

Impact of Justiciability of the Right to Education on its Enforcement in India and Pakistan

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This article traces the elevation of the right to education from a Principle of Policy to a Fundamental Right within a comparative context of the Pakistani and Indian Constitutions. The pivotal concern of this article is to assess the impact, if any, of this transition on the way the right to education is envisaged in both countries. It achieves this purpose by reviewing the case law from both jurisdictions to analyse the way courts interpreted this as a fundamental right, even before it was expressly enshrined so in both the constitutions. It therefore draws the conclusion that this transition of the right to education from a Principle of Policy to a Fundamental Right was actually the result of the way courts interpreted this right. The elevation of this right has induced new enthusiasm and eagerness among courts in both jurisdictions to construe this right even more liberally.

Introduction

‘Education is the most powerful weapon which you can use to change the world.’ - Nelson Mandela

Most modern constitutions pledge to secure the socio-economic well-being of their societies, and education is an area that has received increasing importance in this regard. Some constitutions make education a fundamental, justiciable and enforceable right, whereas others continue to list it as one of the ‘Directive Principles of State Policy’ (‘Principle of Policy’) that serves as a guide for law-making on social development, but is non-justiciable and unenforceable by the courts. Pakistan and India have tried both routes. In both countries, education was formerly a

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part of the Principles of Policy, but has recently been elevated to the status of a Fundamental Right.¹

The central aim of this article is to examine whether this transition has made a genuine difference in the prioritization of education on the legislative agenda, or broadly, the way in which the provision of education is envisaged. It traces the development of education, first as a Principle of Policy, and later as a Fundamental Right in both the Constitution of India 1949 (the 'Indian Constitution') and the Constitution of the Islamic Republic of Pakistan 1973 (the 'Pakistani Constitution') over the last two decades by reviewing case law from both jurisdictions. For this purpose, the article is divided into three parts, with each part juxtaposing the two Constitutions for a comparative perspective. Part I presents a brief overview of the transition of education from a Principle of Policy to a Fundamental Right and a textual discussion of the constitutional provisions. Part II analyses the way courts interpreted provisions relating to education in the Constitutions in the era before it was rearticulated as a Fundamental Right. Part III then considers whether the change in the status of education as a 'right' has had an impact on its enforcement, or whether it largely continues to be interpreted as before. One of the main arguments of the article is that courts in both jurisdictions attempted to enforce education as a right even before it was enshrined as a Fundamental Right in the respective Constitutions. It may not be farfetched to suggest that instead of these amendments making an effective impact on the enforcement of the right through the courts, the way the courts were already enforcing the right to education compelled the legislatures to introduce these amendments. However, with the institution of education as a Fundamental Right, a new enthusiasm and

¹ 'Fundamental Rights' are constitutional rights which are enforceable by the Superior Courts of a country, provided that the pre-conditions mentioned in the respective constitutional provisions are met. Besides the right to education, other examples of Fundamental Rights include right to life, right to fair trial, freedom of trade and freedom of expression.

eagerness to enforce the right more liberally and decisively is evident.²

Part I: The ‘Transition’ of Education: From a Principle of Policy to a Fundamental Right

In both India and Pakistan, right to education has made a long journey from its initial incorporation as a Principle of Policy to its assimilation in the Chapter on Fundamental Rights in the respective Constitutions. While drafting the Indian Constitution, the framers resolved to promote education under Part IV of the Constitution titled ‘Directive Principles of State Policy’. Although the Principles of Policy were meant to serve as useful guidelines for the government in policymaking, they were expressly made unenforceable by courts. Regarding the role and application of the Principles, Article 37 of the Indian Constitution provides:

The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

‘State’, for interpretation of provisions on Fundamental Rights and Principles of Policy, is defined in Article 12 as:

... unless the context otherwise requires, ‘the State’ includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

² The term ‘enforcement’ is used in the article to refer to the courts upholding the right to education as a valid, existing right and granting a remedy to the claimant accordingly, irrespective of whether the process entailed a positive or negative exercise of the right to education.

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Amongst the various directives touching upon social, economic and political welfare, Articles 41 and 45 are the most directly relevant to education, and read as follows:

41. Right to work, to education and to public assistance in certain cases: The State shall, *within the limits of its economic capacity and development*, make effective provision for securing the right to work, *to education* and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want. (emphasis added)

45. Provision for free and compulsory education for children: The State shall endeavour to provide, *within a period of ten years from the commencement of this Constitution*, for free and compulsory education for all children until they complete the age of fourteen years. (emphasis added)

The current condition of education in India clearly shows that the ten-year goal set by Article 45 proved to be elusive. In light of various court decisions and other factors, including lobbying by international organizations and domestic pressure groups, the legislature finally decided to bring the Constitution in 'line with the Court's approach'.³ The resulting 86th Amendment to the Indian Constitution in 2002 made education a Fundamental Right, which requires the State to provide education to children aged between six and fourteen years. The new 'right to education' under Article 21A states:

The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

As with the Principles of Policy, the precise mechanism of providing education was left for the State to decide through

³ Philip Alston and Nehal Bhuta, 'Human Rights and Public Goods: Education as a Fundamental Right in India' (2006) NYU Law School, CHRGI Working Paper No. 5, 91.

legislation. Subsequently, in August 2009, the *Lok Sabha* (House of People) passed the Right of Children to Free and Compulsory Education Act, 2009 (the ‘RTE Act’)⁴.

A similar trajectory of the constitutional status of education can be traced in Pakistan. The Pakistani Constitution also expressed the determination to promote education by including it in Part II, Chapter 2 containing the ‘Principles of Policy’. Article 30 elaborates, but also circumscribes, the extent to which these Principles may be used as mechanisms for the accountability of the State:

(1) The responsibility of deciding whether any action of an organ or authority of the State, or of a person performing functions on behalf of an organ or authority of the State, is in accordance with the Principles of Policy *is that of the organ or authority of the State, or of the person, concerned.*

(2) *The validity of an action or of a law shall not be called in question on the ground that it is not in accordance with the Principles of Policy, and no action shall lie against the State, any organ or authority of the State or any person on such ground. (emphasis added)*

Clearly, the role envisaged for these Principles is quite similar to that in the Indian Constitution. Likewise, the Principles relating to education under clauses (b) and (c) of Article 37, are largely devoid of any implementation mechanism:

37. Promotion of social justice and eradication of social evils: The State shall:

...(b) remove illiteracy and provide free and compulsory secondary education *within minimum possible period;*

⁴ The RTE Act came into effect in the whole of India, except the state of Jammu and Kashmir, on 1 April 2010.

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(c) make technical and professional education generally available and higher education equally accessible to all on the basis of merit. (emphasis added)

However, unlike Article 45 of the Indian Constitution, Article 37 above does not specify a precise deadline for either ‘removing illiteracy’ as a whole or ‘providing free and compulsory secondary education.’ The term ‘within minimum possible period’ was used to allow the legislature the maximum discretion in the matter. In April 2010, almost eight years after India’s decision to introduce a ‘right to education’ in its Constitution, Article 25A was inserted via the 18th Amendment in the Pakistani Constitution, making education a Fundamental Right. It reads as follows:

The State shall provide free and compulsory education to all children of the age of five to sixteen years in such manner as may be determined by law.

The relevant definition of the term ‘State’ is provided in Article 7, and like its counterpart in the Indian Constitution, includes not just the Central and Provincial governments but also local bodies and other authorities:

... unless the context otherwise requires, ‘the State’ means the Federal Government, [Majlis-e-Shoora (Parliament)], a Provincial Government, a Provincial Assembly, and such local or other authorities in Pakistan as are by law empowered to impose any tax or cess.

Comparison of Article 25A with its Indian counterpart reveals two interesting differences. Firstly, instead of the ages of six to fourteen years provided for in the Indian Constitution, a wider age bracket of five to sixteen years is mentioned in the Pakistani Constitution, which theoretically, encompasses more children. Secondly, Article 21A notes that the State shall determine provision of this right through law, while Article 25A simply states that the ‘law’ may determine provision even though the State is responsible for such provision. It can be argued that this makes a

difference since Pakistani legal history shows that ‘law’ may include judgments of the courts as well. Although legislation pertaining to provision of education has not been passed by the provinces, a blueprint is now available in the form of the Right to Free and Compulsory Education Bill passed in Islamabad Capital Territory (ICT) in 2012. It provides for free and compulsory education to children aged between five to sixteen years in schools established by the Federal and Provincial Governments in the ICT.

The discussion in the sections below will show that the courts considered education as a Fundamental Right even prior to its introduction as an express Fundamental Right in both the Constitutions. However, this does not imply that these amendments have had no impact on their respective jurisprudence. The subsequent discussion reveals that, broadly, the influence can be seen in three areas: 1) emergence of right to education as an independent, self-standing right; 2) adoption of a more liberal interpretation of this right; and 3) refusal of entertaining excuses of budgetary constraints.

Part II: Education as a Principle of Policy

Until the recent amendment in the Indian Constitution, it did not, at least *prima facie*, empower the courts to enforce socio-economic rights included in the Principles of Policy. Despite this, the Indian Supreme Court interpreted their enforcement to be within its mandate.⁵ As the discussion of case law will illustrate, the Court greatly expanded its jurisdiction, on one hand, by innovatively using Principles of Policy in the interpretation of Fundamental Rights and, on the other hand, by expanding the ambit of specific Fundamental Rights. For instance, right to life was no longer solely about protecting life, it was about ‘good governance’ generally.⁶ From provision of food and clothing,⁷ to access to clean air and

⁵ Nick Robinson, ‘Expanding Judiciaries: India and the Rise of the Good Governance Courts’ (2009) 8 Wash. U. Global Stud. L. Rev. 1, 41.

⁶ *ibid.*

⁷ *Shantistar Builders v Narayan Khimalal Totame* AIR 1990 SC 630.

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water,⁸ to a ban on smoking in public places,⁹ everything appeared to fall under the ever-encompassing umbrella of 'right to life'. Initially sparked by concerns of regaining legitimacy after the abuses committed during Indira Gandhi's emergency, this transformation gained momentum due to the Supreme Court's 'excitement' at the apparent restoration of democracy in the country.¹⁰ The right to education, thus, was indirectly affected by the enforcement of socio-economic rights.

Jurisprudence of the Indian Supreme Court suggests that education enjoyed the status of a Fundamental Right in India even before it was officially declared so by the Indian Constitution. For instance, in *Mohini Jain*, the petitioner questioned Karnataka Government's notification which permitted private medical colleges in the State to charge exorbitant tuition fees from students not admitted on 'Government seats'.¹¹ The main question before the Court was whether education was a right guaranteed to the people of India. It was held that although the Indian Constitution did not explicitly deem it to be a Fundamental Right, it did enjoy the same status.

The scope of Article 21 (right to life) was read with Principles of Policy, including Articles 41 and 45, and was expanded to include the right to life with human dignity, which could not be guaranteed without education. The Court also relied on the Preamble of the Indian Constitution, which promised to secure 'social, economic and political' justice. It was observed that if the right to education was not enforced, various Fundamental Rights guaranteed by the Constitution would remain beyond the reach of majority of the citizens, who happened to be illiterate. In this context, charging a capitation fee¹² for admission in educational institutions was held to be unconstitutional, as it

⁸ *M.C. Mehta v Union of India* 1996 Supp. 10 SCR 973.

⁹ *Murli S. Deora v Union of India* 2002 AIR SC 40.

¹⁰ *Robinson* (n 5) 1.

¹¹ *Mohini Jain v State of Karnataka* 1992 INDLAW SC 527.

¹² 'Capitation fee' is the fee in excess of that payable towards the tuition fee, other fees and charges declared by any institution in its prospectus.

violated the right to education by restricting access to the privileged few.

A criticism that may be raised against this and many subsequent judgments is the reliance placed on the Principles of Policy. Aware of such criticism, the Court attempted to justify its approach by stating that these directives were not ‘mere pious declarations’ that could be isolated from Fundamental Rights. Using this line of reasoning, the Court innovatively enforced directives which the Indian Constitution itself declares unenforceable in Article 37.

Similar criticism can be raised against *Unni Krishnan J. P.*,¹³ a landmark judgement on education in India, which is quoted in almost every subsequent case involving the right to education. With capitation fees once again under challenge, the respondents argued that Article 37 specifically stated that the Principles of Policy could not be enforced by any court, and thus could not be used to declare capitation fees unconstitutional. However, the Supreme Court noted that Article 45 (in relation to provision of education) was the only Principle which prescribed a time limit and noted that ‘if, therefore, endeavour has not been made till now to make this Article reverberate with life and articulate with meaning, we think that the Court should step in’.¹⁴ Thus, given that more than three decades have passed since the expiration of the stipulated time period, the obligation created by Article 45 had become an enforceable right.

This provides a classic example of the ‘good governance’ approach, whereby the courts try to enforce non-justiciable rights by arguing that since the government has failed to enforce them, it is the courts’ duty to do so.¹⁵ However, the Court did caution against treating all Principles as justiciable. The ‘right to education’ was considered a part of the right to life and was of fundamental importance in India. The Court nevertheless limited

¹³ *Unni Krishnan J. P. v State of Andhra Pradesh* 1993 INDLAW SC 1056.

¹⁴ *ibid* para 153.

¹⁵ *Robinson* (n 5).

the obligation of the State to provide free education up till the age of fourteen years, after which it was subject to the economic capacity of the State.

In *State of Himachal Pradesh*, the primary question was whether teachers of recognized aided private schools were entitled to the same pay-scales as those of their counterparts in government schools, and if so, whether the former were also entitled to receive grant-in-aid for meeting ninety five percent of the net approved expenditure incurred by the aided schools, that is, total expenditure less the income from the fees, fines, etc. as provided by the Grants-in-Aid Rules.¹⁶ It was held that aided private schools and government schools had always been treated on an equal footing and hence, the teachers employed in both types of schools were entitled to the same salaries and allowances. Additionally, the imposition of a maximum limit on disbursement of grants-in-aid provided by the State was declared arbitrary and unjustified. Resultantly, the Government was directed to increase its economic capacity and fulfil its constitutional duty of providing free and compulsory education to children up to the age of fourteen years across public and private educational institutions.

Further recommendations were made in *M. C. Mehta*, in which the Court directed the State to design a scheme for providing alternate employment or income to parents of child-labourers in order to incentivize schooling of such children.¹⁷ Similarly, in *R. D. Upadhyay*, it was held that the State must provide education to 'all children in all places', including those in prisons and children of prisoners.¹⁸ The Court was thus not only expanding the meaning of the right to education but was also striving to make it accessible to more and more children. Alongside, the Court did not limit itself to a negative enforcement of the right (such as prohibiting capitation fees), but also issued

¹⁶ *State of Himachal Pradesh v H. P. State Recognised and Aided Schools Managing Committees* 1995 INDLAW SC 1299.

¹⁷ *Mehta* (n 8).

¹⁸ *R. D. Upadhyay v State of A.P. & Others* AIR 2006 SC 1946.

directives to the State to take positive steps for the enforcement of the right.

Education enjoyed the status of a right in the eyes of Pakistani courts as well, even prior to its express elevation to a Fundamental Right in the Pakistani Constitution. However, the Pakistani case law discussed below, depicts a negative exercise of right to education whereby courts largely engage in reinforcing an entitlement already provided by the State and thereby, unlike the Indian Supreme Court, enforced the right in a very limited fashion. For instance, in *Abdur Rehman*, a resolution to demolish school buildings for the construction of a shopping plaza was declared contrary to the right to education and accordingly set aside.¹⁹

The Court not only considered this right in cases involving provision of education by schools, but also interpreted the scope of the right of education in a number of cases involving institutes of higher education. In *Umar Asif Raza*, the petitioner applied for admission in the University of Engineering and Technology, Lahore, on open merit basis as a resident of province of Punjab but the University refused his admission on the ground that he did not produce his father's domicile certificate to prove that the petitioner belonged to Punjab.²⁰ It was held that the right to receive education was the 'basic' right of every citizen and any lapse on part of parents in providing a domicile certificate should not prevent the child from enjoying this right, especially since the petitioner's origin could be determined through other means. Thus rejection of admission on this basis was held unconstitutional. Right to gain admission in higher education institutes was held to be linked to the right to life²¹ by explaining that if a person otherwise qualified was prevented from receiving higher education, this would negatively affect his right to life.

¹⁹ *Abdur Rehman v Municipal Committee* 2000 MLD Lahore 906.

²⁰ *Umar Asif Raza v. University of Engineering & Technology* 1997 PLD 594 Lahore.

²¹ Constitution of the Islamic Republic of Pakistan 1973, art 9.

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The issue arose again in *Ahmad Abdullah*, where the petitioners (medical students and colleges) contended that the right to education was a Fundamental Right and it included the right to choose a field and career. The compulsory disaffiliation of the medical college's from the University of Punjab and affiliation with University of Health Sciences (UHS) instead was argued to affect these rights by negatively impacting the students' chances of advancement in their careers since the degree awarded by the UHS did not enjoy worldwide recognition, which meant that the petitioners may be disadvantaged in seeking admissions in foreign universities. The Court recognized that the meaning of 'right to life' had expanded over time and included all rights that were necessary for a dignified existence which was not possible in the absence of at least a certain level of education. Therefore, the right to education was fundamental, and the State must strive to enable its citizens to enjoy this right.²² However, this right was not absolute and had to be regulated by the State, for example, in the form of affiliations and disaffiliations between universities. Such affiliations were held not to flow from the 'right to education', but were merely privileges that a university was entitled to grant and therefore disaffiliation of a medical college from a university did not infringe any Fundamental Right.

In *Muhammad Salman*, students of another medical college challenged the rules promulgated under the University of Health Sciences Ordinance, 2002, which imposed the restriction of clearing professional examination in four attempts, by arguing that it violated the right to education guaranteed by the Constitution.²³ The Court stated that a person's right to education was subject to the relevant existing statutes, and therefore the condition to clear medical exams within four chances was not a violation of this right. One surprising comment made by the Court was that educational institutions were meant to teach students who were 'desirous' to study. Did this mean that the right did not cover those who did not want to study? Can failure to clear an exam in four

²² *Ahmad Abdullah v Government of Punjab* 2003 PLD 752 Lahore.

²³ *Muhammad Salman v Government of Punjab* 2006 CLC 463 Lahore.

attempts be taken to mean that the student does not desire to study or rather s/he does but is simply unable to do so due to other reasons such as lack of access to good institutions?

On the other hand, in *Muhammad Afzal*, the issue was whether the petitioner was entitled to advance increments upon acquisition of higher academic qualifications as per Policy of the Board of Intermediate and Secondary Education.²⁴ Without referring to any particular Article of the Constitution, the Court held that the 'right to education' was every person's inalienable right, and therefore the petitioner was entitled to benefits of the increment, despite having improved qualifications without permission of the authority. Thus, the petitioner's attempt to deem education as a 'right' even before it was included as a Fundamental Right in the Constitution proved to be successful in this case.

Like in India, the superior courts in Pakistan (the High Court and the Supreme Court) have also employed not only 'right to life' but various other Fundamental Rights to derive legitimacy for the 'right' to education. This can be observed in *Imdad Hussain*, where the Court held that the right to education was a Fundamental Right under the right to life (art 9), right to dignified existence (art 14), freedom of trade, business or profession (art 18) and freedom of religion (art 20), read with Article 37(c), a Principle of Policy pertaining to technical and professional education.²⁵ The Court held that such an interpretation would ensure that no unreasonable restraint could be placed on education, whether imposed by the legislature or the executive. Shifting away from its earlier position,²⁶ the Court appeared more willing to enforce the right to education even if it was contrary to a statute.

Furthermore, Pakistani courts have appeared keen to extend the benefits of the right to education to underprivileged sections of

²⁴*Muhammad Afzal v Board of Intermediate and Secondary Education* 2007 SCMR 1460.

²⁵ *Imdad Hussain v Province of Sindh* 2007 PLD 116 Karachi.

²⁶ *ibid.*

the society, even where there was a clash with the claims of privileged classes. In *Shazia Batool*, the Court held that reservation of seats in educational institutions for weaker sections of society did not violate the right to education of other stronger sections of the society.²⁷

The above quoted cases show that a parallel between the two jurisdictions only exists to the extent of certain interpretive techniques, like life including dignity, which further includes education. Unlike in India, the courts in Pakistan simply reinforced an entitlement that had already been provided by the State and hence, the enforcement of the right to education in Pakistan was limited. The Pakistani courts also considered the right to education in respect of universities. The approach can be termed highly tenuous as, realistically, it is difficult to justify that why the State should be saddled with providing education all the way up to the university level and that too in absence of any express constitutional provision to that effect.

Part III: Education as a Fundamental Right

As discussed earlier, the right to education became a Fundamental Right in the Indian and Pakistani Constitutions in 2002 and 2010 respectively. What remains to be seen is whether this change has made a real difference in the way education is approached as a socio-economic good or need, given that education was recognized by the courts as a constitutional right even prior to the introduction of Articles 21A and 25A in the Indian and Pakistani Constitutions respectively.

In India, one of the first cases in which Article 21A was considered was *Messrs Zee Telefilms Limited*.²⁸ The Court held that the expression 'education' had to be given a broader meaning in light of Article 21A and 'sport' was deemed to be a part of education. It thus appears that this new provision was viewed by

²⁷ *Shazia Batool v Government of Balochistan* 2007 SCMR 410.

²⁸ *Messrs Zee Telefilms Limited v Union of India* 2005 INDLAW SC 80.

the Court as an opportunity to interpret the term ‘education’ more liberally.

An interesting case involving Article 21A was *Election Commission of India*, in which the utilization of services of government school teachers for election works during school timings was challenged on the ground that it violated the Fundamental Right to education.²⁹ The Election Commission, on the other hand, argued that under Article 324 of the Indian Constitution, the Commission was to be provided with such services for discharging election duties. The Court held that a balance had to be struck between the two provisions and directed that the teachers should not be put on these duties during school timings. Although the Court discussed the idea of striking a balance, it may be said that it was the right to education that won the battle as some inconvenience in election works was tolerated while deprivation of children from receiving education was not allowed.

In *Ashoka Kumar Thakur*, reservation of seats for ‘socially and economically backward classes’ was challenged on the ground that it was *ultra vires* the Constitution.³⁰ One argument advanced was that it shifted emphasis from primary to higher education and thus violated Article 21A. Although the *ultra vires* argument was rejected, the Court accepted that higher education could not be advanced at the cost of primary education. It was held that the State was under a constitutional obligation to implement this Article, and any delay in doing so could not be tolerated, for it was education that made a person aware of all his rights and also gave him the ability to enforce them. A direction was issued to the Union of India to come up with a deadline for the implementation of the Article within six months. The Court, after acknowledging that it was the Parliament which controlled the purse, stated that if the Parliament failed to allocate funds the way it was supposed to, it became the duty of the Court to point it out. The State could not

²⁹ *Election Commission of India v St. Mary's School and Others* 2007 INDLAW SC 1282.

³⁰ *Ashoka Kumar Thakur v Union of India* 2008 INDLAW SC 596.

avoid its constitutional obligations on the basis of financial disabilities.

Thus, it appears that after the insertion of Article 21A, the Indian Supreme Court has begun to assume a much stronger stance in directing the government as to how much resources are to be allocated to and expended on education. Where previously it only made recommendations, it can now issue directions as to what 'must' rather than 'should' be done. Moreover, the Court has greatly expanded the scope of the right of education by stating that the duty of the State was not only to provide schools with proper infrastructure but also to incentivise parents to send their children to schools by provision of mid-day meals, books, uniforms and introduction of harsher penalties for parents who failed to send their children to school. Further expansion can be seen of this right in *Avinash Mehrotra*, which incorporated the provision of safe environment in schools within the right to education.³¹

Similarly, in *Environmental and Consumer Protection Foundation*, a registered charitable society sought various directions for improvement of conditions in government and aided schools as well as those run by local authorities.³² Provision of basic infrastructure facilities like toilets, clean drinking water, sufficient number of class rooms, appointment of teachers and other facilities which would provide children with a clean and healthy learning environment, were held to be rights under Article 21A, and several orders were passed directing the States and Union Territories to ensure their provision. During pendency of this case, the RTE Act was passed and the constitutional validity of the Act was challenged before the same Court. The Supreme Court upheld the validity of the legislation in *Society for Unaided Private Schools of Rajasthan*³³, and issued several directions for the implementation of the Act, including a direction to the

³¹ *Avinash Mehrotra v Union of India* 2009 INDLAW SC 435.

³² *Environmental and Consumer Protection Foundation v Delhi Administration* 2012 10 SC 197.

³³ *Society for Unaided Private Schools of Rajasthan v. Union of India* 2012 6 SCC 1.

Government and other competent authorities to frame rules and guidelines within a period of six months. Since then, several rules, guidelines and notifications have been issued for its implementation, which illustrates that positive steps are being taken in India to ensure the realization of the goal visualized by Article 21A.

In Pakistan, the 18th Amendment made the right to education a Fundamental Right by introducing Article 25A. Being a recent addition, it has only been interpreted in a handful of cases so far. The first case to do so was *Ghulam Mustafa*, which involved teachers claiming non-payment of salaries while the State claimed that the teachers had been fired on account of budgetary constraints.³⁴ In light of Article 25A, the Court held that the State could not escape its constitutional obligations on the pretext of budgetary constraints, as the right to education was justiciable and the school could not be closed without providing alternate educational facilities. Interestingly, the petitioners did not argue the violation of Article 25A. This line of argument was introduced and pursued by the Court itself and may be taken to show the Court's eagerness to enforce the new provision.

In *Kiran Shahzadi*, a university student was aggrieved by the refusal of the university in allowing her to appear in a comprehension paper and *viva voce* as well as failed to announce her result.³⁵ The decision stated that education was a Fundamental Right, which the courts were duty-bound to protect. When the petitioner attempted to appear in the comprehension exam, she had been exonerated of the charge which initially formed the ground for the university's refusal to let her appear in the exam, consequently, appearance in the exam became her right. As the petitioner had already appeared in the comprehension paper held recently, the Court issued direction to the university to allow her to appear for the *viva voce* and to announce her result in view of her rights under Article 25A.

³⁴ *Ghulam Mustafa v Province of Sindh* 2010 CLC 1383 Karachi.

³⁵ *Kiran Shahzadi v Quaid-e-Azam University* 2011 CLC 1375 Islamabad.

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In *Fiaqat Hussain*, certain projects being run by the Federal Government in different provinces, like the Basic Education Community Schools (the 'BESC'), which were providing informal education to backward classes and areas, were shut down following the abolishment of the Concurrent Legislative List by the 18th Amendment.³⁶ This was challenged by the parents of students and employees of the projects, who argued that despite devolution of the subject of education to the provinces after the 18th Amendment, the Federal Government was still obligated to promote development of formal and informal education in the country. The primary issue was, whether pursuant to the abolishment of the Concurrent Legislative List, the Federation had the power to legislate on matters directly, indirectly or ancillary to education, particularly by introducing informal education through projects like the BESC. The Court stated that this informal system was just a mode of imparting education, or 'special study', in less developed areas where it was not possible to set up regular schools. The children of such areas were entitled to receive education not only under Article 25A, but also under 'Islamic injunctions'. Furthermore, the 2002 Ordinances under which the BECS were established were found to be protected by the 17th and the 18th Amendments, and hence would remain operative unless specifically repealed in accordance with the Constitution. Until then, the BECS providing informal education to the underprivileged classes could not be closed down. Hence, the impugned action on part of the Federal Government was declared unconstitutional. This case shows that Article 25A was extended to cover even the informal education system operating in the country to ensure that children in less privileged areas were not deprived of the rights guaranteed under this Article, and highlights the

³⁶ *Fiaqat Hussain v Federation of Pakistan* 2012 PLD 224 SC. Prior to the 18th Amendment, the Pakistani Constitution had two legislative lists, namely the Federal Legislative List and the Concurrent Legislative List. The former provided areas where the Parliament had authority to legislate whereas the latter dealt with areas where the respective Provincial Assembly was competent to legislate. The 18th Amendment, while abolishing the Concurrent List, has transferred some of its items to the Federal List whereas others have been devolved to the Provinces.

collective responsibility of the Federal and Provincial governments in achieving this goal.

Human Rights Case No. 19360-P involved the use of Article 25A for demanding increment in salaries of teachers and dealing with other financial and administrative problems in a public school.³⁷ The Court reiterated that both the Federal and Provincial Governments were required to ensure that the right guaranteed by Article 25A was upheld. The Chairman of the Board of Governors of the school informed the Court that under directions given by the Supreme Court, salaries had been increased more than a hundred percent, the Provincial Government had granted Rs. 15 million as grant-in-aid for the school's infrastructure development, and that other administrative problems of the school were also in the process of being resolved. In view of these submissions, no further action seemed necessary and resultantly, the case was disposed of. Thus, in light of these directions, effective steps were taken by the executive authorities to improve the conditions of the school.

The latest reported judgement on the subject is *Constitution Petition No.37 of 2012*.³⁸ The Court observed that schools in different provinces were not being used for imparting education and had either been illegally occupied by the police or other government departments; although the monthly/annual expenditures like payment of salaries were still being incurred. The Court expressed remorse at the fact that the case had been pending for about a year, and despite the issuance of various directives, the executive authorities had not acted to enforce Article 25A. Dissatisfied with the situation, the Court appointed District and Sessions judges of all the provinces to carry out surveys of schools functioning in their areas in order to prompt the provincial governments to implement the orders of the Court 'in letter and spirit'. The case brings into sharp relief the limitations of the right to education even after its new status as a Fundamental Right. Despite the Court being eager to uphold the right, its enforcement

³⁷ *Human Rights Case No. 19360-P OF 2012* 2013 SCMR 54.

³⁸ *Constitution Petition No.37 of 2012* 2013 SCMR 764.

is hampered by the uncooperative attitude of various organs of the State. Absence of legislation and lack of policy commitment serve as obstacles in the way of the desired effects.

Conclusion

In light of the Indian and Pakistani jurisprudence, it is apparent that the right to education enjoyed the status of a Fundamental Right long before it was enshrined as such in the respective Constitutions. Rather than the amendments making a real difference to the enforcement of this right through the courts, it seems that the manner in which the right to education was being enforced by the courts compelled the legislatures on both sides of the border to bring about these amendments. It is obvious that the courts were eager to extend the right to petitioners by holding that the 'right to education' could be found in the Constitutions, despite the express provisions of the constitutions explicitly stating that these were policy principles that could not be enforced by any court.

This does not mean that the amendments had no impact whatsoever. The judgments from both jurisdictions indicate three main effects. Firstly, the courts no longer consider themselves bound by the requirement of justifying access to education on the basis of other rights like right to life. It has emerged as an independent, 'self-standing' right that does not derive its legitimacy from other Fundamental Rights. Secondly, the courts seem to be much more liberal in interpreting this right and are attempting to widen its scope; provision of mid-day meals and books in India and provision of alternate arrangements in case of closing of schools in Pakistan being interesting examples of this expansion.

A notable contrast in this regard is that while the courts in India have been proactive in providing access to educational avenues in both the pre- and post-Fundamental Right era, the Pakistani courts appear to have largely viewed the right to education as a negative right before the 18th Amendment. The courts were seen reinforcing entitlements already provided by the State, like reservation of seats for backward classes and payment

of due salaries to school teachers. However, post-Amendment, a new enthusiasm can be witnessed whereby directions are being issued to the governments to increase salaries, provide grants-in-aid, improve infrastructure facilities and even make laws to regulate the subject. Thus, it can no longer be said that the right to education is generally considered a negative right in Pakistan. Recent case law shows that the trend has changed and now stands on lines similar to those being pursued by Indian judgments.

Lastly, in terms of effect, the courts in both countries now refuse to be impressed by excuses of budgetary constraints. The tolerance shown in the past has disappeared. The judgments repeatedly proclaim that the government cannot ignore its constitutional obligation to guarantee the right to education, and must reconsider budgetary allocations so that appropriate funds are allocated to secure this Fundamental Right.

As these developments are recent, perhaps it may be too soon to generalize these conclusions. However, in view of the present case law, it appears likely that the courts will use every opportunity to widen the scope of this right in order to make quality education available to more and more sections of the society. However, it would be a mistake to see express insertion of this right as a major success, as it is only a step towards making this right accessible to the public at large. In order to ensure meaningful enforcement, all organs of the State must work together. Rather than hampering implementation of the court orders, other organs need to realize that today the obligation accrues under an express constitutional provision and not only an unenforceable Principle of Policy. In India, at least the RTE Act has finally been introduced and positive steps are being taken to facilitate the framing of rules and guidelines. In Pakistan, on the other hand, except in the Islamabad Capital Territory, the rest of the population awaits legislation that can define the modalities for the realization of their constitutional right to education. Apart from legislation, appropriate institutional and budgetary changes also need to be made. Unless these changes materialize, citizens would continue to be denied effective enforcement of their right to education.