



# Early Childhood Care and Education and the Right to Education

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This essay describes the law and policy developments on the issue of early childhood care and education (ECCE), particularly, pre-school education in India. It also attempts to explore how courts have deliberated on this important policy objective. The article begins with a brief description of the constitutional position on ECCE and proceeds to an understanding of the legal developments on this issue.

## The Constitution on ECCE:

The Constitution of India includes social welfare objectives such as education and work as directive principles of state policy. Unlike the fundamental rights<sup>1</sup>, no court can enforce a directive principle of state policy or adjudicate upon a matter that involves infringement of a directive principle<sup>2</sup>. However, the state is expected to pay heed to these directives as guidelines for formulating law and policy.

Originally, the Constitution of India, 1950 included universal elementary education as an unenforceable directive principle under Article 45 (erstwhile)<sup>3</sup>. This directive principle of state policy stated that the state must endeavour to provide free and compulsory education to all children until they complete the age of fourteen years. Further, it is important to note that Article 45 (erstwhile) was the only directive principle of state policy under the Indian Constitution to prescribe duration of 10 years by which, the state was to secure the stated objective. This provision did not distinguish between ECCE and elementary education; it only describes the obligation of the state to provide free and compulsory elementary education to all

children up to the age of fourteen years.

*The Supreme Court in Mohini Jain<sup>4</sup> and Unnikrishnan<sup>5</sup> :*

The Supreme Court declared and clarified on the right to education in two judgments- Mohini Jain v State of Karnataka (1992) and Unnikrishnan J. P. v State of Andhra Pradesh (1993). In the former case, the Supreme Court declared the right to education as part of the fundamental right to life guaranteed under Article 21 of Constitution. The Court held that the right to education is available to all citizens at all stages. Citizens could now demand that the state provide them education. In Unnikrishnan, the Court emphasized on the principle that the right to education is concomitant to the right to life. However, it restricted the right to free and compulsory education to children up to fourteen years. The Court reasoned that- (i) the constitutional directive is available only to children, and (ii) the state does not have the economic capacity to provide the right to education at all levels.

Both these judgments emphasize that the right to education is essential to meaningfully realize the right to life. However, neither of these judgments distinguishes between elementary education and ECCE. For the Court, this distinction between ECCE and elementary education does not pose any concerns because the right to education was made available to children until they complete the age of fourteen years.

## The fundamental right to education and ECCE:

In 2002, the Parliament of India inserted the right of children to free and compulsory education as a

<sup>1</sup>The Supreme Court and High Courts under Articles 32 and 226 of the Constitution can enforce fundamental rights such as the right to equality, freedom or life.

<sup>2</sup>Article 37, Constitution of India, 1950

<sup>3</sup>The forthcoming section of the article entitled "The fundamental right to education and ECCE" covers the revision that was made to Article 45 under the Constitution (Eighty-Sixth Amendment) Act, 2002.

<sup>4</sup>Mohini Jain v State of Karnataka, (1992) 3 SCC 666

<sup>5</sup>Unnikrishnan J. P. v State of Andhra Pradesh 1993 SCC (1) 645

fundamental right under Article 21 A in the Constitution<sup>6</sup>. The newly inserted right was restricted to elementary education for children between 6 and 14 years. As a result, the Supreme Court or High Courts can remedy any infringement

of Article 21 A. However, the amendment modified Article 45 to include ECCE for children below the age of six years. The revised Article 45 states that the State shall endeavour to provide early childhood care and education for children up to the age of six years. Therefore, by including ECCE as a directive principle of state policy, the amendment restrains any person from approaching a court to enforce any scheme or programme concerning ECCE<sup>7</sup>.

The responsibility of providing elementary education lies with the Ministry of Human Resource Development while the Ministry of Women and Child Development is responsible for implementing the ICDS and hence ECCE. The insertion of the right to education was proposed by the MHRD. As a result, children under the age of six years have been left outside the scope of the right to education.

#### **The right to food case<sup>8</sup>:**

Some orders passed by the Supreme Court's in *P.U.C.L. v Union of India* (2001) are also relevant to our discussion as they were vital to universalizing the Anganwadi system in India. This petition was filed by the People's Union for Civil Liberties to uphold the right to food as a part of the right to life guaranteed under Article 21 of the Constitution. The petitioners moved the Court to secure access to food and nutrition and protect people from hunger and starvation. The Court has issued several orders for the implementation of all schemes related to food security including, the universalization of mid-day meals scheme and revival of the public distribution system. A court appointed committee monitors the implementation of these orders through implementation reports submitted by all states, union territories and the union government.

The ICDS is key to the conceptualization of ECCE in India as it provides for the health, education and

developmental needs of children under the age of six years. With regard to this scheme, the Court issued one order<sup>9</sup> directing the state to universalize the Anganwadi system under the ICDS. Another subsequent order<sup>10</sup> was passed requiring the state "To provide conditions necessary for pre-school children's psychological and social development through early stimulation and education." Unfortunately, we find that many Anganwadis are either under-staffed or functioning with dismal infrastructure even in 2013<sup>11</sup>.

#### **The RTE Act and ECCE:**

The right to education under Article 21 A is implementable in a manner determined by law, the Right of Children to Free and Compulsory Education Act, 2009 (hereafter, "RTE"). While this law mostly applies to elementary education, it is optional for state governments to provide early childhood care and education (Section 11). Additionally, the RTE also mandates that where schools provide pre-school education, the entry class for admissions and reservations under the RTE shall be pre-school (Section 12). As a consequence, all schools that provide pre-school education are also under an obligation to provide free and compulsory pre-school education. This provision under the RTE entitles children (i) to obtain admission in a neighbouring government, private or aided school; and (ii) to be provided free and compulsory pre-school education if the child falls under an economically or socially disadvantaged section of society.

The constitutional validity of the RTE Act was challenged by a group of unaided and aided schools in *Society for Unaided Private Schools of Rajasthan v Union of India*<sup>12</sup>. In 2012, the Foundation intervened in this petition arguing that the validity of the RTE must be sustained. Further, on the issue of ECCE, the Foundation submitted that the Court must read ECCE into the right to education under Article 21A, thereby seeking an extension of this right to children under the age of 6 years. This submission was based on three grounds, namely-

<sup>6</sup>The Constitution (Eighty-Sixth Amendment) Act, 2002

<sup>7</sup>Article 37 of the Constitution prohibits any court from enforcing any directive principle of state policy.

<sup>8</sup>*People's Union for Civil Liberties v Union of India* W. P. (c) 196 of 2001

<sup>9</sup>W.P. (c) 196/2001, Order dated 28/11/2012, available at: <http://www.righttofoodindia.org/orders/nov28.html>

<sup>10</sup>W.P. (c) 196/2001, Order dated 29/04/2004, available at: <http://www.righttofoodindia.org/orders/apr2904.html>

<sup>11</sup>"Poor Status of Anganwadis in Bangalore" CIVIC (2012), available at:

<http://civicspace.in/sites/default/files/attachments/public%20hearing%20on%20health%20english%20version.pdf>. Also see "Anganwadis for All – A Primer" Right to Food Campaign (2007) available at: <http://www.righttofoodindia.org/data/icds06primer.pdf>

<sup>12</sup>(2012) 6 SCC 1

- (i) the Supreme Court in Unnikrishnan held that all children are entitled to the right to education up to fourteen years and this right is enforceable against the state;
- (ii) research shows that ECCE plays a vital role in securing educational outcomes in schools; and
- (iii) that the domain of pre-school education in India is largely unregulated as the RTE Act mandates norms and standards for Class I and above. The Court, however, was silent on the issue of extending the right as the Parliament had included revised Article 45 to cover ECCE.

### **ECCE and the out of school children litigation in Karnataka:**

The importance of ECCE has also been brought before the Karnataka High Court in the out of school children petition<sup>13</sup>. The Karnataka High Court took up a suomotu petition<sup>14</sup> on the issue of out of school children based on a newspaper report<sup>15</sup>. The Court considered the issue of 50,000 children out of school as a massive violation of the fundamental right to education. In this case, the Court is not only attempting to redress the situation of out of school children, but it has also entered domains of educational governance by constituting a High Level Committee that will oversee RTE implementation in Karnataka. This litigation has also resulted in many changes including new definitions of out of school children and changing the functions of attendance authorities. However, it is interesting to note that the focus on the Anganwadi system in this petition was limited to ensuring that children transition to mainstream schools without any attention paid to ECCE as a broader concern. Issues that did gain momentum were those related to infrastructure in Anganwadis, toilets particularly<sup>16</sup>. While the Court has emphasized on the need for better coordination between various departments, the objective of ensuring good quality ECCE has been left outside the scope of this litigation.

### **Concluding Remarks:**

While the Indian State has successfully legislated on the issue of elementary education of children

between the age of six and fourteen years, there have been few efforts focused on securing uniform and good quality ECCE. The domain of ECCE in India has remained largely unregulated. There is no uniform law or policy that regulates their establishment, functioning or imposes regulatory standards on either Anganwadis or pre-schools. Moreover, different ministries are responsible for the Anganwadi system and the pre-school system. It is not necessary to secure a right in order to further good quality ECCE. However, in the absence of a clear law or policy on ECCE, even courts seem reluctant to adjudicate upon the issue. Therefore, the pressing need for formulating a comprehensive policy that details out the manner of establishment, sets uniform standards and regulates the functioning of preschools and Anganwadis cannot be overlooked.



<sup>13</sup>W.P. (C) 15678 of 2013 High Court of Karnataka

<sup>14</sup>Supra at n. 5

<sup>15</sup>"The glitches that dog RTE implementation", the Hindu (March 31, 2013) available at: <http://www.thehindu.com/news/national/karnataka/the-glitches-that-dog-rte-implementation/article4564801.ece>

<sup>16</sup>"All Anganwadis in Karnataka will have toilets by next June, says Court", The Hindu (August 20, 2013) available at: <http://www.thehindu.com/news/national/karnataka/all-anganwadis-in-karnataka-will-have-toilets-by-june-next-says-court/article5039280.ece>



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