KERALA HIGH COURT

V. Rev. Mother Provincial

Vs

State of Kerala

O. P. Nos. 1450, 1811, 1915, 1920 1957, 1966, 2135, 2174, 2186, 2187, 2206, 2207, 2239, 2252, 2339, 2351, 2441, 2450, 2451, 2495, 2553, 2674, 2675, 2676, 2680, 2688, 2729, 2769, 2770, 2774, 2796, 2839, 2863, 2946, 2958 and 3193 of 1969

(P.T. Raman Nayar, C.J., P. Govindan Nair and V.P. Gopalan Nambiyar, JJ.)

19.09.1969

JUDGMENT

P.T. Raman Nayar, C.J.,

1. The petitioners in these applications brought under Article 226 of the Constitution are persons running affiliated private colleges in the districts to which the Kerala University Act, 1969 (for short, the 'Act') applies, namely, the revenue districts of Trivandrum, Quilon, Alleppey, Kottayam and Ernakulam. The colleges, all of which receive aid out of State funds and all of which are open to the general public, belong to the petitioners in the sense that legal title to, though perhaps no beneficial interest in, what are ordinarily regarded as the properties of a college, namely, the lands and buildings and other properties, moveable and immoveable, required to run it, vests in them. The petitioners assail certain provisions of Chapters VIII and IX of the Act on the score that these provisions are violative of the fundamental rights vouchsafed by Articles 14, 19 (1) (f), 26 and 31 of the Constitution. By far the majority of the petitioners (thirty-three out of thirty-six) run what might be called minority institutions, those running what might be called majority institutions being in a very small minority. The petitioners running the minority institutions rely also on Article 30 (1)-that indeed is their principal weapon or attack.

2. The State of Kerala (hereinafter referred to as 'the Government') is the principal contesting respondent. The University of Kerala, also a respondent, has filed a counter-affidavit which is but a faithful word-for-word reproduction of the Government's voice, but, by an additional counter-affidavit, it has put forward a contention to meet the attack based on Article 30 (1), which the Government has not chosen to take (though counsel was at pains to make out that Government was by no means averse to reaping any benefit therefrom) and which might more acceptably have come from a private party intent only on defeating the petitioners at any cost. If we expected to derive any assistance from the stand taken by the University as a high independent body viewing the matter objectively from an academic eminence, we have been disappointed.

3. The Act makes provision for the appointment and conditions of service of teachers of private

colleges. These teachers are naturally interested in defending those provisions of the Act that benefit them; and, for that purpose, the President of the All-Kerala Private College Teachers' Association has been allowed to come on record as a respondent on behalf of the members of the Association.

4. It might be as well to begin with a conspectus of the impugned provisions of the Act; and, for that purpose, it is necessary to refer to some of the definitions in Section 2 thereof. "College", according to clause (6) of the section, means an institution maintained by, or affiliated to, the University, in which instruction is provided in accordance with the provisions of the statutes, ordinances and regulations; and Section 74 (1) says that all colleges existing in the University area immediately before the commencement of the Act shall stand affiliated to the University. Clause (8) of the section defines, "educational agency" as any person or body of persons who or which establishes and maintains a private college, while clause (13) tells us that "private college" means a college maintained by an agency other than the Government or the University and affiliated to the University. "Principal", clause (12) says, means the head of a college. "Teacher", according to clause (24), means a 'Principal,' Professor, Assistant Professor, Reader, Lecturer, Instructor or such other person imparting instruction or supervising research in any of the colleges or recognized institutions and whose appointment has been approved by the University; while a "recognized teacher", according to clause (17), is a person employed as a teacher in an affiliated institution and whose appointment has been approved by the University.

5. Chapter VIII of the Act deals with the management of private colleges including the appointment and conditions of service of teachers and the non-teaching staff of such colleges. A person or body of persons who or which manages more than one private college is called a corporate management (see Section 47); and separate, though similar provision is made in Sections 48 and 49 for the constitution of a managing body for colleges not under corporate management and those under corporate management respectively, the managing body being called "governing body" in the case of the former and, "managing council" in the case of the latter. (We shall use the term "managing body" to include both). In either case, it is for the educational agency-we shall use this expression, as the Act itself does in many sections, to include also the "corporate management" of Section 47 to constitute the managing body; in the one case it is for the college under its management, and, in the other, for all the colleges under its management. This body is to consist of the principal of the college or one of the principals of the colleges, as the case may be; the manager appointed under Section 50; a person nominated by the University; a person nominated by the Government; a person elected by the permanent teachers of the college from among themselves in the case of colleges not under corporate management and two such persons in the case of colleges under corporate management; and not more than six persons nominated by the educational agency in the case of colleges of the former kind and not more than fifteen such persons in the case of colleges of the latter kind. This managing body is to be a body corporate having perpetual succession and a common seal; the manager is to be its chairman, a member thereof is to hold office for a period of four years from the date of its constitution; its duty is to administer the college or colleges in accordance with the provisions of the Act, and the statutes, ordinances, regulations, bye-laws and orders made there under-see Sections 30 to 36; its powers and functions, the removal of its members and the procedure to be followed by it, including the delegation of its powers, are to be prescribed by the statutes; and its decisions are to be taken at meetings on the basis of a simple majority of the members present and voting.

6. Section 50 of the Act deals with the manager who, as we have seen, is the chairman of the managing body. The manager is to be appointed by the educational agency for the college or colleges under its management, as the case may be; his appointment and removal is to be intimated to the University by the educational agency; his duty is to give effect to the decisions of the managing body; he is to exercise such powers and discharge such duties as may be delegated to him by the educational agency or the managing body; and suits by or against a college are to be instituted by or against him.

7. Under Section 54, the qualifications of teachers are to be prescribed by the Regulations. Section 53 governs the appointment of such teachers. The post of the principal of a college is a selection post and appointment thereto is to be made by the managing body from among the teachers of the college or of all the colleges, as the case may be, an outsider being appointed only if there is no suitable person in such college or colleges. The appointment should be made having regard to seniority and merit and is subject to the approval of the Syndicate. Appointment to the lowest grade of teacher in each department of the college is to be made by the managing body by direct recruitment on the basis of merit and all such appointments are to be reported to the University for recognition which, in the light of the definition of "recognised teacher" in Section 2(17) of the Act, means, for approval. Before any such appointment is made, the post is to be advertised in such manner as may be prescribed by the statutes. Appointments to posts in what might be called intermediate grades, namely, grades between the lowest grade and the principal, are to be made by the managing body by promotion from among the teachers or the college or of all the colleges, as the case may be, on the basis of seniority-cum-fitness, direct recruitment being resorted to only if there is no person possessing the qualifications prescribed for the post.

8. Section 55 provides for the probation of teachers. Sub-section (1) thereof prescribes probation for a period or one year within a period of two years and there is a proviso which says that in exceptional cases the period or probation may be extended by a period not exceeding one year, subject to the prior approval of the Syndicate. There is also an explanation which says that probation undergone by a teacher before the commencement of the Act shall be deemed to be probation for the purposes of the sub-section, provided that such probation was within a period of two years immediately before the commencement of the Act. By sub-section (2), the managing body is authorized to terminate the probation of a probationer for want of vacancy; while sub-section (3) gives a discharged probationer preference in the matter of future appointments to the same post. Sub-section (4) requires the managing body to confirm a teacher who has satisfactorily completed his probation in the post, if the post is substantively vacant; and, if it is not, or, if the appointment is for a specific period, to allow the teacher to continue for the remaining period of his appointment. Sub-section (5) says that if, on the expiry of the prescribed period of probation, the managing body considers the teacher not suitable for continuance in the post, it shall discharge or revert him, as the case may be, but before doing so shall give him a reasonable opportunity of showing cause against such discharge or reversion. Sub-section (6) requires the managing body to make up its mind in the matter within one month of the expiry of the prescribed period of probation, and, if the teacher is not discharged or reverted, as the case may be, he shall be deemed to have been confirmed in the post if the post is substantively vacant, while sub-section (7) gives a discharged or reverted probationer a right of appeal to the Vice-Chancellor within sixty days of his getting a copy of the order discharging or reverting him.

9. Section 56 deals with the conditions of service of teachers. Sub-section (1) of the section says that such conditions including conditions relating to pay, pension, provident fund, gratuity, insurance and age of retirement shall be such as may be prescribed by the statutes. Sub-section (2) requires the managing body to obtain the previous sanction or the Vice-Chancellor before dismissing or removing a teacher or reducing him in rank or placing him under suspension for a continuous period exceeding fifteen days. Sub-section (3) enjoins that a teacher shall be given a reasonable opportunity of showing cause before any disciplinary action is taken against him, while sub-section (4) gives a punished teacher a right of appeal to the Syndicate which is given the power to order reinstatement in cases of wrongful removal or dismissal, and to order such other remedial measures as it deems fit which, the sub-section expressly provides, the managing body is bound to obey.

10. By Section 57 any pending dispute between the management and the teacher of a college relating to the latter's conditions of service is to be decided under the provisions of the Act and the statutes made thereunder, notwithstanding anything contained in any law for the time being in force or in any contract or in any judgment, decree or order of any Court or other authority. The section also provides for the reopening of any such dispute disposed of before the commencement of the Act, and for its decision under the provisions of the Act and the statutes made thereunder, on application made by the management or the teacher to the Vice-Chancellor within thirty days of the commencement, provided that the dispute arose after the 1st day of August, 1967, on which day the bill in respect of the Act was published.

11. Section 58 lays down that a teacher shall not be disqualified from continuing as a teacher merely on the ground that he has been elected as a member of the Legislative Assembly of the State or of Parliament or of a local authority, but at the same time requires him to be on leave during the period the Legislative Assembly or Parliament, as the case may be, is in session.

12. Section 59 applies the provisions of the chapter, mutatis mutandis, to the non-teaching staff of the colleges.

13. Section 60 gives colleges in existence at the commencement of the Act six months' time to comply with the provisions of the chapter, namely, Chapter VIII, and Section 61 provides for the disaffiliation of, or the discontinuance of grant to, any college which fails to comply with the provisions of the Act, after giving the educational agency and the managing body an opportunity of being heard.

14. The only provision in Chapter IX that is attacked is Section 63. The heading of that section reads, "Power to regulate the management of private colleges." Actually, the section does much more. If a grave situation arises in which the working of a college cannot be carried on because of default in the payment of the salary of the members of the staff of the college for a period of not less than three months, or the wilful closing down of a college except during a vacation for a period of not less than one month, or persistent default or refusal to carry out the duties imposed on the authorities of the college by the Act, Statutes, Ordinances or Regulations or Rules, or Bye-laws or lawful orders made thereunder, the Government may, after giving the managing body, the manager, and the educational agency, a reasonable opportunity of showing cause against the proposed action, appoint the University to manage the affairs of the college temporarily for a period not exceeding two years, if it considers it necessary to do so in the interest of the college.

On such appointment, the University gets all the powers and functions of the managing body, but is required to submit a monthly report of the decisions taken by it in connection with the management of the college to the managing body. The managing body can appeal against any such decision to the Government and the University is bound to modify its decisions in consonance with the orders made by the Government. The manager appointed by the managing body under Section 50 (1) continues in office and is bound to give effect to the decisions of the University. If he fails to do so, the University may remove him, after giving him an opportunity of being heard, and appoint another person in his place in consultation with the educational agency. A manager so removed has a right of appeal to the Government. The managing body may apply to Government for the termination of the appointment of the University to manage the affairs of the college, and the Government may terminate the appointment if it is satisfied that the circumstances no longer require it. The managing body and the educational agency shall be liable to pay to the University all expenses incurred by it from out of University funds for the management of the college, and any amount so due shall be a first charge on the assets of the college. The University is bound to maintain accounts for the income and expenditure of the college during the period of its management and should hand over the balance, if any, to the managing body on the termination of its management and the educational agency and the managing body has a right to inspect these accounts.

15. The scope and content of the several provisions of the Constitution relied upon by the petitioners are well settled by a series of decisions of the Supreme Court and here, as in most cases, the real difficulty lies in the application of the principles laid down in the decisions to the particular facts and circumstances of the case. Article 14 is attracted as much by persons situated alike, and not subject to reasonable classification having regard to the purpose to be served by an impugned statute, being treated differently, as by persons situated differently having regard to this purpose being treated alike. 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 - see *Sidhrajbhai v. State of Gujarat*[1]*,*

16. So far as the attack based on Articles 19 (1) (f) and 31 (1) is concerned, the principal contention of the respondents is that the right to administer is not property and that interference with such a right cannot attract these provisions of the Constitution. True, the right of management, whether it be of a beneficial owner or of an express trustee, or of a mahant or a shebait, or of a so-called trustee, hereditary or non-hereditary, of a temple, is not by itself property, any more than the right of management of a paid manager is. But it is an essential and important incident of holding property, and, where it stems from a legal or beneficial interest in property, any restriction on the exercise of that right is a restriction on the right to hold property vouchsafed by Article 19 (1) (f) and can be justified only as a reasonable restriction in the interests of the general public or for the protection of the interests of any Scheduled Tribe attracting clause (5) of that article. (The latter justification, namely, the protection of the interests of any Scheduled Tribe has not been attempted and may be ignored so far as these cases are concerned). In such a case, namely, where the right to manage stems from an interest in property, the right is not a right of bare management attracting the observation in AIR 1963 SC 540,

paragraph 7, that "interference with the right of bare management of an educational institution does not amount to infringement of the right to property under Article 19 (1) (f)" - see in this connection *Raghubir Singh v. Court of Wards*[2], where a law providing for the taking over of the management of an owner was struck down as offending Article 19 (1) (f). My right to hold my property includes the right to manage it as I please, and the fundamental right which Article 19 (1) (f) gives me to hold my property would be worth little if you could interfere with my management as you please unless, of course, you could justify the interference under Article 19 (5). If the right of an owner to manage his property were not guaranteed by Article 19 (1) (f), the Constitution need not have gone to the trouble of enacting Article 31A (1) (b) for the purpose of saving "the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property" from attack under Article 19. The necessary implication of this is that interference, except - when the conditions for attracting the saving are satisfied, would attract Article 19 - indeed Article 31A (1) (b) was introduced in its present form in 1955 (with retrospective effect) in order to get over AIR 1953 SC 373, and save a taking over from attack under Article 19 (1) (f) subject to the conditions and safeguards set out in the article.

17. Whether or not interference with a property-holder's right to manage can amount to deprivation of property within the meaning of clause (1) of Article 31, we do not think that clause, takes the petitioners any farther than Article 19 (1) (f). For, under that clause there can be a deprivation by authority of law, and the test would still be whether or not Article 19 (1) (f) is infringed. But, if there is a deprivation involving a transfer of the ownership or right to possession of any property to the "State" as defined in Article 12, clause (2) of Article 31 would be attracted and a law which

[1] AIR 1963 SC 540

[2] AIR 1953 SC 373

provides for such deprivation would be bad if the deprivation is not for a public purpose and if the law does not provide for compensation unless the saving in Article 31-A applies.

18. Two of the petitioners, namely, the Petitioners in O. P. Nos. 2339 and 2796 of 1969-they run what we have called majority institutions - are companies incorporated under the Indian Companies Act, and the Travencore Companies Act respectively. It is clear from the decision in *State Trading Corporation of India v. Commercial Tax Officer*[3], that they are not citizens and cannot claim the protection of Article 19. That they could have been registered under the Societies Registration Act, had such a law been in force at the time in the area concerned, makes no difference; nor does the decision just referred to countenance the tearing of the corporate veil for such a purpose. For reasons already stated, Article 31 (1) cannot help them although Article 31 (2) and Article 31A (1) (b) may apply. And, of course, the right under Article 30 (1) is not available to them.

19. The petitioners running minority institutions have not chosen to rely on Article 26 since Article 30 (1) gives them equal, possibly greater, protection with specific reference to educational institutions. Moreover, the applicability of Article 26 to educational institutions is, it would appear, a matter of doubt-see the observations of the Supreme Court in ***Azeez Basha v. Union of India, AIR 1968 SC 662, Para SO at p. 674***. Of the three petitioners running majority institutions, only one, namely, the petitioner in O. P. 2796 of 1969, the Nair Service Society

(which, as we have seen, is a company) has chosen to rely on Article 26. This it did, not in the petition as originally brought, but by an additional ground taken (by leave granted in C. M. P. No. 9288 of 1969) in the course of the hearing. That ground is taken in the following terms :-

> "The Nairs being a section of the Hindu denomination has a fundamental right to establish, administer and maintain educational institutions under Article 26 of the Constitution of India. The provisions in Chapters VIII and IX of the Kerala University Act are void inasmuch as they are opposed to fundamental rights guaranteed by the Constitution of India.

Even so no affidavit was filed in the main case averring the facts necessary to attract the article but we are prepared to treat the affidavit filed in the interlocutory application for leave (as, it would appear, the respondents have been content to do) as an affidavit in the main case. The facts are thus set out in paragraph 6 of that affidavit:- The Nairs constitute a section of the Hindu Religious denomination and have therefore under Article 26 of the Constitution of India the right to establish and maintain institutions for religious and charitable purposes and to administer such property in accordance with law. The Educational Institutions established by the Nair Service Society and affiliated to the University of Kerala are institutions established and administered for religious and charitable purposes - subject to public order, morality and health. Sections 49, 52, 53, 55, 57, 58, 59, 61 and 63 infringe the right guaranteed under Article 26 of the Constitution of India and are therefore void."

It will be noticed that what is averred is that the Nairs are a section of a religious

[3] AIR 1963 SC 1811

denomination (which might well be so since they are Hindus) and that the educational institutions established and administered by the Society are institutions established and administered for religious and charitable purposes within the meaning of Article 26 (which would appear to be doubtful in view of the observations of the Supreme Court already referred to). But the vital averment for attracting the article, namely; that the institutions were established and are being maintained for and on behalf of the Nair community is significantly absent; nor are we able to make out such an averment by implication.

20. It follows that the question whether the petitioners running majority institutions are entitled to the protection of Article 26 does not arise; and we wish to make it clear that we are expressing no opinion whatsoever as to the availability of that article.

21. So far as the minority institutions are concerned, they stand on the very same footing as the institutions considered in *In re Kerala Education Bill*[4]*,* which accorded to them the protection of Article 30 (1). They are institutions established and administered by religious heads like Bishops or heads or religious orders of the Roman Catholic and other Christian Churches for, and on behalf of, the particular religious minority concerned. The persons who establish the institutions and who administer them are themselves members of a religious minority of this country and act only as representatives of that minority; and if, as contended by the respondents, mainly by the University, more than this were required to show that an institution is an institution of a religious or linguistic minority or of a religious denomination or any section thereof, then Articles 26 and 30 might as well not have been enacted in the Constitution. In the *R. R. B. S. K. Patro v. State of Bihar*[5]*,* the Supreme Court was at pains to make out that the school in question was established

by the local Christian residents before according it the protection of Article 30 (1) only because of the contention that the school was established and was being administered by an alien corporation, the Church Missionary Society, London. It is not authority for the extreme contention advanced, namely, that even in the case of institutions established and administered by the local heads of a religious or linguistic minority for and on behalf of the minority, there must be the evidence that the members of the minority contributed funds for, or otherwise participated in, the establishment of the institution. And, as we have already pointed out, the religious heads are themselves members of the minority entitled to the protection of the article. Nor do we see any force in the further contention, taken by the University, that an institution established and administered by a minority ceases to be an institution of its choice, the moment it affiliates itself to a University and thus becomes subject to the control of the University in certain matters.

22. Although it was at one stage disputed that Christians were a minority, though not that Christianity was a religion, it was later conceded that Christians constitute a minority based on religion even in the area to which the Act applies. That being so, it is unnecessary to decide whether a minority within the meaning of Article 30 means a minority in the whole of India (which would mean that every linguistic group would be a minority even in its own linguistic State), or a minority in a particular State, or a

[4]1957, AIR 1958 SC 956

[5](1969) 1 SCC 863 : AIR 1970 SC 259

minority in the area to which an impugned statute applies. But, it seems to us, that it cannot be the last mentioned, for, in that case, it would be open to a Legislature to defeat the article by limiting the operation of the statute to areas where particular religious or linguistic groups are in a majority. It would appear that the area that is relevant for the purpose would be the area over which the jurisdiction of the interfering authority extends.

23. In AIR 1958 SC 956, the controversial provisions of the Kerala Education Bill, 1957, were tested against Article 30 (1) (and also Article 14) of the Constitution. Clauses 7 (1) and 11 (1) of the Bill were declared to have easily passed the test; Clause 12 (4) was regarded as perilously near failure and was only tentatively passed after a process of moderation; while Clauses 14 and 15 were struck down as having entirely failed. Clause 7 (1) of the Bill may be usefully compared with Section 50 (1) and (2) of the Act; Clause 11 (1) with Section 56 (2) and (4); and Clauses 14 and 15 with Section 63. It might be as well to set out those provisions of the Bill for ready reference :

> "7. Managers of Schools. - (1) Any educational agency may appoint any person to be the manager of an aided school under this Act, subject to the approval of such officer as may be authorized by the Government in this behalf.
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> Explanation. - All the existing managers of aided schools shall be deemed to have been appointed under this Act.

11. Appointment of teachers in Government and aided schools. - (1) The Public Service Commission shall, as empowered by this Act, select candidates for appointment as teachers in Government and aided schools. Before the 31st May of each year, the Public Service Commission shall select candidates with due regard to the probable number of vacancies of

teachers that may arise in the course of the year. The candidates shall be selected for each district separately and the list of candidates so selected shall be published in the Gazette. Teachers of aided schools shall be appointed by the manager only from the candidates so selected for the district in which the school is located, provided that the manager may, for sufficient reason, with the permission of the Public Service Commission, appoint teachers selected for any other district. Appointment of teachers in Government schools shall also be made from the list of candidates so published.

12. Conditions of services of aided school teachers. - (4) No teacher of an aided school shall be dismissed, removed, reduced in rank or suspended by the manager without the previous sanction of the officer authorized by the Government in this behalf.

14. Taking over management of schools. - (1) Whenever it appears to the Government that the manager of any aided school has neglected to perform any of the duties imposed by or under this Act or the rules made thereunder, and that in the public interest it is necessary to take over the management of the school for a period not exceeding five years, they may, after giving the manager and the educational agency, if any, a reasonable opportunity for showing cause against the proposed action and after considering the cause, if any, shown, do so, if satisfied that such taking over for the period is necessary in the public interest.

(2) In cases of emergency, where the Government are satisfied that such a course is necessary in the interests of the pupils of the school, they may, without any notice under sub-section (1) to the manager or the educational agency, take over the management of any school after the publication of a notification to that effect in the Gazette.

(3) Where any school has been taken over under sub-section (2), the educational agency or the manager of the school, within three months of the publication of the notification under the said sub-section may apply to the Government for the restoration of the school showing the cause therefor, and where the Government are satisfied of the cause so shown they shall restore the school.

(4) The Government may also make such further orders as may appear to them to be necessary or expedient in connection with the taking over of the management of any aided school under this section.

(5) Where any school is taken over under this section, the Government shall pay to the person or persons interested, such rent as may be fixed by the Collector, having regard to the rates of rent prevailing in the locality for similar properties :

Provided that where any property has been acquired, constructed, improved or maintained for the purposes of the school with the aid given or by appropriation or diversion of any grant made by the Government the rent shall be fixed by the Collector after taking into account the amount of such aid or grant.

(6) Where any school is taken over under this section, the Government may run the school affording any special educational facilities which the school was affording immediately before such taking over.

(7) Any person aggrieved by an order of the Collector fixing the rent under sub-section (5) may, in the prescribed manner, appeal to the District Court within whose jurisdiction

the school is situate within sixty days from the date of the order and the decision of the Judge shall be final.

(8) It shall also be lawful for the Government to acquire the school taken over under this section, if they are satisfied that it is necessary so to do in the public interest, in which case compensation shall be payable in accordance with the principles laid down in Section 15 for payment of compensation.

15. Power to acquire any category of schools. - (1) If the Government are satisfied that for standardizing general education in the State or for improving the level of literacy in any area or for more effectively managing the aided educational institutions in any area or for bringing education of any category under their direct control, in the public interest it is necessary to do so, they may, by notification in the Gazette, take over with effect from any day specified therein any category of aided schools in any specified area or areas; and such schools snail vest in the Government absolutely with effect from the day specified in such notification :

Provided that no notification under this sub-section shall be issued unless the proposal for the taking over is supported by a resolution of the Legislative Assembly.

(2) Where any school has vested in the Government under sub-section (1), compensation shall be paid to the persons entitled thereto on the basis of the market value thereof as on the date of the notification :

Provided that where any property, movable or immovable, has been acquired, constructed or improved for the purposes of the school with the aid or grant given by the Government for such acquisition, construction or improvement, compensation payable shall be fixed after deducting from the market value the amounts of such aid or grants :

Provided further that in the case of movable properties the compensation payable shall be the market value thereof on the date of the notification or the actual cost thereof less the depreciation, whichever is lower.

(3) In determining the amount of compensation and its apportionment among the persons entitled thereto the Collector shall follow such procedure as may be prescribed.

(4) Any person aggrieved by an order of the Collector may, in the prescribed manner, appeal to the District Court within whose jurisdiction the school is situate within sixty days of the date of such award and the decision of the Judge shall be final.

24. As we have seen, the petitioners are the owners of the colleges they run in the sense that legal title to the properties of the colleges vests in them, whether in their own right or as duly accredited representatives of the persons in whom title vests does not matter. Out of this ownership (whether or not it includes a beneficial interest in the property) stems the right to hold the property from which, in turn, stems the right to manage the colleges which includes the right to appoint the staff of the colleges and the right to control them. Exception is taken to Sections 48 and 49 of the Act on the score that they not merely take away the right of management from the petitioners but also vest the properties themselves in an entirely different person, namely, the managing body, which is made a corporation aggregate and thus endowed with a distinct legal personality. This, it is said, offends not merely Article 30 (1), the protection of which is available only to the petitioners running minority institutions, but also Article 19 (1) (f) and Article 31 (1),

the protection of which is available to all the petitioners excepting that Article 19 (1) (f) is not available to the non-citizen petitioners. There is also the contention, somewhat far-fetched we should think, that the managing body is a corporation controlled by the State, namely, the University. Further that Sections 48 and 49 involve the transfer of the right to possession of the properties from the petitioners to such a corporation, thereby involving compulsory acquisition or requisitioning of the properties within the meaning of Article 31 (2A) thus attracting Article 31 (2), and, there being no provision for compensation, offending this article.

25. We think that, subject to what we have to say with regard to sub-sections (2) and (4) of the sections, these contentions proceed on a misconception of the true scope and effect of Sections 48 and 49 which, it seems to us, have been better understood by the respondents than by the petitioners. We see nothing in these sections which deprives the petitioners of their property or of the possession thereof - the right of administration conferred on the managing body does not involve the right to legal possession which remains with the petitioners. And even the right of administration or management really remains with the petitioners subject only to regulation for the better running of the institutions concerned.

26. As we have said, we accept the construction placed on Sections 48 and 49 by the University and the Government as disclosed by the following extracts from their counter-affidavits :

> ".....The function of Sections 48 and 49 is to clothe the managements of the institutions with a legal personality to enable them to enforce their rights and discharge their obligations springing from contracts of employment etc., without in any way interfering with their effective power of administration. They are intended to prevent the existing evils enumerated earlier and enable the managements to sue or be sued under a statutory name. The Legislature while taking great care not to disturb the right of administration of an educational agency has recognized the need to associate the University, the State Government and the teaching staff with the educational agency for the purpose of enabling those bodies merely to assist the educational agency in the proper conduct of the affairs of the institution. The decisive voice of the educational agency in the administration of the institution is secured by giving an overwhelming majority in the governing body or managing council to nominees of the educational agency and by the overriding provision contained in Clause (7) of both Sections 48 and 49 that 'notwithstanding anything contained in sub-section (6), decisions of the managing council (governing body) shall be taken at meetings on the basis of simple majority of members present and voting.' Under Section 48, the governing body consists of the manager of the college, who under Section 50 is appointed by the educational agency and also six persons nominated by the educational agency. It also includes the Principal of the College who is himself appointed under Section 53 (2) by the governing body. The other members of the governing body are one nominee of the University, one nominee of the Government and one teacher elected by the teachers of the college. Section 49 is modeled on the same pattern... .(Paragraph 28.)

The State Government, besides its governmental responsibilities in relation to education, which is

a State subject also incurs substantial expenditure by way of grants-in-aid to each private college. Likewise, the University is the custodian of the entire collegiate education within its jurisdiction and also gives diverse grants to private colleges. The teaching staff constitutes the instrument through which any educational agency runs an educational institution ana the teachers therefore have a heavy responsibility in its working. Their participation in the governing body or managing council will enable the educational agency more effectively to contribute in the proper running of the institution without derogation of the right of the educational agency to administer it. Moreover it will give them the opportunity of keeping in close touch with the actual running of the institution thus enabling them to check any malpractices. Their function is largely informative, not administrative, in view of the overwhelming majority of the educational agency. They are merely the watch-dogs of the institution and can claim no effective share in the management. Malpractices such as the taking of premia from teachers and students for appointments and admissions, favoritism in appointments and promotions of teachers are likely to be eradicated in the set-up prescribed by the Act. These provisions will only effectuate the policy and purpose for which the educational institutions have been established and will not in any way detract from their object or troy or annihilate the power of administration which is left intact with the educational agency. It should be noted that the day-to-day administration of the college is left entirely to the manager who is appointed by the educational agencies. The decisive voice in the governing body or managing council is expressly reserved to the educational agency, and the representatives of the State and the University and the teaching staff cannot impair its right of administration. (Paragraph 29) The allegation of the petitioner that Sections 48 and 49 have taken away the rights of administration from the educational agency and have vested it in an entirely different body is denied. While it is true that the governing body or managing council is clothed with corporate personality by the Act, in order to find out whether of not the educational agency's right of administration has been impaired, it is necessary to lift the corporate veil and determine the persons in whom the power of administration is effectively vested. Since the decisive voice of the educational agency is scrupulously preserved by the provisions of Sections 48 and 49, it is not correct to say that there is transfer of the right of administration or that the right of administration is vested in an entirely different body. It is well settled that in adjudging the constitutional validity of any provision regard must be had not to the form but to its substance and effect. The educational agency is still the decisive authority and the presence of representatives of the University or the Government or the teaching staff does not in any way detract from the substance of the educational agency's right of administration. There is no sharing of the administration with the other members of the governing body or managing council. (Paragraph 30).

> .... Secondly, for reasons already stated, the managing council/governing body is not substantially different from the educational agency and therefore in essence tile right to administer will remain in the hands of the educational agency. Thus, there is nothing in the Act to prevent or prohibit an educational agency from administering a college in its own way subject only to compliance with the Act and the regulations thereunder.... .(Paragraph 31)

The allegation that the provision in Section 49 (4) for a member of the governing body/managing council holding office for a period of four years from the date of its constitution has the effect of disabling the educational agency from removing any of its nominees from membership even if

he has lost the confidence of the educationa agency is misconceived....(Paragraph 32) The allegations in Para. 14 are denied. The right given to representatives of the State, the University and the teaching staff to participate in the discussions or the deliberations of the governing body or managing council without any decisive voice is not such as would make the decisions arrived at the decisions of those representatives and not of the educational agency. Since the decisions are taken by a majority of votes and the educational agency is assured of an absolute majority of votes no decision can be taken by the governing body or the managing council against the wishes of the educational agency, and therefore all decisions of the governing body or managing council can only be taken according to the wishes of the educational agency. The fact that representatives of the University or the State Government had taken part in the deliberations or discussions will not in any way affect this position (Paragraph 33)."

27. It will be noted that under Sections 48 and 49 the managing body is to be constituted by the educational agency, although, no doubt, (so far as Section 48 is concerned - apparently by oversight this requirement is omitted from Section 49) in accordance with the provisions of the Statutes which will have to be so framed as not to affect any fundamental right. Of the eleven persons that constitute the managing body under Section 48, as many as six are persons to be nominated by the educational agency, while, of the twenty-one persons that constitute the managing body under Section 49, as many as fifteen are persons to be nominated by the educational agency. (We read clause (f) of sub-section (1) of both the sections as leaving the number, subject to a maximum of six under Section 48 and a maximum of fifteen under Section 49, to be determined by the educational agency and not by the Statutes; else the entire basis on which Sections 48 and 49 are sought to be sustained would fall to the ground). As we read the sections, the persons nominated by the educational agency are there merely as representatives of the agency just as the persons nominated by the University are there as representatives of the University and the persons nominated by the Government are there as representatives of the Government, not as independent holders of a statutory office. There is also the manager who is to be appointed by the educational agency and whose relationship with the agency is, as we shall presently see, purely the contractual relationship of master and servant, although it might perhaps be said that he is the holder of a statutory office. However that might be, the effect of clause (f) of sub-section (1) of Sections 48 and 49 is to give the educational agency six votes in the managing body under the former section and fifteen votes under the latter section, thus giving the educational agency, as rightly pointed out on behalf of the respondents, the simple majority for determining decisions of the managing body under sub-section (7).

28. As we have said, we regard the nominees of the educational agency merely as its representatives on the managing body, and not as the holders of independent statutory office bound to act according to their own judgment and not under the instructions of the educational agency. That being so, it follows that it should be open to the educational agency to change its nominees according to its convenience and that there should be no question of sub-section (4) of the two sections which gives a member of the managing body a term of four years from the date of its constitution or of sub-section (6) which provides that the removal of the members of the managing body shall be prescribed by the Statutes, applying to the managers or nominees of the educational agency. (These sub-sections should really apply only to the elected members and it should be possible to treat the nominated members as if they were ex-officio members like the principal and the manager, entitled to membership only so long as their nomination is in force). Were the position otherwise, and were the members nominated by the educational agency holders

of independent statutory office with a statutory term of four years and removable only as provided by the Statutes, the entire argument advanced to sustain Sections 48 and 49, namely, that despite these sections the right of management remains with the educational agency, would prove a false argument and the sections would be liable to be struck down under Article 19 (1) (f) - it is not pretended that it would be in the interests of the general public to take away the management from the educational agency and vest it in some other body - and, a fortiori, under Article 30 (1) (provided, of course, these articles are applicable to the persons for whom their protection is claimed, a qualification which we shall hereafter not repeat).

29. But sub-sections (2) and (4) of both sections do pose a serious threat to such a construction and must, therefore, go. It is difficult, in our view, to read sub-section (4) as inapplicable to the nominated members, and it a nominee is given a statutory term of four years and cannot be changed at the will of the educational agency except by removal, the agency would cease to have the controlling voice in the managing body and would be deprived of the management.

30. So far as sub-section (2) is concerned, it is claimed that it is a harmless device in no way affecting the educational agency's right to manage, and intended only to provide a statutory authority against whom a writ would lie and on whom duties and obligations can be cast by the statutes and to whom directions can be issued by the University - it has been held in *Papali v. The University of Travencore*[7], and *Rama Varma v. Cochin Devaswom Board*[8], that a writ will not lie against the management of a private college. If that be so it is difficult to see why the educational agency itself could not have been constituted into a Statutory authority, and, unless it be that the effect of Sections 48 and 49 is to transfer the management from the educational agency to the managing body, it would serve no purpose to obtain an order against the managing body (which has no property and no person against which the order can be executed) in the absence of provision to the effect that an order against the managing body would be binding on the educational agency. Moreover, even if it be that the managing body is only a creature of the educational agency fully under its control, it is nevertheless an entirely different legal person once it is invested with corporate personality. There would undoubtedly be a transfer of management from the agency to an entirely different person and we are by no means certain that, after compelling a person to wear a corporate veil, you can, when you choose, lift the veil (to be lowered again at your choice) and proclaim that her form and face were never hidden. It would be a different matter if, after assuming the veil herself, she were to use it to hide her identity. Sub-section (2), properly understood, might be a useless provision; but, apart from that it readily lends itself to misapplication, it is far from being a harmless provision.

31. We agree with the respondents that (shorn of sub-sections (2) and (4) Sections 48 and 49 leave the right of management of the educational agency unimpaired. They only provide for the knowledgeable voices of the University, the Government, and the teachers of the colleges, persons vitally interested in the welfare of the institutions, being heard before a decision is taken. Most of the matters that come up before the managing body would be non-controversial from the point of view of the educational agency. In such matters, the educational agency would allow a free vote to its representatives and leave the matter to be decided according to the majority view in

[7]1956 Ker LT 583 : (AIR 1957 Trav Coc 46)
[8]1966 Ker LT 864

the managing body. But, in controversial matters, the composition or the managing body ensures that the voice of the educational agency will prevail although it is to be regulated by due heed being paid to the voices of other interests represented on the managing body. At the most, the provisions of Sections 48 and 49 are only regulatory provisions designed to secure the better running of the institutions by the educational agency itself by giving it the benefit of the views of knowledgeable persons interested in the welfare of the institutions.

32. Some such body as that contemplated by Sections 48 and 49 though not a body corporate functions even now and has been functioning for a long time in most of the colleges in the country - indeed many of the University Acts provide for that. There is a recommendation for the constitution of such a body in the report of the Universities Commission of 1902. This has been repeated in the reports of the Radhakrishnan Committee (1948-49), of the Kothari Commission (1964-66) and of the Model Act Committee (1965). According to these reports, the managing body should, in addition to the representatives of the educational agency, include the principal and other representatives of the teaching staff, representatives of the Universities, and, in the case of colleges receiving grant from Government, representatives of the Government. Of course, these reports have no direct bearing on the legality of the impugned provisions; but, they constitute expert educational opinion of the highest authority as to what is for the good of the colleges themselves so that they might better fulfill their purpose.

33. Section 50 seems to us unobjectionable. It provides that the manager shall be appointed by the educational agency, and, there being nothing in the context to indicate the contrary it follows that the power of dismissal and removal is also with the educational agency. As we have already seen, the legal relations between the educational agency and the manager are not provided for by the statute and the relationship is purely the contractual relationship of master and servant. The manager is an ex officio member of the managing body; a person can be a member of the managing body only so long as he is the manager; and it follows that the term of four years given by Sections 48 and 49 (as they now stand) to the members of the managing body, and the provision for their removal being prescribed by the Statutes, cannot apply to the particular person serving on the managing body by reason of his being the manager.

34. We must, however, observe that sub-section (5) of Section 50 which says that suits by or against a private college shall be instituted by or against the manager thereof would be objectionable if it really meant what the petitioners say it means and, perhaps, what it was designed to mean, namely, that a decision obtained by or against the manager would be binding on the educational agency. For, even though the manager is a servant of the educational agency, there is no reason why the statute should step in to appoint an agent to represent the educational agency in litigation. That must be left to the educational agency itself and to impose a statutory agent on the educational agency is a serious infringement of its right to manage its own property and its own affairs. The position would be worse if the manager were, as the petitioners apprehend he is, a statutory officer independent of the educational agency, but, even if he be, as we have found, a mere servant, it is possible for him to prejudice the interests of the educational agency in a litigation without the educational agency knowing anything about it before it is too late to take action to safeguard its interests, if such action were possible. But the sub-section as it stands seems harmless because it is meaningless. A college is not a legal person or even a legal entity, and there is nothing in the Act which makes it one. That being so, it seems to us that no suit will lie by or against a college - there is nothing to show that the word "college" is used in

the sub-section as a label for some legal person. A college as such has no property - as we have already explained, what is popularly called, and what we have called, the property of a college is really the property of the educational agency, used by it for running the college. It seems to us that a decree be obtained in the kind of suit contemplated by the sub-section, namely, a suit by or against a private college in the name of the manager, would be a useless decree binding on nobody, unless it is held on the facts of the particular case that the college or manager is only a label for some other legal person. But if the effect of sub-section (5) be that, willy-nilly, the rights of the educational agency would be affected by the sort of suit contemplated, we would have no hesitation in striking down the sub-section unless, in the view we have taken, the manager would be regarded as a person appointed by the educational agency itself to represent it in litigation.

35. The requirement of sub-section (1) of Section 50 that the educational agency shall appoint a manager, and of sub-section (2) that his appointment or removal shall be intimated by the agency to the University does not, or course, affect the agency's right of management. A like provision in clause 7(1) of the Kerala Education Bill, 1957, was easily passed in *In re Kerala Education Bill*[9], although the appointment there was subject to the approval of an officer of Government, not as under Section 50 a mere matter of intimation of appointment or removal. True, the clause said, "may appoint", not as the section says, "shall appoint", but having regard to the provisions of the Bill imposing duties on the manager (with no provision made as to who is to perform those duties in cases where no manager is appointed), there can be no doubt that appointment was obligatory. After all, to insist that an educational agency shall appoint a sort of executive officer is only a regulatory and not a restrictive measure.

36. The rest of the impugned provisions of Chapter VIII affects that aspect of management that relates to the appointment of the staff of the colleges and their conditions of service including disciplinary control over them. The petitioners themselves recognize that a competent and contented staff, assured of fair treatment and fair prospects, is essential for the proper functioning of a college. Any measure designed to secure this would be only regulatory and would not be a restriction on the right of management. But any measure which goes beyond this and is unnecessary for the proper functioning of a college would be an unwarranted interference with the right of management offending Article 30 (1), and, since no consideration of public interest attracting clause (5) of Article 19 is put forward apart from the interests of the institutions themselves, it is not possible to justify a measure as a mere regulatory measure for the benefit of the institutions, offending Article 19 (1) (f) as well.

37. No exception is, or indeed can be taken to Section 52 which, apart from requiring

[9]1957, AIR 1958 SC 956

the statutes to prescribe the terms and conditions of affiliation of a college and the procedure for the grant of affiliation, enables the statutes to provide for the pattern of staff, scales of pay and terms and conditions of service of members of the staff, and admission and selection of students for courses and examinations. Of course, if any of the statutes prescribed for this purpose is unreasonable and offends the legal rights of the educational agencies, it will then be time enough for complaint.

38. Section 54 by which (read with Section 34 (c)) the qualifications of teachers of private colleges are to be prescribed by the Regulations made by the Academic Council is likewise unexceptionable. The same cannot, however, be said about sub-sections (1), (2) and (3) of

Section 53 which provide for appointment to the post of the principal of a college. The principal of a college is, as Section 2(12) recognises, the head of the college, and (adopting the words used in *A. M. Patroni v. E. C. Kesavan*[10], with reference to the post of the headmaster of a school), the post of the principal is of pivotal importance in the life of a college; 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; and the right to choose the principal is perhaps the most important facet of the right to administer a college. The imposition of any trammel thereon - except to the extent of prescribing the requisite qualifications and experience or otherwise fostering the interests of the institution itself - cannot but be considered as a violation of the right guaranteed by Article 30 (1) of the Constitution, and, for the reasons we have already given, by Article 19 (1) (f) as well. To hold otherwise would be to make the rights "a teasing illusion, a promise, of unreality". Provision may, of course, be made to ensure that only proper persons are appointed to the post or principal; the qualifications necessary may be prescribed, and the mode of selection for the purpose of securing the best men may be laid down. But to go beyond that and place any further fetter on the choice would be an unreasonable interference with the right of management. Therefore, so far as the post of principal is concerned, we think it should be left to the management to secure the services of the best person available. This, it seems to us, is of paramount importance, and the prospects of advancement of the staff must yield to it. The management must have as wide a field of choice as possible; yet sub-section (2) of Section 53 restricts the choice to the teachers of the college or of all the colleges, as the case may be, and enables the appointment of an outsider only if there is no suitable person in such college or colleges. That might well have the result of condemning the post to a level of dull mediocrity. A provision by which an outsider is to be appointed, or a junior member of the staff preferred to a senior member, only if he is of superior merit, the assessment of which must largely be left to the management is understandable; but a provision which compels the management to appoint only a teacher of the college (or colleges), unless it pronounces all the teachers unsuitable, is clearly in derogation of the powers of the management, and not calculated to further the interest of the institution. Once sub-section (2) is struck down, sub-sections (1) and (3) serve no purpose - indeed the three are inextricably mixed and must stand or fall together. But we might say that there can be no objection to the appointment of the principal as of any other member of the staff being subject to the approval of some authority of the University so long as disapproval can be only on the ground that the person appointed has not the requisite qualifications. Also that,

[10] AIR 1965 Ker 75

if disapproval is not to be only on some such stated ground, but is left entirely to the will and pleasure of the appointing authority, that would be to deprive the educational agency of its power or appointment and would be bad for offending Articles 19 (1) (f) and 30 (1). It is one thing to constitute an expert committee or other body to assist the management in selecting the best men as recommended in the several reports on University education to which we have referred (and as contemplated by clause 11 (1) of the Kerala Education Bill which passed the test of Article 30 (1) in AIR 1958 SC 956); quite another to say that some outside authority can disapprove of an appointment made by the management for any or no reason. Sub-section (4) of Section 53 says that appointment to the lowest grade of teacher in each department of a college shall be made by the managing body by direct recruitment on the basis of merit. No one can object to this, although, since no appointment is likely to be made from the non-teaching staff, it was hardly necessary to say that it shall be by direct recruitment. Merit must of course be the criterion; but, as we have already indicated, beyond prescribing the requisite qualifications and the mode of (including the machinery for) selection so as to ensure that merit prevails, the assessment of

merit must be left to the management and not to any outside authority. Sub-section (5) of Section 53 which requires all appointments made under sub-section (4) to be reported to the University for recognition, in other words, having regard to the definition of "recognized teacher" in Section 2 (17), for approval, must pass muster so long as it is clearly understood that approval can be withheld only on the ground that the person appointed has not the requisite qualifications. Sub-section (6) of Section 53 only ensures that appointments are made only after due advertisement so that the best candidates are secured. The post has to be advertised in such manner as may be prescribed by the statutes. This seems to be only reasonable, and the sub-section does not prevent the management from advertising the post in such manner as it chooses in addition to the manner prescribed by the statutes. About the wisdom of sub-section (7) of Section 53 which requires that appointments to the teaching staff including that of the head of a department should be made by promotion from among the teachers of the college or of all the colleges, as the case may be, and permits direct recruitment only if there is no person among the teachers of the college or colleges possessing the qualifications prescribed for the post, we are doubtful. We should have thought that, with regard to the head of a department in a first grade, and more so in a postgraduate college, it should be possible to secure the best talent without any closed-shop restrictions. That indeed would appear to be in keeping with the recommendations of the expert bodies to which we have already referred. But, wisdom or expediency is not for us to consider, and having regard to prevailing conditions and especially the conditions in this State - in matters of common knowledge we are not bound to exclude our own knowledge and experience and shut our eyes to realities, whatever the parties or even the experts might say - we are prepared to uphold this section as necessary to prevent favoritism and secure fair prospects of advancement for the teaching staff. In that view, we would have been prepared to uphold the provision in sub-section (9) for an appeal by a disappointed teacher but for that, for reasons we shall state in considering sub-section (4) of Section 56, we do not think that a body like the Syndicate would be a proper appellate forum. As it is, however, the provision for an appeal is so unreasonable as interference with the right of management that the attack both under Article 19 (1) (f) and under Article 30 (1) must prevail. At the same time, we would like to make it clear that the test of seniority-cum fitness prescribed in the sub-section does not mean that promotion is to be on the principle of seniority subject to fitness which is the test adopted for "non-selection" posts in the several service rules of the State. Seniority-cum-fitness means that due and equal regard should be paid both to seniority and to fitness, and, since fitness is a matter of degree, it would appear that a senior person can be overlooked in favour of a junior who is demonstrably more fit for the appointment than he is. We also think that, notwithstanding the wording of the sub-section which would appear to permit of direct recruitment only if there is no person available for promotion possessing the necessary qualifications, if the basis of the promotion is to be seniority-cum-fitness, it would be open to the management to resort to appointment otherwise than by promotion if there is no person fit for promotion. An unfit person is not entitled to promotion merely because he possesses the necessary qualifications. Sub-section (8) of Section 53 seems to us only reasonable. (But we might remark that the proviso thereto is not really a proviso but an independent provision). This sub-section only says that no course of study shall be abolished without the prior approval of the University, something to which no exception can be or is taken, and, further, that a teacher discharged from a college due to the abolition of a course of study shall be given preference in the matter of appointment if the course is restarted within a period of three years. That seems to us only fair, and the preference in favor of the discharged teacher does not mean that his qualifications and fitness for the post are not to be considered. The sub-section does not require the discharged teacher to be appointed if he is unqualified or unfit as might well

happen if the qualifications for the post have been changed or the teacher has misconducted himself meanwhile.

39. Section 55 provides for the continuance of a teacher after satisfactory completion of probation and seems to us quite necessary for securing fair conditions of service for the teachers while at the same time ensuring their suitability, and for preventing abuses of the kind referred to in the counter-affidavits of the respondents which it is unnecessary to detail, but which it is a matter of common knowledge do exist in smaller or greater degree. The provisions of the section are similar to provisions for probation and confirmation in the rules for Government servants, and we are satisfied that they only ensure that security of tenure essential for a contented service - they are no more than a safeguard against mala fide, arbitrary or capricious discharge. Objection has been taken to sub-section (6) of the section which requires the managing body to make up its mind as to the suitability of a probationer within a month of the expiry of the period of probation. This, we think, is an eminently reasonable provision, for, after having watched the work and conduct of a person for the prescribed normal period of one year, it should not take the managing body more than a month to decide whether that person is suitable or not. If it does not pronounce him unsuitable within that time, there is nothing wrong in presuming that it has found him suitable. It should not be open to the managing body to postpone its decision indefinitely with the Damoclean sword of discharge hanging over the probationer's head. That would do the institution no good. The provision for an appeal in sub-section (7) of the section is also reasonable, and we note that the appeal is to a proper forum, namely, to the Vice-Chancellor. Whether the Vice-Chancellor will have the time for the purpose or whether his time should be taken up with such matters is not for us to consider.
It is pointed out that the section makes no provision for discharge before the expiry of the period of probation and it is said that this compels the retention, to the detriment of the institution, of a teacher who has earlier proved his unfitness. That is not so, for, there is nothing to prevent the removal of such a teacher, since proved unfitness, even if it be due only to incompetence, is a proper ground for what is commonly known as disciplinary action. It is really only a question of degree - a greater degree of incompetence will ordinarily be required for a removal. In the one case, the teacher has to prove his fitness; in the other, it has to be proved that he is unfit; and it is only fair that a man should be given at least a year's trial to prove his fitness.

40. No complaint is made that one year is too short a period to assess the suitability of a teacher and that, therefore, Section 55 compels the management to accept a person before it has had time to judge whether he is fit for continuance. Therefore, nothing need be said about the unworkable provision made by the proviso to sub-section (1) of the section for an extension of the period in exceptional cases with the prior approval of the Syndicate excepting that the effect of the insistence on such approval would be to deny the teacher the benefit of an extension even if the management were inclined to give him an extended trial.

41. Section 56 provides for the conditions of service of teachers. To sub-section (1) which says that these conditions, including conditions relating to the pay, pension, provident fund, gratuity, insurance and age or retirement, shall be such as may be prescribed by the statutes, no objection has been taken. Of course, if any condition prescribed is unreasonable, objection can be taken to that. But, serious objection is taken to sub-section (2) which says that no teacher shall be dismissed, removed, or reduced in rank, or placed under suspension, for a continuous period exceeding fifteen days without the previous sanction of the Vice-Chancellor. This, it seems to us,

would so affect disciplinary control as to be subversive of discipline and can hardly be regarded as a regulation or a restriction in the interest of the institution or of the general public. The Vice-Chancellor can hardly be expected to have the time to deal with such matters, and, in any case, the long delay that will necessarily be involved would, by itself, render the managing body's powers of disciplinary control largely ineffectual. The proper remedy against any abuse of the disciplinary power would be an appeal. An appeal has been provided for by sub-section (4) and why, in addition to this, there should be a previous sanction is more than we are able to understand. But, as we have already indicated, the appeal provided for by sub-section (4) suffers from the defect of the appeal being to a forum which seems to us entirely unsuitable for the purpose. Although the substantive right conferred, namely, the right of appeal, is proper - and if we may say so more satisfactory than the remedy of arbitration provided by the old Kerala University Act of 1957 - the mode of the exercise of that right seems to us so unreasonable, and so much against the interests of the institution, that it can hardly be justified either as a regulation of, or a reasonable restriction on, the power of management. For, the appeal lies not, as one would have expected, to a judicial or quasi-judicial tribunal, but to a large body like the Syndicate comprising as many as seventeen members, twelve of them elected, some of them themselves teachers. It is an executive body which, having regard to its composition, would, in the ordinary course, be subjected to pulls and pressures including such pulls and pressures that either the punished teacher or the teachers as a body would be able to exert and does not seem to us to be a body which can properly be entrusted with a judicial function of this nature. We might also observe that it is a body that is in session only intermittently so that it can hardly be expected to dispose of the appeals before it within a reasonable time, and, since its powers would include the power to grant a stay pending an appeal before it, it might well be that teachers who deserve to be dismissed are continued in service for an indefinite period. Sitting as an appellate authority against a punishment, it is to function as a quasi-judicial authority and its decision would be subject to judicial review, and, how a body like the Syndicate would be able to produce what is ordinarily called a speaking order is more than we can see. As we have already observed, we are of the view that, although a right of appeal is unexceptionable, the right actually conferred by sub-section (4) of Section 58 is bad for offending both Article 19(1) (f) and Article 30 (1). It is true that a provision for previous approval before imposing serious punishment was passed in AIR 1958 SC 956. But it was passed only hesitantly and tentatively and the Bill contained no provision for an appeal. Therefore, that decision does not mean that such a provision is, in all circumstances, good. To sub-section (3) of Section 56 which only requires that a reasonable opportunity of showing cause against the action proposed should be given to a teacher before any disciplinary action is taken against him, there can, of course, be no exception taken; and none is taken.

42. To Section 57 which provides for pending disputes between the management and a teacher relating to the latter's conditions of service being decided under the provisions of the Act and of the statutes made thereunder notwithstanding anything contained in any law for the time being in force or in any contract or in any judgment, decree or order of any Court or other authority, and for the reopening of any disposed of dispute which arose after the 1st August 1967, the date of the publication of the bill, we do not think any valid objection can be taken. If, in the result, any fundamental right is violated, it will be time enough to complain.

43. Section 58 is a very controversial section and we think it ought to be struck down, since, apart from not being a regulatory measure calculated to further me interests of the institutions, it

is capable of much mischief. Its wording is not very clear; but both sides read it as meaning and we think they are right - that it entitles a teacher to stand for election to the Legislative Assembly of the State or to Parliament or to any local authority, irrespective of the wishes of the management, and to continue as a teacher while serving on those bodies, provided that if he becomes a member of Parliament or of the Assembly, he is to go on leave during the period the body is in session - he is bound to ask for leave and the management to grant it (though, perhaps, not leave on allowances except to the extent that he has earned such leave) whether he is attending the session or not. This means that he will be intermittently and frequently absent for short periods whenever the Legislature is in session; but can claim to return to duty during the intervals when it is not in session. Surely, he will be of little use as a teacher in the institution, and the management will have to appoint another teacher to do his work. How this can further the interests of the institution or of the general public, it is difficult to understand. Or, even if some public interest is served, how it can be regarded as a reasonable sacrifice of the rights of the management and the interests of the institution. We are not unaware that an expert body like the Kothari Commission was of the view that teachers should be free to exercise all civic rights enjoyed by citizens and should be eligible for public offices at the local, district, State, or national levels, that the participation of teachers in social and public life was highly desirable in the interests of the profession and the educational services as a whole, and that such participation would enrich the social and political life of the country. Even so, it was of the view that teachers participating in elections should proceed on leave during the election campaign and relinquish their teaching duties temporarily if the requirements of public office interfered with the proper discharge of those duties. That, in the case of membership of the State Legislature or of Parliament, would mean that the teacher concerned should proceed on leave from the date he stands for election until the results of the election are announced, and, if he is successful, continue on leave until his membership of the Legislature expires. Or, what is much the same thing, give up his job with the right to return to it. But, as we have seen, what Section 58 provides for is an entirely different thing. It enables the teacher to absent himself intermittently for short periods and to return to duty during the intervals rendering himself useless as a teacher and putting the management to the additional expense of appointing some other teacher to do his work. Teaching is a full-time vocation. Other preoccupations, however beneficial to himself or even to the general public they might be, that prevent a teacher from devoting his whole time to his teaching duties cannot be in the interest of the college he serves, nor, in the balance, in the interest of the general public since the colleges cater to a public need. With due respect to the views of experts in the field or education, the politician teacher can hardly be an asset to a college. On the other hand, he can be a great evil, for, he would tend to involve the pupils in his own politics and to assume a self-importance subversive of discipline. Except to the extent that it relates to the membership of local authorities not involving absence from teaching duties at the college, we think that Section 58 is bad for offending Article 19 (1) (f) and, of course, Article 30 (1) as well.

44. Section 59 provides that the provisions of Chapter VIII shall apply mutatis mutandis to the non-teaching staff of the colleges. A competent and contented non-teaching staff is also a desideratum for the proper running of a college, and we can see no objection to such of the provisions of the chapter as we have upheld being applied mutatis mutandis to the non-teaching staff.

45. Section 61 which only provides for the disaffiliation of, and the withholding of grant to, a

college which fails to comply with the provisions of the Act (of course, only the valid provisions) after due observance of the rules of natural justice by giving the educational agency and the managing body an opportunity of being heard, seems to us unexceptionable.

46. The only provision that remains to be considered is Section 63 which appears in Chapter IX. As we have seen, even what is called a private college is really a public institution in the sense that it serves the public, and its proper running is a matter of public importance. We have no doubt that in the emergency contemplated by Section 63, when it has become impossible to run the college because of non-payment of the salary of the staff for a period of not less than three months, or the wilful closure of the college (which means the inexcusable closure) except during a vacation for a period not less than one month, or persistent (which means frequent and contumacious) default or refusal by the authorities of the college to carry out the duties lawfully imposed on them, there should be provision for the suspension or removal of the management and the appointment of some other management in its stead. (The section, it might be noted, also provides for a show-cause to all persons affected). That would be necessary in the public interest no less than in the interest of the institution itself and would come within the saving in Article 19 (5). But, it is to be noticed that, even so, it would not be a regulatory measure passing the test of Article 30 (1) (from which test Article 31-A gives no absolution) if it involves the taking over of the management, even for a temporary period, from the minority concerned. The like provision, like to Section 70 of the Act, in clause 14 of the Kerala Education Bill failed this test in AIR 1958 SC 956 and that was not and could not be, because of the provision for acquisition in some other clause, namely, clause 15.
The provision actually made in Section 63, however, involves the transfer of the right to possession of the properties of the college concerned to the University (which there can be no doubt answers the definition of the word "State" in Article 12 - see *Electricity Board, Rajasthan v. Mohan Lal*[11], where the Supreme Court held that an Electricity Board constituted under the Electricity (Supply) Act, 1948, was a "State" as defined by Article 12, disapproving of the decision in *University of Madras v. Shantha Bai*[12], which had held that the Madras University was not a State). Else, the section would be altogether ineffectual. Therefore, the section does provide for compulsory requisitioning of the property within the meaning of Article 31 (2) - see clause (2A) of the Article - and it offends that Article since it makes no provision for compensation; nor can it have effect since there has been no compliance with clause (3). And, for the very same reason, namely, that it has not received the assent of the President - it was not reserved for his consideration the saving in Article 31-A (1) cannot apply in view of the first proviso thereto.

47. In justifying the provisions of the Act, the University and the Government have alleged that various abuses, such as, favouritism and the extortion of so-called donations in connection with the admission of pupils, and the appointment and promotion of the staff, unfair treatment of the staff, breaches of statutory provisions governing them, and defiance of the authority of the University, are prevalent in the private colleges. They have also referred to want of adequate provision in the old University Act for the enforcement of orders and directions issued by the University authorities to prevent or remedy such abuses and to the absence of any legal remedy for the aggrieved party. The petitioners have, of course, denied that there have been any such abuses in the institutions they run. But, we have not thought it necessary to go into the merits of the charges, since the conclusions we are reaching are in no way dependent on that. We are not suggesting that the charges are unfounded; but, even if they are, such of the provisions as we

have passed are mere regulatory provisions for the better running of the institutions which can lawfully be imposed on an institution which is being run well. And such of the provisions as we have struck down, would be bad even if the charges were well-founded. For this reason, we think it equally unnecessary to consider the criticism, not altogether unfounded, that the impugned provisions of the Act are scarcely calculated to obviate or remedy the alleged abuses, and we are, since no charge of mala fides as such can lie against a Legislature, in no

[11] AIR 1967 SC 1857

[12] AIR 1954 Mad 67

way concerned with the inference sought to be drawn therefrom that the Act is not really intended to meet the alleged abuses, but is designed for some ulterior end.

48. The attack based on Article 14 of the Constitution is three-fold: First, that the Act treats colleges that are well run and colleges that are badly run alike. Secondly, that it results in discrimination as between the northern districts of the State, where the less stringent provisions of the Calicut University Act are in force, and the southern districts to which the more stringent (and, in so far as they are regulatory more beneficent!) provisions of the Act apply. And thirdly, that it discriminates as between private colleges on the one hand and Government colleges on the other, in that the impugned provisions are made applicable only to private colleges.

49. With regard to the first contention, as we have already remarked, the provisions that we have passed are merely regulatory and equally salutary whether an institution be well run or badly run. No question of discrimination can, therefore, arise. So far as the second is concerned, it is true that the entire State was, at one time, governed by the same University Act, namely, the Kerala University Act 1957, so that, prima facie, it might be difficult to justify the application of dissimilar provisions to the northern and southern districts on historical or geographical grounds. Nor is it pretended that the conditions in the northern districts are in any way different from those obtaining in the southern districts. Indeed, many of the abuses to which reference has been made are in respect of colleges in the northern districts. But, having regard to the circumstances to which we shall presently refer, we do not think we should consider this particular charge at this stage. While the bill in respect of the Act was pending consideration, it became so urgently necessary to establish a separate University for the northern districts - for what reasons it is not for us to inquire - that an Ordinance, namely, the Calicut University Ordinance replaced later by the Calicut University Act as a matter of course had to be promulgated for the purpose. That Ordinance, quite properly we think, adopted the provisions of the Kerala University Act, 1957, rather than those of the Bill which had not yet been passed by the Legislature. A Bill for the northern districts which is practically a copy of the Act is now before the Legislature, and we are assured will soon become law. These are the circumstances that dissuade us from considering the charge for the present. We think it will be time enough for any aggrieved party to urge it if the dissimilar treatment persists beyond the time reasonably necessary for according similar treatment and we decline the invitation to issue a writ analogous, it is said, to a writ of prohibition, in effect staying the provisions of the Act until the new bill in respect of the northern districts becomes law. We must, at the same time, make it quite clear that we are expressing no opinion whatsoever on the question whether the dissimilarity in the provisions of the Calicut University Act and the impugned Act gives rise to a discrimination offending Article 14 of the Constitution.

50. We see little basis for the third head of the charge, for, by their very nature, private colleges form a different class from Government colleges and the application of the impugned provisions

only to private colleges is obviously based on a reasonable classification. What is sought to be secured by the impugned provisions are, or should be, secured in the case of Government colleges by the very fact that they are run by the Government. This particular head was urged with special reference to the provisions relating to the appointment of the staff and their conditions of service. So far as that is concerned, more or less similar provisions already exist in the case of Government colleges excepting with regard to what is contained in Section 58 which we have substantially struck down. But, even in regard to this, namely, membership of Legislatures and the like, it is obvious that Government servants do not stand on the same footing as private citizens.

51. There is yet another contention based on Article 14 urged on behalf of what we have called the majority institutions. This particular application of Article 14 would, if upheld, amount to a rewriting of the Constitution, for, it amounts to this, namely, that the protection of Article 30 (1) should be afforded not merely to minority institutions to which it is in terms confined but also to majority institutions. And, the protection of Article 19 to non-citizens although it is confined to citizens. The argument is that, having regard to the purpose of the Act, and in particular, of the impugned provisions, no reasonable classification can be made as between the majority institutions and the minority institutions or between citizens and non-citizens. Hence, if certain provisions are applicable only to majority institutions and not to minority institutions or only to non-citizens and not to citizens, there would be discrimination offending Article 14. In other words, unless, having regard to the objects of a statute, a reasonable classification can be made between the majority and the minority or between citizens and non-citizens, like treatment must be accorded to both. This argument ignores the fact that whatever be the object of a particular law, the Constitution itself by Article 30 makes a classification as between the minority and the majority, and, by Article 19, a classification between the citizen and the non-citizen. Different treatment based on this classification is authorized by the Constitution itself and cannot be questioned under Article 14. The argument is virtually an invitation to strike down Articles 19 and 30 (1) for offending Article 14, or, rather, to extend the application of those articles to persons to whom they do not apply to save them from being struck down under Article 14.

52. There are two other contentions which deserve no more than passing notice. As we have seen, two of the petitioners, namely, the petitioners in O. P. Nos. 2339 and 2796 or 1969, are companies. It is said that in view of Entry 44 of the Union List it is not within the competence of the State Legislature to make provision for the management of these companies. But the Act does not make provision for the management of the companies. It does not, for example, say who shall act for the company and in what circumstances. All it does, so far as we are concerned, is to regulate the working of colleges affiliated to the University and this falls squarely and completely within Entry 11 of the State List, irrespective of whether or not a college is run by a company or by any other person. The Act no more entrenches on Entry 44 of the Union List than, for example, legislation regarding land or its management would entrench on that entry because the land belonged to a company.

53. It has also been argued that, in view of the University Grants Commission Act of 1956, made under Entry 66 of the Union List, the State Legislature has not the competence to make any law which might even incidentally fall within that entry, and the decision in *Gujarat University v. Sri Krishna*[13], is relied on in this connection. We have been quite unable to appreciate this contention and must, therefore, content

[13] AIR 1963 SC 703 (paragraph 24)
ourselves with saying that it was taken.

54. Our conclusion is that sub-sections (2) and (4) of Sections 48 and 49 of the Act, sub-sections (1), (2), (3) and (9) of Section 53, sub-secs. (2) and (4) of Section 56, Section 58 (except to the extent excepted in paragraph 43) are bad for offending Article 19 (1) (f) so far as the citizen petitioners are concerned; also for offending Article 30 (1) so far as minority institutions are concerned. Accordingly, in all the petitions excepting O.P. Nos. 2339 and 2796 of 1969 we grant a declaration that these provisions of the Act are void and unenforceable - no further relief than such a declaration seems necessary as against parties like the Government and the University. Section 63 of the Act is bad for offending Article 31 (2) (not being saved by Article 31A (1) (b)) as against all the petitioners; also for offending Article 30 (1) so far as minority institutions are concerned. Accordingly, in all the petitions we grant a declaration that that section is void and unenforceable. Otherwise, we dismiss the petitions. No costs.
Order accordingly.