
Extended Abstract

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**Balancing the Absence of a Right to Education in the Constitution of Sri Lanka:
Recognition of the Right to Education through Recent Court Decisions**

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1. Abstract

<p>Right to Education is an undebated right encapsulated in almost all of the international instruments. Starting from the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, leading up to the recent International Convention on the Rights of Persons with Disabilities together with regional instruments on human Rights state the obvious: The right to education is so basic and fundamental that it is an inalienable right that should be protected and nurtured by the State. With this immense burden being laid upon the State in ensuring that this right is guaranteed to its citizens, the legislative organ of the State plays a pivotal role. The basic mechanism adopted by the States in this endeavor is through the Fundamental Rights chapter of the Constitution. The 1978 Constitution of Sri Lanka only contains the right to education as a Directive Principle which is not a right enforceable through courts. The issue that arises with regard to Sri Lanka is whether in the absence of an explicit provision for such a fundamental right, the judiciary plays a proactive role as another mechanism that steps in to fill the gap and balance the need. In the light of this question, where the Legislators have failed, the Judiciary champions this cause. This paper explores the role played by the Judiciary through recent Court decisions with special reference to benchmark judgments on the <i>South Asian Institute of Technology and Medicine (SAITM), Grade one School admission case in Kuliypitiya</i> as well as the <i>Z-score judgment</i>. The final conclusion drawn from the analysis is that even though there is no explicit recognition of the right to education in the Constitution, the judiciary has by default, through judicial activism, taken up the role of filling the gap and balancing the need that should have been taken up by the legislators as evident through the recent judgments of Sri Lanka.</p>
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Keywords: Constitutional protectionism, Human Rights, Judicial Activism, Right to education.

2. Introduction and research problem/issue

<p>The Universal Declaration of Human Rights as adopted in 1948 states in Article.26 that everyone has a Right to Education. It should be free and directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. Education and Human rights</p>
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have a kinship that originates in mutual co-existence. One cannot gain education if they are deprived of the human right to access education, nor be expected to realize and achieve their inherent human rights if they are not educated regarding **their rights**. **This interdependency paves way for discussion on the inalienability of the right** to education as a fundamental right in any Constitution. However since many constitutions around the world, including the Constitution of Sri Lanka, still do not recognize this right explicitly in the Fundamental Rights chapter there is a vital need to address this through another mechanism. Therefore by default judicial activism has taken up the role of filling the gap and balancing the need that should have otherwise been taken up by the legislators. This fact is quite evident through the recent judgments of the Court of Appeal and the Supreme Court of Sri Lanka. Thus the research paper will explore the role played by the Judiciary through recent Court decisions to address the issue of the absence of an explicit provision with regard to such a fundamental right, to fill the gap and balance the need to ensure that this right is granted.

3. Research Methodology

The research methodology adopted for this paper is conducted through a comprehensive study and evaluation of existing literature and analysis of judicial decisions in the light of human rights perspectives. The literature review will explore both international and regional instruments, which embodies the Right to Education. It will also draw from various other jurisdictions such as India and the United States of America and how their judiciary has interpreted the Right to Education.

The key areas of discussion include;

- Universality of Human Rights focusing mainly on the Right to Education, its evolution and importance.
- The Right to Education as embodied in various international and regional instruments.
- The consequences of the absence of an explicit provision that guarantees the Right to Education and its direct impact on the society.
- An evaluation of how the Courts have interpreted the right to Education through judicial decisions in Sri Lanka. ○ Judicial decisions of other comparative jurisdictions with or without an explicit provision on the Right to Education

4. Results and findings 500 words

When analysing the key judgments highlighted in this paper it is evident that the judiciary had taken immense effort to ensure that the right to education is protected and it can be traced back to decades. The most significant way of handling it was through the equality clause under Article 12(1) of the Constitution of Sri Lanka. In the *Chandrani*

de Soyza vs. Minister of Education S.C (FR) Application No.77/2016 (famously referred to as “Kuliyapitiya grade one admissions case”) even though the proceedings were terminated because a private school had agreed to take in the five year old boy who was denied admission due to the fact that his parent was a HIV patient, the court made it a point to set a precedent by stating on record (the Court was not obligated to do so) that the right to education as embodied in the Directive Principles of state policy should ensure the right to universal and equal access to education at all levels. The Court also took a further step in protecting the rights of HIV/AIDS patients stating that their human rights should be upheld at all times.

The Z-score judgment (*Visal Bhashitha Kavirathne & 16 Others Vs.*

Commissioner General of Examinations & four Others S.C. (FR)

Application No.29/2012) given in favour of the 16 prospective university entrants also ensured that the rights of those students to access tertiary education should not be barred by the actions of the state.

The most recent judgment given by the Court of Appeal in favour of the graduates of SAIM (*Dhilmika Sundamalshani Suriyarachchi Vs. Sri*

Lanka Medical Council and Others CA/WRIT/187/2016), a non-state institution that grants a medical degree, also showed with clear proof that the judiciary is aware of the need to balance the right to education in the absence of explicit provisions in the constitution.

Not only in the local level but also in India and other jurisdictions such as United States of America this kind of activism is clearly visible. In the United State’s case of *Brown v. Board of Education of Topeka* where the state established separate public schools for African American children segregating students according to skin colour the court held that it was unconstitutional. This case clearly indicates that the right to education is universal and no form of discrimination is tolerated in the access to such right proving that an equality clause is more than capable of securing the right to education.

But India is in the forefront with regard to judicial activism in this regard as evident from the case of *Avinash Mehrotra Vs. Union of India* where right to education was held

to include the right to t a safe environment in schools leading up to fire safety precautions. Sri Lankan activism and interpretation when compared to that of India is slightly lower.

5. Conclusions, implications and significance 100

The Constitution of Sri Lanka is silent on the matter of enshrining the Right to education in its Fundamental Rights Chapter. However for decades the judiciary has taken up the task of filling in the void and ensuring that the rights of individuals (whether explicitly stated in the constitution or not) is guaranteed through judicial activism. However Sri Lankan judicial activism as per the findings and discussion has passed significant milestones but has a long way to go when comparing with the other jurisdictions especially that of India. In the era where Sri Lanka is on the discussion forum of another constitution this paper will contribute significantly in highlighting the need of a specific clause for the right to education as a fundamental right.

6. References (Selected)

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