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BETTER LAWS. BETTER GOVERNANCE

SUBMISSIONS TO THE MINISTRY OF HUMAN RESOURCES DEVELOPMENT ON THE NEW EDUCATION POLICY

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I. SUMMARY OF RECOMMENDATIONS

For the consideration of the Ministry of Human Resources and Development and the new National Education Policy, particularly with respect to school education, we recommend the following:

1. The state shall undertake decentralisation of educational decision-making in a planned and consistent manner with the view to encourage local and community initiatives and cultivate stakeholder participation. For this, the state shall initiate a programme of action for decentralisation in education, incorporating blue-prints from different States.
2. The state shall seek to adopt, progressively and as far as possible, principle-based regulations for education governance instead of rule-based regulations, to make them responsive to the rapid changes in the education sector, ensuring the right to an equitable and quality education, nurturing initiative and innovation, inculcating a consultative rather than prescriptive approach to providing education and striking the appropriate balance between accountability and autonomy of schools.
3. The state shall undertake all necessary steps for building capacity in local institutions and personnel to implement decentralised decision-making and principle-based regulations.

II. INTRODUCTION

The Ministry of Human Resources Development has recently released its inputs ('MHRD inputs' or 'inputs') for the draft National Education Policy, 2016 for public deliberation. The inputs are significant as they are a direct vision of the concerns which the government expects the new education policy to engage with. The new National Education Policy is in itself significant considering the dramatic changes that the political economy of the Indian state has seen since the previous policy enacted in 1986. Since a National Education Policy is almost a generational document, it ought to take note of a distinct possibility that the role of the state in the provision of public goods, including education, is set to change. It is reasonable to assume that the private sector's presence and influence would only expand. Further, the complexity of the sector would inevitably require greater decision-making and accountability mechanisms at a more local level, involving stakeholders, communities and local governments. Of course, the state would continue to have an important role to play in laying down policy, a broad framework curriculum, and a basic set of non-negotiable principles and values to hold institutions and personnel responsible. But importantly, it must supervise the delegation of its own powers as an exercise in both democracy and efficient decision-making. The movement towards these ideas started in the late 1980s itself. The National Policy on Education, 1986 highlighted the need for a radical change in the governance of education sector and called for 'decentralisation and creation of a spirit of autonomy for educational institutions' along with 'giving pre-eminence to people's involvement, including associations of non-governmental agencies and voluntary effort.' The policy was later supported by a Programme of Action (hereafter 'POA'), 1992. Among other things, the POA of 1992 provided for setting up Village Education Committees (hereafter 'VEC') under the panchayats. The VECs would be responsible for administration of the delegated programmes in the field of education at the village level.¹ Further, district level bodies with appropriate representation would be set up to formulate educational plans, and appropriate state legislation would devolve powers to the urban local bodies to carry out the constitutional mandate as outlined by the 74th Amendment.

The 73rd Amendment, mandating Panchayati Raj Institutions in every state of India, was enacted keeping in consideration that despite the long standing existence of such institutions and the fact that Article 40 enjoined the state to provide them with necessary wherewithal to function as units of self-government, they had not been able to acquire the status of 'viable and responsive people's bodies'.² The Amendment added the Eleventh Schedule to the Constitution which enlists education (including primary and secondary education, technical training and vocational education, adult and non-formal education) as

1 p.113, Plan of Action, 1992.

² Statement of Object and Reasons, The Constitution (Seventy-third Amendment) Act, 1992

one of the subjects allotted to panchayats, in the pursuit of making them substantial institutions of governance.³ States enacted their respective Panchayati Raj Institutions laws to devolve appropriate powers and responsibilities to the local governance structures.

The Jomtein Declaration (1990) notes the criticality of strengthening partnerships among stakeholders and different levels of government for providing basic education to all. It recommends strong partnerships between different government departments and between the government and other actors such as the community, non-governmental organisations, private sector, families and even religious groups. These partnerships, the Declaration says, contribute to planning, implementing, managing and evaluating basic education programmes.⁴ At the World Education Forum, Dakar, India pledged for, *inter alia*, ensuring 'engagement and participation of civil society in the formulation, implementation and monitoring of strategies for educational development'. Further, it also committed to developing 'responsive, participatory and accountable systems of educational governance and management.'⁵ Besides the obligations arising out of international commitments, the Constitution enjoined the state to establish village panchayats and vest them with such powers and authority that would enable them to function as 'units of self-governance.'⁶ Further, the National Policy on Education, 1986 also recommended envisioning tangible role of community and local authorities in education governance. The 73rd and 74th Constitutional Amendments mandated the states to create a third rung of governance, much closer to people and empower the same with power and authority over certain subjects. Decentralisation and, to some extent, de-regulation received a renewed impetus and different basis, with the changes in economic policies encouraging liberalisation and privatisation. The RTE Act takes note of this evolving context and mandates all government and aided schools to establish a School Management Committee (SMC) consisting of parents (including proportionate representation of parents of children belonging to weaker section and disadvantaged groups) and assigns obligations to local authorities.

The inputs not only build on previous policies and legislation, but also make its novel interventions cognizant of changes in state policy as well as development in technology. In this context, there are two areas of relevance which do not find adequate attention in the inputs, but are critical for realisation of objectives that the new education policy would set out for itself, namely (i) decentralisation of education governance and (ii) regulation of schools. We discuss them separately in the following parts.

³ Article 243G of the Constitution of India.

⁴ World Declaration on Education for All, 1990 in MEETING BASIC LEARNING NEEDS: A VISION FOR 1990s, 161 (available at: <http://unesdoc.unesco.org/images/0009/000975/097552e.pdf>)

⁵ The Dakar Framework for Action, 8-9 (available at: http://www.unesco.at/bildung/basisdokumente/dakar_aktionsplan.pdf)

⁶ Article 40, Constitution of India

III. VISION FOR EFFECTIVE DECENTRALISATION

A. Facets of decentralisation

Decentralisation can happen in several forms. Fiske classifies them as: deconcentration, delegation and devolution. Of these, deconcentration is the weakest form. It is ‘no more than shifting of management responsibilities from central to regional or other lower levels.’ In case of delegation, the Central/State government transfers decision-making power to local authorities, but retains the power to withdraw it. Devolution implies transfer of administrative, fiscal and other powers to local authorities, and the State or Central government is not at liberty to withdraw it easily.⁷ In context of the school education sector in India, Govinda and Bandyopadhyaya suggest that, largely, only ‘deconcentration’ was followed in most parts.⁸

It is plausible that at the first stage of institutional capacity building at local levels, the government initially chooses deconcentration. It allows them to develop requisite competence and experience as implementers of policy. It may subsequently delegate decision-making powers to them for certain non-trivial subjects to further build requisite capacities, while retaining the option of withdrawing these powers if course-correction is immanent. Ultimately, once the capacities have been sufficiently developed, institutional stability has been achieved, communities and local governments are made adequately aware about their powers and responsibilities and sufficient confidence exists, important decision-making powers can be ‘devolved’ to local governments. A report by National Commission for Protection of Child Rights notes that under decentralisation and devolution of authority, ‘all three functions of planning, implementation and monitoring of the programme should devolve at the local level enabling an active role for the gram panchayats (local bodies) or municipalities.’⁹ Further, it says that local community groups should interact with panchayats in a systematic manner. ‘The plans should flow from the gram panchayats to the cluster level and consolidate at the Block level. The role of district and the State is to respond to the demands from the field level. It is necessary to have a shorter cycle of planning as far as children are concerned. *Ongoing long cycle of planning based on a centralized annual plan fails to deliver the entitled and much needed benefits to the*

⁷ Edward Fiske, *Decentralisation of Education: Politics and Consensus* (World Bank, 1996)

⁸ R. Govinda and M. Bandyopadhyay, *Changing Framework of Local Governance and Community Participation in Elementary Education in India* (2010), available at <<http://eric.ed.gov/?id=ED510902>> (last visited on 12 August 2016).

⁹ National Commission for Protection of Child Rights (NCPCR): *The First Six Years*, p. 19 available at http://www.ncpcr.gov.in/view_file.php?fid=407 (last visited on 27 September 2016) (Hereafter, NCPCR Report)

*infants and young ones.*¹⁰ Importantly, it notes that all efforts should be made towards institution building, ensuring predictability and continuity in governance.

However, this progressive devolution of powers can be efficiently achieved when there is a programme or plan of action to support or inform it. This would help both the state and Central government as well as local institutions to adopt necessary strategies and targets.

B. Mutually Exclusive, Collectively Exhaustive: Towards efficient decentralisation

Pritchett and Pande argue that effective decentralisation requires an unbundling of key functions in elementary education that makes the classification ‘mutually exclusive and collectively exhaustive’.¹¹ This entails that in delineating duties, the legislation ought to be precise in the role it envisages for a local body and for the State/Central government, in their shared endeavour of universalising elementary education.¹²

Further, in the event that there can be more than one authority at the same level, the need for a clear allocation of roles is accentuated. Pritchett and Pande argue that the problems with respect to quality in education are institutional in nature, involving issues of appropriate delegation and feedback mechanisms with credible enforcement.

The duties of the Central/State government and local authorities listed under sections 8 and 9 of the RTE Act respectively, seem to overlap besides being imprecise. In addition to this, under the Act, ‘local authority’ includes, ‘Municipal Corporation, Municipal Council or Zila Parishad or Nagar Panchayat or Panchayat and any such other authority or body having administrative control over the school or empowered by or under any law for the time being in force to function as a local authority in any city, town or village.’ This definition is broad enough to include VECs, panchayats and other structures that may be working simultaneously in a given unit. The Act does not clarify their respective roles which could lead to inefficiency. Moreover, the Act requires government and aided schools to constitute

¹⁰ Ibid. Emphasis supplied.

¹¹ Lant Pritchett and Varad Pande, *Making Primary Education Work for India’s Rural Poor: A Proposal for Effective Decentralization*, available at <https://www.hks.harvard.edu/fs/lpritch/India/decentralization_education_india_varad.pdf> (last visited on 11 August 2016).

¹² R.S. Tyagi observes how District Education Committee in Gujarat had been rendered largely redundant due to minimal devolution of power and overlap of even those functions; R.S. Tyagi, *Decentralised Management of elementary Education and Role of Self-Governance Institutions*, (NUEPA, 2016) available at <http://www.nuepa.org/New/download/Publications/Occasional_Paper-48_R_S_Tyagi.pdf> (last visited on 11 August 2016).

SMC which shall participate in formulation of school development plans, monitor the utilisation of grants and first level of grievance redressal for teachers of the concerned school.¹³ Pritchett and Pande comment that the Indian experience of decentralisation in primary education has produced sub-optimal results due to the absence of finance or control over functionaries, or not equipping them with capacity.¹⁴ Considering that decentralisation, by itself, would not lead to desired outcomes, the ‘institutional design’ question becomes critical. In this light, Pritchett and Pande suggest that all regulatory functions in the sector should be unbundled. Thereafter, the jurisdiction best placed to carry them out should be identified and allocated those functions. These institutions should then be provided adequate finance and control over functionaries.¹⁵ They argue that such unbundling should lead to classification that is ‘mutually exclusive and collectively exhaustive’, in the sense that all possible functions are covered by different levels of governance and none of them overlap with each other.

The MHRD Inputs suggest the need for improving educational planning, governance and management. Drawing, perhaps from the Dakar framework, it recognises that systems must be made participatory, accountable and responsive to the emerging educational priorities of the education sector.¹⁶ To achieve this efficiently, a policy mandate supported by a clear plan of action from the government are important.

C. Efforts at Decentralisation

Over the years, there have been varied efforts at the Central, State and local levels to carry forward the Constitutional and legislative mandates and implement decentralisation in education governance. Govinda and Bandopadhyay argue that it now generally accepted that ‘accountability has to be built up at the local level to ensure enrolment, retention and completion of each and every child in school.’¹⁷ Decentralisation, however, has happened with varying success across India without a national plan towards progressive capacity building.

¹³ As per the 28 September 2015 notification of MHRD amending RTE Rules, 2010 available at: http://mhrd.gov.in/sites/upload_files/mhrd/files/165948_2.pdf (last accessed on 27 September 2016)

¹⁴ Pritchett and Pande, 20

¹⁵ Ibid. 23

¹⁶ p.16, *Some Inputs for Draft NEP, 2016*, Ministry of Human Resource Development, Government of India.

¹⁷ Govinda, R. (1997) *Decentralisation of Educational Management: Experiences from South Asia*, IIEP, UNESCO, Paris.

One of the early programmatic intervention adopting a decentralised approach to educational governance was the District Primary Education Programme (DPEP), launched in 1994. A centrally sponsored scheme, the programme adopted an ‘area specific approach’ with the district as a key unit of planning. However, it was met with numerous criticisms. One of the major drawbacks of the DPEP was that it failed to optimally utilise decentralisation for improving the quality of education.¹⁸ Many schools failed to ensure that any advancement in learning and writing levels of their students. As per 2008 ASER report, about 44% of students in class 5 could not read class 2 text and 63% of them could not do basic divisions.¹⁹ Therefore, even after spending a considerable sum of money the government could not ensure quality in primary education. The paucity of funds with the government, which then sought money from international organisations, indicated the need for decentralisation of fiscal responsibilities.

Therefore, as mentioned before, Govinda and Bandyopadhyay note that only *deconcentration* was pursued at district level and the decision-making remained ever centralised. Even there the enforcement has been largely uneven. As NCPDR notes, the effective decentralization requires devolution of decision-making powers.

Despite the fact that most State governments have enacted Panchayati Raj legislations and even conducted elections at regular intervals, the involvement of panchayats in the school system appears rather limited. In most cases they are concerned only with constructing and maintaining school buildings and even there, the lowest rung of the institution has only a negligible say in the educational matters of children and functioning of local schools.²⁰ Not only are panchayats resource starved, but they also lack a clear understanding about their roles and responsibilities. This has significantly impeded their impact and functioning. Rampant political interference in the functioning of panchayats has also curtailed their ability to play an effective role in local governance in school education.²¹ Yet, as Mehrotra reinforces, panchayats have a crucial role to play in making a real difference to the ‘pattern of accountability of school system.’²² Considering that establishing the structures of local governance is largely under the domain of State governments, the extent as well as depth of decentralisation widely varies across the country. Govinda and Bandyopadhyay note that, in general, the approach has been rather technical, with top-down initiatives that basically

¹⁸ Ranjit Dev Raj, ‘Community effort lacking in WB-funded programme in India’, available at <http://www.unesco.org/education/efa/known_sharing/grassroots_stories/india.shtml> (last visited on 16 August 2016).

¹⁹ Annual Status of Education Report (ASER) -2008 available at http://img.asercentre.org/docs/Publications/ASER%20Reports/ASER_2008/FullAser2008.pdf (last accessed on 30 September 16)

²⁰ Govinda and Bandyopadhyay, p.11.

²¹ Ibid.

²² Mehrotra, S. K. (2006) *The Economics of Elementary Education in India*. New Delhi: Sage Publications.

resulted in changing certain rules and regulations to allow extension of governance to local levels, rather than a bottom-up establishment of institutions and their terms.

The following are some examples of the variations in how Panchayati Raj Institutions are functioning in different states to illustrate our earlier point on variations.

In Kerala, panchayats play a proactive role (the State government also devolves 30-40% of development budget to local bodies) at all stages including planning, implementation and monitoring of programmes.

In Madhya Pradesh decentralisation has largely involved devolution of administrative functions, although with the enactment of Jan Shiksha Adhinyam in 2002, roles and responsibilities of local bodies have been laid down along with an education fund to finance it.

In Karnataka, establishment of semi-autonomous School Development and Management Committees in each school has allowed parents a greater voice in the management of schools and positively affected teaching accountability and quality.

In Rajasthan, with the Lok Jumbish project, a system of local governance was sought to be built from grass root level itself. Therefore, depending on the policy adopted by a state, there are different patterns of local governance emerging, where some play a part only at the implementation stage, while others are involved in formulating policies itself.

In Nagaland, the Communitization of Public Institutions and Services Act, 2001 is a significant legislation. It recognises a VEC that comprises parents of children who go to school, persons with expertise and the senior-most teacher who is also the member-secretary of the committee. The routine powers and management functions of the government are transferred to the VEC, which include powers to disburse salaries of teachers and staff (administering the principle of no work, no pay, maintenance of buildings, purchase of books and equipment, etc.) The assets of the government are transferred to the VEC on the basis of a memorandum of understanding and a fund is created for salary credits and other grants and contributions from public and private parties. The government here performs a facilitative and regulatory role.²³ The Act therefore engenders not only deconcentration by transferring functions of the State government to the VEC but also decentralises decision-making by providing the community with necessary resources and funds (along with the power to raise its own funds) to carry out its functions effectively. The underlying idea seems to be that the community should be provided a real stake in matters of governance to enhance accountability of schools which, consequently, would also improve the quality of education. The results of this initiative have been impressive with

²³ R.S. Pandey, COMMUNITIZATION - THIRD WAY OF GOVERNANCE, 63-4 (2010)

higher teacher attendance and better quality of infrastructure and books available to students.²⁴

To be sure, variations by themselves are not problematic. They are both inevitable and somewhat justified. The absence of clear targets and guidance for states, a sustained effort at capacity building, and a roadmap for government, community and stakeholders to work out their strategy and pace of decentralisation, is problematic.

1. Community Participation - Some Regional Examples

Apart from central and State-led efforts, civil society participation and local initiatives have seen some measure of success in engaging the community in school governance, in accordance with local needs. Some of these efforts could actually be made part of the 'best practices' manual to assist other States and voluntary organisations. The following are three examples of such efforts:

a.) **Prajayatna**, in Karnataka,²⁵ conducts training sessions for SDMC members in monthly meetings. To enhance accountability, teachers were provided with an 'accountability tool' that tracked the performance of students in each grade, based on school tests. In the next monthly meeting, the teachers would be present this tool to SDMC members to keep them informed about the progress made in learning. In case no discernible improvement is recorded over time, Prajayatna would conduct discussions to understand possible impediments and consultatively devise strategies to improve the situation on a case-by-case basis.

b.) '**Vidya Chaitanyam**'²⁶ initiative, promoted by Centre for Education Innovations, facilitated capacity-building of illiterate and semi-literate women in about 60 village organisations of Andhra Pradesh. After training, these women were then entrusted the responsibility to assess the quality of basic education in state schools through tools such as 'scorecards'. In the process of empowering the most marginalised community members, the

²⁴ Ibid. 65

²⁵ Anjani Kochar, 'Teacher Accountability and Assessment of Student Learning Levels' (Ideas for India 15-01-2015), available at

<http://www.ideasforindia.in/article.aspx?article_id=399#sthash.lExRNWzt.dpuf> (last visited on 8 August 2016)

²⁶ S. Galab, Charlotte Jones, Michael Latham, Richard Churches, 'Community-based Accountability for School Improvement: A Case Study from Rural (CfBT Education Trust)', available at <<http://cdn.cfbt.com/-/media/cfbtcorporate/files/research/2013/r-community-based-accountability-in-india-2013.pdf>> (last visited on 10 August 2016)

act of holding local schools accountable was made possible through regular face-to-face inspection visits to collect scorecard data and publication of results at local SMC and women's self-help groups meetings. This built a cadre of committed parents who were fully engaged in the accountability project.

c) Seva Mandir, a voluntary organisation, runs over 170 schools in Udaipur, Rajasthan. Its schools are characterised by a camera-based teacher monitoring system for countering teacher absenteeism, recruiting teachers from local community, creating village development forums with community members and building their funds and capacities, and involving them along with parents and teachers in governing these schools and ensuring quality. With innovative incentive schemes, both teacher attendance and learning outcomes improved.²⁷

D. Scope of Decentralisation under Right to Education Act

The RTE Act mentions an array of obligations at different levels of governance. These levels include State/Central Government; local authorities; and SMCs inasmuch as they play a role in formulating school development plans and monitoring the grants. The Act empowers the Central Government to delegate the functions of setting up a national curriculum as well as providing minimum conditions for teaching eligibility. Central and State governments are entrusted with ensuring that every child in the age-group of 6-14 years completes her/his elementary education. Along with the local authorities, they must ensure that functional schools with requisite infrastructure, facilities and teachers are available in every neighbourhood. They need to ensure that trained teachers are available and quality education is imparted in these schools. They also should ensure that children from weaker and disadvantaged are not discriminated in their schools. Schools are prohibited from charging capitation fee, detain or expel students, subject them to any screening procedure before admission or administer corporal punishment. Government schools are required to constitute SMCs to encourage stakeholder participation.

1. School Management Committees

The provision for constituting SMCs in every government and special category school²⁸ under the RTE, arguably, marks an important break from earlier policies. It sets up, for the first time, legislative backing at the central level for community participation, by involving parents in formulating school development plans and monitoring the utilization of grants.

²⁷ See, Esther Dufflo, Rema Hanna and Stephen Ryan, Incentives Work: Getting Teachers to Come to School, 102(4) American Economic Review, 1241 (2012)

²⁸ In government-aided and minority schools, SMCs are to function only in an advisory capacity as per the RTE Amendment Act 2012.

The school development plan formulated by the SMC is supposed to form the basis for grants provided by the state.²⁹

Under the model rules, SMCs have been assigned specific functions such as raising awareness in the neighbourhood about the rights of the child, monitoring student attendance and notifying the local authority about violations under the RTE, among others.³⁰ Some States have also provided for additional functions such as arranging to demonstrate learning outcomes, hiring teachers temporarily and serving as a grievance redressal forum for children and parents. On paper, the SMC can be seen as having considerable potential for both empowering the local community to effect change and for improving the overall efficiency of education governance by ensuring that resources are allocated according to local needs. It is, however, unclear how it interacts with other local authorities like VECs, panchayats, etc. Unlike VECs, which operationalized micro-planning, school mapping and awareness generation at village level, SMCs formed of parents of children studying in that school, were attached only to specific school (although they have been tasked with awareness generation).

In 2014-15, 93.4% of government schools in India (including government-aided schools) reported that they had an SMC.³¹ While this appears to be a positive indicator, it implies that more than 70,000 schools are yet to constitute an SMC, even five years after the RTE Act came into force. Moreover, there are serious capacity-related issues. A 2011 case study³² of 88 schools in Madhya Pradesh and Chhattisgarh revealed that awareness levels among SMC members were low which impeded their ability to function effectively. Many members were not aware of the number of drop-outs in their area, teacher absenteeism or the details of financial support provided to the school. The study also found a mismatch in the perception of the head teacher and SMC members regarding the frequency of SMC meetings and issues discussed at the meetings. It has further been found that the funds allocated for training SMC members are inadequate and are utilised minimally.³³ Moreover, only 3-4 SMC members are trained from each school.³⁴ The trainings are infrequent and sometimes do not take place at all. School development plans are not made regularly, nor are they made in a participative manner.³⁵ Further, they are not integrated with the district-level budget plan.

²⁹ Section 21 and 22, RTE Act 2009.

³⁰ Section 13(6), RTE Model Rules 2009.

³¹ DISE 2014-15.

³² CREATE India, 'Effective School Management Committees CREATE India Policy Brief 4', February 2011.

³³ Accountability India and Central Square Foundation 'POLICY BRIEF: SCHOOL MANAGEMENT COMMITTEES - Successes, Challenges and Opportunities', June 2014.

³⁴ Ibid.

³⁵ Ibid.

SMCs also have a limited discretion in spending.³⁶ There is also a view that SMCs have not been given adequate powers to make them relevant units of decision-making.

The MHRD Inputs propose to address the gaps in the SMC policy framework. They also mention that State governments will enact clear rules regarding the composition and functioning of SMCs, and that SMCs will be given disciplinary powers over ‘absenteeism and indiscipline’ and will also recommend names for teacher awards. The Inputs envisage some role for the community in education governance. It is essential that this intention is matched by corresponding changes in legislation and devolution of decision-making power to SMCs as may be required. In this regard, it is worthwhile to explore different routes of empowering SMCs.

The Karnataka Bye-Laws³⁷ for SDMCs (School Development and Monitoring Committees) provide one such model. Karnataka’s Panchayati Raj Act provided for these committees and the procedure for their constitution was notified in 2001. In 2006, the state notified a set of model bye-laws which specified in detail the functions that the SDMC was required to undertake. These bye-laws make the SDMC accountable to the Civic Amenities Committee under the Gram Panchayat. They also list concrete functions for the SDMC and corresponding powers. For instance, SDMCs have to monitor and verify regular attendance of students and teachers. To this end, each SDMC member is empowered to verify the attendance registers maintained by the school. The SDMC is also empowered to convene meetings with parents who fail to send their children to school. The bye-laws further institute a clear grievance redressal mechanism involving the SDMC and the local authority. This is in contrast with the RTE which does not provide clear roles or continuity in the conduct of grievance redress by different authorities. A study³⁸ conducted by NUEPA and the Centre for Child and Law found several capacity-building gaps in SDMCs. Some of its members lacked awareness about their roles and frequently faced political interference and bureaucratic hurdles in their functioning. However, this model still provides some useful options for strengthening the RTE rules on SMCs and integrating their functioning with local authorities.

Persistent Challenges: A constant roadblock to effective decentralisation has been the failure of local initiatives to sustain themselves or carry out their desired objectives due to inadequate recognition or lack of budgetary support. Further, the challenge is to make these committees and arms of local governance effective where they are not merely the implementers of the decisions taken by higher authorities but develop initiative to participate in identifying needs and conceptualising the plans. Importantly, as a government

³⁶ Ibid.

³⁷ Karnataka Grama Panchayat’s (School Development and Monitoring Committees) (Model) Bye-Laws, 2006.

³⁸ Centre for Child and the Law, ‘A Study of the Role of SDMCs in the School Management and Supervision in Karnataka in the context of SSA’, available at < <https://www.nls.ac.in/ccl/cclmedia/ER/sdmc.pdf>> (last visited on 12 August 2016).

document notes, ‘the community is heterogeneous, stratified and has different sections with differing and sometimes antagonistic interest too. While eliciting community support, it is important that persons belonging to deprived sections get due representation in the form created for community participation.’³⁹ To some extent, the RTE Act considers this by mandating representation of parents from weaker sections and disadvantaged groups. Even in panchayat elections, one-third seats are reserved for women. Effective participation, however, remains a challenge in both circumstances, even in states like Kerala.⁴⁰

Further, as discussed before, there are serious gaps in the capacity of local bodies with limited funds and little control over the functionaries. In addition to the awareness-related issues, this impedes them from functioning effectively. Further, there are overlaps and inefficiencies. Powers and functions of these bodies need to be more clearly specified and we have discussed that the idea of unbundling functions and re-categorising them to be ‘mutually exclusive and collectively exhaustive’ and financing them accordingly could be an effective strategy.

A policy or programme that would guide executive rule-making could be imperative for articulating the distinct roles to be performed by each of these bodies. Further, it could also help clarify specific roles that each local authority needs to perform.

E. Recommendations for Policy

The MHRD’s suggestions on wider community engagement in education play an important role in paving the way for a long term roadmap for decentralisation. There are certain international practices that the government could consider for laying out a plan for decentralisation in school education governance.

The Institute for Public Policy Research in England proposed a ‘decentralisation decade’ that would be based on a ‘set of principles and lessons for a phased and asymmetrical yet purposeful approach’ with a ‘series of safeguards’ to ensure that the programme avoids the risks associated with it. Further, the programme would not radically change the architecture of local governance but it would have a clear timetable for the political, administrative and financial functions of the government that could be decentralised.⁴¹ Rwanda, which

³⁹ Gol (1999), *Every Child in School and Every Child Learning: Diverse Strategies for Universalizing Access to Schooling, Alternative Schooling, the DPEP Experience*. New Delhi Ed Cil.

⁴⁰ Mukundan and Bray, ‘The Decentralisation of Education in Kerala State, in India: Rhetoric and Reality’, *International Review of Education* (2004), available at <http://web.edu.hku.hk/f/acadstaff/376/IRE_Mukundan_&_Bray.pdf> (last visited on 12 August 2016).

⁴¹ *Decentralisation Decade: A Plan for Economic Prosperity, Public Service Transformation and Democratic Renewal in England* (2014) (available at: http://www.ippr.org/files/publications/pdf/decentralisation-decade_Sep2014.pdf?noredirect=1)

embarked on decentralisation policy in 2000, divided its decade long decentralisation plan into two phases. Phase I (2000-05) aimed at establishing democratic and community development structures at the district level. It was accompanied by legal, institutional and electoral reforms. The second phase involved deepening the process by ‘enhancing effectiveness in service delivery to communities.’ Decentralisation is still evolving in Rwanda with the third phase that seeks to bring coherence in the legal and institutional framework, along with deeper and more sophisticated mechanisms of decentralised service delivery. These steps are part of a larger vision of governance reforms called Vision 2020.⁴² In the specific context of education, Uganda initiated decentralisation after understanding the number of benefits it had to offer. With reduction of bureaucracy, decentralisation would help minimise corruption (by reducing intermediate channels), enhance monitoring, accountability and efficient raising of revenue. Importantly, it enabled managing education system according to local priorities. While Rwanda chose all-at-once decentralisation, it could have given itself more scope for experimentation and revision had it chosen the phased method.⁴³ In a number of Latin American countries with a centralised history of governance, decentralisation policy (of course, with wide variety across the region) was implemented for over three decades in the form of three ‘waves’, concentrating on administrative and fiscal decentralisation in the first part, social and political in the second, and seeking linkages between local governance and globalisation in the third.⁴⁴ These could be good examples for India to consider.

As discussed, within India, different States adopted different models of decentralisation with varying success and priorities. Of course, there are a number of structural, formal and substantive changes that effective decentralisation would require. The policymakers should acknowledge the existing challenges of decentralisation in education governance and provide systemic solutions for improvement. Diversities in States and their ideas of decentralisation, particularly in the sphere of education must be accommodated in order to evolve a sound framework for action. Socio-economic conditions of local units, which form a key part of the decentralisation model, must be taken into account as well. The IIPR’s approach of ‘asymmetric yet purposeful decentralisation’ could be an interesting option.

⁴² Decentralisation Implementation Plan (2011-2015), Ministry of Local Government, Rwanda (2011) (available at: http://www.minaloc.gov.rw/fileadmin/documents/Minaloc_Documents/DIP_3rd_Phase_Draft_14.3.11_final_version.pdf)

⁴³ *Decentralisation of Education in Africa: The Case of Uganda* in Decentralisation, School based management and Quality (ed. Joseph Zazda and David Gamage), 180-1

⁴⁴ GIORGIO BROSIO AND JUAN PABLO JIMENEZ (ed.), DECENTRALISATION AND REFORM IN LATIN AMERICA: IMPROVING INTERGOVERNMENTAL RELATIONS (2012); OVERVIEW OF DECENTRALISATION PROCESS IN LATIN AMERICA: MAIN ACHIEVEMENTS, TRENDS AND FUTURE CHALLENGES (Discussion Paper, 2013, available at: <http://ecdpm.org/wp-content/uploads/2013/10/DP-148-Overview-Decentralisation-Process-Latin-America-2013.pdf>)

Further, issues of capacity building, adequate budgeting, transparency and accountability, clear delineation of roles and duties and avoidance of overlapping structures of education governance should be analysed and tackled. As of today, every unit of government at the local level is equipped with parallel structures, institutions and players of education governance. The mandate of the RTE must be harmonised with the powers and duties of local institutions. For this, a combination of individual-level awareness about the RTE Act, and provisions for periodic modification of the decentralisation project, should be introduced.

Lessons learnt from the decentralisation experience in education in the past must be utilised to evolve a coherent framework for divesting powers and authority at the appropriate levels of government. At the same time, different States must be consulted for effective conceptualisation of a post-2016 strategy for implementation. The cross-provincial and cross-party conversations over this theme along with the participation of members of civil society could therefore help evolve a coherent programme of action for decentralisation, for realising the policy directives and objectives.

IV. VISION FOR REGULATION IN SCHOOL EDUCATION

A. Introduction

There are a number of factors that influence both the content as well as guaranteeing of the right to education. These factors range from socio-political formations to demands of economy, from the constitutional imperatives to requirements of numerous other legislations enacted by State and Central governments, and from the precedents laid down by courts to the expectations of people. Further, these factors are inherently dynamic. That being the context, we believe that an institutional approach to the governance of education could be helpful. Such an approach acknowledges that while education as an institution has had its own set of tenets that informed its development, it does not operate in isolation and constantly engages (or needs to engage) with other institutions and shifts in the larger political economy of the state. For example, the post-liberalisation era has witnessed a significant surge in private schools and the number of children enrolled in them. The broad autonomy of private schools has been held as part of the freedom of trade and occupation. Yet, courts have moderated this autonomy with the concerns of equity and inclusion forming important bedrocks of the institutional vision of education. The Statement of Objects and Purpose of the RTE Act also acknowledges this.

The regulations governing education ought to be consonant with the constitutional values enshrined in fundamental rights and directive principles of state policy. Further, they must reckon with the federal scheme envisaged in the constitution wherein both the Union and

State could enact laws governing school education. Besides the legal notions of federalism, education regulation must appreciate the regional and cultural variations across India.

In addition to the abovementioned bases of regulation, there are a number of legislations such as labour laws, marriage laws, Protection of Children from Sexual Offences Act, Child Labour (Prohibition and Regulation) Act, and other municipal laws, besides RTE Act itself, that directly or indirectly affect the right to education. Further, India is signatory to a number of human rights treaties and documents that it has a standing obligation to fulfil through legislations and regulations.

Section 33 and 34 of the RTE Act empowers the Central and State governments to constitute a National Advisory and State Advisory Councils respectively. Both bodies are expected to advise their respective governments on the implementation of the Act. Yet, the task of linking RTE with other laws, responding to emerging trends in pedagogy or even curriculum-setting besides processing the vast education statistics and research requires an independent committee of educationists, administrators and members of civil society. This committee should make considered recommendations that may provide a normative basis for Central or State level law and policy making. It could additionally be provided that the committee would produce reports at regular intervals to be laid before the Parliament. The Central government must ensure adequate funding to the committee for conducting research and preparing plans for improving the access to and quality of education. There are some models tried by other countries which could guide establishment of this Commission.

1. *National Education Commission in Sri Lanka* makes recommendations to the President on the national education policy, to enable the education system to respond to the changing needs of the society. It can provide informed opinions for review of policies and plans, in case required.⁴⁵
2. *Finnish Education Evaluation Centre* (Finland) evaluates the system as such instead of individual schools. This involves improving learning outcomes, adapting the system to changing needs of society and supporting the education providers in developing quality management by evaluating their quality systems and producing information on good practices. Based on these inquiries, it reviews the national plans.⁴⁶
3. *Council of Ministers of Education, Canada* (CMEC) is an inter-governmental body comprising education ministers from different states founded on a memorandum. The ministers collectively deliberate on education issues in their respective states, assess Canada's international obligations, develop and report on educational

⁴⁵ Section 8, National Education Commission Act, 1991 (Sri Lanka) available at http://nec.gov.lk/wp-content/uploads/2014/10/nec_act.pdf

⁴⁶ Foresight and Effective Evaluation 2020: The Strategy of Finnish Education Evaluation Centre, available at: http://karvi.fi/app/uploads/2014/10/KARVI_Strategia_2015_EN_WWW.pdf

indicators, promote research on the nation's state of education, and device programmes of mutual interest or with pan-Canadian implications.⁴⁷

India could consider an amalgam of these models involving ministers (or education secretaries) from states, educationists and steered by the concerned secretary at MHRD, given that education, for us, is a concurrent list subject. This would also promote co-operative federalism among States and between States and Central government. The States may, at their level, do something similar involving District Education Officers for educational planning. In fact, the NCPCR report suggests that 'the plans should flow from the gram panchayats to the cluster level and consolidate at the Block level. The role of district and the State is to respond to the demands from the field level.'⁴⁸

The overlap between the functions of National and State Advisory Councils should be resolved keeping overall coherence, efficiency and fairness in mind.

The above discussion pertained to macro-level decision-making in terms of laying down vision and standards. Yet, practical implementation of the right to education requires micro-level decision making as well and here it becomes pertinent to ask what the form and manner of regulations should be. As we concentrate on the question of the texture of regulation, it needs to be emphasised that both decentralisation and regulation should be seen as inextricably linked projects. Therefore, we argue for a form of regulation that appreciates decentralisation and adopts a flexible approach to encourage rights and promoting local initiatives. As far as form is concerned, regulations could either be principle-based or rule-based. We believe that principle-based regulations with a responsive regulator could help realise this right through local initiative in a non-coercive manner.

B. Towards Principle Based Regulations (PBR)

Ordinarily, the regulations we come across in executive orders and even in certain legislations largely contain imperative rules backed by penalties. The regulations tend to be detailed and prescriptive, leaving little room for the regulator to exercise discretion. In fact, discretion in regulatory functions is considered with disfavour as it can leave the regulator open to corruption.

Principles, unlike rules, are more open textured in their formulations. PBR invite the regulator to exercise prior knowledge and reason to a given situation and involve other

⁴⁷ <http://www.cmec.ca/11/About/index.html>

⁴⁸ NCPCR Report, 19-20

relevant stakeholders in decision-making as well.⁴⁹ This discretion here is not arbitrary, but guided by the principles and standards contained in these regulations. For example:

Rule based regulation	Principle based regulation (PBR)
No school shall be recognised which has less than two rooms (of X dimensions), two teachers, separate toilets for girls and boys, playground (of at least Y dimensions) and a library (containing at least Z number of books).	A school seeking recognition shall have reasonable space for classrooms and adequate number of teachers. It shall also be required to ensure access to reading, sports and hygiene facilities of acceptable standards.
Schools are required to ensure that each student who passes her respective class is able to read a prescribed text and solve prescribed mathematical problems for assessing the student's learning achievement.	Schools shall ensure that each child receives quality education, and shall devise methods for evaluating learning abilities/outcomes of a child.

While PBRs would be a novelty in the education sector, the financial sector (which can ill-afford uncertainty) is increasingly considering PBR. The report of the Financial Sector Legislative Reforms Commission constituted by the Government of India notes that ‘there is value in harnessing India’s common law tradition, where laws enacted by Parliament work at the level of high principles, and do not embed specific details.’ This implies a principles-based approach where ‘law will articulate broad principles that do not vary with financial or technological innovation.’⁵⁰ The Commission accordingly, presented a draft law. In 2012, the Securities and Exchange Board of India (SEBI) amended the Mutual Fund Regulations. The amended regulations reflect a change of approach from rule-based model followed since 1996 to a new principle-based one. For example, on valuation of mutual funds, the new regulations say: ‘Mutual fund shall value its investments in accordance with the following *overarching principles* so as to ensure fair treatment to all investors...’⁵¹

The PBR could be supplemented with illustrations to guide the decision-maker. The mutual fund regulations, for example, say: ‘In audio-visual media based advertisements, the

⁴⁹ Julia Black, *Forms and Paradoxes of Principles Based Regulations*, 2008 3(4) CAPITAL MARKETS LAW JOURNAL 425.

⁵⁰ Report of the Financial Sector Legislative Reforms Commission, 13 available at: http://finmin.nic.in/fslrc/fslrc_report_vol1.pdf

⁵¹ See, Securities and Exchange Board of India (Mutual Fund) Regulations (Amendment), 2012 available at: http://www.sebi.gov.in/cms/sebi_data/attachdocs/1329903183583.pdf (emphasis supplied)

standard warning in visual and accompanying voice over reiteration shall be audible in a clear and understandable manner. *For example, in standard warning both the visual and the voice over reiteration containing 14 words running for at least 5 seconds may be considered as clear and understandable.*⁵² In the context of school education, the regulations could provide that it shall be reasonable to mandate schools for providing functional toilets, drinking water, covered classrooms, qualified teachers and other necessary facilities for instructions. Professor Julia Black argues that, at least, in financial and tax regulations, the emerging view seems to be to provide guidance alongside the principles than detailed rules.⁵³ Sometimes, the illustrations may be incorporated in the regulations and often regulators themselves can come out with a list of clarifications or ‘FAQs’ or handbooks to provide guidance. Along with this, with a body of decided cases and evolving practices, the system acquires necessary certainty and predictability while retaining an element of flexibility in case there are changes in the eco-system that require regulatory attention. Yet, there has to be a balance between principles and the guidance tools such that the primacy of the former remains. The new National Education Policy could pave way for principles-based regulations in the education sector in a planned manner supported by requisite capacity building.

Importantly, the movement from a rule-based to a principle-based model implies a change of regulatory ethos from one of control and direction to one based on trust and responsibility. It also establishes outcomes, ideals and incentive structures that promote behaviour that can achieve the goals of regulation.⁵⁴ It engrains flexibility over rigidity. The outcome orientation of PBR can arguably also make for a more responsive regulatory system.⁵⁵ For example, Section 19 of the RTE Act requires schools to ensure compliance with the norms laid down in the Act within a period of three years. In case of non-compliance, the schools face the risk of closure and de-recognition. Considering that it may impact access to education for a lot of students, can there be a more deliberated approach to this decision where reasonable efforts are made towards ensuring conducive learning environments for students while allowing the schools to function? The MHRD Inputs note that the community and alternate private schools which are providing low-cost education to children in rural and under-developed areas ought to be treated differently. A PBR model allows for those facilities while retaining the obligations on part of all parties to ensure necessary infrastructure and facilities are provided to these schools progressively, by working out context specific plans.

⁵² Ibid. (emphasis supplied)

⁵³ Julia Black, *Making a Success of Principles-based Regulation*, 1(3) Law and Financial Markets Review 191, 197 (2007)

⁵⁴ Ibid.

⁵⁵ Ibid at 444.

However, one notices certain paradoxes with PBR. While flexibility and openness makes it attractive, the same, it is argued, comes at the cost of certainty that detailed rules provide. Further, discretion has been often looked at as a breeding ground for corruption which the rule-based approach can eliminate. Yet, these rules are often disobeyed or ignored and deterrence of sanctions may not work at all times. Professor Robert Baldwin from London School of Economics, seems to prefer realism in rule making, which anticipates key hazards, who/what produces these hazards, and enforcement strategies that may be required to bring about compliance. Sometimes, this may be achieved with principles and on other occasions by intelligent rules.⁵⁶ In any case, facilitative PBR seem to be more amenable to such realism than a prescriptive centralised rule-based model inasmuch as the former allows the regulator to take cognizance of local situations and arrive at decision after deliberation. Echoing this belief, tying principle-based regulations with decentralisation, the NCPCR Report notes that ‘the method through which the goals are to be attained should be flexible. This would entail decision making in response to the local context. In a way, flexibility would enable an organic process of decision making at the level of the gram panchayat, which in the long run would foster new tradition and culture for caring for children and their protection in a sustainable way.’⁵⁷

Considering that a system of PBR would entail a major attitudinal change where the regulators would exercise their considered judgment and play a more proactive role, it requires sustained efforts at capacity building of both personnel as well as institutions. Therefore, it may only happen in a planned and phased manner supported by a policy directive and a programme of action subsequently. Another perennial question about PBR is its enforcement and for that reason one could call it a ‘weak-regime’. This is where the onus shifts to the regulator who needs to be sensitive to the needs of the time and behaviour of the stakeholders. A ‘responsive regulation’ may be helpful here.

There are a number of suggestions/theories on what makes a good system of regulations. It is argued that an important test of regulatory theory is whether it helps in addressing challenges that the regulators face in practice. Black and Baldwin’s proposal for ‘really responsive regulation’⁵⁸ offers considerable scope to address some of the challenges identified in the regulation of private, alternate or community schools in India. Under this model there are five objects of a regulator’s responsiveness. First, the ‘attitudinal settings’ comprises of how the regulated entities (schools and their promoters, teachers and parents, for example) view the regulatory regime (enabling or disabling of initiative, for example). Second, the ‘institutional environment’ includes wider normative, organizational and resource allocation structures in which the regulator is situated (for example, depending upon the level of governance a regulator is situated (sub-district level or state or national

⁵⁶ Robert Baldwin, *Why Rules don’t Work?*, 53 *Modern Law Review* 321, 337 (1990).

⁵⁷ NCPCR Report, 20

⁵⁸ Baldwin and Black, *Really Responsive Regulation*, The Modern Law Review Limited (2008).

level)) the sphere of influence and control would vary. Third, a regulator may respond to a case in a punitive or rehabilitative or restorative manner. An important object of a regulator's responsiveness is the underlying logic of these actions. Therefore, a regulator's response to a case of sexual harassment or corporal punishment would be different from that of non-payment of fees, for example. The capacity building exercise for regulators should equip them with perspective on appropriate responses to a situation. Fourth, a regulator must monitor and assess its own performance with respect to the objectives of the law and requirements of the field and carry out changes, if necessary. It is here that State and National Advisory Councils could play an important part in enforcing the mandate of the RTE Act. Finally, a regulator is expected to be alert to the internal and external change that could affect the regime (for example, amenability to Right to Information Act would entail that regulators need to keep meticulous record of their actions). The authors also propose a set of tasks for such a regulator in this system:

- Detecting non-compliant behaviour
- Developing tools for responding to such behaviour
- Enforcing those tools
- Assessing their success or failure
- Modifying approaches accordingly

On first glance, this framework suggests some possible benefits when applied to the case of private school regulation. For instance, an ideal regulator would acknowledge and respond to changes in institutional environment such as the increase in the proportion of private schools vis-à-vis government schools, or the increase in the number of low-cost private schools. Such a regulator would also evaluate its own performance on tasks such as school inspections or recognition, and modify its choice of approach accordingly.

C. Suggestions for Policy

Bringing about such changes in regulatory structures, and forms and methods of regulation, would require enactment or amendments of various laws at different levels. Further, depending upon regional and socio-economic circumstances of States and districts, it would also entail variations in both the range and depth at which such changes are carried out. Overall, it would require investment in establishing robust institutions with necessary capacity building. Considering that an education policy is a generational project, it seems an appropriate place to locate these concerns and provide a unity of vision towards which different constituents of governments may make their own programmes.

To conclude, we believe that both effective decentralisation and principle-based responsive regulations are inextricably connected projects. Importantly, both are long-term systemic projects. There may be limited instances of immediate causality between the gaps in the existing system and recommendations made here, considering that these projects are not merely corrective but constitutive. Yet, as pointed out, there are clear, long-term and

pervasive benefits with transformational potential if decentralisation is effectively carried out and local initiatives and drive are encouraged by a sensitive and deliberative regulator guided by principles-based regulation. The immediate apprehensions with both are valid, yet not irresolvable. Three steps are critical for this. *First*, the new education policy should provide a clear mandate for both decentralisation and principle-based regulations. *Second*, it should also provide that for implementation of these mandates, States, local authorities and civil society should be consulted to evolve a programme of action. The programme of action should provide finer conceptualisation of these projects with a roadmap for implementation and monitoring. *Third*, when the policy mandate and a programme of action are in place, they need to be developed and carried forward by the incumbent and subsequent Central and State governments. Depending on local contexts and evolving circumstances, collective decisions should be made from time to time on appropriate frame of regulations considering the deconcentration-devolution scale on one end and rules-principles spectrum on the other. Periodic revisions and openness are critical for a successful implementation of these ideas.



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