

**The Principal, Elijah Institute of Management Studies, Kurichikkara P.O.,
Thrissur-680028 By Its Present Principal, Dr. C.K. Francis - Petitioner
@HASH The University of Calicut, Calicut University P.O., Thenhipalam,
Calicut -673635, Kerala, Represented B**

Court: High Court Of Kerala

Date of Decision: Sept. 29, 2016

Acts Referred: Constitution of India, 1950 - Article 226

Citation: (2016) 4 KerLJ 412 : (2016) 4 KLT 474

Hon'ble Judges: A.M. Shaffique, J.

Bench: Single Bench

Advocate: Sri. Santhosh Mathew, Sri. Arun Thomas, Sri.Alphin Antony, Sri.Jennis Stephen, Sri. Sathish Ninan and Sri.Vijay V. Paul, Advocates, for the Petitioner; Sri. P.C. Sasidharan, SC, Calicut University, for the Respondents

Final Decision: Disposed Off

Judgement

Mr. A.M. Shaffique, J. - These writ petitions concern a common issue and hence they are heard and decided together.

2. Petitioners in these writ petitions are Colleges or Principals of Colleges affiliated to University of Calicut. Substantially, the question involved is

whether the University can interfere with the right of the management to conduct college election for the academic year 2016-2017 in the

parliamentary mode (indirect mode) or any other form. As far as the Calicut University is concerned, petitioners challenge an instruction issued by

the University of Calicut, Dean of Students" Welfare on 9/9/2016 by which the Principals of all affiliated Colleges were informed to conduct

college union election 2016-2017 on 7/10/2016 in Presidential mode (Direct Mode) in all the Colleges excluding those Engineering colleges, the

affiliation of which are transferred to the Kerala Technical University in accordance with the revised College Union Election rules. It was also

mentioned that those colleges which had obtained favourable orders from the court to conduct college union election 2016-17 in Indirect Mode

(Parliamentary mode), can conduct election as per the court order, provided, they attach a copy of the court order along with the results. Further

instructions had been issued to take urgent steps for conduct of college union election 2016-17 in the College in terms of what is stated above and

also other requirements of the report of Lyngdoh Committee/University's Election rules.

3. During the course of argument, learned standing counsel appearing for the University submitted that the letter issued on 9/9/2016 has been

modified by another letter dated 22/9/2016 by which direction had been issued to reschedule the date of the college election to 20/10/2016. It

was indicated that the election shall be conducted in Presidential mode (Direct mode) in all the Colleges affiliated to the University of Calicut. Other

instructions had also been issued in the matter.

4. According to the petitioners, it is open for the College to conduct election as per directions issued by the Apex Court in University of Kerala

v. Council, Principals, Colleges, Kerala and Others [(2006) 8 SCC 304] wherein directions had been issued by the Supreme Court to the

Universities and Colleges across the country to conduct election for appointment of the students' representative bodies as per parliament mode of

election. It is submitted that it is difficult for the College to conduct election in the parliamentary mode unless the Court grants permission to

conduct election on the basis of the directions issued by the Apex Court.

5. From the facts involved in the writ petitions and from what has been argued by the learned counsel appearing on either side, it would appear that

the issue relating to the conduct of election in Colleges was referred to a Larger Bench of the Supreme Court and is closed as per order dated

01/02/2016, leaving open the question to be considered in an appropriate case.

6. In fact, in Council of Principals" of Colleges v. State of Kerala (2004 (2) KLT 995), a Division Bench of this Court while considering a

question as to whether the election to the college unions has to be conducted following the presidential system or the parliamentary form of

election, held that the college union is not an authority under the University Act and constitution of the college union is not mentioned in the bye-

laws. In so far as no bye-laws has been framed by the Syndicate in accordance with Section 41 so as to bind various affiliated colleges, the letters

issued by the University have no statutory support and is not binding on the affiliated colleges. Accordingly, it was held at para 6 as under;

6. The University letters dated 29.10.2003 and 15.11.2003 cannot therefore be legally sustained. University has also taken up the stand that

those letters could be sustained under statute 9(6) of Chapter XXIII. We may refer to the said provision. Statute 9 deals with grant of affiliation.

Statute 9 (6) says that the educational agency/management shall give an undertaking to the University to carry out faithfully, the provisions of the

Act, Statutes, Ordinances and Regulations and the directions issued by the University, from time to time, in so far as they are related to the college.

First of all it is not a direction concerning affiliation. Further the direction has no statutory force. University is relying on the Constitution of College

Unions framed under clause (7) of the bye laws of the Mahatma Gandhi University Union which is not binding on the affiliated colleges. In such

circumstances the direction given in the letters to conduct election following the presidential system of election cannot be sustained and the affiliated

colleges are free to follow a system which is better for the administration and discipline in the colleges. The Writ Petitions are allowed accordingly.

The direction to conduct election following the presidential system of election will stand set aside.

The University of Kerala challenged the aforesaid judgment by filing Special Leave Petitions before the Apex Court. An interim order dated

22/9/2006 came to be passed, {2006(8) SCC 304}. By the said interim order, the Apex Court, as an interim measure, directed certain

recommendations of the Lyngdoh Committee to be implemented subject to certain modifications. One such measure as provided under Clause

6.1.4 reads as under:-

6.1.4. Subject to the recommendations in respect of the possible model of elections, all institutions must over a period of 5 years, convert from the

nomination model to a structured election model, that may be based on a system of parliamentary (indirect) elections, or on the presidential (direct)

system, or a hybrid of both. It is highly desirable that all institutions follow this mechanism of gradual conversion, especially for privately-funded

institutions that prefer a status quo situation.

7. Further, it was directed that ""we direct that the suggestions given be implemented as and when the necessity so arises. It is made clear that the

recommendations made, which we have accepted to be adopted as an interim measure, shall be followed in all college/university elections, to be

held hereinafter, until further orders"".

8. Another bench of the Apex court hearing the very same matter expressed doubt regarding the implementation of such a measure and

accordingly having formed an opinion that directions in the interim order 22/9/2006 amount to judicial legislation, opined that, it is not legally

permissible and accordingly, the matter was referred to a Larger Bench. The opinion expressed by one of the learned Judges for referring the

matter to a Constitution Bench was approved by the other Judge, though not agreeing with the substance. Paras 7, 16 and 17 in University of

Kerala v. Council of Principals of Colleges, Kerala and Others [(2010) 1 SCC 353] are relevant, which reads as under:-

7. The aforesaid question, therefore, raises a great constitutional question about judicial legislation, whether it is permissible at all under our

Constitution, and even if it is, what is the extent of judicial legislation? In my opinion, the interim order of this Court dated 22-9-2006, prima facie,

amounts to judicial legislation and the question before us is whether this is legally permissible. I am prima facie of the opinion that it is not.

16. It is not necessary to refer to the other decisions of this Court where it has assumed legislative or executive powers, but the time has come

when a thorough reconsideration by an authoritative Constitution Bench is required about the constitutional correctness of these decisions. Hence, I

refer the following questions of law, preferably to be decided by an authoritative Constitution Bench of this Court, to be nominated by the Hon^{ble}

the Chief Justice of India:

1. Whether the Court by an interim order dated 22- 9-2006 can validly direct implementation of the Lyngdoh Committee's Report;

2. Whether the order dated 22-9-2006 really amounts to judicial legislation;

3. Whether under our Constitution the judiciary can legislate, and if so, what is the permissible limit of judicial legislation. Will judicial legislation not

violate the principle of separation of powers broadly envisaged by our Constitution;

4. Whether the judiciary can legislate when in its opinion there is a pressing social problem of public interest or it can only make a recommendation

to the legislature or authority concerned in this connection;

5. Whether Article 19(1)(c) and other fundamental rights are being violated when restrictions are being placed by the implementation of the

Lyngdoh Committee Report without authority of law; and

6. What is the scope of Articles 141 and 142 of the Constitution? Do they permit the judiciary to legislate and/or perform functions of the

executive wing of the State.

In our opinion, these are questions of great constitutional importance and hence, in our respectful opinion they require careful consideration by a

Constitution Bench of this Court.

17. The matters we are referring to a larger Bench are occurring in a large number of cases all over the country and indeed all over the world.

Hence, the issues we have raised have to be decided after careful consideration preferably by a Constitution Bench and after hearing learned

counsel for the parties, and also taking the help of some Senior Counsel as amicus curiae. Let the papers of this case be placed before the Hon^{ble}

the Chief Justice of India for constituting preferably a Constitution Bench at an early date for deciding the questions stated by us above.

A.K. Ganguly, J. (disagreeing in substance) - I agree with my learned Hon^{ble} Brother Katju, J., that the questions formulated by His Lordship

should be referred to a Constitution Bench for an authoritative pronouncement. Since those questions concern the very core of our constitutional

jurisprudence, I would like to add my perception on those questions which may be a shade at a variance with Brother Katju, J. The relevance of

those questions is perennial and they are bound to figure in decisions of this Court in various situations. So while making an authoritative

pronouncement on those questions the Constitution Bench may consider the views of both of us.

9. Reference is also made to the judgment dated 24/2/2015 in WP(C) No. 21428/2014 and a learned Judge of this Court while considering a

batch of cases disposed of the writ petition declaring that it is open for the petitioners to choose any one of the four modes of election in the college

students" union election as permitted by the Apex Court in its order dated 22/9/2006 [(2006) 8 SCC 304]]. However, it was made clear that the

benefit of the judgment will be confined to the petitioners alone and will be subject to final decision by the Larger Bench.

10. On the other hand, learned standing counsel appearing for the University submits that the bye-laws of the College Students" Unions has been

approved by the College and revised as per resolution dated 29/6/2012. Clause (V) reads as under:-

V. Elections to be held on a yearly basis and that the same should be held between 6 to 8 weeks from the date of commencement of the

academic session. Election should be conducted in "Presidential mode" only. Except as otherwise exempted by the University, the conduct of all

elections in the Colleges affiliated to the University shall be held as provided hereunder.

Reference is also made to Section 40, which reads as under:-

40. Rules, Bye-laws and orders.

(1) The Syndicate shall have power to make Rules, Bye-laws and Orders not inconsistent with the provisions of this Act, the Statutes, the

Ordinances and the Regulations, for the guidance and working of Boards and Committees and other bodies constituted under the provisions of this

Act or the Statutes or the Ordinances or the Regulations and for regulating the procedure and conduct of business at meetings of any authority of

the University other than the Senate.

(2) All such Rules, Bye-laws and Orders shall have effect from such date as the Syndicate may direct, but every such Rule, Bye-law or Order shall

be submitted to the Senate during its next succeeding meeting.

(3) The Senate shall have power to cancel or modify any such rule, bye-law or order.

It is therefore submitted that when modification had already been made in the bye-laws, which has statutory force, the University was justified in

directing that the Union election has to be held as per presidential mode.

11. Learned senior Counsel appearing for the petitioners would however submit that Section 40 does not enable the University to incorporate such

a provision in the bye-laws and if at all any such modification is made, it is ultra vires the statute.

12. In Council of Principals" of Colleges (2004 (2) KLT 995) (supra), question considered was whether Clause 7 of the bye-laws for college

unions would bind the affiliated colleges. It was held that no bye-laws had been framed by the Syndicate in accordance with Section 41 of the MG

University Act to bind the various affiliated colleges. This judgment has become final and the Apex Court, in its order dated 01/02/2016 held as

under:

SLP(C) No. 14356/2005

The issue laid before this Bench is based on the opinion expressed by a Division Bench of this Court in University of Kerala v. Council,

Principals" Colleges, Kerala and Ors. 2009(15) SCR 800 which pertains to the elections of Students Unions of the Universities of the various

States of the country. Though, by the Order dated 11.11.2009, the said Bench had directed that the matter be placed before the Chief Justice of

India for constituting, preferably a Constitution Bench, the same has been referred to this Bench.

We have heard Mr. Sushil Balwada, learned counsel for the petitioner and Ms.Lalita Kohli, learned counsel for the respondents.

It is submitted on behalf of the parties that acting on the recommendations of the Lyngdoh Commission, as accepted by the Division Bench of this

Court by its order dated 22.9.2006 as referred to in University of Kerala (supra), elections of the students" unions are being held since thereafter

in accordance therewith. When the instant matter was called on for hearing today, it was submitted on behalf of the parties that as elections are

presently being held in terms of the Order dated 22.9.2006, founded on the Lyngdoh Committee's recommendations, no live issue survives for the

scrutiny of this Court.

In this view of the matter, we feel it expedient to leave the issue at that for the present, to be examined in future in an appropriate case, if the

occasion so arises.

The petition stands closed in these terms.

WP(C) No. 429/2009 SLP(C) No. 16908/2015.

These matters have also been laid before this Bench, being included in the batch of petitions in terms of the opinion expressed by this Court in

University of Kerala case (supra) and the orders of the Chief Justice in connection therewith.

At the outset, when this Bench sought to ascertain from the petitioner in person, claiming to represent the petitioner no.1, National Students Front,

as its President, as to whether the said Body is registered and further as to its current enrolled strength, etc, he could not furnish the information. In

this view of the matter, having regard to the capacity in which the petitioner is before this Court, as well as the issues which seek determination, we

are of the opinion that in the absence of the materials sought for by the Court, it is not possible to hold as a starting premise, that the petitioners

have the required locus standi to maintain the challenge.

These petitions are thus dismissed on this ground.

Therefore, the only question is, whether, when the bye-laws has been revised as per resolution dated 29/6/2012, can it be ignored.

13. While challenging the said condition in the bye-law, reference is made to the interim orders passed by the Apex Court. The said interim

directions issued by the Apex Court no longer survives in view of the fact that civil appeal has been closed without rendering a judgment.

14. The argument that survives to be considered is regarding the scope of power to be exercised by the University for framing the bye-laws. The

bye-laws admittedly is framed under Section 40. Section 40(1) clearly indicates the power of the Syndicate to make bye-laws and orders which

are not inconsistent with the provisions of the Act.

15. The power under Section 40(1) is to make Rules, bye laws and orders which are not inconsistent with the provisions of the Act, the statutes,

the ordinances and the Regulations, for the guidance and working of "Boards and Committees and other bodies constituted under the provisions of

this Act or the Statutes or the Ordinances or the Regulations" and for regulating the procedure and conduct of business at meetings of any authority

of the University other than the Senate. As rightly contended by the learned counsel appearing for the petitioners, framing of byelaws of the College

Students" Union does not amount to a statutory functioning of the Syndicate. The power of the Syndicate to frame bye laws is apparently for the

guidance and working of Boards and Committees and other bodies and for regulating the procedure and conduct of business at meetings of any

authority. Under such circumstances, I do not think that the bye laws now framed by the University is one framed in terms with the power vested

with the Syndicate under Section 40(1) of the Act. of course, the bye-laws framed by the University can be treated as a guideline for affiliated

colleges. It is open for them to either conduct elections based on the said bye-laws or to adopt their own method for conduct of college union

elections in the respective Colleges.

16. Chapter 6 deals with the powers of the Syndicate and statute 3 of the said chapter refers to the powers and duties of the Syndicate. Though

they have power to manage and control Colleges instituted by the University, no power is vested to interfere with the college union elections of an

affiliated college. Therefore, I am of the view that the judgment of the Division Bench of this Court in Council of Principals" of Colleges (2004 (2)

KLT 995) (supra) holds the field. In that case, the Division Bench observed that the bye-laws framed is not binding on the affiliated colleges and

therefore, the direction to conduct election following the presidential system of election will stand set aside. There is no change in situation as

matters stand now. As already indicated, the appeal filed before the Apex Court stands closed and therefore the aforesaid judgment has become

final. In the light of the aforesaid finding, I am of the view that all affiliated Colleges are permitted to adopt their own method of election, no

interference is possible by the University. I do not think that there is any necessity to set aside the impugned letter issued by the Dean of the

University. Suffice to observe that it shall be open for the respective Colleges to adopt its own method for conducting the election.

17. Writ petitions are disposed of with the above directions.