LEGISLATIVE RELATIONS BETWEEN THE UNION AND THE STATES AND EDUCATIONAL PLANNING

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I

The provisions relating to education are spread over several parts in the Constitution of India. There are some directives given in part IV of the Constitution indicating some of the objectives which the country's effort in regard to education must strive to achieve. Then, there are some fundamental rights given to individuals and groups which prescribe the don'ts for the union and the state governments. There are, again, some special provisions regarding educational institutions belonging to certain minorities like the Anglo-Indian community. And, finally, there are the provisions which distribute the legislative field in regard to education between the union and the states.

Apart from the provisions laid down in part XI of the Constitution and in the three lists of the seventh schedule, the directive principles enshrined in articles 41 and 45, respectively, would also seem to have a significant bearing on the distribution of legislative responsibility between the union and the states in regard to education.

Article 41 directs that "the State shall, within the limits of its economic capacity and developments make effective provision for securing the right to work, to education and to public assistance in cases of unemployment...." And article 45 directs that "The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years." It is important to note that these directions are addressed not only to the states, but, to both, the union and the states equally.[1] Thus it is as much the responsibility of the union as of the state to secure the right to education to the individual and to achieve the target of free and compulsory education for all children up to the age of fourteen years.

It is submitted that notwithstanding the fact that in the distribution of legislative powers, the states possess the exclusive power with regard to primary and secondary education.[2] The union has under article 45 the duty and the power to execute the directive regarding free and compulsory education. How this directive may be executed by the union may be a

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1. *Vide* definition of state in article 36.
2. See *Gujarat University* v. *Shri Krishna*, A.I.R. 1963 S.C. 703, 715.

difficult and delicate matter, but it appears that in the exercise of the vast powers possessed by the union regarding the allocation and distribution of resources and revenues between itself and the various states, it may discriminate on the ground of the fulfilment by the state of the requirement of this directive. The union and its agencies like the University Grants Commission may also, for instance, make the availability of their consent and funds for new universities desired to be opened by the states, conditional on the state having taken satisfactory steps in the fulfilment of this directive. And, one may venture to suggest, that in a very extreme case of recalcitrance or failure on the part of state, the union may even come to the conclusion that "a situation has arisen in which the government of the state cannot be carried on in accordance with the provisions of this Constitution" as contemplated in article 356 and bring the state under Governor's rule. The exercise of the power under article 356 for the enforcement of a directive principle would no doubt be attended by rare and almost abnormal circumstances; however, given such circumstances, it cannot be said that it will be unconstitutional for the President to conclude that "situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution." The directive principles are not only vital "provisions of this Constitution," but, owing to the disability imposed upon the courts in regard to their enforcement the significance of political sanction, like the one in article 356, for the enforcement of these principles assumes an aided importance. The marginal note to article 356 speaks of "failure of constitutional machinery" in the state. Apart from the very limited extent to which the marginal note may be suffered to control the plain language of the article, there also seems to be little justification for unduly restricting the scope of the words "failure of constitutional machinery" used in the marginal note itself. Constitutional practice in India has not confined the scope of article 356 to situations where no political party is able to command a majority in the state legislature. As is well known, the Communist government in the State of Kerala was dismissed by the President even though it continued to command the confidence of the House. Indeed, the use of the provisions of article 356 is a matter of political wisdom and judgment for which the President and his government are responsible to Parliament and, eventually, to the electorate. It is not a "legal" matter to be agitated before a court of law.

II

Coming to the legislative lists in the seventh schedule the chief provision in regard to education seems to be at entry 11 of list II : "Education, including universities, subject to the provisions of the entries 63-64-65 and 66 of list I and entry 25 of list III." The entries of list I and list II

referred to above are as follows :

List I—Union List

63. The institutions known at the commencement of this Constitution as the Benaras Hindu University, the Aligarh Muslim University and the Delhi University, and any other institution declared by Parliament by law to be an institution of national importance.

64. Institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament by law to be institutions of national importance.

65. Union agencies and institutions for—

(*a*) professional, vocational or technical training, including the training of police officers; or

(*b*) the promotion of special studies or research; or

(*c*) scientific or technical assistance in the investigation or research and scientific and technical institutions.

66. Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions.

List II—State List

33. Theatres and dramatic performances; cinemas subject to the provisions of entry 60 of List I; sports, entertainments and amusements.

While entry 11 of list II and the entries referred to therein constitute the basic provisions of the Constitution regarding the distribution of legislative powers on education, they are by no means exhaustive. There are a number of other entries in the three lists which would affect matters relating to education, at times, not inconsiderably. For instance, entry 26 of list III refers to "Legal, medical and other professions." Acting under this entry Parliament has passed the Indian Advocates Act, 1961, setting up the Bar Council of India whose functions, enumerated in section 7 of the Act, include;

(*h*) to promote legal education and to lay down standards of such education in consultation with the universities in India imparting such education and the State Bar Councils;

(*i*) to recognise Universities whose degree in law shall be a qualification for enrolment as an advocate and for that purpose to visit and inspect Universities.

The impact of these provisions on the power of the state to legislate on "education, including universities" is obvious.

Among other entries affecting education with varying degrees of remoteness may perhaps be mentioned entries 28 (charitable and religious endowments), 39 (newspapers, books and printing presses) and 40 archaeological sites and remains) of list III, and, entries 12 (libraries, museums, etc.), 33 (theatres, dramatic performances, etc.) and 41 (state public services, etc.) of list II.

It would appear from the above scheme that while "education" including "universities," is by and large the responsibility of the state, the union has been invested with overriding powers in regard to certain aspects of education, presumably regarded of national importance. In this respect the Constitution of India departs radically from the constitutions of the United States, Canada or Australia. The reason for the departure is simple. Higher education, generally, and scientific and technical education in particular, is the *sine qua non* of a rapid industrial and economic growth of the country which in its turn is indispensable for the viability of constitutional government itself, not to speak of other values, in the country. It was necessary, therefore, to make the all India resources available for planning higher and technical education in this country.

III

Inevitably there is some overlapping of authority here as in other legislative fields carved out in the lists of the seventh schedule for the union and for the states, especially between the state power to legislate over "universities" and the union power over "Co-ordination and determination of standards in institutions of higher education." The principles for deciding disputes of jurisdiction in such matters continue to be the same as devised by Indian and Imperial courts for resolving similar disputes under the Government of India Act, 1935, whose provisions in fact have provided the structural basis for the present constitutional arrangement in this regard. Principles from Canadian and Australian constitutional decisions have also been drawn upon both, under the Government of India Act and the present Constitution, wherever appropriate. However, the actual difficulties have been involved not so much in finding the principles as in selecting the appropriate ones for application. This is perhaps best illustrated by the recent dispute in *Gujarat University* v. *Shri Krishna*.[3]

The point raised before the Supreme Court in this case was whether the State of Gujarat, acting through the Gujarat University, could

3. A.I.R. 1963 S.C. 703.

prescribe Gujarati or Hindi as the exclusive medium of instruction and examination in colleges and institutions under the jurisdiction of that university. The Supreme Court held, by a majority, that the state had no such power. The Court reasoned that the power to prescribe an exclusive medium would, ordinarily be covered both under "education, including universities" in list II, and, under "Co-ordination and determination of standards in institutions of higher education," in list I. However, held the majority, what falls under the latter cannot at the same time also fall under the former, because, the entry in list II (entry 11) expressly reduces the content of the state power reposed therein by adding the words "subject to the provisions of entries 63, 64, 65 and 66 of list I...." Thus, held the Court, as soon as it is found that "medium" of instruction falls in item 66 of list I, it logically follows that it is "carved out" from entry 11 of list II.

The power to lay down the exclusive medium of instruction was held to fall under item 66 of list I for the reason that it has a "direct bearing and impact" upon coordination and determination of standards in institutions of higher education. In the words of Shah, J., who spoke for the majority :

> Power to legislate in respect of medium of instruction is, however, not a distinct legislative head; it resides with the State Legislatures in which the power to legislate on education is vested, unless it is taken away by necessary intendment to the contrary. Under items 63 to 65 the power to legislate in respect of medium of instruction... *in so far it has a direct bearing and impact upon the legislative* head of co-ordination and determination of standards in institutions of higher education or research and scientific and technical institutions, must also be deemed by item 66 List I to be vested in the Union.[4]

And further,

> It is true that "medium of instruction" is not an item in the legislative list. It falls within item No. 11 as a necessary incident of the power to legislate on education : it also falls within items 63 to 66. In so far as it is a necessary incident of the powers under item 66 List I it must be deemed to be included in that item and therefore excluded from item 11 of List II.[5]

Perhaps it is fortunate from the point of view of "education" on the whole that the Court has left exclusively with the union the question of determining the end of the English medium for Indian universities. However, it is submitted, that the reasoning of the Court not only makes an abrupt departure from principles hitherto recognized but also threatens

4. *Id.* at 715.
5. *Id.* at 716-17.

the power of the states on "education" and "universities" with virtual extinction. Because if what is comprehended in "Co-ordination and determination of standards" is to be excluded, or "carved out" from state jurisdiction the loss may not be confined to "medium" of instruction, but, may extend to courses, syllabi, classification and qualifications of teachers, and, in fact, to any area of policy in regard to higher education worth the name. With the reasoning, perhaps, even secondary education might be brought under the union on account of its impact on standards of higher education. It is noteworthy, that here the state law has not been turned down on account of any conflict with a union statute. In fact, there has been no union statute on the question. The state law has been invalidated just for want of power :

> The validity of the State legislation on University education and as regards the education in technical and scientific institutions not falling within Entry 64 of List I would have to be judged having regard to whether it impinges on the field reserved for the Union under Entry 66. In other words, the validity of State legislation would depend upon whether it prejudicially affects co-ordination and determination of standard, but not upon the existence of some definite Union legislation directed to achieve that purpose. If there be Union legislation in respect of co-ordination and determination of standards, that would have paramountcy over the State law by virtue of the first part of Art. 254 (1); even if that power be not exercised by the Union Parliament the relevant legislative entries being in the exclusive lists, a State law trenching upon the Union field would still be invalid.[6]

In his dissenting opinion, Subba Rao, J., applied the doctrine of pith and substance as laid down in *Prafulla Kumar* v. *Bank of Commerce*,[7] arguing that as long as the law squarely fell under entry 11 of the state list its overlapping with entry 66 of list I did not invalidate it.

It is submitted, that even the *Prafulla Kumar* rule is not strictly applicable. In the *Prafulla Kumar* case the provincial legislation referred directly to items expressly provided for in the federal list. Here, it is submitted, the true analogy is provided by the rule in *In re C.P. Motor Spirits Act*.[8] Here, as in the *C.P. Motor Spirits* case, the real question is whether the contents of item 66 in the union list should be given a meaning which will entirely eclipse the content of the state power on "universities" or should they be given a restricted, albeit, not unreasonable meaning and content so that some area is left for the state to exercise the power granted to it.

The majority decision in the *Gujarat University* case is unique inasmuch as the Court here turned down as invalid legislation which fell

6. *Id.* at 716.
7. A.I.R. 1947 P.C. 60.
8. A.I.R. 1939 F.C. 1.

squarely within the powers allotted to the state on the hypothesis that it would "prejudicially affect," or "trench upon" an area that is supposed to fall, by implication, also under the legislative jurisdiction of the union. The power being an "incidental" one, both for the state as well as for the union, it should be quite understandable to uphold either legislation in regard to it by the application of the well-known principle of "broad and liberal" interpretation. However, "broad and liberal" interpretation is seldom given by courts to an unexercised power for the purpose of invalidating an actual exercise of power by the rival legislature. Yet that is what the Court has done in the *Gujarat University* case by holding that the exercise of power by the state on the question of medium is invalid because it trenched upon the union power of coordination and determination of standards, broadly interpreted, even though no union legislation on the subject existed.

It is submitted that the "broad and liberal" interpretation rule is applied where attempt is made to import artified and implied limitations to the language used in the legislative lists. It is applied, generally, in cases where no problem of conflict of jurisdictions is posed. However, as soon as there is conflict, this rule yields place to others. As illustrated by the *Prafulla Kumar* case, a broad and liberal interpretation to the superior jurisdiction which, in collaboration with the non-obstante clause, would wipe out otherwise legitimate state jurisdiction is avoided. So, in the *C.P. Motor Spirits* case, where a broad and liberal import assigned to the federal power over "exercise" would have completely eclipsed the provincial power over "tax on sale of goods," the Court preferred to restrict the scope of the superior power so as to permit the legitimate exercise of the provincial jurisdiction. As already submitted, it is this latter case which afforded the analogy for the situation in the *Gujarat University* case.

Also, even applying the test which commended itself to the majority it is difficult to see how the state law on exclusive medium would "prejudicially affect" the union power regarding coordination and determination of standards, or, would "trench upon" that power. Certainly the state, here, had attempted no law on or in regard to either coordination or determination of standards. Their lordships observed that in certain fields like law or engineering, if adequate textbooks or competent teachers are not available in the medium prescribed by the state, "standards must necessarily fall."[9] Presuming that the inadequacy of textbooks and teachers referred to by their lordships did, in fact, exist the effect of the state law in question would only be to affect existing standards, but not the power of the union to legislate in regard to standards. Parliament

9. A.I.R. 1964 S.C. 703, at 717, para. 26.

would still be free to legislate establishing standards in regard to text-books, qualifications and competence of teachers and, perhaps, even in regard to medium of instruction insofar as incidental to the maintenance of standards prescribed by it. The fact, however, is that Parliament has laid down no standards. Apparently, the majority opinion assumes that the standards of university education in existence before the introduction of the state law relating to medium of instruction were invested with parliamentary approval. There seems to be no factual basis for the assumption.

It is likely that on some future occasion the Supreme Court will reject the broad import given to item 66 in list I in the *Gujarat University* case. And, it is for this reason that the union government must be advised not to depend too much on the law laid down in that case and to proceed with their project of making university education a concurrent subject if they intend continuing to give leadership in matters of university education.

Perhaps the Court has been already beginning to realize that the majority opinion in the *Gujarat University* case has gone too far ; and, the process of restricting its application to the question of medium has started. This is evident from *Chitralekha* v. *State of Mysore*,[10] where the Court rejected the argument, based on the *Gujarat University* case, that the state could not lay down an oral test, administered through a selection committee, for admission of students in engineering and medical colleges, inasmuch as such a test would affect "Co-ordination and determination of standards" in these institutions. Disposing of the argument of the petitioners based on certain passages from the *Gujarat University* case, Subba Rao, J., speaking for the majority, observed :

> This and similar other passages indicate that if the law made by the State by virtue of entry 11 of List II of the Seventh Schedule to Constitution makes impossible or difficult the exercise of the legislative power of the Parliament under the entry "Co ordination and determination of standards in institutions for higher education or research and scientific and technical institutions" reserved to the Union, the State law may be bad. This cannot obviously be decided on speculative and hypothetical reasoning.[11]

Yet, what factual evidence did the Court have before itself in the *Gujarat University* case for determining the impact of the question of medium on the determination of standards ?

IV

In conclusion it may be said that under the Constitution of India, though "education, including universities" has been allotted to the states, exclusively, as an item of legislation the union has ample powers, under

10. A.I.R. 1964 S.C. 1823.
11. *Id.* at 1830.

entry 66 of list I to pass any laws affecting education in the universities and institutions of higher education or research and scientific and technical institutions. Further, the union may also assert itself in matters of secondary education not only by exercising the power of the purse, but also, to a considerable extent, as an incident of the power under entry 66 of list I. The holding in the *Gujarat University* case perhaps goes too far in preventing the states from acting even in the absence of union legislation in matters affecting standards of higher education. However, even if the Court refuses to abide by the stand taken in the *Gujarat University* case, the position remains that in the case of conflict between union legislation under entry 66 of list I and that under entry 11 of list II, union legislation will prevail.

In this context it is not necessary for the union to ask for anything more. The extent of the power at present being exercised by the union is best illustrated by the provisions of the University Grants Commission Act, 1956. The Commission, set up under this act has the duty "to take, in consultation with the Universities or other bodies concerned, all such steps as it may think fit for the promotion and coordination of University education and for the determination and maintenance of standards of teaching, examination and research in Universities..."[12] The Commission has the power to allocate and disburse funds for the maintenance and development of other universities to furnish information desired by it[13] and to make inspections at any university.[14] It has the power to withhold from any university the grants proposed to be made to it out of the fund of the Commission if the university fails to comply with the recommendations of the Commission.[15]

The effectiveness of the control of the Commission over university education in the country can be imagined from the fact that there is hardly any university in the country which is not receiving huge grants from the Commission, and, practically no new university can be set up by the states today without a generous commitment to help from the Commission.

Nor is the advisory and standardizing role of the union confined to universities and higher education. The terms of reference for the Education Commission recently set up by the union government would reveal that planning over the entire field of education, including primary, secondary and vocational, as well as higher and technical education has become the concern of the union. The role of the states, though of course highly pronounced at the primary and secondary levels, has not remained exclusive even there. At the university levels it is getting unmistakably dominated by the union.

12. The University Grants Commission Act, 1956, § 12.
13. *Id.* § 12 (1).
14. *Id.* § 30.
15. *Id.* § 14.