

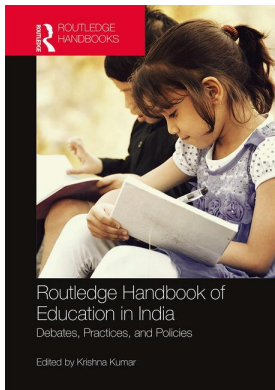
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## **Routledge Handbook of Education in India Debates, Practices, and Policies**

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### **Compulsion to educate**

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# Part I

## Logic of access

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The opening section of this handbook focuses on access to education. As a term, ‘access’ generally refers to availability of an opportunity. In the context of education, access depends on provision, implying the availability of institutions where education is available. The core idea for any discussion of access to education is the state, its policies and the will to execute them by providing for appropriate institutions within the reach of families and children. Geography of institutional provision, by itself, would mean little for assessing the adequacy of access unless it is matched with the economic condition of families and the age of children for whom the provision is being made. This is why the question of access has proved so difficult for India. Despite the fact that India has a political system based on the principles of liberal democracy, making primary education available to all children has taken a hundred years – after it was first attempted – to be accepted as a legal goal. The term ‘primary’ is currently being replaced by ‘elementary’, referring to a recently enacted central law that makes education from the age of six to fourteen a fundamental right of every child. The first chapter in this handbook examines the complexities of this law, including the problems its execution is likely to face. Archana Mehendale, the author of this chapter, discusses the background of this law by taking the reader into the implications of federal governance in children’s education. She also helps the reader to examine the new law in the context of poverty, especially the widely prevalent use of children as a source of income for the family.

The second chapter, by Nalini Juneja, takes us into the tangled issues of poverty and schooling in the urban context. Her analysis reveals how urban demography intersects with spatial planning and the political economy of privatisation of education. This subject rarely figures when policies of education per se are discussed. How the land demarcated for schools in model plans made for urban development passes into the hands of private bodies is a story that normally does not belong to educational research. But it is a highly relevant narrative today because privatisation of education is occurring at a rapid pace at all levels of education, including the higher ones. The value of education as a saleable commodity is rising fast in response to the current tendency in the state to withdraw and transfer its educational responsibility to private providers. In turn, the status of private schooling – and now, universities too – is impelling the state to proceed more adroitly in this direction. This is a theme many readers will recognise as a global phenomenon, rooted in the ideological formation known as neo-liberalism. Global though it is,

the phenomenon needs to be analysed in local contexts of nations and regions if one wants to study the modus operandi of the capture of children's education by private capital.

Though the term 'private' distinguishes fee-charging schools from the ones run by the government, there are sharply differentiated schools within both categories. While state schools differ on many counts such as 'central' and 'state' (i.e. provincial) and within each of these, private schools also differ on several counts, such as the fees they charge, the language they use as a medium of teaching, and the types of bodies that run them. Padma Sarangapani studied these different types in the city of Hyderabad. Her chapter attempts to develop a typology, then relate it to the question of quality and unravel the concept of quality. The chapter makes us aware of how problematic it may be to simplify the Indian urban educational scene, especially if we conflate private schooling with quality. This assumption has consistently gained popularity over the past three decades. During this period, 'quality' has emerged – or has been propagated – as a discourse. It has helped to deepen the reach of the neoliberal framework of analysis and its influence on state policy. In educational theory too, the discourse of quality has enabled a stolid perspective to gain currency.

How does the system of education, with such bewildering variety of schools and diversity of policies in 29 states, function and survive? How does it accommodate the expectations of a sharply stratified society? The answer to these questions is: 'With the help of a public examination culture.' Although public examinations are part of the system of education, they have served the system for well over a century by imparting to it a firm, annually reinforced coherence. This is why it is correct to call the public examination system a cultural construct that has its own customs and rituals recognised and observed across India's vast geography. The most important among the various examinations that Indian children take through their educational career is the Grade XII 'Board' examination. This exam ends the higher secondary stage, and it serves to dispense eligibility for further education. Those who appear in it are already stringently filtered, so to speak, by the Grade X examination, traditionally known as the 'high school' exam. Both of these examinations are taken by 'Boards', an institution that exercises tremendous power over the curriculum, how it finds expression in syllabi and textbooks, but most importantly, how teachers teach in the classroom. The 'Boards' that arrange or 'take' the exams are of two types. One category functions in 29 states of India; the other category has just two, the 'central' board that affiliates the few schools run by the central government all over India and a much greater number of private schools with a certain elite status. The complex story of the examination system is presented in the last chapter of this part. Disha Nawani, the author, offers a historical background to the secondary examination system, and also presents valuable statistics showing the 'results' of each Board in the past few years. These data enable us to get a glimpse into the magic of the exam system, its capacity to allocate success and failure on the basis of a one-time performance, and thereby to offer a meritocratic handle to the social system to manage diversity of backgrounds, interests, and aspirations.

The various systemic and social factors that shape the logic of access to different stages of education are mentioned and discussed in other sections of this handbook as well. While access at the elementary level is now a legal right, going beyond this level involves competitive capacity and socio-economic wherewithal. Thus, the crucial transition from Grade VIII to IX contains, as an object of inquiry, a complex story in which social stratification in terms of caste and income levels, and gender, play crucial roles in shaping individual educational mobility. These factors accumulate greater power as an individual looks towards higher education. Access at these higher levels is no longer just about the availability of a college to enrol in; it is also about the capacity to face a mixture of systemic and social factors. These factors form the subject matter of the chapters included in Part IV. These chapters enable us to realise how important it may be to comprehend systemic resistance to social inclusivity in the Indian society.

# Compulsion to educate

*Archana Mehendale*

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The Constitution is regarded as a 'superior or supreme law' (Ware 1966) that reflects the normative structure and ideology of a sovereign and guides the state's relationship with its citizens. The Indian Constitution is 'partly flexible and partly rigid' (Kashyap 1986), allowing it to be amended through its representative democracy. The Constitution (86th Amendment) Act, 2002 (hereafter referred to as the 86th Amendment) was a significant milestone. Adopted after both Houses of Parliament had unanimously voted in its favour and receiving the President's assent thereafter, the amendment inserted a new Fundamental Right, amended a Directive Principle of State Policy and inserted a new Fundamental Duty.

The new Article 21A under Part III Fundamental Rights of the Constitution, states: 'The State shall provide free and compulsory education to all children of the age of six to 14 years in such manner as the State may, by law, determine.' The revised Article 45 under Part IV Directive Principles of State Policy states: 'State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.' The new Article 51A (k) under Fundamental Duties recognises the duties of 'who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and 14 years'. The enactment of The Right of Children to Free and Compulsory Education Act, 2009 (hereafter referred to as the RTE Act) and its coming into force in 2010, operationalised the fundamental right to education for children between the ages of six and 14 years. The RTE Act is a central legislation on a concurrent subject, and state governments are empowered to formulate rules to execute the legislation. Using these delegated legislative powers, the state governments have prepared rules which are applicable in their jurisdiction and are meant to guide the implementation of the RTE Act. These are subordinate to the RTE Act and are thus expected to adhere to the provisions of the RTE Act.

Being a justiciable Fundamental Right, the government is now legally bound to provide free and compulsory education to children, and ordinary citizens can directly approach the High Court or the Supreme Court if the government fails to fulfil its mandate. Such a firm legal accountability of the government was missing before the amendment when it was classified as a non-justiciable Directive Principle of State Policy. This recent law-making on education has percolated into public imagination and discourse through a new acronym, 'RTE', which has become the new reference point of education policy, a new peg on which all ideological,

pedagogical, administrative, and social questions related to education and educational spaces are left to hang. The 'RTE' pitch has been extended to areas that are not technically covered by the 86th Amendment, the RTE Act, or the rules notified by the state governments. Regulation of fee hikes in private schools is one example where the RTE Act does not directly make any provision, but it is drawn upon to justify arguments for lower fees. The RTE buzzword is periodically used by education administrators and teachers to draw attention to the changed regime within which education has to be transacted and their roles enacted.

The chapter first describes the context within which the right to education became a constitutional and a statutory right in India by highlighting its historical, administrative, and legal significance. The idea of compulsion implied in the right is then explored in order to locate the contradiction within historical and contemporary ideas surrounding free and compulsory education. The chapter concludes with a brief account of the contestations and debates on various legal provisions, which point to the gaps and issues that remain unresolved within the official agenda and public discourse.

## Context and significance of the legislation

The framers of the Indian Constitution had committed to providing free and compulsory education to children below the age of 14 years within ten years of commencement of the Constitution (see Article 45 before it was amended in 2002). Although this commitment was placed under Part IV Directive Principles of State Policy, this was the only provision that had a time frame of ten years mentioned in the Constitution. This commitment was neither taken seriously nor was there any kind of parliamentary review or debate in 1960 when the goal was supposed to have been achieved. The increase in the illiterate population during this decade from 294.2 million in 1951 to 325.5 million in 1961 confirms that elementary education was not a political priority.

### *Context*

The National Policy on Education (1968) and the National Policy on Education (1986) were also committed to universalisation of free and compulsory elementary education in a time-bound manner, but they failed to meet their targets. The first official recommendation to include the right to education under the Fundamental Rights was made by the Acharya Ramamurti Committee (Ramamurti 1990), which was constituted to review and recommend policy revisions. But these recommendations were ignored and the revised policy of 1992 stated 'it shall be ensured that free and compulsory education of satisfactory quality is provided to all children up to 14 years before we enter the 21st century'. In the early 1990s, three different factors influenced the decision to make education a fundamental right in India.

First, the Education for All Initiative, which was kick-started during the World Conference on 'Education for All (EFA): Meeting Learning Needs' held at Jomtein, Thailand in March 1990, saw the adoption of the 'World Declaration on Education for All' along with the 'Framework for Action to Meet Basic Learning Needs'. It held that 'education is a fundamental right for all people, women and men, of all ages, throughout the world' (Inter Agency Commission 1990). The initiative was significant in the Indian context because it opened the possibility of external donor assistance for basic education. The government, which had deliberately opted not to seek external financing for primary education till then, sought external funds from the World Bank for supporting its new programme, called the District Primary Education Programme. The EFA also started a new era of international monitoring through observable and

measurable targets, thereby placing the government under pressure to demonstrate its commitment to international observers. Second, judicial directions in two landmark cases related to the role of the state in higher education actually paved new jurisprudence on the right to education. In 1992, while hearing a case of capitation fees in professional colleges, in *Mohini Jain v. State of Karnataka*,<sup>1</sup> the Supreme Court held that ‘right to education’ is concomitant to fundamental rights enshrined under Part III of the Constitution and that ‘every citizen has a right to education under the Constitution’. In 1993, a five-member bench of the Supreme Court in the landmark case of *Unnikrishnan, J.P. v. State of Andhra Pradesh*<sup>2</sup> reviewed the earlier judgment and held that ‘though right to education is not stated expressly as a fundamental right, it is implicit in and flows from the right to life guaranteed under Article 21 ... [and] must be construed in the light of the Directive Principles of the Constitution’. Thus,

right to education, understood in the context of Article 45 and 41 means: (a) every child/citizen of this country has a right to free education until he completes the age of 14 years and (b) after a child/citizen completes 14 years, his right to education is circumscribed by the limits of the economic capacity of the State and its development.

Third, large-scale mobilisation and civil society advocacy drew upon the Supreme Court judgments and demanded that the right upheld by the judiciary be enshrined in the Constitution to give it political and legal permanence.

### *Significance of a justiciable right*

In their recent work on studying Constitutions of 191 countries, Heymann *et al.* (2014) found that 81 per cent of the countries recognised the right to primary education and 53 per cent of them provided it free at the primary stage. The newer Constitutions, particularly those adopted in the developing and middle-income countries since the 1990s, were more likely to include the right to education.<sup>3</sup> Legislation in countries like China, Japan, and the United Kingdom imposes obligations on the state to provide funds for free and compulsory education.<sup>4</sup> International human rights law classifies education as an economic, social, and cultural right that can be attained as per the maximum availability of states’ resources and in a progressive manner.<sup>5</sup> India, as we discussed earlier, was committed to providing free and compulsory education since 1950, but it was only in 2002 that this was elevated to a justiciable right. The significance of making education a justiciable right can be accounted for at historical, administrative, and legal levels.

The division of justiciable and non-justiciable rights under Part III and Part IV respectively of the Indian Constitution builds on the idea of a hierarchy of rights that makes the first generation of civil and political rights privileged because they are legally enforceable, while the second generation of social, economic, and cultural rights are meant to direct the governance and state policy and be progressively realised. Juneja (2003) has argued that the Constituent Assembly debated about the inclusion of education up to the age of 14 years as part of Fundamental Rights, but this was relegated to the Directive Principles. The amendment reinstates the right under Part III on Fundamental Rights of the Constitution after it remained unimplemented as a Directive Principle of State Policy. It is also historically significant given that it is the first time that a positive right having significant resource implications has been introduced under Part III of the Constitution. By inserting it as Article 21A, it has reinforced the Supreme Court observations in *Unnikrishnan*, where the right to education was linked to Article 21 on right to life.

At an administrative level, having a central legislation on a concurrent subject has opened newer challenges to federal relations. There are significant inter-state variations in terms of

economic, political, and education levels, and state governments are faced with a number of challenges while implementing centrally laid norms. The dependence of the state governments on the central funds, particularly funds allocated through the District Primary Education Programme (DPEP) in 1994 and the Sarva Shiksha Abhiyan (SSA) in 2003 while trying to retain their autonomy in policy matters such as teachers' appointments, service conditions, curriculum and assessments, is one example. Even after the RTE Act came into force, state governments expressed their inability to adhere to its mandate without the financial support of the central government. Significant funding from the central government for over a decade of DPEP and SSA has neither resulted in achievement of goals on access and quality of education,<sup>6</sup> nor has it enabled the state governments to deliver the programme on their own. Concurrency of education has largely tilted towards a centralising trend putting the principles underlining the federal structure under strain. Evidently, a number of state governments have not made use of their available jurisdiction to formulate state-specific policies. For instance, rules notified by some state governments under the RTE Act are replicas of the rules framed by the central government. The state curriculum frameworks also do not express the distinct imaginations of state governments on education and its aims and are closely modelled on the National Curriculum Framework. Another area of administrative significance is that of decentralisation in education. The RTE Act provides for decentralisation by outlining duties of the state governments and local authorities. Additionally, state governments have notified rules that further elaborate on the roles mandated for sub-statal bodies. Although education was required to be decentralised by state governments after the 73rd and 74th Amendments to the Constitution, state governments had not devolved funds, functions, and functionaries to the local levels. By providing a uniform minimum framework of sharing of duties among the state and the local authorities, the RTE Act effectively suggests a top-down approach of decentralisation.

The third area where the RTE Act has necessitated administrative changes is that of the implementation mechanism. Since the early 1990s, the governments have adopted a 'mission mode'<sup>7</sup> style of functioning that runs parallel to the education departments, and is designed to ensure greater efficiency and streamlined implementation. The RTE Act requires that the focus is shifted again to the education departments and goes beyond a programmatic mode of realising a fundamental right. Although the Anil Bordia Committee (Ministry of Human Resources Development 2010) suggested a revised framework for the Sarva Shiksha Abhiyan (SSA) that was aligned with the RTE Act, the implementation of the Act requires state departments to perform their conventional functions of funding, provisioning and regulation, that are not limited to the scope and tenure of the SSA. In other words, RTE would require state education departments to be present, and rebuild their administrative capacities and orientations to deliver on the legal mandate.

The legal significance of education as a justiciable right is that violation of rights or its inadequate protection can be challenged in the courts. This itself has resulted in the interpretation of the scope and applicability of various provisions. One of the significant legal features introduced by the RTE Act is that of horizontal application of rights. In a general sense, fundamental rights are enforceable only against the state and are meant to protect citizens from the actions of the state. Thus, if a fundamental right is being violated, action would rest against the state as it is duty bound to protect these rights. Article 21A does not refer to the private institutions in any way. However, Section 12(1)(c) requires private unaided schools to provide 25 per cent of their total seats to children from disadvantaged and weaker sections. The horizontal application of rights which extends the duties created under the RTE Act to non-state actors was challenged by private schools in the Supreme Court.<sup>8</sup> The apex court said that the principle of reasonable restriction on the right to carry out business or profession (Article 19 (1)(g))<sup>9</sup> is not an absolute right and the state can restrict it in the interest of the general public (Article 19 (6)).<sup>10</sup> Thus,



Section 12(1)(c) provided under the RTE Act that flows out of Article 21A would justify restriction on the right to carry on business that is enjoyed by the private schools as per Article 19(1)(g). One of the earlier drafts of the constitutional amendment bill had specifically prohibited the state from making ‘any law, for free and compulsory education ... in relation to the educational institutions not maintained by the State or not receiving aid out of State funds’. However, the provision was removed as it was considered fit to leave it to the judiciary to decide on the scope and width of Article 21A and the extension of duties to private institutions. This unique legal feature of the RTE Act has also been a subject of legal contestation requiring the judiciary to comment on the hierarchy of fundamental rights.

### **Nature of compulsion**

The international legal framework on human rights recognises the right to education, which encompasses an entitlement to free and compulsory education at the primary school level. This is enunciated in the Universal Declaration on Human Rights (1948), International Covenant on Economic, Social and Cultural Rights (1966) and the United Nations Convention on the Rights of the Child (1989).

In the General Comment No. 11 of the International Committee on Economic, Social and Cultural Rights (1999), the term ‘compulsory’ has been explained to refer to the ‘fact that neither parents, nor guardians, nor the State are entitled to treat as optional the decision as to whether the child should have access to primary education’. It also notes that the provision of compulsory primary education in no way conflicts with the right of parents and guardians to choose for their children schools other than those established by the public authorities. Thus, a reference to ‘compulsion’ in the expression of the human right to education is not new and hints at the legacy of compulsory education in Western countries that had helped to establish universal education systems in those regions; an approach that was forwarded and reaffirmed as a universal method of respecting and fulfilling the right to education.

### *The idea of compulsion*

Compulsion is linked with the idea of duty and has typically been used with a connotation of ‘enforcement’ by the state on its citizens. Similar ideas of compulsion are related to compulsory conscription for military service in some countries, compulsory licencing (regulation) of enterprises, compulsory taxation, and so on that are practised in democratic societies. However, given the inherent conflict between human rights and the state’s exercise and imposition of its authority, compulsion has been questioned on the grounds of infringement of personal freedom and liberty, while arguing that public interest alone cannot justify making certain actions compulsory. For instance, voting, although necessary for a healthy functioning democracy, is not made compulsory because it is seen as an imposition that goes against the exercise of fundamental freedoms. When the compulsion is on the state, it is seen as an extension of the duty of the state. However, questions related to the nature of compulsion – what does it require of the parties on whom it is imposed? Who imposes compulsion? Is it adequate to realise the right? – remain largely unanswered even in the international normative articulations.

### *What has compulsory education meant in India?*

The earliest effort to introduce free and compulsory education was Gokhale’s bill in the Imperial Legislative Assembly in 1911, which proposed abolition of child labour among boys and imposed



taxation to provide free education for poor families. This was defeated because it would create a problem of availability of cheap agricultural labour. Moreover, the elite did not support the taxation of the rich for the education of the masses (Kumar 1991). The origins of legislation on compulsory education can be traced to the colonial period when, like other British colonies, India also adopted legislation on free and compulsory education almost alongside legislation outlawing employment of children in factories and mines. These were promulgated at the provincial level and worked on a schema wherein local authorities had the discretion to notify the applicability of free and compulsory education in their jurisdiction. In some provinces, local authorities could put in place exemptions on the basis of gender or other criteria. These legislations were modelled on truancy law and compelled children to attend school. Parents and employers could be penalised for keeping children away from school. The legislation provided bureaucratic procedures including issuance of show-cause notices to parents and levying fines and penalties against them. Although this idea of compulsion was linked with imposition of force and authority, the legislation also provided for 'reasonable excuses for non-attendance' that allowed children to stay away from school. These included lack of educational facilities, conditions of physical and mental disability, and other circumstances that may require children to stay at home.

After Independence, these legislations remained in force in several states,<sup>11</sup> but their implementation remained weak (Law Commission of India 1998: 70). Weiner (1991) explained this lack of implementation as being a result of the deeply entrenched caste system. He argued that by not providing free and compulsory education, differentiation among social classes was being maintained with the aim of preserving the existing social arrangements. Weiner's main theory about lack of political will to implement free and compulsory education legislation can be summarised as:

India's low per capita income and economic situation is less relevant as an explanation than the belief systems of the state bureaucracy, a set of beliefs that are widely shared by educators, social activists, trade unionists, academic researchers, and, more broadly, by members of the Indian middle class. These beliefs are held by those outside as well as those within government, by observant Hindus and by those who regard themselves as secular, and by leftists as well as by centrists and rightists. At the core of these beliefs are the Indian view of the social order, notions concerning the respective roles of upper and lower social strata, the role of education as a means of maintaining differentiations among social classes, and concerns that 'excessive' and 'inappropriate' education for the poor would disrupt existing social arrangements.

*(Weiner 1991: 5)*

Juneja (1997) showed how the officials responsible for enforcing the legislation were not aware of the provisions and their mandate and how the enforcement of compulsory education was 'actively discouraged' from the early 1960s. In other words, free and compulsory education failed to have any impact in India and compulsion on parents and employers was rarely enforced. What is important to note is that the state itself was not duty-bound to provide education in any way, and the legislation was merely enabling in nature.

The 86th Amendment and the RTE Act brought a paradigm shift in the schema of the legislation, although the phrase 'free and compulsory education' continues to be used. The considerable confusion that surrounds the use of rather contradictory terms such as 'right' and 'compulsory' can be attributed to the ambiguity related to the nature of compulsion imagined in the legislation. When the Parliamentary Standing Committee (1997) deliberated on an early draft of the

constitutional amendment bill, it held that reference to compulsion in the language of a fundamental right can cause confusion and there is a need to clarify on whom does the compulsion lie under the 'fundamental right to compulsory education'. It recommended that the compulsion should lie on the state, which is duty-bound to fulfil and protect a fundamental right. The Saikia Committee (1996) had earlier observed that if compulsion is placed on the state, it will open the floodgates for litigation and state education departments will be overburdened with court cases. The Law Commission of India, in its 165th report (1998), had recommended a different approach to compulsion and the legislation as a whole. It had suggested that the central government adopt a minimal skeletal legislation leaving the state governments with guidelines to amend existing state legislations or enact new ones. It recommended making it compulsory for the parents and guardians to send their children to school. Furthermore, it recommended that the state legislation should provide for 'permissive compulsion', which would allow state governments and local authorities to enforce the law selectively in a phased manner, grounds for exemption from compulsory schooling, and minimum and maximum punishments that can be imposed on defaulting parents. It observed that persuasion and incentives are not enough and some amount of compulsion is necessary. It clarified that 'a statute imposing compulsion is no encroachment on any fundamental right, for no one has any right to remain ignorant and illiterate'. The report also extended the idea of compulsion to obligation on the state, parents, and society as a whole. These ambiguities around the nature and meaning of compulsion continued to remain unaddressed even in the legislation itself.

It is argued that the state that had failed to enforce compulsory education through its local authorities and attendance authorities would be ineffective in discharging its duties of providing education to all. Yet, compulsion has been imposed on the state. As the explanatory note provided under Section 8(1) of the RTE Act clarifies, the compulsion is on the state and not on the parents. Since the local authorities are required to ensure free and compulsory education of all children, it is not clear how the local authorities will ensure that all the children are in school without bringing in an element of compulsion. The new legislation works on the assumption that all children, if given a chance, would like to be in school, that children have stability in their lives and have a place to stay, and that they are interested in formal schooling and investing in their future. Moreover, there is no reference to the child and her agency. The legislation, which provides children a right, does not factor in possibilities that children may exercise their agency and not wish to attend school. Therefore, children effectively are also under the compulsion to attend schools.

### *Is compulsory education free?*

National and international law prescribe that compulsory education is also 'free'. This implies that while parents are under the compulsion to send their children to school, the state is under the obligation to provide such education free of charge. Even though 'right to free and compulsory education' is a universally established legal norm, Tomasevski (2006) argues that in developing and transition countries, up to 35 per cent of the cost of education is borne privately. This goes against the principle that education should be free for the users because getting educated is mandatory for all children. Her review of education law and practice in 170 countries shows that more than 20 different charges can be imposed on children, and children are pushed out of schools as the costs of schooling increase. Wherever countries have compensated families for lost revenue in sending children to school, there has been better retention of children in education. Even though India has the highest number of child labourers in the world, the notion of free education in India does not include the idea of compensating parents for the opportunity costs involved in sending their children to school instead of sending them to work as wage labour.

Free education has meant that government schools would not charge fees at the elementary level. Tilak (1996) shows how this entitlement of free education even in a restricted sense is violated by government schools. Using National Sample Survey Organisation (NSSO) data, he shows that households spend large sums of money on acquiring primary education, and students pay tuition fees, examination fees and other fees even in government primary schools, and incentives are not available for all students. Against this background, it is pertinent to note that Section 3(2) of the RTE Act provides that ‘no child shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing the elementary education’. This is applicable in government schools and in unaided non-minority private schools for children admitted under the provisions of Section 12(1)(c),<sup>12</sup> unlike the colonial education legislation which guaranteed free education only in government schools. Although state rules have reiterated that no charges or fees should be levied by private schools on children admitted through this provision, evidence shows that schools have imposed various kinds of fees on these children. Furthermore, most private schools have not received timely and complete reimbursements from state governments, resulting in the schools passing on these charges to the children (Mehendale *et al.* 2015; Sarin and Gupta 2014). An important underlying principle on which the provision of free education rests is the premise that education is a charitable activity and cannot be run as a profit-making enterprise.<sup>13</sup> Yet, the RTE Act shies away from applying this principle in the regulation of private schools and does not deal with the issue of high fees charged by private schools.

To summarise, the 86th Amendment and the RTE Act use the term ‘free’ and ‘compulsory’ in a manner very different from the colonial legislation on free and compulsory education. The entitlement to free education is now extended to unaided non-minority private schools, but what constitutes ‘free education’ in these private schools is left widely open-ended. While the compulsion was clearly on the parents (and partially on the employers) in the older legislation, the new legislation places compulsion primarily on the state (at all three levels – centre, state, and local authorities), on private schools, parents, and effectively also on children. The idea of compulsion does not fit into the new vocabulary of rights and entitlements. The term is a superfluous remnant. As the legislation provides for duties of the state, it was not necessary for the legislation to carry the term compulsory in order to convey that the compulsion is on the state. On the other hand, by keeping an anachronous term such as compulsion, it has left room for ambiguities in interpretation and subtly underlined the idea of ‘shared compulsion’, wherein the compulsion is in fact placed on not just the state but also on the private entities (schools as well as parents) and the children themselves.

## Gaps and issues

The process of policy-making is essentially a political one, which entails balancing and mediating between contesting interests, values, and priorities. This is true of the process of law-making in India, wherein democratic processes such as expression of political contestation do not come to a close with the formulation of legislation, but carry over and resurface during the continuous processes of interpretation and implementation. A number of ambiguities (both conceptual and normative), gaps, and questions that remained unsettled, negotiated, and ignored during the process of formulation of RTE, have surfaced between 2010 and 2015, a period when RTE was being tested as a ‘lived document’. The scope and applicability of the RTE, its limits and significance, the meaning of its provisions, and its relation to other legislative norms have been elaborated upon by all three arms of the government. Parliament amended the RTE Act in 2012 and specified a definition of children with disabilities, their right to home-based schooling, private

unaided schools, and minority institutions with School Management Committees playing an advisory role. The state legislature of Rajasthan and Karnataka have contemplated amending the RTE Act for their respective states.<sup>14</sup> Five years after having supported the adoption of the original Act, these state governments are considering amendments that will address their specific requirements and concerns about the RTE Act. The proposals for such amendments underline the fact that RTE is subject to testing and amendments through a process of continued contestations among various stakeholders. The executive has utilised its powers to give directions under Section 35(1) and has issued a number of explanatory advisories and guidelines on matters such as neighbourhood schools, screening procedures, grievance redress by local authorities, and so on. These directions have intended to clarify the scope of specific provisions and put some of the controversies to rest. The third arm of the government, the judiciary, has played a crucial role in interpreting the scope of duties and rights enunciated in the RTE Act, particularly the exclusion of minority-run schools from the purview of the RTE Act.<sup>15</sup> This brief comment on the role of the three arms of the government in dealing with enduring tensions and contestations about the RTE Act reflects the discordance that prevails between these institutions. For instance, executive actions (and inactions) pertaining to Teachers' Eligibility Tests have been challenged in the Courts.<sup>16</sup> Although the legislature intended that certain provisions such as recognition of private schools<sup>17</sup> and provision of qualified teachers<sup>18</sup> be time bound, the state governments have not implemented these provisions within the stipulated timeframe, thereby diluting the legislative intent.

While the RTE Act passes through a course of re-interpretation and revisions, two distinct streams are evident. The first stream consists of different issues and questions pertaining to the legal provisions that are on the 'official agenda'. These are questions and problems that the government itself recognises as being worthy of review and reconsideration. These are backed by interest groups and stakeholders, including school managements, parents, teachers, and others. These issues straddle and find space between the official agenda and review as well as the public discourse, which is largely shaped by the media. One example of the issues falling under the first stream is that of the application of the RTE Act to the minority-run institutions, which was not mentioned in the legislation itself. Given that religious and linguistic minority schools have a constitutional right to establish and administer institutions without state interference (Article 30 of the Constitution), the imposition of, particularly, Section 12(1)(c) requiring private schools to offer admission to children of disadvantaged and economically weaker backgrounds was challenged in the courts. In a way, the silence of the legislation on this matter necessitated the courts to interpret and settle it.<sup>19</sup>

Another example is that of quality of education, which is not explicitly defined although all schools are required to ensure particular standards of infrastructure, duration of class hours, qualified teachers, curriculum, and evaluation (Mehendale 2014). In a system governed by the principles of New Public Management and goal-driven regulation (Dale 1997), quality is construed as production of minimum learning outcomes; the fact that the RTE Act does not guarantee these measures of quality is being questioned. Data from the National Achievement Survey (Government of India, n.d.) and Annual Status of Education Reports (ASER 2014) show that a large number of students are unable to demonstrate minimum competencies in language and mathematics, and it is contended that the RTE Act is unable to address this paradox. States like Gujarat and Kerala have tried to bring in references to learning outcomes and independent assessments within the state rules, thereby attempting to guarantee right to 'quality' education.<sup>20</sup>

The issue of corporal punishment in schools found a place on the official agenda, with the guidelines issued by the National Commission for Protection of Child Rights in response to increasing cases of corporal punishment in schools. Being a recommendatory body, the

enforceability of these guidelines is limited, yet it has brought to light the inadequacy of existing legal provisions on corporal punishment. Not only is there no separate offence under the Indian Penal Code on corporal punishment meted out by those who are *in loco parentis*, but in fact it takes a lenient view, with Sections 88 and 89 providing immunity to a person inflicting corporal punishment on a child if such punishment is inflicted ‘in good faith for the child’s benefit’ (NCPCR, n.d.). There has been a lot of contention around the no-detention provision and the requirement of continuous and comprehensive evaluation (CCE), bringing these matters back to the drafting table. The Gita Bhukkal Committee (Ministry of Human Resources Development 2014) objected to these provisions and recommended that learning outcomes are measured in schools, that ‘performance-driven culture’ is catalysed in the schools, and no-detention is implemented in a phased manner.<sup>21</sup> The Central Advisory Board on Education (CABE), the highest federal advisory body on education, recommended that the no-detention policy under the RTE be revoked.<sup>22</sup> The state of Rajasthan has proposed to amend the RTE Act to delete the no-detention clause in its application within the state.<sup>23</sup>

The second stream consists of issues and questions pertaining to the RTE Act that remain on the periphery and have not yet become part of the official agenda. Despite the backing of interest groups and civil society organisations, these issues have neither received serious attention and consideration of policy-makers, nor have they been at the forefront in the public discourse and media coverage. They continue to remain on the periphery as ‘gaps’ or agenda issues-in-waiting. For example, the definition of teacher and her status is not included in the RTE Act. In fact, it remains silent on who is a teacher, particularly with reference to her status and position within the school, the education system and effectively within society as a whole. Although it specifies the minimum qualifications that a teacher has to fulfil and the duties she is bound to perform, it does not deal with the differentiated working realities of elementary school teachers in India. The presence of various categories of teachers, referred to by different names, appointed by different authorities (both public and private), on different service terms and conditions, with different kinds of job requirements, has not been acknowledged by the RTE Act. The fact that the state governments are primarily responsible for decisions on teachers’ service matters has been a convenient ‘escape hatch’ for the central government.

Another example is that of the rights of young children to early childhood care and education, which was debated during the formulation of the RTE Act, but was included only as a discretionary obligation of state governments. Since then, the issue has remained on the periphery despite advocacy groups demanding its inclusion through an amendment. Given that different parent ministries are responsible for school education and early childhood care and education, the matter has remained unresolved within the government itself. Similarly, lack of inter-ministerial coordination around child-related legislation, particularly children with disabilities, child labourers, children in need of care and protection, and children allegedly in conflict with the law, has pushed the right of education of these categories of children to the margins. Even though these categories together account for the majority of out-of-school children and hence deserve to be seen as primary beneficiaries of the right to education, the existing legal provisions are inadequate in addressing their actual needs. Another key matter that has seen state indifference is the establishment of effective mechanisms for grievance redress and monitoring. The local authorities and the Commissions for Protection of Child Rights at the central and state levels, although meant to dispense with cases and violations under the RTE Act through a more accessible administrative channel, have remained non-functional, thereby leaving the right-holders with the sole option of taking a judicial recourse. Given that such an option of approaching the High Court or Supreme Court is beyond the reach of those whose rights stand violated, the right remains largely unexercised by the primary right-holders.

The location of issues in either stream is not on account of their 'merit' in terms of how critical they are to the fulfilment of the objects of the RTE Act. On the other hand, they reflect the political process of balancing between the competing interests that continue to be determined by complex factors. In a democratic society, the constant shaping and re-shaping of public opinion and political preferences and the slow, iterative response of policies/legislation to such processes ensures that no change is drastic and unimplementable. The RTE Act, although appearing only as an aspirational piece of legislation, shows the way in which school reforms are headed.

## Conclusion

The recognition of the right to education as a justiciable Fundamental Right is a milestone in the history of education in India because of its legal, political, and administrative significance. It has heralded a significant departure from the earlier colonial legislation in terms of the way in which 'free' and 'compulsory' have been understood and defined. This corresponds to the changing education scenario and emerging role of private actors in education provision, which the new legal regime tries to simultaneously accommodate and regulate. The process by which the right to education became a constitutional right and the ensuing enactment and implementation of the RTE Act manifest the underlying contestations and tensions. A selective surfacing of some of the issues on the official agenda, while sidelining other critical ones and the resulting reviews, revisions, and reimagination of the original legislative intent indicates that the RTE Act remains a constantly negotiated instrument. Lack of acknowledgement of the complexity of implementation and the resulting slow pace at which the legal provisions are interpreted and mediated at the local level could result in summarily dismissing the workability of specific legal provisions or the legislation itself. Given the significance of this Fundamental Right, there is a need to guard against any such premature dismissal of the established statutory norms.

## Notes

- 1 AIR 1992 SC 1858.
- 2 (1993) 1 SCC 645.
- 3 For example, the South African Constitution, which provides for the right to basic education, including adult education.
- 4 The Compulsory Education Law of People's Republic of China (1986, revised in 2006) provides nine years of free and compulsory education and mandates the state to guarantee funds. The Japanese Constitution and the Basic Act on Education (2006) and the Basic Plan for Promotion of Education guarantee nine years of free and compulsory education. In the UK, the Education and Skills Act, 2008 was amended so as to guarantee state-provided free and compulsory education to children of 5–18 years.
- 5 See Article 2 of the International Covenant on Economic, Social and Cultural Rights, 1966 and the UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10, available at: [www.refworld.org/docid/4538838c22.html](http://www.refworld.org/docid/4538838c22.html) (accessed 27 October 2015).
- 6 The Performance Audit Report (Report no. 15 of 2006) of the Comptroller and Auditor General of India highlighted that

the objective of SSA was to enroll all out of school children in school, education guarantee centres, alternate schools and back to school camps by 2003. The date was revised to 2005 only in March 2005. However, out of 3.40 crore children (as on 1 April 2001), 1.36 crore (40 per cent) children in the age group of 6–14 years remained out of school as on March 2005 four years after the implementation of the scheme and after having incurred an expenditure of Rs. 11133.57 crore.

(Para. 7.3.2)



- 7 'Mission mode' refers to projects such as Sarva Shiksha Abhiyan that have clearly defined objectives, scope, implementation timelines and milestones, as well as measurable outcomes and service levels. These were donor-supported and were implemented by a structure that ran parallel to the state structure in terms of funding, accounting, and monitoring, but was run with members from the state education department and consultants.
- 8 *Society for Unaided Private Schools of Rajasthan v. Union of India* (2012) 6 SCC 1.
- 9 Article 19(1)(g) is a fundamental right which provides freedom to practise any profession, or to carry on any occupation, trade, or business.
- 10 Article 19(6) is a fundamental right which states that nothing provided for in Article 19(1)(g) can prevent the state from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by said subclause.
- 11 Nineteen states and Union Territories had legislation on free and compulsory education as per the 165th report of the Law Commission of India (para. 6.2). These were adopted between 1917 and 1995 and were loosely modelled on the Delhi Education Act, 1960 with some state-level variations. See also Juneja (2003) for a list of pre-Independence and post-Independence legislation on compulsory education.
- 12 Section 12(1)(c) provides that private schools should allocate 25 per cent of their seats starting Grade 1 or preschool, whichever is earlier, to children belonging to disadvantaged and economically weaker sections. This is supplemented by Section 12(2) which mandates state governments to compensate the private schools to the extent of per-child expenditure incurred by the state or the actual amount charged due to the child, whichever is less.
- 13 See Supreme Court decision in *P.A. Inamdar v. State of Maharashtra* decided on 12 August 2005 and reported in (2005) 6 SCC 537.
- 14 State amendment of a central legislation is possible within the framework of Article 254 of the Constitution. States can bring in an amendment as education is a concurrent subject, but they will have to seek the President's assent if it has to survive a challenge of repugnancy with the Central Law as per Article 254(2). If they don't seek the President's assent, the bill will be hit by Article 254(1) and can be challenged on grounds of repugnancy. The proviso of Article 254(2) allows Parliament to bring in legislation that can even repeal such a legislation brought by the state.
- 15 See *Pramati Educational & Cultural Trust v. Union of India* (2014) 8 SCC 1.
- 16 A large number of cases filed at the High Court level come from aggrieved candidates who are challenging the state decisions on eligibility criteria, relaxation of norms on pass percentage, declaration of results, and appointments.
- 17 As per Section 19 of the RTE Act, schools were given three years after the commencement of the Act to meet the infrastructure norms as specified under the Schedule of the Act.
- 18 As per Section 23(2) of the RTE Act, state governments were given five years after the commencement of the Act to put in place adequate teacher educational institutions in the state.
- 19 See *Pramati Educational & Cultural Trust v. Union of India*.
- 20 Rules notified by Gujarat and Kerala both refer to provision for independent periodic assessments to present school quality reports (Gujarat Rule 27 and Kerala Rules 7(i) and 20(3)). Gujarat allows schools seeking recognition to relax the infrastructure norms as long as they are able to demonstrate learning outcomes (Rule 15). Kerala only prescribes setting up of norms and standards on quality (Rule 7a).
- 21 Opinions of experts and politicians were divided on this crucial issue.
- 22 This recommendation was made during the 63rd meeting of the CABE held on 19 August 2015.
- 23 See The Right of Children to Free and Compulsory Education (Amendment Bill), 2015 (Bill no. 34 of 2015), introduced in the Rajasthan Legislative Assembly.

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