

Right to Free and Compulsory Education in Pakistan after 18th Constitutional Amendment

Aman Ullah

University of the Punjab, Lahore

Abstract

The Constitutions of India and Pakistan guarantee justiciable human rights and incorporate the Directive Principles of State Policy. Fundamental rights are justifiable through courts, while the principles of policy enjoy immunity from judicial interference. Right to education was constitutionally recognized as one of the principles of policy, not as a fundamental right in both countries. Although its status was earlier elevated from the directive principles of state policy to a fundamental right, owing to judicial activism, however, it was incorporated by a Constitutional Amendment in the Indian Constitution under Article 21-A. While in Pakistan, it was the 18th Amendment of the Constitution which elevated it to the status of a fundamental right. Resultantly, now it is subject to judicial review, under newly inserted Article 25-A. Now, the governments are obliged for its provision to all children, aging from five to sixteen years. Learning a lesson from the Indian recognition, Pakistan must cover its distance more swiftly and smartly, instead of wasting time in litigation or enactment of supportive legislation.

Keywords: 18th Amendment, Fundamental Right, Compulsory and Free Education, Legislation, Education Litigation

Introduction

Education is an inevitable and integral part of a human life, which has various valuable and noble purposes. Internationally, it has been emphatically recognized in the Declaration, Conventions and other relevant documents. While right to education means that it necessarily should be available to everyone, leaving no child left behind; accessible to all, without any discrimination; acceptable to students and their parents or guardians, and adaptable to the requirements of an individual and a society at large. It is called as a four 'A' scheme (Preliminary Report of the Rapporteur on the Right to Education, 1999). Moreover, in more than 140 national constitutions, it has been enshrined as a fundamental right or a duty of a state. It is incorporated in a constitution either as a principle of policy, not

binding through courts, or as a fundamental right, enforceable by courts. First, it was a constitutional right but as an optional principle both in India and Pakistan. Now, it has been recognized as an enforceable fundamental right. Since it is a positive fundamental right, therefore, it requires financial recourses or budgetary provisions. Although it is a human right, having a characteristic of universality, but, in many countries, it is justifiable only for citizens. Foreigners, immigrants or illegal workers cannot compel the government to provide them the right to education equal to its citizens. Then, the paper distinguishes the legal impact of a human right, incorporated as a principle of policy, or as a fundamental right, particularly, when a Principle of a Policy is expressly declared in a constitution that its infringement would not be called in question in any Court on any ground. Further, it explains that albeit an unequivocal jurisdictional debar, how the Indian constitutional Courts elevated a non-justifiable right to education to a status of an enforceable fundamental right, juxtaposing their juridical approach with their counter-parts in Pakistan.

Owing to judicial activism, when the Indian Courts obliged the government for a policy-making agenda, then, how right to universal or primary education was incorporated as a fundamental right after constitutional amendments, creating a liability for the governments and parents. The paper especially underscores that it does not make any substantive difference even a right is embodied in a constitution as a fundamental right unless it is followed by a sub-constitutional law, making a positive right to be a ground reality. Finally, it explains how India, after its incorporation as a fundamental right, substantiated it with a comprehensive law, which saved the Judiciary to manage it at a micro-level. Otherwise, it would have been an endless involvement of the Judiciary in administrative affairs, ignoring the principles of separation of powers and stepping-in the shoes of government. It is concluded at the end that how Pakistan should move ahead after 18th Amendment, which first time recognized right to free and compulsory education for every child between six to fourteen years, without any inordinate delay or waiting for judicial instructions, learning lessons from the Indian experience.

Why We Need Education

Without education, life is not human, but animal or vegetative. (Unni Krishnan v Satae of Andhra of Pradesh , 1993) No doubt, various justifications are advanced to emphasize on the role of education, particularly, education as a human right. However, the major reasons are personal, economic, civil and political, general welfare, communitarian, and humanitarian. Personally, education provides self-esteem, self-honor, ego, and commonsense to live a useful daily life. Economically, it enables an individual to improve his living conditions, enhancing his earning capacities. It also provides human development, sustainable economic growth, poverty reduction, and social mobility, to leap frog from one economic class to another one. While the civil and political rights approach underscores that

an individual equipped with primary education may relatively understand the importance of his vote to elect a government of his choice, strengthening democracy and good governance (Talik, 2004). Moreover, he can be conscious of his legal and political rights. On the other hand, the general welfare or public good approach shows that education is necessary to live in a peaceful and calm society. Such society cannot exist without at least primary education, which creates common values integral for social cohesion (Bitensky, 1992). Every neighborhood is unsafe with an illiterate community as it is detrimental for a citizens and residents. There is a communitarian dimension of education, which denotes that a literate individual may prove for his community, based on religion, economy, race, color or caste, while humanitarian interpretation refers to its absoluteness and immediacy as a human right, establishing its priority over everything else, without justification of economic limitations. The Constitution of Texas explains the purpose of education that it is an indispensable component of a human life and “essential to the preservation of the liberties and rights of the people....” (Constitution of Texas, 1876).

While in an American case, its seven objectives were laid down that it must provide every child “(i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) Sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) Sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) Sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) Sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) Sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.” (Rose v Council for Better Education, 1989).

Protection in International Instruments

The UN Charter just obliges every member state that it would promote the respect of human rights. However, they were not defined in the Charter. Few years later, a Declaration was passed by the General Assembly, called the Universal Declaration of Human Rights 1948, enshrined right to education, first time. Article 26(1) provided that “Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages.” While other provisions of the Declaration explained the purpose of right to education as a “development of full human personality; promotion of understanding; tolerance and friendship among all nations, racial or religious groups; respect for human rights; above all, maintenance of peace.” Another international document, which protected the right

South Asian Studies 28 (2)

of every child to free, primary, and compulsory education, was International Covenant on Economic, Social, and Cultural Rights, 1966. It also guaranteed that “the States Parties to the present Covenant recognize the right of everyone to education.’ It enumerated the same objectives like that of the Declaration. However, in addition, it recognized that ‘primary education shall be compulsory and available free to all.’” (Articl 13.1 Part III).

The Convention on Elimination of all kind of Discrimination against Woman (CEDAW) emphasized on the girls’ education. While the UN Convention on the Rights of the Child 1989 went one step ahead and apart from its recognition it asserted to provide education on the basis of equal opportunity. Its Article 28 (1) provided that the “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.”

Constitutional Incorporation

India

The Indian Constitution was framed after the UN Charter 1945 and the Universal Declaration of Human Rights 1948. Independence struggle was loaded with the demand of Human rights Charter or the incorporation of the Bill of Rights in the Indian legal system. Therefore, when India saw the dawn of independence, its first priority was a constitution adorned and guaranteed with human rights, which could not be recognized in the era of Raj. Right to education was incorporated in the Constitution, but only as a Directive Principles of State of Policy, non-enforceable by Courts. It was enshrined directly and indirectly, in the name of social, cultural and economic rights. Its Article 38 envisaged that “the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.” However, another Article of the Constitution enshrined it expressly that State shall legislate to provide, inter alia, right to education, without discrimination, but subject to economic resources (Article 41 Indian Constituion). It provided that “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.” On the other hand, Article 45 provided that “the State shall endeavor to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.” Its non-operative part also asserted to protect the educational rights of the disadvantaged or weaker strata of the society (Article 46 Indian Constitution). Apart from the non-operative part of the Directive Principles of State Policy, right to life was guaranteed as a justifiable fundamental right, enforceable by Courts. It

provided that “no person shall be deprived of his life or personal liberty except according to procedure established by law” (Article 21 Indian Constitution).

Pakistan

Similarly, right to education has been protected impliedly and explicitly in the Constitution of Islamic Republic of Pakistan 1973. It obliges the State that it shall promote educational interests of backward classes, provide free and compulsory education, and to create national cohesion through education. It also provides right to education as a basic necessity of life, but as a Principle of Policy, which is obligatory for state. However, it is left to the sweet wish of executive and legislature, instead of monitored by Judiciary. However, it expressly provided right to life or personal liberty as a fundamental right. Article 9 of the Constitution, which is part of the fundamental rights, assure every person, instead of only citizens that “no person shall be deprived of life or liberty, save in accordance with law.”

From Principle of Policy to Fundamental Right; Judicial Role

India

Initially, it had to be provided to every child, within a period of ten years from the commencement of the Indian Constitution. The time limit lapsed a lot of time, but the dream of free and compulsory education could be materialized, particularly, for the children of poor masses. In the late 70's, Public Interest Litigation or Social Action Litigation emerged as a blessing for disadvantaged people of India. The constitutional courts broke the shackles of aggrieved party to knock their door. Now, it was not a privilege of a privileged class, with heavy purses, to get justice against the abuse power by public functionaries, but through PIL, it reached out the little man of India. Right to education was one of its beneficiaries (Neuborne, 2003). The Supreme Court of India, exercising its Public Interest Litigation jurisdiction, admitted a petition filed against private educational institutions, engaged in imparting medical and engineering education (*Unni Krishnan v Satae of Andhra Pradesh*, 1993). The Court, for the first time in its history, laid down a principle, elevating a Directive Principle of State Policy, not enforceable in any court, (Article 37 Indian Constitution) to the status of a fundamental right. It was held that the right to basic education was implied in the fundamental right to life under Article 21 when read in conjunction with the Directive Principle on education under Article 41. Moreover, it must be understood in the context of the Directive Principles of State Policy, including Article 45, which provided that the state was bound to endeavor to provide, “within a period of ten years from the commencement of the Constitution, for free and compulsory education for all

children under the age of 14.” The Court discarded the view that fundamental right to education for a professional degree was also implied in Article 21. The ground on which the Court premised its justification was that the passing of 44 years since the enactment of the Constitution had effectively converted the non-justifiable right to education of children under 14 into an enforceable one under the law. Taking an unequivocal stand, the Court opined that Article 21 must be interpreted in the light of Articles 41, 45 and 46.

Although in its earlier rulings like *Mohini Jain v. State of Karnataka*, (All Indian Report, 1993) the Court had recognized that the right to life also included “the 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.” The court went on to say that right to life and human dignity could not “be assured unless it is accompanied by the right to education.” Moreover, the “Government was under an obligation to provide educational facilities at all levels to its citizens” (All Indian Report, 1993). However, it did not raise the legal status of right to free and compulsory education from a Directive principle of Policy to a fundamental right, albeit recognizing that “every citizen has a right to education under the Constitution” (All Indian Report, 1993).

Following *Unni Krishnan*, the Supreme Court entertained another Public Interest Litigation case. In the instant case of *M.C. Mehta v State of Tamil Nadu*, (All Indian Report, 1997) the Supreme Court got an opportunity to reiterate that there was an indivisible relationship between child labor and compulsory education. It was held that the problem might be addressed by insisting on compulsory education. It was only education to solve the problem of child labor. To exploit the potential of a child, he should be saved from hazardous work, and education was the only salvation (All Indian Report, 1997). Regarding private, unaided and minority institutions, the Supreme Court declared many states’ enactments to be null and void as the Constitution did not allow that, discarding the state’s reservation policy on the unaided and minority colleges (*P.A Inamdar v Sate of Maharashtra* , 2005). In *Pai Foundation v State of Karnatka*(2003), the Supreme Court ordered to truncate regulations in the private educational institutions.

To implement the Supreme Court’s agenda, a committee was constituted (the Saikia Committee) in 1997, which reported that the Constitution should be amended to elevate the right to free and compulsory education from six to fourteen years of age, as a fundamental right and to impose a fundamental duty on parents to provide opportunities for education to their children (Sripati & Thiruvengadam, 2004). Another committee was formed subsequently (the Majumdar Committee), which recommended to raise education budget to 5 percent of the GDP (Sripati & Thiruvengadam, 2004).

Pakistan

Like Indian Courts, their counter-parts in Pakistan also played an active role, but balked at elevating a Principle of Policy to the status of a fundamental right. Nonetheless, the Courts in Pakistan did not lag behind to highlight the significance of right of children to get free education. The Lahore High Court in the case of *Headmaster, Zia-ul-Aloom High School v Chairman (Canadian Labour Congress, 1996)* held that the word 'life' in Article 9 of the Constitution, would include all such rights which were necessary for a leading proper and comfortable life, worthy of citizens of a free country. Further, it also observed that acquiring knowledge was a part of life. Therefore, state was required to provide all possible facilities and opportunities to citizens for receiving education. In another case, the same Court observed that a "dignified existence may not be possible without a certain level of education and the State has to play a role in ensuring by positive action that the citizens enjoy this right" (*Ahmad Abdullah v Government of Punjab*, 2003). They also sustained its view in later cases observing that although it was not expressly provided as one of the Fundamental Rights enumerated in the Constitution, but the same could be drawn from the right to life while giving a broad or expanded interpretation' (*Syeda Zhazia Irshad Bukhari v Government of Punjab*, 2005). While the Sindh High Court also followed the suit, expanding right to life, and observed that "right to education was a fundamental right covered by Arts.9, 14, 18 and 20 read with 37(c) of the Constitution and, therefore, any unreasonable restraint, hindrance or condition on its exercise would be ultra-vires the Constitution, irrespective of whether the same was imposed by an administrative or executive act, by some statutory rule or even by the statute itself" (*Imdad Hussain v Province of Sindh*, 2007). All activism of the Courts in Pakistan could not set an agenda for Parliament to raise the status of a Principle of Policy to a fundamental right, so that, the Constitutional Judiciary could be empowered to determine the violations and deliver judgments with their implementation tools. However, the 18th Constitutional Amendment, which provided this right to children, can be attributed to judicial endeavors.

From Option to Obligation: Constitutional Amendments

India

To implement the agenda set by the Supreme Court and in the light if Saikia and Majumdar Committees, 86th Constitutional Amendment Bill was tabled in Parliament, which became part of the Constitution in 2002. A new Article 21A was inserted, just after right to life, which provided the right to every child between 6 to 14 years of age, in Part III of Fundamental Rights (The Right of Children to Free and compulsory Education Act, 2009). While in Part IVA, a new duty of citizens was added that "who is a parent or guardian to provide opportunities for education to his child or ward between the age of 6 and 14 years"

(51 A (K) Part IV A, Indian Constitution). Not only the State was obliged to provide free and compulsory education, assigning the Judiciary to play a decisive role, but the parents were also made duty bound to provide opportunities for education to their children. However, the law, which followed the constitutional amendment, did not suggest any penal measures to compel the parents to provide opportunities for education to their children (The Right of Children to Free and compulsory Education Act, 2009).

The constitutional amendment could not trigger the availability of free and compulsory education for Indian children, automatically. To get such facility of free education required building, trained teachers, curriculum, free books, meal and transportation, and sustainable funding to provide a qualitative elementary education was hard to achieve after judicial review. Therefore, again, the Supreme Court intervened and set another agenda for Parliament to make right to education a ground reality. In the landmark case of *Ashoka Kumar Thakur v Union of India* (State Corporation Commission, 2008), the Constitution (Ninety-Third Amendment) Act 2005 and the Central Educational Institutions (Reservation in Admission) Act, 2006 were called in question in the Court, which fixed reservation seats for Other Backward Classes, in contradiction to the principle of equality. Regarding the constitutional amendment, it was held to be valid, not against the basic structure of the Constitution, while reservation law was also declared lawful. Finally, the petitions were disposed off with some clarifications and directions to the government. However, regarding right to education, the Court did not waste the opportunity to order the government to come-up with a comprehensive plan to implement the fundamental right. It held that Parliament was required to fix a deadline by which time free and compulsory education would have reached every child.

The Court also asserted that it must be done within six months, as the right to free and compulsory education was the most important of all the fundamental rights. Other fundamental rights were in fructuous without right to education. As ordered by the Court, the Government brought a comprehensive law (The Right of Children to Free and compulsory Education Act, 2009), except two deficiencies. One is that it does not point out the authority that shall ensure the enrolment of students so that no child is left behind to avail elementary education. The second is that the parents have been obliged to provide opportunities for education to their children, but in the case of breach of their duty, due to economic or religious reasons, what would be their civil or criminal liability. The Act (The Right of Children to Free and compulsory Education Act, 2009) re-asserts the right.. Moreover, “no child shall be held back, expelled, or required to pass a board examination until completion of elementary education.” It also requires that there shall be a mandatory 25% reservation for economically disadvantaged communities in admission to Class One in all private schools. Although such reservation in private schools has already been declared ultra vires, but again they have been inserted (*Pai Foundation v State of Karnataka*, 2008). Further, it obliges that building; teachers, with a proportional teachers-students ratio; quality of

education; play material games and sports would be provided to all children. Many authorities have been established to provide, control, monitor and to make accountable the negligent people. Most significant is that a deadline of three years has been stipulated for the provision of school infrastructure. Last but not least, the state and the central governments have been equally held responsible to share the financial burden.

Pakistan

In India, it was the judicial activism that elevated a Directive Principle of State Policy to a fundamental right, and then it was constitutionally incorporated on the orders of the Supreme Court. On the other hand, the Judiciary in Pakistan emphasized and re-emphasized repeatedly, but it was not brave enough to recommendatory right to education to an obligatory fundamental right. Unlike India, it remained to be an option and could be converted into an obligation judicially. However, the incumbent democratic government took this Hercules job, and with support of other parliamentary parties, it passed a constitutional amendment, enshrining right to free and compulsory education, almost identical to the Indian provisions (18th Constitutional Amendment, Pakistan Constitution). Newly inserted Article 25-A provides that “the State shall provide free and compulsory education to all children of the age of five to sixteen years in such manner as may be determined by law.” It differs with the Indian right to free and compulsory education, as the Indian Constitution made it compulsory for all children from six to fourteen years old, but the newly added right is available to every child between five to sixteen years of age. Implications of the difference are that Pakistan will need more resources to cover more children. However, both Indian and Pakistan’s Constitutions are silent on the right to pre-school and adult education. Now, Pakistan is at the stage where India was in 2002 at the passage of 86th Constitutional Amendment. After a long struggle of 8 years, the Indian Supreme Court, filling the vacuum of inactive executive and parliament, ordered to assure the positive right to be available, within six months, to the poor masses (*Unni Krishnan v Satae of Andhra of Pradesh*, 1993).

What Next: Its Realization

As right to education imposes dual duty on state and as well parents. India has covered a long distance to achieve the target of free and compulsory primary education for every child, at least regarding a legal regime, but not enough. To make its education legislation more effective and comprehensive, it needs to impose an express duty of a specific authority, which would assure the enrolment of all children, and no child is left behind. Like American states’ constitutions, India should also impose penal measures on parents, if they fail to comply.

South Asian Studies 28 (2)

Without any delay or waiting for a nudge from the higher courts, Pakistan should pass a comprehensive Act to provide free and compulsory education, saving resources for teaching learning equipments, library, like the Right of Children to Free and Compulsory Education Act 2009, passed in India. Definitely, it would be a great service to the nation and humanity, if poor people are not pushed to expensive judicial review, or higher courts are not unabatedly involved in educational rights litigation, which will continuously suck the courts' resources and time, at the cost of ordinary litigation. Moreover, any future educational legislation must not miss to impose civil or criminal liability on parents, if they prefer child labor or other considerations on availing compulsory elementary education provided free from the state.

Liability of State

No one else can be expected or obliged to provide elementary education to all children of a nation, not even international institutions or a private sector, except a State. No doubt, a State has a potential to take this huge responsibility, owing to its economic and human capabilities to establish and run a viable universal school system. The Economic, Social and Cultural Rights 'Committee of the UNO also recognized it. Emphasizing on the significance of elementary education, enshrined in Article 13 of the Convention, which stated that "States as having the principal responsibility for the direct provision of education in most circumstances". The Committee defined the availability that it meant "educational institutions and programs have to be available in sufficient quantity", such as buildings, sanitation facilities for both sexes, safe drinking water, trained teachers on domestically competitive salaries, teaching materials, libraries, laboratories and computer facilities. Article 13 of the International Convention on Economic, Social and Cultural Rights 1966 goes further to expand the availability of right to education that a state must provide private institutions and persons an opportunity to establish and run private educational institutions, parallel to the state school system.

Defining the availability of right to education from the constitutionally obliged authorities, an American Court in a right to education litigation, wherein it was challenged that devastating teacher turnover due to low salaries, uncertified teachers, buildings in unsafe condition, lack of equipments and libraries, overcrowding, growing numbers of ELL students, students from poverty backgrounds, and widely varying graduation rates were the responsible factors as violation of fundamental right to adequate education. The Court held that the state had failed its constitutional responsibility and ordered the state to provide adequate teaching quality and proper facilities (*Abbeville County School District v State*, 1999). Recently, the Indian Supreme Court expanded right to free education, holding that "educating a child requires more than a teacher and a blackboard, or a classroom and a book. The right to education requires that a child study in a

quality school, and a quality school certainly should pose no threat to a child's safety" (Avinash Mehrotra v Union of India, 2009). Apart from availability, it is as well duty of the authorities to assure enrolment of every child, and control the dropout rates and non-completion of the elementary education.

Parents' Responsibility

Since to educate all children is a tremendous assignment, therefore, it should not be an exclusive responsibility of a state, but parents must be obliged to provide an opportunity to their children less than 14 and more than 6 years of age for compulsory education. Amish community of America reckoned that the secular state school system of education was detrimental to their children spiritual and cultural fabric, therefore, they refused to send their children to get compulsory education. Wisconsin's educational law provided criminal penalties for parents who failed to discharge their duty. Therefore, the failure of parents' obligation was prosecuted, and the respondents were charged and convicted of transgressing Wisconsin's compulsory education law and fined \$5.00 (Wisconsin v Yoder, 1972). In the Right of Children to Free and Compulsory Education Act 2009, the Indian authorities have been obliged exclusively to assure enrolment of all children, without specifying a particular institution. The Act also failed to propose penal actions against the parents, who, due to economic reasons or child labor, would avoid the constitutional and legal duty.

Conclusion

After independence, both India and Pakistan have a long struggle to achieve economic, social and educational prosperity. Since right to education is a positive right, emerged as a human right of second generation, therefore, not only it needs a comprehensive legal regime, but an aggressive economic policy to implement it in letter and spirit. India has come forward; Pakistan is lagging behind, regarding a comprehensive educational legislation, even after recognizing right to free compulsory education as a fundamental right. India has set an ambitious agenda to provide school system infrastructure within next three years, which continuously requires judicial supervision. Pakistan still has to move forward to determine its universal education goals, with its stumbling and war-torn economy. Moreover, the government must act proactively to discharge its duty imposed under 18th Constitutional Amendment, to provide right to education as a fundamental right. The approach of duty would have more impact than that of right. On the other hand, if the government, due to its traditional bureaucratic or lame excuses of weak economy, does move ahead, then higher courts must not wait for educational litigation. The active Supreme Court of Pakistan may order the federal and provincial governments to save enough financial resources in the coming budget to assure its availability and accessibility to all children of the nation. Owing to judicial activism and parliamentary efforts, now education is a fundamental human

right, enforceable by courts. However, activist judges, civil society, media and academicians must play a sustainable vigilant role to make it a reality for the poor masses of Pakistan and India, who cannot afford their children's primary education.

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Biographical Note

Dr. AmanUllah is Assistant Professor at University Law College, University of the Punjab, Lahore-Pakistan