy. When coupled with decreasing budgetary allocations for

¹ See Appendix 1, Table 3 - Public Expenditure on Education as Percentage of Gross Domestic Product: Developed Countries and India.

the education sector (in real terms) this would imply that the government's policy does not match with its rhetoric in the Plan of Action enumerated in 1992 on the Educational Policy formulated in 1986.²

Allocation for education should increase from the current average of 3% of GDP to 6% as advocated by the Kothari Commission and primary education should be strengthened for tangible results for the greatest number. This is the Constitutional mandate and the most efficacious means to achieve universal education. Resources can be mobilised through targeted taxation if there is the political will for the same.

Recognition of the fundamental right to education would also imply the recognition of a fundamental duty on the part of the State to provide the child below fourteen years with quality primary education and that of the child to receive such education when made available to it. The Right of Children to Free and Compulsory Education Act, 2009 is hence a correct step in this direction but its implementation is still pending.

² See Appendix, Table 2: Statement Indicating the Public Expenditure on Education, to see this decreasing trend.

As is shown by the Kerala model of education, social awareness about the need for formal education is the prime remedy to surmount any barrier that denies access to education. But even the Kerala model of education has succeeded in increasing literacy levels and perhaps women empowerment but has not succeeded in ensuring the quality content of right to education.

Government has a huge role to play to make the concept an available right. Governmental role extends to creating effective legislation, planning with vision and creativity, allocation of proper and adequate resources, encouraging non-governmental providers to complement governmental measures through incentives, fast and effective compliance measures to prevent large-scale deviation from intended outcomes, etc.

Current initiatives of the government that link free food programmes for children to schooling is effective but needs motivated supervision to ensure success in the face of proven bureaucratic apathy.

The quality of education that is provided through the educational system in India has to be improved to promote self-sufficiency and empowerment of individuals by the time they

complete primary education. This will encourage parents to send their children to school.

The society should be oriented through social engineering devices to revise its concepts of role associated with gender so as to encourage more women to take up non-traditional roles in society. Empowerment brought about by such a social revolution will promote better access to education for the future generations.

Most cases before the Supreme Court has been for the preservation of minority rights in establishing and administering educational institutions of choice rather than for ensuring access to education. This has allowed the issue of minority rights to cloud and bias the reasoning process on debates in the field of education. By dominating the debates in the field of educational rights, the issue of minority rights has eclipsed the fundamental necessity of ensuring access to education to enable empowerment.

The Supreme Court has not addressed the issue of access to education as a basic right in any other case as comprehensively as it did in *Unnikrishnan*. But by not accepting *Mohini Jain* in *Unnikrishnan* with regard to education as a fundamental right beyond the primary level and leaving it to the mercy of the State to

appropriate necessary resources, the Supreme Court did nothing much to ensure access to education.

Significantly, the Supreme Court has endorsed the treatment of higher education as non-merit goods in *T.M.A. Pai*. This goes against the concept of education as envisaged in a socialist economy.

Ensuring access to education means not merely providing the noon meal on school days till the age of fourteen but equipping the citizen to earn a living through the education that is provided as a fundamental right.

The Supreme Court has laid emphasis on merit in admissions to educational institutions while accepting the concept of reservation. Claims on merit and reservation arise due to lack of resources. Unless the basic education provided as a fundamental right caters to empower the citizen in its fundamental sense, the demand for admission to higher educational institutions will not cease.

It remains for the State to rise to the occasion now thrust upon it by the decision of the Supreme Court in *Inamidar* to establish and provide adequate educational facilities to ensure that all

aspirants to education, whether primary or secondary or professional, get access to the education of their choice. Provision of education of quality by the State, when made accessible to all, would ensure access and empowerment and thus supplement the policies of State sponsored affirmative action.

The main problem thrown open by the Supreme Court in *Inamdar* is the politically unpalatable concept of no reservation in either a minority or a non-minority unaided educational institution. In reality, the educational institutions were not opposing reservations as such, but the unsaid requirement that the subsidy inherent in any reservation be met by the management of the institution not from the fees collected from the students but from other unspecified sources. With no other viable avenue for resource mobilisation other than fees, the policy of the State would have ensured the death of all private initiative in the field of education, but for the intervention of the Supreme Court in the case of *Inamdar*.

But the courts can only step in to ensure that the government remains within its constitutionally authorised limits. It can only ensure that governmental schemes work in favour of the intended

beneficiaries without impairing the rights of others. Though it has acquitted itself well as an arbiter of competing claims, the courts cannot be a substitute to the government.

The trend of cases fought in the Supreme Court indicates the need for providing greater security to potential investors in the educational sector. The issue of minority rights have cropped up in this area only because it is the minority's right to establish educational institutions that has been safeguarded as a fundamental right under the Constitution of India and almost all providers of education has sought to protect their investment under the umbrella of fundamental rights for the benefit of minorities against encroachment by the State. This indicates that a level playing field for investors in the field of education with adequate protection for their investment against encroachment by the State is lacking in India. If this is addressed, then it could lead to the establishment of larger number of educational institutions leading to a reduction in pressure with respect to admissions and thereby ensure greater opportunities for accessing education, be it primary, secondary or tertiary.

Limiting the right to primary education by an arbitrary age

criteria does not provide justice to those deprived of it in their childhood for reasons beyond their control. When right to primary education is a fundamental human right there cannot be any justification to deny it on the basis of age or any other criteria.

Inadequate infrastructure shows a lack of proper utilisation of resources by the State. It implies the failure of the State in fulfilling its basic mandate of empowering its people. Government needs to come out with more target-oriented schemes like the Operation Blackboard and DPEP to improve the available infrastructure.

The dilution of the law itself is the main reason for the inefficient and inadequate implementation and enforcement of the law. Persuasion is the politically chosen method for universalising primary education instead of compulsion while universally compulsion has ensure better results in shorter spans of time. Increased drop-out rate on account of economic incapacity is unfortunate. Higher education need not be subsidised at the cost of primary education.

Further dilution lies in the policy itself. Non-formal supplementary education programmes are made available for non-school-going and working children on the ground of poverty and

economic compulsions. This makes child labour a reality that has to be accepted and delays the implementation of the Act till that golden dawn when poverty is eradicated.

Evidence indicates that poverty is not the sole cause for children not attending school. It is due to the lowest priority given to education by the parents when they are given a choice of either sending their child to school or for work. Compulsory education would help in such a situation.

Even then, if education is made mandatory for children, will the current pattern of schooling be able to create any difference from the point of view of empowerment?

There is a serious problem of quality education being denied to many on the ground that providing access is more important than providing quality. This creates a competing claim between 'access' and 'quality' which is not beneficial for accessing an effective right to education.

Vocational training can provide a skill set to the individual that enables him to earn his livelihood. It provides for diversification of educational opportunities to enhance employability of individuals by reducing the disparity between demand and supply. Vocational

training at the local level could be managed on a need based manner through community colleges. This could lead to increased employment opportunities at the local level and ensure better quality of life for greater number of people.

The government-sponsored program for providing non-formal education can go a long way in providing empowerment at the grass roots level. Sufficient measures to ensure quality and goal orientation in the education imparted at such centres can create a cost effective machinery to empower the masses. This can also be used to remedy barriers caused due to a weak teacher-pupil ratio. Access to the classroom even in a non-formal manner would also mean access to the teacher to effectuate the teaching process.

Labour laws should be strengthened and incentives provided to employers to allow for bettering the access to the working population to access avenues of non-formal education.

Social equity and quality needs to be achieved at the primary level of schooling for its attainment at the higher levels of learning to be a smooth affair. Only this will lead to inclusive economic growth and social cohesion.

Higher education is no longer a campus based affair of

students in the age-group of 18 to 25. Advancements in technology have enabled a learner-centric approach to learning as distinct from the traditional classroom-centric patterns of education.

Success in the use of technology to enable the student base of the country to be treated as human capital so that the education they receive in this era of globalisation ensures their employability in the global markets would be the key to advance social mobilisation and advancement.

The widespread use of our own interactive satellite based education system aims to bring the school to the students which would be a lot more advantageous than the traditional measures aimed at getting the students to the school.

Since 2004, with the launch of the EduSat which is exclusively dedicated to education, the Indian effort to universalise education has received a great boost. Greater effort is now needed to improve the access to such technology for the rural and remote areas of our country.

As exemplified by the Kerala model of educational empowerment, it is the demand from the society that ultimately shapes the success of universal accessibility to education. Without

enforcing the provisions for compulsory education in the Kerala Education Act, 1958, Kerala has shown the way of reaching literacy and education to nearly all its residents. This successful penetration of schooling has been made possible due to the involvement of social organisations and the increased awareness levels of the people of Kerala to the benefits of getting a formal education.

If empowerment means the ability to influence public policy, the political philosophy, administration, legislation, etc., then the targets of affirmative State action are empowered. If it means that the living law is synchronous with the statute law, then statutory empowerment becomes a reality. On the other hand, if the presence of a right in the statute books is an indication of its absence in practical life, then empowerment is only a dream, a mirage that gives hope and leads to despair.

SUGGESTIONS

In the light of the analysis and discussions made in the foregoing chapters, the following suggestions are made:

1. Notifying the Right of Children to Free and Compulsory Education Act, 2009 for implementation.

2. Increasing State involvement in the education sector to ensure greater access to education for all.

3. Restrictions to be placed on the utilisation of the common resources of the society in building exclusive fiefdoms in the education sector especially under the protection granted under Articles 29 and 30 of the Constitution of India, by ensuring a level playing field for all providers of education.

4. Limiting the affirmative action policies of the government to one or at the most two generations of every eligible family to ensure a greater access to all to the common resources.

5. Free, compulsory and uniform state sponsored secular and quality primary education for all citizens irrespective of their age.

6. Preventing religious and sectarian education being imparted through institutions engaged in providing primary, secondary, or tertiary education including professional education. This would lead to right to education being separated, as it rightly should, from the narrower world of minority rights.

7. Increasing the number of Universities in the country and bringing down the number of affiliated colleges per University to

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improve the quality of supervision exercised by each University.

8. To provide an enabling atmosphere for the creation of more number of autonomous educational institutions to respond better and cater faster to the varied needs of the society and the industry.

9. Enabling pursuit of education for knowledge sake by placing lesser restrictions on the kinds of subjects and courses that can be pursued by people through ensuing inter disciplinary mobility and pacing of studies to suit individual abilities. This requires greater academic freedom to Universities by change of University statutes.

10. Amending the Constitution to provide for compulsory schooling to every child below the age of eighteen and legislating to punish those who prevent any child from attending school.

11. A stricter enforcement of the labour legislations in the country to prevent exploitation of children engaged in child labour when they should actually be in school.

12. Sensitisation of the executive and judicial machinery for a stricter implementation of laws and a non-lenient view of violations that result in robbing the content of right to education.

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It is sincerely believed that these suggestions would improve access to quality education thus making the right to education a meaningful one.

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APPENDIX

Table 1: Government, Aided and Unaided Schools in some Districts of Kerala.¹

Revenue District	Govt.	Aided	Un-Aided	Total
Alappuzha	319	401	23	743
Patthanamthitta	260	443	34	733
Kollam	407	452	43	893
Trivandrum	517	378	58	983
Ernakulam	369	552	72	993
Trichur	253	701	38	992
Kottayam	296	570	46	912
Idukki	165	270	19	454
Palakkad	308	586	40	934
Malappuram	545	781	52	1378
Kasaragod	287	220	19	526

Table 2: Statement of Public Expenditure on Education in India.²

Sl. No.	Year	GDP at current prices (at factor cost)	Total Expenditure by all Sectors	Expenditure on Education by the Education Dept.	Expenditure on Education by Education & Other Dept.s	Expenditure on Education by Education & Other Dept.s as percentage of Public Expenditure	Expenditure on Education by Education as percentage of GDP	Expenditure on Education by Education & Other Dept.s as percentage of GDP
1	1951-52	10080	814.14	64.46	64.46	7.92	0.64	0.64
2	1952-53	9941	857.67	72.26	72.26	8.43	0.73	0.73
3	1953-54	10824	908.2	80.06	80.06	8.82	0.74	0.74
4	1954-55	10168	973.74	95.82	95.82	9.84	0.94	0.94
5	1955-56	10332	1111.26	118.39	118.39	10.65	1.15	1.15
6	1956-57	12334	1158.01	132.88	132.88	11.47	1.08	1.08
7	1957-58	12610	1416.62	150.26	150.26	10.61	1.19	1.19
8	1958-59	14106	1594.36	173.78	173.78	10.90	1.23	1.23
9	1959-60	14816	1770.06	207.59	207.59	11.73	1.40	1.40
10	1960-61	16220	1997.93	239.56	239.56	11.99	1.48	1.48
11	1961-62	17116	2225.4	260.30	260.30	11.70	1.52	1.52
12	1962-63	18302	2942.67	278.76	278.76	9.47	1.52	1.52

¹ Source: <http://www.education.kerala.gov.in/schools.htm> [internet accessed on 13th December, 2008.]

² Source: <http://www.education.nic.in/planbudget/GDP51-08.pdf> [internet accessed on 3rd December, 2009.]

13	1963-64	20916	3488.97	313.93	313.93	9.00	1.50	1.50
14	1964-65	24436	3844.91	369.29	369.29	9.60	1.51	1.51
15	1965-66	25586	4404.82	432.61	432.61	9.82	1.69	1.69
16	1966-67	29123	5100.24	487.83	487.83	9.56	1.68	1.68
17	1967-68	34225	5619.77	593.14	593.14	10.55	1.73	1.73
18	1968-69	36092	6922.07	649.13	649.13	9.38	1.80	1.80
19	1969-70	39691	7908.07	760.23	760.23	9.61	1.92	1.92
20	1970-71	42222	8787.12	892.36	892.36	10.16	2.11	2.11
21	1971-72	44923	10610.89	994.82	1011.07	9.53	2.21	2.25
22	1972-73	49415	11863.56	1128.80	1150.43	9.70	2.28	2.33
23	1973-74	60560	12884.48	1274.29	1300.72	10.10	2.10	2.15
24	1974-75	71283	14625.03	1539.98	1570.67	10.74	2.16	2.20
25	1975-76	75709	17958.99	1809.11	1849.47	10.30	2.39	2.44
26	1976-77	81381	20482.83	1987.44	2039.09	9.96	2.44	2.51
27	1977-78	92881	22666.31	2256.17	2630.60	11.61	2.43	2.83
28	1978-79	99823	26134.84	2561.08	2994.69	11.46	2.57	3.00
29	1979-80	108927	30915.39	2868.92	3347.57	10.83	2.63	3.07
30	1980-81	130178	36398.39	3374.33	3884.20	10.67	2.59	2.98
31	1981-82	152056	41715.71	3790.15	4298.29	10.30	2.49	2.83
32	1982-83	169525	49768.76	4761.79	5509.17	11.07	2.81	3.25
33	1983-84	198630	61889.25	5454.48	6229.53	10.07	2.75	3.14
34	1984-85	222705	69025.45	6432.77	7455.88	10.80	2.89	3.35
35	1985-86	249547	67091.41	7456.97	8713.02	12.99	2.99	3.49
36	1986-87	278258	80454.66	8450.32	9479.13	11.78	3.04	3.41
37	1987-88	315993	92518.38	10430.19	11798.35	12.75	3.30	3.73
38	1988-89	378491	107543.75	12408.72	14069.82	13.08	3.28	3.72
39	1989-90	438020	126045.99	15044.21	17192.50	13.64	3.43	3.93
40	1990-91	510954	146711.52	17193.66	19615.85	13.37	3.37	3.84
41	1991-92	589086	170370.38	18757.61	22393.69	13.14	3.18	3.80
42	1992-93	673221	190327.49	20952.97	25030.30	13.15	3.11	3.72
43	1993-94	781345	218535.15	23413.10	28279.69	12.94	3.00	3.62
44	1994-95	917058	251691.92	27232.15	32606.22	12.95	2.97	3.56
45	1995-96	1073271	286194.55	31516.59	38178.09	13.34	2.94	3.56
46	1996-97	1243546	329389.92	36371.64	43896.48	13.33	2.92	3.53
47	1997-98	1390148	370838.48	41109.32	48552.14	13.09	2.96	3.49
48	1998-99	1598127	439768.12	51225.26	61578.91	14.00	3.21	3.85
49	1999-00	1786525	512519.33	61281.46	74816.09	14.60	3.43	4.19
50	2000-01	1925017	572160.14	62498.09	82486.48	14.42	3.25	4.28
51	2001-02	2097726	619713.14	64847.70	79865.70	12.89	3.09	3.81
52	2002-03	2261415	678548.31	68561.55	85507.34	12.60	3.03	3.78
53	2003-04	2538170	743668.96	73044.93	89079.25	11.98	2.88	3.51
54	2004-05	2877701	797345.74	81280.85	96694.10	12.13	2.82	3.36
55	2005-06	3282385 p	889713.96	94483.70	113238.71	12.73	2.88	3.45
56	2006-07	3779385 p	1057670.01 (RE)	115671.32 (RE)	138022.04 (RE)	13.05	3.06	3.65 p
57	2007-08	4320892 q	1168728.03 (BE)	131662.08 (BE)	157319.99 (BE)	13.46	3.05	3.64 p

q = quick estimates RE = Revised Estimates
p = provisional estimates BE = Budgeted Expenditure
a = advance estimates

Note:- GDP figures for the years from 1979-80 to 198-99 are on the base year 1993-94 series and from 1999-00 to 2006-07 are on the base year 1999-00 series.

Sources:- (1) GDP figures are taken from National Accounts Statistics published by CSO.

(2) Expenditure on Education Figures are taken from Budgeted Expenditure on Education published by Department of Secondary and Higher Education.

Table 3: Public Expenditure on Education as Percentage of Gross Domestic Product - Developed Countries and India.³

Country	1999	2000	2001	2002	2003	2004	2005	2006
Australia	5.1	5.0	5.1	5.0	4.9	4.9	4.8	5.2
Austria	6.2		5.7	5.7	5.5	5.4	5.4	
Belgium			6.0	6.1	6.1	6.0	6.0	6.0
Canada	5.7	5.6	5.1	5.2			4.9	
Denmark	8.1	8.3	8.4	8.4	8.3	8.4	8.3	7.9
Finland	6.1	5.9	6.0	6.2	6.4	6.4	6.3	6.1
France	5.8	5.7	5.6	5.6	5.9	5.8	5.6	5.6
Germany	4.5	4.5	4.5	4.7	4.7	4.6	4.5	4.4
Greece	3.2	3.3	3.5	3.6	3.6	3.8	4.0	
Ireland	4.2	4.3	4.3	4.3	4.4	4.7	4.8	4.8
Italy	4.7	4.5	4.9	4.6	4.7	4.6	4.4	4.7
Japan	3.6	3.7	3.6	3.6	3.7	3.7	3.5	3.5
Luxemburg	3.4							
Netherlands	4.9	5.0	5.1	5.2	5.4	5.5	5.5	5.5
New Zealand	6.9		6.8	6.6	6.6	6.7	6.5	6.2
Norway	7.1	6.6	7.0	7.6	7.5	7.5	7.0	6.5
Portugal	5.3	5.4	5.6	5.5	5.6	5.3	5.4	5.3
South Korea	3.8		4.1	4.0	4.4	4.4	4.1	4.2
Spain	4.4	4.3	4.2	4.2	4.3	4.2	4.2	4.2
Sweden	7.3	7.2	7.1	7.4	7.3	7.2	7.0	6.9
Switzerland	5.3	5.2	5.4	5.7	6.0	5.9	5.7	5.5
United Kingdom	4.6	4.6	4.7	5.3	5.4	5.3	5.5	5.6
United States	5.1		5.7	5.7	5.9	5.6	5.4	5.7
India	4.5	4.4			3.7	3.4	3.2	3.2

The Table uses Finance Indicators by ISCED level.⁴

³ Compiled using data sourced from [http://stats.uis.unesco.org/unesco/Table Viewer/tableView.aspx?ReportId=172](http://stats.uis.unesco.org/unesco/Table%20Viewer/tableView.aspx?ReportId=172) [internet accessed on 17th January, 2010]. This list of developed countries is compiled taking into account the following facts: These countries are: High Income OECD members; Development Assistance Committee members; Advanced Economies as per the CIA's The World Factbook and the International Monetary Fund; High Income Economies as per the World Bank; have a Human Development Index at or above 0.9; and belong to the Top 30 Countries listing of Economist Intelligence Unit's Quality of Life Index.

⁴ http://www.unesco.org/education/information/nfsunesco/doc/isced_1997.htm [internet accessed on 17th January, 2010]. "The International Standard Classification of Education (ISCED) was designed by UNESCO in the early 1970's to serve 'as an instrument suitable for assembling, compiling and presenting statistics of education both within individual countries and internationally'. It was approved by the International Conference on Education (Geneva, 1975), and was subsequently endorsed by UNESCO's General Conference when it adopted the Revised Recommendation concerning the International Standardization of Educational Statistics at its twentieth

Table 4: Public Expenditure per Pupil as a Percentage of Gross Domestic Product per Capita - Developed Countries and India.⁵

Country	1999	2000	2001	2002	2003	2004	2005	2006
Australia	17.8	17.4	18.0	17.3	17.3	17.5	17.5	18.5
Austria	32.4		28.8	29.6	29.9	29.7	29.7	
Belgium			24.1	24.5	23.9	28.4	28.4	
Denmark	38.4	38.9	38.8	38.5	37.1	36.7	35.6	34.6
Finland	26.3	25.0	25.4	26.1	26.8	28.5	28.0	27.4
France	25.0	24.7	24.6	24.8	26.4	26.3	24.8	24.7
Greece	16.4	18.1	18.1		18.7	19.9	20.6	
Ireland	15.9	16.4	16.7	16.9	17.4	18.5	19.0	19.8
Italy	26.5	25.6	27.1	26.1	26.4	25.5	24.7	26.4
Japan	19.9	20.7	20.7	21.2	22.2	22.3	21.6	21.5
Nether-lands	23.2	23.3	23.5	24.1	25.0	25.4	25.5	25.6
New Zealand	25.6		24.8	23.8	23.2	23.5	22.1	20.9
Norway	27.5	25.1	26.5	29.5	31.1	30.3	28.9	
Portugal	24.4	25.0	26.3	26.4	26.9	27.4	28.3	28.0
Spain	21.1	20.7	20.8	21.3	21.7	21.8	21.7	22.3
Sweden	29.1	28.9	28.5	29.3	28.8	32.7	31.8	31.2
Switzer-land	28.7	28.0	29.3	31.1	32.2	31.7	30.5	29.5
United Kingdom	20.6	20.5	20.9	23.2	24.4	23.5	21.8	25.8
United States	21.6		24.5	23.7	24.4	23.3	22.3	23.9
India		22.0			17.3	15.2	14.2	14.0

The Table uses Finance Indicators by ISCED level.

Table 5: Public Expenditure on Education as a Percentage of Total Government Expenditure - Developed Countries and India.⁶

Country	1999	2000	2001	2002	2003	2004	2005	2006
Australia		13.3						
Austria	12.4		11.1		10.8	10.8	10.9	
Belgium			12.4		11.8	12.2	12.1	12.4
Canada			12.5					
Denmark	14.9	15.3	15.4		15.1	15.3	15.5	15.5
Finland	12.5	12.2	12.7	12.7	12.8	12.8	12.5	12.6
France	11.5	11.4			11.0	10.9	10.6	
Germany	9.5	9.9	9.7		9.7	9.8	9.7	9.7

session (Paris, 1978). ... The present classification, now known as ISCED 1997, was approved by the UNESCO General Conference at its 29th session in November, 1997."

⁵ Compiled using data sourced from <http://stats.uis.unesco.org/unesco/TableViewer/tableView.aspx?ReportId=172> [internet accessed on 17th January, 2010]. Compilation of this list of developed countries is explained in footnote to Table 3.

⁶ Compiled using data sourced from <http://stats.uis.unesco.org/unesco/TableViewer/tableView.aspx?ReportId=172> [internet accessed on 17th January, 2010]. Compilation of this list of developed countries is explained in footnote to Table 3.

Greece	7.0		7.7	7.9	8.0	8.5	9.2	
Ireland	13.2	13.5		12.8	13.2	14.0	13.9	14.0
Italy	9.6	8.9	9.9	9.2	9.8	9.6	9.2	9.7
Japan	9.3	10.5	10.5	10.6	9.7	9.8	9.5	9.5
Luxemburg	8.5							
Nether-lands	11.1	11.4	11.3		11.5	11.8	12.2	12.0
New Zealand			16.1	16.2	20.9		15.5	19.7
Norway	15.6	16.2		16.1	15.7	16.6	16.7	16.2
Portugal	12.8	12.7	12.7		12.2	11.5	11.3	11.3
Spain	11.3	11.2	11.3		11.2	11.0	11.0	11.1
Sweden	13.6	13.4	12.8		12.8	12.9		12.6
Switzer-land	15.2	15.1			13.0			16.3
United Kingdom	11.4	11.4	11.4	11.5	12.0	11.7	12.5	11.9
United States			17.1		15.2	14.4	13.7	14.8
India	12.7	12.7			10.7			

The Table uses Finance Indicators by ISCED level.

Table 6: Growth in Higher Education in India.⁷

Institutions	1950	1990	1996	2008
Deemed and other Universities	30	177	214	431
Colleges	750	7346	9703	20,677
Enrolment ('000s)	263	4925	6755	11612
Teachers ('000s)	24.0	272.7	321.0	505

Source: Compiled from Higher Education in India: Issues Related to Expansion, Inclusiveness, Quality and Finance, UGC 2008 and <http://planningcommission.nic.in>.

Table 7: State-wise Distribution of Working Children according to 1971, 1981, 1991 and 2001 Census in the age group 5-14 years.

Sl. No.	Name of the State/UT	1971	1981	1991	2001****
1	Andhra Pradesh	1627492	1951312	1661940	1363339
2	Assam*	239349	**	327598	351416
3	Bihar	1059359	1101764	942245	1117500
4	Gujarat	518061	616913	523585	485530
5	Haryana	137826	194189	109691	253491
6	Himachal Pradesh	71384	99624	56438	107774
7	Jammu & Kashmir	70489	258437	**	175630
8	Karnataka	808719	1131530	976247	822615
9	Kerala	111801	92854	34800	26156
10	Madhya Pradesh	1112319	1698597	1352563	1065259

⁷ <http://www.academics-India.com/Yashpal%20Committee%20Report.doc> [internet accessed on 28th January, 2010].

11	Maharashtra	988357	1557756	1068427	764075
12	Chhattisgarh				364572
13	Manipur	16380	20217	16493	28836
14	Meghalaya	30440	44916	34633	53940
15	Jharkhand				407200
16	Uttaranchal				70183
17	Nagaland	13726	16235	16467	45874
18	Orissa	492477	702293	452394	377594
19	Punjab	232774	216939	142868	177268
20	Rajasthan	587389	819605	774199	1262570
21	Sikkim	15661	8561	5598	16457
22	Tamil Nadu	713305	975055	578889	418801
23	Tripura	17490	24204	16478	21756
24	Uttar Pradesh	1326726	1434675	1410086	1927997
25	West Bengal	511443	605263	711691	857087
26	Andaman & Nicobar Island	572	1309	1265	1960
27	Arunachal Pradesh	17925	17950	12395	18482
28	Chandigarh	1086	1986	1870	3779
29	Dadra	3102	3615	4416	4274
30	Delhi	17120	25717	27351	41899
31	Daman and Diu	7391	9378	941	729
32	Goa			4656	4138
33	Lakshadweep	97	56	34	27
34	Mizoram***		6314	16411	26265
35	Pondicherry	3725	3606	2680	1904
	Total	10753985	13640870	11285349	12666377

Source: National Commission for Protection of Child Rights.⁸

Note: * 1971 Census figures of Assam include figures of Mizoram.

** Census could not be conducted.

*** 1971 Census figures of Mizoram is included under Assam.

**** includes marginal workers also.

Table 8: Technical Education in India over the years.⁹

⁸ http://www.ncpcr.gov.in/Reports/Data_on_Child_Labour_Census_1971_to_2001.pdf [internet accessed on 31st January, 2010].

⁹ Source: Compiled from data available in the Project Implementation Plan, August, 2002, Technical Education Quality Improvement Programme of Government of India, prepared for Government of India, Department of Secondary Education and Higher Education, Ministry of Human Resource Development, New Delhi by the National Project Implementation Unit, Noida. <http://www.npiu.nic.in/pdf/TEQIP-PIP.pdf> [internet accessed on 2nd February, 2010].

Period	No. of Diploma Level Institutions	Intake	No. of Degree Level Institutions	Intake	No. of Post-Graduation Level Institutions	Intake
1947-48	53	3670	38	2500		70
1967-68	284	47000	137	25000		
1977		60000		30000		6000
1997	1100	184000	547	131000		16900
2000	1224	18800	838	232000	246	21460

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