

Right to Education of the Disabled*

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Abstract

The present lecture tries to demonstrate as to how persons with disabilities have been neglected in India, both by the society as well as by the government. The desire of such persons with disabilities to join the mainstream way of life remains a distant dream for now as the present mechanisms and policies in place are grossly inadequate to effect any real change in the current scenario. It is in this light that this lecture discusses the right of disabled children to receive education for their overall development since this right is a fundamental right that is available to every child, including the ones with any form of disability. However, any reformatory measures in this area are seriously impeded by a lack of a standardised and uniformly accepted definition of disability in India, leading to varying and incorrect estimates in identifying children with special needs. Different data bases have their own parameters of judging and identifying disability, leading to large discrepancy in figures.

The rights of disabled children have been viewed in a serious light by many nations in the recent past in pursuance of various International Conventions and other instruments. India also being a signatory to few of such Conventions has enacted

legislations specific to the disabled. In fact, now with the enactment of the Right to Education Act, there is a duty upon the government to swiftly move on the correct path and fulfil its constitutional obligations in providing free and compulsory

* Written text of Mahatma Gandhi Fourth Memorial Lecture delivered on 25 January 2011 at NIE Auditorium, NCERT, New Delhi by Justice Ajit Prakash Shah.

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education to disabled children. However, the measures in the said Act, as also in the other legislations in India are inadequate and do not hold a great amount of promise for children with special needs as most measures in these enactments are short-sighted. Therefore, there is an urgent need to study the models of other nations which have enacted legislations in this field so as to gain a better insight into the flaws from which our systems continue to suffer.

The lecture touches upon the crucial debate whether it is justified to continue with the system of special schools or should an all-out effort be made to abolish such system of education and provide a complete inclusive education to such disabled children since such special schools have the tendency to further alienate such children from the mainstream way of education. It is also to be considered whether such a move is tenable given the present scenario and limited resources at hand.

It is, therefore, evident that educational measures for the disabled have been highly myopic in India and the government is increasingly finding it difficult to tackle this problem. The solution however, lies in not viewing these measures and policies and compensatory in nature, but realising that such children with disabilities are equally human and have certain fundamental rights, including the right to receive effective education, which cannot be sacrificed at the altar

of negligence and unpreparedness of the government.

RIGHT TO EDUCATION OF THE DISABLED

I am conscious of the honour in being invited to deliver the Mahatma Gandhi Memorial Lecture at one of India's leading institutions for educating children. Gandhiji has influenced our lives for several decades now. His approach to most issues was down to earth and holistic, be it social, cultural, economic, health or education. He envisioned a complete transformation of the system of education by way of his social philosophy and the curriculum of what he called 'basic education', which favoured the child belonging to the lowest stratum of society. Therefore, Gandhiji's vision of employing education as a process of social transformation sought to alter the symbolic meaning of 'education' and to change the established structure of opportunities for education.

For Mahatma Gandhi, education meant an all-round development of the faculties, best attained through action. He believed that mere thrust of information on the mind only puts an unnecessary burden on the memory and does not lead to any real gain. Therefore, imparting education should be a wholesome and complete process and not be an isolated exercise. Such a holistic education helps an individual to navigate all the predicaments of life leading to development of a well-balanced

personality. He also believed that every individual child should have full opportunity for the balanced and harmonious development of all her/his faculties and should acquire the capacity for self-reliance in every aspect of a clean, healthy and cultured life, together with an understanding of the social, political and moral implications of such a life.

Six decades after the independence, the promise of universal basic education still remains unfulfilled. By the 86th amendment the Right to Education (between the age of 6 and 14) has been declared as a fundamental right, but basic education still remains a distant dream for many. In this lecture, I have made an attempt to focus on the right to education of the most vulnerable and marginalised class, the disabled.

DISABILITY IN INDIA

India has a huge number of persons who are afflicted with one form of disability or the other. Even with the advancements made in the field of medical science, no visible impact has been made in our country due to the sheer number of persons who are suffering from disabilities. Furthermore, in India, it is very difficult to conclusively ascertain the total number of such disabled persons as the estimates vary due to lack of unified and commonly accepted definition and understanding of disability. The two data sets that are largely relied upon for this purpose

are the 2001 Census and the 2002 National Sample Survey (58th Round).¹

The 2001 Census, which covers five types of disability, gave prevalence rate of 2.13 per cent or 21.91 million people with disabilities out of the total population of 1028 million.² The National Sample Survey Organisation (NSSO), 58th round survey arrived at figure of 1.8 per cent of the population (18.5 million) having disability. Despite the fact that such figures are by no means small, the actual number of disabled persons are grossly underestimated, especially when certain other credible data sets are also considered.³ The Registrar General of India⁴ admits that the official Indian data on disability are unreliable due to under-reporting of disability fearing social stigma. Therefore, the efforts for advancement in this area are highly impeded by such under-reporting and lack of actual data.

The fact that our country houses one of the highest numbers of disabled persons in the world raises a grave concern, especially when the right to lead a life with dignity is a fundamental right enshrined in our Constitution. In this lecture, I wish to lay stress upon the aspect of education for the disabled which, also being a fundamental right, is integral to lead one's life with dignity. Education is perceived as the most potent instrument of social change and empowerment. The value of education is in fact, more greatly felt

in a nation like ours where ills such as poverty and illiteracy threaten to diminish the sheen of national growth and development.

THE SOCIAL REALITY OF CHILDREN WITH DISABILITIES

In India, it is a common experience that the disabled have hitherto found themselves unable to fit in the mainstream and be accepted as a part of the same. Therefore, marginalisation from the mainstream way of life is greatly prevalent among the disabled. In fact, children with disability are five times more likely to be out of school than children belonging to Scheduled Castes and Scheduled Tribes.⁵ Moreover, when children with disability do attend school they rarely progress beyond the primary level, leading ultimately to lower employment chances and long-term income poverty.

In our country, unfortunately, the government's efforts for social upliftment have not been uniformly adequate across all marginal/disadvantaged sections. It would not be incorrect to say that in comparison to the other disadvantaged groups, the disabled persons have largely remained neglected. The difference between the commitment of the government in ensuring welfare of the disabled persons as compared to that of the Scheduled Castes and Scheduled Tribes can be seen from the fact that Article 46 of the Constitution makes a straightforward commitment to promoting the

'special care and education' of SC/ST population, whereas Article 41 referring to children with disabilities, states:

The State shall within the limits of its economic capacity and development make effective provision for securing the right to work, old age, sickness and disablement.

The clause, within the limits of the State's economic capacity and development, gives a large amount of leeway to the government for justifying a very slow pace of implementation of welfare measures for the disabled persons and thereby ignoring its social and constitutional commitment.

As per NCERT survey, about 84,000 children with disabilities were enrolled in schools in 1998; and an unpublished data gathered for the MHRD suggested that approximately 55,000 children with disabilities were enrolled in schools in 1999.⁶

The various other data sets again give diverse figures, differing in most cases, by a large percentage. Even as per these figures, using the highest estimate of the total population of children with disabilities, less than 1 per cent of children with disabilities attend school. Surprisingly, enrolment ratios for those with disabilities aged 5 to 18 years in a mainstream school were higher in rural areas than in the urban areas.⁷ The figures of enrolment also vary according to the type of disability.⁸ Even the World Bank Report of 2007 and NSSO acknowledge that the

severity of impairment is an important variable, with almost three quarters of children with severe disabilities being illiterate and the same share do not attend school. At the other end, those with only mild disabilities, who do not necessarily need any aids/appliances or significant modifications in teaching and learning methods, close to one-third of these are not in school. Thus, across the levels of severity, irrespective of the nature of disability, a shared picture of lack of progress beyond primary school emerges distinctly.

IDENTIFICATION OF CHILDREN WITH DISABILITY

As already stated above, due to the lack of unanimity of an acceptable standard/definition of disability, there is confusion with regard to the actual number of disabled persons in our country. The data however, get even more confusing when the numbers are calculated individually for each state where differences between identification rates are much higher. In Rajasthan and Uttar Pradesh, only 0.31 per cent and 0.7 per cent children have special needs, while in Maharashtra and Himachal Pradesh, the figures are much higher at 2.45 and 2.3 per cent respectively.⁹ Therefore, it is not difficult to fathom that such discrepancies in data and lack of uniform standard shall be greatly detrimental to any policy initiatives that may be undertaken for the welfare of these disabled persons. It is for this very reason of absence

of proper and correct identification methods of children with special needs, the government had launched the *Sarva Shiksha Abhiyan* (SSA). However, even the SSA does not provide a definition of children with special needs but assumes that such a group is synonymous with children with disabilities. The various kinds of disabilities listed under the SSA are:

- Visual impairment
- Hearing impairment
- Mental retardation
- Locomotor impairment
- Learning disability
- Cerebral palsy
- Multiple disabilities, and
- Others

The SSA states that identification procedure should be carried out by a competent team comprising of doctors, eye specialist, ENT specialist, resource teachers and general teachers. However, the complete absence of parents and the child is striking as it amounts to excluding the very people from the decision-making process, for whose welfare such measures are sought to be implemented and enforced.

RIGHT TO EDUCATION AS A BASIC FUNDAMENTAL RIGHT

The Universal Declaration of Human Rights (1949), the United Nations General Assembly Charter (1959) and the United Nations Convention on the Rights of the Child (1989) all acknowledged education as a human right. The Salamanca Statement and

Framework for Action on Special Needs Education (1994) suggested 'inclusion' in mainstream education to be the norm so that all children have the opportunity to learn. The Millennium Development Goals endorsed at the UN Millennium Development Summit (September, 2000) targeted the eradication of extreme poverty and hunger and the achievement of universal primary education as its first two goals. Therefore, with the emphasis on the importance of education universally, the idea of inclusive education and the right of a child to receive education gained strength across the world, including India.

Even before any legislative measures were undertaken by India, such as the Persons with Disabilities Act, the Supreme Court had declared in the *Mandal Commission case*¹⁰ that even though words 'backward class of citizens' as used in Articles 15 and 16 do not cover persons with disability, the Constitutional Scheme and spirit of Article 14 allows for reservation or other kinds of affirmative action in favour of persons with disability. In the case of *Unnikrishnan J.P. vs State of Andhra Pradesh*,¹¹ a Constitution bench of the Supreme Court held that the right to education was a fundamental right available to all the citizens of India but the said right is available only up to the age of 14 years.

However, Right to Education, was for the first time recognised as a fundamental right in the case

of *Anand Vardhan Chandel vs University of Delhi*, wherein the High Court of Delhi stated that receiving education is a vital part of 'life and personal liberty' guaranteed by way of Article 21 of the Constitution of India. The landmark though, undoubtedly came with the introduction of the 86th Constitution Amendment Act which brought about the following three insertions to the Constitution and led to the enactment of the Right to Education Act:

- (1) Introduction of *Article 21-A*, which provided that the State shall provide free and compulsory education to all children between the ages of 6-14 years in such a manner as the State may by law determine.
- (2) An amendment to *Article 45*, that is the provision for early childhood care and education to children below the age of 6 years; the State shall endeavour to provide early childhood care and education for all children until they complete the age of 6 years.
- (3) In *Article 51-A*, after clause (j), the following clause (k) has been inserted: *a parent or guardian shall provide opportunities for education to his children or ward between the ages of 6-14 years.*

However, the above Constitutional amendment is only a means to realise the right to education. Given the state of affairs in the education sector (especially the reality of the schools run by government bodies lacking even the basic infrastructure),

realisation of such an ideal shall only be a distant dream.

CRITICISM OF THE RIGHT TO EDUCATION (RTE) ACT

India was one of the first countries to ratify the United Nations Convention on Rights of Persons with Disabilities (UNCRPD), in October 2007, which says that *State parties shall ensure that persons with disabilities are not excluded from the general education system on the basis of disability and that children with disabilities are not excluded from free and compulsory primary education or from secondary education on the basis of disability.* Yet, children with disabilities have not been explicitly included as a category in Section 2(d) of the RTE Act, which otherwise lists children belonging to disadvantaged groups. However, the same section also allows the appropriate government to specify, by notification, any other group of children who are disadvantaged as a result of any other factor.

Free and compulsory education for children up to the age of 14 was to be realised within 10 years of adopting the Constitution of India. However, it took nearly 40 years and a few assertions by the Courts of the country to move the government to draft the first bill for amending the Constitution so as to make education a fundamental right. In 1950, when the founding fathers created the Constitution, the logic of limiting the age of compulsory schooling to 14 was ostensibly based on the prevalent

system where matriculation was not important. However, today after sixty years, when one considers that the economy is growing at 8 to 9 per cent, it would be irresponsible to provide for basic education of minimum quality only up to the eighth standard. Therefore, there is an urgent need to go beyond the age group of 14 years and also include children up to 18 years.

Furthermore, as per Census 2001, there are approximately 60 million children in the age-group of 3-6 years. While the 86th Amendment to the Constitution does not cover children less than 6 years of age, it is universally accepted that there is a need for early childhood care, especially for the disabled since in many cases, a great amount of damage (sometimes irreparable) occurs in the child, both mentally and physically, during the initial years. Therefore, there is a greater need to treat these children specially and address the problem of initial care and attention of such children.

That the government is not vigorously pursuing the welfare policies of disabled persons can be understood from the fact that between the Ministry of Human Resources and Development (MHRD), and Ministry of Social Justice and Empowerment (MSJE), there is no complete and coherent demarcation of duties with regard to education of disabled. As a result of this confusion and lack of coordination between the two ministries, the implementation of the

policy initiatives has largely suffered. Total fund allocation on children with special needs, most of which directly went to the specialist national institutions for the disabled for aids and appliances for the disabled. In the same year, a low 1.0 per cent of the total MHRD expenditure for education was allocated to the inclusive education arm of the Sarva Shiksha Abhiyan.¹²

LEGISLATIVE AND POLICY FRAMEWORK

Till the 1960's, although the United Nations recognised the importance of education, it did not undertake any cogent effort to make education a fundamental right. It was only after the coming in force of the International Covenant on Economic, Social and Cultural Rights, 1966 that the United Nations started viewing education as a right. Thereafter, in 1989, the rights of a child were further crystallised in form of Convention on the Rights of the Child.

Many countries have long been trying to address the need to spread education as one of its top priorities keeping in mind the international commitments (conventions, treaties, etc.) as well as its impending domestic needs. These international mandates and policy frameworks have been instrumental in providing an impetus to the efforts of the nations which have ratified these mandates.

However, apart from recognising the importance of imparting education, the International frameworks have also realised that

the disabled children equally have a right to be empowered with this instrument of social change.¹³ *The 1989 United Nation Convention on the Rights of Child*¹⁴ states that disabled children have the 'right to achieve participation in the community and their education should lead to the fullest possible social integration and emotional development'. The 1990 *World Conference on Education for All: Meeting Basic Learning Needs*¹⁵ states that the learning needs of the disabled demand special attention. *The Salamanca Statement and Framework for Action on Special Needs Education (1994)*¹⁶ stipulates that disabled children should attend neighborhood school. It declares that regular schools with this inclusive orientation are the most effective means of combating discriminatory attitudes, creating welcoming communities, building an inclusive society and achieving education for all. India has been a signatory to all these declarations.

All these international mandates played an important role in highlighting the situation of people with disabilities, especially in the field of education. Therefore, it does not come as a surprise that many of these mandates have shaped new national legislations and policies. The following legislations have been enacted in our country as a result of increase in importance of the rights of the disabled persons:

- *Rehabilitation Council of India Act (1992)*: states that children with

special needs will be taught by a trained teacher

- *Persons with Disabilities Act* (1995): educational entitlement for all children with special needs up to 18 years in an appropriate environment.
- *National Trust Act* (1999): provide services and support to severely disabled children.

These enactments have further helped shape the comprehensive National Action Plan for Inclusion in Education of the Children and Persons with Disabilities,¹⁷ and the National Policy for Persons with Disabilities in 2006.¹⁸ Over the years, the government has launched various programmes and schemes such as the Project Integrated Education of the Disabled Children (PIEDC) launched in 1987 in collaboration with UNICEF. Thereafter, the Integrated Education for Disabled Children (IEDC) scheme, which was initially launched in 1974, was subsequently revised in 1992. This scheme was shifted from the Ministry of Welfare to the Department of Education and greater assistance was provided to children with disabilities in mainstream schools. The IEDC is currently operative and offers financial assistance towards the salary of teachers, assessment and provision of aids and appliances, training of special teachers, removal of architectural barriers, provision of instructional materials, community mobilisation, early detection and resource support. It covers 15,000

schools and has enrolled a total of 60,000 children.

After India became signatory to the Salamanca Statement, 1994, a substantial shift towards 'inclusive education' was seen. With regard to inclusive education, it is important to consider two government reports, i.e. the Sargent Report, 1944,¹⁹ and the Kothari Commission.²⁰ Both these reports recommended the adoption of a 'dual approach' to meet the educational needs of these children. These reports suggested that children with disabilities should not be segregated from normal children; rather, integrated education should be adopted. The Kothari Commission observed that many challenged children find it psychologically disturbing to be placed in an ordinary school and in such cases they should be sent to special schools. The Sargent Report also endorsed similar recommendations. Thus, both these reports stressed the need to expand special and integrated facilities. This dual approach continued for the next 20 years and was reaffirmed in the National Policy of Education.²¹

However, it would not be wrong to say that the traditional understanding of disability in our country is based on a 'medical' or 'compensatory' model. Such a model, being largely in the nature of an affirmative action only seeks to undo the wrongs that the disabled have suffered at the hands of the non-disabled. This model does not tend to

grant such facets as a matter of right to such disabled persons, thereby undermining the fact that the persons with disability are equally human and have as much a right to live with dignity as any other non-disabled persons. However, in our society, it has been commonly understood that unless the children are cured of the disability, they will not be able to participate in the mainstream society. One of the consequences of medical model of understanding of disability is the segregation of disabled people. The distress and humiliation caused by such enforced segregation is intensified by neglect and a disturbing lack of care.

Even the Persons with Disability Act has a medical perspective. Though the Disability Act deals with education rights, the nature of the Act is not rights based but the governments are being asked to do the best they can for persons with disabilities. Capability development of persons with disabilities on an equal basis with non-disabled persons is not conceived by the Disability Act. It is rather concerned with allowing concessions to persons with disabilities.

LEGAL FRAMEWORK IN OTHER COUNTRIES

Since the legal and policy framework in India is grossly inadequate and has so far not been very effective. Thus, there is an urgent need to bring in a great amount of change in the system by which we are seeking to bring the

disabled children into the mainstream education. However, experiences of the disabled children with regard to implementation and effectiveness of inclusive education has varied. In some cases, the experience has been quite positive and fruitful. Therefore, there is a need to study the education systems of such nation states in order to better understand the lacunae in our own system. The Special Education systems of a few nations are given as hereunder:

UNITED STATES OF AMERICA

Early American judicial decisions on special education indicate that till the late sixties, the education of disabled children was not a priority for the lawmakers.²² The Supreme Court of Massachusetts in 1893 upheld the expulsion from a public school of a child who was 'weak in mind.'²³

In 1919, the Wisconsin Supreme Court affirmed a lower court decision authorising the exclusion from a public school district of a child who had the academic and physical ability to benefit from school, but who drooled uncontrollably, had a speech impediment, and exhibited facial contortions.²⁴ This type of unchecked discrimination against challenged children continued until the mid-1900s. The Illinois Supreme Court ruled in 1958 that legislation requiring compulsory education for children and establishing programmes for challenged children did not require that a public education be provided for a mentally impaired child.²⁵

Legislations of many states allowed the exclusion of any child whenever school administrators decided that the child would not benefit from public education or that the child's presence would be disruptive to others. The same can be illustrated by the examples of a North Carolina statute which authorised criminal charges against parents who persisted in forcing the attendance of a challenged child after the school administrator had excluded the child from a public school.

However, by the late 1960s, the appalling condition of special education services was brought to the nation's attention by the civil rights movement and President Lyndon Johnson's War on Poverty. Public pressure on elected officials and school administrators to change existing policies escalated as special needs children assigned to 'dummy' classes became targets of prejudice and discrimination by their peers and some teachers. The problems manifested as a result of under-education, social stigma and emotional trauma to challenged children prompted concerned parents and citizens to call for urgent changes.²⁶

During the early 1970s, there were two decisions which articulated and essentially established the challenged child's right to a free appropriate public education: *Pennsylvania Association for Retarded Children (PARC) vs Pennsylvania*²⁷ and *Mills vs Board of Education*.²⁸

In both these cases, it was held that equal protection requires that children with disabilities be also accorded the same access to a public education as other children and that parents have due process rights related to their children's education.

As a direct response to the PARC and Mills cases, the US Congress enacted the Education for all Handicapped Children Act (EAHCA). The EAHCA was thereafter amended and is now known as the Individuals with Disabilities Education Act (IDEA). The primary purpose of the EAHCA was to grant financial aid to the states to enable them to provide challenged children with a free appropriate public education. Congress desire that parents need not resort to litigation to remedy their children's educational deprivation was also an important factor in the drafting of the EAHCA. However, a lack of specificity in drafting and subsequent Supreme Court interpretations of the EAHCA led to extensive litigation.

These Acts established the specific right of children with special needs to 'free appropriate public education' and also gave parents of such children the right to participate in and to challenge decisions made about their children's education. This new regime of laws emphasises the need for inclusiveness by laying down that as far as possible, challenged children are to be educated in regular classrooms. These Acts also specifically call for a substantial increase in funding for special education by state and local

governments. There is also an impetus under these Acts to bring back special children into the mainstream, who had previously been excluded from public education.

Under these acts, Although the school officials still retain primary control over the manner of education of these special children, but the introduction of increased parental rights and their assertive participation have greatly benefitted the children in the decision-making process by exercising a meaningful check on school officials' discretion.

SALIENT FEATURES OF THE IDEA²⁹

The IDEA is considered to be the backbone of the initiatives in the American state. Some of the key features of this Act are as hereunder:

A. Identification

A school district's obligation to locate and identify children with disabilities lasts until a child turns twenty-one. Not all disabilities are apparent early on, and many disabilities result from injuries or serious illnesses which can occur in a child's later years.

B. Referral

Children with suspected disabilities are 'referred' for consideration of whether the child has a disability requiring services. The most common referrals are from teachers and parents, but the district has an obligation to consider a referral from anyone with relevant information.

C. Evaluation

If the decision is made to evaluate a child, evaluation procedures must be completed within sixty calendar days from the date the parents receive notice of the decision to evaluate. The purpose of the evaluation is to establish eligibility for special education, provide the basis for planning the child's programme, determine any necessary related services and decide the child's placement.

D. Annual Review

Each year the school is required to conduct a review of the disabled children to ascertain the student's progress and to consider revisions. Placement in special education must also be reviewed annually.

E. Due Process

When disagreements arise between the parents and the school district about eligibility, evaluation, programming or placement, a due process hearing procedure may be invoked to resolve disputes.

F. Least Restrictive Environment

The term Least Restrictive Environment (LRE) has been applied to the requirement that in order to receive funding under the IDEA, states must ensure the following:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are

educated with children who are not disabled and that special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

G. Related Services

Related services provided under IDEA are transportation, and such other developmental, corrective and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services counselling services, including rehabilitation counselling and medical services except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with disability to benefit from special education and includes the early identification and assessment of disabling conditions in children.

The United States Supreme Court in *Board of Education vs Rowley*³⁰ made it clear that the IDEA does not entitle a child to enable him to reach his maximum potential. The IDEA ensures an 'appropriate' education, not the 'best' education. However, courts interpreting Rowley have made it clear that the educational benefit must be 'meaningful' and not de minimus. For example, the

Constitution of West Virginia states that 'the Legislature shall provide, by general law, for a thorough and efficient system of free schools'. This particular provision came before the Supreme Court of Appeals of West Virginia in *Pauley vs Kelly*,³¹ held that a thorough and efficient system of schools is one which develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically.

The Experience in U.S.A.

The goal of ensuring access to public education for students with disabilities has largely been met. Children with disabilities have moved in massive numbers from institutions, home education, or no education to their neighbourhood public schools. They have gone from learning in segregated environments to learning in regular education classrooms with non-disabled peers. Disabilities are being identified at a younger age, and many more infants and toddlers are receiving early intervention services. The IDEA has been a major force behind this progress, but credit is also due to parents and educators and to a general change in people's attitudes about children with disabilities.

United Kingdom

The U.K. has two significant legislations in Education Act, 1980 (for England and Wales) and the

Education (Scotland) Act, 1981. These Acts have greatly altered the rights of not only the children to receive education, but also that of their parents with regard to the admissions in school.³²

Under these Acts, firstly the parents have a right to request a particular school for their children. Secondly, the child must be admitted to the school unless a statutory ground of refusal exists. In England and Wales, officials could refuse the request, if granting, it would cause 'prejudice to the provision of efficient education or the efficient use of resources'. In Scotland, the primary ground of refusal was stated more restrictively; schools could refuse parents' requests only if granting them was 'likely to be seriously detrimental to order and discipline at the school or the educational well-being of the pupils there' or would require the hiring of new teachers or significant extensions or alterations to the school. The Scottish legislation limited justifications for refusing parents' school requests to conditions at the requested school.

The vague standard in the English and Welsh legislation allowed education authorities to use a much broader range of concerns to justify refusals, including conditions at other schools or in the authority generally. When officials refused a parent's request, parents could appeal to a local appeal committee. In Scotland, parents had a further appeal to the Sheriff (the lowest trial court judge).

In English law, the development of rights to education is limited by several factors, the most fundamental being the very nature of the British Constitution. The United Kingdom does not have a written Constitution and supremacy of Parliament is unchallenged. As a result, the courts do not have the power to strike down statutes which deny access to education on discriminatory grounds. However, an analysis of the English statutes reveals that they have been carefully drafted to avoid this possibility.

The U.K. legislations do not confer express rights to an education on children or parents. Education is universal and compulsory (up to age sixteen), but this is achieved by imposing duties on the Secretary of State for Education, Local Education Authorities (LEA) and parents which, collectively, secure a suitable education for every child. Thereafter, the parents who feel that the Local Education Authority (LEA) is failing to satisfy its statutory duties may complain to the Secretary of State, who has a corresponding power to direct the LEA to act.

Canada

The Canadian Human Rights Act, 1977 makes it unlawful to discriminate in the area of access to education on the ground of disability. The Canadian Charter of Rights and Freedoms guarantees equal opportunities to all Canadians, including those with a 'physical or mental disability'.³³

Access to education for disabled children tends to be dealt within the context of provincial inclusive education policies. In Canada, school districts are allowed to develop alternative achievement standards for children falling in different categories. *The National Council on Disability's 2008* review found that the development of these alternatives is uneven between states and generally lags behind the actual needs. In the leading Supreme Court case, Board of Education of the *Hendrick Hudson Central School District vs Rowley*, the Court held that 'personalised instruction with sufficient support services to permit the child to benefit educationally from the instruction is required'. Cases since *Rowley* have determined that the programme must provide for more than 'de minimus or trivial academic achievement' but is not required to offer 'every available service necessary to maximise a disabled child's potential'.

The limits to reasonable accommodation in Canada are set out in a Supreme Court case titled *British Columbia (Public Service Employee Relations Commission) vs BCGSEU*, known as the Meiorin case. The case outlined the relevant anti-discrimination provisions, explained the requirements for reasonable accommodation (and conversely undue hardship) and further described other anti-harassment and anti-bullying provisions in favour of the disabled children.

The Meiorin test for reasonable accommodation requires that the accommodation must:

- be rationally connected to the function to be performed
- be adopted in good faith
- be reasonably necessary to achieve the purpose or goal, and
- not impose an undue hardship on the service provider.³⁴

In Canada, a number of state Human Rights Commissions have also developed guidelines for 'accommodating students with a disability', for example, Ontario and New Brunswick state commissions.

Australia

There are several legislations in Australia that address the issue of discrimination in the education sector:

Disability Discrimination Act, 1992 and the National Disability Standards for Education (2005)

The *Federal Disability Discrimination Act, 1992* (FDDA) provides for the Attorney-General to issue mandatory standards covering any aspect of disabled people's right to participate fully in society. The Disability Standards for Education came into effect in 2005 and set out definitions of key concepts such as adjustments, reasonable adjustments and 'on the same basis', the phrase used extensively in the disability convention. The exceptions relate to unjustifiable hardship, protection of public health and special measures.

The *Disability Discrimination Act, 1992* imposes legal obligations and duties on schools in relation to students with a disability.

Section 22 of the Act states that it is unlawful for a school to discriminate against a student on the grounds of his or her disability by:

- Refusing or failing to accept his or her application for admission as a student,
- Denying or limiting him or her access to any benefit provided by the school or expelling the student or by subjecting the student to any other detriment,
- Developing curricula that will either exclude him or her from participation or subject him or her to any other detriment or by accrediting curricula having such content.

NEW SOUTH WALES EDUCATION ACT, 1990

The principles of this Act include that:

- every child has the right to receive an education,
- the education of a child is primarily the responsibility of the child's parents,
- it is the duty of the State to ensure that every child receives an education of the highest quality,
- the principal responsibility of the State in the education of children is the provision of public education.

Section 20 of the Act relates to assistance for government school

children with special needs. This section of the Act was amended in 2008 to include children with a significant learning difficulty as a category of children who may require additional support. The Education Act is also read with the *New South Wales Anti-Discrimination Act, 1977* which prohibits discrimination on the grounds of race and disability amongst other things. Disability is broadly defined under this Act in similar terms as under the *Commonwealth Disability Discrimination Act, 1992*.

CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD)

Recognition of rights of the disabled persons across many countries even prompted the United Nations to enact a convention entirely dedicated to the rights of such disabled persons in the United Nations Convention on the Rights of Persons with Disabilities which is a detailed instrument.

The United Nations Convention on the Rights of Persons with Disabilities was adopted on 13 December 2006. The goal of disabilities convention is stated as promoting, protecting and ensuring the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities.

At various points in the Convention, different rights such as right to life and liberty, right to equality before law, right to work, right to health, right to education, etc., are simply 'reaffirmed', or the convention obliges states to 'recognise' and

'guarantee' them. The very fact that these previously existing rights have been reaffirmed shows that these basic rights have hitherto not been properly accorded to the disabled since history has consistently been unkind to disabled people. Therefore, the Convention not only seeks to bring all the human rights of persons with disabilities under the same roof but also pushes towards making the existing rights applicable to persons with disabilities. The Convention makes a very significant step in recognising that persons with disabilities are entitled to the same rights as all human beings.

Although the Convention is not specifically described as an anti-discrimination convention in the same mould as CEDAW and CERD, there is no doubt that a concern about discrimination is at its core.³⁵ Although the anti-discrimination part of the Disabilities Convention does not do much in terms of renewing the concept of the human rights, the Convention outlines a number of key characteristics of the rights which are not otherwise specified in major international human rights instruments and therefore, the disabled group has continually suffered by such exclusion. The rights in this convention focus on the societal dimension of the rights experience, thereby departing from human rights' traditional emphasis on the relationship of the individual to the state. Thus, this Convention shows more sensitivity

to the mainstream human rights framework than was typically done by the previous instruments since the particular circumstances of disability have made it necessary to address them by way of a separate instrument. However, most significantly, the Convention stresses upon the need of mainstreaming and inclusive participation as a separate and equally important right.

Article 24 of the CRPD discusses education to the disabled and states that States Parties shall ensure an inclusive education system at all levels and life-long learning directed to full development of human potential and sense of dignity, talents and creativity, mental and physical abilities, to their fullest potential and enabling such persons to participate effectively in a free society.

INDIA'S OBLIGATIONS UNDER THE CRPD

By ratifying the CRPD, India has accepted the two-fold obligation to review all its laws and policies to bring them in line with the Convention and take measures against any action or practice that contravenes the Convention. Although the Right to Education provides for free and compulsory education to children between 6 and 14 years. However, keeping in mind that challenged children need special measures, challenged persons between 3 and 18 years should receive free and compulsory education irrespective of their physical, sensory or cognitive

impairments. This is so because children with disability suffer the maximum amount of damage early on in their life, which in some cases is also irreversible. Therefore, there is a need to identify such children at a very early age and take urgent steps for their educational welfare.

INCLUSIVENESS VS SPECIAL EDUCATION

The processes of educating the challenged children or 'special education' came to India in the last two decades of the 19th century through Christian missionaries. While special education enables the teachers to focus on the needs of the challenged children and these special schools are equipped with the resources that are required as per the needs of the challenged children. However, the special education system in the Indian scenario turns out to be an expensive investment and other alternatives need to be evaluated, analysed and decided upon soon, so that the goal of 'Education for All' is realised as it is not cost-effective in the rural area where the infrastructure is not at par with the urban India. It also leads to the segregation of the disabled and the same time is also considered to be violation of the Human Rights as it leads to the formation of a specific disability culture.³⁶

The idea of inclusion and thereby making the disabled children as part of the mainstream has gained strength in many countries now. The experience across the world shows

that special educational services has failed to provide appropriate educational services to children with disabilities and therefore, most students with disabilities must be taught in regular schools and classes. Special educational practices have very little positive impact on student achievement and this system contributes to the excessive fragmentation of the student's overall educational experience. If a child is suffering from a certain ailment, it is the duty of the state to bring the child at par with the others by way of including her/him in the mainstream schools, although with any additional support services that are required.

However, at this stage in our country, it would be too early to say that no special schools are required and all such existing special schools should be done away with. Since the difficulty in handing children with different kinds of disabilities varies with the severity of disability, recourse of enrollment of such children should be only when the nature of challenged is so severe that reconciliation of such children with the mainstream is not possible in any manner. Even if the special schools are to be completely eliminated and the challenged children must only be taught in regular schools, the vision, although noble, cannot be fulfilled overnight. There are a large number of factors and concerns that have to be addressed first, such as sensitising the non-disabled and creating awareness about disabilities, putting

in place an adequate infrastructure for the disabled, training teachers to aptly handle and encourage such challenged children, etc., before the dream of a complete inclusive education can be realised. Having said that, it is the fundamental duty of the state to provide for equally efficient system of education for such children, as also the fundamental right of such children to receive education, and therefore, the state cannot shirk from its responsibility by giving the excuse of budgetary constraints for not mainstreaming these children.

BARRIERS IN IMPLEMENTING INCLUSIVE EDUCATION

While the importance of inclusive education cannot be ignored, yet the said agenda is not short of a number of problems that are holding back the implementation of inclusive education on a large and varied scale. The problems in implementation persist both at the level of government policy and also at the level of implementation. While the policy would mandate that all children should go to school, in many cases, quality learning is not taking place, which is contradictory to the ethos of inclusive education. The reasons for the non-implementation of the inclusive education in India can be attributed to a number of factors which are both internal and external in nature. The external barriers exist before a challenged child before coming to and getting enrolled in

schools, which includes physical location of schools, non-availability of school, social stigmatisation or economic conditions of the learners.³⁷

The internal barriers are mostly psychological like self-concept, confidence, etc., which are sometimes imposed by the external factors and first step to remove the internal barriers is to remove the external barriers. On the other hand, external barriers are the attitudinal barriers of the non-disabled towards the disabled, cost barriers in putting in place a mechanism for special education, barriers of lack of infrastructure and barriers caused by lack of specially trained teachers.

CONCLUDING REMARKS

There have been several enactments of legislations and various policy initiatives in our country in keeping pace with the development of the law for the disabled in various other countries as a result of international conventions. Underlying all of this is the deep sense that the existence of an education system gives rise to individual rights in children and parents. This principle is based on the idea that the allocation of educational resources must not be based solely on the aggregate public benefit; it is not purely a matter of a public investment, where the only important consideration is the maximisation of the public welfare (however that might be measured). Children have a stake in their own education which the state must acknowledge and

protect. The underlying assumption is that the education system does not exist primarily for the benefit of society generally, but for the benefit of individual members within society. Children are stakeholders in their education; hence, it is entirely appropriate to relate the state's duty to provide a system of education to the interests of individual child.

In India, the education policy has lacked foresight and vision, and whenever problems have arisen, rather than tackling the problem, the authorities have seen fit to change the policy to suit the circumstances. It is, therefore, high time that the legislators stopped viewing imparting of education to the disabled as a compensatory or a medical measure, but realised that such children are also human having an equal and fundamental right to receive the best possible education for their future development.

There is another important facet which cannot be overlooked is the quality of general education being offered in Indian schools, which has come under scrutiny and highlights a pressing need which demands a critical engagement and re-examination of a general education system. Changes in the classroom require simultaneous development of reforms in professional development, curriculum, alongside a change in attitudes and beliefs as reflected in the culture of the school. While it is essential that teachers are made aware of and assisted in developing

innovative teaching strategies, such a skewed focus on knowledge underplays the need for focusing upon and changing values, beliefs and attitudes. There is a need for re-examining perceptions around the values and purposes of education for children with disabilities. The ongoing debates around 'inclusion' in India might provide the impetus for a critical reflection on the current teaching practices and educational policies. Inclusion needs a different school culture, and this might be an opportunity for the Indian education system to critically re-examine its many failings to enable the purposeful participation of the nation's children. It should, and will be our objective to make mainstream education not just available but accessible, affordable and appropriate for students with disabilities.

It is clear that to fulfil the goal of 'Education for All' there has to be constant monitoring of children with special needs and disabilities. Because of the advent of special education, and the segregation, thereof, the general population is not exposed to the challenged people and don't know how to react. The people in the mainstream society do not get an opportunity to interact with these people and therefore are not sensitised to their needs. If we, as a society, are exposed to challenged people, from the very inception and interact with them, the phenomena of de-labeling will also gain strength.

THE WAY FORWARD

Access to Inclusive Education

Persons with disabilities should not be excluded from the general education system on the basis of disability, and government should ensure that all such persons have access to an inclusive education system. This inclusive education should include free and compulsory primary and secondary education. The system should be aimed at the fully developing the human potential and sense of dignity and self-worth, development of talents and creativity as well as their mental and physical abilities.

Improving the Overall Quality of Education

Another important and overarching aspect would be move swiftly towards a better quality of education and schools, especially, the government schools or the schools in rural areas. The appalling standards of government and municipal schools are evident by regular incidents on absenteeism and neglect on the part of the teachers in such schools. Once the overall quality of education is increased in our country, it shall automatically lead to an enhanced and faster rate of enrolment and training of challenged children into the mainstream education system.

The government must also raise adequate resources in order to fructify the dream of right to education in its true spirit. Thus, it is suggested that the government should allocate more

resources to education than the current spending on this sector at the moment.

Identification of Children with Disabilities

There is an urgent need to update the process of identification of children with disabilities since the total number of identified children with disabilities to total population of all children in the age group of 6 to 14 at 1.48 per cent is very low.³⁸ Therefore, it is required that the government must employ specially trained surveyors, enumerators and other government functionaries at all levels, especially the grass root levels. A study by MHRD has revealed that 40 per cent of all out-of-school children are children with special needs. This requires an early identification of such children be given due importance.³⁹

Reasonable Accommodation in Education

The Government should ensure that reasonable accommodation of the individual's requirements is provided at all levels of the education system, such as individualised support, facilitating the learning of Braille and alternative script, orientation and mobility skills, facilitating peer support and mentoring, facilitating the learning of sign language and employing teachers qualified in sign language and/or braille, and to train professionals and staff who work at all levels of education.

Right to Support

Every child with disability has the right to receive necessary, adequate and appropriate support, such as educational institutions being easily accessible to the disabled, free supply of books in formats which the child understands including braille, plain language, large print, etc., the free supply of assistive devices required by the child, transport facilities to children or in the alternative financial incentives to parents and guardians to enable children to attend school, scholarships for students with disabilities with preference to girls with disabilities, extra time to complete tests and examinations as appropriate.

Parental Rights and Accountability

Since parents have primary responsibility for their children's education, their concerns should be respected when possible. In addition, school officials can make mistakes in some cases, and reliance on bureaucratic procedures and standards may result in officials' overlooking important special circumstances in particular cases. Parents can correct officials' mistakes or their having overlooked special circumstances. Parental rights and accountability would increase their participation and influence over decisions concerning their children's education.

It is necessary to evaluate the claims of the rights holders, i.e., the children and their parents and balance the same with the

corresponding duty of office bearers. In the context of education, there exists a relationship between the state and the child, the child and the parent, the state and the parent and thus, the law should be very clear how each of these relationships are to be regulated. The nature of legally enforceable claims that a child and his parents would have against the state and the schools should be outlined, i.e., minimum entitlements (both qualitative and quantitative) should clearly be specified in law.

In addition to this, initiatives should be taken to launch programmes for training parents and community members in order for them to be sensitised on how to support children with disabilities.

Right to Higher Education

No person with disability should be denied admission in a higher education institution by reason of his/her disability if he/she fulfil all the requirements for such admission. It should be mandated that all higher educational institutions should reserve not less than six per cent of the seats in each course for persons with disabilities.

Qualified Teachers

Presently, there are about 40,000 registered special educators in the entire country. Therefore, this shortfall in specialised personnel can only be met by restructuring the educational courses for teachers in order to ensure that every teacher is

qualified and trained to understand and address the needs of challenged children. Therefore, the current curriculum of education for teachers should necessarily include training programmes and vice versa, every special educator should also be made to undergo general education curriculum. All educators should be trained to teach a student with disabilities in an inclusive classroom. These teachers should assess the learning ability of each child and accordingly supplement additional instructions, as required and also hold regular meetings with parents and guardians of children to apprise them of a child's ability to learn, progress in learning and any other relevant information about the child. There have been instances whereby the Courts have focused on this aspect by giving due importance and encouragement to extensively cultivate special educators. In a judgement delivered by the Delhi High Court, it was held that these special educators should be paid at par with the teachers of regular courses. However, despite the said judicial pronouncement, the Government has failed to implement any such measure.

Establishment of the Education Reform Commission

The Government should establish a body in the nature of an Education Reform Commission whose task would be to ensure an effective participation of all stakeholders in the process of formulation, implementation and

monitoring of the curriculum and related programmes and policies, including disabled and non-disabled children, teachers and parents.

Strengthening the Administrative Machinery

At present, the National Advisory Council and the State Advisory Councils, envisaged under the Right to Education Act, do not include any disability experts. However, these disability experts are required to be inducted into such advisory councils for addressing the educational needs of challenged children and thereby making education more inclusive.

It is also suggested that it is vital to constitute 'resource groups' in the form of local organisations and NGOs at state and district levels for better management and co-ordination and therefore, leading to more effective planning and management.

Furthermore, a National and other state level authorities must also be created which would be in the nature of redressal forums where issues, such as denial of admission, incorrect identifications or refusal of identification of disability, unnecessary discrimination, lack of support and infrastructure, etc., can be addressed by providing a legal framework. This alternate mechanism of resolution of disputes is required to make the process of redressal of grievances of challenged children and their parents, less cumbersome.

NOTES AND REFERENCES

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¹²Analysing problems with the implementation of inclusive education policies in India using Multiple Governance Framework, Monika Nangia.

¹³The UN General Assembly declared 1981 as the International Year of Disabled Persons and thereafter declared 1983-1992 as the Decade of the Disabled; followed by the UNESCAP Decade of the Disabled Persons from 1993-2002. Article 26 of the Universal Declaration of Human Rights, 1948 emphasises upon 'The Right to Education'.

Protocol 1 of the European Convention on Human Rights, 1952, states that no person shall be denied the right to education.

According to UNESCO Convention against Discrimination in Education, 1960, the States' parties to this convention undertake to formulate, develop and apply a national policy which will tend to promote equality of opportunity and of treatment and in particular to make primary education free and compulsory.

Montreal Declaration on Intellectual Disabilities (2004) lays down that under no circumstance should an individual with an intellectual disability be considered completely incompetent to make decisions because of his or her disability. Article 12 of the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities states that persons with disabilities have the right to recognition everywhere as persons before the law.

¹⁴Articles 23 and 24

¹⁵Article III

¹⁶Article IV

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¹⁹Central Advisory Board of Education, 1944.

²⁰Education Commission, 1966.

²¹Ministry of Human Resources and Development, 1986.

²²Philip, T.K. Daniel and Karen Bond Coriell, Traversing the Sisyphean Trails of the Education for all Challenged Children's Act: An Overview, Ohio Northern University Law Review, 1992 (18 Ohio N.U.L.Rev.571).

²³Watson v. City of Cambridge, 32 N.E. 864 (Mass. 1893).

²⁴Beattie v. Board of Education, 172 N.W. 153 (Wis. 1919).

²⁵Department of Pub. Welfare V. Haas, 154 N.E. 2d 265 (Ill.1958).

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