

THE INDIAN LAW INSTITUTE, NEW DELHI

...

Seminar
on
Educational Planning in India:
Legal and Constitutional Implications

January 1966

LEGISLATIVE RELATIONS BETWEEN THE UNION AND THE STATES
AND EDUCATIONAL PLANNING

by

P.K. Tripathi*

Part 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 direct itself to. Then, there are some fundamental rights given to individuals and groups which prescribe the duties for the States and the Union 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 distribution of the legislative powers provided in Part XI of the Constitution and in the three Lists of the VII Schedule, there is a direction in Article 41, and another in Article 45 regarding education. Article 41 directs that "The state shall, within the limits of its economic capacity and developments make effective provisions for securing the rights 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 10 years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of 14 years".

It is important to note that these directions are addressed not only to the States, but, to both, the Union and

*Dean, Faculty of Law, University of Delhi, Delhi.

states equally; (vide definition of state in Article 36). 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 14 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 (vide *Gujrat University v. Shri Krishna*, A.I.R. 1963, S.C. 703, at page 713), 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 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 very extreme cases of failure on the part of the 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.

Part II

Coming to the legislative Lists in the VII 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 III referred to above are as follows:

List I :

Entry 63

The institutions known at the commencement of this Constitution as the Benares 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.

Entry 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.

Entry 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 detection of crime.

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

List II

Entry 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 and Medical professions". Acting under this entry, Parliament has passed the Bar Councils Act, 1961, setting up the Bar Council of India whose functions, enumerated in S. 7 of the Act, include:

- (b) 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 31 (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.

Part 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 principle 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 devisions 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 Gujrat University v. Shri Krishna, A.I.R. 1963 S.C. 70s.

The point raised before the Supreme Court in this case was whether the State of Gujrat, acting through the Gujrat University, could prescribe Gujрати 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 "Coordination 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 was a "direct bearing and impact" upon coordination upon coordination and determination of standards in institutions of higher education.

Perhaps it is fortunate that the Court has left exclusively with the Union the question of determining the end of the English medium from 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 the power of the States on "education" and "Universities" with virtual extinction. Because, if what is comprehended in "coordination 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 this reasoning, perhaps, even secondary education will come 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.

In his dissenting opinion, Mr Justice Subba Rao applied the doctrine of pith and substance as laid down in Prafulla Kumar v. Bank of Commerce, A.I.R. 1947 P.C. 60, 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. and Berar Motor Spirits Act" (A.I.R. 1939 F.C. 131). Here, as in the C.P. and Berar 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.

It is possible that on some future occasion the Supreme Court may reject the broad import given to item 66 in List I in the Gujrat 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 itself realised that the majority opinion in the Gujrat University case has gone too far; and, already the process of limiting its application to the question of 'medium' has started. This is evident from Chitralekha v. State of Mysore, A.I.R. 1964 S.C. 1823, where the court rejected the argument, based on the Gujrat 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 "coordination and determination of standards" in these institutions. Disposing of the argument of the petitioners based on certain passages from the Gujrat University case, Subba Rao, J., speaking for a unanimous Court, 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 the Constitution makes impossible or difficult the exercise of the legislative power of the Parliament under the entry "Coordination 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." (A.I.R. 1964 S.C. at p. 1830).

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

Part 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 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 Gujrat 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 Gujrat 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..."(S.12). The Commission has the power to allocate and disburse Funds for the maintenance and development of the Universities established by the Union and for the development of other univer-

sities in the country. It has the power, to require any University to furnish information desired by it (S.12,i) and to make inspections at any University (S.13). 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 (14). 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 of help from the Commission.

Nor is the advisory and standardising 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.

....