

Courts and colleges: a problematic relationship

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THE rapid quantitative expansion of higher education in India in recent years – both in number of students as well as the number of institutions engaged in the delivery of tertiary education – has unsurprisingly brought with it a series of challenges and concerns. Unlike earlier decades, most of this growth has been led by private educational institutions. Although these institutions enjoy a *de jure* non-profit status, they are frequently *de facto* money making business enterprises run by politically well-connected individuals and in most cases provide a depressingly low quality of education. In such a scenario, the regulation of higher education has become critical.

While there are a range of higher education regulators in India such as

the University Grants Commission (UGC), All India Council for Technical Education (AICTE), Medical Council of India (MCI), Bar Council of India (BCI) and so forth, their manifold weaknesses (both competence and corruption) has been widely noted. Since nature abhors a vacuum, power shifts when institutions designed for specific regulatory tasks fail to deliver. Other institutions step in, and while sometimes they are compelled by circumstances, at other times they appear propelled by their own hubris, oftentimes assuming roles they are ill-equipped for.

The weakness and failures of the executive and legislative branches of government has been a critical factor in the judiciary's growing power in India. Hence, it should not be surpris-

ing that given the problems plaguing higher education institutions in India, the institutional actor which has – actively since the early 1990s but in some ways even before – been playing a significant role in the regulation of higher education has been the judiciary. But what merits reflection – and is the focus of this essay – is not so much the participation of the judiciary and the increasing litigation involving higher education institutions (though this is revealing for its own reasons), but rather the manner in which the Indian judiciary has involved itself in regulation of these institutions and engaged in the articulation of a certain vision of higher education.

One way in which the judiciary has regulated private higher educational institutions has been through emphasizing the ends of education. Educational institutions cannot, the Supreme Court has consistently held, engage in ‘profiteering’. The word ‘profiteering’, which was initially reserved for cases involving abusive and unfriendly market practices relating to essential commodities or land and property matters, has curiously found its way into the Supreme Court’s jurisprudence on higher education. Although it was first used in *Unnikrishnan* (1993), its overarching principle – that educational institutions are symbols of charity – was put in place in an earlier case, *St. Stephen’s College* (1992).

Over time, however, the Supreme Court’s views have oscillated with the changing political economy of higher education. Having come to accept the place of private institutions, subsequent cases like *T. M. A. Pai* (2002) have permitted private institutions to generate surplus, but simultaneously require that this surplus be ploughed back into the institutions. This form of regulation –

through the ‘profiteering’ narrative – treats private educational institutions as distinct from other private enterprises and professions. On the one hand this undermines the creation of a diverse set of higher education institutions, which can each be free to determine their own ends. On the other hand (as with India’s disastrous experience with rent control), it simply drives the activity underground, as innumerable experiences of Indian higher education attest. And one might add, this treatment has little constitutional basis; there is nothing in our reading to suggest that the text treats education differently from other private enterprises and professions.

Another form of judicial intervention of considerable significance relates to the institutional regulatory structure of higher education. Indian higher education is structured around centralized regulatory bodies with wide-ranging powers – indeed so much so that they remain one of the bastions of the *licence-permit raj*. While these are all statutory bodies, some like the UGC or AICTE are predominantly funded by the state and their personnel appointed by the state, while others (especially those regulating the professions) like the MCI and BCI are elected bodies.

Notwithstanding the merits and demerits of such a system, the broad principle is that these regulatory bodies should be independent in character and thereby relatively free from political interference. The freedom granted to them is, of course, not simply to prevent political interference but also to create the intellectual autonomy that the delivery of higher education demands. Barring clear and patent instances of administrative *mala fide*, interference in the operation of such bodies must therefore be kept to a bare minimum.

The reality of these higher education regulatory institutions, however, mirrors the sordid experience of the licence-permit raj in other domains. In recent years, the heads and staff of the AICTE, MCI, Dental Council of India (DCI), National Council for Teacher Education (NCTE), and the Council of Architecture have been indicted for corruption, while there have been myriad corruption allegations and investigations into other apex regulatory bodies (including the UGC). This was an important reason why the Yash Pal Committee proposed scrapping these bodies and replacing them with one single regulatory body, which would have constitutional status (called the National Commission for Higher Education and Research).

It is in this context of regulatory failures that the courts have stepped in with increasing frequency. But are their interventions a form of an institutional safety net, remedying the failures of the original regulators, or institutional hubris, compounding them instead? A recent decision by the Delhi High Court in medical education enables us to reflect upon this question.

In *Teerthanker Mahaveer Institute of Management v. Union of India* (2011), three petitions were filed before the Delhi High Court seeking permission to increase their intake of students for the MBBS course. The argument put forth by the petitioners was that their request for an additional intake of students had been arbitrarily rejected by the MCI even though they possessed the requisite infrastructural capacity to accommodate the additional intake. The Council, on the other hand, argued that the petitioner colleges had only been granted approval for running an MBBS course and not recognition for the same. It was suggested that under MCI regulations,

the latter could only be received after the completion of five years of the course, and without such recognition they were ineligible under the applicable regulations and statutory instruments to be granted permission for additional intake.

Since the regulations themselves had not been challenged (this was a simple administrative law case), the Council argued that the plea of the petitioners must be rejected. The petitioners contested their ineligibility and claimed that neither the act nor the regulations framed under it prohibited the colleges from seeking an increase in their admission capacity before they had been granted 'recognition' by the central government. *Teerthanker Mahaveer Institute of Management* thus dealt with a host of technical legal matters relating to the interpretation of the Indian Medical Council Act, 1956, and the regulations which have been framed under the statute.

The court sided with the petitioners and directed the MCI to grant an increase in the additional intake of students in the petitioner institutions, subject to their fulfilment of the requisite infrastructural requirements and so forth. Leaving the legal niceties aside, it is interesting to observe how the court entered into a prolonged discussion on the state of healthcare and medical education in India. Lamenting the state's lethargy towards establishing sufficient educational institutions that could meet the growing demand, the court concluded there is now an extraordinary dependence on private institutions and that much hope rests on them.

The court emphasized that while there is an urgent need for the creation of new medical colleges, it is also vital to ensure that there is no decline in the quality of education offered, since 'doctors who deal with

human lives cannot be seen to be half-trained or half-baked doctors.' To achieve this goal, the court argued that 'the solution will not come from denying these [petitioner] medical colleges the required increase but would be to ensure that the increase is permitted in admission capacity to these colleges only when they strictly adhere to the laid down criteria and the regulations of the MCI.'

Needless to say, this way of phrasing the problem only leads to confusion. The precise legal dispute was *what* the regulations of the MCI mandated; so it is simply unhelpful to state that the solution lies in permitting an increase in capacity in accordance with the regulations. The legal question at hand was whether, in the present factual scenario, *the regulations permitted or prohibited an increase in capacity*. A more generous and holistic reading of the paragraph, however, confirms that what the court is trying to say is rather clear: the solution to the present medical education and healthcare crises in India lies not in denying the petitioner institutions permission to increase their intake, but rather to ensure that if the institutions can accommodate extra students, they should be permitted to do so.

But this isn't what was at issue before the court. The question before the court was not whether India's medical education crises is best resolved by granting the petitioner institutions the permission to increase their intake. It was whether, *even though the petitioner institutions may have the requisite infrastructure*, they were permitted to increase their intake under the applicable statute and regulations, since the MBBS course they had been conducting had not yet achieved a completion of five years. The court, despite delving into the

necessary legal materials, seems to have been ultimately motivated by its understanding about how best to reform Indian medical education and address the nation's health concerns.

Indeed, at one stage the court is brazenly blunt and states that it is not 'in the larger public interest to stop the growth of medical colleges when asking for increase, if these medical colleges otherwise fulfil the laid down criteria of the regulations in terms of infrastructure and facilities.' It also declares that to 'achieve a balance between the unprecedented institutional growth today vis-à-vis a skewed doctor-patient ratio, the only solution is to review the entire regulatory mechanism and revitalize the system of checks before this aberration of rot becomes a trend in the country' and observes that it is time for the MCI 'to be vigilant and reinvigorate the system to stop the unplanned and unequal growth of mediocre colleges aimed at commercialization of medical education, rather than stop the growth of colleges catering to the needs of the aspirant doctors by giving lopsided interpretations to the regulations.'

This kind of reasoning is illustrative of how courts resolve higher education disputes by making assessments on how to 'fix the system', something about which they lack the requisite knowledge or expertise, let alone the fact that it represents a lack of fidelity towards the specific legal problem before them. Let us consider, for instance, the very issue at hand. If the real concern is to improve the modest quality of health indicators of the Indian people, a supply chain of healthcare would need doctors, nurses and paramedics, pharmacists and lab technicians and hospital administrators. But if the goal is better societal health outcomes, where should the marginal expenditure be directed?

Almost any serious analysis of Indian health would conclude that by far the biggest bang for the buck would be in public health. The sad reality may be not that India has produced too few doctors, but that it has produced too few nurses and public health professionals.

Until the recent establishment of the Public Health Foundation of India, the country had just a handful of schools of public health, all going back to pre-independence. So should Indian courts direct that the nation produce more civil and environmental engineers who can ensure clean water and sanitation and agricultural scientists who can ensure greater food output and from there to better nutrition? Speaking on this issue, the National Rural Health Mission task force put the issue in perspective: 'We have for far too long,' said the task force, 'clung to the belief that only graduate doctors can render competent health care, and that all other attempts to deliver health services are ill-conceived and against patient interest. The task force is of the view that this bland assertion needs to be critically examined.'¹ The persistence with 'bland assertions' says as much about India's courts as about India's healthcare system.

Even if we address the argument on its own terms and assume that doctors matter most of all for better health outcomes, the question arises as to whether the solution lies in increasing the supply of doctors or in trying to retain the limited supply in the first place. According to estimates by the OECD, India was the largest supplier of doctors to rich countries, with an

estimated 56,000 Indian doctors just in OECD countries (and more in the Gulf) in the mid-2000s. This number is approximately double the total number of doctors graduating in India annually. And so should the output of doctors be increased so that they can better serve patients in rich countries or should these doctors be prevented from leaving India?

Equally troubling is the complete lack of attention to the political economy of the medical profession in India. There is an assumption that if there are more doctors they will serve the populations that desperately need them most – the large rural majority. But nearly three-fourths of India's doctors legally permitted to practice, operate in and around urban areas, serving less than thirty per cent of the population. And of those that do serve in rural areas, it is arguable just how many of them show up in the first place. With absenteeism rates ranging from a quarter to a third, the few becomes even fewer. And of those who do show up, the quality of care provided by India's doctors leaves much to be desired.²

This discussion is simply to suggest that the problems troubling both medical education and the state of healthcare in India are far more complex than what the courts imagine. By routinely adjudicating higher education disputes through a determination of what verdict might improve higher education in India, or improve the sector to which that education relates (in this case, healthcare), the court not only strays away from its mandated role of strictly addressing the legal dispute at hand but also ventures into

territories in which it is thoroughly unequipped to travel. Cases like *Teerthanker Mahaveer Institute of Management* hold the potential of having profoundly adverse implications as the judiciary not only undermines the independence of the statutory regulator, but also that its pronouncements are likely to increase litigation because the court sets a low threshold for justiciability.

In a case just over half a decade ago, the Supreme Court was confronted with an open-ended Chhattisgarh legislation which had led to the creation of over a hundred private universities, many of which were offering neither any education nor infrastructure, and abusive practices were rampant.³ The court rightly struck down the legislation. But it also, rather troubling, entered into a detailed and unnecessary discussion about the role of the University Grants Commission and its relevance for private educational institutions. These matters were not strictly at issue before the court, and the relationship of the commission to private institutions is tenuous at best. What is noteworthy is the willingness with which courts seek to define and redefine the role of the independent regulator.

To be sure, courts do and must play an important role of review – but review must be distinguished from court induced regulation. Indian higher education faces many serious challenges ranging from quality, quantity, access and funding, and poor regulation of this sector has contributed considerably to its malaise. In addressing these issues, courts consider themselves to be part of the solution, oblivious of the fact that they may instead constitute a serious part of the problem.

1. Para 4.1.2, Report of the Task Force on Medical Education for the National Rural Health Mission, Ministry of Health and Family Welfare, Government of India, available online at: http://mohfw.nic.in/NRHM/Documents/Task_Group_Medical_Education.pdf

2. For an excellent study on this issue see, Jishnu Das et. al., 'The Quality of Medical Care in India: Evidence from a Standardized Patient Study in Two States', Draft 2011 (under review; on file with authors).

3. Prof. Yashpal v. State of Chhattisgarh, (2005) 2 SCC 61.