

# School Management Committees as a Means for Bottom-Up Implementation of the Right to Education in India

by *Florian Matthey-Prakash\**

**Abstract:** *In 2002, the right to free and compulsory primary education was added to the Indian Constitution's fundamental rights catalogue as a new Article 21A. Fourteen years later, in spite of its elevation to the constitutional text, the right to education still shares the fate of other socio-economic rights in India: The right-bearers themselves are practically unable to claim their right in court, and therefore do not have measures to exert pressure on the state if it does not provide the right to them, except for elections. The institution of School Management Committees could enable parents to become active in the implementation of the right themselves. However, conceptual as well as implementation issues prevent this institution from providing one adequate compensation for lack of access to the courts.*

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## I. Introduction

Primary education in India has come a long way, which shows most prominently in the literacy rates at the time of Indian Independence and today: In 1947, only 16.7 per cent of all Indians could read and write.<sup>1</sup> The 2011 census found that since then, the literacy rate has increased to 73 per cent.<sup>2</sup> Among 15-24 year olds, almost 90 per cent could read and write in 2015, and the previously large gender gap has almost vanished in this age group.<sup>3</sup>

Still, many problems remain: There is a large gap between learning outcomes of children in government schools and private schools; especially when compared to better, more expensive schools.<sup>4</sup> Children from India's middle and upper classes almost exclusively at-

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1 Educating India, *The Hindu*, 4 April 2011, available at <http://www.thehindu.com/opinion/editorial/educating-india/article1599783.ece> (last accessed on 16 January 2016).

2 See <http://censusindia.gov.in/2011census/censusinfodashboard/index.html> (last accessed on 16 January 2016).

3 According to UNESCO data, 91.83 of all males aged 15 to 24 were literate in 2015, and 87.24 per cent of all females, see <http://www.uis.unesco.org/DataCentre/Pages/country-profile.aspx?code=IND&regioncode=40535> (last accessed on 16 January 2016).

4 See the figures in the ASER Report 2015, [http://img.asercentre.org/docs/Publications/ASER%20Reports/ASER%202014/fullaser2014mainreport\\_1.pdf](http://img.asercentre.org/docs/Publications/ASER%20Reports/ASER%202014/fullaser2014mainreport_1.pdf) at pp. 86-87 (last accessed on 16 January 2016).

tend private schools, meaning that the education system entrenches social differences. Overall learning outcomes – for instance, concerning simple mathematics and reading/understanding assignments – have actually decreased considerably in the last few years.<sup>5</sup> In the international PISA Plus survey of 2009, India ranked at the bottom of the 74 participating countries, even though the two states that participated are among those that show better learning achievements than most other states in the country.<sup>6</sup>

The Indian state has – at least on paper – used a rights-based approach in order to improve the primary education system in recent years. In 2002, a new Article was added to the fundamental rights catalogue of the Indian Constitution. Since then, Article 21A states that “[t]he State shall provide free and compulsory education to all children of the age of six to fourteen years in such a manner as the State may, by law, determine”.

Right-bearers can claim the delivery of the right in India’s High Courts and the Supreme Court. Therefore, the constitution mandates that there be effective means for children (or, rather, their parents) to claim their right through judicial means. However, in practice, even with Article 21A having been in place for fourteen years, this is not the case. The institution of School Management Committees (SMCs) could provide parents with alternative means of right enforcement that might act as one factor in compensating for this deficit, and therefore be an institution for legal empowerment.

In the first part of this paper, I shall first briefly summarise how the right to education has become a fundamental right in Indian constitutional law and describe its legal foundations today (I.). Then, the issue of lack of access to justice in India shall be outlined (II.). The Indian judiciary has attempted to compensate for this issue with the institution of Public Interest Litigation (PIL, III.). While this has led to a large number of cases in which the Indian courts have adjudicated social rights, PIL cannot fully compensate for the fact that courts remain inaccessible for the poor themselves, as it does not legally empower them to take their rights in their own hands (IV.).

SMCs could potentially help in filling this gap. They shall be the focus of this paper’s second part. In this part, I shall first outline the legal framework provided by the Right to Education Act of 2009 and the rules implemented under that act concerning SMCs, arguing that there are several conceptual shortcomings (V.). The most pressing issue, however, is the fact that not even the framework that is in place today is implemented properly (VI.).

5 ASER Report 2015, note 4, at pp. 86-87 (last accessed on 16 January 2016).

6 See *Maurice Walker*, PISA 2009 Plus Results, ACER Press, Melbourne 2011, pp. 11, 12, 18–20, 42, 44, 53, 55, 68-71, available at <http://research.acer.edu.au/cgi/viewcontent.cgi?article=1000&context=pisa> (last accessed on 16 January 2016). Himachal Pradesh and Tamil Nadu participated in the survey.

Still, my conclusion will be that SMCs remain a very promising institution for legal empowerment (V.)

## Part 1: The Right to Education and the Problem of Access to Justice

### I. The Right to Education as a Fundamental Right

The right to education has been an explicitly justiciable fundamental right only since 2002. Previously, the constitutional text included a call for primary education to be free and compulsory as a so-called “Directive Principle of State Policy”. The directive principles, which form Part IV of the Constitution, are explicitly non-justiciable: Article 37 states that the principles “shall not be enforceable by any court”, though they “are nevertheless fundamental in the governance of the country” and the State shall “apply [them] in making laws”.

Part IV contains several socio-economic rights in addition to the right to education.<sup>7</sup> The Constitutional Assembly had decided to not include them in the fundamental rights catalogue for reasons that are usually cited against the justiciability of socio-economic rights; the fact that the Assembly opted for creating two different “categories” – rights and principles – is an expression of the idea that socio-economic rights, as “second-generation rights”, ought not to be given the same status as civil and political, or “first-generation”, rights.<sup>8</sup>

Even though the constitutional text is quite unambiguous concerning the justiciability of the principles, the Indian Supreme Court has, since the 1970s, effectively overridden this provision by reading social rights – and thus, sometimes explicitly, the content of several directive principles – into the “right to life and personal liberty”.<sup>9</sup> The right to life, read as right to *dignified* life in those judgments,<sup>10</sup> as provided in Article 21, is a fully justiciable fundamental right.

This included the right to education as well: In the early 1990s, two Supreme Court judgments – the decisions of *Mohini Jain*<sup>11</sup> and *Unni Krishnan*<sup>12</sup> – declared that Article 21

- 7 It also contains policy principles that are not rights, such as a call for a uniform civil code (Article 44, see *Tanja Herklotz*’ article in this volume) or for the state to endeavour for international peace and security (Article 51) and even calls for prohibition (Article 47) and a ban of cow slaughter (Article 48).
- 8 See *Granville Austin*, *The Indian Constitution: Cornerstone of a Nation*, Oxford 1999, pp. 77-80.
- 9 See *Francis Coralie Mullin vs. The Administrator, Union Territory of Delhi*, 1981 AIR 746, 1981 SCR (2) 516, as well as many subsequent cases.
- 10 In *Francis Coralie Mullin*, note 9, the Supreme Court stated that “[w]e think that 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 expression oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.”.
- 11 *Ms Mohini Jain vs. State of Karnataka*, 1992 AIR 1858; 1992 SCR (3) 658.
- 12 *Unni Krishnan, J.P. vs. State of Andhra Pradesh*, 1993 AIR 2179; 1993 SCR (1) 594.

also included the right to education. Interestingly, both judgments were not immediately concerned with primary education – rather, in *Mohini Jain*, the petitioner challenged prohibitively high “capitation fees” charged by private universities, which the Supreme Court struck down because of education being a fundamental right that may be read into Article 21. In *Unni Krishnan*, in which private education providers challenged the wide scope of *Mohini Jain*, the Court defined that the contents of that right shall be defined (and therefore, limited) by Article 45, meaning that education *up to the age of fourteen years* (i.e. only primary and lower secondary education) must be free and compulsory. Several years later, in 2002, the Indian Parliament passed the Eighty-Sixth Constitutional Amendment that added Article 21A to the constitutional text. Another seven years later – in 2009 – the parliament took a step towards implementation of that right by passing the Right of Children to Free and Compulsory Education Act (or Right to Education Act), which came into force in 2010.

The act reinforces the obligation on the state to provide free and compulsory education to all children in the age group of six to fourteen years, and includes a range of different provisions that ought to make this goal a reality – for instance, that schools must provide opportunities for children above the age of six years to be admitted and to catch up with other children of their age (Section 4), that local authorities must establish a school in every neighbourhood (Section 6) and ensure that children under their jurisdiction enrol in and attend school (Section 9), etc. Furthermore, even private schools must reserve 25 per cent of their seats for children from “economically backwards families”, with the State reimbursing them for the tuition fees that the children themselves do not have to pay (Section 12(1)(n)).

The act also includes several minimum standards that all schools have to adhere to: Sections 18 and 19 refer to the Schedule of the Act, which, for instance, sets a maximum student-teacher ratio, describes that certain facilities must be available, and how many instructional hours must be provided in a year.

The Act remains relatively un-specific concerning many of these provisions, which is why they have to be developed further by the “state rules” that the governments of India’s states may enact (Section 38(1) of the Act). Most of these rules imitate the “model rules” that the central government has created for the states to use as guidance.

## II. *Lack of Access to Justice in India*

Articles 32 and 226 of the Constitution allow every right-bearer to enforce his or her fundamental right in the Supreme Court and the High Courts. With the right to education having been declared to be part of the justiciable right to life more than twenty years ago, and having been part of the constitutional text for more than a decade, one might expect that there is a considerable number of cases in which parents have attempted to claim their children’s right to free and compulsory education from the state.

If one searches for judgments by the Supreme Court in which it mentioned Article 21A, one can find none in which children themselves, represented by their parents, or their par-

ents have claimed the fundamental right from the state.<sup>13</sup> Many of the cases do not directly concern children's interests at all. Several cases were brought to the Court by private schools that believed that the state was restricting their rights too much by imposing certain duties on them;<sup>14</sup> for instance by requiring them to reserve 25 per cent of their seats to children from economically backwards classes, as provided by Section 12(1)(b, c) of the Right to Education Act,<sup>15</sup> as mentioned above.

The cases that do directly concern children's interests were brought to the Supreme Court as PILs: For instance, in one case, the petitioner raised the issue of the rights of children, including the right to education, of mothers who were in jail: As there was no one else to take care of them, those children stayed in jail with their mothers and could not go to school.<sup>16</sup> Another PIL case followed a fire in a school that led to the deaths of 93 children.<sup>17</sup>

- 13 The author used the Indian legal database of Manupatra to perform a full-text search for Supreme Court decisions that mention Article 21A. The Court had mentioned the article in 37 judgments from 2004 to 2014. In several of those, Article 21A was just mentioned in passing and was not relevant for the merits of the judgment; see, for instance, *Zee Telefilms Ltd. vs. Union of India*, Writ Petition (civil) 541 of 2004, in which the Court cited Article 21A as an illustration of what activities may be considered "state" activities.
- 14 See, for instance: *Sindhi Education Society vs. The Chief Secretary, Govt of NCT of Delhi*, Civil Appeal No. 5489 of 2007; *PV Indiresan vs. Union of India*, Civil Appeal 7084 of 2011; *State of Kerala vs The Tribal Mission*, Civil Appeal No. 6267 of 2012; *State of Karnataka vs. Associated Management of (Government Recognised - Unaided - English Medium) Primary and Secondary Schools*, Civil Appeals Nos. 5166-5190 of 2013; *State of Tamil Nadu vs. K Shyam Sunder*, Civil Appeals Nos. 6015-6027 of 2011.
- 15 The most important cases concerning this provision are *Society for Un-Aided Private Schools of Rajasthan vs. Union of India*, Writ Petition (C) No. 95 of 2010, in which the Court upheld the provision, but decided that it does not apply to non-state aided minority schools. In *Pramati Educational and Cultural Trust vs. Union of India*, Writ Petition (C) No. 416 of 2012, the Court went even farther by also excluding state-aided minority schools. Still, the Supreme Court upheld the provision/Section 12 in principle, clarifying that the State may also fulfil its duties under Article 21A by leaving its implementation in part to the private sector, and that Article 21A allows it to impose duties and therefore limit private schools' rights. However, as minority schools are given special protection by the Constitution in articles 15(5) and 30(1), according to the Supreme Court, this duty must not be imposed on these schools – which raises the question what "minority schools" actually are, as the constitution itself does not offer a clear definition. As a consequence, there now seems to be a tendency for "regular" private schools to re-define themselves as "minority schools", see *Srutya Susan Ullas*, Minority card is passport to freedom from RTE, *The Times of India* 14 September 2014, available at <http://timesofindia.indiatimes.com/city/bengaluru/Minority-card-is-passport-to-freedom-from-RTE/articleshow/42399797.cms> (last accessed on 27 February 2016).
- 16 *R. D. Upadhyay vs. State of AP*, Writ Petition (C) 559 of 1994 with Writ Petitions (C) 133 of 2002 etc.
- 17 *Avinash Mehrotra vs. Union of India*, Writ Petition (C) 483 of 2004.

There are some cases that were raised by children and/or their parents themselves in some of the high courts.<sup>18</sup> However, also at that level, in the majority of judgments that cite Article 21A, the courts were approached by other parties; particularly by (prospective) teachers (for instance, challenging the decision to not appoint them or to discharge them, asking for higher salaries, or challenging the withdrawal of recognition of the school that employed them)<sup>19</sup> or by private schools for various reasons.<sup>20</sup>

The children that the right to education and the Right to Education Act are primarily aimed at are those belonging to the poor part of the society: Today, practically all children from families that can afford to send them to private schools do enrol in the private education sector<sup>21</sup> – the fact that even the number of low-cost (and often low-quality) private schools has risen sharply in the last few years is an indicator of this phenomenon.<sup>22</sup> It almost appears as if anyone who can afford any private school for their children will choose those over government schools. Therefore, more affluent families do not depend on a functioning education system provided by the state.

It almost appears as if most observers consider it a given that right-bearers from the poorer part of society do not access the courts themselves to claim the delivery of socio-economic rights – which is why the very few cases in which they do get special attention.<sup>23</sup> Curiously, it also appears that there is no recent research on (lack of) access to the higher judiciary in India. However, there is one extensive study on lack of access to India's lower

- 18 See, for instance, *Abdullah (Minor) (Master Mohd.) vs. Government of NCT of Delhi*, Writ Petition (C) 1587/2001 (Delhi High Court); *Naresh Gangaram Gosavi vs. Chembur English School*, PIL No. 26 of 2011 (Bombay High Court – a PIL, but with parents of economically backwards children being petitioners); *Ashith Karthik Rao vs. The State of Karnataka*, Writ Petition (PIL) No. 29061 of 2014 (Karnataka High Court – again, a PIL, but with children from economically backwards backgrounds as petitioners). Also see *Ng. Komon vs. State of Manipur*, W.A. No. 16 of 2009 (Gauhati High Court), in which the petitioner was not a child or parent, but the Chairman of a village whose (government) school was shifted to another village.
- 19 See, for instance, *Ashoka Kumar vs. The Union of India*, judgment of 20 September 2007 (Delhi High Court); *Bhupendra Nath Tripathi vs. State of Uttar Pradesh*, Spl. Appeals 858, 561, 1390 of 2008 (Allahabad High Court).
- 20 See, for instance, *Vaishali International School Teachers Welfare Association vs. All India Sidharth International Educational Society*, 132 (2006) DLT 237 (Delhi High Court); *Queen Mary Public School vs. State of Kerala*, Writ Petition (C) 19723 of 2007 (Kerala High Court).
- 21 *Sonalde Desai, Amaresh Dubey, Reeve Vanneman, Rukmini Banerji*, *Private Schooling in India: A New Educational Landscape*, India Policy Forum, 2008-09, pp. 17 et seq., available at [http://testnet.w.ncaer.org/image/userfiles/file/S%20Desai\\_A%20Dubey\\_R%20Vanneman\\_R%20Banerji.pdf](http://testnet.w.ncaer.org/image/userfiles/file/S%20Desai_A%20Dubey_R%20Vanneman_R%20Banerji.pdf) (last accessed on 16 January 2016).
- 22 See *Geetha B. Nambissan*, *Low-Cost Private Schools for the Poor in India: Some Reflections*, in: IDFC Foundation, *India Infrastructure Report 2012: Private Sector in Education*, New Delhi 2013, pp. 84 et seq.
- 23 In addition to the high court judgments on the right to education cited above in note 18, also see the case of *Mohd. Ahmed (Minor) vs. Union of India*, W.P.(C) 7279/2013 in the Delhi High Court, where a child from a poor family with a rare disease was awarded access to expensive medical treatment because of his right to health as part of the right to life.

judiciary, i.e. the district courts: *Krishnan et al* report that, among other factors, costs, gender and caste discrimination, power imbalances, intimidation and corruption, as well as lack of legal awareness (which even applies to less-qualified advocates, who cannot access and understand a large amount of precedent and literature because they are only available in English<sup>24</sup>), are hurdles for the poor when attempting to access the lower judiciary.<sup>25</sup> Several of these factors appear to be likely candidates for factors that restrict access to the higher judiciary as well. Perhaps some of them even more so: For instance, as far as costs are concerned, hiring “better” attorneys with more effective contacts might be essential in having a case receive any attention in the first place, at least within a reasonable number of time. The huge backlog of cases in the Supreme Court and High Courts<sup>26</sup> means that not finding ways to draw the judges’ attention to them results in there being very little chance that a case will be resolved in a foreseeable amount of time.

### III. Claiming Social Rights in Indian Courts: Public Interest Litigation

Still, India’s higher judiciary has built up a considerable amount of social rights jurisprudence.<sup>27</sup> In order to overcome the issue of lack of access to justice, the Indian Supreme Court has created the institution of “Public Interest Litigation” (PIL):<sup>28</sup> In the case of a PIL, the courts are not approached by the aggrieved persons themselves, but by other individuals or organisations who act *bona fide* on their behalf, or even approach the courts because of lack of implementation in general, entirely detached from individual cases. PILs may be submitted to the courts by social activist lawyers or NGOs.<sup>29</sup> Sometimes, courts have ac-

24 Jayant K. Krishnan, Shirish N. Kavadi, Azim Girach, Dhanaji Khupkar, Kalindi Kokal, Satyajee Mazumdar, Nupur, Gayatri Panday, Aatreyee Sen, Aqseer Sodhi, Bharati Takale Shukla, Grappling at the Grassroots: Access to Justice in India’s Lower Tier, *Harvard Human Rights Journal* 27 (2014), p. 519, available at [http://harvardhrj.com/wp-content/uploads/2014/07/V27\\_Krishnan\\_et\\_a\\_l.pdf](http://harvardhrj.com/wp-content/uploads/2014/07/V27_Krishnan_et_a_l.pdf) (last accessed on 16 January 2016).

25 *Krishnan et al*, note 24, pp. 515 et seq.

26 In 2013, there were more than 31 million cases pending in the Indian court system, see Tom Laseter, India’s Stagnant Courts Resist Reform, *Bloomberg Businessweek*, 8 January 2015, available at <http://www.bloomberg.com/news/articles/2015-01-08/indias-courts-resist-reform-backlog-at-31-4-million-cases> (last accessed on 16 January 2016). Nick Robinson describes the Supreme Court as a “court overwhelmed by petitions not from poor or ordinary people but from those with money and resources”, see Nick Robinson, The Judiciary: Hard to Reach, *Frontline* 27 (2010), available at <http://www.frontline.in/static/html/fl2703/stories/20100212270304600.htm> (last accessed on 16 January 2016).

27 Though one might argue about how strong and effective the remedies that the courts tend to award actually are, see Madhav Khosla, Making social rights conditional: Lessons from India, *ICON* 8 (2010), pp. 739 et seq.

28 For an overview of the development of Public Interest Litigation, see Madhav Khosla, *The Indian Constitution*, New Delhi 2012, pp. 119 et seq.

29 See, for instance, the large number of petitions submitted by the social activist lawyer M.C. Mehta.

cepted post cards sent to them that named social issues as a PIL<sup>30</sup> and sometimes have acted entirely on their own in “*suo motu* petitions”.<sup>31</sup>

PIL is supposed to be a mechanism that will enable the courts to adjudicate on matters concerning people who cannot access them themselves.<sup>32</sup> It was originally “invented” by the Supreme Court in order to adjudicate on violations of prisoners’ rights, as those people had no realistic means to access the judiciary – mainly because of the physical barrier of being imprisoned.<sup>33</sup> Later, PIL cases were often concerned with socio-economic rights, and were brought to the courts because of the social and economic barriers that keep the right-bearers from accessing the courts.<sup>34</sup>

However, according to critics, following the central government’s embracement of policies of economic liberalisation, the “attitude of the Supreme Court has, in large part, shifted into alignment with the narrow neo-liberal view of constitutional rights”.<sup>35</sup> Even before, one could already witness a tendency of the Supreme Court to often limit itself to “expansive pronouncement[s] on socio-economic rights” without, in many cases, actually ensuring actual implementation of the right.<sup>36</sup> Today, however, “even the court’s rhetoric on socio-economic rights [has] been weakening”.<sup>37</sup> “The imperative of upholding civil liberties, socio-economic rights, and environmental protection has been subordinated to agendas such

- 30 See the case of Sunil Batra vs. Delhi Administration, AIR 1980 SC 1579, cited in *Vijayashri Sri-pati*, *Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)*, *American University International Law Review* 14 (1998), p. 456.
- 31 See, for instance, the *suo motu* petition of the Karnataka High Court concerning “Out of School Children”, Writ Petition No. 15768/2013.
- 32 Justice Bhagwati, in *S. P. Gupta vs. Union of India & Another*, Transfer Case (Civil) 19 of 1981, wrote that: “where a legal wrong or a legal injury is caused to a person or to a determinate class of person by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ”.
- 33 See, for instance, the early PIL case of *Hussainara Khatoon vs. State of Bihar*, 1979 AIR 1369, 1979 SCR (3) 352.
- 34 Justice Bhagwati, in *S. P. Gupta*, note 32, further noted that “it is necessary to [...] promote public interest litigation so that the large masses of the people [...] may be able to realise and enjoy the socioeconomic rights granted to them and [so that] these rights may become meaningful for them instead of remaining mere empty hopes”.
- 35 *Paul O’Connell*, *The Death of Socio-Economic Rights*, *The Modern Law Review* 74 (2011), p. 547.
- 36 *Prashant Bhushan*, *Misplaced Priorities and Class Bias of the Judiciary*, *Economic & Political Weekly* 44 (2009), p. 37.
- 37 *Bhushan*, note 36, p. 37.

as the ‘war on terror’, ‘development’<sup>38</sup> and satisfying corporate interests’.<sup>39</sup> According to this interpretation, the desire to protect socio-economic rights has weakened in particular: “Whenever socio-economic rights of the poor come into conflict with environmental protection, the courts have usually subordinated those rights.”<sup>40</sup> Based on these observations, particularly concerning environmental issues and socio-economic rights, one might argue that for the judges, PIL has become a mechanism to adjudicate on matters that they themselves deem important.<sup>41</sup>

#### IV. The Importance of Access to Justice: Legal Empowerment of the Poor

The fact that one can at least sometimes witness a – to put it as dramatically as *Rajagopal*<sup>42</sup> – “anti-poor bias” of the Supreme Court, particularly when accepting PIL cases, shows that PIL has not succeeded in fully compensating the lack of access to justice by the poor. But even if PIL benefitted the poor as much as it should, it would still be an institution that was created because of a malfunctioning judiciary system that prevents a large part of the population from accessing it in practice. Even if it worked as desired, it would still not allow right-bearers to take matters in their own hands and be able to ensure that their rights are granted to them themselves. In addition to “top-down” measures aimed at improving the situation of the poor, there is also a necessity for “bottom-up” mechanisms that allow them to take part in the implementation themselves. The necessity is not merely a moral or political, but also a legal one, prescribed by international as well as Indian constitutional law.

International law requires India to give its citizens access to its judiciary: As the Special Rapporteur on extreme poverty and human rights to the UN General Assembly has noted, “[a]ccess to justice is crucial for tackling the root causes of poverty”, and therefore embedded in several international human rights covenants that India is a party to: For instance, the right to an effective remedy and the right to enjoy rights without discrimination (articles 2.3 and 2 of the ICCPR).<sup>43</sup>

Additionally, from a constitutional law point of view, the Indian State is required to provide means for right-bearers to claim their rights from the State; at the very least as far as the right to education is concerned: Doctrinally, the decisive difference between free and

38 The understanding of “development”, the critics say, is limited to economic growth, also see *Anna-Lena Wolf*’s article in this volume.

39 *Bhushan*, note 36, p. 32.

40 *Bhushan*, note 36, p. 37. *Rajagopal* similarly diagnoses “a bias against the poor” by the Supreme Court, see *Balakrishnan Rajagopal*, Pro-Human Rights but Anti-Poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective, *Human Rights Review* 8 (2007), p. 157.

41 *Rajagopal* diagnoses an “urban and elitist bias against the poor and the countryside”, see *Rajagopal*, note 40, p. 168.

42 *Rajagopal*, note 40, p. 168.

43 United Nations General Assembly, Note by the Secretary-General: Extreme poverty and human rights, UN Doc. A/67/278 (9 August 2012).

compulsory primary education being a directive principle (Article 45) and now being a fundamental right (Article 21A) is the fact that the latter is enforceable in court. Article 32, which allows the enforcement of rights in the Supreme Court with judicial writs, is a fundamental right in itself, and was even described as the “most important article” of the Constitution “without which this Constitution would be a nullity” by *Ambedkar*,<sup>44</sup> probably the most prominent figure among the “creators” of the constitution.

Access to the judiciary, combined with the justiciability of a right – especially one where the focus is on its “positive scope” or the duty to *fulfil* the right,<sup>45</sup> as it is the case with the right to education<sup>46</sup> – is one way in which right-bearers (or, in the case that they themselves are minors: their parents) can participate in the implementation process of the right themselves. The concepts of “access to justice”, and even more so of “legal empowerment of the poor” are not limited to this one option, however.

The (international) debate around legal empowerment of the poor considers several different ways of empowerment: It is concerned with all methods through which the “poor and marginalised people” may “seek and obtain justice and [...] use the legal system to improve their lives”.<sup>47</sup> UNDP’s Commission on Legal Empowerment of the Poor (CLEP) described the approach as “the process of systemic change through which the poor and excluded become able to use the law, the legal system and legal services, to protect and advance their rights as citizens and economic actors”.<sup>48</sup> *Van de Meene* and *van Rooij* describe the approach as one that “focus[es] on the lack of power, opportunities and capacities that impede poor and marginalised people’s use of law and (para) legal tools to take control of their lives and improve their livelihoods”.<sup>49</sup> Legal empowerment is considered to be not just a goal, but also an end in itself; the *process* of empowerment becomes the focus, which may ultimately lead to “making the quest for poverty eradication a more sustainable one”: It is not just a tool for poverty reduction but also a tool against poverty “production”.<sup>50</sup>

The legal empowerment of the poor approach constitutes somewhat of a reversal in the field of law and development: While previously, the focus had been on promoting “rule of

44 Constituent Assembly Debates, Vol. VII – Thursday, the 9th December, 1948. Available at <http://parliamentofindia.nic.in/ls/debates/vol7p23.htm> (last accessed on 16 January 2016).

45 For the duties to “respect, protect, fulfil” that are now seen as common to all human rights, see General Comment 12 on the Right to Adequate Food by the Committee on Economic, Social and Cultural Rights, U.N. Doc. E/C.12/1999/5 (1999).

46 *Manfred Nowak* sees the obligation to “fulfil” as the “most important” aspect of the right to education, see *Manfred Nowak*, *The Right to Education: Its Meaning, Significance and Limitations*, *Netherlands Quarterly of Human Rights* 9 (1991), p. 422.

47 *Ineke van de Meene, Benjamin van Rooij*, *Access to Justice and Legal Empowerment: Making the Poor Central in Legal Development Co-operation*, Leiden 2008, p. 6.

48 Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone*, Volume I: Report of the Commission on Legal Empowerment of the Poor, New York 2008, p. 3.

49 *Van de Meene/van Rooij*, note 47, pp. 6-7.

50 *Dan Banik*, *Rights, Legal Empowerment and Poverty: An Overview of the Issues*, in: *Dan Banik* (ed.), *Rights and Legal Empowerment in Eradicating Poverty*, Surrey 2008, p. 25.

law” “through legal reform and institutional strengthening (mainly of the judiciary)”, i.e. on “top-down institutional reform measures”, “[m]ore recently, under the influence of the global struggle against poverty, legal reform programmes have shifted their focus to the justice seeker”, i.e. to “bottom-up” intervention.<sup>51</sup> One reason for this change is the fact that the top-down approach was unable to overcome “asymmetric power relations”, because of which the poor did not benefit even when the top-down measures were meant to benefit them.<sup>52</sup> PIL itself can be used as an illustration: The institution strengthened the judiciary – as an institution at the “top” – by facilitating the process of raising issues in court, and was meant to enable the courts to deal with cases concerning the poor who do not have access to justice. Ultimately though, as mentioned above, the thus-empowered courts gradually shifted their attention away from those initially-intended beneficiaries.

The legal empowerment approach aims to strengthen legal awareness, to develop alternative dispute resolution mechanisms, and to strengthen civil society and community organisations.<sup>53</sup> While alternatives to the judiciary for rights enforcement and dispute resolutions that “emulate” courts, such as alternative dispute resolutions mechanisms, are the most obvious choice as far as state or state-backed institutions for legal empowerment are concerned, others – like India’s SMCs– may also achieve the aim of allowing poor citizens to “use the law [...] to protect and advance their rights”: *Golub* notes that the difference in between the “rule of law orthodoxy” and the legal empowerment approach is, amongst other factors, that “the disadvantaged play a role in setting priorities, rather than government officials and donor personnel dictating the agenda” and that the latter approach “frequently involves nonjudicial strategies that transcend narrow notions of legal systems, justice sectors, and institutional building”.<sup>54</sup> Strengthening SMCs may constitute exactly such legal empowerment measures, as will be shown below.

Obviously, with India being a democracy, the most obvious form of right-bearers exerting pressure on the state to implement the rights would be through elections. In fact, when the constitution was drafted, that was the justification given for the fact that the directive principles are not justiciable: If the state does not fulfil its duties defined by the principles, the Constitutional Assembly believed, then it would be answerable to the electorate: It was supposed to be the courts’ task to protect the fundamental rights, and the people’s task, through elections, to exert pressure on the government to fulfil the promises that the direc-

51 *Van de Meene/van Rooij*, note 47, p. 10.

52 *Ibid.*

53 *Van de Meene/van Rooij*, note 47, p. 13.

54 *Stephen Golub*, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative*, Washington 2003, p. 4, available at <http://carnegieendowment.org/files/wp41.pdf> (last accessed on 27 February 2016).

tive principles had made.<sup>55</sup> With the voter turn-out being surprisingly high in the poorer parts of India's society,<sup>56</sup> this approach does seem promising at first sight.

However, as statistics and other indicators show, this is not what ended up happening, as the example of primary education shows particularly well: In the first decades following Independence, the government focused more on higher education than primary education,<sup>57</sup> even though Article 45 clearly expressed that primary education must be given priority.<sup>58</sup> Most recently, the central government even went as far as *reducing* the budgetary allocation for primary education.<sup>59</sup>

Even though primary education is a pressing concern for a large part of the population, with most parents stating that good education is most important for their children's future,<sup>60</sup> the issue of primary education is not given a high priority in the public debate or in discussions surrounding elections.<sup>61</sup> This might be due to the fact that other factors – such as “communal” or caste-based politics that play an important role in elections, particularly state elections<sup>62</sup> – are often a “distraction” from social concerns in the public debate, or be-

- 55 See the words of *Ambedkar* in the Constitutional Assembly debates, noting that future governments that would not fulfil their duties under the Directive Principles would not have to answer to the judiciary, but the electorate, quoted in *Austin*, note 8, pp. 77 et seq.
- 56 *Sanjay Kumar*, Patterns of Political Participation: Trends and Perspectives, *Economic & Political Weekly* 44 (2009), pp. 47 et seq.
- 57 *Ramachandra Guha*, *India after Gandhi: The history of the world's largest democracy*, New York 2008, pp. 468-469.
- 58 The provision, unlike all other directive principles, even imposed a time limit (ten years from the commencement of the constitution, i.e. 1960) for the implementation of free and compulsory education.
- 59 *Prashant K. Nanda*, Budget 2015: Focus shifts to higher education, available at <http://www.livemint.com/Politics/W2Z3Ebwx8ZcVavXZx1yN8I/Union-Budget-2015-cut-of-over-165-for-education-sector.html> (last accessed on 16 January 2016). A reason for this might be a belief that the state governments, who share responsibilities in the primary education sector with the central government in the constitutional setup, would in turn increase their spending on primary education. It remains to be seen if the states will fulfil that expectation.
- 60 The PROBE Team, *PROBE Revisited: A report on elementary education in India*, New Delhi 2011, p. 45.
- 61 *Jean Drèze, Amartya Sen*, *An Uncertain Glory: India and its contradictions*, Kindle Edition 2013, pos. 2593, 2873; *Jean Drèze, Amartya Sen*, *India: Development and participation*, Oxford 2002, pp. 145, 186 et seq.
- 62 *Patrick Heller* writes that “[o]n a day-to-day basis, the Indian citizen engages with the State either as a client or as a member of a group, but not as a rights-bearing citizen. [...] Demands on the States are made through bribes, by appeals to caste or communal solidarities or through the influence of powerful interest groups.”, see *Patrick Heller*, *Democratic Deepening in India and South Africa*, *Journal of Asian and African Studies* 44 (2009), p. 138.

cause of the fact that the public debate often also tends to focus on the concerns of the higher middle class.<sup>63</sup>

Importantly, in addition to that, to a large part of the population, it is apparently not obvious that education is a “public good” that the state is supposed to provide for everyone: It appears that most consider their children’s education to primarily be their own responsibility, and believe that thus, they have to invest money to admit their children in private schools, without considering this to be a result of an underperformance by the state. For instance, the extensive PROBE Report of 2006 on primary education in India notes that parents tend to consider government schools to be “meant for” low-caste and poor children.<sup>64</sup> In a study on quality of schooling in the state of Andhra Pradesh, parents voiced the view that they have “the right to complain” if they are dissatisfied with the quality of private schools – but that they have no right to do so concerning the quality of government schools, for which they do not have to pay.<sup>65</sup>

If there were more awareness that the State is under an obligation to provide for primary education – and also to provide quality education<sup>66</sup> –, parents’ expectations for government schools might increase. If parents witnessed concrete possibilities to effectively claim services from the State, and to participate in the implementation process, rights awareness would spread, and many of the poor might become active and leave the state of resignation that many of them commonly live in.<sup>67</sup> Being able to become actively involved in the implementation process might also increase the political priority of primary education during elections. But it would also offer a channel for the people through which they can voice their concerns to the state in addition to the one provided by elections. Furthermore, engaging the people also gives the state an opportunity to assess where and in what ways implementation is lacking, as it will get direct feedback about the effectiveness of its “top-down” measures “from below”.

63 Jean Drèze and Amartya Sen note that if the media, as it often does, cites the so-called “*aam aadmi*” (“ordinary man”), it still speaks of a relatively privileged part of the society, see Drèze, Sen note 61 (2013), pos. 4981.

64 The PROBE Team, note 60, p. 51.

65 Young Lives/Save the Children, Perspectives on Quality of Schooling in Andhra Pradesh, India, p. 4, available at <http://www.younglives.org.uk/publications/WP/parents-views-of-school-quality-in-andhra-pradesh/parents-views-of-school-quality-in-ap> (last accessed on 16 January 2016).

66 The CESCR cites four “essential features” of education: availability, accessibility, acceptability and adaptability. Both “availability” and “acceptability” are said to impose certain quality standards on states when providing education. See Committee on Economic, Social and Cultural Rights, General Comment 13, The right to education, U.N. Doc. E/C.12/1999/10 (1999).

67 Drèze and Sen describe that “underprivileged Indians are reluctant to rise and demand a rapid and definite removal of their extraordinary deprivation” and that the poor “live precariously with such deprivations, and keep, rather fatalistically, a low profile” in public debate, Drèze, Sen, note 61 (2013), pos. 4978 and 3344. There are “grass root” movements for different causes in India (though, curiously, not particularly many in the field of education). However, these normally do not choose official “state channels” for their causes – except for elections.

In addition to that, the state may also find ways to channel the right-bearers' activity in order to directly engage them in the right implementation themselves: A positive example in the field of education is the story of the rapid expansion of the education system in Himachal Pradesh, where the illiteracy rate among 10-14-year olds decreased from 61 per cent in 1971 to just 4 per cent in 1999.<sup>68</sup> This was facilitated by active public participation like cooperative action in village communities, cooperation in between parents and teachers and parents actively participating in the efforts to improve school infrastructure.<sup>69</sup>

The example of Himachal Pradesh shows how the state can benefit from parents' participation once it starts prioritising primary education – though, of course, Himachal Pradesh is a relatively small mountain state, meaning that the lessons learned from there need not necessarily be applicable in the entire country. But, considering how important parents believe education to be for their children – increasingly even for girls –, it might be that they are applicable at least to a certain extent.<sup>70</sup>

## Part 2: School Management Committees as Institutions for Legal Empowerment

### V. *The Legal Framework for School Management Committees*

The institution of School Management Committees was created by the Right to Education Act of 2009. Section 21 states that all (government and government-aided<sup>71</sup>) schools shall create such committees, which shall, according to paragraph (2), “monitor the working of the school”, “prepare and recommend school development plan[s]”, “monitor the utilisation of [...] grants” received from the government, as well as other functions “as may be prescribed”. Paragraph (1) states that three fourths of the SMC members shall be parents (or guardians), and that proportionate representation shall be given to parents (or guardians) of children belonging to disadvantaged groups or weaker sections of the society. Half of all the members shall be women. Non-parent/guardian members include “representatives of the local authority” – the local body that is responsible for the implementation of the Right to Education Act, i.e. *panchayats* (the lowest administrative level in villages) and municipal corporations –, and teachers. All members shall be elected.

The Right to Education Act only gives a very general guideline for the institution and leaves many open questions: How shall the election take place? What authorities does the

68 See the figures at *Drèze, Sen*, note 61 (2002), p. 178.

69 *Drèze, Sen*, note 61 (2002), p. 180.

70 Obviously, providing a functioning education system is still primarily the state's own obligation, meaning that it must not rely on citizens working to secure it for themselves. In the case of Himachal Pradesh, in addition to the work done by the people, the state's government involvement also increased accordingly after Himachal Pradesh was formed as a separate state in 1971, see *Drèze, Sen*, note 61 (2002), p. 177.

71 A special clause was added to Section 21 in 2012 for minority schools, for which the role played by the SMCs shall be an “advisory function only”.

SMC have in relation to teachers, especially the head teacher? What means does it have to enforce its decisions? What shall be the content of a School Development Plan?

The Right to Education Act is meant to create general provisions for the entire country that shall be defined more concretely by “state rules” based on the act, which the state governments are enabled to create by Section 38. That section specifically states that such rules may provide for “the [o]ther functions to be performed by School Management Committee” and “the manner of preparing School Development Plan”.

The states are entirely free in drafting the rules within the limits of Section 38. In order to give them some guidelines, the central government has created so-called “model rules” – which the states mostly have copied for their own rules, and which do not answer all of the open questions mentioned above.

Part V of the model rules gives suggestions for the composition and functioning of SMCs. Section 13(1) of the model rules prescribes that SMCs need to be created within six months after the respective state rules come into force, while section 13(2–3) further elaborate on the composition of the 25 per cent of the members who are not parents or guardians (one third shall be representatives of the local authority, one third teachers, and one third “local educationists” and children).

Section 13(4) prescribes the election of a chairperson and vice chairperson. Section 13(5) declares that the Committee shall meet once a month and shall take minutes of all meetings that shall be available to the public. Section 13(6) assigns some additional functions to the SMCs; for instance, communicating the rights of children to the community, ensuring the fulfilment of duties by the teachers, ensuring the enrolment and attendance of children, monitoring the infrastructural norms given by the Act’s Schedule, monitoring the implementation of the Mid-Day Meal scheme,<sup>72</sup> etc. Section 13(7) prescribes that the funds given to the school (and managed by the Committee) shall be kept in a separate account. Section 14 prescribes what contents the School Development Plan shall have – for instance, that it shall be a three-year plan with annual sub-plans (Section 14(2)), that it shall estimate enrolment and the number of teachers needed for the next years (Section 14(3)(a–b)), assess the need for infrastructural changes (Section 14(3)(c)) and state what additional financial requirements may arise (Section 14(3)(d)).

The model rules are more concrete than the Act’s provisions, and also extend the duties and rights of the Committee. However, it is still lacking in several respects, especially as far as effective enforcement of the SMCs’ tasks is concerned: How can an SMC ensure that teachers follow their obligations under the Act? How can it ensure that parents regularly send their children to school, and what can it do if parents or children refuse? And what rights might it have against the state to apply for additional funding if it identifies that it is needed?

72 The Mid-Day Meal scheme is not part of the Right to Education Act, but was introduced nationally in 1995 as part of the National Programme on Nutritional Support to Primary Education, see <http://mhrd.gov.in/mid-day-meal> (last accessed on 16 January 2016).

At least in one important respect, the state had already come close to giving a lot more power to the SMCs: The original Right to Education Bill of 2005,<sup>73</sup> which was ultimately not passed, prescribed that teachers be member of a “school-based cadre” (Section 23), rather than being employed directly by the state. The appointment of teachers would have been performed by the local authority or directly by the SMC itself. The Bill also gave SMCs the authority to not only disburse salary to teachers, but also to deduct payment of salary if teachers are absent from duty (Section 22(4)(iv)).<sup>74</sup>

This provision was subsequently scrapped; “probably to appease the hugely powerful teacher-politician lobby”:<sup>75</sup> Teachers of government schools are relatively powerful and often closely tied to politicians, as their help is important to conduct elections, which usually take place in schools and are organised by teachers “on election duty”.<sup>76</sup> At the same time, teacher absence is a huge issue in India’s government schools.<sup>77</sup> In a 2005 study, 25 per cent of all teachers who should have been present at the time of inspection in Indian government primary schools were absent.<sup>78</sup> Even when teachers were present, more than half of them were not “actively engaged in teaching” at the time of inspection.<sup>79</sup>

The studies by ASER show that the degree of teacher absence has apparently decreased since then.<sup>80</sup> However, the teacher attendance numbers do not shed light on the actual teaching activity, for which there was no progress whatsoever in between the two PROBE Reports of 1999 and 2006: In both, there was no teaching activity at all at the time of investigation in half of the schools investigated.<sup>81</sup> Since the 2006 report, there has not been a

73 Available at [http://planipolis.iiep.unesco.org/upload/India/India\\_RighttoEducationBill2005.pdf](http://planipolis.iiep.unesco.org/upload/India/India_RighttoEducationBill2005.pdf) (last accessed on 16 January 2016).

74 Interestingly, in the state of Himachal Pradesh, SMCs in tribal areas do hire – and remunerate – teachers themselves on contractual basis, see Harish Kumar vs. State of Himachal Pradesh, Judgment of 22 October 2013 (Himachal Pradesh High Court).

75 Editorial: Half Measure on the Right to Education, *Economic and Political Weekly* 44 (2009), p. 6.

76 *Kingdon/Muzammil*, A Political Economy of Education in India – I: The Case of UP, *Economic and Political Weekly* 46 (2001), pp. 3052 et seq.

77 See the PROBE Team, *Public Report on Basic Education in India*, New Delhi 1999, pp. 62 et seq. and The PROBE Team, note 60, p. 35 (last accessed on 16 January 2016).

78 *Michael Kremer, Karthik Muralidharan, Nazmul Chaudhury, Jeffrey Hammer, F. Halsey Rogers*, Teacher Absence in India: A Snapshot, *Journal of the European Economic Association* 3 (2005), pp. 659–660.

79 *Ibid.*

80 The ASER Report of 2005, at p. 20, reported a similar degree of teacher absence in Indian rural government schools (also around 25 per cent), see [http://img.asercentre.org/docs/Publications/ASER%20Reports/ASER\\_2005/aserfullreport2005.pdf](http://img.asercentre.org/docs/Publications/ASER%20Reports/ASER_2005/aserfullreport2005.pdf) (last accessed on 18 January 2016). According to the ASER Report of 2014, at p. 90, the absence rate has decreased to 15 per cent – however, it had already been as low as 12.9 per cent in 2010, meaning that it has increased slightly again in the last few years, see [http://img.asercentre.org/docs/Publications/ASER%20Reports/ASER%202014/fullaser2014mainreport\\_1.pdf](http://img.asercentre.org/docs/Publications/ASER%20Reports/ASER%202014/fullaser2014mainreport_1.pdf) (last accessed on 16 January 2016).

81 The PROBE Team, note 77, p. 47; The PROBE Team, note 60, p. 35.

comparable study that has considered this parameter, but it would be surprising if the problem had vanished completely.

Furthermore, there seems to be a measurable correlation in between political power of teachers and lack of learning outcomes by their students: *Kingdon* and *Teal* report that achievement levels of students in a subject taught by a unionised teacher are lower than in a subject that is taught by a non-unionised teacher.<sup>82</sup>

Therefore, breaking the political stronghold of government school teachers as suggested by the 2005 Bill could have had very positive effects on the quality of education: Giving an SMC that is dominated by parents of children (who ought to be taught by these teachers regularly), and therefore effectively giving those parents themselves the power to impose sanctions on underperforming teachers might have been a very powerful tool.

Still, it may not be surprising that this provision did not “survive”: *Alsop et al* highlight that empowerment “means redressing imbalances of power between those who have it and those who do not” – and note that (unfortunately), this is often understood as a “zero-sum game”, meaning that one group gains power at expense of another.<sup>83</sup> Indeed, allowing parents to reduce teachers’ salaries because of non-performance would have put them in a very strong power position that might have also been abused. *Alsop et al* argue that other means of “balancing” than the “zero-sum game” – i.e. empowerment of one group not only the expense of another group – might end up being more successful, as they would meet with less resistance.<sup>84</sup> While the idea of SMCs being able to impose sanctions on underperforming teachers itself has its merits, it should therefore have come with some additional safeguards to balance the distribution of power between the groups concerned: For instance, the Bill could have clearly defined when and to what extent the salary may be cut, what procedure needs to be followed, how teachers’ rights may be protected by that procedure, what means teachers have to appeal against unfavourable SMC decisions, etc. As the bill did not include such provisions, it was perhaps inevitable that the (potential) political pressure by “teachers lobby” resulted in the provisions being scrapped for the later bill that ultimately became the Right to Education Act of 2009.

Nevertheless, the idea of giving the SMC powers that enable parents to assert themselves against the teachers was a step in the right direction. To effectively facilitate parents’ empowerment, it would be desirable to give SMCs such rights in the future and then include procedural safeguards, while also keeping in mind that parents of children in government schools, who are often un-educated themselves, will only be able to use some powers effectively and responsibly if they receive adequate guidance and training.

82 *Kingdon, Geeta, Teal, Francis*, Teacher unions, teacher pay and student performance in India: A pupil fixed effects approach, *Journal of Development Economics* 91 (2010), p. 284.

83 *Ruth Alsop, Mette Bertelsen, Jeremy Holland*, Empowerment in Practice: From Analysis to Implementation, Washington 2006, p. 2.

84 *Alsop et al*, note 83, p. 2.

There is another field in which the powers of the SMC are lacking: One issue raised against the Right to Education Act in general is that it focuses very little on the quality of education<sup>85</sup> – most of its provisions concern enrolment of children and minimum standards for schools’ infrastructure, rather than content or teachers’ and students’ performance. At the same time, quality of education is the one field in which government schools are trailing behind India’s private schools the most, even if private schools’ infrastructure is similarly lacking or in an even worse state.<sup>86</sup> SMCs could also be able to help in improving this aspect if they were entrusted with managing some aspects of the curriculum or teaching methods.<sup>87</sup> However, they are not empowered to do so, neither by the Right to Education Act nor the model rules.

Unfortunately, many states have done little more than copying the model rules without giving additional authorities to the SMCs – which the Right to Education Act allows them to do –, and also without creating more concrete regulations for implementation that are adapted to the local situation in each state. For instance, in some states, institutions that were similar to SMCs was already in existence – in the case of Madhya Pradesh and Karnataka, their role (as “parent-teacher associations” and “school development and monitoring committees”) was even stronger than under the Right to Education Act. With the creation of the new institutions of SMCs, it is unclear how they relate to the existing bodies.<sup>88</sup>

### VI. Lack of Implementation of SMC Provisions

While there are some conceptual shortcomings in the legal framework creating the SMCs, the real problems lie in the on-the-ground implementation (or lack thereof) and societal conditions that inhibit effective working of the committees.

88 per cent of all schools had created an SMC in the (school) year 2013–14.<sup>89</sup> However, in many cases, the Committees “function only on paper”: There is “minimal public participation” in SMCs, which “leads to ineffective school development planning which remains

85 See, for instance, *Chandrappa*, Right to Education Act (RTE) Elementary Education: Backbone of the Education System, IJAESS 2 (2014), pp. 16–20.

86 *Karthik Muralidharan*, Public-Private Partnerships for Quality Education in India, available at <http://econweb.ucsd.edu/~kamurali/papers/Other%20Writing/public%20private%20partnerships%20for%20quality%20education%20in%20india.pdf> (last accessed on 16 January 2016); *Karthik Muralidharan, Michael Kremer*, Public and Private Schools in India, available at [http://scholar.harvard.edu/files/kremer/files/public\\_and\\_private\\_schools\\_in\\_rural\\_india\\_final\\_pre-publication.pdf](http://scholar.harvard.edu/files/kremer/files/public_and_private_schools_in_rural_india_final_pre-publication.pdf) (last accessed on 16 January 2016).

87 National Coalition for Education, Status of Functioning of School Management Committees, 2013, p. 45.

88 *Archana Mehendale*, Model Rules for the Right to Education Act, Economic and Political Weekly 45 (2010), p. 9 et seq.

89 RTE Forum, Status of Implementation of the Right of Children to Free and Compulsory Education Act, 2009: Year Four (2013–2014), p. 7.

top down”.<sup>90</sup> Many SMCs do not follow the tasks that they were entrusted with: A 2012 study had found that the SMCs of more than 50 per cent of the schools in India had not yet developed school development plans at all.<sup>91</sup> Specifically in the state of Rajasthan, where the functioning of SMCs has been studied for the Udaipur district, more than 93 per cent of the schools have created an SMC, but, according to parents questioned, only 42 per cent of the SMCs were holding regular meetings in 2013 in that district.<sup>92</sup>

There is also a neglect of “[e]ngagement with the local self-governance systems” (i.e. panchayats etc.) – local authorities should ideally cooperate with SMCs, coordinate schools, allocate funds to them, etc.<sup>93</sup> However, under the Right to Education Act, the responsibilities given to different bodies are often left opaque, and the state rules frequently do not lead to much more clarity. Also, for the rules on SMCs to be implemented properly, there ought to be some government body that monitors the committees, reviews and assesses their performance and identifies problems, and ensures that the committees are accessible, which is not the case as of now.<sup>94</sup>

Parents, in SMC elections and their representation in the Committees, are supposed to be the dominating group. In theory, SMCs could be a very powerful means for them to raise their voices and channel their issues “upwards”, even with the conceptual shortcomings. However, parents of children in government or government-aided schools are generally very poor and un-educated; often even illiterate. The administration and schools and teachers usually treat them with very little respect and show little interest in sharing “power” with them.<sup>95</sup> Reports suggest that even if SMCs are formally created, they do not actually hold regular meetings with the parents – instead, teachers may simply write minutes of meetings that did not actually happen, or just send the minutes of meetings that they have held without the parents for the parents to sign.<sup>96</sup> The fact that in the Udaipur district, more than 70 per cent of the teachers responded that the district’s SMCs were holding regular

90 RTE Forum, note 89, p. 7.

91 CRY Report 2012, available at <http://www.cry.org/about-cry/media-center/press-releases/a-far-cry-from-equitable-quality-education-for-all.html> (last accessed on 16 January 2016).

92 *Ahmad, Nesar/Rao, Mahendra S./Soni, Hariom*, Community Monitoring of Right to Education, in: Jha, Praveen/Rani, P. Geetha, Right to Education in India. Resources, Institutions and Public Policy, pp. 306, 321.

93 RTE Forum 2013, note 89, p. 7; National Coalition for Education, note 87, p. 44.

94 National Coalition for Education, note 87, p. 45.

95 *Kiran Bhatta* speaks of “virtually illiterate parents [...] who avoid coming to PTA meetings for fear of being rebuked by the teacher for sending their children ‘dirty’ to school”, see *Kiran Bhatta*, Don’t Make Experts the Enemy in Framing a New Education Policy, The Wire, 18 September 2015, available at <http://thewire.in/2015/09/18/dont-make-experts-the-enemy-in-framing-a-new-education-policy-10670/> (last accessed on 16 January 2016).

96 *Kiran Bhatta*, note 95.

meetings – as compared to only 42 per cent of the parents, as mentioned above – might be an indication of this phenomenon.<sup>97</sup>

If SMCs are created and operational, and parents do attend meetings, still, there is a large discrepancy in knowledge about their role and the rights and duties in between (head) teachers and parents.<sup>98</sup> Conflicts of interest in between these groups may hinder exchange of information in this respect, meaning that more efforts of raising awareness “from outside” – i.e. the state and/or NGOs – is required.

Even more worrisome is the fact that in spite of the Right to Education Act declaring that parents shall dominate SMCs, there are still many SMCs that do not have any parent members that at all: According to one 2013 study, this is the case for 40 per cent of all SMCs in the country.<sup>99</sup> Surveys of parents of government school children in Delhi have found that the majority of parents in the capital is entirely unaware of the existence of the institution of SMCs.<sup>100</sup> The awareness seems to be higher in other parts of the country, particularly when non-governmental organisations have performed work to raise awareness.<sup>101</sup> However, in many areas, evidence suggests that the level of inclusiveness in participation that the Right to Education Act envisions is not reached, with women being under-represented in the Committees, especially if they are additionally members of generally marginalised groups of the community.<sup>102</sup>

The state has attempted to empower SMC members – and thus, for the most part, parents – through training programmes. However, these are often poorly implemented.<sup>103</sup> All in all, in spite of having passed laws for the creation of SMCs, in many respects, the state has not shown much interest in making them a strong unit.<sup>104</sup>

There are some promising reports from some regions – particularly, once again, in the state of Himachal Pradesh – where parents are somewhat effectively involved in SMCs. But, as mentioned above, Himachal Pradesh was already known as a state with a relatively high level of involvement of local communities (also by the poor) in policy issues. This culture of participation and public engagement has allowed SMC operation to take off in the

97 *Ahmad/Rao*, note 92, p. 321. Similarly, only 66.1 of the parents stated that the SMCs were “taking decisions and proposals for schools”, while 95 per cent of all teachers gave an affirmative answer to this question.

98 National Coalition for Education, note 87, p. 45.

99 CRY Report 2013, note 91.

100 Josh4India Report 2014.

101 National Coalition for Education, note 87, p. 3 (Rajasthan), p. 35 (Bihar).

102 National Coalition for Education, note 87, p. 5; CRY Report 2013, note 91.

103 *Kiran Bhatti*, Centre for Policy Research, in an interview with the author (2015); *Chettri*, Strengthening SMC to make SDP– Should be an Empowering Process, at <http://www.accountabilityindia.in/accountabilityblog/2705-strengthening-smc-make-sdp—should-be-empowering-proces> (last accessed on 16 January 2016).

104 Assessment by *Kiran Bhatti*, Centre for Policy Research, in an interview with the author (2015).

first place.<sup>105</sup> Places where the level of community involvement is low to begin with remain in somewhat of a vicious circle as far as SMCs are concerned, showing that the state first has to become active by facilitating access to these institutions before parents can use them to then participate in the rights implementation process.

### VII. Conclusion and Outlook: SMCs Remain Promising Institution

Still, the institution of SMCs has a lot of potential. For them to function properly, parents need to be made aware not only of their existence, but also of their rights to participate in them<sup>106</sup> – and, in fact, to be the dominating group in them. Educating them and aiding them in asserting their rights could help them break the resistance that apparently still comes from teachers and bureaucrats against their empowerment – though, of course, the right balance needs to be found.

The work that has been done in this field by NGOs is commendable.<sup>107</sup> However, it is primarily the state's duty to implement its laws and to make its citizens' rights a reality; especially if it makes a promise to its citizens by adding a new fundamental right to the constitutional text. So far, the state has failed in properly implementing the provisions of the Right to Education Act concerning SMCs, but it has also failed in creating provisions that can effectively facilitate parents' empowerment in the first place. Of course, there is no international or constitutional obligation to create SMCs as such, but the state *is* obliged to facilitate access to justice and empower its citizens to effectively use and claim their rights whenever it guarantees a right to them, and to be able to effectively use institutions that it creates for this purpose. The failure to do so weighs especially strongly for the one socio-economic right explicitly guaranteed by the constitution, and especially considering the importance of education as a right that – if it is guaranteed – enables right-bearers to more effectively claim and enjoy other rights. In other words: Education itself leads to empowerment, legal and otherwise, which puts the right to education in a key position.

Several levels of India's administration are concerned with the right implementation "above" the SMCs, with panchayats or municipal corporations at the lower and the National Commission for the Protection of Child Rights and the State Commissions for the Protec-

105 *Kiran Bhaty*, Centre for Policy Research, in an interview with the author (2015).

106 Consequently, the conclusion of the study performed in Rajasthan's Udaipur district concerning SMCs is that the SMCs' "General Assemblies" – i.e. effectively the assembly of all parents, "people representatives" and teachers that elects the "executive committee" of each SMC in that State – need to be strengthened through specific trainings, see *Ahmad/Rao*, note 92, p. 311.

107 Several NGOs have done work to make parents aware of their children's right. ASER/Pratham does not only evaluate children's learning achievements, but also distributes "Communication Packs" whose aim it is to increase and improve parent/teacher communication, see <http://www.asercentre.org/p/231.html> (last accessed on 27 February 2016). The NGO Indus Action focuses on raising awareness on Section 12 of the Right to Education Act, i.e. that parents can have their children be admitted for free in 25 per cent of the seats of private schools, see <http://www.indusaction.org> (last accessed on 27 February 2016).

tion of Child Rights working at the higher end; the latter being directly below the central and state ministries as independent bodies. According to Section 31 of the Right to Education Act, it is the Commissions' duty to monitor the implementation of the right to education and the act – and therefore, also to ensure that SMCs are created and working as desired. Unfortunately, the Commissions themselves have not been given the means to perform their work as they should – in terms of personnel, financing<sup>108</sup> as well as lack of legal powers: Most problematically, the Commissions are merely able to pass recommendations, not to give binding orders to the lower-level administration.<sup>109</sup>

One institution that can give binding decisions is the judiciary. As stated above, the High Courts and Supreme Court are, in practice, not accessible for the right-bearers. However, they can be effectively approached through PILs, which may be used as a tool to further the empowerment of government school children's parents as well: In petitions, NGOs and other rights advocacy groups could point out shortcomings in the conceptual legal framework for SMCs as well as fields in which implementation is lacking. For this, of course, the judiciary needs to once again become aware of the importance of socio-economic rights.

In addition to the Right to Education Act's implementation, the courts are also competent to test the contents of the act itself against Article 21A. In doing so, they can order measures – for implementation or changes of the law – that might then put the parents in a position where they will be able to use their powers in SMCs, and then ultimately not be in need of such help from the judiciary anymore. Thus, once the parents are given a minimum amount of empowerment and agency, SMCs might allow them to drive the right implementation forward without much further assistance from outside.

A promising example of what might be possible through SMCs is the case of the first State Level School Management Convention in Uttar Pradesh, organised by the NGO coalition "SCoRE": In 2012, 1,600 SMC members from 72 districts of Uttar Pradesh gathered in Lucknow to exchange their experiences and to voice their concerns about the primary education system in India's largest state.<sup>110</sup> Such events may allow parents from different regions to educate each other about their roles in SMCs and may sensitise them about issues that may arise and how they can be dealt with. It may also allow them to identify shortcomings in the legal framework for SMCs. In addition to that, the convention is a means for parents to channel their concerns "upwards", to collectively draw attention to problems in the implementation process, and to claim the right delivery more vocally.

Such developments should be nurtured and supported, as they may compensate for the lack of means of parents to claim their children's rights from the state through traditional

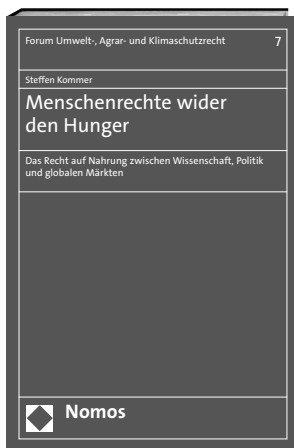
108 RTE Forum, note 89, p. 15.

109 See Section 13(1) of the Commissions for Protection of Child Rights Act, 2005.

110 State Collective for Right to Education (SCoRE), First State Level School Management Committee Convention (Report), available at <http://www.rteforumindia.org/sites/default/files/1st-State-level-SMC-Convention-SCoRE.pdf> (last accessed on 16 January 2016).

(i.e. judicial) means. If they remain in a state where they can do very little to improve their situation, where they cannot effectively exercise pressure on the state to fulfil its duty, the right to education will remain a *right* only on paper.

## Der Kampf gegen den Hunger und für soziale Menschenrechte



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