

(1976) 07 KL CK 0011

In the High Court Of Kerala

Case No : O.P. No's. 3801, 3871, 3948, 4004, 4025 and 4065 of 1974

Benedict Mar Gregorios

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 13-07-1976

Acts Referred:

Agra University Act, 1926 — Section 14A
Constitution of India, 1950 — Article 19, 19(1), 30, 30(1), 30(2)
Kerala University Act, 1969 — Section 1, 2, 2(27), 3, 5
Kerala University Act, 1974 — Section 83A(1)

Citation : (1976) 07 KL CK 0011

Hon'ble Judges : Khalid, J;Gopalan Nambiyar, J;Balagangadharan Nair, J

Bench : Full Bench

Advocate : George Varghese Kannanthanam, Thomas V. Jacob and P.C. Joseph, in O.P. Nos. 3801, 3871 and 4065/74 and Joseph Vithayathil, in O.P. 3948/74, for the Appellant; K. Velayudhan Nair, V.S. Moothath, N.R.K. Nair, K.J. Joseph and T.K.M. Unnithan, in O.P. 4004/74, for the Respondent

Final Decision : Allowed

Judgement

1. These writ petitions challenge the provisions of the Kerala University Act, 1974 (Act 17 of 1974). The Petitioners are the owners of private colleges, inasmuch as the legal title to the colleges vests in them. The colleges receive aid out of State funds. As observed by a Full Bench of this Court in V. Rev. Mother Provincial v. State of Kerala 1969 K.L.J. 863 although the legal title to the colleges vests in the Petitioners it may be difficult to predicate that the beneficial interest in the properties of the colleges also vests in them.

2. The Petitioner in O.P. No. 3801 of 1974 is the Archbishop of Trivandrum, who owns three colleges; the one in O.P. No. 3871 of 1974 is the Bishop of Quilon owning two colleges; the one in O.P. No. 3948 of 1974 is the Vicar-General of the Archdiocese of Changanacherry owning two colleges; the one in O.P. No. 4025 of 1974 is the Metropolitan of Marthomite Church owning four colleges; and the one in O.P. No. 4865 of 1974 is the Superior of the Christ Monastery of the C.M.I.

Fathers, Irinjalakuda, owning one college.

3. This is the second -- or perhaps the third -- round of battle against the attempt of the State to control and regulate the management and administration of the private educational institutions of the State. The first round was fought in the reference made in the advisory jurisdiction of the Supreme Court in *In re Kerala Education Bill 1957* AIR 1958 S.C. 956. The Supreme Court sustained some of the provisions of the Bill proposed to be enacted as an Act and held that certain sections offended, in particular, Article 30(1) of the Constitution. The proposed legislation took shape as the Kerala Education Act, 1958 aimed inter alia at controlling the management and administration of private aided schools. This was followed by the Kerala University Act, 1969 in regard to the management of private colleges in the State. Its vires was challenged before a Full Bench of this Court. It was ruled in *V. Rev. Mother Provincial v. State of Kerala* 1969 K.L.J. 863 that certain sections of the Act were bad as contravening Article 19(1)(f), and also Article 30(1) of the Constitution, as far as minority institutions are concerned. The decision was confirmed by the Supreme Court vide *State of Kerala, etc. Vs. Very Rev. Mother Provincial, etc.,* . Then came the University Act of 1974, herein impugned.

4. Arguments were addressed only in the five writ petitions that we have mentioned. No arguments were addressed in O.P. No. 4004 of 1974, and its fate was left to rest upon the decision of these specified writ petitions.

5. Article 30(1) of the Constitution guarantees to all minorities, whether based on religion or language, the right to establish and administer educational institutions of their choice. Articles 30(2) forbids discrimination against a minority institution in the matter of granting aid. Although the Article, unlike some of the other Articles of the Constitution dealing with fundamental rights, is couched in terms absolute and unqualified, it has now been settled by the decisions of the highest Court that such is not its effect or purport, and that regulations on the right in the interest of the efficiency of instruction, discipline, health, sanitation, and the like, are permissible. We might well quote the observations of the Supreme Court in *Rev. Sidhajibhai Sabhai and Others Vs. State of Bombay and Another*, Observed the Court:

Unlike Article 19, the fundamental freedom under Clause (1) of Article 30, is absolute in terms; it is not made subject to any reasonable restrictions of the nature the fundamental freedoms enunciated in Article 19 may be subjected to. All minorities, linguistic or religious have by Article 30(1) an absolute right to establish and administer educational institutions of their choice; and any law or executive direction which seeks to infringe the substance of that right under Article 30(1) would, to that extent, be void. This, however, is not to say that it is not open to the State to impose regulations upon the exercise of this right. The fundamental freedom is to establish and to administer educational institutions: it is a right to establish and administer what are in truth educational institutions, institutions which cater to the educational needs of the citizens, or sections

thereof. Regulation made in the true interests of efficiency of instruction, discipline, health, sanitation, morality, public order and the like may undoubtedly be imposed. Such regulation are not restrictions on the substance of the right which is guaranteed: they secure the proper functioning of the institution, in matters educational.

(pp. 849, 850)

We would stress that what is permissible is only regulation of the rights and not any restriction thereon; and that the regulation can only be in the interest of the efficiency of instruction and other like matters noticed by the Court. This aspect was noticed in the Full Bench decision in 1969 K.L.J. 863 referred to earlier. The Full Bench observed:

Article 30(1) is not a charter for maladministration; regulation, so that the right to administer may be the better exercised for the benefit of the institution is permissible; but the moment you go beyond that and impose, what is in truth, not a mere regulation but a restriction on the right to administer, the article comes into play and the interference cannot be justified by pleading the interests of the general public; the interests justifying interference can only be the interests of the institution concerned. (para 15)

On appeal from the above decision the Supreme Court in *State of Kerala, etc. Vs. Very Rev. Mother Provincial, etc.*, observed:

Administration means "management of the affairs" of the institution. This management must be free of control so that the founders or their nominees can mould the institution as they think fit, and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best served. No part of this management can be taken away and vested in Anr. body without an encroachment upon the guaranteed right.

There is, however, an exception to this and it is that the standards of education are not a part of management as such. These standards concern the body politic and are dictated by considerations of the advancement of the country and its people. Therefore, if Universities establish the syllabi for examinations, they must be followed subject, however, to special subjects which the institutions may seek to teach, and to a certain extent the State may also regulate the conditions of employment of teachers and the health and hygiene of students. Such regulations do not bear directly upon management as such although they may indirectly affect it. Yet the right of the State to regulate education, educational standards and allied matters cannot be denied. The minority institutions cannot be allowed to fall below the standards of excellence expected of educational institutions, or under the guise of exclusive right of management, to decline to follow the general pattern. While the management must be left to them, they may be compelled to keep in step with Ors. . (paras 9 and 10)

In *D.A.V. College, Vs. State of Punjab and Others*, the impugned Act contained

provision for the constitution of a governing body of a College consisting of not more than 20 persons approved by the Senate and including two representatives of the University and the Principal of the College ex officio. It was held that the provision for the constitution of this governing body and for the approval of the appointment of staff by the Vice-Chancellor were unwarranted interference with the right of management.

6. In *The Right Rev. Bishop S.K. Patro and Others Vs. The State of Bihar and Others*, the National Christian Council which was managing a school founded at Bhagalpur was required by the educational authorities to constitute a managing committee composed of two persons elected as President and Secretary of the School, whose election was approved by the President of the Board of Secondary Education. It was held that the school in question was a minority institution and that the impugned order was invalid. The decision of the Supreme Court in *The Ahmedabad St. Xavier's College Society and Another Vs. State of Gujarat and Another*, contains a detailed analysis and review of all the decisions rendered under Article 30(1) of the Constitution. Chief Justice Ray stated thus:

An educational institution runs smoothly when the teacher and the taught are engaged in the common ideal of pursuit of knowledge. It is, therefore, manifest that the appointment of teachers is an important part in educational institutions. The qualifications and the character of the teachers are really important. The minority institutions have the right to administer institutions. This right implies the obligation and duty of the minority institutions to render the very best to the students. In the right of administration, checks and balances in the shape of regulatory measures are required to ensure the appointment of good teachers and their conditions of service. The right to administer is to be tempered with regulatory measures to facilitate smooth administration. The best administration will reveal no trace or colour of minority. A minority institution should shine in exemplary eclecticism in the administration of the institution. The best compliment that can be paid to a minority institution is that it does not rest on or proclaim its minority character. (page 1398)

* * * *

Autonomy in administration means right to administer effectively and to manage and conduct the affairs of the institutions. The distinction is between a restriction on the right of administration and a regulation prescribing the manner of administration. The right of administration is day-to-day administration. The choice in the personnel of management is a part of the administration. The university will always have a right to see that there is no maladministration. If there is maladministration, the university will take steps to cure the same. There may be control and check on administration in order to find out whether the minority institutions are engaged in activities which are not conducive to the interest of the minority or to the requirements of the teachers and the students. In *State of Kerala, etc. Vs. Very Rev. Mother Provincial, etc.*, this Court said that if the administration goes to a body in the selection of whom the founders have

no say, the administration would be displaced. This Court also said that situations might be conceived when they might have a preponderating voice. That would also affect the autonomy in administration. The provisions contained in Section 83A(1)(a) of the Act have the effect of displacing the management and entrusting it to a different agency. The autonomy in administration is lost. New elements in the shape of representatives of different types are brought in. The calm waters of an institution will not only be disturbed but also mixed. (pp. 1399, 1400, para 41)

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This Court has consistently held that it is not only permissible but also desirable to regulate everything in educational and academic matters for achieving excellence and uniformity in standards of education. (p. 1401)

Khanna, J. observed:

* * * *

Administration connotes management of the affairs of the institution. The management must be free of control so that the founders or their nominees can mould the institution as they think fit and in accordance with their ideas of how the interest of the community in general and the institution in particular will be best served. (p. 1413)

* * * *

The right to administer educational institutions can plainly not include the right to maladminister. Regulations can be made to prevent the housing of an educational institution in unhealthy surroundings as also to prevent the setting up or continuation of an educational institution without qualified teachers. The State can prescribe regulations to ensure the excellence of the institution. Prescription of standards for educational institutions does not militate against the right of the minority to administer the institutions. Regulations made in the true interests of efficiency of instruction, discipline, health, sanitation, morality, public order and the like may undoubtedly be imposed. Such regulations are not restrictions on the substance of the right which is guaranteed: they secure the proper functioning of the institution, in matters educational (see observations of Shaj, J., in *Rev. Sidhrajbhai Sabhai*, (1963) 3 S.C.R. 837 at p.850 : AIR 1963 S.C. 540 (supra)). Further, as observed by Hidayatullah, C.J., in the case of *Very Rev. Mother Provincial* (supra) the standards concern the body politic and are dictated by considerations of the advancement of the country and its people. Therefore, if universities establish syllabi for examinations they must be followed, subject however to special subjects which the institutions may seek to teach, and to a certain extent the State may also regulate the conditions of employment of teachers and the health and hygiene of students. Such regulations do not bear directly upon management as such although they may indirectly affect it. Yet the right of the State to regulate education, educational standards and allied matters

cannot be denied. The minority institutions cannot be allowed to fall below the standards of excellence expected of educational institutions, or under the guise of exclusive right of management, to decline to follow the general pattern. While the management must be left to them, they may be compelled to keep in step with Ors. . (pp. 1421 and 1422, para 90).

* * * *

Balance has, therefore, to be kept between the two objectives, that of ensuring the standard of excellence of the institution and that of preserving the right of the minorities to establish and administer their educational institutions. Regulations which embrace and reconcile the two objectives can be considered to be reasonable. (page 1423, para 94).

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So far as this aspect is concerned, I am of the view that it is permissible for the State to prescribe reasonable regulations like the one to which I have referred earlier and make it a condition precedent to the according of recognition or affiliation to a minority institution. It is not, however, permissible to prescribe conditions for recognition or affiliation which have the effect of impairing the right of the minority to establish and administer their educational institutions. Affiliation and recognition are, no doubt, not mentioned in Article 30(1), the position all the same remains that refusal to recognize or affiliate minority institutions unless they (the minorities) surrender the right to administer those institutions would have the effect of rendering the right guaranteed by Article 30(1) to be wholly illusory and indeed a teasing illusion. It is, in our opinion, not permissible to exact from the minorities in lieu of the recognition or affiliation of their institutions a price which would entail the abridgement or extinguishment of the right under Article 30(1). (page 1425, para 98)

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Another conclusion which follows from what has been discussed above is that a law which interferes with a minority's choice of qualified teachers or its disciplinary control over teachers and other members of the staff of the institution is void as being violative of Article 30(1). It is, of course, permissible for the State and its educational authorities to prescribe the qualifications of teachers, but once the teachers possessing the requisite qualifications are selected by the minorities for their educational institutions, the State would have no right to veto the selection of those teachers. The selection and appointment of teachers for an educational institution is one of the essential ingredients of the right to manage an educational institution and the minorities can plainly be not denied such right of selection and appointment without infringing Article 30(1). (pp. 1426 and 1427, para 103)

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Although disciplinary control over the teachers of a minority educational

institution would be with the governing council, regulations, in my opinion, can be made for ensuring proper conditions of service of the teachers and for securing a fair procedure in the matter of disciplinary action against the teachers. Such provisions which are calculated to safeguard the interest of teachers would result in security of tenure and thus inevitably attract competent persons for the posts of teachers. Such a provision would also eliminate a potential cause of frustration amongst the teachers. Regulations made for this purpose should be considered to be in the interest of minority educational institutions and as such they would not violate Article 30(1). (page 1427, para 105)

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The opinion expressed by this Court in *Re Kerala Education Bill* (supra) was of an advisory character and though great weight should be attached to it because of its persuasive value, the said opinion cannot override the opinion subsequently expressed by this Court in contested cases. It is the law declared by this Court in the subsequent contested cases which would have a binding effect. The words "as at present advised" as well as the preceding sentence indicate that the view expressed by this Court in *Re Kerala Education Bill* in this respect was hesitant and tentative and not a final view in the matter. It has been pointed out that AIR 1944 73 (Federal Court) , Spens, C.J., referral to an observation made in the case of *Attorney-General for Ontario v. Attorney-General for Canada* 1912 A.C.C. 571 that the advisory opinion of the Court would have no more effect than the opinion of the law Officers. I need not dilate upon this aspect of the matter because I am of the opinion that the view expressed by this Court in subsequent cases referred to above by applying the general principles laid down in the *Re Kerala Education Bill* is correct and calls for no interference. (page 1429, para 108).

Mathew, J. (on behalf of himself and Chandrachud, J.) stated:

No right, however absolute, can be free from regulation. The Privy Council said in *Commonwealth of Australia v. Bank of New South Wales* 1950 A.C.C. 235, 310 that regulation of freedom of trade and commerce is compatible with their absolute freedom; that Section 92 of the Australian Commonwealth Act is violated only when an Act restricts commerce directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote. Likewise, the fact that trade and commerce are absolutely free under Article 30(1) of the Constitution is compatible with their regulation which will not amount to restriction. (page 1441, para 173)

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The question to be asked and answered is whether the particular measure is regulatory or whether it crosses the zone of permissible regulation and enters the forbidden territory of restrictions or abridgement. So, even if an educational institution established by a religious or linguistic majority does not seek recognition, affiliation or aid, its activity can be regulated in various ways

provided the regulations do not take away or abridge the guaranteed right. Regular tax measures, economic regulations, social welfare legislation, wage and hour legislation and similar measures may, of course have some effect upon the right under Article 30(1). But where the burden is the same as that borne by Ors. engaged in different forms of activity, the similar impact on the right seems clearly insufficient to constitute an abridgment. If an educational institution established by a religious minority seeks no recognition, affiliation or aid, the State may have no right to prescribe the curriculum, syllabi or the qualification of the teachers.

175. We find it impossible to subscribe to the proposition that State necessity is the criterion for deciding whether a regulation imposed on an educational institution takes away or abridges the right Under Article 30(1). If a legislature can impose any regulation which it thinks necessary to protect what in its view is in the interest of the State or society, the right under Article 30(1) will cease to be a fundamental right. It sounds paradoxical that a right which the Constitution makers wanted to be absolute can be subjected to regulations which need only satisfy the nebulous and elastic test of State necessity. The very purpose of incorporating this right in Part III of the Constitution in absolute terms in marked contrast with the other fundamental rights was to withdraw it from the reach of the majority. To subject the right today to regulations dictated by the protean concept of State necessity as conceived by the majority would be to subvert the very purpose for which the right was given.

176. What then are the additional regulations which can legitimately be imposed upon an educational institution established and administered by a religious or linguistic minority which imparts general secular education and seeks recognition or affiliation?

177. Recognition or affiliation is granted on the basis of the excellence of an educational institution, namely, that it has reached the educational standard set up by the university. Recognition or affiliation is sought for the purpose enabling the students in an educational institution to sit for an examination to be conducted by the university and to obtain a degree conferred by the University. For that purpose, the students should have to be coached in such a manner so as to obtain the standard of education prescribed by the university. Recognition or affiliation creates an interest in the university to ensure that the educational institution is maintained for the purpose intended and any regulation which will subserve or advance that purpose will be reasonable and no educational institution established and administered by a religious or linguistic minority can claim recognition or affiliation without submitting to those regulations. That is the price of recognition or affiliation: but this does not mean that it should submit to a regulation stipulating for surrender of a right or freedom guaranteed by the Constitution, which is unrelated to the purpose of recognition or affiliation. In other words, recognition or affiliation is a facility which the university grants to an educational institution, for the purpose of enabling the students there to sit

for an examination to be conducted by the university in the prescribed subjects and to obtain the degree conferred by the university, and therefore, it stands to reason to hold that no regulation which is unrelated to the purpose can be imposed. If, besides recognition or affiliation, an educational institution conducted by a religious minority is granted aid, further regulations for ensuring that the aid is utilized for the purpose for which it is granted will be permissible. The heart of the matter is that no educational institution established by a religious or linguistic minority can claim total immunity from regulations by the legislature or the university if it wants affiliation or recognition; but the character of the permissible regulations must depend upon their purpose: As we said, such regulations will be permissible if they are relevant to the purpose of securing or promoting the object of recognition or affiliation. There will be borderline cases where it is difficult to decide whether a regulation really subserves the purpose of recognition or affiliation. But that does not affect the question of principle. In every case, when the reasonableness of a regulation comes up for consideration before the Court, the question to be asked and answered is whether the regulation is calculated to subserve or will in effect subserve the purpose of recognition or affiliation, namely, the excellence of the institution as a vehicle for general secular education to the minority community and to other persons who resort to it. The question whether a regulation is in the general interest of the public has no relevance, if it does not advance the excellence of the institution as a vehicle for general secular education as, ex-hypothesi, the only permissible regulations are those which secure the effectiveness of the purpose of the facility, namely, the excellence of the educational institutions in respect of their educational standards. This is the reason why this Court has time and again said that the question whether a particular regulation is calculated to advance the general public interest is of no consequence if it is not conducive to the interests of the minority community and those persons who resort to it. (pp. 1442 and 1443).

We hope we shall not lay ourselves open to the charge of disrespect or discrimination if we restrain our temptation to quote from the judgments of Reddy, J., Beg, J. and Dwivedi, J., lest we should encumber this judgment in regions where the exposition of the law has been clear enough.

7. In *The Gandhi Faiz-E-Am College, Shahjahanpur Vs. University of Agra and Another*, a three Judge Bench of the Supreme Court by a majority of two to one, upheld the provisions of Section 14A of the Agra University Act in its operation on the minority institution, The A.V. Middle School, Shahjahanpur. The decisions were surveyed. Mathew, J. dissented. The question considered was whether the University directive obliging the college in question to take two representatives, namely, the Principal of the College and one representative of the teachers of the College on the Managing Committee, would amount to an unwarranted violation of the fundamental right under Article 30(1). The majority held that it would not, while Mathew, J. held that it would. Krishna Iyer, J. speaking for the majority observed:

The various decisions of this Court where legislative fetters have been struck down are cases in contrast. There the rules maim; here they improve. There the input upsets the balance; here the addition is minimal and strengthens from within. There, are external mandates to approve; here an internal principal is proposed to be dovetailed to make administration more proficient without injury to independent action. (para 23, page 1828)

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24. In all these cases administrative autonomy is imperilled transgressing purely regulatory limits. In our case autonomy is virtually left intact and refurbishing, not restructuring, is prescribed The core of the right is not gouged out at all and the regulation is at once reasonable and calculated to promote excellence of the institution -- a text book instance of constitutional conditions. (page 1829)

Mathew, J. in his dissenting judgment stated:

41. The determination of the composition of the body to administer the educational institution established by a religious minority must be left to the minority as that is the core of the right to administer. Regulations to prevent maladministration by that body are permissible. As the right to determine the composition of the body which will administer the educational institution is the very essence of the right to administer guaranteed to the religious or linguistic minority under Article 30(1), any interference in that area by an outside authority cannot be anything but an abridgment of that right. The religious or linguistic minority must be given the freedom to constitute the agency through which it proposes to administer the educational institution established by it as that is what Article 30(1) guarantees. The right to shape its creation is one thing: the right to regulate the manner in which it would function after it has come into being is Anr. . Regulations are permissible to prevent maladministration but they can only relate to the manner of administration after the body which is to administer has come into being. (page 1834)

8. We have sketched in as brief a compass as possible the principles, in the right of which our decision on the impugned provisions must rest. We would stress one or two things which emerge from the decisions referred to. In the first place we would notice that the stand taken by the Supreme Court in the earlier case in *In re Kerala Education Bill 1957* AIR 1958 S.C. 956 in respect of the provisions felt to come perilously near to violating the right under Article 30(1), and which were eventually passed by the Court [clauses 7, 10, 11(1), 12(1), (2), (3) and (5)] has been somewhat modified, if not departed from, by the later decisions: see 1969 K.L.J. 863 at 889, 1971 S.C. 1389 at 1401, 1406-1407, 1429 etc. Next, we would emphasise that only regulations and not restrictions are permissible on the right guaranteed under Article 30(1); and even these regulations must be regulations in the interest of the minority institutions themselves. The passages in the judgments which we have extracted make this aspect sufficiently clear. The question when a regulation widens into a restriction, or when a restriction

straitens into a regulation must necessarily be a process of judicial ingenuity. With these remarks we proceed to examine the sections impugned.

9. Section 2 Clause 27 of the Act defines "teacher" thus:

"teacher" means a principal, professor, associate professor, assistant professor, reader, lecturer, instructor, or such other person imparting instruction or supervising research in any of the colleges or recognised institutions and whose appointment has been approved by the University;

This has to be read along with Section 57 Clause 9 of the Act which provides that every appointment of a teacher under the section shall be reported to the University for approval. The Full Bench of this Court in *V. Rev. Mother Provincial v. State of Kerala* 1969 K.L.J. 863 had occasion to notice the similar provision contained in Sub-section 5 of Section 53 of the 1969 Act which required the recognition or approval of the University for all appointments. Construing the provisions of Sub-sections 1, 2 and 3 of Section 53 of the 1969 Act which provided for appointment to the post of the Principal of a College, and which required the appointment to that post also to be subject to approval by the University it was pointed out that there can be no objection to the appointment of the Principal or of any other member of the staff being subject to the approval by some authority of the University so long as disapproval can be only on the ground that the person appointed has not the requisite qualifications. It was also observed that if the disapproval is not only to be on some stated grounds but is to be left entirely to the will and pleasure of the approving authority, that would be to deprive the educational agency of its power of appointment and would offend Article 19(1)(f) and Article 30(1). The decision was confirmed by the Supreme Court in *State of Kerala, etc. Vs. Very Rev. Mother Provincial, etc.,* . In the light of the principle thus stated we would pass Section 2(27) read with Section 57(9) of the Act subject to the limitation that the University is bound to grant approval once a teacher appointed is found to possess the requisite qualifications prescribed for appointment, and that any arbitrary or unwarranted refusal of approval to an appointment would violate the provisions of Article 30(1).

10. Section 5 of the Act provides for the powers of the University. Clause (xiii) to which exception has been taken gives the University the power, with the previous sanction of the Government, to regulate the emoluments and pattern and to prescribe the duties and conditions of service of the teachers and non-teaching staff in private colleges. The provision appears to us to be dangerously near the border-line between regulation and restriction of the right under Article 30(1) of the Constitution. Indeed, if not embanked within its proper limit, there is danger of its crossing the Rubicon and running against the teeth of the mandate of Article 30(1). While regulation of emoluments and pattern of the staff might be passed as provisions meant to ensure the excellence of the institution and uniformity of standards, we feel that the power to prescribe the duties and conditions of service of both the teaching and non-teaching staff of private

colleges is couched in too wide terms. We have extracted earlier, passages from the decision of the Full Bench of this Court in 1969 K.L.J. 863 , and that of the Supreme Court in State of Kerala, etc. Vs. Very Rev. Mother Provincial, etc., which confirmed the same. In the St. Xaviers College case (8), we have noticed the observations of Chief Justice Ray at pages 1398 and 1399-1400; of Khanna, J. at pages 1413 and 1421-1422 and 1423; of Mathew, J. at pages 1441 and 1442-1443. In the light of the principles so stated we think that the right of prescribing the conditions of service provided for u/s 5(xiii) must be confined to securing the excellence of education and to maintaining the standards and discipline in the institution, and not be allowed to trench upon matters pertaining to the management and administration of the institution which must vest essentially in the minority itself. So limited, we are prepared to pass the section as constitutional.

11. Section 51 read with Sections 52 and 53 and Section 57 Clauses 2 and 4 were objected to. Section 51 defines "corporate management" and "unitary management". The definitions read as follows:

51. (a) "corporate management" means an educational agency which manages more than one private college;

(b) "unitary management" means an educational agency which manages a private college.

Section 52 enjoins on a unitary management to constitute in accordance with the provisions of the Statutes a governing body consisting of the members specified in the section. The members so specified are:

(a) the principal of the private college;

(b) the manager of the private college;

(c) a person nominated by the University in accordance with the provisions in that behalf contained in the Statutes;

(d) a person nominated by the Government;

(e) a person elected in accordance with such procedure as may be prescribed by the Statutes, by the permanent teachers of the private college from among themselves;

(f) the Chairman of the College Union;

(g) a person elected in accordance with such procedure as may be prescribed by the Statutes, by the permanent members of the non-teaching staff of the private college from among themselves; and

(k) not more than six persons nominated by the unitary management.

Under Sub-section (2) the manager of the private college is to be the Chairman of the governing body. Sub-section (3) provides:

It shall be the duty of the governing body to advise the unitary management in all matters relating to the administration of the private college, in accordance with the provisions of this Act and the Statutes, Ordinances, Regulations, rules, bye-laws and orders made thereunder.

Sub-section (4) enacts that the decisions of the governing body shall be on the basis of simple majority of the members present and voting. Section 53 contains an almost similar provision for a managing council for all the private colleges under a corporate management. The Council is to consist of the following members:

(a) one principal by rotation in such manner as may be prescribed by the Statutes;

(b) the manager of the private colleges;

(c) a person nominated by the University in accordance with the provisions in that behalf contained in the Statutes;

(d) a person nominated by the Government;

(e) two persons elected in accordance with such procedure as may be prescribed by the Statutes, by the permanent teachers of all the private colleges, from among themselves;

(f) a person elected by the Chairmen of the College Unions of all the private colleges, from among themselves;

(g) one person elected in accordance with such procedure as may be prescribed by the Statutes, by the permanent members of the non-teaching staff of all the private colleges from among themselves; and

(h) not more than fifteen persons nominated by the corporate management.

The corporate manager of the private colleges is to be the Chairman of the Managing Council. Sub-section (3) reads:

It shall be the duty of the managing council to advise the corporate management in all matters relating to the administration of the private colleges, in accordance with the provisions of this Act and the Statutes, Ordinances, Regulations, rules, bye-laws and orders made thereunder.

Sub Section (4) provides that the decisions of the managing council shall be on the basis of simple majority. These sections have been attacked as constituting a serious in road on the right of management and administration of the institution vested by the Constitution in the minority itself. Prima facie, at any rate, the attack appears to us to be well-founded. But the learned Advocate-General stressed before us that the Council is a purely advisory body, and that there is no provision in the Act even for rendering the advice tendered by the Council binding on the minority institution. What the Council in such circumstance is expected to serve, is not for us to conjecture. If the legislature wishes to have it

as an unnecessary cog in the administrative wheel or set up, we see nothing to deny it that luxury. By confining the power of the governing body u/s 52 and of the managing council u/s 53, to purely advisory functions, and with no provision to make the advice binding on the minority institution, we see no ground to hold that these sections violate Article 30(1). We would confine the provisions of the sections accordingly, and were they to have any wider effect or purpose than purely advisory, we would hold that they trench on Article 30(1) of the Constitution.

12. The counsel for the Petitioner in O.P. No. 4025 of 1974 raised a special point that his client has been owning four private colleges and running them as separate and independent units for purposes of management and administration. He contended that he cannot be obliged to club all the four institutions and keep them under a common Managing Council u/s 53 and to maintain a common roll of seniority in respect of all the four institutions; or to appoint a common manager for all the four institutions u/s 54. There is force in the objection to Section 53 on the ground of its superimposing a committee on the minority institution. But as the body constituted u/s 53 is purely advisory without the advice being even made binding on the minorities, we would overrule the objection to Section 53 raised by counsel for the Petitioner in O.P. No. 4025 of 1974. We see no serious objection to Section 54 providing for appointment of a Manager. The appointment and removal are by the management with intimation to the University, and the Manager derives his powers by delegation from the management. The right of disciplinary action given to the University against the Manager and the provisions of Sub-section (7) allowing withdrawal of aid, appear to us to be too drastic and to violate Article 30. We would strike down Sub-section (7) of Section 54.

13. Section 57 Clauses 2 and 4 were the provisions next objected to. Section 57 deals with appointment of teachers in private colleges. Clause 2 deals with appointment of Principals and reads:

Appointments of principals shall be made by the educational agency by promotion from among the teachers of the college or of all the colleges, as the case may be, or by direct recruitment.

Clause 4 reads:

Appointments to the posts, other than those referred to in Sub-sections (1) and (2), shall be made by the educational agency by promotion from among the teachers of the college or of all the colleges, as the case may be, on the basis of seniority-cum-fitness, or, if none among them is fit for promotion, by direct recruitment.

In referring to the Headmaster of a private aided school, a Full Bench of this Court observed in *Rt. Rev. Aldo Maria Patroni v. E.C. Kesavan and Ors.* 1964 KLT 791 (F.B.).

The post of the headmaster is of pivotal importance in the life of a school. Around him wheels the tone and temper of the institution; on him depends the continuity of its traditions, the maintenance of discipline and the efficiency of its teaching. The right to choose the headmaster is perhaps the most important facet of the right to administer a school; and we must hold that the imposition of any trammel thereon -- except to the extent of prescribing the requisite qualifications and experience -- cannot but be considered as a violation of the right guaranteed by Article 30(1) of the Constitution. To hold otherwise will be to make the right "a teasing illusion, a promise of unreality".(Para 14).

In the Full Bench decision in 1969 K.L.J. 863 referred to previously the Full Bench of this Court applied the principles thus stated about a Headmaster to the Principal of a College -- see at pages 884, 885. That being the pivotal position of the Principal of an institution, Section 57(2) cannot pass the test of constitutionality if it places any trammels on the right of selection by the management. We do not understand Sub-section (2) as in any manner restricting the field of choice of the management, or of obliging it to resort to direct recruitment only after exhausting the teachers of the colleges. Although the wording of Sub-section 2 may lend some countenance to this interpretation, it has to be understood as placing no fetter on the right of the management to choose the Principal, whether by direct recruitment or by promotion; and thus understood, we are prepared to pass the section.

14. Sub-section (3) of the section appears, at first blush, to stand on a different footing. Even while making an appointment by promotion, the minority institution is entitled to choose the one best fitted to serve the interests of the minorities, subject to the person satisfying the standards prescribed by the University to keep up the excellence of education, discipline in the institution and the like. To oblige a minority institution while making an appointment by promotion to follow the principle of seniority-cum-fitness might seem to place an unwarranted fetter on the constitutional guarantee under Article 30. But the concept of seniority-cum-fitness was explained by the Full Bench of this Court in 1969 K.L.J. 863 at para 38, page 886. It was stated that the concept means that due and equal regard should be paid both to seniority and to fitness and that since fitness is a matter of degree, a senior person can be overlooked in favour of a junior who is demonstrably more fit for appointment than he is. And fitness in the interests of the minority institution is certainly a relevant criterion in the choice. After the pronouncement of the Full Bench, there was an amendment effected by the Kerala Act 13 of 1971. Thereafter, the question again came up before a Division Bench of this Court in Rt. Rev. Dr. M.M. John v. Government of Kerala and Ors. 1971 KLT 875. It was held by the Division Bench that the amendment had made no change to the principle of seniority-cum-fitness as expounded by the Full Bench in 1969 K.L.J. 863. A Full Bench of this Court in W.A. No. 324 of 1973 ruled that there was no need to reconsider the view expressed in 1969 K.L.J. 863 regarding the concept of seniority-cum-fitness. In the light of the principles thus expressed regarding seniority-cum-fitness, we do

not think any exception can be taken to Sub-section (3) of Section 57. But Sub-section (4) of the section seems to suffer from the vice of interference with the free and unfettered choice of the management in the selection of teachers by confining it, in the first instance to promotion from among the existing staff, and only if none of them is found fit, to make the appointment by direct recruitment. But an almost similar provision, viz. Section 53(7) of the 1969 Act was upheld by the Full Bench of this Court in 1969 K.L.J. 863 at 886, and the decision was confirmed in *State of Kerala, etc. Vs. Very Rev. Mother Provincial, etc.*, . In view of these decisions, we uphold the said provision.

15. Sub-section (9) of Section 57 requiring approval of the appointment by the University and Sub-section (10) providing the right of appeal to the Appellate Tribunal by any person aggrieved by any appointment were objected to. Regarding approval, we have already held that approval has to be limited to examining the possession of the requisite qualifications and cannot be refused on arbitrary grounds. So understood, we find nothing wrong in the provisions of sub -- Section (9). We are prepared also to pass Sub-section (10) which provides a right of appeal to any person aggrieved by any order of appointment to the Appellate Tribunal. We think it was meant to ensure excellence of education and preserve proper standards. As to the apprehension expressed that the right of appeal given to "any person" may open the door too wide, we think that the requirement that such person should be one "aggrieved" provides a salutary limitation.

16. The proviso to Sub-section (1) of Section 59 and Sub-section (8) of the said section were attacked. Section 59 provides for probation for one year within a period of two years for teachers of private colleges. The proviso enacts that in exceptional cases, the probation may be extended by a period not exceeding one year, subject to the prior approval of the syndicate. In matters of disciplinary control, why the extension of the period of probation of a probationer should be subject to prior approval of such fluctuating body as the syndicate, passes comprehension. We do not think we can pass the provision as in the interests of the minority institution. Sub-section (6) provides for discharge of a probationer found unsuitable. In such cases a right of appeal is given by Sub-section (8) to the discharged probationer to the Appellate Tribunal. There may be nothing wrong on principle to concede a right of appeal against discharge of a probationer. But to throw open the entire field regarding suitability of the probationer may well trench on the minority's right. Suitability from the point of view of the minority's interests would be the proper consideration.

17. Section 60 is the next section objected to. It deals with the conditions of service of teachers of private colleges. Sub-section (1) provides that the conditions of service relating to pay, pension, provident fund, gratuity, insurance and age of retirement, shall be such as may be prescribed by the statutes. Sub-section (3) provides for a report to the Vice Chancellor of the disciplinary action taken under Sub-section (2); and Sub-section (7) provides for a right of appeal

to a teacher aggrieved by disciplinary proceedings taken after the commencement of the Act. These are the sub-sections attacked. These provisions again appear to us to be in no way offensive and little was said against their validity.

18. Section 61 relates to past disputes relating to service conditions of teachers. Little was said to invalidate the section.

19. Section 62 appears offensive. It reads:

62. Membership of local authorities, etc. -- (1) A teacher of a private college shall not be disqualified for continuing as such teacher merely on the ground that he has been elected or nominated as a member of a local authority or of the Legislative Assembly of the State, or of Parliament.

(2) A teacher elected or nominated as a member of the Legislative Assembly of the State or of Parliament shall be entitled to treat the period of his membership of the Legislative Assembly or of Parliament as on leave without salary and allowances.

(3) A teacher referred to in Sub-section (2) shall also be entitled to count the period of his membership of the Legislative Assembly or of Parliament for the purposes of pension, seniority and increments.

The politician-teacher is taken good care of, by the section. It may be a matter of legislative policy to kindle the instinct of public service even in the minds of teachers. But we cannot deny ourselves the responsibility of examining how far the same can go well with minorities' rights under Article 30. The section compulsorily obliges the politician-teacher to be on leave throughout his term as a member of Parliament or Legislature and at the same time, count the period for purposes of pension, seniority and increments. It ill-goes with the sense of earnestness and dedication to the task which we would expect of a teacher; and whatever be the difference between legislative policy and judicial approach, we cannot regard these provisions as in the interests of the minorities or for securing the excellence of education or uniformity of standards. It appears to be an unwarranted interference with the rights of minorities. We would strike down Section 62 as unconstitutional.

20. Section 63 makes applicable the provisions of Chapter VIII of the Kerala University Act (beginning with Section 51) to non-teaching staff of private colleges. Whatever we have said in regard to the sections in these Chapters dealt with in this judgment in relation to teaching staff would have application in regard to non-teaching staff also.

21. Section 65, dealing with the constitution of an Appellate Tribunal was objected to. But very little was said to invalidate it. Section 67 requires compliance by all private colleges with the provisions of Chapter VIII. There will be no need to comply with the provisions held herein to be unconstitutional; and the remaining sections read down or confined in their operation, would be

complied with only in the sense explained.

22. Section 68 providing for penalty for non-compliance with the provisions of the Act, was objected to. The section provides for the withholding or discontinuing aid or grant for disobedience of the provisions of the section. We can find nothing objectionable in the same, so long as the sections whose non-compliance is complained of, are given the limited sense as noticed in this judgment. Section 69 was objected to. But the same has been deleted by Act 11 of 1975. We need not therefore consider the provisions of this section.

23. In the result we would summarise our conclusions as follows:

Section 2(27) and Section 57(9) do not seem to violate Article 30, if approval were to be understood, as it should be, as being obligatory where the teacher concerned satisfies the qualifications prescribed. Section 5(xiii) of the Act should also be limited to prescribing conditions of service to secure excellence of educational standards and not so as to trench upon the minority's right of management and administration. Section 51 by itself is inoffensive. Sections 52 and 53 appear to be meant to deprive the minority institutions of their right of management and administration; but as the governing body and the Managing Council constituted by these sections are purely advisory, and the advice is not even made binding on the minorities, we would pass the sections. We overrule the special objection raised to Section 53 by the Petitioner in O.P. No. 4025 of 1974. Section 54 dealing with the appointment of a Manager is not objectionable, except Sub-section (7), which is too drastic. Only Sub-section (4) of Section 57 is valid. The rest of the section is valid, reading the sub-sections in the way in which we have explained them. The right of approval given to the syndicate by the proviso to Sub-section (1) of Section 59 in respect of the extension of probation of a probationer, is invalid. There seems, on principle to be no objection to the right of appeal conferred by Sub-section 8 of Section 59, but to throw open in appeal, again, the whole range of enquiry as to the suitability of the probationer to continue in service or to be discharged, seems to be a violation of the minority's right of management and administration. Section 60 Sub-sections (1), (5) and (7) do not offend Article 30(1). Section 61 is not invalid, Section 62 is unconstitutional. The provisions of Chapters V and VIII made applicable to non-teaching staff by Section 63, must be understood subject to our decision or observations about them, made in relation to the teaching staff. Section 65 is not invalid. Section 68 would be limited in its application only in compliance with the sections held valid herein, and to compliance of the sections in the sense explained or limited by this judgment. We would grant the Petitioners a declaration as stated in this paragraph. The original petitions are allowed to the extent indicated above. No costs.