The Constitutional Right to Education in India: Horizontal Dimensions

Shubhankar DAM, City University of Hong Kong
RIGHT TO EDUCATION IN INDIA:
HORIZONTAL IMPLICATIONS

By

Shubhankar Dam

Reprinted from
Law Quarterly Review
October 2012

Sweet & Maxwell
100 Avenue Road
Swiss Cottage
London
NW3 3PF
(Law Publishers)
RIGHT TO EDUCATION IN INDIA: HORIZONTAL IMPLICATIONS

In 2002, India’s Constitution was amended to provide for a fundamental right to primary education. Article 21A, inserted by the Constitution (Eighty-sixth Amendment) Act 2002 (65 of 2002), mandated that “the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine”. Though novel, the essence of this explicit guarantee had already been recognised a decade earlier when the Supreme Court declared the right to education as “implicit in” the right to “life or personal liberty” in art.21 of the Constitution (Unnikrishnan J P v State of Andhra Pradesh AIR 1993 SC 2178 at [42]). Therefore, Parliament’s decision to insert art.21A and turn the court’s decision into a constitutional provision may be understood as a form of dialogic which, in the Indian context, remains under-theorised. But what this new provision meant for the then nearly 20 million children with limited or no access to basic education was far from clear. Consequently, Parliament enacted the Right of Children to Free and Compulsory Education Act 2009 (35 of 2009) to define the substance of the right more clearly. The Act, among other things, required unaided private schools (i.e. schools receiving no governmental aid) to admit, to the extent of at least 25 per cent of a class, “children belonging to weaker and disadvantaged group in the neighborhood and provide free and compulsory elementary education”. In effect, the provision partly outsourced the state’s constitutional obligation—and associated costs—to private schools. In Society for Unaided Private Schools of Rajasthan v Union of India (AIR 2012 SC XXX) (the SUPSR case), the constitutionality of the Act was challenged, and mostly upheld by a 2:1 majority in the Supreme Court.

Article 21A casts an obligation on the state (“the State shall provide free and compulsory education”), though the manner of performing that obligation has been left to its legislative discretion (“in such manner as the State may, by law, determine”). The interplay of these two parts may be read as imposing either a formal or substantive obligation. Read formally, art.21A may mean that the state’s obligation is met by simply decreeing that particular entities—mostly likely, existing schools—must take on the task of educating India’s children. This reading casts the legislative width widely. Parliament may go to the extent of mandating private schools to bear the full cost of educating all children who cannot afford to pay for it. But read substantively, art.21A might mean that the obligation is on the state to provide such education. That is to say the state must establish and administer schools, and provide necessary facilities to the children. In this reading,
the legislative width is narrow, and Parliament can only determine a limited number of issues through its legislation. Note that the Education Act, 2009 rejects the two extremes and adopts an intermediate position. The legislation requires the state (acting through its local authorities) to improve the quality of existing schools, establish new ones and finally calls upon unaided private schools to bear a part (25 per cent) of the burden. Did Parliament exceed its legislative discretion in doing the latter? That was the principal question before the Supreme Court.

In his majority opinion, Chief Justice Kapadia held that the constitutionality of the law hinged on three things: the nature of the right to education in art.21A, the nature of a citizen’s freedom to establish and administer schools in art.19(1) and Parliament’s legislative discretion to regulate the former two. While inserting art.21A, Parliament in 2002 also amended the list of “fundamental duties” in the Constitution to require “a parent or guardian to provide opportunities for education to his child [or] ward”. India’s Constitution, perhaps uniquely, has a list of fundamental duties addressed to its citizens, and it now includes a duty to educate one’s children. The right to education on one hand and the duty to educate on the other, the Chief Justice said, means that the Constitution “envisages a reciprocal agreement between the State and the parents and it places an affirmative burden on all stakeholders in our civil society” (at [10]). To be sure, citizens have the freedom to establish and administer educational institutions under art.19(1)(g) which guarantees the freedom “to practise any profession, or to carry on any occupation, trade or business” [T. M. A. Pai Foundation v State of Karnataka (2002) 8 SCC 481]. But that freedom is subject to reasonable restrictions “in the interests of the general public” under art.19(6). According to the Chief Justice, the duty to admit 25 per cent students without fees was a reasonable restriction for two reasons. One, he found that the 2009 Act was mainly intended to eliminate all kinds of barriers—including “financial and psychological barriers”—that children belonging to weaker sections and disadvantaged groups face while seeking admissions (at [10]). Removing such barriers is obviously in the interest of the general public. Two, he relied on the practice of referring to Directive Principles of State Policy in the Constitution to assess the validity of parliamentary legislation. Originally borrowed from the Irish Constitution, Directive Principles are constitutional provisions that are not directly enforceable, but which nonetheless impose obligations on the state. Starting with State of Bihar v Kameshwar Singh (1952) SCR 889, the Supreme Court has consistently referred to such provisions in cases where fundamental rights and freedoms appear to conflict with one another. In this instance, Chief Justice Kapadia referred to art.45 which in its unamended version said that “the State shall endeavour to provide … for free and compulsory education for all children until they complete the age of fourteen years”. Providing “for” free and compulsory education, he said, is different from “providing free and compulsory education” (at [9]). The state’s obligation, therefore, may be met by directly providing education, or as in this case, by enacting a law providing for education. The Chief Justice, however, qualified his conclusion by making an exception for minority unaided schools. Under art.30(1) of the Constitution, religious and linguistic minorities have a fundamental right to “establish and administer educational institutions of their choice”. The right in art.30(1) is “absolute”, and unlike art.19(1), not subject to reasonable restrictions. Therefore,
forcing such schools to admit 25 per cent of children belonging to weaker sections and disadvantageous groups, it was held, would “result in changing the character of the schools” and thereby violate their fundamental right (at [19]).

In his long dissent, Justice Radhakrishnan analysed several decisions on socio-economic rights from India (e.g. Consumer Education and Research Centre v Union of India (1995) 3 SCC 42), South Africa (e.g. Soobramoney v Minister of Health 1998 (1) SA 765 (CC)); Venezuela (Cruz del Valle v Ministry of Health and Social Action, Decision No. 916 (1999)) and Canada (Wilson v Medical Services Commission of British Columbia 9530 D.L.R. (4th) 171) to conclude that such “rights are available only against (the) State and not against private actors” (at [79]). Secondly, after reviewing a large number of Indian precedents, Justice Radhakrishnan held that whenever India’s Parliament “wanted to remove obstacles so as … to achieve socio-economic justice”, it was done through constitutional amendments, not legislation (at [103]). The Education Act, 2009, however, departed from this consistent practice by imposing positive constitutional obligations on private schools. This, he said, was unconstitutional for a legislature could not “under the guise of the interest of general public … burden [private schools] with duties which they do not constitutionally owe to children” (at [141]). Constitutional obligations of unaided private schools, if any, are only negative. That is, they must desist from profiteering, excessive fees, capitation fees or other kinds of maladministration which unreasonably interfere with a child’s right to secure education (at [120]). While this arrangement may be altered to impose positive obligations on private schools, it requires a constitutional amendment (at [145]).

The differences between the majority and the minority opinions can probably be explained by references to the scholarship on “strong” and “weak” forms of judicial review with regards to socio-economic rights. Developed by scholars like Cass Sunstien and Mark Tushnet, the “weak form” of review allows courts to point out failures of the political branches to fulfill certain rights, but leaves the issue of remedy to the latter’s discretion. The underlying aim is for a court to enter into a dialogue with other co-equal branches rather than dictate to them. A “strong form” of review, in contrast, implies a more robust engagement with specific remedies, including the use of writ jurisdiction to ensure bureaucratic compliance. The story of the right to education in India, it seems, is a combination of both these kinds of review. Since enunciating it as an implied constitutional right in 1992, the Supreme Court led on the right to education for more than a decade. With reference to higher education, it was deeply involved in designing and clarifying the substance of the right. With reference to primary education, it was substantially involved in guiding the executive with its policies for achieving the stated goal of universal enrolment in India. But once Parliament stepped in, first with the constitutional amendment in 2002, and later with the Education Act, 2009, the Court, it seems, is now willing to step back from its earlier levels of engagement. Now that Parliament has produced a particular mechanism by which to achieve a socio-economic right, the Court is careful not to tread on it. As the Chief Justice’s opinion makes it clear, so long as the legislation is within a spectrum of reasonableness, its constitutionality must be upheld. Justice Radhakrishnan, in contrast, is unwilling to make any concessions. He insists on interpreting the
“reasonable restrictions” in art.19(6) “strictly”, disregarding the fact that the legislation is in pursuit of socio-economic rights (at [86]).

Perhaps the more important point has to do with what the SUPSR case generally stands for. India’s Constitution imposes “positive” socio-economic obligations on the state. That much is not in doubt. But how to fulfill these obligations was the point of contention here. Broadly, four views are possible in this regard:

(A) The state must offer these services directly.
(B) The state may buy these services from private entities in the market and make them available to those who cannot afford them.
(C) The state may offer a part of the services directly, or procure them in the market. But it may also outsource a part of its obligation to private entities such that the latter must bear the costs.
(D) The state may outsource its obligation to private entities entirely and require them to provide the relevant services to those who cannot pay.

In SUPSR, the majority and the minority views were in agreement that (A) and (B) are constitutional options. In addition, they may also be said to be in agreement that (D) is an unconstitutional option. Their principal difference was about (C). While Chief Justice Kapadia took the view that a part of the state’s positive obligations may be offloaded on private entities by parliamentary legislation, Justice Radhakrishnan disagreed. Parliament, he felt, had no such authority. The majority view in the SUPSR case, in other words, may be taken to stand for the proposition that (most) socio-economic rights in India do not have direct horizontal effect. But Parliament can achieve that indirectly by outsourcing part of its obligations to private entities. Crucially, the majority does not tell us how much of the state’s obligation may be outsourced. The Education Act, 2009, drew the line at 25 per cent. While the Chief Justice upheld this line, he said nothing about the constitutionality of the line generally or anything about its limits.

Education apart, three other provisions have always been central to a social democratic state: food, housing and health. Incidentally, each of these enjoys the status of a fundamental right in India. In Chameli Singh v State of UP (1996) 2 SCC 549 the Supreme Court held that “right to life in any civilized society implies the right to food, water, decent environment, education, medical care and shelter” (at [8]). Similarly, in Paschim Banga Mazdoor Samity v State Of West Bengal (1996) 4 SCC 37, the Court declared the right to health care as a fundamental right, adding that “providing adequate medical facilities for the people is an essential part of the obligations undertaken by the Government in a welfare state” (at [9]). Currently, two bills on the right to food and right to housing respectively are under parliamentary consideration. What are SUPSR’s implications for such legislation in India? Post-SUPSR, is a parliamentary legislation that requires supermarkets, for example, to provide a certain amount of food free of cost to those living below the poverty line in urban areas constitutional? Or is a piece of legislation requiring private hospitals, clinics or other medical facilities to provide a certain amount of services free of charge to those who cannot afford to pay them constitutional? Similarly, is a piece of legislation requiring private developers and housing companies to build a certain number of homes for those who cannot afford it
constitutional? The SUPSR decision does not give us the answers to these questions: the analysis was too tied to the specific provisions on education in the Constitution. But in making unaided private schools partly responsible for achieving constitutional obligations, the decision may have laid the legal foundation for similar arguments in areas central to a decent social democratic state.

Shubhankar Dam

Singapore Management University School of Law