REALIZING THE RIGHT TO EDUCATION FOR ALL: AT THE ALTAR OF THE COURTS OR IN THE HANDS OF THE PEOPLE

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Abstract

The lecture dwells on the varied consequences that ensue when the right to education is agitated for through judicial review or grass-root initiatives of the people. Whilst the former is dictated by what Judges and Co. think the people need, the latter is the people fashioning their own solutions and garnering resources for them from state and non-state sources. Further when justiciability attaches to an entitlement, the right to move the courts is not limited to the beneficiaries of the right alone; persons resisting the recognition of the right also have access to the courts. What do these alternative approaches mean to the ongoing struggle to obtain recognition for the needs and entitlements of the youngest, especially as the most vulnerable of children tell us that education is a composite right, which demands more than being sent to school.

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In these times of culpability by association, I am so thankful to the organisers of the Anita Kaul Memorial Lecture to honour me by association. I first came to know Anita Kaul as a parent, a parent who wished to engage with the education process at NALSAR and not just worry on how her son fared in the system. This commitment to the education of all she carried further as the Member Secretary of the National Advisory Council wherein she did her utmost to make the right to education a real and not a paper right. When the Act came to be challenged and the target groups wished to hijack the law to their ends, I had many an animated conversation with Anita on how to engage with the Court, how justiciability was becoming a double-edged sword and from where to find lawyers who would defend the law in both letter and spirit. I recall Anita's passion, professionalism and commitment in reflecting on the approaches by which the right to education can be realised for all.

There can be no claim to a right if it is not accompanied with a remedy. This dictum has singularly informed the evolution of rights jurisprudence in common law. This belief, which influenced the growth of common law in England was exported to other countries through the process of colonisation. Since judicial review was seen as the preferred remedy to guarantee the realisation of rights, its exclusion was often seen to rob an entitlement the status of a right. It was instead viewed as a duty-based claim, which was then described as an intervention aimed to promote welfare. This reasoning forged an inextricable connection between justiciability and rights.

It is pertinent to ask what is the relevance of this connection between justiciability and rights in discussing the right to education? To recall the well-known: Article 45 of the Constitution of India recognised that within a period of ten years the State shall endeavour to provide free and compulsory education to all children up to the age of 14 years. This promise however figured in Part IV of the Indian Constitution which contains the directive principles of state policy. These principles though fundamental to the governance of the country could not be enforced in any court. This embargo against moving courts, it came to be believed, gave governments the license to drag their feet on

the realisation of the right to education and the time limit of 10 years was soon forgotten. The right to education was given a fillip when the Supreme Court of India in Mohini Jain and Unnikrishnan declared that education was integral to a full and meaningful life under Article 21 of the Constitution. Since judicial enunciation of rights is perceived as fragile and uncertain, a campaign seeking the recognition of the right to education as a fundamental right was launched, which led to the incorporation of Article 21A in the Constitution.

Unlike directive principles, which are non-justiciable, fundamental rights are subject to judicial review. People can move the courts to seek enforcement of fundamental rights. It was felt that this additional string in the bow would expedite the realisation of the right to education. This was the prime motivation for the incorporation of Article 21A in the Constitution. The moving over of the right from the non-justiciable to the justiciable part of the Constitution resulted in a curtailment of the expanse of the right. Whilst Art 14 promised education up to the age of 14 years, the new Article 21A limited the entitlement from 6-14 years. Further whilst the new article required free and compulsory education to be provided, the substantive content of the article was to be such as the State may by law determine. Article 13(2) of the Indian Constitution prohibits the State from making any law which takes away or abridges the rights conferred in part III and if any law is made in contravention to the interdiction then it shall to the extent of contravention be void. How will this protection play out when the content of the right is to be itself settled by statute? The law guaranteeing the right to education would have to be in conformity with other rights guaranteed by part III but this was the situation even before Article 21A was incorporated in the Constitution.

The right to judicial review is not limited to the beneficiaries of the right alone, it also extends to the target group that is those others who have to give up something in the right making enterprise. An analysis of the litigation under the Right to Education Act 2009 shows that the Courts have been activated a lot more by the target group and the collateral players than the beneficiaries. The analysis also shows that the entitlements of the beneficiaries have been strictly construed. Thus, courts have adjudicated by relying upon the text of the law. That the spirit of the statute and the capability development potential of education would require it to be read differently from other statutes has generally been missed by the Courts. This kind of approach gets adopted cause Courts believe that they are neutral arbiters in any conflict resolution. Should such neutral positions be adopted when the parties are not operating from a level playing field is a question that is not asked by the courts.

Leading educationists and education rights activists were involved in the drafting of the RTEA. Their engagement explains the values driven and aspirational provisions of the Act be it in trying to rescue education from the trap of exams or by inducting parents in the School Management Committees or in leaving space for the participation rights of children. The statute which was shepherded by empathetic administrators like Anita Kaul left space for grassroot activism. These micro-systems of power have been used by educational activists in some parts of the country to make the right to education a grassroot initiative. Be it seeking resources from Panchayats for village level schools or training parents to person School Management Committees or obtaining appropriate notifications and regulations to run the School system. One of the most notable grassroot initiatives being the one mentored by Niranjan Aradhya by the Centre of Child and the Law, National Law School Bangalore. These initiatives point towards an alternative strategy and that there are other ways of making the RTEA come alive. Since the needs of

all parts of the country are not the same it seems appropriate that people are encouraged to use RTEA in a manner which facilitate locale specific needs. Such like initiatives would enable people to take ownership of the law and only when such ownership is felt, laws can be followed and need not have to be enforced.

This lecture has been concerned with the right to education of all. As already mentioned the entitlements of the under-sixes were severed from the purview of the fundamental right to education. Insofar as the right to education was required for the unprivileged India, this severance has resulted in them receiving the shell of education with its kernel removed. Without early child care and education, the time and resources required to be spent on early childhood stimulation, health, nutrition, and making children ready for school are only relegated to the realm of discretion. This is like erecting a building without laying the foundations.

And stopping education before the personality has stabilised and learning internalised is also problematic. The Rights of Persons with Disabilities Act 2016 has recognised that persons with benchmark disabilities should be provided education up to 18 years of age. The physical, mental, sensory and developmental impairments of the covered categories is the ostensible reason for this enhanced age coverage. However, as disability arises due to the interaction of the impairment with barriers, we cannot only focus on the impairments. It is also necessary to look at the barriers. And the moment attention is focussed on the geographical, social, economic and cultural barriers, it is evident that there is a case to provide all children education up to 18 years.

The case for education for all needs to be made. In advocating for this expansion especially for the youngest, the learnings from the two implementation models of RTEA need to be kept in view. The two models have not to be perceived in the either-or mode. It needs to be however remembered that despite all its oversight responsibilities, the judiciary is part of the establishment, hence it is not really possible to obtain radical reforms of the foundational kind from it. Framework legislations which are propelled by grassroot social movements seems to be the way to go. This is the only way in which permeability can be provided for in a state-controlled instrument. The incorporation of a right in legislation accords it a modicum of non-negotiability which a policy not backed by law may not possess. Judicial review could assist movements work by preventing harm but may not be as efficacious in producing good and goods. For that to happen both legislative and adjudicative law need to be continually disciplined by the aspirations and expectations of the people.