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The Right to Education: Some Theoretical Issues

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## Introduction

Questions relating to provision of education at different levels can be discussed from the perspective of human rights as well as from that of economic efficiency. These two perspectives have in fact played very important roles in discussions on different aspects of education. Particularly, in discussions on the meaning and content of the right to education the importance of these two perspectives is all too evident, both at the national and the international level. However, as we will see, considerable ambiguity on issues relating to meaning and content of the right to education continues to persist. It is important to explore the reasons for this ambiguity and attempt to clarify the

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meaning and the content of the right to education.

The purpose of this paper is to discuss education in the context of human rights and of economic efficiency. The questions that we ask are whether one can infer right to education from the same considerations from which fundamental rights like right to life and liberty are derived; and whether the right to education is derivable from economic efficiency considerations. Our conclusions can be summed up as follows:

- (i) It is possible to deduce right to education at the basic level from considerations which entail rights like right to life and liberty; the right to higher education however is not inferable from these considerations.
- (ii) While economic efficiency considerations would in general support provision of basic education as well as higher education, it is not possible to infer a right to basic education or a right to higher education on the basis of efficiency considerations.

The status of basic education in national and international law is in conformity with the analysis presented in this paper. However the position is not very clear with respect to higher education. The dominant view seems to be that right to education at the higher level is contingent upon the economic conditions of the state. We argue that this conclusion arises from lack of clarity about the concept of a human right.

The paper is divided into three sections. In the first section we discuss the notions of human or fundamental rights and of economic efficiency and then look at the relationship between the two. In the next section we briefly discuss basic and higher education from the perspective of human rights and

the perspective of economic efficiency. The final and the main section deals with the content of the notion of right to education.

## **Fundamental Rights and Human Dignity**

Human rights occupy a very important place in today's world. Since the formation of the United Nations the international community, recognizing the importance of human rights has made conscious efforts to promote and protect them by the rule of law. This process has led to the codification of human rights in the form of several human rights instruments like the Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights.<sup>2</sup> One of the objectives of the human rights instruments is to build a common understanding of human rights and to set common standards of achievement which would be binding on the countries which are parties to these agreements. Human rights have been given a place of fundamental importance in the Indian Constitution also. Article 13 of the Constitution prohibits the state to make any law which takes away or abridges fundamental rights of its citizens and states that any such law would be considered null and void.<sup>3</sup> Fundamental rights enjoy a similar status in constitutions of

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<sup>2</sup>The importance of fundamental rights is clearly stated in all these instruments. The Universal Declaration of Human Rights in its preamble mentions that recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. The Universal Declaration of Human Rights emphasizes the need to protect human rights by the rule of law. The other important human rights treaties and covenants also build on the above mentioned view of human rights.

<sup>3</sup>Article 13 of the Indian Constitution states that

most other nations in the world.

Given the primary importance of human rights in international law as well as in the national constitutions across the world it is but natural that they play a central role in discussions on major policy issues. Particularly, debates on issues relating to the provision of public goods like health, education etc. seem to be centered around human rights considerations. Provision of public goods and various other entitlements are very often claimed as human rights. However such claims are not always very well founded. It is important to understand that the validity of such claims crucially depends on whether or not they can be deduced from the theoretical considerations which justify the existence of human rights.

Though there are competing theories of human rights each of which provides different justification for the existence of such rights, a careful examination of the international human rights law reveals an adherence to what may be called the classical conception of human rights. According to this conception all human beings are equal in their inherent dignity and worth and all rights follow from human dignity. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which together constitute the pillars of international human

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*Laws inconsistent with or in derogation of the fundamental rights.-*

*(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.*

*(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.*

rights law, in their preambles state that

*these rights derive from the inherent dignity of the human person*

The same justification of fundamental rights appears implicitly or explicitly in all the core international human rights instruments.<sup>4</sup>

Human rights are enshrined as fundamental in the Indian Constitution. Though the Constitution itself does not provide any explanation for the provision of such rights the justification for fundamental rights can be found in the various constitutional debates. The Supreme Court as the interpreter of constitutional laws has implicitly shown adherence to the same conception of human rights as is found in the international law. The right to life and liberty guaranteed under Article 21 of the Indian Constitution is considered absolutely fundamental. In determining whether certain other rights which are not mentioned explicitly in the Constitution can be considered fundamental the Supreme Court has given the right to life and personal liberty a very broad and expansive meaning. The Supreme Court has time and again interpreted the right to life as the right to live with human dignity and hence encompassing all that goes to make the human existence meaningful and dignified. In *Mohini Jain v. State of Karnataka*<sup>5</sup> it was observed that

*“Right to life” is the compendious expression of all those rights*

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<sup>4</sup>The Charter of the United Nations and the Universal Declaration of Human Rights recognize the inherent dignity of all members of the human family. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also in its preamble states that

*those rights derive from the inherent dignity of the human person.*

<sup>5</sup>Referred to as *Mohini Jain* hereinafter.

*which the courts must enforce because they are basic to the dignified enjoyment of life*

In *Bandhua Mukti Morcha v. Union of India*<sup>6</sup> it was observed in the majority judgment written by Justice Bhagwati, that the right to life must be interpreted in a way so as to include the provision of minimum requirements necessary for a person to live with human dignity. Similarly the right to personal liberty has also acquired a very broad interpretation. In *Kharak Singh v. State of Uttar Pradesh*<sup>7</sup> the question regarding the proper scope and meaning of the expression ‘personal liberty’ came up for consideration for the first time before the Court. The majority of the judges took the view that

*“personal liberty” is used in the Article as a compendious term to include within itself all the varieties of rights which go to make up the “personal liberties” of man*

Supreme Court has consistently taken the view that the right to life and liberty is absolutely fundamental, that right to life and liberty should be interpreted as the right to live with dignity and that all other rights are derived from right to life and liberty.

Thus according to the conception of human rights embedded in international law and the Indian Constitution all human rights follow from the dignity and worth inherent in human beings. The notion of a human right here is based on the notion of dignified human existence. In other words a set of entitlements is considered a human right only if it is necessary for dignified human life. Anything which cannot be thought of as being necessary

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<sup>6</sup>Referred to as *Bandhua Mukti Morcha* hereinafter.

<sup>7</sup>Referred to as *Kharak Singh* hereinafter.

for a dignified human existence cannot be considered a human right, however important it may be considered otherwise for the individual or the society.

Human rights are conceptualized with respect to the state. The state as the duty-holder has to protect the rights of its citizens. In order to protect the rights of its citizens the state has to refrain from actions which violate such rights, it has to ensure that actions of individuals do not infringe upon the rights of others and it may also have to provide for certain facilities which might be required for the enjoyment of a right. It should be immediately clear that although human rights are considered inviolable, the state's ability to fulfil its obligations with respect to a fundamental right and hence the realization of the same may depend on certain other considerations. Economic considerations in particular can become very important in this context. The state's ability to fulfil its obligations with respect to a right may be severely constrained by economic conditions in so far as the state's responsibility to provide for facilities which might be required for the enjoyment of the right is concerned. Such constraints on the realizability of certain rights are well acknowledged in the international law.<sup>8</sup> It is, however, important to note that such conditions though relevant for the realization of a right justified on the grounds of human dignity, can never play a role in determining the existence of a right. Any assertion which makes the existence of a right contingent upon the economic conditions of a country is inconsistent with the theory of human rights which is embedded in international law.

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<sup>8</sup>The international human rights instruments generally talk of progressive realization of those rights which are likely to be more demanding in terms of the economic resources of a country.

## Basic Education and Higher Education

One of the most important functions of the state consists of providing education to its citizens. Arguments for the provision of education at different levels are very often based on the view that education is a human right. However it is not difficult to see that from the perspective of human rights the different levels of education do not really enjoy the same status. In order to examine the validity of arguments relating to the status of right to education it is important to distinguish among different levels of education and examine whether human rights considerations entail the provision of education at all levels.

The importance of basic education in the life of an individual can hardly be overstated. Basic education helps the individual to develop his or her own abilities and to comprehend and communicate with the world in which he or she lives. There can be no doubt that in today's world a dignified human existence is not possible without the attainment of education at the basic level. The existence of the right to education at the basic level is therefore clearly justified. In fact, not only should the right to education at the basic level exist, it should exist in its full generality with all its aspects being given equal importance. It is important that everyone should get basic education regardless of the circumstances and the state should ensure this by creating proper educational facilities and by removing all obstacles that might impede the accessibility of the available educational facilities. Since basic education is primarily for those who are not in a position to take their own decisions, the role of the state as a duty-holder becomes all the more important here. The state has to see to it that the decisions taken by others (parents or guardians) on behalf of the children do not stand in the way of the realization of the right.



It is therefore justified for the state to make basic education compulsory for all. But compulsory education if not provided freely may create hard choices for some individuals. Economic conditions might be such that the choice may be between food for subsistence on the one hand and education on the other. Therefore basic education should not only be compulsory but it should be provided free.<sup>9</sup>

The case with higher education is rather different from that of education at the basic level. Higher education can certainly be extremely valuable for the development of the individual self. Apart from the fact that it might open up better employment options, higher education in itself can be highly satisfying in various other ways. But however desirable higher education may be, saying that it is essential for a dignified existence does not really make sense. What one can definitely require is that if proper educational facilities are available then the state as the duty-holder should ensure that everyone has access to those facilities without any interference from others. Discriminations based on race, colour, sex, language, religion, political or other opinion, national or social origin must not deprive individuals or groups of access to educational facilities.

Thus it seems that while the idea of human dignity requires that the state should provide free and compulsory education at the basic level for all, it does not entail any such commitment with respect to higher education. In other words while basic education is a human right, higher education is not. Provision of basic education is justified on the grounds of human rights but one cannot justify the provision of higher education on the same grounds.

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<sup>9</sup>It is of course possible to argue that basic education should be free only for those who face the kind of hard choices mentioned in the text.

However this is not to say that the state should not provide higher education to its citizens. Provision of higher education can be justified on the basis of many other important considerations including the welfare considerations of various kinds.

It is important to note that whatever be the underlying justification, provision of education would require huge amounts of resources. The economic considerations in the provision of education cannot therefore be ignored. Whether or not the benefits accruing from education would always justify the costs involved is in itself an important question. As far as basic education is concerned, there is no doubt that it is highly desirable for the society. In today's world a society cannot possibly function properly if its members do not have the basic minimum education. Thus the provision of basic education would be socially efficient in general.<sup>10</sup> But exceptional cases do exist. It is

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<sup>10</sup>The notion of efficiency is central to the mainstream economic theories. In these theories institutions are evaluated in terms of the efficiency characteristics of the outcomes resulting under them. There are several different notions of efficiency that are used in economics. From a theoretical point of view, the most important among them is that of Pareto-efficiency. An alternative  $x$  is defined to be Pareto-superior to another alternative  $y$  if and only if everyone in the society considers  $x$  to be at least as good as  $y$  and at least one individual considers  $x$  to be better than  $y$ . According to the Pareto-criterion on which the notion of Pareto-optimality is based,  $x$  is to be considered socially better than  $y$  if  $x$  is Pareto-superior to  $y$ . An alternative is defined to be Pareto-efficient or Pareto-optimal if and only if there is no alternative which is Pareto-superior to it. In other words an alternative is Pareto-efficient if and only if it is not possible to make some individual better-off without making anyone worse-off.

The Pareto-criterion is appealing because of its basis lying in unanimity. However the notion is non-committal in most situations. If some individuals prefer alternative  $x$  to alternative  $y$  and there are others who prefer  $y$  to  $x$  then the Pareto-criterion fails to determine which of the two alternatives is socially desirable. There are other notions of efficiency

possible to hypothesize situations where basic education for most would be efficient, but not for all. Consider for example the case in which a very small group of individuals live on a far off island within the territory of a particular country. Cost of providing education for this group might be so large that it becomes unjustified on ground of economic efficiency. But even if it is not efficient, the fundamental status accorded to basic education by the human rights considerations would imply that the state may not be relieved of its obligations with respect to basic education even under such conditions. The imperative of immediate realization of free and compulsory basic education can however be relaxed to allow for progressive implementation of the right to basic education within a reasonable period of time. From the point of view of economic efficiency, higher education is not very dissimilar to basic education. Higher education would often result in an increase of social product, but not invariably so. The efficiency or otherwise of higher education depends to a great extent on the state of development of the country under consideration.

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which do not suffer from this problem or suffer to a lesser degree. The notion of wealth maximization based on the Kaldor compensation principle is the most widely used in economics. According to the Kaldor-principle an alternative x is better than alternative y if in a move from y to x the gainers can, in principle, compensate the losers and still be better-off. However, actual compensation need not be paid.

## The Right to Education in International Law and in the Indian Constitution

The Universal Declaration of Human Rights and the International Covenant on Economic Social and Cultural Rights hold that “Everyone has a right to education.” At the commencement of the Indian Constitution in 1950 the right to education figured among the directive principles. The right to education became a fundamental right after the Constitutional (eighty-sixth Amendment) Act, 2002 came into force. In spite of this recognition at the national and international level the exact content of the right to education remains unclear. As far as the international human rights instruments are concerned the provisions contained therein confer the right to basic education as well as the right to higher education on all members of the human family. The International Covenant on Economic, Social and Cultural Rights contains the most wide-ranging and comprehensive provision on the right to education in the entire international human rights law. The covenant in its Article 13 expresses that for the full realization of the right to education *Primary education shall be compulsory and available free to all and higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.* The other important human rights instruments like the Universal Declaration of Human Rights <sup>11</sup>, the Declaration of the Rights of the

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<sup>11</sup>The Universal Declaration of Human Rights in its Article 26, Clause (1) says that

*Education shall be free, at least in the elementary and fundamental stages.  
Elementary education shall be compulsory.*

The same clause also states that

Child<sup>12</sup> and the Convention on the Rights of the Child<sup>13</sup> take a similar view on the right to education.

The human rights instruments talk of basic education and higher education separately and with a clear emphasis on the need and urgency for provision of basic education. The International Covenant on Economic, Social and Cultural Rights underlines this urgency by providing a separate article on the right to basic education. In its article 14 the covenant states that

*Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge*

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*higher education shall be equally accessible to all on the basis of merit.*

<sup>12</sup>The Declaration of the Rights of the Child in its Principle 7 says that

*The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages.*

<sup>13</sup>The Convention on the Rights of the Child in its Article 28, says that

*States Parties recognize the right of the child to education and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:*

*1(a) Make primary education compulsory and available free to all.*

*1(c) Make higher education accessible to all on the basis of capacity by every appropriate means;*

*for all.*

However it is important to note that inspite of this emphasis on basic education in international law, there is no real distinction between these two levels of education. The arguments for the provision of basic education as well as higher education are based on the same considerations of human rights. By way of explaining the position of the international instruments, the General Comments on the right to education make this point all the more clear. Not only do the General Comments proclaim the right to higher education they also stress on the commonality of the essential elements of education at all levels. In General Comment No. 13 it is stated that

*Higher education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms at all levels.*

Although it is recognized that the precise and appropriate application of the essential elements will depend upon the conditions prevailing in a particular State these elements are supposed to be applied almost equally at all levels of education. The only difference seems to lie in that: Whereas basic education shall be available free to all, States parties are required to progressively introduce free higher education. However, recognizing that the immediate realization of free and compulsory education even at the basic level may not be possible due to economic constraints, the international human rights instruments require the state parties to realize this goal progressively within a reasonable period of time. Thus the meaning and content of the right to higher education in the international human rights instruments does not seem to be much different from that of the right to basic education.

The Constitution of India in its Article 21A says that

*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.*

In the Constitution of India there is no explicit mention of the right to education at the higher level. The question has however been discussed by the Supreme Court of India in the course of several Public Interest Litigation Cases that came up in the past few decades. Two of the most important judgements related to the right to education are *Mohini Jain v. State of Karnataka* and *Unni Krishnan J. P. v. State of Andhra Pradesh*<sup>14</sup>. In *Mohini Jain* the Supreme Court held that right to education at all levels is guaranteed under the Constitution. In *Unni Krishnan* the Court was of the opinion that every child in the country had a right to education up to the age of fourteen and her or his right to education thereafter was subject to the limits of economic capacity of the state.

As has already been mentioned, the right to education did not figure among the fundamental rights at the time of commencement of the Indian Constitution. Before it became a fundamental right in 2002, The Supreme Court inferred it from the right to life and liberty. In *Bandhua Mukti Morcha* the Supreme Court held that the right to life guaranteed by Article 21 does take in educational facilities. In the same vein the supreme court in *Mohini Jain* has observed that

*The right to education flows directly from right to life.*

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<sup>14</sup>Referred to as *Unni Krishnan* hereinafter.

The court has consistently upheld the view that the right to education is derivable from the same considerations from which fundamental rights like right to life and liberty are derived. In determining the meaning and content of the right the court has however not been very consistent particularly with respect to higher education. While in *Mohini Jain* the Supreme Court held that right to education at all levels is guaranteed under the Constitution; in *Unni Krishnan* the Supreme Court was of the opinion that *Mohini Jain* was wrong in saying this. The Court in this case has tried to settle the issue by expressing in clear terms that every child in the country had a right to education up to the age of fourteen and thereafter was subject to the limits of economic capacity of the state. The Supreme Court in its judgement in *Unni Krishnan* case argued that:

*it would not be correct to contend that Mohini Jain was wrong insofar as it declared that 'the right to education flows directly from right to life.' But the question is what is the content of this right? How much and what level of education is necessary to make the life meaningful? Does it mean that every citizen of this country can call upon the State to provide him education of his choice? In other words, whether the citizens of this country can demand that the State provide adequate number of medical colleges, engineering college and other educational institutions to satisfy all their educational needs? Mohini Jain seems to say, yes. With respect, we cannot agree with such a broad proposition. The right to education which is implicit in the right to life and personal liberty guaranteed by Articles 21 must be construed in the light of the directive principles in Part IV of the Constitution. So far as the right to*



*education is concerned, there are several articles in Part IV which expressly speak of it. Article 41 says that the 'State shall, within the limits of its economic capacity and development, make effective provisions 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.' Article 45 says that '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.' Article 46 commands that 'the State shall promote with special care the educational and economic interest of the weaker section of the people, and, in particular, of the Schedule Castes and the Scheduled Tribes and shall protect them from social injustice and all forms of exploitation.'... The three Articles 45, 46 and 41 are designed to achieve the said goal among others. It is in the light of these articles that the content and parameters of the right to education have to be determined. Right to education, understood in the context of Articles 45 and 41, means : (a) every child/citizen of this country has as right to free education until he completes the age of fourteen years and (b) after a child/citizen completes 14 years, his right to education is circumscribed by the limits of the economic capacity of the State and its development.*

The lone dissenting view in this judgement came from Justice Sharma. He expressed his opinion by saying that

*there is no Fundamental Right to education for a professional degree that flows from Article 21.*

Thus it is clear that the position of the national and international law with respect to the question of the provision of basic education is in line with the argument presented in this paper. However with respect to higher education the position taken in the national and international law is quite different from our analysis. Both in international and national law right to higher education seems to have been accorded the status of a human right subject only to the economic conditions of the country. Our analysis suggests that this view may not be correct. Given the justification of human rights it is difficult to see how one can give higher education the status of a human right unless the notion of human dignity is broadened so much as to incorporate not only the basic needs of life but also things which are desirable on other grounds. Thus by proclaiming the right to higher education, the international human rights instruments run into the risk of broadening the notion of human dignity beyond reasonable limits. The position taken by the Supreme Court runs into more serious problems. The assertion claiming the existence of higher education to be contingent upon economic conditions of the state can be interpreted in two possible ways. It is possible that the assertion is based on the view that the notion of human dignity incorporates the economic conditions of a country. The other possibility is that the assertion is supposed to be independent of any reference to the notion of human dignity. The first interpretation would involve making the notion of human dignity contingent on economic conditions. Given the justification for human rights in general, the second interpretation would lead to logical inconsistency. Thus the position taken in the national and international law with respect to the status of higher education does not seem to be consistent with the idea of human rights embedded in the Indian constitution and the international human rights instruments.

It is hoped that a clear understanding of the theoretical issues discussed can contribute in developing a proper perspective on the question relating to the provision of higher education.

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