

International Human Rights Perspectives on the Fundamental Right to Education—Integration of Human Rights and Human Development in the Indian Constitution

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This Article provides for a legal, jurisprudential, and constitutional foundation for developing the right to education in India. The right to education is specifically addressed from an international human rights perspective and the Indian constitutional perspective. The Article underscores the need for ensuring that the right to education is constitutionally protected as an economic and social right. It also stresses the necessary governance measures taken with a view to achieve full realization of this right. The formulation of necessary enforcement mechanisms in India for enforcing the right to education becomes an important theme in the Article, particularly when it is examined in the context of integration of human rights and human development.

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“A Constitution may indicate the direction in which we are to move, but the social structure will decide how far we are able to move and at what pace.”

—Andre Beteille¹

I. INTRODUCTION

Education is the most important value by which human beings engage and interact with society, and through which the human mind develops. The dynamic process of education remains one of the most important issues for both developing and developed countries in order to uplift humanity. While education has remained a policy goal in numerous countries for many decades, the recognition of a right to education with possible national and international law enforcement mechanisms is of recent origin. The fact that countries attempt to enforce policy issues through rights-based approaches underlines the empowering dimension of rights in public policy discourse. The world

1. ANDRE BETEILLE, *THE BACKWARD CLASSES IN CONTEMPORARY INDIA* 1 (1992).

cannot afford to tolerate the poverty, injustice, and waste associated with the mass violation of the right to education.² As Justice Cardozo said:

We are free only if we know, and so in proportion to our knowledge. There is no freedom without choice, and there is no choice without knowledge,—or none that is not illusory. Implicit, therefore, in the very notion of liberty is the liberty of the mind to absorb and to beget.³

The freedom to acquire knowledge through which one can pursue liberty is one of the fundamental goals of any contemporary society. To use Amartya Sen's words, "Development consists of the removal of various types of unfreedoms that leave people with little choice and little opportunity of exercising their reasoned agency."⁴ Illiteracy is obviously one of the troubling unfreedoms that has affected the people of developing countries like India, and therefore, urgent efforts need to be taken both at the national and international level to promote education, thus improving people's "basic capabilities."⁵

Mass illiteracy has left hundreds of millions of adults and children in the developing world, including India, disadvantaged, vulnerable, and impoverished. The poor have been victims of the lack of education and have lost their basic right to a meaningful existence due to a failure to participate in the policy formulating and decision-making processes that fundamentally affects their lives. Universal primary education is imperative in addressing the single greatest challenge facing humanity: eradication of poverty. If the global community is serious about efforts to end misery and develop a social order that will have political equality and social justice as its hallmarks, it cannot ignore the need to pursue the task of providing education for everyone in developing countries. India

2. KEVIN WATKINS, OXFAM INT'L, EDUCATION NOW: BREAK THE CYCLE OF POVERTY 1-7 (1999).

3. BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 104 (Greenwood Press 1982) (1928).

4. AMARTYA SEN, DEVELOPMENT AS FREEDOM, at xii (1999).

5. It is useful to refer to the concept of "capability" as a vital goal and measure of development. This has grown primarily out of the writings of Amartya Sen and has come to significantly influence some basic ideas and indices in the annual Human Development Reports of the United Nations Development Programme (UNDP), referred to below in the text. See Amartya Sen, *Capability and Well-Being*, in THE QUALITY OF LIFE 30 (Martha Nussbaum & Amartya Sen eds., 1993); see also Amartya Sen, *Development Thinking at the Beginning of the XXI Century*, in ECONOMIC AND SOCIAL DEVELOPMENT INTO THE XXI CENTURY 531, 540-42 (Louis Emmerij ed., 1997). For analysis and suggestions about the relationship between rights-based approaches and capabilities, see Martha Nussbaum, *Capabilities and Human Rights*, 66 *FORDHAM L. REV.* 273 (1997); and Alicia Ely Yamin, *Reflections on Defining, Understanding, and Measuring Poverty in Terms of Violations of Economic and Social Rights Under International Law*, 4 *GEO. J. ON FIGHTING POVERTY* 273 (1997). For significant policies of UNDP, see MAHBUB UL HAQ, REFLECTIONS ON HUMAN DEVELOPMENT (1995).

is one such country that has suffered significantly due to its failure to formulate effective strategies to eliminate illiteracy. This problem is due to the total failure of development planners, politicians, government functionaries, intelligentsia, and the civil society to formulate suitable policies in India's early years as a democracy.⁶ The purpose of this Article is to examine various legal issues relating to illiteracy and lack of education in India from a human rights and human development perspective and it recommends the need for providing an enforceable fundamental "right to education"⁷ under the Indian Constitution. The concept of the right to education as a "social constitutional right"⁸ argued in this Article is based upon the fact that education is indispensable to the empowerment of the citizenry.

First, this Article examines the problem of illiteracy in India from a governance standpoint by illustrating that the form of illiteracy, or lack of education, prevalent in India and other developing countries is itself a violation of human rights.

Second, this Article traces the evolution of a fundamental right to education in India by referring to the international human rights framework, as well as the Indian constitutional framework.

Third, this Article analyzes the Constituent Assembly debates and the role played by the framers of the Indian Constitution in giving particular status to various provisions of the Constitution, with reference to the Fundamental Rights and the Directive Principles of State Policy. It draws on the approach of the Supreme Court of India, particularly its transformation from a positivistic and traditional court in its nascent stage to an activist and progressive court, currently with its most significant expansion in the development of fundamental rights.

Next, it examines the transformation of the Supreme Court of India to identify the court's role in developing a fundamental right to education through its constitutional jurisprudence.

6. See generally Upendra Baxi, *The State and Human Rights Movements in India*, in *PEOPLE'S RIGHTS—SPECIAL MOVEMENTS AND THE STATE IN THE THIRD WORLD* 335-52 (Monoranjan Mohanty et al. eds., 1998).

7. For further reading, see Matthew H. Kramer, *Rights Without Trimmings*, in *MATTHEW H. KRAMER ET. AL., A DEBATE OVER RIGHTS* (1998). See also Matthew H. Kramer, *On the Nature of Legal Rights*, 59 *CAMBRIDGE L.J.* 473-508 (2000).

8. For a very interesting argument on social constitutional rights in promoting constitutionalism, see ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* 288-348 (Julian Rivers trans., Oxford Univ. Press 2002) (1986).

Finally, this Article concludes by supporting the formulation of a fundamental right to education⁹ within the framework of the Indian Constitution, so that India's human rights policies can be meaningfully integrated with human development policies.

II. ILLITERACY IN INDIA AND POLICY INITIATIVES FOR PROMOTING EDUCATION

In India, the magnitude of illiteracy constitutes a serious handicap for the socio-economic development of the country.¹⁰ In 1948, the University Education Commission first reviewed the status of education in India and recommended that education could be a powerful tool for reducing inequalities among the Indian people, in acquiring economic independence, and in achieving effective democracy.¹¹ The Kothari Commission (1964-66) recommended reconstruction of the educational system under three main heads: internal transformation, qualitative improvement, and expansion of educational facilities.¹² Moreover, the Draft National Policy on Education (1979) reiterated that universal primary education should be provided to children up to fourteen years of age.¹³ The policy also stated that special attention should be given to the education of girls and children of backward castes.¹⁴

In order to fully grasp the nature and magnitude of illiteracy in India, it is useful to review the Indian Government's Five-Year Plans to gain an understanding of the importance given to education within the

9. See generally Vijayashri Sripathi & Arun K. Thiruvengadam, *India: Constitutional Amendment Making the Right to Education a Fundamental Right*, 2 INT'L J. CONST. L. 148-58 (2004).

10. See generally CTR. FOR WOMEN'S DEV. STUDIES (CWDS), HUMAN RIGHTS AND HUMAN DEVELOPMENT (2000) [India] [hereinafter CWDS, HUMAN RIGHTS]. For information on the Centre for Women's Development Studies, go to <http://www.cwds.org>. For further reading, see Human Rights and Human Development, http://hdr.undp.org/docs/publications/background_papers/indiapaper.pdf (last visited Mar. 27, 2004) [hereinafter Human Rights and Human Development].

Education for All is not a mere question of literacy. It is an empowerment of people. What is it that we are seeking? We are striving to achieve a world in which peace and harmony reign, a world free of poverty and malnutrition. Education is the path that leads to that world.

P.V. Narasimha Rao, Remarks at the Education for All Summit of Nine High Population Countries (Dec. 16, 1993), *in* CWDS, HUMAN RIGHTS.

11. KRANTI KAPOOR & B.C. MEHTA, EDUCATION IN INDIA—GROWTH AND EQUITY ASPECTS 33-37 (1996).

12. *Id.* at 34.

13. Draft National Policy on Education, 1979 (India), <http://shikshanic.nic.in/cd50years/g/T/GW/OTGW0101.htm>.

14. KAPOOR & MEHTA, *supra* note 11, at 34.

Indian governance policies. After independence from British rule, India inherited a system of education, which was not only modest in its reach, but also was marked by the persistence of large inter-regional and structural imbalances and inequalities. Only fourteen percent of the population was literate, and only one child out of three had been enrolled in primary schools.¹⁵ Such low levels of enrolment in the school system and high levels of illiteracy also showed sharp regional and gender disparities.¹⁶ Both the Constitution as well as the successive Five Year Plans recognized and gave consideration to the need for a literate population and universal education for all children in the age group of six to fourteen years as a crucial input for nation building.¹⁷

The 1970s saw the planners' inclusion of the policy of Universal Primary Education (UPE) as a part of the minimum needs programme.¹⁸ However, the Fifth Five Year Plan demonstrated that numerous states were not in a position to allocate the necessary economic resources to achieve the goal of UPE.¹⁹ Socially disadvantaged groups like the economically poor, scheduled castes,²⁰ and scheduled tribes,²¹ existed at

15. Five-Year Plans (Planning Commission, 1980-2002) [India], <http://www.planningcommission.nic.in/plans/planrel/fiveyr/> (last visited Mar. 27, 2004).

16. *Id.*

17. *Id.*

18. For a constitutional perspective of the debate relating to rights for minimum entitlements, see Erwin Chemerinsky, *Making The Case for a Constitutional Right to Minimum Entitlements*, 44 MERCER L. REV. 525, 541 (1993); Erwin Chemerinsky, *Under The Bridges of Paris: Economic Liberties Should Not Be Just for the Rich*, 6 CHAPMAN L. REV. 31-41 (2003); Mark S. Kende, *The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective*, 6 CHAPMAN L. REV. 137 (2003). For some highly persuasive arguments relating to inclusion of social welfare rights within the Constitution in the U.S. context, see Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1103-06 (1986); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 61 (1987); Frank I. Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 8-9 (1969); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, 693; Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 966-67 (1973).

19. See Fifth Five Year Plan 17-19 (Planning Commission 1975-80), [India], <http://www.planningcommission.nic.in/plans/planrel/fiveyr/5th/5vfore.htm> (last visited Mar. 27, 2004) [hereinafter 5th Five Year Plan].

20. The term "scheduled castes" refers to a list of socially deprived ("untouchable") castes prepared by the British Government in 1935. The intent of the schedule of castes was to increase representation of scheduled caste members in the legislature, government employment, and university placement. The Constitution and various laws also use the term.

21. The term "scheduled tribes" refers to a list of indigenous tribal populations who are entitled to much of the same compensatory treatment as scheduled castes.

the periphery of the schooling system.²² In addition, factors existed which contributed to the tardy progress in achieving growth in education. Some of these factors were that there were socio-economic compulsions in families that forced parents not to send their children to schools, that the curricula was irrelevant in nature, and there was a lack of essential facilities.²³

The Sixth Five Year Plan (1980-85) proposed to give special attention to educationally backward states and socially disadvantaged groups.²⁴ Creatively, it suggested changes in school hours which were more suitable to local conditions, and proposed a nonformal system of learning.²⁵ With the specific objective of retaining as many children in school as possible, it introduced incentives like free midday meals, supply of uniforms and learning materials, and compensation to the families of scheduled caste and scheduled tribe girls.²⁶ The plan also made provisions requiring educationally backward states to increase their existing rates of enrolment.²⁷ While highlighting the need for increased enrolment and retention of girls in schools, it proposed to attach day care centers, known as *Balwadi-cum-creches*, for infants in order to enable girls who undertook sibling care duties to attend school.²⁸ It also proposed income generation work for girls outside school hours to supplement family income, to provide residential quarters for teachers, to underline the need to strengthen the teaching of science in girls' schools, and formulated the policy of appointing female teachers in rural areas to encourage girls' education.²⁹ A review of the Sixth Five Year Plan demonstrated the need to improve the quality, relevance, and effectiveness of the elementary education system; the enrolment and retention rates of female students; and to promote girls' education in all the states and union territories.³⁰

22. Sixth Five Year Plan ch. 21.5 (Planning Commission, 1980-85) [India], <http://www.planningcommission.nic.in/plans/planrel/fiveyr/6th/6planch21.html> (last visited Mar. 27, 2004) [hereinafter 6th Five Year Plan].

23. *Id.* ch. 21.5.

24. *Id.* ch. 21.1.

25. *Id.* ch. 21.13.

26. *Id.* ch. 21.20; *see also* VINA MAZUMDAR & BALAJI PANDEY, CWDS, PERSPECTIVES OF WOMEN'S EDUCATION 1971-81 [India] [hereinafter CWDS, PERSPECTIVES].

27. 6th Five Year Plan, *supra* note 22, ch. 21.12.

28. *Id.* ch. 27.26.

29. *Id.* Notably, this was the first plan to have a separate chapter on Women and Development. *See id.* ch. 27.

30. 2 Seventh Five Year Plan ch. 10.9 (Planning Commission, 1985-1990) [India], <http://www.planningcommission.nic.in/plans/planrel/fiveyr/7th/volz/7v2ch10.html> (last visited Mar. 27, 2004) [hereinafter 7th Five Year Plan].

The Seventh Five Year Plan (1985-90) strengthened the existing schemes and facilities and also underlined the role of local communities in the fulfilment of these objectives.³¹ Programs such as “Operation Blackboard” and other programs for teachers’ education, were launched to improve school facilities and revise nonformal education.³² In 1986, the Planning Commission revised the National Policy on Education (NPE) and formulated several new proposals taking into consideration these developments.³³ The plan resolved to give the highest priority to solving the problem of children dropping out of school, and would adopt an array of meticulously formulated strategies to be applied at the grassroots level all over the country to ensure children’s retention in schools.³⁴ It proposed that all children who attained the age of eleven by 1990 would have had “five years of schooling or its equivalent through the formal/non-formal stream of education.”³⁵ Similarly, it proposed that by 1990 free and compulsory education would be provided to all children until they reach fourteen years of age.³⁶ For the first time in the history of independent India, the government prepared a “Programme of Action” in 1986, covering twenty-four subjects for the implementation of the NPE.³⁷ The subjects covered by the Programme were distance education, correspondence courses, open schools and universities, and women’s studies.³⁸ Due to the strengthening of the women’s movement, by underlining the need for gender equality in education, a chapter titled “Education for Equality” was included.³⁹ It was later reviewed and revised in 1992.⁴⁰ The 1986 NPE was considered a landmark approach to women’s education and resulted in the initiation of Mahila Samakhya projects.⁴¹ This programme highlighted processes rather than outcomes.⁴²

31. *Id.* ch. 10.23.

32. 2 Eighth Five Year Plan ch. 11.1.4 (Planning Commission, 1992-1997) [India], <http://www.planningcommission.nic.in/plans/planrel/fiveyr/8th/vol2/8v2ch11.htm> (last visited Mar. 27, 2004) [hereinafter 8th Five Year Plan].

33. *Id.*

34. 7th Five Year Plan, *supra* note 30, chs. 10.27, .31.

35. 8th Five Year Plan, *supra* note 32, ch. 11.5.12.

36. 2 Ninth Five Year Plan ch. 3.3.58 (Planning Commission 1997-2002) [India], <http://www.planningcommission.nic.in/plans/planrel/fiveyr/9th/vol2/v2c33.htm> (last visited Mar. 27, 2004) [hereinafter 9th Five Year Plan].

37. Programme of Action: NPE 1986 [India], http://www.ncte-in.org/pub/policy/part2_2.htm#36 (last visited Mar. 27, 2004).

38. *Id.*

39. *Id.*

40. *Id.*

41. These projects had the objective of imparting education for women’s equality. For more information, see R.K. BHANDARI, MINISTRY OF EDUCATION AND CULTURE, EDUCATIONAL DEVELOPMENT OF WOMEN IN INDIA (1982).

The policy and the Programme of Action of 1986 and 1992 directed the national education system to play a positive and interventionist role in the empowerment of women, and promoted women's studies as a part of various courses aimed to advance gender justice and equality.

The Eighth Five Year Plan (1992-97) introduced a decentralized approach to educational planning and management at all levels from *panchayati raj* (local self-government) institutions to large-scale participation of voluntary agencies.⁴³ It encouraged the development of innovative and cost-effective complementary programmes like Open Learning System (OLS), which catered to the needs of girls, women, scheduled castes and tribes, and the poor.⁴⁴ The plan also proposed to set up district boards of education treating them as nodal agencies for the planning and management of education at the district level, the involvement of people in school management through village education committees, and the involvement of NGOs, students, and university teachers in a significant manner.⁴⁵ The plan focused more on educationally backward districts rather than states as identified in the Sixth and Seventh Five Year Plans.⁴⁶ It was proposed that primary or nonformal centers of learning were to be provided for every child within a walking distance of one kilometer from his or her home.⁴⁷ Voluntary agencies, factories, and cooperatives would be encouraged to set up part-time primary schools to serve the children of groups such as migrant labour, inhabitants of hill areas, desert areas, nomadic tribes, and the urban poor.⁴⁸

The Ninth Five Year Plan (1997-2002) focused on the elimination of gender discrimination in admissions, as well as removal of gender bias and stereotypes in syllabi and text books.⁴⁹ Apart from strengthening other facilities and incentives mentioned in the previous plans, it also promoted gender sensitisation of teachers.⁵⁰ The problem of women's education has been examined by a number of different global committees since India's independence, and the Education Commission endorsed the

42. See Dr. Sarala Gopalan & Dr. Mira Shiva, *2000 National Profile on Women, Health and Development: Country Profile—India* 356 (2000).

43. See 8th Five Year Plan, *supra* note 32.

44. *Id.* chs. 11.4.1, 4.2(4).

45. *Id.* ch. 11.4.2(6).

46. *Id.* ch. 11.4.2(10); see also C. Upendranath, *Structural Adjustment and Education: Issues Related to Equity*, *ECON. & POL. WKLY.*, Oct. 30, 1993, at 2415.

47. 8th Five Year Plan, *supra* note 32, ch. 11.5.3.

48. *Id.*

49. 9th Five Year Plan, *supra* note 36, ch. 3.3.80.

50. S.P. AGRAWAL & MENA USMANI, *CHILDREN'S EDUCATION IN INDIA* 122 (2000).

recommendations and suggestions of these committees.⁵¹ In all the Five Year Plans, special provisions were made for the education, health, and welfare of women.⁵²

Notwithstanding the fact that there has been a great expansion of higher education in India following independence, the progress of literacy in general, and that of women in particular, has been poor. Various social reasons have been suggested to explain this phenomenon, including structural apathy within the system, inadequate resources, and inefficient administration.⁵³ However, interestingly, there are no problems in the performance of girls in private schools, colleges, and universities, including those girls located in tribal areas.⁵⁴ The problem prevails in the state-administered schools for the poor, where there is a break down of institutional support. The Total Literacy Campaigns (TLC) for adults and adolescents has mounted since the late 1980s resulting in a tremendous response from women and girls, particularly in rural areas, who contour a social movement reminiscent of the freedom struggle in several districts.⁵⁵ "The number of illiterate persons aged 5 and above rose from 350 million in 1981 to 371 million in 1991" as reported in the Public Report on Basic Education (PROBE).⁵⁶ The 2001 Census has recorded that the percentage of literate persons of the total population in India is 65.38%, of which 75.85% of males are literate and 54.16% of females are literate.⁵⁷ While these statistics show an improvement in the literacy rate, India, however, is far from becoming a country with education levels comparable to other developed countries.

51. The National Commission on Women's Education (1958-59); Hansa Mehta Committee on Differentiation of Curricula for Boys and Girls appointed by the National Council for Women's Education, the Education Commission (1964-66); The Committee on the Status of Women in India (CSWI) (1975). The first committee recommended top priority to girls' primary education by suggesting measures like appointment of women teachers, provision of free books and materials, part-time education for girls between the ages of eleven and fourteen, and special assistance to all states until eighty percent of girls in the six to eleven age group were enrolled. Unfortunately, this part of the suggestion was never implemented during the second half of the 1960s because of a financial crisis. The Hansa Mehta Committee strongly opposed separate curricula on the basis of gender. For further reading, refer to Human Rights and Human Development, *supra* note 10.

52. *See generally* 5th Five Year Plan, *supra* note 19; 6th Five Year Plan, *supra* note 22; 7th Five Year Plan, *supra* note 30; 8th Five Year Plan, *supra* note 32; 9th Five Year Plan, *supra* note 36.

53. 9th Five Year Plan, *supra* note 36, chs. 3.3.63-71.

54. *See generally id.* chs. 3.3.36-40.

55. *See generally* MINISTRY OF EDUC., 2003 ANNUAL REPORT 63-65 (2002-2003), available at <http://www.education.nic.in/htmlweb/annualreport03/eleedu.pdf>.

56. THE PROBE TEAM, PUBLIC REPORT ON BASIC EDUCATION IN INDIA 12 (1999).

57. Provisional Population Totals: Census of India 2001, <http://censusindia.net/results/provindia1.html> (last visited Mar. 27, 2004).

III. INTERNATIONAL HUMAN RIGHTS FRAMEWORK AND THE RIGHT TO EDUCATION

A. *Relevance of Economic and Social Rights*

The international human rights movement has paved the way for developing jurisprudence relating to civil and political rights within the governing systems of nation states.⁵⁸ The Universal Declaration of Human Rights (UDHR) has provisions relating to both civil and political rights and economic, social and cultural rights.⁵⁹ Unfortunately, since the formation of the United Nations and until recently, the dominant model for governance was a Western-style democracy, which gave more emphasis to the development and sustenance of civil and political rights, rather than economic, social, and cultural rights.⁶⁰ This concentration on civil and political rights was born out of the Cold War-era perception that an elevation of economic, social, and cultural rights was characteristic of communism.⁶¹ This skewed thinking has resulted in extreme neglect of economic, social, and cultural rights and the impoverishment of numerous regions of the world. The historical error of neglecting economic, social, and cultural rights by the West, combined with other factors relating to poor governance policies, has today resulted in lack of education, rampant poverty, large-scale unemployment, and other maladies that generally are associated with third-world countries.⁶²

Shedrack Agbakwa has observed that “the foregoing example is emblematic of developed states’ attitudes towards developing states’ socio-economic development.”⁶³ In his final report on the impunity of

58. For further information on the systemic connection between economic, social, and cultural rights, and lack of stability, refer to the U.N. Secretary-General’s testimony to the effect that unfulfilled basic needs constitute “the deepest causes of conflict.” *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping: Report of the Secretary-General*, U.N. GAOR, at 4, U.N. Doc. A/47/277/S/24111 (1992), <http://www.un.org/Docs/SG/agpeace.html> (last visited Mar. 27, 2004).

59. See generally Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc. A/810 (1948) [hereinafter UDHR].

60. Shedrack C. Agbakwa, *Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights*, 5 YALE HUM. RTS. & DEV. L.J. 177, 203 (2002).

61. Linda M. Keller, *The American Rejection of Economic Rights as Human Rights and the Declaration of Independence: Does the Pursuit of Happiness Require Basic Economic Rights?*, 19 N.Y.L. SCH. J. HUM. RTS. 557, 559 (2003).

62. According to Philip Alston, the U.S. presidential administrations of Ronald Reagan and George H. Bush rejected in totality the notion of economic, social, and cultural rights. Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT’L L. 365, 372 (1990); see also Keller, *supra* note 61, at 557.

63. Agbakwa, *supra* note 60, at 203.

perpetrators of economic, social, and cultural rights violations, UN Commission on Human Rights Special Rapporteur, Mr. El Hadji Guissé notes:

During the discussions on methods of implementing economic, social and cultural rights, . . . the representatives of several developing countries expressed the fear that the inevitably slow progress in realizing those rights might be taken for unwillingness on their part. They had not reckoned with the developed countries' determination to undermine any possible basis for a truly fair world economic order where economic, social and cultural rights would have a chance of being realized. It was soon observed afterwards that the fears of the former and the hypocrisy of the latter very rapidly became a source of massive and grave violations of economic, social and cultural rights. . . .⁶⁴

The inescapable conclusion is that the international community members failed to support economic, social, and cultural rights, as well as actively hindering the development of economic, social, and cultural rights.⁶⁵

Furthermore, Agbakwa has argued that "the nonenforcement of economic, social, and cultural rights ridicules the so-called autonomy of the individual," a concept that forms the basic foundation of civil and political rights.⁶⁶ Research has shown that appropriate socio-economic "conditions must exist as a precondition to personal autonomy."⁶⁷ In this context, Agbakwa has referred to the thoughts of Joseph Raz, for whom autonomy "affects wide-ranging aspects of social practices and institutions. . . . Almost all major social decisions and many of the considerations both for and against each one of them [whether civil and political rights or economic, social, and cultural rights] bear on the possibility of personal autonomy, either instrumentally or inherently."⁶⁸ Hence, it may be argued that the lack of education results in the lack of autonomy in every sense of its meaning, as education not only imparts knowledge, which is necessary to lead an autonomous existence, but it also empowers human beings to make responsible decisions that affect their lives. Moreover, in an era of globalisation and increased economic

64. *The Realization of Economic, Social and Cultural Rights: Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations, Prepared by Special Rapporteur El Hadji Guissé*, U.N. Comm. Hum. Rts., 49th Sess., ch. 16, U.N. Doc. E/CN.4/Sub.2/1997/8 (1997), <http://www.derechos.org/nizkor/impu/guissee.html> (last visited Sept. 13, 2003).

65. Agbakwa, *supra* note 60, at 204.

66. *Id.* at 184.

67. Dr. Daniel Warner, *An Ethics of Human Rights: Two Interrelated Misunderstandings*, 24 DENV. J. INT'L L. & POL'Y 395, 411 (1996).

68. Joseph Raz, *Right-Based Moralities*, in THEORIES OF RIGHTS 182, 194-95 (Jeremy Waldron ed., 1984); *see also* Agbakwa, *supra* note 60, at 184.

interdependence amongst nation states, the governments all over the world make important decisions that affect the lives of their people quite significantly.⁶⁹ Illiteracy deprives people of a basic awareness and understanding of the impact these decisions would have on their existence.⁷⁰ This aspect of illiteracy is related to the issue of access to justice in developing countries, such as India, where the poor and illiterate are not even aware of their basic rights under the Constitution or of those rights that have been judicially recognized.

In this context, Agbakwa has referred to a report submitted to U.N.E.S.C.O., which emphasizes that “[n]ational development hinges on the ability of working populations to handle complex technologies and to demonstrate inventiveness and adaptability, qualities that depend to a great extent on the level of initial education.”⁷¹ “Accordingly, the realization of the right to education and other economic, social, and cultural rights are, as Hercules Booyesen observes, “a prerequisite for the creation of wealth”” and, as such, a necessary precondition of development.”⁷² The fact that civil and political rights became entrenched in many constitutions and legislation of developing countries, instructively demonstrates that the countries could have taken additional steps to ensure the protection and promotion of economic, social, and cultural rights. The enforcement of economic, social, and cultural rights could provide the precious space and numerous opportunities that would make the enjoyment of civil and political rights socially meaningful and practically significant. In the case of India, the use of public interest litigation is one method by which the judiciary interprets economic, social, and cultural rights into the fundamental rights framework, thereby guaranteeing a host of constitutional protections.⁷³

69. See generally Robert McCorquodale & Richard Fairbrother, *Globalization and Human Rights*, 21 HUM. RTS. Q. 735, 747 (1999).

70. There are numerous writings addressing the negative impact of globalization on economic, social, and cultural rights in both developed and developing states. See generally MICHEL CHOSSUDOVSKY, *THE GLOBALIZATION OF POVERTY: IMPACTS OF THE IMF AND WORLD BANK REFORMS* (1997); *GLOBALIZATION: CRITICAL REFLECTIONS* (J. Mittleman ed., 1997); McCorquodale & Fairbrother, *supra* note 69, at 735.

71. Agbakwa, *supra* note 60, at 188 (internal citations omitted).

72. *Id.* (internal citations omitted); see Learning the Treasure Within, Report to U.N.E.S.C.O. of the International Commission on Education for the Twenty-first Century (Odile Jacob ed., 1996), available at http://www.unesco-org/delors/delors_e.pdf (last visited Mar. 27, 2004); Hercules Booyesen, *The Dilemma of International Economic Human Rights: Their Improvement Through an Integrated System Approach*, 23 S. AFR. Y.B. INT'L L. 93, 109 (1998).

73. In the case of South Africa, there have been similar developments and the courts have indeed taken such a position while interpreting the Constitution. As in *Soobramoney v. Minister of Health, KwaZulu-Natal* 1998 (1) SALR 765, 767-68 (CC), the courts may still be reluctant to grant every petition. In *Soobramoney*, the Court declined to compel dialysis treatment for a sick

B. Progressive Realization of the Right to Education

There is no doubt that the standard of implementation specified in the International Covenant on Economic, Social and Cultural Rights (ICESCR), "progressive implementation," has affected the "conceptualisation of the rights and the process of monitoring them."⁷⁴ Article 2.1 of the ICESCR permits the full realization of these rights to be accomplished in stages as resources permit.⁷⁵ It mandates a state party

to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.⁷⁶

It is possible that the standard of progressive realization may be used by States to claim a lack of resources as the reason for not meeting the obligations relating to the right to education.⁷⁷ To ensure that does not happen, a number of restrictions have been imposed on progressive realization, both through the language of the ICESCR and its following interpretation.⁷⁸ The problem of nonenforcement of the right to education can be overcome by referring to the concept of "minimum core content" in economic, social, and cultural rights.⁷⁹ The Committee on Economic, Social and Cultural Rights (CESCR) has established that there is a "minimum core content" with regard to each economic, social, and cultural right which all State parties have obligations to fulfil.⁸⁰ The CESCR in its third general comment declared that it is "of the view that a minimum core obligation to ensure the satisfaction of, at the very least,

patient because of the state's insufficient resources. Nevertheless, the availability of judicial review (or other independent review) can be a significant weapon in the hands of the oppressed and may provide occasions for appropriate judicial intervention. *Grootboom v. Oostenberg Municipality* 2000 (3) BCLR 277 (S. Afr.); see Craig Scott & Philip Alston, *Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise*, 16 S. AFR. J. HUM. RTS. 206 (2000).

74. Audrey R. Chapman & Sage Russell, *Introduction to CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 4 (Audrey R. Chapman & Sage Russell eds., 2002).

75. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 2.1, 993 U.N.T.S. 3, 6 I.L.M. 360 (entered into force Jan. 3, 1976) [hereinafter ICESCR]; see also Chapman & Russell, *supra* note 74, at 4.

76. ICESCR, *supra* note 75, art. 2.1.

77. Chapman & Russell, *supra* note 74, at 4.

78. *Id.* at 5.

79. See Fons Coomans, *In Search of the Core Content of the Right to Education*, in Chapman & Russell, *supra* note 74, at 217-46.

80. *Id.* at 6.

minimum essential levels of each of the rights is incumbent upon every State party.”⁸¹ The violations approach of monitoring economic, social, and cultural rights may be helpful to overcome the hurdle of progressive realization.⁸² It is also useful to refer to the 1986 Limburg Principles on the Implementation of the ICESCR, which was formulated by a group of distinguished experts in international law.⁸³ It defined “a violation of the Covenant” as a “failure by a State party to comply with an obligation contained in the Covenant.”⁸⁴ It also recognized that these failures could be acts of either commission or omission.⁸⁵ Developing a violations approach for monitoring economic, social, and cultural rights received further attention at a meeting of international experts in Maastricht in 1997 to elaborate on the Limburg Principles.⁸⁶ The Maastricht Guidelines define violations of economic, social, and cultural rights in relation to three types of obligations of states: the obligation to respect, to protect, and to fulfil enumerated rights.⁸⁷ Thus, the Maastricht Guidelines emphasize that a failure to perform any or all of these obligations constitutes a violation of economic, social, and cultural rights.⁸⁸

C. Education as a Human Right

Katarina Tomasevski, the Special Rapporteur on the right to education for the United Nations Commission on Human Rights, has observed in her recent book that “[r]ights-based education necessitates two changes: human rights ought to be moved from the margins to the core of the many policies that shape education, and the universality of the right to education ought to be translated into universal human rights obligations.”⁸⁹ Education has been valued in all societies⁹⁰ as both an end

81. *General Comment No. 3: The Nature of States Parties Obligations (art. 2, para. 1): Committee on Economic, Social and Cultural Rights*, 5th Sess., Supp. No. 3, para. 10, U.N. Doc. E/1991/23 (1990), <http://lawhk.hku.hk/demo/unhrdocs/escgc3.htm> (last visited Mar. 27, 2004).

82. See Audrey R. Chapman, *A “Violations Approach” for Monitoring the International Covenant on Economic, Social and Cultural Rights*, 18 HUM. RTS. Q. 23, 24 (1996).

83. See *Introduction to Symposium: The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, Annex, U.N. Doc. E/CN.4/1987/17, reprinted in 9 HUM. RTS. Q. 121 (1987).

84. *Id.* at 131.

85. *Id.*

86. *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 691 (1998).

87. *Id.* at 693.

88. *Id.* at 693-94.

89. KATARINA TOMASEVSKI, *EDUCATION DENIED: COSTS AND REMEDIES* 4 (2003).

90. It may be noted that the World Declaration on Education for All was adopted by 155 governmental delegations; the Vienna Declaration and Programme of Action was adopted by 171

in itself and a means for the development of the individual and society.⁹¹ The global community recognizes education as a human right due to its indispensability to the preservation and enhancement of the inherent dignity of the person.⁹² The UDHR states, "Everyone has the right to education."⁹³ Additionally, the UDHR says that education shall be free, at least in the elementary and fundamental stages.⁹⁴ Article 26 of the UDHR continues on, stating that elementary education should be compulsory; higher education should be equally accessible to all on the basis of merit; and technical and professional education should be made generally available.⁹⁵ The UDHR also stipulates that education should help to develop the human personality and strengthen respect for human rights.⁹⁶ In addition, it acknowledges that parents have a right to choose the kind of education that their children will receive.⁹⁷

Articles 13 and 14 of the ICESCR set out detailed formulations of the right to education.⁹⁸ Article 13 contains a statement that every person has the right to education and that education should be a main contributor to the full development of the human personality.⁹⁹

Article 13(2) of the ICESCR also specifically stipulates:

- (a) Primary education shall be compulsory and available free to all;
- (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
- (c) 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;

governmental delegations; the Convention on the Rights of the Child has been ratified or acceded to by 191 States parties; the Plan of Action of the United Nations Decade for Human Rights Education was adopted by a consensus resolution of the General Assembly (49/184). See *General Comment 13, The Right to Education (art. 13): "Committee on Economic, Social and Cultural Rights,"* 21st Sess., at note 1, <http://www.hku.hk/law/conlawhk/sourcebook/human%20rights/ESCommGC13.htm> (last visited Mar. 27, 2004) [hereinafter *General Comment 13*].

91. U.N.E.S.C.O., THE DAKAR FRAMEWORK FOR ACTION, EDUCATION FOR ALL: MEETING OUR COLLECTIVE COMMITMENTS para. 19 (2000), available at <http://unesdoc.unesco.org/images/0012/001211/121147e.pdf>. For a comprehensive account, see U.N.E.S.C.O., THE RIGHT TO EDUCATION: TOWARDS EDUCATION FOR ALL THROUGHOUT LIFE (2000).

92. *General Comment 13, supra* note 90, para. 4.

93. UDHR, *supra* note 59, art. 26, para. 1.

94. *Id.*

95. *Id.*

96. *Id.* art. 26, para 2.

97. *Id.* art. 26, para 3.

98. See ICESCR, *supra* note 75, arts. 13-14

99. *Id.* art. 13.

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

(3) [T]he liberty of parents . . . [or] legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum education standards as may be laid down or approved by the State. . . .¹⁰⁰

In addition, article 13 recognizes the liberty of parents or guardians to ensure the religious and moral education of their children in conformity with their own convictions.¹⁰¹ Article 14 requires each State Party that has not been able to secure compulsory primary education free of charge, to undertake, “within two years, to work out and adopt a detailed plan of action for the progressive implementation . . . of compulsory education free of charge for all.”¹⁰²

Articles 28 and 29 of the Convention on the Rights of the Child (CRC) deal with the right of the child to education.¹⁰³ Article 28 is similar to the provisions contained in the ICESCR.¹⁰⁴ In addition, it states that school discipline should be administered in a manner consistent with a child’s human dignity.¹⁰⁵ Article 29 stipulates that the education of the child shall be directed towards the “development of the child’s personality, talents and mental and physical abilities to their fullest potential.”¹⁰⁶ The United Nations Educational Scientific and Cultural Organization (U.N.E.S.C.O.) Convention against Discrimination in Education (CDE) stipulates that states must undertake to formulate, develop, and apply a national policy which will tend to promote equality of opportunity and treatment, and, in particular, to make primary education free and compulsory.¹⁰⁷ In addition, the CDE recognizes

100. *Id.* art. 13, para. 2.3.

101. *Id.* art. 13, para. 3.

102. *Id.* art. 14.

103. Convention on the Rights of the Child, Dec. 12, 1989, Annex, arts. 28-29, U.N. Doc. A/RES/44/25 [hereinafter CRC].

104. *Id.* art. 28.

105. *Id.* art. 28, para. 2.

106. *Id.* art. 29, para. 1(a). For further information, see, *General Comment 1: The Aims of Education: Committee on the Rights of the Child*, U.N. Doc. CRC/GC/2001/1 (2001), available at <http://www1.umn.edu/humanrts/crc/comment1.htm> (last visited Jan. 6, 2004) [hereinafter *General Comment 1*].

107. Convention Against Discrimination in Education, Dec. 14, 1960, 429 U.N.T.S. 93, art. 4 (entered into force May 22, 1962) [hereinafter CDE].

parents' right to freely choose their children's educational institutions and to ensure that the religious and moral education of their children is in conformity with their own convictions.¹⁰⁸

Article 10 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) also contains provisions pertaining to the right to education.¹⁰⁹ It provides for equal access to career and vocational guidance and to education at all levels; access to the same curricula and examinations; elimination of stereotyping in the roles of women and men; and the same opportunities to benefit from academic scholarships.¹¹⁰ Several regional human rights instruments also recognize the right to education.¹¹¹ These include the African Charter on Human and Peoples' Rights (article 17); the African Charter on the Rights and Welfare of the Child (article 11); the American Declaration of the Rights and Duties of Man (article 12) and the Additional Protocol to the American Convention on Human Rights in the area of economic, social, and cultural rights (Protocol of San Salvador) (article 13); the European Convention on the Legal Status of Migrant Workers (articles 14 and 15); and the Framework Convention for the Protection of National Minorities (articles 13 and 14).¹¹²

D. *Legal Standards and Their Enforcement*

Felix Morka asserts that "[l]egal standards on the right to education encompass two broad components: enhancement of access of all to education on the basis of equality and nondiscrimination, and freedom to choose the kind (public/private institutions) and content (religious and

108. *Id.* art. 5, para. 1(b).

109. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, art. 10 (1981) [hereinafter CEDAW].

110. *Id.*

111. Felix Morka, *Module 16, The Right to Education*, in Circle of Rights: Economic, Social & Cultural Rights Activism: A Training Resource 5, at <http://www1.umn.edu/humanarts/edumat/IHRIP/circle/modules/module16.htm> (last visited Jan. 6, 2004).

112. For more information, see the Belgian Linguistic case (European Court of Human Rights Publication Series A, vol. 6 at 31), which defines the right to education as a right of access to educational institutions "existing at a given time." See also African Charter on the Rights and Welfare of the Child, O.A. v. Doc. CAB/LEG/24.9/49 (1990) (*not yet in force*) arts. 11(1)-(2); African Charter on Human and People's Rights, O.A. v. Doc. CAB/LEG/67/3rev.5, *reprinted in* 21 I.L.M. 58 (1986) art. 17; American Declaration on the Rights and Duties of Man, AG/RES.1591 (xxviii-0/98) art. xii; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvadore), O.A.S.T.S. No. 69 (1998) (*signed* Nov. 17, 1998), *reprinted in* 28 I.L.M. 156 (1989), *corrections at* 28 I.L.M. 575 and 1341 (1989) art. 13; European Convention on the Legal Status of Migrant Workers, E.T.S. No. 93, adopted Nov. 24, 1977 (*entered into force* May 1, 1983) arts. 14-15; Framework Convention for the Protection of National Minorities, E.T.S. No. 157 (*entered into force* Feb. 1, 1998) *reprinted in* 34 I.L.M. 351 (1995) arts. 13-14.

moral) of education.”¹¹³ Both aspects represent the essence of the right to education.¹¹⁴ The number and variety of reservations, declarations, and objections relating to relevant articles in the CRC illustrate the demanding nature of the obligations involved in ensuring the right to education.¹¹⁵ However, at least four components of the right to education can be seen within various legal provisions: “[1] equal enjoyment of, and equal access to, educational opportunities and facilities; [2] compulsory and free primary education; [3] generally available and accessible secondary education, and equally accessible higher education; [4] freedom of choice in education, and freedom to establish private institutions.”¹¹⁶ The CESCR in General Comment 13, identifies four elements of the State’s obligations with respect to the right to education: (1) availability, (2) accessibility, (3) acceptability, and (4) adaptability.¹¹⁷

1. Availability

The availability of education consists of two government obligations: the right to education as a civil and political right requires the government to permit the establishment of schools, and the right to education as an economic, social, and cultural right requires the government to ensure that free and compulsory education is available to all school-age children.¹¹⁸ Morka notes that “the duty to provide compulsory and free primary education is undoubtedly a prerequisite for the realization of the right to education.”¹¹⁹ According to Katarina Tomasevski, the Special Rapporteur on the Right to Education, “The State’s obligation to make primary education free of charge is frequently, albeit erroneously, associated with the State’s provision of primary education. The State’s obligation to make primary education free is in quite a few countries implemented through subsidies to a diverse range of primary schools.”¹²⁰ Tomasevski also stated:

The first State obligation relates to ensuring that primary schools are available for all children, which necessitates a considerable investment.

113. Morka, *supra* note 111, at 4.

114. *Id.*

115. CRC, *supra* note 103, art. 28.

116. Morka, *supra* note 111, at 5.

117. *General Comment 13, supra* note 90; *Economic, Social and Cultural Rights: Preliminary Report of the Special Rapporteur on the Right to Education, Katarina Tomasevski*, 55th Sess., Agenda Item 10, para. 45, U.N. Doc. E/CN.4/1999/49 (1999) [hereinafter *Tomasevski Preliminary Report*].

118. TOMASEVSKI, *supra* note 89, at 51.

119. Morka, *supra* note 111, at 5.

120. *Tomasevski Preliminary Report, supra* note 117, para. 45.

While the State is not the only investor, international human rights law obliges it to be the investor of last resort so as to ensure that primary schools are available for all school-age children. . . . If the intake capacity of primary schools is below the number of primary-school aged children, legal provisions on compulsory education will not be translated into practice and access to education will remain a need or a wish rather than being a right.¹²¹

2. Accessibility

The second obligation of State parties relates to accessibility of education.¹²² Minimally, governments have an obligation to protect the right to education by guaranteeing access to existing educational institutions for all on the basis of equality and nondiscrimination.¹²³ The State's affirmative obligation to ensure equal access to educational institutions looks to both the physical and constructive access to educational resources.¹²⁴ One example is access for the elderly. The Vienna International Plan of Action on Aging calls for easier physical access to institutions and constructive access to education by overcoming stereotyped images of the elderly as people with either mental or physical handicaps.¹²⁵ Similarly, article 10 of CEDAW provides that governments are obligated to take all appropriate steps towards the "elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging education . . . and by the revision of textbooks and school programmes and the adaptation of teaching methods."¹²⁶ Also under article 10, women and girls have a right to equal access to specific educational information, such as family planning advice and sports programs.¹²⁷ In a similar manner to that for the elderly, the right to education has been affirmed for disabled persons.¹²⁸ Rule 6 of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities provides that "States should recognize the principle of

121. *Id.* paras. 51-52.

122. *Id.* para. 57.

123. *Id.* "Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations." *Minority Schools in Albania* (advisory opinion), 1935 P.C.I.J. (ser. A/B) No.64, at 19 (Apr. 6).

124. Morka, *supra* note 111, at 7.

125. UNITED NATIONS, WORLD ASSEMBLY, VIENNA INTERNATIONAL PLAN OF ACTION ON AGING, at recommendations 48, 50, U.N. Sales No. E.82.I.16 (1983).

126. CEDAW, *supra* note 109, art. 10(c).

127. *Id.* art. 10(g)-(h).

128. *See Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, 85th mtg., Annex, at rule 6, U.N. Doc. A/RES/48/96 (1993), <http://www.independentliving.org/standardrules/StandardRules1.html> (last visited Mar. 27, 2004).

equal primary, secondary and tertiary educational opportunities for children, youth and adults with disabilities, in integrated settings.”¹²⁹ To this end, the CESCR directs State parties to “ensure that teachers are trained to educate children with disabilities within regular schools and that the necessary equipment and support are available to bring persons with disabilities up to the same level of education as their non-disabled peers.”¹³⁰ Similarly, article 13 of the African Charter on the Rights and Welfare of the Child guarantees children with physical and mental disabilities the right to training towards “achieving the fullest possible social integration, individual development and his cultural and moral development.”¹³¹

3. Acceptability

The Special Rapporteur, Katarina Tomasevski, has said that “the State is obliged to ensure that all schools conform to the minimum criteria which it has developed as well as ascertaining that education is acceptable both to parents and to children.”¹³² The European Training and Research Centre for Human Rights and Democracy asserts “[acceptability] involves the right to choose the type of education received, and the right to establish, maintain, manage and control private educational establishments” in the Manual on Human Rights Education.¹³³ It does not, however, require the state to provide the same ancillary benefits to private school pupils that public school pupils may enjoy, such as free bus transportation, free textbooks, or free school meals.¹³⁴ Pupils and parents have a right to be free from indoctrination, and as such, mandatory study of materials that are incongruent with a pupil’s religious or other beliefs could violate the right to education.¹³⁵

129. *Id.*

130. *General Comment 5: Persons with Disabilities: Committee on Economic, Social and Cultural Rights*, 11th Sess., para. 35, U.N. Doc. E/C.12/1994/13 (1994), <http://shr.aaas.org/thesaurus/instrument.php?insid=28> (last visited Mar. 27, 2004).

131. African Charter on the Rights and Welfare of the Child, *supra* note 112, art. 13.

132. *See Tomasevski Preliminary Report*, *supra* note 117, para. 62.

133. EUR. TRAINING AND RES. CTR. FOR HUM. RTS. AND DEMOCRACY, HUM. SEC.: UNDERSTANDING HUM. RTS.: MANUAL ON HUM. RTS. EDUC., RIGHT TO EDUCATION 178, <http://www.etc-graz.at/human-security/manual/modules/208-Education.pdf> (last visited Mar. 27, 2004).

134. *See Blom v. Sweden*, Communication No. 191/1985, Supp. No. 40, paras. 10.2-3, U.N. Doc. A/43/40 (1988); *Lindgren et al. v. Sweden*, Communications Nos. 298/1988 and 299/1988, Supp. No. 40, paras. 10.2-4, U.N. Doc. A/46/40 (1991).

135. *See Harti Kainen v. Finland*, Communication No. 40/1978, para. 10.4, U.N. Doc. CCPR/C/OP/1 (1984) (stating the UN Human Rights Committee ruled that the mandatory participation of children in the study of the history and religion of ethics must be neutral and

Another important element of acceptability relates to the child-friendly nature of the schools.¹³⁶ Based on the CRC, it is imperative that education respect the right of the child “to be curious, to ask questions and receive answers, to argue and disagree, to test and make mistakes, to know and not know, to create and be spontaneous.”¹³⁷

4. Adaptability

Normally, what a child learns in the school should be determined by his or her future needs as an adult. However, the Convention on the Rights of the Child requires that the best interests of the child be given prominence. Thus, the education system should remain adaptable, taking into account the best interests of the child.¹³⁸

While the best interests of the child have an evolutionary meaning and depend upon the different circumstances of each child, there should be sufficient discretion for the parents to determine these interests in a given situation.

E. Assessment of the Right to Education

Without generally accepted criteria, the task of evaluating a state's performance of the implementation of the right to education proves burdensome. It is necessary to develop “benchmarks and methodology for evaluating the adequacy and effectiveness of steps” taken towards realizing the right to education.¹³⁹ A crucial step in developing the core competence for assessing implementation efforts has been called the “variable or shifting dimension” of State parties' obligations.¹⁴⁰ As Paul Hunt explained to the CESCR, “because of the progressive realization and resource availability phrases, the precise content of at least some State obligations is likely to vary from one State to another—and over time in relation to the same State.”¹⁴¹ In striving to define the core

objective); *see also* ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A TEXTBOOK 206 (ASBJØRN EIDE ET AL. eds., 1995).

136. *Tomasevski Preliminary Report*, *supra* note 117, para. 67.

137. *See* Thomas Hammarberg, A School for Children with Rights, 1997 Innocenti Lectures (Oct. 23, 1997), *in* UNICEF International Child: The Significance of the United Nations Convention on the Rights of the Child for Modern Education Policy (1997); *see also* *Tomasevski Preliminary Report*, *supra* note 117, para. 67.

138. Morka, *supra* note 111, at 9.

139. *Id.*

140. *State Obligations, Indicators, Benchmarks and the Right to Education: Background Paper Submitted by Paul Hunt*, 19th Sess., Agenda Item 7, para. 6(c), U.N. Doc. E/C.12/1998/11 (1998) [hereinafter *Hunt Paper*].

141. *Id.*

content of the right to education, an effective monitoring technique could prove useful.¹⁴²

To measure each State party's right to education, quantitative and qualitative compliance indicators are necessary and useful.¹⁴³

Quantitative indicators present tangible data on budgets, literacy rates, enrollment rates, and commuting times, dropout and repetition percentages as distributed by gender, social class, age, geographic centers (e.g., by state and region, urban vs. rural areas), religion and ethnicity. In contrast, qualitative indicators assess nontangibles like class interaction, textbook content and pedagogical programs. Assessing the qualitative aspects of education is far more complex than evaluating the quantitative status of education. Such complexity is derived from the web of relationships involved in the right to education. . . .¹⁴⁴

The CESCR has taken the position that, "it may be useful for States to identify specific benchmarks or goals against which their performance in a given area can be assessed . . . global benchmarks are of limited use, whereas national or other more specific benchmarks can provide an extremely valuable indication of progress."¹⁴⁵ In his background paper to the CESCR, Paul Hunt outlines a three-step process for identifying and utilizing national benchmarks to measure States' performance on the right to education: (1) selecting key indicators, (2) setting national benchmarks, and (3) monitoring the national benchmarks.¹⁴⁶

One way to measure human rights work is to analyse a national budget and use it as a gauge of a country's priorities. This analysis involves the interpretation of information regarding resource allocation to evaluate official policies and priorities.¹⁴⁷ When considering governmental expenditures on education, reference can be made to the percent of the national budget allocated to educational expenses versus the amount actually spent per capita and overall at the national, regional, and state levels.¹⁴⁸ To truly judge whether education is a national priority, one must view the amount spent for education in relation to the amount spent in other sectors of the economy.¹⁴⁹ An increased budgetary

142. *Id.* para. 7.

143. Morka, *supra* note 111, at 10.

144. *Id.* For example, the relationship between the State, parents, and child; the relationship between the State and minorities; the relationship between the State and traditionally disenfranchised persons; and the relationship between the State and the church. *Id.*

145. *Hunt Paper*, *supra* note 140, para. 8 (quoting General Comment 1, para. 6).

146. *Id.* paras. 9-23.

147. Kate Halvorsen, *Notes on the Realization of the Human Right to Education*, 12 HUM. RTS. Q. 341, 361 (1990).

148. *Id.*

149. *Id.*

allocation does not always directly translate into an increased enjoyment of the right to education.¹⁵⁰ A comprehensive budget analysis may provide an important tool to counter States that claim they are noncompliant due to a lack of resources.¹⁵¹ Often, simple comparative budget analysis between defence and education sectors can expose the misplaced priorities of many developing country governments.

F. *Right-Bearers and Duty-Holders*

Savitri Goonesekere asserts “human rights create entitlements for rights-holders.”¹⁵² The nature of the legal enforcement mechanism and validity associated with human rights adds to the political and moral imperative inherent in the policy of promoting education.¹⁵³ These rights create obligatory duties on the part of the States, as well as other responsible bodies and individuals to fulfil the mandate necessitated by a particular right.¹⁵⁴ Human rights obligations have alternative guidelines by way of judicial intervention in the event of nonenforcement.¹⁵⁵ This may be called an enforceable right to education and these rights can be enforced by the legislative, executive, and administrative bodies that are given the task of implementing these rights.¹⁵⁶ Goonesekere argued that, “[w]hile the State has a margin of discretion in choosing types of actions and measures, the implementation of obligations is not a matter of the good faith of the State, but constitutes a legal obligation for which the State is accountable to the international community.”¹⁵⁷ However, arguments that put forth a theory of hierarchy of rights are inaccurate, as they do not reflect the issues relating to promoting the rule of law and human rights in developing countries.¹⁵⁸

150. Morka, *supra* note 111, at 11.

151. *Id.*

152. Savitri Goonesekere, *A Rights-Based Approach to Realizing Gender Equality*, para. 41, at <http://un.org/womenwatch/daw/news/savitri.htm> (last visited Mar. 27, 2004).

153. *Id.*

154. *Id.*

155. *See id.*

156. For a persuasive argument on the violations approach of monitoring the ICESCR, see Audrey R. Chapman, *A ‘Violations Approach’ for Monitoring the International Covenant on Economic, Social and Cultural Rights*, 18 HUM. RTS. Q. 23 (1996).

157. *See* Goonesekere, *supra* note 152, para. 41.

158. Goonesekere states:

A distinction is often drawn between State obligations imposed by civil and political rights which must be ‘ensured’, and socio-economic rights, which must be ‘recognized’, and realized ‘progressively’ or ‘to the maximum extent of available resources.’ It is sometimes argued that there is a hierarchy of rights according to which some rights (civil and political) are more important than others, guaranteed and immediately realizable. According to the same argument, other rights (socio-economic

Asbjørn Eide, in his study on the right to adequate food as a human right, developed a three level typology of state obligations, which has become a widely accepted framework for analysing States' obligations regarding human rights.¹⁵⁹

The obligation to *respect* requires the state, and thereby all its organs and agents, to abstain from doing anything that violates the integrity of the individual or infringes on her or his freedom, including the freedom to use the material resources available to that individual in the way she or he finds best to satisfy basic needs. . . . The obligation to *protect* requires from the state and its agents the measures necessary to prevent other individuals or groups from violating the integrity, freedom of action, or other human rights of the individual—including the prevention of infringements of his or her material resources.

The obligation to *fulfill* requires the state to take the measures necessary to ensure for each person within its jurisdiction opportunities to obtain satisfaction of those needs, recognized in the human rights instruments, which cannot be secured by personal efforts.¹⁶⁰

In the words of Goonesekere,

This framework of analysis of State obligations clarifies the indivisibility and interdependence of civil and political rights, and economic and social rights and supports the growing recognition of the similarity of the two families of rights in terms of the obligations of States for their implementation. Civil and political rights are no longer seen exclusively as 'hard rights,' immediately claimable and requiring nothing but the State's noninterference in the individual's enjoyment of the right. 'Socio-economic rights' are no longer seen as 'needs' to be progressively satisfied at the will and pleasure of Governments through welfare benevolence, resource allocation, and administrative and policy planning.¹⁶¹

and cultural rights) are not immediately realizable, but may be postponed until adequate resources are available for their realization. Civil and political rights are characterized as 'hard' rights, justiciable in courts, imposing negative duties on States of recognition, protection and non-interference. Socio-economic rights are then considered 'soft' rights, imposing positive duties on States which can best be realized progressively through allocation of resources and administrative policy planning, rather than enforcement through the Courts.

Id. para. 45 (internal citations omitted).

159. See, e.g., Asbjørn Eide, *Realization of Social and Economic Rights and the Minimum Threshold Approach*, 10 HUM. RTS. L.J. 35, 37 (1989).

160. *Id.*

161. Goonesekere, *supra* note 152, para. 47. "The Constitutions of India, Pakistan, Bangladesh and Sri Lanka, drawing on the Constitution of Ireland have separate chapters on enforceable fundamental rights and non-enforceable directive principles of state policy." *Id.* at n.5. Other examples are:

Additionally, this integral understanding of human rights would allow for an enormous range in developing the right to education within the international legal and human rights framework. International recognition of economic, social, and cultural rights within the scheme of human rights, as valuable rights equal to civil and political rights would undoubtedly facilitate the development of economic, social, and cultural rights within constitutions and legislation of more states in the developing world.

IV. THE HUMAN RIGHTS FRAMEWORK OF THE INDIAN CONSTITUTION

The Indian Constituent Assembly, which was brought into existence by the will of the Indian people and with the help of the British authorities, drafted a Constitution for India between 1946 and 1949.¹⁶² Within the Constituent Assembly, Indians were, for the first time in a century and a half, responsible for their own democratic governance.¹⁶³ They were already a free people ready and willing to shape their destiny and to create democratic institutions of governance, which would guarantee and help them in the fulfilment of their goals.¹⁶⁴ Undoubtedly, the task of framing a new constitution was not easy, and the members were fully aware of the responsibility.¹⁶⁵ However, they approached it with a remarkable sense of idealism, purpose, and enthusiasm.¹⁶⁶ Granville Austin commented that the transcendent goal of the Indian Constitution was to promote “social revolution.”¹⁶⁷ The framers intended for this social revolution to fulfil the basic needs of Indian citizens, and

Constitutions of Vietnam, Lao PDR, Cambodia and China. Also Constitution of South Africa, Art. 27 (general), Art. 28 (children). Sri Lanka Draft Constitution, Art. 22 (rights of children to basic nutrition, shelter, basic health care), Art. 24 (safe conditions of work), Art. 25 (access to health care including emergency medical treatment, food and water, appropriate social assistance).

Id.

162. GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION*, at xi (1966).

163. *Id.* See generally PANCHANAND MISRA, *THE MAKING OF THE INDIAN REPUBLIC: SOME ASPECTS OF INDIA'S CONSTITUTION IN THE MAKING* 23 (1966) (discussing the social, economic, and political origins of the Indian Constitution); VIDYA DHAR MAHAJAN & R.R. SETHI, *CONSTITUTIONAL HISTORY OF INDIA* 385 (3d ed. 1956).

164. AUSTIN, *supra* note 162, at xi.

165. *Id.*

166. *Id.*

167. *Id.* at xi, 167 (commenting that the Supreme Court of India was to be the guardian of the Constitution and protect the function of social revolution); see also Upendra Baxi, *The Constitutional Quicksands of Kesavananda Bharati and the Twenty-fifth Amendment*, (1974) 1 SCC (Jour) 45, available at <http://www.ebc-india.com/lawyer/articles/74v1a3.htm> (last visited Feb. 26, 2004).

further hoped that it would bring about fundamental changes in the structure of Indian society.¹⁶⁸

The theme of social revolution runs throughout the proceedings and documents of the Assembly. This theme formed the basis for the decision to adopt the parliamentary form of government and direct elections, the Fundamental Rights and the Directive Principles of State Policy, as well as many aspects of the executive, legislative, and judicial provisions of the Constitution.¹⁶⁹ Although the theme of social revolution spread throughout the entire Constitution, Parts III and IV of the Constitution Fundamental Rights and in the Directive Principles of State Policy respectively demonstrated the core of this commitment.¹⁷⁰ These two parts are perceived as the conscience of the Constitution.¹⁷¹

The Constitution of India has two specific chapters regarding the human rights and human development policies for governance administration in India.¹⁷² The chapter on Fundamental Rights in Part III and the chapter on Directive Principles of State Policy in Part IV form the core provisions of the Indian Constitution.¹⁷³ The Constitution ensures that the fundamental rights are guaranteed.¹⁷⁴ These rights are basic human rights and have been interpreted as civil and political rights. Articles 12-35 of the third chapter of the Constitution of India elaborate

168. AUSTIN, *supra* note 162, at xi. See generally A. Kuppaswamy, *Framing of the Constitution and Dr. B.R. Ambedkar's Role*, in INDIAN CONSTITUTION AND POLITY 1, 1-13 (R.V.R. Chandrasekhara Rao & V.S. Prasad eds., 1991).

169. AUSTIN, *supra* note 162, at xi. Prime Minister Jawaharlal Nehru articulated a similar view of the Constituent Assembly's task in stating: "The first task of this Assembly is to free India through a new Constitution, to feed the starving people, and to clothe the naked masses, and to give every Indian the fullest opportunity to develop himself according to his capacity." T.K. TOPE, CONSTITUTIONAL LAW OF INDIA 1 (2d ed. 1992). For a fuller discussion of Nehru's importance and role in the drafting of India's Constitution, see NEHRU AND THE CONSTITUTION (Rajeev Dhavan & Thomas Paul eds., 1992).

170. AUSTIN, *supra* note 162, at 50.

171. *Id.*

172. See C. Raj Kumar, *The Development of International Human Rights Law in National Judiciaries—The Indian Experience*, Annual Year Book of the Faculty of Law, Meiji Gakuin University, Tokyo, Japan (2003). The constitutional framework in India with reference to human rights and human development has been elaborated in this Article.

173. See CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: INDIA 11-62 (Albert P. Blaustein & Gisbert H. Flanz eds., 1994) [hereinafter INDIA CONSTITUTION]. For more about the dynamics and the inter-relationships between the Fundamental Rights and the Directive Principles of State Policy, see S.K. Agarwala, *The Legal Philosophy of P.N. Bhagwati*, 14 INDIAN B. REV. 136 (1987) (drawing upon JOHN RAWLS, A THEORY OF JUSTICE (1971), RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978)), and Jagat Narain, *Judges and Distributive Justice*, in JUDGES AND THE JUDICIAL POWER 191 (1985).

174. See INDIA CONSTITUTION, *supra* note 173, at 34.

on the fundamental rights.¹⁷⁵ Articles 36-51 outline important parts of the framers' vision for good governance administration; and taken together, these are known as the Directive Principles of State Policy.¹⁷⁶ These provisions are not enforceable by any court of law, but the principles laid down are fundamental in the governance of the country and it is the duty of the State to apply these principles in making laws.¹⁷⁷

Interestingly, according to recent decisions of the Supreme Court of India, the Directive Principles have been held to supplement fundamental rights in achieving a welfare state.¹⁷⁸ The contemporary relevance of human development policies in India may be traced back to the debate on whether to include the chapter on Directive Principles of State Policy in the Indian Constitution.¹⁷⁹ Some critics perceived the Directive Principles skeptically.¹⁸⁰ Dr. Wheare has doubted "whether there is any gain on balance from introducing these paragraphs of generalities into a Constitution."¹⁸¹ Notwithstanding this skepticism, experience has shown

175. *Id.* at 11-55. The six fundamental rights mentioned in the Indian Constitution are: (1) right to equality; (2) right to freedom (of speech and expression, to assemble peacefully and without arms, to form unions and associations, to move freely within the territory of India, to live in any part of India, to practice any profession or occupation); (3) right against exploitation; (4) right to freedom of religion; (5) cultural and educational rights; (6) right to property; and (7) right to constitutional remedies. *Id.* Part III, art. 19; *see also* AUSTIN, *supra* note 162, at 51.

176. INDIA CONSTITUTION, *supra* note 173, at 76-80. Some examples of Directive Principles of State Policy are:

Article 38: State to secure a social order for the promotion of welfare of the people;

Article 39: The State shall, in particular, direct its policy towards securing—

- (a) that the citizens, men and women equally, have the right to an adequate means of livelihood;
- (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
- (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
- (d) that there is equal pay for equal work for both men and women;
- (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter a vocations unsuited to their age or strength;
- (f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

Id. at 71.

177. P.M. BAKSHI, THE CONSTITUTION OF INDIA art. 37 (1996).

178. C. Raj Kumar, *Human Rights and Human Development*, FRONTLINE, Feb. 16-Mar. 1, 2002, at <http://www.frontlineonnet.com/fl1904/19041040.htm> (last visited Mar. 27, 2004).

179. *Id.*

180. *Id.*

181. *Id.* at 5; *see also* SIR IVOR JENNINGS, SOME CHARACTERISTICS OF THE INDIAN CONSTITUTION 4 (1953).

that the Directive Principles have been a guide for the Union Parliament and state legislatures.

In addition, the Directive Principles of State Policy have been a great source of legal, jurisprudential, and constitutional support for the judiciary in delivering their decisions, as well as guiding the governmental bodies in formulating human development policies, and thereby promoting good governance.¹⁸² The Government of India Fiscal Commission of 1949, for example, recognized that its recommendations ought to be guided by the Directive Principles.¹⁸³ “It is obvious,” the report said, “that a policy for the economic development of India should conform to the “objectives” laid down in the Directive Principles of State Policy.”¹⁸⁴ Thus, it may be inferred that the Constitution of India has the basic framework, which human rights and human development policies in India may be formulated to create for effective governance.¹⁸⁵ But the integration of these two policies involves an approach that is highly demanding on the judiciary and other branches of the government.¹⁸⁶ Present indications demonstrate that the Indian judiciary can respond to the need for the expansion of the scope of rights jurisprudence so as to include the economic and social rights within the human rights discourse, in addition to civil and political rights.¹⁸⁷

V. SUPREME COURT OF INDIA AND THE INDIAN CONSTITUTION

The Supreme Court of India has often interfered with the implementation of the framers’ reformist vision on the grounds that the actions in question violate the Constitution’s individual liberties

182. For an important and excellent article on integration of fundamental rights and directive principles of state policy in India, see Mahendra P. Singh, *The Statics and the Dynamics of the Fundamental Rights and the Directive Principles—A Human Rights Perspective*, Journal Section, SUPREME COURT CASES (SCC), (2003) 5 SCC (1), 1-14 (India), at <http://www.ebc-india.com/lawyer/articles/2003v5a4.htm>. See also P.K. Tripathi, *Directive Principles of State Policy: The Lawyer’s Approach to Them Hitherto, Parochial, Injurious and Unconstitutional*, 17 SUP. CT. J. 7 (1954).

183. Kumar, *supra* note 178.

184. *Id.*; see also Fiscal Commission Report, Chapter devoted to Fundamental Objectives of an Economic Policy, 9; First Five Year Plan: A Draft Outline (Planning Commission, 1975-80) [India]; Third Five Year Plan (Planning Commission, 1965-70) [India], <http://planningcommission.nic.in/plans/planrel/fiveyr/3rd/3planch1.html>.

185. Kumar, *supra* note 178.

186. *Id.*

187. For a general review, see Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, in JUDGES AND THE JUDICIAL POWER 289-315 (R. Dhavan et al. eds., 1925); RAJEEV DHAVAN, LAW AS STRUGGLE (Pub. Interest Legal Support and Research Ctr., Working Paper No. 10, 1992); Rajeev Dhavan, *Managing Legal Activism: Reflections on India’s Legal Aid Programme*, 15 ANGLO-AM. L. REV. 281; S.K. AGRAWALA, PUBLIC INTEREST LITIGATION IN INDIA: A CRITIQUE (1986).

provisions.¹⁸⁸ The need for social reform preceded the Constituent Assembly's bestowment on the judiciary as the guardian of individual rights under the Constitution and, hence, the protection of liberties within the constitutional framework needed to be balanced with the path for achieving social reform. The Supreme Court of India perceived itself to be an institutional guardian of individual liberties against political aggression, and in that process, went beyond the framers' vision of achieving an immediate social revolution. The Supreme Court of India took upon itself a role similar to that of the United States Supreme Court as defined by Chief Justice Marshall in *Marbury v. Madison*.¹⁸⁹ This perception of the judicial role led the court to develop implied limitations on the powers of the political branch that are analogous to the U.S. judiciary's approach to the separation of powers. The best known of these implied limitations, the "basic features limitation," precludes the Indian Parliament from amending the Constitution in such a way as to displace its basic features.¹⁹⁰

The Constitution of India contains some salient provisions that ensure compliance with the constitutional norms by providing for judicial supervision of executive actions. First, Article 13(2) provides: "The State shall not make any law which takes away or abridges the rights conferred by [the Constitution's Fundamental Rights Part] and any law made in contravention of this clause shall, to the extent of the contravention, be void."¹⁹¹ The judiciary has interpreted this provision as giving them the power to invalidate acts and executive orders that are not in consonance with the Constitution.¹⁹² Second, Article 32 expressly guarantees the right to seek judicial enforcement of the Constitution's fundamental rights provisions and authorizes the Supreme Court to issue writs to compel compliance with those provisions.¹⁹³ Article 32 further

188. See generally Raju Ramachandran, *The Supreme Court and the Basic Structure Doctrine*, in SUPREME BUT NOT INFALLIBLE—ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 107-33 (2000); Ashok H. DeSai & S. Muralidhar, *Public Interest Litigation—Potential and Problems*, *supra*, at 159-92.

189. *Marbury v. Madison*, 5 U.S. 137, 173-80 (1803).

190. See B.P.J. Reddy & R. Dhavan, *The Jurisprudence of Human Rights*, in HUMAN RIGHTS AND JUDICIAL REVIEW—A COMPARATIVE PERSPECTIVE 175-226 (D.M. Beatty ed., 1994). This concept is referred interchangeably in the various decisions, case law and commentary as the "basic structures doctrine," the "basic features doctrine," and the "essential features doctrine." In this Article, the term "basic features limitation" is used herein to refer to this implied limitation on the Indian Parliament's power to amend the Constitution.

191. INDIA CONSTITUTION, *supra* note 173, Part III, art. 13(2).

192. *Id.* at 34 (offering explanations of the constitutional articles and major Supreme Court cases).

193. *Id.* Part III, art. 32.

guarantees the right to challenge both legislative and executive actions of the state and federal governments.¹⁹⁴ Third, Article 142 provides that the

Supreme Court of India in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India.¹⁹⁵

This provision has been used by the court to give directions to the state and central governments on numerous occasions to enforce a particular fundamental right.¹⁹⁶

The Constituent Assembly Debates notes the positive aspects of including the fundamental rights provisions in the Constitution, and it also refers to the members arguing for a strong judiciary to protect individual rights, including the rights of minorities to protect them from government interference.¹⁹⁷ During the debate, Dr. B.R. Ambedkar, one of the most influential participants in the Assembly, stressed the importance of Article 32.¹⁹⁸ He stated:

If I was asked to name any particular article in this Constitution as the most important, an article without which this Constitution would be a nullity, I could not refer to any other article except [Article 32]. It is the very soul of the Constitution and the very heart of it.¹⁹⁹

In fact, every other speaker who addressed the merits of Article 32 expressed similar sentiments.²⁰⁰ Several noted that without Article 32, the constitutional protection of fundamental rights would be meaningless.²⁰¹ Another speaker referred to Article 32 as the most important of the Constitution's provisions.²⁰² While another noted that judicial enforcement of the fundamental rights provisions was in and of itself a

194. See *id.* Part III, art. 32, 12 (defining "state" as used in the fundamental provisions to include the national, state, and local governments).

195. *Id.* Part IV, ch. IV, art. 142.

196. *Id.*

197. Indeed, the Constitution of India's fundamental rights provisions include explicit protections for the protection of minorities. See, e.g., INDIA CONSTITUTION, *supra* note 173, Part III, art. 29 (affording the right to conserve distinct languages, scripts, and cultures); see also *id.* Part III, art. 30 (affording linguistic and religious minorities the right to establish and administer educational institutions).

198. See also AUSTIN, *supra* note 162, at 19 (listing Dr. Ambedkar as one of the twenty most influential participants in the Constituent Assembly), *id.* app. II (noting Dr. Ambedkar's chairmanship of the Assembly's Drafting Committee).

199. VII Constituent Assembly Debates 23 (Dec. 9, 1948) (statement of Dr. B.R. Ambedkar), <http://164.100.24.208/IS/condeb/vo17p23.htm>.

200. See *id.*

201. *Id.* (statement of Prof. Shibban Lal Saksena and statement of Shri Rohini Jumar Chaudhari).

202. *Id.* (statement of B. Pocker Sahib Bahadur).

fundamental right.²⁰³ Additional commentary on the Constitution itself generally asserts that the framers envisioned the courts, and particularly the Supreme Court, as the protectors of the constitutionally defined fundamental rights.²⁰⁴

VI. INTERNATIONAL HUMAN RIGHTS LAW AND ITS IMPACT ON CONSTITUTIONALISATION OF THE RIGHT TO EDUCATION IN INDIA

The Constitution of India has fully recognized the significance of education for the purpose of social transformation.²⁰⁵ While the Constitution is committed to social justice, as demonstrated by its various provisions, it took many years for the branches of the government to understand the true import of these provisions. The Preamble affirms a determination to secure “liberty of thought, expression, belief, faith and worship; equality of status and opportunity; and to promote among them all fraternity, assuring the dignity of the individual and the [unity and integrity of the Nation].”²⁰⁶ The objectives specified in the Preamble comprise the basic structure of the Constitution, which cannot be amended, and the Preamble may be invoked to determine the ambit of the Fundamental Rights and Directive Principles of State Policy. Creative judicial interpretation of the provisions relating to fundamental rights in the Constitution has resulted in the expansion of their scope and relevance. For instance, the phrase “personal liberty” has been given a broad interpretation with particular significance to literacy.²⁰⁷ In Francis Coralie’s case, Justice Bhagwati observed:

The fundamental right to life which is the most precious human right and which forms the arc of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality

203. *Id.* (statement of Shrimati G. Durgabai).

204. In his remarkable work on the origins of the Indian Constitution, Granville Austin asserted that the members of the Constituent Assembly approached the shaping of the provisions relating to the judiciary with “an idealism equalled only by that shown towards the Fundamental Rights.” AUSTIN, *supra* note 162, at 164. He noted further that the Indian courts, particularly the Indian Supreme Court, have a special responsibility to safeguard fundamental rights. *Id.* at 165; *see also* M.P. JAIN, INDIAN CONSTITUTIONAL LAW 125 (4th ed. 1999) (1987) (“The Supreme Court has been constituted as the guardian of fundamental rights.”); T.K. TOPE, *supra* note 169, at 600 (“Article 13(2) and the elaborate provisions contained in [the jurisdictional and advisory opinion articles] indicate the intention of the framers of the Constitution to confer very wide powers of interpretation on the Supreme Court of India.”).

205. For a very interesting article on the constitutionalisation of right to education in South Africa, see Eric Berger, Note, *The Right to Education Under the South African Constitution*, 103 COLUM. L. REV. 614 (2003).

206. INDIAN CONSTITUTION, *supra* note 173, at 21.

207. *See generally* MAHENDRA P. SINGH, V.N. SHUKLA’S CONSTITUTION OF INDIA 164-70 (10th ed. 2001).

which may endure for years to come and enhance the dignity of the individual and the worth of the human person. . . . The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.²⁰⁸

The Supreme Court held in another landmark case:

In *Maharashtra State Board of Secondary and Higher Education v. K.S. Gandhi*,²⁰⁹ right to education at the secondary stage was held to be a fundamental right. In *J.P. Unni Krishnan v. State of Andhra Pradesh*²¹⁰ a constitutional Bench had held education up to the age of 14 years to be a fundamental right It would be therefore incumbent upon the State to provide facilities and opportunity as enjoined under Article 39(e) and (f) of the Constitution and to prevent exploitation of their childhood due to indigence and vagary.²¹¹

Article 45 of the Constitution corresponds to article 13(1) of the ICESCR and states 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.”²¹² The question of whether the right to education was a fundamental right and enforceable was answered in the affirmative by the Supreme Court in *Mohini Jain v. State of Karnataka*.²¹³ The validity of this decision was further examined by a bench of five judges in *J.P. Unni Krishnan v. State of Andhra Pradesh*.²¹⁴ Private medical and engineering colleges brought the case to question the state legislation regulating the tuition and fees charged to students seeking admission.²¹⁵ The college management sought enforcement of their right to business.²¹⁶ The court expressly denied this claim and proceeded to examine the nature of the

208. Francis Coralie Mullin v. The Administrator, Union Territory of Delhi, (1981) 2 S.C.R. 516, 517-18 (India).

209. *Mohini Jain v. State of Karnataka*, (1992) 3 S.C.C. 666 (India).

210. *J.P. Unni Krishnan v. State of Andhra Pradesh*, (1993) 1 S.C.C. 645 (India).

211. See SINGH, *supra* note 207, at 302-04.

212. INDIA CONSTITUTION, *supra* note 173, at 79. For a comprehensive understanding of the development of economic, social, and cultural rights in the Indian context, see *Justiciability of ESC Rights—the Indian Experience*, in Circle of Rights, Economic, Social & Cultural Rights Activism: A Training Resource, at <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/justiciability/htm> (last visited on Mar. 27, 2004) [hereinafter *Justiciability of ESCR*].

213. *Mohini Jain*, 3 S.C.C. at 667.

214. *J.P. Unni Krishnan*, 1 S.C.C. at 647.

215. *Id.*

216. *Id.*

right to education.²¹⁷ The court refused to accept the nonenforceability of the Directive Principles of State Policy.²¹⁸ In its consideration of the issue, the court found that

It is significant that among the several articles in Part IV, only Article 45 speaks of a time-limit; no other article does. It is not a mere pious wish and the State cannot flout the said direction even after 44 years on the ground that the article merely calls upon it to “endeavour to provide” the same and on the further ground that the said article is not enforceable by virtue of the declaration in Article 37. The passage of 44 years—more than four times the period stipulated in Article 45—has converted the obligation created by the article into an enforceable right.²¹⁹

The court observed:

The right to education . . . is not an absolute right. It must be construed in the light of directive principles Right to education, understood in the context of Articles 45 and 41, means that every child/citizen of this country has a 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.²²⁰

The court then proceeded to examine how, and to what extent, this right would be enforceable.²²¹ It resolved the issue by stating that the right to education further includes the right to force the State to provide educational facilities to citizens within the limits of the State’s economic capacity.²²² Through this holding, the court clarified that it was not transferring Article 41 from Part IV to Part III, rather, it was merely relying upon Article 41 to illustrate the content of the right to education flowing from Article 21.²²³ The court’s apprehension was based on the recognition that finding the existence of such a right might open the flood gates for many other claims.²²⁴ It clarified “[T]he right to education which is implicit in the right to life and personal liberty guaranteed by Article 21 must be construed in the light of the directive principles in Part IV of the Constitution.”²²⁵

217. *Id.* at 648.

218. *Id.* at 649.

219. *Id.* at 656.

220. *Id.*

221. *Id.*

222. *Id.* at 657.

223. *Id.*

224. *Id.*

225. *Id.* para. 183, at 655-56.

The recent unanimous passage of the 93rd constitutional amendment bill by the Indian Lok Sabha²²⁶ has resulted in the development of a fundamental right to education as a guaranteed right.²²⁷ It is extremely important to analyse and evaluate the circumstances under which the Lok Sabha passed this constitutional amendment, as well as the implications of the amendment on human rights and human development policies in India.

Article 45 in the Constitution of India states “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.”²²⁸ This commitment was made more than fifty years ago.²²⁹ As previously discussed, the Supreme Court of India upheld the fundamental right to education in two cases.²³⁰ In *Mohini Jain v. State of Karnataka*, the court, speaking through Justice Kuldeep Singh, held that the right to education was part of the fundamental rights to life and personal liberty guaranteed by Article 21.²³¹ In the subsequent case, *J.P. Unni Krishnan v. State of Andhra Pradesh*, the court was presented with the issue of whether the Constitution of India guaranteed a fundamental right to education to its citizens.²³² While it was agreed that the right to education emanated from the right to life guaranteed by Article 21 of the Constitution, Justice Jeevan Reddy observed that “every child/citizen of this country has a right to free education until he completes the age of fourteen years and 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.”²³³ This was the legal position regarding the right to education within the Indian Constitution prior to the passage of the 93rd Constitutional Amendment.

226. The Lower House of the Indian Parliament is called the Lok Sabha or the House of People.

227. The remaining portion of this Article has been reprinted with both adaptations and additions from articles by the author originally appearing in *Frontline*. Part One appears at: C. Raj Kumar, *Human Rights and Human Development*, 19 FRONTLINE Iss. 4, Feb. 16-Mar. 1, 2002, available at <http://www.frontlineonnet.com/fl1904/19041040.htm>. Part Two can be found at C. Raj Kumar, *Human Rights and Human Development*, 19 FRONTLINE Iss. 5, Mar. 2-15, 2002, available at <http://www.frontlineonnet.com/fl1905/19050840.htm>.

228. INDIA CONSTITUTION, *supra* note 173, at 79.

229. *Id.* pmb1.

230. See *Mohini Jain v. State of Karnataka*, (1992) 3 S.C.C. 666 (India); *J.P. Unni Krishnan v. State of Amdhra Pradesh*, (1993) 1 S.C.C. 645 (India).

231. *Mohini Jain*, 3 S.C.C. at 666.

232. *J.P. Unni Krishnan*, 1 S.C.C. at 648.

233. *Id.* at 656.

A. *Right to Education—Legal, Constitutional, and Governance Implications*

The 93rd Constitutional Amendment Bill, states 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.²³⁴ This amendment has given any citizen the power to seek enforcement of the right by granting writ jurisdiction under Articles 32 and 226 of the Constitution.²³⁵ To have a particular right is to enforce a claim against other people or institutions that should be ensuring said rights.²³⁶ Thus, the 93rd Constitutional Amendment Bill grants the Indian populace an enforceable right to free elementary education—a constitutional amendment being the strongest backing a State can give to a social program. In conferring this right, the Indian Constitution claims that all are entitled to a free elementary education and that, in the case where the government denies access to education, there must be some culpability by the State.²³⁷ This insistence on the enforceability of rights is the crucial dimension of integration of human rights and human

234. On November 27, 2002, the Lok Sabha cleared the Constitution 93rd Amendment Bill to make elementary education a fundamental right. This passage culminates an endeavour that has been in the making since July 1997 and is now well on its way into the law books. Once the bill becomes an act, all the children in the age group of six to fourteen years will have the fundamental right to free and compulsory education. Also, as per the bill, “the State shall endeavour to provide early childhood care and education for all children until they complete the age of six years. Further, the Bill makes it the fundamental duty of parents and guardians to provide opportunities for education to their children/wards in the 6 to 14 age group.” *Parliament nod for Education Bill*, THE HINDU, Nov. 28, 2002, at 1, available at <http://www.hinduonnet.com/thehindu12002/11/28/stories/2002112802901300.htm>. On December 16, 2002, the President of India gave assent to the 93rd Amendment Constitution Bill, which seeks to make the right to education for children between the ages of six and fourteen years a fundamental right. Accordingly, Article 21 providing for Fundamental Right to Life and Personal Liberty has been amended to make education up to high school a fundamental right for all citizens. See *President's Assent to Bill on Right to Education*, THE HINDU, Dec. 17, 2002, at <http://www.thehindu.com/2002/12/17/stories/2002121703341300.htm>.

235. INDIA CONSTITUTION, *supra* note 173, at 51, 129.

236. See D. Conrad, *The Human Right to Basic Necessities of Life*, 10 & 11 DELHI L. REV. 1 (1981-82).

237. Amartya Sen has also posed two basic diagnostic inquiries, which are

(1) How compatible are the normative concerns in the analyses of human development and human rights? Are they *harmonious enough*—to be able to complement rather than undermine each other? (2) Are the two approaches sufficiently distinct so that each can add something substantial to the other? Are they *diverse enough*—to enrich each other?

The answers to both of these foundational questions are definitely in the affirmative.

AMARTYA SEN, UNDP, HUMAN DEVELOPMENT REPORT: HUMAN RIGHTS AND HUMAN DEVELOPMENT (2000). For a better understanding of the relationship between human rights and human development, see SEN, *supra* note 4.

development.²³⁸ However, it needs to be observed that the amendment in its present form illogically and unreasonably restricts the right to education for children between the ages of one to five years, because the Supreme Court guaranteed this right in its holding in the *J.P. Unni Krishnan* decision.²³⁹

While the 93rd Constitution Amendment Bill proposes to give constitutional sanctity to an already existing legally enforceable right, it should not purport to narrow the existing law on this issue by restricting the fundamental right to education for children only between the ages of six to fourteen years.²⁴⁰ Article 21A of the Indian Constitution codifies the right to education and reads, "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, by law, determine."²⁴¹ It has now, however, been one year since the amendment was entered into the law books and two years since the government decided to amend the Constitution and the right is still not enforceable, because the enabling legislation has yet to be enacted.²⁴² Even though the government slated the enabling legislation, entitled The Right to Free and Compulsory Education Bill of 2003, for introduction and consideration in the monsoon session of the Parliament that concluded in August 2003, it was never introduced.²⁴³ It has been commented that while political consensus on achieving universalization of primary education (UPE) has been encouraging, it has not been properly followed by financial and budgetary allocations. The Union Budget of 2003-04 particularly reflects this. In the Union Budget of 2003-04, the budget allocation for elementary education is Rs.4669 crores, which is inadequate and indeed remains to be one of the major impediments to the realization of the right to education.²⁴⁴

238. See *Justiciability of ESCR*, *supra* note 212.

239. See *J.P. Unni Krishnan*, 1 S.C.C. at 648. For a critical perspective on the 93rd Constitution Amendment Bill, see T.K. Rajalakshmi, *A Regressive Bill*, 18 FRONTLINE, Dec. 8-21, 2001, at <http://www.flonnet.com/fl1825/18250300.htm>. It should be noted that the 93rd Constitution Amendment Bill is now new Article 21A.

240. Rajalakshmi, *supra* note 239.

241. INDIA CONSTITUTION, *supra* note 173, art. 21A.

242. Anita Joshua, *Right to Education Still a Dream*, THE HINDU, Sept. 5, 2003, at <http://www.thehindu.com/2003/09/05/stories/2003090500801300.htm>. For an interesting perspective on implementation of economic, social and cultural rights in India, see S. Muralidhar, *Implementation of Court Orders in the Area of Economic, Social and Cultural Rights: An Overview of the Experience of the Indian Judiciary*, XXIV DELHI L. REV. 113-22, 200 (2002).

243. Joshua, *supra* note 242.

244. See Union Budget 2003-2004 in the Context of Elementary Education, Azim Premji Foundation, <http://www.azimpremjifoundation.org/downloads/UnionBudgetApr2403.pdf> (last visited Mar. 27, 2004).

B. Relevance of the Convention on the Rights of the Child in Promoting the Right to Education

The UN General Assembly adopted the CRC on November 20, 1989, and it entered into force on September 2, 1990.²⁴⁵ As of January 1, 2000, it had been ratified by 191 states.²⁴⁶ The Convention's coverage is considerable: it defines a child as "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier," which effectively puts the burden on the State to justify instances in which it prescribes a lower age limit.²⁴⁷ Article 28 of the CRC recognizes the right of the child to education and it states that "with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) make primary education compulsory and available free to all."²⁴⁸

Thus, while the 93rd Constitution Amendment Bill partially fulfils the mandate of the CRC, its impact is limited because it restricts its application to children between the ages of six to fourteen years. Therefore it has limited impact.

The child's right to education is not only a matter of access (art. 28) but also of content. An education with its contents firmly rooted in the values of article 29(1) is for every child an indispensable tool for her or his efforts to achieve in the course of her or his life a balanced, human rights-friendly response to the challenges that accompany a period of fundamental change driven by globalization, new technologies and related phenomena. Such challenges include the tensions between the global and the local; the individual and the collective; tradition and modernity; long- and short-term considerations; competition and equality of opportunity; the expansion of knowledge and the capacity to assimilate it; and the spiritual and the material.²⁴⁹

Article 29, paragraph 1, of the Convention on the Rights of the Child is of far-reaching importance. The aims of education that it sets out, which have been agreed to by all States parties, promote, support and protect the core value of the Convention: the human dignity innate in every child and his or her equal and inalienable rights. . . . The aims are: the holistic development of the full potential of the child (29(1)(a)), including development of respect for human rights (29(1)(b)), an enhanced sense of

245. CRC, *supra* note 103.

246. For ratification information, see http://www.unhchr.ch/html/menu2/6/crc/treaties/status_crc.htm (last visited Jan. 15, 2004).

247. CRC, *supra* note 103, art. 1.

248. *Id.* art. 28.

249. *General Comment 1: The Aims of Education* (Art. 29(1)), app., para. 3, U.N. Doc. CRC/GC/2001/1 (2001) [hereinafter *General Comment 1*].

identity and affiliation (29(1)(c)), and his or her socialization and interaction with others (29(1)(d)) and with the environment (29(1)(e)). [Thus,] Article 29(1) not only adds to the right to education recognized in article 28 a qualitative dimension which reflects the rights and inherent dignity of the child; it also insists upon the need for education to be child-centered, child-friendly and empowering, and it highlights the need for educational processes to be based upon the very principles it enunciates.²⁵⁰

Consequently, the state governments in India need to develop education policies that are in tune with social realities.

C. *Right to Education Through Integration of Human Rights and Human Development*

The fundamental idea of human development is the enrichment of lives and freedoms of ordinary people. This shares common ground with the objectives expressed by various declarations of human rights.²⁵¹ Thus, the promotion of human development and the fulfilment of human rights, undoubtedly share a common motivation, representing a process as well as an end.²⁵² It would be interesting to examine how far this shared motivation to achieve equality and dignity for all may be transferred for the integration of these two policies.²⁵³ An example of

250. *Id.* app., paras. 1-2.

251. The term "development" is "often equated with economic development, usually measured as economic growth, improved balance of payment, and other macroeconomic variables." Sigrun I. Skogly, *Structural Adjustment and Development: Human Rights—An Agenda for Change*, 15 HUM. RTS. Q. 751, 752-53 (1993); see also Theo Van Boven, *Human Rights and Development: The U.N. Experience*, in HUMAN RIGHTS AND DEVELOPMENT: INTERNATIONAL VIEWS 121, 125 (David P. Forsythe ed., 1989); Danilo Turk, *Development and Human Rights*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 167, 167-73 (Louis Henkin & John L. Hargrove eds., 1994). Economic factors need not be the sole criterion for assessing development and hence a more appropriate and acceptable definition of development is the one the UNDP uses to formulate the Human Development Index in the annual Human Development Report. Also, it may be useful to refer to the UN Declaration of the Right to Development, which defines development in the second paragraph of its preamble as "a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom." *Declaration on the Right to Development*, G.A. Res. 128, U.N. GAOR, 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/41/53 (1986) [hereinafter *Declaration on the Right to Development*]. On the interface of human rights and development, see Brigitte I. Hamm, *A Human Rights Approach to Development*, 23 HUM. RTS. Q. 1005, 1010 (2001); N.J. Udombana, *The Third World and the Right to Development: Agenda for the Next Millennium*, 22 HUM. RTS. Q. 753, 755-57 (2000).

252. For a comprehensive understanding of the relationship between human rights and capabilities, see Martha C. Nussbaum, *Capabilities, Human Rights, and the Universal Declaration*, in THE FUTURE OF INTERNATIONAL HUMAN RIGHTS 25, 26-30 (Burns H. Weston & Stephen P. Marks eds., 1999).

253. UNDP, HUMAN DEVELOPMENT REPORT (2000).

such a harmonious integration is the development of a fundamental human right to education within the Indian Constitution. The extent to which this right has aided in implementing the human development policy of achieving literacy remains to be seen.²⁵⁴

The “goal rights system” liberates the system of rights from the narrow confines of constraint-based obligation, by demanding active steps towards the fulfilment of rights.²⁵⁵

The general formulation of the goal rights system leaves open the question of what substantive rights are to be included as part of societal goals. Sen himself has argued forcefully for considering ‘capability rights’ as the substantive content of goal rights. . . . In this view, societal goals should include the fulfillment of people’s rights to capabilities.²⁵⁶

If we adopt this perspective in the context of the 93rd Constitution Amendment Bill, then the right to education is to be viewed as a proxy for more fundamental rights to the capabilities derived from access to education; namely, the capabilities of being educated, thereby, avoiding illiteracy and ignorance and being able to actively participate in the society. The extent to which the government fulfils people’s right to education will then be assessed by the extent to which they attain these capabilities. Also, the right to education will require, as an obligation, any action that others can take to improve people’s capabilities.²⁵⁷ This is due to the fact that perceiving capability rights as goal rights results in a ripple effect and, therefore, fulfilment becomes part of societal goals.²⁵⁸

The right to education as guaranteed by this new amendment has a greater role to play. This is because education is the means of self-realization and self-expression, as well as physical, social, emotional, and spiritual development of human beings. Education is the only effective means to help Indian children escape from the cycle of poverty, servile jobs, and institutionalized ignorance and succeed in their struggle for survival. Drawing from Amartya Sen’s work on democracy and

254. See generally *United Nations Development Programme: Report of the Office of the High Commissioner for Human Rights*, U.N. OPS, U.N. Doc. GLO/99/615/A/11/31 (1999), available at <http://magnet.undp.org/DOCS/hr/HURISTNO.htm> (last visited Mar. 27, 2004) [hereinafter *UNDP Report of High Commissioner*].

255. See Amartya Sen, *Rights and Agency*, 11 PHIL. & PUB. AFF. 3-19 (1981); see also Amartya Sen, *The Right Not To Be Hungry*, in 2 CONTEMPORARY PHILOSOPHY: A NEW SURVEY: PHILOSOPHY OF SCIENCE 343, 347-48 (Guttorm Floistad ed., 1982).

256. S.R. OSMANI, UNDP, HUMAN RIGHTS TO FOOD, HEALTH, AND EDUCATION 4, at <http://www.undp.org/rbap/rights/the.htm> (last visited Mar. 27, 2004).

257. For a critical perspective on access to and quality of higher education in India, see *The Lessons Remain To Be Learnt*, THE HINDU, Jan. 5, 2003, available at <http://www.hinduonnet.com/thehindu/2003/01/05/stories/2003010500241600.htm>.

258. OSMANI, *supra* note 256.

development in general and his research on famines in particular, it may be argued that there is no such question of fulfilling some preconditions before a nation or a people becomes ready for human rights.²⁵⁹ On the contrary, as Sen observed, it is through institutionalisation of human rights and democracy that individuals become fit, worthy, and possess dignity in human development terms.²⁶⁰ It is the opportunity for the exercise of democratic rights itself, which gives training for democratic claims for development of all. Sen summarizes the case for human rights from a development perspective in three aspects: “1. Their intrinsic importance, 2. Their consequential role in providing political incentives for economic security, and 3. Their constructive role in the genesis of values and priorities.”²⁶¹ Human rights, in other words, have intrinsic as well as instrumental value: there can be no development without freedom, and freedom enhances development.²⁶²

Alternatively, it may be argued that the “path of human development through the assistance of human rights” confronts all struggles and competing claims that arise because of this new integration.²⁶³ But this integration needs to be supplemented with policy changes at all levels of decision-making in the government for it to be effective. The integration of human rights and human development policies rests upon an examination as to the similarities and differences between these two conceptions.²⁶⁴ They are ideologically close enough to derive motivation and concern for each other, promoting compatibility and mutual understanding.²⁶⁵ From an enforcement strategy standpoint, they are different enough to be able to supplement each other. Thus, an integral approach of these two conceptions can result in significant improvements in human society, thereby facilitating in numerous ways the advancement of dignity, well-being, and freedom of individuals in general.²⁶⁶ The UNDP’s Human Development Report 2000 has correctly

259. See Sen, *The Right Not To Be Hungry*, *supra* note 255.

260. See generally SEN, *supra* note 4.

261. Kumar, *supra* note 227, at 1.

262. Bas de Gaay Fortman, “Rights-Based Approaches”: *Any New Thing Under the Sun?*, IDEA NEWSL., Dec. 2000, at <http://www.carleton.ca/idea/newsletter/reports1220008.html>.

263. Manabi Majumdar, *Human Development and Human Rights Through the ‘Prism of Gender’*, IDEA NEWSL., Dec. 2000, at 4, at <http://www.carleton.ca/idea/newsletter/reports1220004.html> (internal citations omitted).

264. See SEN, *supra* note 237, at 19-26.

265. *Id.* at 19.

266. These principles are very well explained in PATRICK VAN WEERELT, UNDP, *A HUMAN RIGHTS-BASED APPROACH TO DEVELOPMENT PROGRAMMING IN UNDP—ADDING THE MISSING LINK* (2001).

observed that any useful conception of human development cannot ignore the importance of political liberties and democratic freedoms.²⁶⁷

Earlier, this Article examined the constitutional framework in India, which establishes the structural processes by which these policies can be implemented. It remains to be seen how far the role of integration of human rights and human development policies have been performed by the Indian judiciary, and whether the assertion of these rights and principles constitute enforceable policies for governance and administration. Another important investigation may be how the government perceives its position, with reference to an observation of how these principles, could be transformed to enforceable rights and with regard to actual implementation of the principles. This analysis would lead to the inquiry of whether or not the judiciary's role in promoting directive principles of state policy as fundamental human rights has resulted in the Parliament making amendments to the Indian Constitution; thus giving constitutional legitimacy to judgments and solidifying the rights-development combination. Further, the rights-based approach to development requires both capacity building within existing institutions of governance and providing support to the protection and promotion of human rights through the creation of human rights enforcement mechanisms and organizations.²⁶⁸ It is in this context that the right to development has attempted to bring together the human rights and human development discourses with a view to promote good governance policies.

D. United Nations Declaration on the Right to Development and Its Relevance for Governance Administration in India

The Declaration on the Right to Development (DRD), adopted by the United Nations in 1986, stated unequivocally that the right to development is a human right.²⁶⁹ The first article of the text of the DRD lucidly delineates the concept of the right to development.²⁷⁰ It states, "The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."²⁷¹

267. See SEN, *supra* note 237, at 19-26.

268. UNDP Report of High Commissioner, *supra* note 254.

269. Declaration on the Right to Development, *supra* note 251.

270. *Id.* art. 1.

271. *Id.*

The DRD is a consensus document that emerged after a series of negotiations amongst the Nation States as to what should constitute the provisions of this declaration.²⁷² There are three main propositions of the Declaration: The first is that the right to development is a human right; the second is that the human right to development is a right to a particular process of development in which all human rights and fundamental freedoms can be fully realized, which means that it combines all the rights enshrined in both the covenants and each of the rights has to be exercised with freedom; and finally that the meaning of exercising these rights consistently with freedom implies free, effective, and full participation of all the individuals concerned in the decision-making process.²⁷³ Therefore, the process must be transparent and accountable; individuals must have equal opportunity of access to the resources for development and receive fair distribution of the benefits of development and income; and finally, the right confers unequivocal obligation on duty-holders, including individuals in the community, States at the national level, and Nation States at the international level.²⁷⁴ Nation States have the responsibility to help realize the process of development through appropriate development policies. Other States and international agencies have the obligation to co-operate with the Nation States to facilitate the realization of the process of development.²⁷⁵

Arjun Sengupta, the UN independent expert on the right to development, has argued that the right to development is a right to a process of development, and not just an umbrella right or the sum of a set of rights.²⁷⁶ It is the right to a process that expands the capabilities or freedom of individuals to improve their well-being and to realize what they value. Sengupta described this right to development in terms of an improvement of a “vector” of human rights, which is composed of various elements that represent the different economic, social, and cultural rights, as well as civil and political rights.²⁷⁷ It is extremely

272. *Id.*

273. *Id.*

274. *Id.*

275. Arjun Sengupta, *On the Theory and Practice of the Right to Development*, 24 HUM. RTS. Q. 837-89 (2002); see also ARJUN SENGUPTA, THE RIGHT TO DEVELOPMENT AS A HUMAN RIGHT (Francois-Xavier Bagnoud Ctr. for Health and Human Rights, Working Paper Series, 2000), available at http://www.hsph.harvard.edu/fxbcenter/FXBC_WP7_Sengupta.pdf.

276. *Report of the Independent Expert on the Right to Development*, U.N. Commission on Human Rights, 56th Sess., U.N. Doc. E/CN.4/1999/WG.18/2; U.N. Doc. E/CN.4/2000/WG.18/CRP.1; U.N. Doc. E/CN.4/2001/WG.18/2; U.N. Doc. E/CN.4/2002/WG.18.2.

277. SENGUPTA, *supra* note 275, at 2535.

useful to borrow his language to illustrate the mainstreaming of rights-based approaches within the development discourse.

The right to development as a right to a particular process of development can be best described as a “vector” of all of the different rights and freedoms. Each element of the vector is a human right just as the vector itself is a human right. They all will have to be implemented following fully the human right standards. Furthermore, all the elements are independent in the sense that the realization of one right, for example the right to health, depends on the level of realization of other rights, such as the right to food or to housing, or to liberty and security of the person, or to freedom of information, both at the present time and in the future. Similarly, realization of all these rights in a sustainable manner would depend upon the realization of the rights to health and education, as well as to freedom of information given the initial stock of human, material, and institutional assets.²⁷⁸

Further, Sengupta has observed that

[a]n improvement in the realization of the right to development or an increase in the value of the vector will be defined as an improvement in all the elements of the vector (i.e., human rights), or at least in one element of the vector while no other element deteriorates. Because all human rights are inviolable and none is superior to another, the improvement of any one right cannot be set off against the deterioration of another. Thus, the requirement for improving the realization of the right to development is the promotion or improvement in the realization of at least some human rights, whether civil, political, economic, social, or cultural, while no other deteriorates. If any one right deteriorates, or is violated, then the right to development is violated.²⁷⁹

It is interesting to observe that the UN Declaration that was adopted in 1986 by the General Assembly has many similarities, both in terms of text and interpretation, to Part III of the Indian Constitution, the Directive Principles of State Policy, which was entered into force in 1948. Some examples of these similarities include: Article 1 of the Declaration, which speaks of “economic, social, cultural and political development” from a human rights perspective, while Article 38(1) of the Indian Constitution speaks of creating a social order in which justice, “social, economic and political” shall inform all the institutions of national life.²⁸⁰ Article 2(3) of the Declaration speaks of people’s “active, free and meaningful participation in development” and “fair distribution of the

278. Sengupta, *supra* note 275, at 868-69.

279. *Id.* at 869.

280. *Declaration on the Right to Development*, *supra* note 251, art. 1; INDIA CONSTITUTION, *supra* note 173, art. 38(1).

benefits,” while Article 39(a) of the Constitution speaks of ownership and control of the material resources of the community to be “distributed as best to subserve the common good” and Article 39(c) speaks of the economic system not resulting in the “concentration of wealth and means of production to the common detriment.”²⁸¹ Articles 3(2) and 4(2) of the Declaration speak of “full respect for the principles of international law concerning friendly relations and cooperation among states” and the need for “effective international co-operation with appropriate means and facilities to foster nations comprehensive development” respectively, while, Article 51 of the Constitution speaks of state endeavouring to “a. promote international peace and security; b. maintain just and honorable relations between nations; c. foster respect for international law and treaty obligations in the dealings of organized people with one another.”²⁸² It is important for all three branches of the government of India to understand the need for reading, interpreting, and integrating the human rights and human development polices and the Directive Principles of State Policy of the Indian Constitution to the UN Declaration on the Right to Development.²⁸³

Of particular attention is that in some respects, the Directive Principles of State Policy in the Indian Constitution go beyond the DRD and hence, it is all the more important for Indian governance administrators to be cognizant of these provisions and work towards their realization.²⁸⁴ For example, provisions like, Article 39A (Equal justice and free legal aid); Article 40 (Organization of village panchayats); Article 41 (Right to work, education and to public assistance in certain cases); Article 42 (Provision for just and humane conditions of work and maternity relief); Article 43 (Living wage, etc., for workers); Article 43A (Participation of workers in management of industries); Article 45 (Provision for free and compulsory education for children); Article 46 (Promotion of educational and economic interests of Schedule Castes and Scheduled Tribes and other weaker sections); Article 47 (Duty of the State to raise the level of nutrition and the standard of living and to improve public health); Article 48 (Organisation of agriculture and

281. *Declaration on the Right to Development*, *supra* note 251, art. 2(3); INDIA CONSTITUTION, *supra* note 173, arts. 39(a), (c).

282. *Declaration on the Right to Development*, *supra* note 251, arts. 3(2), 4(2); INDIA CONSTITUTION, *supra* note 173, art. 51.

283. MAHBUB UL HAQ CTR. FOR HUMAN DEV., *HUMAN DEVELOPMENT IN SOUTH ASIA* (1999).

284. Satish Kumar, *Human Rights and Economic Development: The Indian Tradition*, 3 *HUM. RTS. Q.* 47, 47-55 (1981).

animal husbandry); and Article 48A (Protection and improvement of environment and safeguarding of forests and wildlife).²⁸⁵

E. Promoting Good Governance Policies from a Human Rights and Human Development Perspective

There are certain indicators of economic growth and social development on the basis of which countries measure governance administration.²⁸⁶ Typically, these may be economic indicators of growth, which may include certain human development variables like the level of education or, for that matter, the participation of women in development. On the whole, notwithstanding efforts to include human, social, and political indicators of development, they have so far not been successful in finding a place of influence beside the powerful index of GNP/GDP. One important purpose of the inclusion of human rights and human development in an integrated approach would be dislodging the monopolistic hold of GNP/GDP on our minds. It has been argued that poverty can be removed at quite low-income levels, and that high average incomes are no guarantee against widespread misery.²⁸⁷ Thus, policies in this area by conjoining the “*language of rights*” to governance measurement indicators can result in a paradigm shift of both social and institutional approach to development.

Human rights provide for legal entitlements when enforcement mechanisms are crated, when a particular right is to have a claim on other people or institutions that they should help, assist, or collaborate in ensuring access to freedom.²⁸⁸ This insistence on rights and corresponding duties helps the transformation governance debate beyond the idea of human development and links the human development approach to the concept that others have duties to facilitate and enhance development.²⁸⁹ Further, with the involvement of duties come a host of other concerns, such as accountability, culpability, and responsibility.²⁹⁰ The following are some of the indicators of governance administration in India that will have significant impact on integration of human rights and human development policies. These indicators are: the right to food, education, health, shelter, environment, and livelihood; rights of women,

285. INDIA CONSTITUTION, *supra* note 173, arts. 39-48.

286. PHILIP ALSTON, UNDP GOVERNANCE, HUMAN RIGHTS, AND THE NORMATIVE AREAS (1999).

287. Paul Streeten, *Looking Ahead: Areas of Future Research in Human Development*, 1 J. HUM. RTS. DEV. 25, 32 (2000).

288. *See* SEN, *supra* note 237, at 19-26.

289. *Id.* at 21.

290. *Id.*

minorities, tribals, children, aged, manual scavengers (safai karamcharis), and disabled etc.; right to good governance, right to corruption-free administration;²⁹¹ and even the right to information.

It may be noted that the Supreme Court of India and other courts in India have recognized that education, health, livelihood, and environment have been declared explicitly as integral parts of the right to life under Article 21 of the Indian Constitution. Of course, the problem, of access to these rights and the meaningful exercise of them needs to be examined and strategies devised for their implementation. Pursuing a human rights based approach to development requires additional indicators that place stress on participation, empowerment, transparency, accountability, and democracy for measuring levels of enjoyment of human rights. These indicators, when couched in the language of rights, can be a vital tool for initiating reforms in governance. They impress upon the government that the task of implementing these reforms is no longer purely an administrative task, but one which is based on a legal obligation and duty of the government. Some of the needed creative indicators are those of access to justice, right to survival, right to development, and participative governance, including representation.

The problem of corruption is writ large in India and it has also significantly affected the protection and promotion of economic and social rights, besides violating civil and political rights. The right to education is violated due to corruption at various levels of policymaking relating to the education sector. It is important that transparency in governance and the accountability of the government becomes the urgent focus of the government of India. Good governance alongside India's growth and development policies as the right to education as well as other rights will not be fulfilled, but for the systematic and sincere efforts to curb corruption.²⁹² The role of national human rights institutions (NHRIs) needs to be re-examined so that they focus on the economic and social rights. Traditionally, the NHRIs have proven to be conscious of civil and political rights only and effective in the protection of rights that are protected under the Constitution. But if the governance discourse needs to move beyond human rights and toward human development, it is necessary that NHRIs play a critical role so that national enforcement strategies relating to the right to education and other economic and social

291. For further reading of corruption and human rights in the context of India, see C. Raj Kumar, *Corruption and Human Rights—Prompting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India*, 17 COLOM. J. ASIAN L. 31 (2003).

292. See *id.*

rights may be devised.²⁹³ This should be supplemented by the NHRIs taking efforts to formulate suitable national monitoring mechanisms for violations of economic and social rights.

VII. CONCLUSION

Legal frameworks of guaranteed civil and political rights, either in international legal and human rights framework or within the national constitutional and legislative framework, provide very little guidance and help for the masses of people who are struggling in parts of the developing world,²⁹⁴ including India, to acquire and experience the basic needs of survival and existence.²⁹⁵ It is imperative for the international community to understand the need for focusing on economical, social, and cultural rights, thereby accepting a holistic perspective of balancing the development of human rights. The need for valuing economic and social rights does not mean any reluctance to the protection and promotion of civil and political rights, as some advocates of “Asian values” claims have urged, but rather in furtherance of both sets of rights. Accepting a holistic perspective will inevitably lead to an understanding of the importance of the right to education, as it will result in increasing human capabilities for the fulfilment and enjoyment of other economic, social, and cultural rights and civil and political rights. This Article does not contend that the gains attained in civil and political rights are any less significant, but that one should not lose sight of the fact that the process of marginalisation of people due to impoverishment, poverty, and unemployment because of the neglect of economic, social, and cultural rights, would ultimately threaten the other values of democracy, which the international community cherishes.

The Indian experience demonstrates that initial judicial recognition of a right to education as a constitutionally interpreted fundamental right resulted in the passage of an amendment to the Indian Constitution, which guarantees fundamental right to education. This development is significant, given the fact that the right to education has been perceived

293. For further reading on national human rights commissions, see C. Raj Kumar, *National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights*, 19 AM. U. INT'L L. REV. 259-300 (2004).

294. For a comprehensive work on development, social movements, and their impact on human rights see generally BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW—DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* (2003).

295. For a very interesting argument on poverty and implications for human rights, see THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS* (2002). See also Samantha Besson, *Human Rights, Institutional Duties and Cosmopolitan Responsibilities*, 23 OXFORD J. LEGAL STUD. 507-23 (2003).

as an economic, social, and cultural rights which, prior to the amendment, was not given sufficient constitutional protection. True integration of human rights and human development is possible only if those engaged in governance understand that their lackadaisical attitude toward enforcement of economic, social, and cultural rights will have dangerous consequences for the sustenance of democracy and the rule of law. Thus, it may be observed that a balanced and holistic understanding of human rights, nationally and internationally, will not allow postponement of the enforcement of economic, social, and cultural rights. While India has sustained a vibrant democracy based on the rule of law and other constitutionally enshrined freedoms and rights, the development of the right to education and its concomitant enforcement and implementation would strengthen the existing governance mechanisms. Moreover, the right to education is uniquely placed among other economic, social, and cultural rights because it has the potential to promote the empowerment of the Indian populace, in addition to creating greater opportunities for growth and development. This would ultimately help diminish inequalities and other bottlenecks associated with developing nations. The right to education, in the fullest sense of the phrase, promotes the development of the rule of law and of good citizenry. It is no exaggeration to conclude that the fundamental right to education, when fully realized, will be the cornerstone of third world development.