

STILL BORN LEGISLATION!*

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The month of December has gained vital importance in the history of child rights movement as it has witnessed many important events related to the 'Child Rights' both at the national and international levels. To name a few; India had ratified the UN Convention on the Rights of the Children in December 1992; the National Commission for Protection of Child Rights (NCPCR) had organized its first historic National Consultation in December 2008 as part of recommending crucial policy changes to improve the lives of children by restoring their childhood; and the International Human Rights and Anti Child Trafficking days are also observed in this month.

However, the significance of all these historic events has been shadowed of late by the Central government by introducing the much criticized , diluted and distorted Right to Education Bill in its new *avatar*, *the Right of Children to Free and Compulsory Education Bill of December 2008* in the Parliament through the backdoor. At the time when the bureaucracy was preparing the ground for introducing the much diluted Bill in the Parliament, the National Commission for Protection of Child Rights (NCPCR) had unanimously passed a resolution for the "Abolition of Child Labour and realization of Right to Education" adhering to the three non-negotiable core principles. They are; any person below 18 years is a child, all forms of child labour need to be abolished, and all children who are out of school are child Labourers and all works whether hazardous or non-hazardous are detrimental to the growth of the child. The NCPCR looks up to the State for subscribing to these recommendations as guiding principles while formulating the policies and legislations towards abolishing child labour and realizing the Right to Education.

The biggest paradox at the fag-end of the year 2008 is that the core recommendations made by the NCPCR, which is a national level body having the mandate to monitor the implementation of the new Act if it comes through, was not even taken note of forget about incorporating those crucial elements into the text of the new education bill. All the recommendations of NCPCR would have altered at least the crucial definitions such as 'the Child', 'working child', and 'child labour' etc. Contrary to this, even the definitions that were there in the earlier February 2008 bill related to 'Working Child', 'Out-of-School Child' and 'Migrant Family', etc. were removed by the Central government in the bill recently tabled in the Rajya Sabha.

This is nothing but a heinous crime against Indian children. The ardent proponents of neo-liberal agenda who are defending the present bill owe an explanation to the children of India for their treachery to join hands with the market forces to deny education to millions of deprived children who had a ray of hope after the Supreme Court Judgment in the case of Unnikrishnan v. State of Andhra Pradesh declaring the

* A critique of 'the Right of Children to Free and Compulsory Education Bill 2008' introduced in the Rajya Sabha on 15th December 2008

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education as a fundamental right up to the age of 14 years. Further, the court had also pronounced that the fundamental right continues to exist even after 14 years depending upon the economic capacity of the state. It is important to note that the highest judicial body accorded the status of fundamental right to all children categorically up to the age 14 years and progressively even after 14 years subject to economic capacity of the state. After dilly-dallying for almost 15 years the Indian State has introduced a bill that totally negates not only the spirit of the Constitution but also the far-reaching interpretation by honourable Supreme Court that linked the Right to Education with right to life as inseparable right to ensure not just right life but right to a dignified life¹.

Therefore it is all the more important to place all the distortions and dilutions in the currently tabled bill in the Rajya Sabha which is completely unconstitutional and goes against the interest of children, particularly those in the age group of birth to six years. There is an urgent need to place the glaring shortcomings of the Bill in public domain to expose the illusions created by the ruling elite, bureaucracy and a negligible section of civil society in favour of the Bill that deprives care and education to a vast section of child population and legitimizes the existing inequalities and disparities in the education system to maintain the status quo.

To begin with, the title of the bill has been changed from 'the Right to Education Bill' to 'the Right of Children to Free and Compulsory Education Bill' in order to dilute the 'rights perspective' reflected in the earlier title and again taking it back to free and compulsory framework of truancy model. The implication of the change is that education being a fundamental right may not be justiciable through court of law in favour of right holders; the children. Instead, the bill tabled in the Rajya Sabha will empower the bureaucracy and other attendance officers to blame teachers and parents of truants for noncompliance of attendance.

Secondly, the preamble of the bill has been replaced with the statement of objects and reasons. In any statute the preamble serves as an important aid to interpret the law to achieve the intended goal. The larger implications of the removal of the preamble are as follows;

1. It takes away the broader framework for interpreting the law in line with the ethos of social justice and equity.
2. It would have provided an inseparable linkage between dignity of the individual and right to basic education as upheld by the Supreme Court in 1993.
3. All the more, it would have been a constant reminder for the executive and judiciary about their roles and responsibilities to achieve equitable quality education to all children within the prescribed time without compromising with any factor that comes in the way of achieving the long standing goal.

¹ For more details refer the Supreme Court Judgment in *Unnikrishnan v. State of Andhra Pradesh* (1993 1 SCC 645). The Court drew a link between basic education and the fundamental right to life. It held that the right to life is inseparable from the right to basic education, and the latter flows from the former.

Thirdly, in any law the definitions clause assumes a lot of significance and provides clarity while implementing the law. It is unfortunate that nearly 29 definitions in general and all the crucial definitions necessary to ensure equitable quality education in particular have been omitted from the bill tabled in the Rajya Sabha. For instance; the definitions like *age appropriate grade, compulsory education, equitable quality, participation in elementary education in relation to child* etc. are the important operational definitions to put law into practice and also for necessary interpretation whenever required. In relation to what I have already stated in the second Para of this write up, the linkage between the total abolition of child Labour and attaining right to education has been weakened by removing important operational definitions such as *Working Child, Out-of-School Child, Migrant Family* etc. This dilution not only negate the fundamental right of the child (up to the age of 14 years) but also defies the position of National Commission for Protection of Child Rights (NCPCR) in relation to abolition of all forms of child labour to realize the fundamental Right to Education.

The most atrocious part in the definition clause is the removal of definitions related to pre-school education that were meant to ensure justice to children in the age group of 0-6 years. With this omission children of this age group who were already excluded from the purview of fundamental right to education earlier are now further excluded from the purview of this legislation as well to claim their entitlements under Early Childhood Care and Education (ECCE).

To list out a few important definitions removed in the bill: these are; Academic Year, Age Appropriate Grade, Aided School, Child in need of Care and Protection, Compulsory Education, Equitable Quality in relation to Elementary Education, Migrant Family, Neighbourhood School in relation to a Child, Out-of-School Child, Participation in Elementary Education in relation to a Child, Pre-primary Section in Relation to a School, Pre-School, Working Child etc.

Fourthly, as I understood the focus of the much awaited Right to Education bill is to ensure equitable quality education to all children irrespective of agencies imparting education. This has been more or less defeated and destroyed by removing the phrase "equitable quality" from the title in the chapter-1; entitlement chapter. It clearly indicates that the state is not willing to provide equitable quality education to all children in India as a matter of principle and commitment as per the Constitution and other international legal instruments including the UNCRC.

Instead, the Bill in its present form confirms further that the neo-liberal state is practising discrimination by legitimizing two distinct parallel streams; inequitable, multilayer and low-quality education system for the poor children and, so-called quality education to the elite section through various other means. This is nothing but legitimization of inequitable quality education through a central legislation. This violates the basic principles enshrined in the Constitution and other international instruments ratified by India time to time and perpetuate the in-egalitarian system of education by introducing a *New Sapta Varna System*² in the place of current *Chaturvarna System*

² **"New Sapta Varna System of Education"** means the system of education according to the social and economic status of stratified Indian masses on the lines of ; International General Certificate of Secondary Education (IGCSE) for the children coming from Elite class ,Indian Council for Secondary Education(ICSE) for the children coming from the Rich class ,Central Board of Secondary Education(CBSE) for the children coming from the upper middle class and bureaucracy , State recognized

There is no definition for the term neighborhood in the definitions clause. However, the term has been used in the text of the legislation. It creates confusion for the enforcing agency to understand the meaning and connotation of the term with relation to universal access. In the context of Common School System (CSS), it means all children of a defined geographical area should attend the common neighbourhood school notified by the State irrespective of their social status gender, religion etcetera.

Further, the time frame mentioned in the earlier bill to mainstream all push out (dropout) children into main stream fulltime school education with appropriate bridge course or transition program has been removed. This indicates that the fundamental rights of deprived children will not be restored on priority within a time limit. This takes away the stake of the deprived child to basic education before she/he attains the prescribed age and thereby denying the right. As a result of this, the state can prolong the task of mainstreaming the push-out (dropout) and non-school going children according to its whims and fancies as being done since the implementation of the Constitution.

Another important diversion in the bill is introducing the penal action against the head teacher for the delay of transfer certificate at the time of transition that would result in further demoralization of the teacher community. This exemplifies a disabling legislative process instead of enabling legislation process that would have made them work proactively to realize the long standing goal.

Fifthly, the most decisive factor in the realization of Fundamental Right to Education is to commit the necessary funds for the effective implementation of the right. In this regard, the central government's responsibility is of paramount importance. Bulk of the finances has to come from the centre to realize the right. Unfortunately, the centre has completely abdicated its responsibility towards implementing of the fundamental right to education. Going by the 'definitions' clause (chapter-I), it is very clear that the onus of implementing the fundamental right has finally been transferred to the states (federal states), Panchayats and poor parents.

The central government justifies that the education is a concurrent subject since 1976; therefore it is a joint responsibility of the centre and states. Although it is true, the state governments have not been in a position to spend adequate funds on the subject. It was in this context that under the Sarva Shiksha Abhiyan project a reasonable amount was given to states to universalize quality school education. It is evident that unless there is a substantial financial support from the central government the goal of providing quality education to all children couldn't be achieved. The Central government's argument on the lines of education being in the concurrent list is a very wise way of abdicating the responsibility of educating the children coming from deprived section.

Private English Medium Schools for the children coming from the middle class , State run and State aided institutions for the children coming from lower middle class/poor masses , Institutions run by the local self governments for the poorest of the poor especially in urban slums and Education Guarantee Scheme of SSA for the children coming from marginalized and pauperized class ”

Thus, it is clear that the political economy of right to education in India is to protect and promote the interest of the handful of children coming from the ruling elite, bureaucracy, rich business class and market oriented upper middle class by making education a purchasable commodity and renouncing and dismantling the public education system to make the remaining child population to serve the above said section as bonded labourers, child labourers, daily wage workers and manual labourers to maintain the status quo and perpetuation of inequality and injustice for ever.

The bill adhering to the truancy principle, invoked a provision under 51A (k) to make parents responsible for the education of their wards. This is nothing but shifting the onus on the poor people who are already struggling for their survival. I am of the opinion that centre is playing dually in relation to roles and responsibilities. On one hand whenever there is a financial implication, the central government speaks the language of concurrent and decentralized responsibility and whenever the issues of contents, curriculum, minimum standards and processes related to education come, the same centre is centralizing its control on the states.

The Bill tabled in the Rajya Sabha retained the provision related to 25 percent reservation clause in the private schools for the children coming from weaker sections and disadvantage groups. The cost of education of these children is reimbursed by the state /central government on the basis of per child cost in the government school.

Contrary to this, the private institutions have the social obligation and responsibility to provide education to marginalized children since they are benefited by various other facilities provided by the state. For instance, in many places these institutions were given the land reserved for public good under civic amenity or the government land meant for common use. Apart from this road, electricity, water, trained teachers and many such facilities are provided by the state to these institutions. This being the case, the state's decision to reimburse the cost of 25 students is nothing but nepotism that gradually paves the way for further privatization of education.

Sixthly, all the norms and standards prescribed by the National Council for Teacher Education (NCTE) in the previous bill for the appointment of teachers have been removed. This will help the state to continue the practice of appointing unqualified and untrained para- teachers at the cost of quality education. In addition to this, the provision of 'ensuring equitable quality education by strengthening the teacher education process through innovative measures' is removed including the use of Information and Communication Technology (ICT).

Further, the provision pertaining to equitable facilities and learning opportunities for differently abled children is also removed. The changed version of the provision related to medium of instruction (medium of education is a better usage) is a conspiracy of the state to protect the interest of private institutions by succumbing to their pressure and thereby negating the universal truth that children perform better with more creativity if we provide them education in their respective mother tongue. This is also a violation of the Constitutional provision under Article 350A.

Seventhly, the title of chapter VI has been changed from 'monitoring the implementation of Act' to 'protection of right of children' with a motto of making the NCPCR soul responsible for the implementation of Fundamental Right to Education. As all of us know the NCPCR was established under the Commission for Protection of

Child Rights Act 2005 to protect the child rights with a broader framework of UNCRC in the Indian context. The implementation of right to education needs a specialized and competent body having requisite expertise in the area of school education. In my opinion, the NCPCCR as such is not a competent authority to monitor the implementation of Right to Education. A body with expertise in the area of school education and vested with judicial powers at National/ State/ District/ Taluk/ Panchayat level can only ensure the stringent and effective implementation of the Fundamental Right.

The revised bill in its present form takes away the right to education by not providing justiciable clause under the law. The fundamental right of the Child is not justiciable. Any violation under the law needs prior sanction or permission from the state through an authorized mechanism. A child who is deprived of her fundamental right to education cannot question the state or any other authority responsible for it in the court of law. The centre made a mockery of our democracy and great dishonour to basic human rights and human dignity enshrined in various international and national legal instruments by subjecting the Fundamental Right to the mercy of state and bureaucracy.

Finally, many crucial provisions in the main text of the earlier bill is either dropped or shifted to miscellaneous chapter or memorandum under delegated legislation under rule making process by further diluting the already diluted bill to make the whole legislation dry and ineffective. For instance, the state is not even willing to place the ECCE related provision in the schedule under the desirable list .It shows that the state completely abdicates its responsibility of protecting and nurturing the rights of children below six years. To demonstrate this, the definition related ECCE in the definition clause is removed.

It seems from the revised bill that the state is not keen to consider the electricity and computer as essential for a school in the age of information technology. Hence the desirable clause related to the provision of electricity, telephone and computer is dropped.

The true colour of the state in relation to finding adequate resources to ensure equitable quality education is self exposed by making an empty statement without any commitment in the last part of the bill under Financial Memorandum. It is a universal truth that implementation of any legislation having financial implications need to be estimated to ensure adequate allocation of resources. Many expert committees like the Education Commission of 1964-66 (6% of the GNP), Tapas Mujamdar committee and the CABE as part of redrafting the bill made concrete recommendations in this regard. It is surprising to know why the government is reluctant to consider the recommendations made by such expert committees to arrive at a rough estimation that could have been mentioned in the financial memorandum as well.

To conclude, the Article 13 of the Constitution establishes the paramount nature of the Constitution with regard to the fundamental rights. The first clause under the article relates to the laws already existing and in force and declares that pre-Constitutional laws are void to the extent to which they are inconsistent with the fundamental rights. The second clause relates to post –Constitutional laws and

prohibits the state from making any law that either takes away totally or abrogates in part, a fundamental right³

The Supreme Court of India had accorded the Status of Fundamental right to education in its historical judgment pronounced in the case of Unnikrishnan v. State of Andhra Pradesh in 1993. Further; the Constitution was amended to accord the status of Fundamental right to education through the 86th Constitutional Amendment Act and inserted article 21-A in the Constitution. The bill introduced in the Rajya Sabha takes away the fundamental right to education until the age of 14 years accorded by the Supreme Court and thereby negating the fundamental right to dignified life.

Therefore in my opinion, the bill tabled in the Rajya Sabha is unconstitutional and inconsistent with the fundamental right to dignified life. It also breaches various other provisions of the Constitution and international covenants and conventions ratified by the Indian state time to time including the United Nation Convention on The Rights of the Child (UNCRC).

³ For more details refer notes on article 13 in Bakshi .P.M, (2009):*The Constitution of India* ,Universal Publishing ,New Delhi, p 13