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What are the different strategies and approaches to realize Right to Education (RTE) in India?

Shantanu Gupta
Institute of Development Studies,
University of Sussex
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ABSTRACT

Since the UN Universal Declaration of Human Rights over 50 years ago, there has been a proliferation of international conventions on rights. Currently, the international legal framework encompasses an astounding variety, stretching from women's rights to rights of the indigenous peoples to knowledge rights. But despite the burgeoning number of formal rights at the international and national level, substantive rights in practice remain elusive for most (Clark, Reilly & Wheeler 2005:76, Emphasis added). Human rights are regarded as worth of respect and protection but there are plenty of gaps in translating internationally recognized human rights into entitlement for people in countries' national legislation. Even though worries about such negative gaps have been expressed, few analyses of the conditions which enable the realization of rights have been carried out. This is what this paper proposes to do in the case of education by asking the following key research questions: Does the new Right to Education (RTE) legislation matter for the realization of education rights for the children of India?

I. INTRODUCTION

Human rights are regarded as worth of respect and protection. They are considered essential for the eight aspects of the good governance agenda¹ in, for example, advocating for participation and inclusiveness as well as transparency and rule of law. Although there is wide acceptance of human rights, a wide gap between theory and practice is noticeable. Landman (2004:914) demonstrates this by showing, in a literature review, the extensive

¹ See UNESCAP - <http://www.unescap.org/pdd/prs/projectactivities/ongoing/gg/governance.asp>

amount of work which has been done in translating internationally recognized human rights into entitlement for people in countries' national legislation.

Even though worries about such negative gaps have been expressed, few analyses of the conditions which enable the realization of rights have been carried out. This is what this paper proposes to do in the case of education by asking the following key research questions: Does the new Right to Education (RTE) legislation matter for the realization of education rights for the children of India?

However, how can a rights-based approach help development? Broadly, development and human rights are directed to the same purposes - enabling livelihood in dignity, equity and freedom and, throughout the process, centering policies in the human person. "Development and human rights are interdependent", Cheria, Petcharamesree and Edwin (2004:2) express. More yet, "development and human rights become different but inseparable aspects of the same process, as if different strands of the same fabric" (Uvin 2004:122).

Clark, Reilly and Wheeler (2005:76), in their contribution, highlight that with the incorporation of human rights in the debate a re-politicization of the development agenda occurred. Such an inclusion "requires understanding rights not merely as legal entitlements, but as a political tool in social change strategies". The introduction of rights in the development debate enables the re-emergence of the discussion of power division and argues for equality of all.

Education is undoubtedly a human right which, as Tomasevski (1999:3) and Osttveit (1999:2) point out, has been transformed into a "luxury" instead of a right in many places. Signs of that can be seen through words and images of student journalists who report on the condition of education worldwide for the Education for All consortia and observe that hindrances in education range from lack of schools in Mozambique (Cezinando 1999:22) to issues that affect curricula formulation and not living up to the prestige of a previous era, like in the Russian Federation system (Chupina 1999:6-7). In India the situation is no different as many people were excluded from their right to education for very many years. In this paper we will analyze the potential scenario of the education rights on ground after the commission of 'Right to Education' legislation.

Decentralization in India divides education in a way that all levels of government have concurrent power in oversight and regulation for different levels of schooling. The decentralized system gives equal powers to the sub-national states but how they use their discretionary powers and engender the implementation of policies is part of each state's judgment. This is one of the circumstances which can make a difference in the realization of the right to education.

Huge regional disparities are a trait of any country of India's size and its observation in the educational panorama is not a surprise. Note, however, that even in places of success in the realization of education, like Kerala, there are negative gaps and certain groups are excluded from having the education they are entitled to as a right.

This study will be built more on the qualitative data as it requires a broad view of education in the contexts under analysis. The main source of qualitative data is literature review. There is a wide body of literature regarding education, Right to education legislation, human rights and development that can be drawn upon and complemented by information from other sources - such as bilateral and multilateral agents, NGOs and official country reports.

With this collected data, an assessment of the right to education in India is what this paper proposes to do. The proposed assessment can be translated into measuring human rights and its implementation. It is not an easy task as Landman (2004) points out, "it is hard to measure economic, social, and cultural rights since their progressive realization relies on the fiscal capacity of the state for which not comparable measures are possible" (Landman 2004:923). Nevertheless, it can be done and a system for it is proposed as he considers that "human rights can be measured in principle (i.e. as they are laid out in national and international legal documents), in practice (i.e. as they are enjoyed by individuals and groups in nation states), and as outcomes of government policy that has a direct bearing on human rights protection" (Landman 2004:911).

Structure of the paper

In order to address the issues set forth, this paper is structured as follows:

Chapter 2 explores the history of right to education bill and movement in India, from the Supreme Court ruling in 1993 to the actual passes legislation in 2009

Chapter 3 explores the link between human rights and development providing the theoretical framework for this analysis. By defining the right to education and putting it in perspective, this chapter will enable us to embark on the analysis of the international human rights framework and how it is in place at the moment. These observations will also enable us to comprehend the value of the rights-based approach to development and its influence in the effective realization of rights and achievement of goals, such as enshrined in the UN Millennium Development Goals (MDGs).

Chapter 4 is divided into many small subsections to analyze the India's Right to Education legislation on various aspects

Chapter 5 explores the question: Why Right based approaches? And Why now ?

Chapter 6 concludes with a summary of the study, restating its main findings and emphasizing the enabling conditions for the realization of the right to education and answering the question of whether legislation matters for the realization of a right.

This paper finds that legislation is not an imperative for realizing rights but it a useful tool, which can assist on the claiming of a right. It is not, however, a determinant of whether or not people have their right to education realized but it can used as a mobilization tool to transform rights and policies into reality.

II. History of RTE in India

15 December 2008, seventy one years since Mahatma Gandhi gave the call for universal education in 1937; sixty one years since independence; fifty eight years since the Constitution, instead of making education a fundamental right made it part of the Directive Principles; fifteen years since the Supreme Court in 1993 ruled on the right to education; six years after the 86th constitutional amendment was passed by the Parliament in 2002 by inserting Article 21A making education a fundamental right for children in the restricted age group of 6 to 14 years; and four years after the draft bill was prepared by the **CABE**² committee, the Right to Free and Compulsory Education Bill was introduced in the Rajya

² Central Advisory Board of Education (CABE) Committee

Sabha³ on 15 December 2008. Though the delay on part of the state is deplorable, the introduction is undeniably momentous (Rana, 2009).

The Supreme Court, in 1993 in the Unnikrishnan case, ruled that the right to education would be restricted by the economic capacity of the state *only* beyond age 14, the government ignored it. When the current draft was being prepared by the CABE in 2005, **NUEPA**⁴ made cost calculations in different scenarios, using the Kendriya Vidyalaya salary scales and state government scales for teachers and all the provisions of the mandatory schedule. The amounts in each case fell well within the six per cent of the GDP norm promised by the Common Minimum Programme of the present UPA government (Rana, 2009)

Yet, despite a much better economic situation than during Gandhiji's time in 1937, the response of the government was no different! The high level group set up by the prime minister to examine the economic and legal implications of the bill recommended that the states bring in their respective legislations for reasons not disclosed. Essentially it was felt that it was much too expensive for the Centre to fund the scheme as per the NUEPA calculations, and further that the Centre could be burdened with a plethora of court cases; so let the states with financial assistance from the centre assume both these responsibilities. The phrase used was that 'states were flush with funds', and in any case they are prone to misuse central funding for freebies like cheap rice and colour TVs for buying votes. Once the states rejected the recommendations and many of the critics, in August 2007, questioned the prime minister on the quantum of funds required (on the basis of reduced projections of child population figures by the Registrar of Census in its 2006 corrections to the Census 2001 figures), and perhaps because of the 'political' value of such a legislation on the threshold of parliamentary elections, the central legislation was resurrected.

Finally in last two months RTE got the momentum after Kabil Sibbal coming aboard as the Human Resource Cabinet minister in the new Manmohan Singh Government and it was

³ Rajya Sabha is the upper house of Indian parliament

⁴ National University of Educational Planning and Administration (NUEPA)

quickly tabled and passed first in Rajya Sabha and then in Lok Sabha⁵ in August, 2009. So as of today Indians have one more fundamental right i.e Right to Education (Rana, 2009).

In the next chapter, we will explore the various aspects of 'education' as a human right and as a fundamental right, as drafted in various legislations of various countries.

III. Education as a Right

Human rights are widely recognized and accepted by the international community as ideals to be defended and entitlements to be guaranteed to all people, and by all people. The list of matters which are considered as human rights is broad and keeps growing since human rights are understood as tools for enabling people to live in dignity, equity and freedom.

Tomasevski (2003:36-50) tells us the history and the evolution of the theme within the United Nations (UN) and its evident that the centrality of human rights in the UN has been translated in a multitude of human rights documents generated through political discussions and negotiations among nation-states. International treaties, covenants and conventions that aim to establish and regulate human rights in the international sphere are numerous and it is patent that the practice of generating international legislation on rights will continue for many years as the challenges which surprise the world with inequality, ignominy and constraints are under continuous transformation.

Tomasevski (2003) is, however, skeptical of the future of human rights in the UN believing that it is constituted of rhetoric which does not match practices. Her opinion is widely divergent from others such as Weiss (in Mertus 2005: foreword) who asserted that the human rights mechanisms within the UN have "evolved dramatically since the signing of the Universal Declaration of Human Rights in December 1948".

The Universal Declaration of Human Rights (UDHR)⁶ is the first international settlement to emerge on the theme. This document is a landmark for human rights as from it many others

⁵ Lok Sabha is the lower house of parliament in India

have followed. The International Convention on Civil and Political Rights (ICCPR) and the International Covenant of Economic, Social and Cultural Rights (ICESCR), both dated 1966, deserve special attention since it is from their aggregation of issues that the divide of human rights into generations occurred⁷.

The mentioned division of human rights into three generations was originated politically and strategically done in order to facilitate greater adherence to treaties from nations (Eldridge 2002:13-14). From then onwards the classification of human rights became important and a division in the theme was rooted, blurring the characteristics of complementation and indivisibility of human rights.

The first generation of rights relates to civil and political rights, the second focuses on economic, social and cultural rights while the third, on another plateau, addresses community or solidarity rights (Nowak 2001:252; Uvin 2004:15 and Cheria, Petchamarese and Edwin 2004:16). The consequence of this segregation of rights is that civil and political rights gained status of being hierarchically superior to the other generations of rights (Mertus 2005:3). One explanation for it lies on the belief that civil and political rights only require the state to refrain from actions and play a passive role, which would demand less costs and investment than other categories of rights. The other rights, the defenders of such theories continue to argue, requires states to be active in providing effective benefits to people.

However others have argued that such an assumption is mistaken since all generations of rights require both passive and active behavior from nation-states, who are the main duty-holders of the internationally acquired obligations (Eldridge 2002:14-15). Recent pronouncements made by the UN, such as the during the 1993 World Conference on Human Rights, confront the division of rights by recognizing that all rights are hierarchically equal and cannot be implemented separately as they are interdependent and affect each other throughout their realization.

⁶ The UDHR does not have the binding powers of an international treaty, covenant or convention due to its character of declaration. Many have been arguing, however, that the clauses enshrined in the UDHR have become natural rules of *jus cogens* and, therefore, have acquired binding characteristics for both its signatories and even to the other countries which have not acceded or ratified to the declaration themselves.

⁷ The collection of the UDHR, the ICCPR and the ICESCR is known as the International Bill of Rights.

The **right to education** is among the listed human rights whose status affects the realization of all other rights. Tomasevski (2005:224), passionately telling the difficulties on realizing her job as the UN Special rapporteur on the Right to Education, states that "[t]he right to education defies classification either as a civil and political right or an economic, social and cultural one. It forms part of both Covenants and, indeed, all core human rights treaties. I emphasized that the right to education represented an interface between civil and political rights and economic, social and cultural rights".

But, what is the fundament for education as a right? Legally, education is enshrined in all of the major international treaties, starting by the UDHR. UDHR establishes the right to education, in its article 26, in the following terms:

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children (UNHR, art. 26). From this sole definition of the right to education, traces of what it really means, its substance, are set forth but other international legislation also deal with it. The most important provisions in this respect the right to education are Article 2 of the UDHR, Articles 13 and 14 of the CDESCR, Articles 28 and 29 of the CRC, and Article 13 of the Protocol of San Salvador⁷ (Nowak 2001:225) and what underlies all of these norms is the assurance that people will have education which enables them to "participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace" (CESCR, Art. 13).

Tomasevski (2005:224) also reminds us that "it is not only human rights law that regulates education, internationally or domestically". There are many other laws which have an influence on the substance of the right to education and "[Reaching out of human rights law became hugely important (...) [and Reaching out of the law was even more important" because there are other variables which influence the realization of the right to education.

Education is a process which engages many "different actors who may derive from different (sometimes competing) claims from their right to education: the one who provides education (the teacher, the owner of an educational institution, the parents), the one who receives education (the child, the pupil) and the one who is legally responsible for the one who receives education (the parents, the legal guardians, society and the state)" (Nowad 2001:246). These actors will be addressed in the next chapters as we analyze the variables that influence the right to education. For now, we need to ask: what does the right to education really mean?

The core of the right to education relates to its substance, which differs from education itself. Effective and transformative education should be the result of the exercise of the right to education, which is a universal human right. The right is about the entitlement to claim the substance of it; it relates to the possibility of demanding the right to education and making it justiciable.

The substance of the right to education is given in broad terms by international legislation but real meaning is given to it as national legislators incorporate it. The process of incorporation is more important than the process of adhering to an international treaty because it is this incorporation that entitles people to demand for their right to education. As Tomasevski (2005:229) reminds us, "[international treaties are meant to be tools to vindicate human rights. Alas, they are not known beyond small circles around ministries of foreign affairs and international human rights organizations that can afford to travel to Geneva". Nevertheless, it is the international clauses that set minimum boundaries to secure rights. In the case of the right to education, the norms have been interpreted by Tomasevski (1999) and carved into the 4-A scheme establishing parameters for the analysis of the implementation of the right to education.

The 4-A scheme

The 4-A relate to availability, accessibility, acceptability and adaptability. Each one of these characteristics is extracted from the right to education and refers to obligations which should be undertaken by the government in order to fulfill its commitments. It translates the juridical notions into comprehensive fragments of the substance of the right to education. Note, however, that all the criteria are interrelated for there is no divisibility of the right and only a holistic view can generate the concept of the right to education.

Availability is the first component of the right to education in Tomasevski's (1999) framework. It relates to the possibility of education being obtained by all without any discrimination. It refers to existence of educational institutions within reasonable distance for pupils' attendance it refers to security within the educational system, as well as to making entry into the educational system available to all regardless of age or social condition.

As far as infrastructure for schooling is concerned, it requires active employment of resources from the nation-states that can be a constraint to the realization of rights but, as Tomasevski (1999:18) highlights, others actors, like private investors, can assist on the realization of this aspect of the right to education.

Another topic related to availability is the insurance of free and compulsory education to all. The freedom, in economic terms, includes direct costs but also indirect and opportunity costs and other "invisible costs", as Ribeiro (2002:19) defines it. It has been evident that in many countries it is those indirect costs which disable people to effectively enjoy education. These indirect costs make education unavailable to many.

The assurance of free education, however, tends to create a link between poverty and lack of education. Although in many cases, such as in the northeast of Brazil (Verner 2004), better education can be translated into wealth, the problems with realizing the right to education are not linked to poverty. Tomasevski (2005:222) argues that the matters lie on policy rather than poverty.

In terms of ideological freedom, the availability of the right to education aims to assure that no indoctrination occurs in the educational system and that tolerability of views is practice. No discrimination for the entry into the schooling system due to cultural characteristics.

However, even if all those aspects of the right to education are assured in practice, the right to education would not be complete. It requires other components to make it holistic to all. Therefore, while availability of education refers to the existence of the schooling system, accessibility refers to the possibility of entering it and remaining in it.

Accessibility means governments must strive for the practical elimination of gender and racial discrimination and ensure the equal enjoyment of all human rights, and must not be satisfied with merely formally prohibiting discrimination. In addition, accessibility relates to the primary, secondary and tertiary levels of education in different ways; governments are only obliged to provide access to free and compulsory education for all children in the compulsory age range. The right to education should be realized progressively, ensuring all-encompassing, free and compulsory education is available as soon as possible, and facilitating access to post-compulsory education as circumstances permit (Tomasevski 2004:7). Accessibility also relates to gender and racial discrimination, complementing the cultural and ethnic discrimination variable described in availability. Measures for preventing such discrimination should be in place to insure that all have access to the educational system. Note, also that "discrimination is a moving target: in addition to old forms of prejudice needing greater scrutiny, such as non-citizens being denied or offered low-grade education, new issues continue to arise" (Tomasevski, 2004:iv)

The degree to which accessibility of education should be made available, however, changes as the schooling cycle progresses. Special importance is given to primary education in all of the international legislation concerning the right to education. All treaties establish that primary education shall be compulsory and available free to all. Ribeiro (2002:18) considers that such a compulsoriness and freeness compose the minimum standards of the obligation towards the right to education which should be observed "immediately, with no delay".

As far as secondary education is concerned, the progressive realization of the substance of the right is what the international treaties require. Availability and accessibility are the key words

for this level of education, which should take the form of formal, technical and vocational education, for, as Ribeiro (2002:19) continues to say "there is no compulsory requirement nor there is a guarantee that it will be made available and free to all". This is a hindrance in the international system for education but it reflects a compromise which would suit states capacity in the supply of education.

Higher education is, yet, less assured than secondary for it should be made accessible on the basis of state capacity and with progressive introduction of free education. As seen, the right to education varies according to the level of education being examined however availability is not automatically translated into the realization of the right to education. Therefore, we follow on the analysis of the next criteria for understanding and assessing the right to education.

Acceptability requires minimum guarantees regarding the quality of education, for example in terms of health and safety or professional requirements for teachers, but it is much wider in scope than this. These guarantees have to be set, monitored and enforced by the government throughout the education system, whether the institutions are public or private. Acceptability has been considerably broadened through the development of international human rights law: indigenous and minority rights have prioritized the language of instruction, while the prohibition of corporal punishment has transformed methods of instruction and school discipline. The emerging perception of children as subjects with the right *to* education and with rights *in* education has further extended the boundaries of acceptability to include the contents of educational curricula and textbooks, which are increasingly considered from the perspective of human rights (Tomasevski 2004:7).

Acceptability is one of the very important themes that guide discussions regarding the right to education for the people that might have education available and accessible but with poor quality which does not lead to the desired outcomes. It involves curricula setting and respect for parents' views on the education of their children, the language of education and the culture of education, for example. As Tomasevski (2004:v) says, there are very few guidelines given by international treaties and national legislations on this matter. In theory, however, international organizations such as UNESCO should be available to assist states in the formulation of technical expertise to develop a coherent curriculum which would enable

students to learn skills to match the goals of education. It would also be part of the same groups of institutions to assist countries on the formulation of indicators to measure the quality of the educational system.

Another aspect of acceptable education lies in the bridge between the educational system and the labour market. "Achieving an acceptable level of quality education also demands that attention be paid to the opportunities school-leavers can expect to enjoy when finishing education and entering the job market. One important aspect of this involves close participation between education and the labour sectors, and this is another example of how education must develop a balanced, mutual relationship with all other areas of society to maximize its effectiveness" (Tomasevski 2004:v).

Making education acceptable also means attending to other actors, such as teachers and parents for instance, who become plaintiffs of better educational policies as well as demand for collective rights. The International Labour Organization (ILO) conventions have been instrumental in assuring this aspect of the right to education as they handle issues such as the right of teacher to organize for better working conditions, training and salaries. Concerns regarding discrimination also figure within ILO rulings.

Adaptability requires that schools respond to the needs of each individual child, in keeping with the Convention on the Rights of the Child. This reverses the traditional approach in which schools expected the children to adapt to whatever form of education the school provided. As human rights do not exist in isolation, adaptability involves safeguarding all human rights *within* education as well as enhancing human rights *through* education. This necessitates cross-sectoral analysis of the impact of education on the whole range of human rights, to monitor, for example, graduate employment by ensuring integrated planning between the relevant sectors (Tomasevski 2004:7).

However, none of the above aspects of the right to education would be complete without the **adaptability** of education to the best interest of each student. The ideal that education only regards children permeates the literature regarding this aspect of the right to education but adaptability should concern every student, regardless of age, sex, ethnic origin or whichever other circumstance. The characteristic of adaptability directly deals with methods of teaching

and with "[m]aking education responsive to the immediate reality facing children in their own community" (Tomasevski 1999:24). Participation becomes a valuable resource in this context as it enables the children to voice their experiences and demand for responsiveness of the schooling institutions towards their individual education process. Williams (2005) narrates the importance of the participation of children in the shaping of their scholar needs and of other rights related to their sphere of activity; she highlights how the opening of innovative ways for participation enhanced their right to live in equity, dignity and in freedom. Adaptability means to do that, to adjust education to peoples changing realities.

By these parameters it becomes very clear that the right to education cannot be closed in one single category of rights but permeates through all of them. Ribeiro (2002:27) eloquently describes the meaning of the right to education within each generation of rights by saying that:

It can be affirmed, therefore, that the civil and political aspects of the right to education is the libertarian aspect which demands that the state-party should respect the freedom of parents to choose the contents of their children's education, as well as freedom from indoctrination (religious, philosophical, political, etc), the freedom to establish educational institutions other than state schools, the freedom of association and freedom of academic expression. The social aspect of the right is given to all citizens to receive education and the obligation towards the state to provide it. The economic aspect is the possibility of increasing social mobility which quality education permits, and the ensuing direct positive effect on the economy of a country. The cultural aspect can be understood in the degree of participation in the cultural life of a community, which is achieved through education.

It is within these perspectives that we must analyze the right to education. Nonetheless these characteristics enable us to characterize states, but not measure rights. The next section therefore deals with the many methods for measuring.

Measuring Rights

Human rights, due to their abstract nature, are difficult to measure but "though measurement is an imprecise science but is one that is nonetheless useful for mapping human rights developments in the world, examining the plausible explanations for the continues global

variations in their protection and providing policy solutions for improving that protection in the future" (Landman 2004:931). However, there are many methodologies to approach the measurement of rights.

One of them coincides with the many global campaigns which plea for better education in quality and equity. These include, for example, the Education for All (EFA) goals, the Millennium Development Goals (MDGs), the United Nations Literacy Decade (2003-2012), the UN Girls' Education Initiative (UNGEI) and the UN Decade for Education and Sustainable Development (2005-2014). Tomasevski (2006:xiv) asserts that "[a]ll these diverse global actors have a stake in education, but their definitions are incompatibly different". Note, however, that each of those initiatives are dissociated to each other and have specific targets to be achieved.

Tomasevski (2006:xiv) goes beyond to criticize the fact that "[f]ree and compulsory education for all the world's children forms the backbone of international human rights but does not shape local education strategies". Shetty (2005:73), however, sees effectiveness in them and highlights the benefits of using a rights-based approach while aiming at targets by saying that "the rights-based framework ensures that the MDGs, which are outcomes, are achieved through a process that respects the values, standards and the principles outlined in the Universal Declaration of Human Rights (UDHR)".

Another approach to monitoring rights is the violations approach. Chapman (1996:13) pleads for such a method by pointing that "[a] violations approach is more feasible and more manageable than the monitoring of progressive realization or the degree of implementation of a positive standard of the right to education. Violations are more easily defined and identified, particularly for non-governmental organizations and perhaps for the government and the international bodies as well". She also establishes a framework for recognizing and tackling violations of human rights by classifying the violations into groups: violations resulting from actions and policies of governments, resulting from discrimination patterns and relating to state failure to fulfill the minimum core obligation of rights.

Landman's (2004) proposal of measuring human rights in principle, in policy and outcomes and in practice seems more interesting to the purpose of this paper. He proposes that an initial assessment of the translation of internationally recognized human rights into national

legislation composes the first criteria to measuring human rights. That would be the measure of rights in principle.

Another indicator of rights in principle would be the participation in the regional and international human rights regimes. As Landman (2004:913-914) puts it, this "[c]oding of rights in principle is important because it translates legal qualitative information into quantitative information that can be used to track the formal commitment of countries to rights protection against which actual practices can be compared". It is the *de jure* protection.

However, for the analysis of the right to education, neither Tomasevski's (1999) nor Landman's (2004) frameworks can be used by themselves as both of them have shortcomings. Tomasevski's (1999) framework, although under constant evolution, analyses condition of the right to education without assessing the educational system and lacks a view of the past in order to evaluate the improvement of the right to education in a given context. Landman's (2004) framework, on the other hand, lacks space for qualitative arguments which cannot be quantified, such as the progressive realization of a right.

Therefore, this paper uses a combination of both patterns to analyze how available, accessible, acceptable and adaptable the right to education is in principle, practice and policies and how well it reflects in national legislations. With all this background we will try to analyze the right to education legislation of India in the forthcoming chapter

IV. Analysis of Right to Education bill of India

Why Government(s) took many years to pass RTE ?

From RTE movement started in 1988 to supreme court judgment in 1993, our politicians took twenty one long years to give education as a fundamental right to the children of India. Even though nearly all educationally developed countries attained their current educational status by legislating free and compulsory education – Britain did so in 1870 – India has dithered and lagged behind in introducing such legislation, with grave consequences. Of the nearly 200 million children in the 6 to 14 age group, more than half do not complete eight years of elementary education, as never enrolled or dropouts. Of those who do complete eight years of schooling, the achievement levels of a large percentage, in language and mathematics, is

unacceptably low. It is no wonder that a majority of the excluded and non-achievers come from the most deprived sections of society – dalits, OBCs, adivasis, girls, Muslims and poor – precisely the people who are supposed to be empowered through education (Rana, 2009).

Thus it has taken 55 years from Independence to make education a fundamental right of children and a further 6 years for the Right to Education Bill to be introduced in Parliament (APF, 2009)

Does RTE follow UN's Child Rights Convention?

“The Bill needs to bring into its ambit all children in the age group of 3-16 years. It ignores children who are below 6 yrs. of age “ (APF, 2009).

With heightened political consciousness amongst the deprived and marginalized, never in the history of India has the demand for inclusive education been as fervent as today. Yet even a cursory examination of the proposed bill shows some glaring shortcomings. Like the age of the child. As a signatory to the UN Child Rights Convention, India has accepted the international definition of a child, which is up to age 18. The bill proposes to cover only children from age 6 to 14, clearly excluding and violating the rights of the 0-6 and 14 to 18 year olds. This problem can be traced to the 86th amendment and its article 21A, which defines the age from 6 to 14. As a bill flowing out of the amendment, it is clear that the bill cannot go beyond Article 21A, which makes it imperative that the 86th amendment must be re-amended to correct this anomaly, and once that happens, the change needs to be reflected in the corresponding act at that point of time. Many argue that the bill should be put on hold till such a re-amendment is passed, but that would be playing into hands of elements who neither want the amendment nor the bill (Sadgopal, 2008). Such elements do not want the state to invest in education and instead prefer to leave it to the markets, and persuading the Parliament to re-amend at this stage with the kind of majority required seems remote, given the fractured polity post the nuclear deal and the Mumbai terrorism episodes. Having made education a fundamental right, the question that needs serious debate is whether the bill introduced in Parliament will help improve the situation in a substantial manner or not. To address that question, it needs to be recognized that the challenge of elementary education is

to somehow find a way to deal with the elusive triangle of access, equity and quality. The bill needs to be critically evaluated from the viewpoint of this triangular challenge (Rana, 2009).

Is education really free under RTE ?

The basic aspect of access is the provision of a school in the proximity of a child, since there are still areas in the country where such access is lacking. The bill envisages that each child must have access to a neighborhood school within three years from the time the bill is notified as an act. The presence of a nearby school is, however, no guarantee that a child can indeed access it. One of the key barriers, particularly for the poor and the deprived, is the issue of cost. That is where one of the critical aspects of Article 21A comes into play, namely, the state shall provide 'free' education. Normally, 'free' is interpreted as non-payment of fees by the parents of the child. But numerous studies have concluded that the fee constitutes only one of the components of educational expenditure. And since the landless, poor and socially deprived cannot meet the other expenses, this result in the non-participation of their children in education. These other expenses differ from place to place, though uniforms, copies and books and so on are perhaps common. The bill defines free education to mean any fee, expense or expenditure that keeps a child from participating in education, and obliges the state to provide all these. This broader definition, with implications for higher expenditure by the state, appears to be a better way to meet the challenge of access in terms of costs, rather than providing a list of items that will be covered, which are difficult to anticipate in different locations and in the future and hence cannot be exhaustive (Rana: 2009; Sadgopal: 2008).

Is quality education available to all under RTE ?

Sustained participation in schooling is, however, equally influenced by the quality of access. The high non retention rates in spite of higher enrolments in recent years are a clear indication that concerns of quality cannot be postponed till access is guaranteed, as also by the increasing tendency to seek out questionable private schools perceiving their quality to be 'better'. The approach of providing schooling through education guarantee centers and untrained para teachers has also greatly exacerbated the problem of quality of government schools ever since the District Primary Education Programme pioneered this cost-cutting strategy, further expanded through the Sarva Shiksha Abhiyan (SSA) in many states of the country. This approach has resulted in making education more iniquitous, since the

government system itself now has a variety of streams – the EGS centre, the rundown rural or *basti* school, the alternative school, the Kendriya, Sarvodaya, Navodaya and other kinds of schools and so on (Sadgopal, 2008).

Clearly, access to each is determined according to the social and class background of children, thus segregating them further. Consequently, the social integration that education was expected to assist, by bringing children from diverse backgrounds together in the same classrooms, has been allowed instead, one may say deliberately, to experience higher degrees of fragmentation. No wonder then that an increasing number of parents, both urban and rural, despite great financial difficulties, are attracted to the option of purchasing education from private profit-making schools that seem to have external frills of quality and regular presence of teachers.

Is Quality of education guaranteed in RTE?

While ensuring that every child who traverses through the elementary education system acquires a certificate of completion, the Bill fails to guarantee that a child has acquired competencies deriving from said education process. No standards are set for learning outcomes. A case of guaranteeing graduation but not education. Failure of the child to attest to acquisition of competencies is also not flagged for remedial action and/or systemic enhancements. The bill should also define a framework to measure the quality of education imparted (APF. 2009). Parth (2009) of Centre for Civil Society (CCS), without creative and regular assessments, quality of education cannot be guaranteed.

Their teachers have been frequently pulled out of schools in recent weeks for crosschecking voter lists and election training. Essentially no teaching will take place for a week around the polling date. Earlier this year, the teachers were busy updating voter lists. And then there are *panchayat* and municipal elections. The private school children of course do not suffer such loss of teaching. Would this discrimination stop when the Parliament passes the Right to Education Bill, 2008, recently approved by the Central Cabinet? Of course not! On the contrary, it will be legitimized since the Bill provides for deployment of government teachers for “decennial census, election to Local Authorities, State Legislatures and Parliament and disaster relief duties.” Government school children will continue to sacrifice their education

to keep the Indian democracy alive, while the private school children will receive education undisturbed (Sadgopal, 2008)

25% reservation in private schools

The proponents of the Bill, especially the internationally funded NGOs, make much out of the provision of 25% reservation in the private schools for the disadvantaged children. Closer examination reveals a different story. As per the Seventh Educational Survey, about four crore children out of 19 crore in the 6-14 age group are currently studying in private schools at the elementary stage (class I-VIII). The above provision will create space for one crore for which the private schools will be reimbursed for the tuition fees. Assuming that these schools are providing quality education, the provision helps only a minority of the underprivileged. What is then the Bill's vision of quality education for the remaining 15 crores? They will continue to receive education through a multi-layered school system with each social segment in a separate layer, the much-acclaimed norms and standards in the Bill's Schedule notwithstanding (Rana, 2009).

Back to the 25% provision. Everybody knows that, apart from the tuition fees, the private school child has to shell out money for a range of items throughout the year expensive uniform and shoes, extra textbooks, picnic and extra-curricular charges, computer fees etc. Who will pay for that? Why has the Bill not thought of changing the elitist character of these schools that violate the educational principles enunciated by Phule, Tagore and Gandhi? Clearly, the Bill lacks the vision of what constitutes quality in relation to India's needs. That, however, is another debate (Sadgopal, 2008).

Dr. Sadgopal (2008) argues that To be sure, there is a hidden political agenda in this 25% provision. Whenever the government sets up high profile elite schools — the centrally sponsored Kendriya or Navodaya Vidyalayas and the XI Plan's 6,000 model schools or the state governments' Pratibha Vidyalayas (Delhi), Utkrishta Vidyalayas (Madhya Pradesh) or residential schools (Andhra Pradesh) — the regular schools are deprived of funds and good teachers alike. People vie against each other to get their children admitted, using their political contacts, bureaucratic pressure or even bribes. The result: poor communities are divided and disempowered. This sop will thus further divert political attention away from the ongoing struggle for education of equitable quality through a Common School System.

Who will implement and monitor the child rights ?

The Bill is silent on the aspect of actual competence of and quality of monitoring by the national and state commissions for protection of child rights. While the provisions provide that an aggrieved person may lodge a complaint with the local authority, there is an obvious problem in this clause, since the very same body that is responsible for ensuring protection of the rights of the child is also made responsible for deciding upon a complaint against it. The bill is silent on the state parties that will be held responsible if its implementation is found lackadaisical.

Can there be a Fundamental Right to unequal and inferior education? The central government's audible answer: Yes, indeed! Professor Amartya Sen told the Confederation of Indian Industries in December 2007 that school education can be funded only by the state. No advanced country in the world has ever been able to provide universal quality education by negating or undervaluing its public-funded education system. This is true for all the G-8 countries, including the USA. Defying this universal experience, the Right to Education Bill is daring to undo the history (Sadgopal, 2008).

V. Why Right based approaches (RBAs) now ?

A closer look at all the important legislations and government schemes in last 10 years reveal that Right based approaches are getting prevalent in India. Starting from the much know Right to Information (RTI), to Right to employment (in form of Nation Rural Employment Guarantee Scheme Act, NREGA), to the recently passed Right to education (RTE) and currently debated Right to food, all are based on the Rights framework.

In 1995 Copenhagen Declaration on social development seeks to use the framework of rights to achieve goals such as poverty eradication. Among the aspirations in employing this “rights based approach” is that groups hitherto disadvantaged socially and economically will be empowered (Ghai, 2001). An underlying proposition is that a society that is committed to achieving social justice must implement special and economic rights. The human development report 2000 had as its theme this linkage between human rights and human development.

Though rights were part of lots of freedom struggles, but from colonial era till second world war, human development was considered the terrain of economists and rights as the terrain of lawyers. In 1960s and 70s the inclusion of many southern countries in UN, helped to bridge these two terrains. All this while only Civil and Political (CP) rights were the part of UN rhetoric, but after the end of cold war, Economic, Social and Cultural (ESC) rights were no more untouchable. As the aid delivery started shifting from project based support to budget support, international organizations and NGOs found RBAs as the best way to bring in the element of accountability and conditionality, which was not openly possible in the new rhetoric of partnership (Uvin, 2004).

In case of India, it's debated that: are RBAs part of the whole international discourse and we just borrowed it? Or these rights based legislation are result of real bottom-up people's movements. If you look at Right to Information (RTI) act, it really started from people's movement, due to some farmers payment issues in the state of Rajasthan. Right to education also finds its roots in the National Alliance for Fundamental Right to Education (NAFRE) movement started in 1988 in India.

For Medha Patkar of Narmada Bacho Andolan Movement, a rights based approach will only be effective and transformative if it changes the starting point of development altogether. In the context of the development projects that threaten to displace people (such as damming the Narmada river in India), the inquiry must begin from the rights to the communities whose livelihood is tied to the river, rather than from a "risk assessment" which immediately limits the inquiry to the compensation packages. A "rights assessment" will raise the fundamental question of the right to participate in the very process of development planning in the first place (Rand & Watson, 2007).

VI. Conclusion: lessons and implications

How much education does India need, and for what purpose? We can readily agree that universal good quality basic education is a requisite and moral requirement of all modern societies, for the sake of social equity, cultural values, and economic functionality (Schwartzman 2004:12).

Throughout this paper the analysis of education demonstrated how people are still excluded from receiving what they are entitled to as a human right; a life in dignity, freedom and equality. Education is one of those rights that enable the full realization of a person's potential and inclusion in society by enabling citizenship and growth. Negative gaps on its realization, however, are perceptible around the world. In India the situation is not different as many children and adults are excluded from having the substance of their right translated into reality. In order to understand the degree to which the right to education is attained, an analysis of different aspects of the India's RTE legislation is done in the paper.

It is identifiable that the Indian legislation is quite aligned to the international norms on the right to education and enshrinement of the right to education into national legislation rests clear. National norms also assure the education rights which are available, accessible, acceptable and adaptable. But, having a legislation which enshrines rights does not mean that the reality of those subjected to it will demonstrate the full realization of the right. The system presents pockets of success in the realization of education but "[these healthy segments of Indian education do not contradict the fact that the system as a whole is under severe strain, financially and institutionally, and needs to change and adjust, for more quality, efficiency and relevance" (Schwartzman 2004:27).

Legislation can be a tool for enhancing the realization of the right but it does not ensure instant realization. In specific cases the Indian judiciary played an important role in assuring the realization of the right to education but to follow such a route does not ensure a sustainable educational system in which education is available, accessible, acceptable and adaptable. Each case is individual and the costs of using this method for accomplishing rights are high.

Having coherent policies in practice, however, is a more stable way of ensuring the realization of the right to education for if all as policies aim at creating ways for the realization of rights and the correction of distortions, when existent, the full accomplishment of rights can be translated into reality. Many of the current policies relating to education in India are not designed to enable available, accessible, acceptable and adaptable education to all and even if some of the policies are comprehensive and all inclusive, they are not implemented to their full extent. Many policies aim at resource distribution and at promoting

equality among different regions and states, for example, but the achievement of the expected effects of these policies is not seen as other variables influence the realization of the right to education. Regional disparities continue to be a trait of the Indian reality. Policies, however, have to be implemented rather than just resting on rhetoric to change reality and make rights effective in practice.

Some of these variables could be believed to be socio-economic conditions, educational tradition, availability of resources and the way in which the duty-holders of educational provision develop their actions and the implementation of policies. Having good policies which aim at a holistic approach to education is very important but it is not enough as they, just as well as legislation, have to be translated into practice. As Soares (2004:85) says, "to change the despairing scenario of basic education in any country would require the participation of all sectors involved. The solution will not come only as a result of governmental policies imposed on schools, as some people believe. It will be slow transformation based on small victories. However, just as access was obtained, quality and equity can also be reached with time" .

Tomasevski's (2005:37) advises that "[t]he right to education requires bridge building, translating human rights into the language of economics and statistics". Such a bridging and coordination , moreover, should not be restricted to the governmental bodies but has to involve all the actors related to education, such as teachers, parents, students, and also those beyond it, like private investors, on the way to achieve consistent and stable policies. There is a "need for academic and professional work, human rights activism, dissemination of knowledge to the constituencies supportive of the right to education, and the creation of new constituencies" (Tomasevski 2005:237). Gaventa (2006: XIV) also stresses this point as he says that "while good management, disclosure of information and legal processes are important, they are not enough" and signals "mobilization, pressure and vigilance from below" as tools for enabling the full realization of rights. Nonetheless, "advancing human rights is a process - a marathon rather than a sprint" (Tomasevski 2005:237) and there is a need to keep going in order to ensure that all the rights that citizens are entitled to in principle are translated into policies and proper implementation, including right to education.

To translate the current RTE bill into practice, national and state governments of India, will rely on SSA (Sarva Siksha Abhiyan). Since the states are at different levels of development in their educational attainments – the contrast between Kerala and say Bihar comes easily to mind – their needs would also be different. The challenge would be to craft flexible and decentralized norms that suit the needs of each state, in contrast to the way the SSA is being currently implemented with rigid norms. There would be other considerations too. For example, the current SSA is incompatible with the fundamental rights based requirements of the bill; the central government would have to decide whether to reformulate the SSA appropriately or to bring in a completely different funding mechanism to implement the fundamental right.

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