

# ISERP: “SOCIAL & ECONOMIC RIGHTS LITIGATION – THE NEXT GENERATION”

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## RIGHT TO EDUCATION

The RTE panel was convened by Ms. Kiran Bhatta, Senior Fellow at the Centre for Policy Research and featured presentations by Dr R. Govinda, Ms. Jayna Kothari, Ms. Annie Namala, Mr. Esteban Hoyos Ceballos, Ms. Lucy Williams and Mr. Kevin Murray.

The Panel, comprising individuals from diverse backgrounds, working towards the cause of education, engaged in a comprehensive discussion on concepts integral to the realisation of the right to education. The outcome was a rich and riveting discourse on education from different perspectives, both professional and geographical.

Ms. Kiran Bhatta in her presentation, described issues that may be categorised under four broad heads namely, public provisioning of education in India (in the larger socio-political context), the concept of education as a 'right', adjudication of education in courts and finally, role of non-state actors (civil society in particular) in addressing various issues pertaining to education. Ms. Bhatta concluded by referring to education in India as a right without a remedy.

Dr. Govinda, Former Vice-Chancellor, National University of Educational Planning and Administration (NUEPA), New Delhi, who was one of the key members on the drafting committee of the Right of Children to Free and Compulsory Education Act, 2009, focused his remarks in broadly two areas. First, he spoke of the various factors- historical,

economic, political and social- that adversely influenced the formulation of the Right to Education Act, 2009. Secondly, he made recommendations for better implementation of the Act. Further, he emphasised the potential role courts and civil society may play in the coming years in being instrumental in the realization of the fundamental right to education. He however also pointed out, that there is a lack of political will towards the enforcement of the now justiciable right to education.

Ms. Jayna Kothari, Partner, Ashira Law, Bengaluru and Founder Member, Centre for Law and Policy Research (CLPR), Bengaluru, who spoke next, presented an overview of the contentious legal issues surrounding the implementation of the Right to Education Act in India. She began by providing a litigation history, emphasising the transformative role that two landmark judgments (*Mohini Jain v. State of Karnataka*, AIR 1992 SC 1858 and *Unnikrishnan v. State of Andhra Pradesh*, AIR 1993 SC 217) played in the cause of education. She was appreciative however, of the RTE legislation, especially its mention of norms and standards, drawing a comparison with South Africa where people have been unendingly fighting norms and standards for education. But she too expressed her concerns regarding the failures in implementation of the Act. Referring to two cases from present times (*Society for Unaided Private Schools of Rajasthan v. Union of India*, (2012) 6 SCC 1, and *Pramati Educational and Cultural Trust v. Union of India*, (2014) 8 SCC 1), she observed that in spite of the RTE Act, civil society organisations are rushing to courts not to implement the Act, but to question its validity. She next gave a brief overview of important cases pending in courts, a combination of those that are contributing to and inhibiting the implementation of RTE Act, respectively, attributing the latter to essentially the lack of a strong design/strategy for providing a remedy under the Act. She finally observed that the slow pace of litigation in India is due to reluctance of civil society organisations in approaching courts in opposition to the government due to their own involvement with the government machinery and stressed that despite separation of powers, courts are in fact the correct institution to approach, for implementation of RTE Act.

Next, Ms. Annie Namala, Executive Director of Centre for Social Equity and Inclusion, steering the discussion towards a new direction, looked at issues that particularly confront the most marginalised children from socially excluded communities. She highlighted fundamental contradictions that exist in matters pertaining to socially excluded children vis-à-vis the Right to Education Act and pointed out that the same results in denial of access to justice. She concluded by citing the potential of various big and small organisations working in villages and hamlets across India, as well as model children who have risen above their disadvantaged position in society, in playing a crucial role towards filling the gaps in the RTE Act and its implementation.

The first international perspective in this Panel was offered by Professor Esteban Hoyos-Ceballos- professor of Law, EAFIT University Law School, Medellín, Colombia. Prof Esteban was one of the lawyers who litigated the economic accessibility of the right to education before the Colombian Constitutional Court. His presentation therefore, was an insight into his experiences litigating this 'complex right' as he put it. He admitted that unlike countries with progressive constitutions (India and South Africa), Colombia has to face far more challenges with respect to the realization of the right to education. He categorized these challenges under three heads, namely, structural (inequality in education provisioning), legal (issues of availability, accessibility and adaptability) and political (lack of political mobilisation) and explained them briefly to provide a Colombian perspective. He concluded by talking about a government initiative called '*Ser Pilo Paga*' (being energetic pays) that aims at facilitating access to education to university students but said that the same is not a law and only a government initiative, which is not enough.

After what we can say was a detailed account of the Right to Education discourse from two significant global south countries, India and Colombia, a global north perspective was in order.

Ms. Lucy Williams, Professor of Law at Northeastern University Law School, Boston, discussed the status of the right to education in the United States with the help of important case law. For context, she first talked about the absence of the mention of socio-economic rights from the American Constitution, and effects of the same; and then explained how education funding in the US is derived from property tax (there is a direct relationship between the rate of property tax of a locality and the quality of public schools in that locality). Talking about the state constitutions that do in fact refer to a right to education, she discussed landmark judgments in which the judiciary has played a vital role in ensuring the realisation of right to education for those in need by directing the legislature to raise funds, despite the legislature's unwillingness to act as per court directions. Ms. Williams concluded by talking about a South African case which has reached a point at which even the Minister of Basic Education echoed the Court's views regarding immediate and not progressive realisation of the right to education and publicly acknowledged the obligation to ensure that every learner has regular text-books.

The last panelist was Mr. Kevin Murray, Executive Director, Programme on Human Rights and the Global Economy, Northeastern University Law School, Boston. Mr. Murray discussed the 'Charter School Movement', a system involving private sector participation in the delivery of public education, unique to the United States. To explain the origins of this concept, he traced the evolution of the education system right from the times of the Social Movement for Civil Rights in the US in the 1960s. He explained that this movement was in fact, a struggle for equal and accessible education for all. He explained how riding the wave of this movement, litigation in the field of education reached its peak around that time. He then moved on to speak about the 'education reform' which was a result of the then President Ronald Reagan's inquiry into the status of education in the country. The three main features of this Education Reform were high stakes testing to measure success (he questioned the use of only one indicator as a measure of success), reconceptualising the idea of discipline in the class-room (this structure is perpetuating a "school to prison pipeline" phenomenon) and lastly, the idea from which the concept of Charter Schools emerges- the idea that market forces can be brought into the social realm as a solution to all problems. Mr. Murray, described both how the Charter School System has grown in America over the years, while at the same time has been litigated against in states like Washington. In conclusion, Mr. Murray spoke about how from a human rights perspective, the Charter School System has both positive and negative implications, as while on the one hand, it is benefitting a significant number of African-American children by providing them top-class education, on the other, it is taking away from public funds that could be used for improvement of public schools. On the current scenario, he commented that a social movement, similar to that from the 1960s is emerging against not only charter schools, but also the general education system present in the country, which hasn't shown tremendous results, but has tremendous potential.

In conclusion, all the panelists raised important issues surrounding the implementation of SERs, albeit from different perspectives. The financial implications of RTE came out as a strong deterrant in the implementation of the right. This has further implications for the role of the private sector. The government of India, as was pointed out, has not budgetted adequate resources for the proper implementation of the RTE, leading to violations of rights and an exit to the private sector. While the non-state sector, can certainly play a role in the provision of education, issues of accountability of the private sector as far as RTE is concerned and the horizontal application of the fundamental right, are issues that need further deliberation. The experience of charter schools in the US provided some insight on the limits of private sector involvement in basic education. Similarly, the differential impact on excluded communities in private schools, was a reminder of the large role that the state must continue to play in the provision of education.

Given the difficulty in terms of physical access and costs of appealing to the judiciary for all violations under the RTE, the need for administrative redress was also highlighted. The courts it was felt could not be the first point of call for SERs. Developing a robust grievance redress mechanism at the level for the frontline bureaucracy was thus a necessity.

However, another issue related to adjudication that came up was that of the separation of powers and the extent to which the courts can intervene in implementation of SERs. The jury is still out on that, as the principle of separation was recognized as a necessary part of a democracy, but at the same time, the courts are expected to step in to guarantee justiciable rights, if the executive or legislature fail to play their role. The New York case mentioned by Prof Williams was instructive in the pro-active role played by the court in asking the school board to increase its funding for schools in New York. The conditions under which courts can play such a pro-active role is worth considering in greater detail. In particular the role of civil society in enabling positive responses from the courts was also mentioned.

The session thus provided deep insights from the experience and cases presented by the panelists while also raising pertinent questions about the future of SERs particularly the role of the judiciary in guaranteeing them.