



CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE WORKING PAPER  
ECONOMIC, SOCIAL AND CULTURAL RIGHTS SERIES  
NUMBER 5, 2005

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***HUMAN RIGHTS AND PUBLIC GOODS: EDUCATION AS A  
FUNDAMENTAL RIGHT IN INDIA***

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Final Version to be published in P. Alston and M. Robinson (eds.) *Human Rights and Development: Towards Mutual Reinforcement* (Oxford, Oxford University Press, 2005)

The Center for Human Rights and Global Justice was established in 2002 to stimulate cutting edge scholarship and to make original and constructive contributions to on-going policy debates in the field of human rights. By emphasizing interdisciplinary analyses, the Center's programs seek to situate international human rights law in the broader context of the political, jurisprudential, economic, sociological, historical, anthropological and other influences that shape it and determine its impact. The Center's Faculty Director is Philip Alston, its Executive Director is Smita Narula, and its Research Director is Margaret Satterthwaite.

## **“Human Rights and Public Goods: Education as a Fundamental Right in India”**

Based on a case study of India the authors considers the evidence of the qualitative impact that human rights discourse, and the constitutional entrenchment of economic and social rights, can have on the attainment of social goods such as education. The paper reviews the history of the amendment to the Indian Constitution in 2002 which made elevated education to the status of a ‘fundamental right’ The paper asks whether the inclusion of a justiciable right to education for children 6 to 14 made a concrete difference. The evidence is mixed. Public debate and public interest litigation have compelled the government authorities to address some critical problems. More importantly rights discourse around education has become a focus for local political action and agitation among under-resourced and oppressed communities.

## **Human Rights and Public Goods: Education as a Fundamental Right in India**

**Philip Alston and Nehal Bhuta**

This chapter explores some of the key issues that arise in the context of efforts to bring the discourses of human rights and development closer together. It does so, by focusing on the right to education, and in particular on an unusually interesting and instructive case study of India. The Indian experience with the right to education illustrates both the central issues that arise in relation to resource constraints and the role played by key actors in relation to economic and social human rights, including civil society, the judiciary and the legislature. In some respects it is a cautionary tale, while in others it provides an invaluable insight into some of the steps that need to be taken if a right to education is to gain community acceptance, take constitutional form, and have a significant impact on both policy and practical outcomes in the field of education.

### **Legal versus Developmentalist Perspectives on Education**

It is relatively uncontentious to say that human rights and development objectives are for the most part complementary. We can even go further and suggest, as does the title of this volume of essays, that they are capable of mutually reinforcing one another. But the sticking point comes when it is suggested that it follows that a human rights lens is not only a desirable way of viewing some of the fundamental challenges facing development, but is actually a superior and perhaps even a mandatory one. Such a formulation immediately raises three questions: (a) is a human rights approach meaningful and thus useful in the context of complex issues of resource allocation affecting sectors such as education, food, and housing? (b) are there ways in which such an approach can be shown to be better than non-rights based ways of approaching those issues; and (c) is a human rights approach mandatory, or obligatory, and if so what does that mean?

The backdrop against which such questions often arise is the disconnect that generally seems to characterize the approaches taken by human rights lawyers on the one hand and

development economists on the other. One way of contrasting these two approaches is by thinking of them in terms of over-drawn depictions, almost caricatures, of the positions adopted on each side. Although caricatures are, by definition, distorted or extreme in some respects, they can nonetheless assist us to get a sense of the strengths and weaknesses of the approaches. A caricature of the international law approach (the equivalent of a drawing by Honoré Daumier of a lawyer in nineteenth century France) posits the absoluteness and immediacy of human rights and a refusal to take account of financial constraints in relation to a fundamental value which must take priority over all else. In at least some cases, this would apply equally to a right like the right to education.

A comparable caricature of the development economist's approach posits an open-ended set of policy options, an emphasis on individual and ideally rational decision-making, and a pre-occupation with the financial dimensions of any social options that might be considered. As one World Bank economist has observed, many economists think that 'human rights principles, as commonly defined today, tend to violate the basic principles of traditional' welfare economics,<sup>1</sup> presumably because the rights approach seeks to preempt at least some choices and to tie the hands of decision-makers in certain respects.

In reality, economists, whatever their starting point, are rarely likely to adopt the position that human rights considerations have no legitimate place in the overall equation. Similarly, international lawyers rarely entertain an absolutist approach to the right to education, even when they adopt a more dogmatic approach to civil and political rights, such as the right to free speech or the right to freedom from torture. And even in relation to those rights, there is room for a degree of relativism in any sophisticated and frank analysis.

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<sup>1</sup> Alfredo Sfeir-Younis, 'Human Rights Day Interview: How may 'human rights' enhance our development mission?', available at

<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20143686~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html#>

The bigger problem for international human rights lawyers is that they are unaccustomed to having to provide justificatory analyses. For most of them, the issue of justification has long since been settled, whether through the adoption of the Universal Declaration of Human Rights of 1948, the widespread ratification of key treaties (such as the two International Human Rights Covenants) adopted in the 1960s and 1970s, the virtually universal acceptance of the Convention on the Rights of the Child of 1989, or simply the evolution of the customary international law of human rights.

While leaving aside the broader philosophical challenge of defending either the concept of human rights or the catalogue of rights adopted by governments within the United Nations framework, the issue of justification is especially relevant in relation to the cost dimensions of rights and particularly those commonly conceived of as positive rights. In this respect, economists would point, and not without cause, to the reluctance of many human rights proponents to engage in debates over the resource implications of taking seriously a range of economic and social rights such as the right to education. They might cite, by way of example, the very lengthy General Comment on that right adopted by the UN Committee on Economic, Social and Cultural Rights<sup>2</sup> which addresses the resources issue only in order to emphasize that States must use their available resources to the maximum, and that in some respects, a lack of resources can be no defence to a failure to take appropriate measures.

In recent years, however, economists have been increasingly prepared to factor into the overall equation a relatively new set of considerations under the rubric of good governance. The result is that development policy literature and relevant programs are now replete with references to the importance of governance, defined to include not only free elections, the absence of corruption, and the presence of various market freedoms, but also accountability, transparency and participation. These elements are not, however, generally viewed in the way that human rights proponents might present them – as

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<sup>2</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 13 (Twenty-first session, 1999), ‘The right to education (article 13 of the Covenant)’, UN doc. HRI/GEN/1/Rev.6 (2003), p. 70, see paras. 31,43, 45 and 50.

matters of justice, fairness, and right which must simply be included whatever their cost. Instead they are seen in instrumental terms as factors which are empirically justified in economic terms. Similarly, education has long been considered as an important element in the economic balance sheet but the perceived returns on investments in education had not led to the conclusion that it should be supplied to every child regardless of his or her productive potential. But while this approach has now been replaced by the language of universal access, it continues to be a program which is put forward and justified, at least in the discourse of international development organizations, essentially in terms of its economic benefits. Thus, for example, an important study on child labor by the International Labor Organization, sub-titled 'An Economic Study of the Costs and Benefits of Eliminating Child Labor', was entitled 'Investing in Every Child'.<sup>3</sup> While the study does not ignore the issue of values, the language of rights is comprehensively avoided. In order to assert that its inspiration is not solely instrumentalist the report notes that the ILO's perspective is that 'child labour is not only, nor perhaps even primarily, an economic problem. The justifications for [its Conventions on child labour] are largely ethical and social in nature, although the economic consequences of child labour are taken into account.'<sup>4</sup>

But rather than highlighting the rights or values dimension, the report's emphasis is very clearly on economic justifications. Thus while it acknowledges the 'personal development and social inclusion' benefits of eliminating child labour it clearly states that the 'two principal benefits' are 'the added productive capacity a future generation of workers would enjoy due to their increased education' and the 'economic gains' which would flow from healthier workers if the worst forms of child labour, such as those that are hazardous, are eliminated.<sup>5</sup> This then leads inexorably into what might be termed a

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<sup>3</sup> *Investing in Every Child: An Economic Study of the Costs and Benefits of Eliminating Child Labour* (Geneva, ILO, 2003). In fairness it should be noted that a companion ILO study entitled *Every Child Counts* (Geneva, ILO, 2002) adopts more of a human rights type approach but the separation of the two approaches nevertheless confirms the point being argued here.

<sup>4</sup> *Ibid.*, p. 15.

<sup>5</sup> *Ibid.*, p. 3.

supply-, rather than a demand-, style approach. The challenge is to ‘supply’ education through ‘an expansion of school capacity and an upgrading of school quality’.<sup>6</sup>

The International Monetary Fund takes an even more determinedly ‘neutral’ or economic approach to the issue. While the Fund now acknowledges, which was not the case only a few years ago, that user fees for primary education, ‘whether taking the form of compulsory benefit taxation or voluntary user fees, are ... second-best compared with free access’.<sup>7</sup> But rather than invoking ethical, let alone human rights, based arguments, the Fund simply observes that requiring payment ‘is generally considered undesirable’.<sup>8</sup> The reason, it transpires, has nothing to do with the rights of children, but rather ‘because of the burden placed on parents, particularly in low-income households’.<sup>9</sup> The thrust of the report, which includes an analysis of three countries in which user fees had recently been eliminated in relation to primary education (Uganda, Malawi and Tanzania) is that economically rational considerations should determine how a given education budget should optimally be allocated. The report thus sums up the classic dilemma in the following terms:

[V]oluntary user fees introduce a dilemma in the choice between efficiency and equality. A decision regarding user payments may, for example, require a judgment about whether 45 children attending school and 5 children excluded is preferable to 50 children not attending school.<sup>10</sup>

But this analysis takes for granted the refusal of the government involved to prioritize comprehensive access to free primary education, and assumes that an agency such as the IMF has no role whatsoever in factoring into the equation either the individual

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<sup>6</sup> *Ibid.*, p. 1.

<sup>7</sup> A. Hillman and E. Jenkner, *User Payments for Basic Education in Low-Income Countries*, IMF Working Paper WP/02/182 (2002), p. 1.

<sup>8</sup> *Ibid.*, p.3.

<sup>9</sup> *Ibid.*, p. 24.

<sup>10</sup> *Ibid.*, p. 25.

government's human rights obligations (an almost universal obligation in relation to the Convention on the Rights of the Child) or the rights of the child in the country concerned to enjoy access to primary education as of right. It is hardly surprising then that the report cautions that 'a strong preference for equality could ... lead to a judgment rejecting financing, through user payments, even when public expenditure cannot provide reasonable schooling, so as to avoid the unequal exclusion of some children. Equality may then mean that all children are functionally illiterate.'<sup>11</sup>

Even studies produced by international organizations which focus specifically on the situation of primary education in India have tended to pay little or no attention to the human rights dimension of the equation. This is well illustrated by a comprehensive 300 page analysis undertaken by the World Bank which opens with the observation that '[t]he vision of education for India is contained in article 45 of its Constitution',<sup>12</sup> but fails to make any significant reference to this dimension of the issue in the remainder of the report. Even when responding to the question of why children are out of school, in the context of an analysis of potential demand-side interventions, the report mentions a range of factors but does not consider the possibility that characterizing education as a right rather than a possible opportunity might contribute to changing community expectations and stimulating demand for education.<sup>13</sup>

While it is obvious that the instrumentalist and rights approaches are not necessarily incompatible, and that one can advocate universal access to education both on the grounds that it is a right and that it is a sound investment, the point is that most of those who take one approach are at best reluctant to embrace also the other. Thus the language of investment can be an attractive formulation for those who wish to play down, or even deny, the human rights dimension of a right to education. Thus for example the Country Reports on Human Rights Practices, issued by the United States Government in February

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<sup>11</sup> *Ibid.*, pp. 25-26.

<sup>12</sup> *Primary Education in India* (Washington DC, World Bank, 1997) p. 14.

<sup>13</sup> *Ibid.*, p. 72. The demand-side factors identified are 'the poor quality of much schooling, weak implementation of compulsory schooling laws, grade repetition, and high demand for child labor.'

2004, contrasts its discussion of the need to protect civil liberties and political rights (or at least to make sure that other countries do) with its references to the desirability of ‘investing’ in education and health.<sup>14</sup> This enables the State Department to both insist on the importance of education while maintaining its position that economic and social rights should be seen not as entitlements but rather in terms of opportunities.

The language of public goods provides a helpful bridge towards bringing the two approaches together. Few people would disagree that the provision of and access to education is a social good, and an indispensable component of human development, sustainable economic growth and poverty reduction. A number of economists have argued that the provision of education is a public good which produces a variety of beneficial externalities, including health improvements, slowed population growth, the strengthening of democracy and good governance<sup>15</sup> – all dimensions of any reasonable definition of ‘human development’ and ‘human security.’<sup>16</sup> Drèze and Sen, adopting Sen’s notion of development as the enhancement of capabilities and freedoms, enumerate five ways in which a successful program of universal education contributes to development: education is intrinsically important in as much as it directly improves a person’s effective freedom in basic social interactions; education facilitates the attainment of employment and other sources of income, and helps persons negotiate and cope with circumstances that may threaten their livelihood (education as self-defense); education facilitates public discussion of social needs and encourages informed collective demands, which can produce better governance and greater effectiveness in the use of public resources; education can help eradicate specific social problems, such as child labour, and; educational achievement among disadvantaged groups increases their ability to resist oppression, organize politically and alter distributive outcomes.<sup>17</sup> Invoking the

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<sup>14</sup> 2003 State Department Country Reports on Human Rights Practices (Washington DC, 2004).

<sup>15</sup> For a review of the arguments concerning public provision of education, see J B G Tilak, ‘Public Subsidies in Education in India’, *Economic and Political Weekly*, January 24, 2004, pp.343-359, at p.344-5.

<sup>16</sup> A Sen, ‘Basic Education and Human Security’, paper delivered at workshop on ‘Basic Education and Human Security’ in Kolkata, India, 2-4 January 2002.

<sup>17</sup> J Drèze and A Sen, *India: Economic Development and Social Opportunity* (New Delhi, Oxford University Press, 1996), pp.14-15.

example of Kerala, Drèze and Sen observe that basic education is a catalyst of social change:

[T]he historical analysis of Kerala's experience ... brings out the dialectical relationship between education progress and social change: the spread of education helps to overcome the traditional inequalities of caste, class, and gender, just as the removal of these inequalities contributes to the spread of education.<sup>18</sup>

Drèze and Sen's final example points us towards the close conceptual kinship between the idea of education as a 'public good' conducive to development, and the idea of education as a human right. At the very least, the notion of human rights connotes the equal dignity and autonomy of human beings in their pursuit of their conception of a good life, a life worth living. At a foundational level, to speak of something as a human right is to not just make a legal claim to resources or for protection against an abuse of power, but it is also to insist that without those resources or that protection, one's equal dignity, autonomy and participatory parity are fundamentally impaired. The externalities that make the public provision of education welfare-enhancing as a public good (health, greater reproductive choices, employment opportunity, slowing of diminishing marginal returns) are also effects that broadly correspond with the achievement of equal dignity and autonomy. At a certain level of abstraction, then, we might readily conclude that education qua public good and education qua human right share an essential affinity.

It is against this background that we turn in this chapter to explore the practical consequences of entrenching education as a legally enforceable right. What does the idea of education as a human right add to the way in which governments and civil society develop strategies to ensure access to education? This chapter seeks to address these questions through a case study of India, which in 2002 amended its Constitution to make education a 'fundamental right' for children between the ages of 6 and 14. Before

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<sup>18</sup> *Ibid* p.109.

addressing those issues it is appropriate to note briefly the status of the right to education in international law.

### **The International Legal Setting for the Right to Education**

While the right to education has been recognized in a great many international human rights treaties, the formulations used and the nature and the scope of the resulting obligations undertaken by states tend to vary significantly.<sup>19</sup> In view of the fact that these different provisions have been analyzed in considerable detail elsewhere,<sup>20</sup> it will suffice for the purposes of the present chapter to note that the relevant provision in the UN Convention on the Rights of the Child is binding on 192 states which have opted to become parties to it and that the only states in the world which are not covered by its provisions are Somalia and the United States. The Convention thus provides a virtually universal basis for examining the right to education.

The key provision of the Convention is article 28 (1) which provides that:

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; ...

It is also pertinent to note that many state constitutions within the United States recognize a right to education and that they are by no means alone in recognizing education in the

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<sup>19</sup> One study lists over 40 international conventions and declarations that refer to education as a human right. See A Fernandez and S Jenkner, eds, *International Declarations and Conventions on the Right to Education and the Freedom of Education* (Frankfurt, Info-3 Verlag, 1995).

<sup>20</sup> See e.g. Manfred Nowak, 'The Right to Education', in Eide, Krause & Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook* (The Hague, Kluwer, 2<sup>nd</sup>. ed., 2001) pp. 245-72.

context of formulations dealing with rights.<sup>21</sup> The UN Special Rapporteur on the Right to Education indicated that in 2001 there were explicit guarantees of the right to education in the constitutions of 142 countries, and that only 44 countries did not include such provisions within their national constitutions.<sup>22</sup> While the relevant provisions have been significant in the context of a state such as India, they have also had an impact within some developed country. This is true, for example, of the United States where education is characterized in rights terms, albeit in widely varying formulations, in the constitutions of some 40 or more States of the United States. While many of these provisions seem to have lain almost dormant for a good period of time, there have been notable exceptions. Suffice it to note for present purposes that the Constitution of New York State guarantees every child the opportunity for a ‘sound basic education’.<sup>23</sup> In 2005 this provision was relied upon by the NY State Supreme Court in Manhattan to order that an \$5.6 billion per year be spent on the City’s schools over and above current levels. An additional \$9.2 billion was ordered to be spent over the following five years to shrink class sizes, relieve overcrowding, and provide the city’s 1.1 million students with adequate laboratories, libraries and other learning places. The case had been initiated twelve years earlier by the Campaign for Fiscal Equity and had been fought strongly by the State Government. The New York Times commented that:

The decision is a major landmark in one of the nation’s biggest school- finance cases, and may have ripple effects across all school districts in the state. Though

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<sup>21</sup> For a cross-section of the literature see R. Levesque, ‘The Right to Education in the United States: Beyond the Limits of the Lore and the Lure of the Law’, 4 *Annual Survey of International and Comparative Law* (1997) 205; S. Steinke, ‘The Exception to the Rule: Wisconsin’s Fundamental Right to Education and Public School Financing’, [1995] *Wisconsin Law Review* 1387; and M. Mills and W. Quin II, ‘The Right to a “Minimally Adequate Education” as Guaranteed by the Mississippi Constitution’, 61 *Albany Law Review* (1998) 1521.

<sup>22</sup> K. Tomaševski, *Free and Compulsory Education for all Children: The Gap between Promise and Performance* (Lund, 2001), p. 19, available at <http://www.right-to-education.org/>

<sup>23</sup> For background to this case see H. Hershkoff and B. Kingsbury, ‘Crisis, Community, and Courts in Network Governance: A Response to Liebman and Sabel’s Approach to Reform of Public Education’, 28 *N.Y.U. Rev. of Law & Soc. Change* (2003) 319.

virtually every state in the nation has been embroiled in lawsuits over school spending, the New York suit has been more closely watched, in part because of the number of students and the dollar figures at stake.<sup>24</sup>

The extent to which a right to education has thus found recognition within a wide variety of constitutional instruments and traditions serves to highlight the potential importance of the experience of any country in which the right has been taken seriously in terms of public advocacy, national constitutional arrangements, and international supervision of treaty undertakings. We turn therefore to examine the situation in India, which constitutes a prime example in this regard.

### **The State of Education in India**

India is an interesting and tractable case study for the actual and potential impact of constitutionalizing the right to education, for two reasons. On the one hand, India is a developing country facing considerable resource challenges, particularly in light of its rapidly growing population and the fiscal constraints of the state and federal governments. On the other hand, India has a well-developed judicial system and a recent history of constitutional rights litigation that, in the breadth of issues that it has touched upon and the scope of remedial judgments delivered, is almost unparalleled in either the developing or the developed world.<sup>25</sup>

In a nutshell, almost 50 percent of the population remains illiterate, and an estimated 58 million out of 185 million children aged between 5 and 14 years are not in school.<sup>26</sup> The Indian Government reported in 2003 that the enrolment rate in rural areas nationwide was only 71%, with a gender disparity of 0.84, meaning a 16% lower rate for girls. In some

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<sup>24</sup> Greg Winter, 'Judge Orders Billions in Aid to City Schools', *New York Times*, 15 Feb. 2005, p.1.

<sup>25</sup> For a brief history of constitutional litigation, see Burt Neuborne, 'The Supreme Court of India', 1 *International Journal of Constitutional Law* (2003) 476.

<sup>26</sup> R Banerji, 'Poverty and Primary Schooling: Field Studies from Mumbai and Delhi', *Economic and Political Weekly*, March 4, 2000 p.795 (citing data from the 50<sup>th</sup> National Sample Survey).

states the levels are considerably lower. In Bihar only 59% are enrolled and in Rajasthan the rate is 61% with a gender disparity of 46% for girls.<sup>27</sup> This result is hardly surprising given that the provision of education (particularly elementary education) appears to have been a relatively low priority for Central and State Indian governments from 1947 to 1980, with less than 2 percent of GDP being expended annually on education until 1979.<sup>28</sup> Expenditures on education grew substantially after the Central government was granted concurrent responsibility for education through a 1976 constitutional amendment,<sup>29</sup> but remained lower (as a share of total government expenditure) than most low-income countries.<sup>30</sup> Significantly, the share of expenditure allocated to elementary education through the 1980s remained below 50 percent, which is low relative to other countries that sought to universalize elementary education at a comparable stage of economic development. Shariff and Ghosh note that:

Japan invested 84 percent of its educational budget in six years of elementary education in 1885 and a meager 8 percent on higher education. By 1960, the share of higher education had increased to 13 percent and the share of higher education had increased to 13 percent. ... In Sri Lanka too, the case is similar. Sri Lanka allocated 70 percent of its educational budget to the first level of education and 6 percent to higher education in 1970. By 1978, when primary education had become universal, the share of higher education had increased (marginally) to 8.7 percent.<sup>31</sup>

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<sup>27</sup> Report of India to the Committee on the Rights of the Child, UN doc. CRC/C/93/Add.5 (2003), para. 801.

<sup>28</sup> Government of India, Department of Education, *Selected Educational Statistics*, at [http://www.education.nic.in/htmlweb/edustats\\_03.pdf](http://www.education.nic.in/htmlweb/edustats_03.pdf), cited in V Sripathi and A K Thiruvengadam, 'India: Constitutional Amendment making the right to Education a Fundamental Right', *International Journal of Constitutional Law* (2003) 149, 151.

<sup>29</sup> A Shariff and P K Ghosh, 'Indian Education Scene and the Public Gap', *Economic and Political Weekly*, April 15, 2000, pp.1396-1406.

<sup>30</sup> World Bank, *Primary Education in India* (1997) p.219.

<sup>31</sup> Shariff and Ghosh, above n 29, 1399.

The nature of the resulting challenge is made all the greater by the fact that the overall social picture in the country has been far from rosy. Thus, over the past ten years, India's ranking in the United Nations' Human Development Index has fallen dramatically.<sup>32</sup> A former Supreme Court Justice and former Chairman on the National Commission on Human Rights, M N Venkatachaliah, put the situation of education in its broader context by observing in 2000 that:

Today we have the dismal situation of a social infrastructure where 670 million people in this country don't have basic sanitary facilities, and 260 million don't have potable water. Forty percent of the world's tuberculosis patients are in India, 25 percent of the world's blind are in India ... Then there is the issue of the enormous corruption in public life, electoral malpractices, the tyranny of wealth, and the insolence of authority.<sup>33</sup>

The poor state of primary education is thus but one of several urgent developmental priorities that the Government of India must balance, and this balancing may well mitigate the value of constitutionally entrenching education as a right.

### **The Response of the Supreme Court**

Beginning in the early 1980s, the Supreme Court of India waived traditional doctrines of standing and pleadings to permit concerned citizens, public interest advocates and non-government organizations to petition it on behalf of individuals or communities suffering violations of constitutionally protected rights. As a consequence, the Court entertained applications for constitutional protection on behalf of a wide range of traditionally powerless persons, including bonded labourers, rickshaw drivers, pavement dwellers, inmates of mental infirmaries and workhouses and victims of environmental damage. In conducting these cases, the Court created its own fact-finding commissions to investigate alleged violations, and dramatically expanded its remedial powers to include detailed

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<sup>32</sup> See *Human Development Report 2004* (New York, Oxford University Press, 2004).

<sup>33</sup> *Frontline* (Madras), Vol. 17, No. 4, Feb 19 – March 03, 2000, [www.flonnet.com/fl1704/17040300.htm](http://www.flonnet.com/fl1704/17040300.htm)

supervision of government institutions and the ordering of programs to mitigate the effects of systematic injustice. Through the development of its ‘Public Interest Litigation’ (PIL) jurisdiction, the Supreme Court of India came to act as a ‘combination of constitutional ombudsman and inquisitorial examining magistrate, vested with responsibility to do justice to the poor litigant before it by aggressively searching out the facts and the law, and by taking responsibility for fully implement its decisions ... PIL provides a model for courts struggling to balance the transformative aspect of law against the law’s natural tendency to favour those rich enough to invoke it.’<sup>34</sup>

It was in fact a Supreme Court public interest case that set in train the movement to create an enforceable constitutional right to education in India. The unamended text of the Constitution of India (adopted 1950) had included a right to education under the title of a ‘Directive Principle of State Policy.’<sup>35</sup> In the Constitution of India, a Directive Principle was distinguishable from a Fundamental Right in so far as a Directive Principle ‘shall not be enforced in any court.’<sup>36</sup> A Directive Principle is phrased in terms of an important duty incumbent upon the State, but one that is to be implemented by the executive and legislative arms of government without intervention or oversight by the judiciary. Thus, the ‘right to education’ as contained in the original text of the Constitution of India was cast in imperative terms:

The State shall endeavour 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.

The ten-year deadline for the provision of free, universal elementary education was not met, and remains unmet to this day.

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<sup>34</sup> Neuborne, above n. 25, p. 503.

<sup>35</sup> Constitution of India, Part IV, art 45.

<sup>36</sup> Constitution of India, Part IV, art 37.

In 1992 and 1993, the Supreme Court of India decided two PIL cases in which the plaintiffs claimed a judicially enforceable right to education.<sup>37</sup> Although both cases concerned the impact of certain state laws on private educational institutions of higher learning, the Court took the opportunity to develop a precedent that also governed the public provision of elementary education. Expressing concern at the obvious failure of the Government of India to uphold its duty under article 45 to ensure free and compulsory elementary education, the Court in *Unni Krishnan* stated:

It is noteworthy among the several articles in Part IV [of the Constitution], only article 45 speaks of a time-limit ... Does not the passage of 44 years – more than four times the period stipulated in Article 45 – convert the obligation created by the article into an enforceable right? In this context, we feel constrained to say that the allocation of available funds to different sectors of education in India discloses an inversion of priorities indicated by the Constitution.<sup>38</sup>

Based, it appears, on the view that the Central and state governments of India had consistently and systematically failed to apply the Constitution in their decision-making in relation to funding allocations for elementary education in India, the Court held that the right to education up to fourteen years of age contained in article 45 amounted to a ‘fundamental right’ that was enforceable by the courts. It also relied upon a link between the right to life recognized in Article 21 of the Constitution as a fundamental right, and the right to education as a directive principle. Sripati and Thiruvengadam observe that the immediate effect of the *Unni Krishnan* decision was that any child below the age of fourteen who was denied facilities for primary education could approach a court for an order directing the authorities to initiate appropriate measures.<sup>39</sup>

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<sup>37</sup> *Mohini Jain v State of Karnataka*, AIR 1992 SC 1858; *Unni Krishnan J.P. v State of Andhra Pradesh*, AIR 1993 SC 2178.

<sup>38</sup> *Unni Krishnan*, at 2232.

<sup>39</sup> Sripati and Thiruvengadam, above n 28, 153.

While human rights proponents have consistently welcomed the Court's activist approach in this area, and its effective re-characterization of the right to education as a fundamental right, despite the arguably clear contrary intent of the drafters of the Constitution, it must be asked whether such a powerful judicial reinterpretation of the relevant principles could be achieved in any other constitutional system and whether it is desirable. But whatever the outcome of such an inquiry in relation to other countries, it is essential to note that within India the Court's initiative had a huge impact in terms of mobilizing civil society, legitimating demands for a right to education, and unleashing extensive pressures on the government to formally amend the Constitution so as to bring it into line with the Court's approach.

### **Responding to the Court's Agenda-setting Role**

Community activists and non-government organizations began utilizing the decision as a means of pushing the executive and legislature toward action on primary education. At the same time, the decisions became a catalyst for political advocacy and public sphere debate over the state of primary education in India, galvanizing a number of different children's rights groups into a coalition demanding government implementation of the 'fundamental right to education.' The Central government responded by establishing two committees to investigate both the desirability and financial implications of amending the Constitution to establish primary education as a fundamental right. A joint committee of state government Ministers of Education (the Saikia Committee) concluded in 1997 that the Constitution should be amended to create as a 'fundamental right' the right to free and compulsory education from six to fourteen years of age, and to impose a 'fundamental duty' on parents to provide opportunities for education to their children in this age group. A second expert committee (the Majumdar Committee) concluded in 1999 that the universalisation of elementary education for children aged six to fourteen years would require an additional expenditure of Rs 140,000,000,000 per year for ten years; on the assumption of annual GDP growth of 5 percent, this amounts to an additional 0.7 percent of GDP dedicated to education per year, raising education expenditure to approximately 5 percent of GDP.

The Saikia Committee report resulted in a bill to amend the Constitution to introduce a new article 21A, which provided: '[t]he State shall provide free and compulsory education to all citizens of age six to fourteen years in such manner as the State may, by law, determine.' It also introduced a new article 51A which imposed a duty on parents and guardians to provide their children with educational opportunities, in the terms recommended by the Saikia Committee. The bill was tabled in 1997, but would not pass into law until December 2002. In the meantime, a number of important criticisms were made of the proposed new right during the hearings Parliamentary Standing Committee on Human Resource Development.<sup>40</sup> The Standing Committee noted that the 'general feeling' of submissions was that the age restriction was arbitrary and neglected the rights of children below six and above fourteen years of age. The exclusion of the application of the right to children under six years of age was noted to be contrary to the Supreme Court's ruling in *Unni Krishna*. It was also submitted to the Standing Committee that, at the time of the drafting of the original article 45 (which encoded the fourteen year age limit), a child received a formal certification of education at 7th grade; in modern India, no formal certification was awarded until 10th grade, or when a child would be aged about sixteen years. The constitutional amendment as proposed would thus not ensure that impoverished children could continue until their formal certification had been obtained. Submissions to the Standing Committee also argued that there was a need (potentially in subsequent legislation pursuant to the amendment) to define the meaning of 'free' as referred to in article 21A, and to include some definition of the quality of education that was to be provided.

Two factors which warrant emphasis in the present context are the role played by civil society in mobilizing to demand the formal constitutional recognition of a right to education and the role played by commentators and scholars, both domestic and foreign, in highlighting the claim that resources were not in fact the sole or even the main barrier to a major improvement in India's educational performance. The latter case was pressed with particular force and perseverance by Myron Weiner who rejected outright the claim

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<sup>40</sup> Available at <http://arunmehta.freeyellow.com/page144.html>.

that the low educational rates in India were due to the lack of financial resources needed to fund universal compulsory primary school education. Focusing on the question of why widespread child labour persisted despite avowed government opposition, he suggested three alternative explanations: (a) child labour was sustained by weak and unenforced government policies on primary education; (b) the middle classes were more concerned to expand government funding for higher education than for primary education; and (c) even more controversially, that child labour was in fact 'part of the government's industrial strategy to promote the small scale sector and to expand exports.'

Weiner depicted compulsory education as a *sine qua non* for the reduction and abolition of child labour. He concluded that: '[t]he sooner India acts, the quicker will be the fall in the illiteracy rate, the more likely it is that child labour will be reduced, and the greater are the prospects for a reduction in fertility rates as children are no longer seen as financial assets to the family. He was particularly critical of what he saw as ameliorative half-measures which involved programs such as the promotion of adult literacy campaigns, the provision of non-formal education to working children, and the provision of free school lunches. In his view, nothing short of a compulsory and constitutionally recognized right to primary education would suffice.<sup>41</sup>

Civil society groups also took up the struggle to give constitutional status to the right to education. As one observer put it, the proposed amendment 'is an initiative which could have far-reaching consequences ... [It] has the potential to be a major catalyst in achieving the elusive goal of universal elementary education.'<sup>42</sup> Much of the groundwork for this support had also been laid by a major public initiative which produced the path-breaking Public Report on Basic Education in India (PROBE Report).<sup>43</sup> The Report was important not only because of its sophisticated advocacy

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<sup>41</sup> Myron Weiner, 'Child Labour in Developing Countries: The Indian Case', 2 *International Journal of Children's Rights* (1994) 121.

<sup>42</sup> R Wazir, 'Profiling the Problem' in Wazir, ed, *The Gender Gap in Basic Education: NGOs as Change Agents* (New Delhi, Sage Publications, 2000), p.18.

<sup>43</sup> PROBE Team, *Public Report on Basic Education in India* (New Delhi, Oxford University Press, 1999).

approach but because it was based upon a detailed empirical study of the situation in five states of northern India, accounting for 40% of the total population but well over half of its children not attending school.<sup>44</sup> In contrast to the economic instrumentalist approach favoured by so many developmental economists, the Report identifies eight arguments which can be invoked to justify the case for universal elementary education. They are: (1) elementary education is a fundamental right, as stated in the Constitution and determined by the Supreme Court; (2) there is massive popular demand for universal schooling; (3) it represents an important investment in human capital; (4) it should contribute to the joy of learning; (5) education helps individual well-being in diverse ways; (6) education assists the social progress of the whole community; (7) education facilitates effective political participation; and (8) universal elementary education is a requirement of social justice.<sup>45</sup>

The Report concluded that ‘the notion of a fundamental right has great value in overcoming the objections and excuses that are consistently invoked to continue postponing the goal of universal elementary education.’<sup>46</sup> To some degree, the very process of drafting and debating the amendment generated popular mobilization around the need to improve basic education in India, with 40,000 citizens from distant villages and towns around India rallying in New Delhi on the day that the amendment was passed.<sup>47</sup> The protest was organized by a coalition of several thousand grassroots organizations from all over India, the National Alliance for the Fundamental Right to Education (NAFRE), and demanded a common school system providing free education of equitable quality.

The role played by civil society in bringing about the constitutional amendment is instructive. Human rights demands are all too often promoted in a top-down fashion,

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<sup>44</sup> *Ibid.*, p. 2.

<sup>45</sup> *Ibid.*, pp. 4-5.

<sup>46</sup> *Ibid.*, p.141.

<sup>47</sup> Anil Sadgopal, ‘A Convenient Consensus’, *Frontline* (Madras), Dec 22, 2001 – Jan 04, 2002,

[www.frontlineonnet.com/fl1826/18261070.html](http://www.frontlineonnet.com/fl1826/18261070.html).

whether pushed by the international community, or by domestic elites. Although this process is not necessarily doomed to failure, it is less likely to succeed and, more importantly, it is less likely to generate the level of societal support which will, over time, ensure that the relevant value is internalized within the community so that, at least at the level of ideas, it is no longer a matter of contention. While India's vibrant civil society, its relatively longstanding democratic traditions, and its legal heritage might all have combined to provide particularly fertile ground for such an initiative, this does not necessarily mean that a campaign based on the assertion of education as a matter of human rights will not work in other countries.

### **The Constitutional Amendment**

Despite the minimum age restriction also being criticized by the government-sponsored National Commission to Review the Working of the Constitution,<sup>48</sup> the amendment establishing the fundamental right to education passed in the form originally proposed.<sup>49</sup> While controversial in its terms, the constitutional amendment was nevertheless hailed by activists and education-focused non-government organizations as an important step towards improving the condition of basic education in India.

To understand how the constitutional amendment might (or might not) assist in realizing this demand, we need briefly to consider the state of basic education in India and some of the reasons why the goal of universal elementary education remains elusive after 58 years of independence. India's achievements in elementary education have been far less impressive than other developing countries that were similarly situated 40 years ago.<sup>50</sup> As already noted, close to half of the Indian population is still illiterate and almost one-

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<sup>48</sup> National Commission to Review the Working of the Constitution, *Final Report*, vol.1, ch.3 (2002) para 3.20.2, recommending that every child have the right to free education until he completes the age of fourteen years, and that girls and members of the Scheduled castes and the Scheduled tribes benefit from the right until the age of eighteen years.

<sup>49</sup> Sadgopal, n. 47 above.

<sup>50</sup> Drèze and Sen, above n 17, 114.

third of the children to whom the Constitutional amendment will apply are not in school.<sup>51</sup> Enrolment rates are suspected of being inflated, and say nothing of whether children actually attend school or learn anything.<sup>52</sup> The PROBE Report and other studies have documented very low levels of learning among enrolled students in those states and regions with high numbers of out of school children.<sup>53</sup> Studies and analyses investigating the reasons behind this poor performance indicate a combination of causes: inadequate financing of education, entrenched social division and discrimination on the basis of caste, class and gender, political apathy and an institutional and management incentive structure that inhibits accountability, responsiveness and quality teaching.<sup>54</sup>

As noted above,<sup>55</sup> elementary education in India has suffered from ‘five decades of underinvestment,’<sup>56</sup> a problem compounded by the fact that state governments are responsible for more than 80 percent of education expenditure. This entails very considerable inter-state disparities in education expenditure, but has also meant that national expenditure on education has suffered as a consequence of the fiscal crisis of state governments throughout India, over the 1990s. Shariff and Ghosh observe that, during the 1990s, the share of state budgets devoted to elementary education has declined in all but three states in India to levels below that achieved in the 1980s.<sup>57</sup> The growth in per pupil expenditure on elementary education also declined over this period in all but three states. While the 1980s saw a steady growth of central and state government

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<sup>51</sup> Banerji, above n. 26 above, p.795 (citing data from the 50<sup>th</sup> National Sample Survey).

<sup>52</sup> Drèze and Sen, above n 17, 113.

<sup>53</sup> PROBE Report, above n. 43; World Bank, *India: Primary Education: Achievements and Challenges* (1997); Banerji, above n 26, 799.

<sup>54</sup> See, inter alia, Wazir, above n 42; PROBE Report, above n. 43; Drèze and Sen, above n 17; S Shukla and R Kaul, eds, *Education, Development and Underdevelopment* (New Delhi, Sage Publications, 1998); A Vaidyanathan and P R Gopinathan Nair, eds, *Elementary Education in Rural India* (New Delhi, Sage Publications, 2001); R Govinda, ed, *India Education Report* (New Delhi, Oxford University Press, 2002).

<sup>55</sup> See notes 26-31 and text.

<sup>56</sup> B J Tilak, ‘Five Decades of Underinvestment in Education’, *Economic and Political Weekly*, September 6-12, 1997; see also PROBE report, above n 43, p.134.

<sup>57</sup> Shariff and Ghosh, above n. 29, p.1403.

expenditure on education generally and on elementary education in particular, the share of GDP devoted to education expenditure fell from 4.1 percent in 1990-91 to 3.8 percent in 1995-6.<sup>58</sup> Drèze and Sen observe that the increased education expenditure of the 1980s went almost entirely toward teachers' salaries, even as there was an absolute decline in the number of primary and upper primary teachers between 1991 and 1993.<sup>59</sup>

Adequate expenditure on education is by no means a sufficient condition for universal elementary education of an equitable standard, but it is undoubtedly a necessary condition. Access to lower and upper primary schools within safe walking distance of a settlement remains a problem in the states most afflicted by illiteracy and poor educational attainment, and as the PROBE Report has documented, the mere presence of a school building does not mean that the school is adequately equipped to educate children at a suitable quality. The PROBE survey of settlements in four traditionally underdeveloped states found a widespread absence of basic facilities like roofing, toilets, water supply, teaching kits and book resources. One third of the schools surveyed by PROBE were de facto single teacher schools, and the pupil-teacher ratio averaged 50:1.<sup>60</sup> The consequence of such resource shortages is that school facilities, while available, may be inadequate to enable learning.<sup>61</sup>

A major problem identified by numerous studies, and a strong disincentive to impoverished parents to bear the opportunity cost and the real cost of sending children to school, is the poor quality of schooling provided. Studies reveal not so much a lack of demand for education among the rural poor and so-called 'backward castes' and 'backward tribes,'<sup>62</sup> as a disaffection with the lack of learning that occurs after very

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<sup>58</sup> *Ibid* 1405.

<sup>59</sup> Drèze and Sen, above n 17, p.123.

<sup>60</sup> PROBE Report, above n 43, ch.4

<sup>61</sup> See also Vaidyanathan, above n 54, p.43-4.

<sup>62</sup> An important exception to this result is the attitude towards the education of girl-children, which is more consistently negative.

considerable sacrifices are made to send children to school.<sup>63</sup> As one interviewee of a field study stated:

We are poor, but not so poor that we cannot send our children to school ... But how is it possible for them to continue? They don't learn anything here. We had to spend so much money on the books, and then the teacher is sitting so far away from the children that absolutely nothing is learned there. Everybody thinks so about the teachers. The only thing they can do is beat up the children. So when Raju came home, and I kept telling him everyday to go to school, he just burned his books.<sup>64</sup>

The quality problem identified in so many studies is in part a reflection of inadequate resources: it is hard for teachers to teach and students to learn in class sizes of fifty or more, in schools with no roof or without teaching aids. However, numerous authors<sup>65</sup> have suggested that complete indifference and inactivity on the part of teachers is to blame, and that this is a result not only of the difficult environment in which teachers must work but of a systematic institutional failure to produce and ensure good teaching through the provision of training, peer review and accountability to local communities.<sup>66</sup> Animating these general quality constraints in any specific case, and particularly in underdeveloped states and locales, are social hierarchies of caste, class and gender. From curricula that are completely unsuited to the educational needs and lived experience of first generation learners in rural areas or urban slums,<sup>67</sup> to discrimination against

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<sup>63</sup> *Ibid.*, pp.26-7; Banerji, above n 26; G K Lieten, 'Children, Work and Education – I', *Economic and Political Weekly*, June 10, 2000, p.2037.

<sup>64</sup> *Ibid.*, p.2175.

<sup>65</sup> For an overview, see G Kingdon and M Muzammil, *The Political Economy of Education in India: Teacher Politics in Uttar Pradesh* (New Delhi, Oxford University Press, 2003), Ch 1.

<sup>66</sup> R Sudarshan, 'Educational Status of Girls and Women: The Emerging Scenario' in Wazir, ed, above n 42, p.64; Vaidyanathan, above n 54, p.44-5; Govinda, above n 54, p.11.

<sup>67</sup> See, eg, M Talib, 'Observations from a School in a Working Class Settlement in Delhi' in Shukla et al, eds, above n 54, pp. 189-199; PROBE Report, above n 43, pp. 68-75; Anita Rampal, 'Texts in Context:

scheduled caste and scheduled tribe members in the location of schools and in the attitude of higher caste teachers, caste and class remain important determinants of access to and the quality of elementary education in India.<sup>68</sup> Likewise, important barriers remain to the education of girl-children from impoverished families.

This cursory overview of the obstacles to the provision of universal elementary education in India leaves out many important issues, such as the tendency toward the expansion of a 'two track' education system. But it does allow us to observe that the achievement of universal elementary education is not only a matter of the availability of resources or even just their distribution: it is a product of the interaction of social, political and institutional forces, of community mobilization and empowerment, and of challenging bureaucratic inertia and deeply embedded social hierarchies.

On the one hand, the complexity and durability of the social structures militating against the universalization of elementary education appears to be a strong argument against the proposition that litigation and court orders upholding the right to education could be effective. The American experience with court-ordered desegregation demonstrates the limitations of attempting to alter deep-seated social structures, such as race segregation, through case-by-case court orders that are ultimately unable to retrench the social forces which reproduce inequality of opportunity between black and white Americans. The prospect of having to try to reengineer the United States' schools and school districts, one by one, perhaps led the Supreme Court of this country to narrow its jurisprudence on desegregation.<sup>69</sup> While the Supreme Court of India has shown itself to be more willing to undertake Olympian tasks of investigation and supervision of government conduct, the

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Development of Curricula, Textbooks, and Teaching Learning Materials' in Govinda, ed, above n 54, pp.154-166.

<sup>68</sup> G Nambissan and M Sedwal, 'Education for all: The Situation of Dalit Children in India' in Govinda, ed, above n 54, 72-86; K Sujatha, 'Education Among Scheduled Tribes', pp.87-95; Banerji, above n. 26; Vaidyanathan, above n 54, pp.27-29.

<sup>69</sup> James Liebman and Charles Sabel, 'A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform', 28 *New York University Review of Law and Social Change* (2003) 183, 192-201.

record of government compliance with the Court's sweeping orders concerning social problems, such as bonded labour,<sup>70</sup> is not encouraging: 'a judge can only give directions: and in regard to many of the gravest problems these directions have to be given to the very institutions whose negligence has compounded the malady in the first place.'<sup>71</sup>

Indeed, in the first budget after the passage of the constitutional amendment establishing the fundamental right to education, the Central government ignored the expert committee report and failed to allocate the amount deemed necessary to universalize elementary education; in fact, the amount allocated was less than 50 percent of the estimated requirement of Rs 140,000,000,000 per annum<sup>72</sup> and less even than the Rs 98,000,000,000 recommended in the Financial Memorandum to the constitutional amendment bill.<sup>73</sup> The Central government has commenced preparation of a Free and Compulsory Education Bill to provide legislative machinery for the constitutional right, but a noted expert on education India comments that administrative structure envisaged by the act describes 'a mechanism of abdication of responsibilities by higher levels of authorities in favour of lower levels; and not a method of devolution of powers and resources, but a mechanism of mobilization of non-governmental resources.'<sup>74</sup>

But to accept that courts can't do everything does not imply acceptance of the opposite view, that they can do nothing at all. The last decade has seen a number of innovative responses to the problems of elementary education in India, and an important part of these innovations has been the embrace of education as a site of community mobilization

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<sup>70</sup> A Shourie, *Courts and Their Judgments* (New Delhi, Rupa, 2001), Ch. 3.

<sup>71</sup> *Ibid* p.400.

<sup>72</sup> At 2005 exchange rates this would be equivalent to around US\$3.2 billion.

<sup>73</sup> Azim Premji Foundation, 'Union Budget 2003-4 in the context of Elementary Education' (on file with authors); A Sadgopal, 'Education for Too Few', *Frontline* (Madras), Dec. 5, 2003, [www.flonnet.com/fl2024/stories/20031205002809700.htm](http://www.flonnet.com/fl2024/stories/20031205002809700.htm)

<sup>74</sup> J B Tilak, 'Free and Compulsory Education – Legislative Intervention', *Economic and Political Weekly*, February 14, 2004.

and popular struggle.<sup>75</sup> The notion of education as a fundamental right has the potential to operate at a number of different levels to assist these kinds of innovations. First, the diffusion of ‘rights consciousness’ could provide a basis for political organization within communities against discrimination and division on the basis of caste and gender, and thus be an instrument towards the creation of a ‘social consensus’ on the entitlement of equal access to quality elementary education. Articulating education in terms of a constitutional and human right, with reference to the content of that term as it has evolved at the international level, may be a useful and effective argumentative strategy within ‘public spheres’ at the local and national level. A 2001 review of a Kenyan access to justice projects supported by the United Kingdom Department for International Development concluded, ‘the empowering influence of rights awareness is a catalyst for social organization and community-driven development. The activist function recognizes that legal rights ... can [best] be achieved ... through articulation of rights using advocacy and lobbying in an activist manner.’<sup>76</sup>

Second, litigation or the threat of litigation may greatly enhance the bargaining power of local communities vis-à-vis state and national bureaucracies and other centers of political power. Because the fundamental rights provisions of the Constitution apply to both state and central governments, villages and communities have the potential to build state-specific campaigns and cases that concern the specific needs of their locales, and to present these claims in the state courts. Of course, the realization of the opportunities presented by strategic litigation depends heavily upon effective, accessible and carefully conducted community lawyering (which is far from alien to India). As examples from the South African context illustrate, constitutional rights litigation can be a powerful process for community mobilization and the assertion of a hitherto latent political

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<sup>75</sup> See, eg, R Govinda and R Diwan, *Community Participation and Empowerment in Primary Education*, Sage Publications, New Delhi, 2003; S Chowdhury, ‘Universal Elementary Education in Rajasthan: A Study with Focus on Innovative Strategies’ in Govinda, ed, above n 54, p.346; P Clarke, ‘Education Reform in the Education Guarantee Scheme in Madhya Pradesh, India and the Fundescola Program in Brazil’, March 2003, World Bank.

<sup>76</sup> S Golub, *Beyond the Rule of Law Orthodoxy*, Carnegie Endowment for International Peace, Rule of Law Working Paper No. 41 (Oct 2003).

subjectivity by the disenfranchised and the oppressed.<sup>77</sup> As Stephen Golub argues the very process of preparing litigation through consultations with and education of the affected community enhances rights awareness, strengthens knowledge of government processes and gives decision-makers the sense that they are under scrutiny from those affected by their actions – even if the litigation itself is unsuccessful: ‘A value of legal empowerment is that it can constitute a feedback loop, through which grass roots experience feeds legal and regulatory change, which further grassroots work in turn converts from reform on paper to reform in practice.’<sup>78</sup>

Third, successful litigation may help to change the budgeting priorities of the state, and start a process towards a more authentic institutional commitment toward education. Thus, for example, this commitment has been a decisive factor in the success of educational achievement in the state of Himachal Pradesh.<sup>79</sup>

### **Drawing Conclusions from the Indian Experience**

While we have accorded considerable attention to the distinctive role played by the courts in India in the struggle to recognize and give effect to the right to education, it would be a mistake to focus only, or even primarily, on litigation as the key to promoting the realization of this right. While the Indian Supreme Court has certainly played an important catalytic role, the key ingredients of the Indian case study include the formal constitutional recognition of the right in the 1949 Constitution, the role of civil society in insisting that substance be given to that commitment, the contribution of sustained analytical critiques of the state of education, and the political salience of these demands.

The emphasis on treating education as a right brings two important dimensions which are all too often downplayed in the context of other approaches to education policy. They are empowerment and accountability. While each of these terms has been overused in the

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<sup>77</sup> See Desai, *We are the Poors* (2002).

<sup>78</sup> Golub, above n. 76.

<sup>79</sup> J Drèze and A Sen, n. 17 above, p. 129; and Report of India, above n. 27, p. 248.

social science and development literature in recent years, their significance in this context is nonetheless considerable.

In terms of empowerment, the recognition of a right to education, and the adoption of an approach to education policy which accords some prominence to that dimension, serves to emphasize that the individual holder of the right is entitled to make certain demands, not only upon a government, but perhaps more importantly upon the right-holder's immediate community. The responsibilities which attach to human rights apply not only to governments in accordance with the traditional state-centric analysis of the functioning of international human rights norms. They also encapsulate and help to inform community expectations. In the context of the right to education for example this will play out as much at the family and village levels as it will in any of the more routine bureaucratic levels. Where a child is being denied educational opportunities, whether for reasons of gender, disability, caste, race, order in the family or whatever, a community which has come internalize a sensibility to, and set of expectations about, every child's inherent right to education will react to the perceived deprivation. The same applies at the village or community level where a right to education based obligation of those in charge will have an impact regardless of the insistence of those responsible that there are simply no available resources.

In the longer term the objective of rights such as the right to education is to internalize a value assumption to the point where a sense of injustice or even outrage follows automatically from any denial of access to primary education. Just as we respond instinctively against arbitrary physical violence exerted against another person, so too would a fully-internalized sense of the right to education lead to an instinctive reaction against a government, a community, or parents or guardians denying a child access to that right.

Closely linked to the concept of empowerment is the sense that the demand for education, by both parents and students, will be enhanced and legitimated by the deeper inculcation of the notion that every individual has not just an opportunity or a duty to learn but a right

to education. While this demand-side effect cannot be taken for granted, nor should it be viewed only in terms of rational economic decision making. As Lant Pritchett has observed, there may well be economic conditions that are sufficiently stagnant as to warrant considering a decision not to attend school as ‘the *optimal* decision from a narrowly drawn economic calculation.’ But, as he notes:

I would never recommend adopting this narrow view [because] the view that basic education is a human right and an essential element of well-being in the modern world is pretty compelling. But it is worth pointing out that when returns are low the economic calculation and the human rights desire may be at odds.<sup>80</sup>

This dimension of empowering the individual to put forward justified and internationally and constitutionally legitimated claims is a vital part of the human rights paradigm. It is also directly related to the notion of accountability which is an essential part of the human rights concept. As noted in the *Human Development Report 2000*, in asserting that there is a human right to primary education it follows that ‘if some persons avoidably lack access to it, there must be some culpability somewhere in the social system.’<sup>81</sup> As the Report explains:

This focus on locating accountability for failures within a social system can be a powerful tool in seeking remedy. It certainly broadens the outlook beyond the minimal claims of human development, and the analysis of human development can profit from it. The effect of a broader outlook is to focus on the actions, strategies and efforts that different duty bearers undertake to contribute to the fulfilment of specified human rights and to the advancement of the corresponding

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<sup>80</sup> Lant Pritchett, ‘Towards A New Consensus for Addressing the Global Challenge of the Lack of Education’, Center for Global Development, Working Paper No. 43, June 2004, available at [http://www.cgdev.org/docs/cgd\\_wp043.pdf](http://www.cgdev.org/docs/cgd_wp043.pdf), p. 56.

<sup>81</sup> *Human Rights and Human Development, Human Development Report 2000* (New York, Oxford University Press for UNDP, 2000) p. 21.

human development. It also leads to an analysis of the responsibilities of different actors and institutions when rights go unfulfilled.<sup>82</sup>

The importance of these elements of empowerment and accountability which flow from treating education as a human right also serve to underscore the importance of distinguishing those policy approaches which are premised, to a greater or lesser degree, upon the recognition of the right to education, from those that set broader development goals relating to education. Michael Clemens, for example, has been highly critical of the practice of ‘a succession of international meetings’ of adopting ‘a litany of utopian international goals’ which inevitably fail to be realized.<sup>83</sup> He lists 18 occasions between 1934 and 2001 when governments explicitly approved the goal of universal primary education. They range from the 1934 International Conference on Public Education to the adoption of the Universal Declaration of Human Rights in 1948, and a succession of UNESCO Regional Conferences in the 1950s and 1960s, through the 1990 World Conference on Education for All and the 2000 Dakar World Education Forum to the Millennium Development Goals.

From a human rights perspective, his list is significantly incomplete since he lists only the Universal Declaration of 1948 and manifests no awareness of the more substantive commitments undertaken in a variety of specific international and regional-level treaties, such as the International Covenant on Economic, Social and Cultural Rights of 1966, and the Convention on the Rights of the Child of 1989. Of course, Clemens might well respond that the substantial lengthening of his list which would result from the addition of all of the relevant undertakings made in the human rights context only serves to reinforce his argument that repeated invocations of principle make little if any difference on their own. But there is a qualitative difference between treaty-based human rights commitments which give rise to binding legal obligations and undertakings given at regional conferences or in other context in which governments are convinced that they

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<sup>82</sup> *Ibid.*, p. 22.

<sup>83</sup> Michael Clemens, *The Long Walk to School: International Education Goals in Historical Perspective*, Center for Global Development Working Paper No 37, March 2004.

are making general policy statements which will have no direct domestic consequences and no sustained or obligatory international follow-up. The human rights undertakings, by contrast, import an obligation to take a variety of specific steps at the national level, and to acknowledge various forms of accountability at the international level.

While this is not the place in which to explore in detail the ways in which these international accountability mechanisms do or should function, it is appropriate to note that in 2003 the Indian Government prepared a very detailed report to the UN Committee on the Rights of the Child, including over 80 pages of detailed statistical and other information on the strengths and weaknesses of the system designed to give effect to the child's right to education.<sup>84</sup> This report was the occasion for the preparation of a range of 'alternative' reports prepared by civil society groups and also submitted to the UN Committee.<sup>85</sup> While the 'concluding observations' adopted by the Committee were very general in nature<sup>86</sup> and likely to be of little specific import, the process as a whole was clearly an important one.<sup>87</sup> Its capacity to provoke the Government to undertake a

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<sup>84</sup> Report of India, above n. 27, pp. 232-314.

<sup>85</sup> E.g. 'The Alternate Report by the National Movement of Working Children, India, submitted to the Committee on the Rights of the Child, July 2003'.

<sup>86</sup> 'Concluding Observations: India', UN doc. CRC/C/15/Add.228 (2004).

<sup>87</sup> The extent to which the process is relevant, despite its shortcomings, is well illustrated by a highly critical assessment published in one of India's leading weekly magazines immediately after the Committee had reported:

The reporting process is like a diplomatic ritual . . . . Even a cursory look at the concluding observations made by the same committee in 2000 on the basis of the earlier report indicates that the committee has mechanically repeated this part of the observations and identified the same set of factors responsible for the poor status of children in India as it had last time. This highly limited level of analysis indicates a lack of engagement with the ground realities on part of the official delegation as well as the committee. The committee also played friendly by not listing 'lack of political will' and 'poor allocation of resources' as reasons for the dismal record. .. Some observations are stale, and have been rendered over and over again; some are new and have been keenly awaited; and some are completely missing ...

systematic inventory, its involvement of civil society both at the domestic and international level, its garnering of extensive domestic press coverage, and its formal evaluation of India's performance in relation to its obligations, all contribute to promoting an element of accountability which is almost entirely absent in the case of other international undertakings relating to education.