CHARLES K. SKARIA

v.

DR. C. MATHEW

March 19, 1980

[V. R. KRISHNA IYER AND R. S. PATHAK, JJ.]

Constitution of India 1950, *Articles* 14 *and* 15—*Admission to Post Graduate degree and diploma course in medicine—Reservation Quota of* 2% *of total number of seats for candidates from entire country minus Kerala—Such reservation—Whether valid.*

The Kerala State runs three medical colleges with post-graduate degree and diploma courses in two of its Universities (Trivandrum and Calicut). The selection is made from among candidates guided by the prospectus issued in this behalf and the Selection Committee makes the selection. The principal of the Medical College, Trivandrum, being the convener thereof. A notification inviting applications was published in the Gazette dated 27-2-1979 wherein the last date for receipt of application for the post graduate course in ophthalmology was set down as March 31, 1979. Candidates were considered on the basis of their merit, marks being allotted for various attributes including military service, membership of the Scheduled Castes and Tribes, and holding of medical diplomas. The competitive marks provided for 10% to diploma holders in the selection of candidates to M.S. and M.D. courses in the respective subjects or sub-specialities.

The Kerala State provided a quota of 2% of the total number of seats for candidates from the entire country minus Kerala.

While clause 12 of the prospectus frowned upon late and/or defective applications, clause 13 provided that attested copies of the statement of marks at each professional examination and those of other documents should be attached with every application.

The Special Secretary to the State Government in a communication to the Selection Committee informed that as the result of the Diploma Course conducted by the Medical College, Trivandrum would not be available before the last date for the receipt of applications, 10% weightage may be given to the concerned applicants, subject to the condition of production of the Diploma Certificate before finalisation of the selection to the post-graduate course.

The number of seats for the post-graduate degree course in Ophthalmology available for the year 1979-80 was six of which one belonged to Schedule Caste/Scheduled Tribe candidate, another to a tutor working in a medical college. The State was left with four seats.

In the Writ Petition, the High Court held that one of the students, Dr. Gopinathan Nair, was so meritorious that none challenged his admission, and that there was no inherent lacuna or illegality in the communication Ex P 3 of the Special Secretary to the Selection Committee. In appeal, the Full Bench of the High Court, allowed the appeal holding that Ex P 3 cannot have the effect of over-riding the effect of clauses 12 and 13 of the prospectus and quashed the selections made on the basis of the rank list for admission.

In the appeals to this Court on the question whether the 2% reservation for the entire country's candidate population from outside Kerala in the "Open Merit Pool", was valid,

A HELD : 1. Principled policy, consistent with constitutional imperatives (Articles 14 and 15) must guide admissions to courses in higher professional education but Governments and Universities, not infrequently take liberties with this larger obligation under provincial pressures and institutional compulsions and seek asylum in reluctant pragmatism mindless of hostility to constitutionality. Nothing is more harrowing for the Court, with increasing litigation and thereby forced in to slow motion and unwilling to intervene in an administrative area than to hamper the stategic stages of educational process like admission andexaminations, but the Justice System cannot run away from hearing and deciding questions of unconstitutionality, especially when educational authorities shape policies, change rules and make peace with the crisis of the hour, ignoring the parameters of the National Charter. Mistrust of Government, is violative of comity between instrumentalities and is not permissible unless substantiated by facts. Suspicion is the upas tree under whose shade reason fails and justice dies. High Court has thrown the academic year in post-graduate Opthalmology into disarray and even wastage. [74 F-H, 77 G-H]

2. Welfare-oriented judicial process must be constructive in its objective, must be geared to order as its goal and must pave the way for resultant contentment, avoiding negative writs which, in practice, prove to be congealing commands. [78 D-E]

D 3. In the instant case, the High Court, on the crucial question, has correctly stated the law regard denial of opportunity for 'outsiders' and consequently found the admission to the courses all wrong, but through its judgment, has jettisoned students who are half-way through their courses and directed fresh admissions on new policies yet to be evolved, with little chance of any one getting through the examinations or even admissions during this academic year. [78 E-F]

E 3. Whatever might be the passion for correct law and provocation on account of governmental indifference, the Court must use its power to correct error and promote order and not strike down an illegal error without going forward to affirmative action which may minimise injury generally. The judicial process, in its creative impulse, must hesitate to scuttle, salvage wherever possible and destroy only when the situation is beyond retrieval. [79 D-E]

F 4. The scheme of reservation or a Paltry 2% for candidates in the whole country outside the two universities of the State has not been substantiated as a sufficient fulfilment of Articles 14 and 15. Fundamental rights of candidates do not depend on the grace of governments and Indians are not, aliens in their own motherland when asking for seats on the score of equal opportunity. A host of good reasons may weigh with the state in formulating prefences, reservations and other cases of choice provided they do not outrage Arts. 14 G and 15, or promote the process of equalisation as a dynamic phase of equality. What is paramount is equal opportunity for each. [81 D-F]

State of Kerala v. *V. M. Thomas,* [1976] 2 S.C.C. 310 referred to.

5. Law in action being a healing art, the Court must strive to avoid driving out the students half-way through their course and to see that no costly seat for advanced studies in which the community as a whole has a stake is wasted. H The Court should not give up the search for alternatives. [82 E-F]

6. There is nothing unreasonable nor arbitrary in adding 10 marks for holders of a diploma. But to earn this extra 10 marks, the diploma must be

obtained at least on or before the last date for application, nor later. Proof of having obtained a diploma is different from the factum of having got it. It is prudent to produce evidence of the diploma alongwith the application, but that is secondary. Relaxation of the date on the first is illegal, not so on the second. Academic excellence, through a diploma for which extra marks is granted, cannot be denuded because proof is produced only later, yet before the date of actual selection. The emphasis is on the diploma, the proof thereof subserves the factum of possession of the diploma and is not an independent factor. [84 D-F]

7. When a statute vests a public power and conditions the manner of exercise of that power then the law insists on that mode of exercise alone. It is unconcerned with that rule. A method of convenience for proving possession of a qualification is merely directory. Moreover, The prospectus itself permits government to modify the method. There is nothing objectionable with the government directive to the selection committee, nor in the communication to the selection committee by the university, nor even in their taking into consideration and giving credit for diplomas although the authentic copies of the diplomas were not attached to the application for admission. [86 A-C]

8. Much of hardship and harassment in Administration flows from overemphasis on the external rather than the essential. The government and the selection committee rightly treated as directory (not mandatory) the mode of proving the holding of diplomas and as mandatory the actual possession of the diploma. The frustrating delay in getting copies of degree was by-passed by the State Government by two steps. Government informed the selection committee that even if they got proof or marks only after the last date for applications but before the date for selections they could be taken note of and secondly the Registrars of the Universities informed officially which of the candidates had passed in the diploma course. The selection committee did not violate any mandatory rule nor act arbitrarily by accepting and acting upon these steps. [86 D-G]

9. The three candidates who had been eventually admitted by the selection committee could not be ousted merely for the reason that the certificate of diploma had not been produced together with the application for admission. Nor, indeed, could government be faulted for issuing a directive to the selection committee that applications from students of the diploma course could be considered subject to the condition that they would "produce the diploma certificate before finalising the selection to post-graduate course". [87 A-B]

10. Though appellant No. 1 has no legal claim to a seat, the overall circumstances merit compassionate consideration and the Court directed. The Kerala University and the Indian Medical Council directed to permit him to complete his course by adding one more seat, for this year only, to the ophthalmic degree course. Marginal adustments by increasing one seat more is possible without injury to academic efficiency. [88 F-H]

11. Directed that the State of Kerala and the Principal of the Trivandrum Medical College, who is the convener of the Selection Committee, as well as the two universities concerned, admit into the post-graduate ophthalmology course Dr. Naomi and Dr. Gopal Krishnan for this year. The two applicants will be accorded admission on their reporting within ten days. [91 E-D]

State of Kerala v. *Kum. T. P. Roshana* [1972] 2 SCR 974 : *A. Periakaruppan* v. *State of Tamilnadu* [1971] 3 SCR 449 referred to.

12. The 2% open seats for the candidates from all the Universities of India outside Kerala runs counter to the constitutional directive of equal opportunity and the preambuler emphasis on national integrity. The State will do well to fashion a formula in terms of the guidelines given by this Court in *Dr. Jagdish Saran's* v. *Union of India and others,* [1980] 2 S.C.R. 831 [91A-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 641-644 of 1980.

Appeals by Special Leave from the Judgment and Order dated 10-12-1979 of the Kerala High Court No. W.A. No. 22/79, W.A. No. 245/79 and O.P. No. 1586/79.

P. Govindan Nair and *A. S. Nambiar* for the Appellants in C. A. No. 641 to 643/80.

M.M. Abdul Khader and *V.J. Francis* for the Appellant in C.A. No. 644/80.

T.S. Krishnamoorthy Iyer and *N. Sudhakaran* for the Respondent No. 1 in C.As. Nos. 641 to 644/80.

The Judgment of the Court was delivered by

KRISHNA IYER J., The universities in the country are often among the contributaries to the flood of litigation in the higher courts of the country. This pathological condition, to which the healing attention of the nation's educational leadership. The above appeals before us present challenges to the scheme of admission to post graduate courses in medicine in the colleges of the Kerala State. But since that State is not alone in the tendency to temporarian with constitutional values and writ petitions for college admissions are almost a hardly annual, we deem it our duty to permit ourselves a few preliminary observations before proceeding to the fact-situation and conflict-resolution.

Principled policy, consistent with constitutional imperatives (Arts. 14 and 15) must guide admissions to courses in higher professional education but Government and Universities, not infrequently take liberties with this larger obligation under provincial pressures and institutional compulsions and seek asylum in reluctant pragmatism mindless of hostility to constitutionality. Nothing is more harrowing for the Court, over-burdened with increasing litigation and thereby forced into slow motion, and unwilling to intervene in an administrative area, than to hamper the strategic stages of educational processes like admissions and examinations, but the Justice system cannot run away from hearing and deciding questions of unconstitutionality, especially when educational authorities shape policies, change rules and make peace with the crisis of the hour, ignoring the parameters of the National Charter. We make these

observations driven by the painful experience of facing this situation year after year, from State after State. If higher education bids farewell to national vision and equal opportunity—the two fundamental criticisms levelled before us in these cases—what hope is there for constitutionalism save surrender to provincialism and lobby power leaving the fortunes of students of advanced learning to litigative astrology annually ? A national consensus on this issue is long over-due and we venture to suggest that the Union of India will actively involve the academic community and the States, and put the problem on the urgent national agenda and reach solutions constitutionally permissible and agreeable to the genius of the States *vis-a-vis* post-graduate courses. No State nor University can despise the Constitution nor leave in 'inglorious uncertainty' or myopic *ad hocism* the career of its talented human resources.

Back to the facts. The Kerala State runs three medical colleges with post-graduate degree and diploma courses in two of its universities Trivandrum and Calicut. The selection is made from among candidates guided by the prospectus issued in this behalf and the Selection Committee makes the selection, the principal of the Medical College, Trivandrum, being the convener hereof. A notification inviting applications was published in the Gazette dated 27-2-1979 wherein the last date for receipt of applications was set down as March, 31, 1979. Candidates were considered on the basis of their merit, but the concept of merit was broadened in such manner that marks were allotted for various attributes including military service, membership of the Scheduled Castes and Tribes, and, were relevant to the point raised in the present case, holding of medical diploma. One of the post-graduate courses offered by two of the colleges is in opthalmology and we are concerned directly with the competitive claims among the candidates for this course only. Right at the outset, we wish to make it clear *that we confined ourselves to the comparative merits of the candidates for the post graduate degree course in Opthalmology and do not wish to disturb any other course lest there should be upsets beyond what we intend.*

The competitive marks admittedly provided for 10% to diploma-holders in the selection of candidates to M.S. and M.D. courses in the respective subjects or subspecialities. We are not concerned with the other aspects of the selection process such as percentages in favour of candidates belonging to the scheduled castes and tribes (10%). Again, 20% of the seats were set apart for the teaching staff in the medical colleges.

One of the bones of contention between the parties in the High Court related to candidates from universities outside Kerala.

A Articles 14 and 15 do not recognise state frontiers or the cult of 'the sons of the soil', if we may speak generally and over-simplistically. The necessary implication of the constitutional mandate is that every basic degree-holder who fills the bill can apply for admission for post-graduate courses. But the Kerala State, in its wisdom, provided a niggardly quota of 2% of the total number of B seats for candidates from the entire country minus Kerala—not a catholic approach informed by nationalist generosity, if we may say so with some trepedition. By way of aside we may observe that other States, observed with provincial impulses, are equally parsimonious is no validation of a violation of law, if it be so. Anyway, the prospectus provided that "instead of open C competition, 2% of the seats under general merit are set apart for candidates coming from *out side Universities* other than Kerala and Calicut."

Another facet of the forensic right before the High Court needs to be mentioned before we proceed to a formulation of the D issues debated in this Court. While clause 12 of the prospectus frowns upon late and/or defective applications, clause 13 states :

> *Certificates to be produced* :—In all cases true copies of the following documents have to be produced :—
>
> xx xx xx]
>
> E (k) Any other certificates required along with the application.

Clause 13 in the form of application for admission contains an explanation which deserves mention in this context :

> NB : Attested copies of the statement of marks at each professional examination and those of other F documents *should be attached with every application.* Here also specify whether a diploma holder or having Military service or Rural service and also whether certificates to this effect have been produced.
>
> (emphasis added)

G While the prospectus is a fairly comprehensive repository of of the directions issued by the State Government in regard to the selection of candidates, the opening passage in paragraph 4 thereof contains the following statement :

> "The selection of candidates will be made according H to G.O. Ms. 280/76/HD dated 14-7-1976 as modified from time to time which shall be deemed to have incorporated *ibid*"

(This power to modify is not arbitrary and can be exercised only reasonably). Apparently in exercise of this power and making a realistic appraisal of the examination-situation in the Calicut and Kerala universities, the Special Secretary to Government issued a communication to the Selection Committee, the operative portion whereof has relevance to the discussion that is to follow :

> It is noted that the result of the Diploma Course conducted in Medical College, Calicut will be published before the last date for the receipt of application to the post-graduate course, while the result of the students of Medical College, Trivandrum will not be available before the last date for receipt of appliation to post-graudate course.
>
> Thus the students of Medical College Trivandrum are placed at a disadvantage, I am therefore to inform you that it has been decided that applications from the students of the Diploma Course, Trivandrum may also be considered and that 10% weightage may be given to the post graduate students of Diploma course in Medical College Trivandrum, subject to the condition that they will produce the Diploma Certificate before finalising the selection to post-graduate course.

The learned single Judge who had specially examined the Government file in this connection, with an eye on the legitimacy of the processes involved and the sufficiency of the notings and consultations made, came to the conclusion that the communication never represented the decision of the Government and was in conformity with Secretariat practice. The learned single Judge summed up his view thus :

> There is thus no inherent lacuna or illegality in the proceedings which led to Ext. P3. I hold that Ext. P3 was validly issued.

Nothing presented to us persuades to a contrary view although we may presently advert to what, with a slant, the Full Bench of the High Court had to say, in appeal, on this aspect of the matter Mistrust of Government, implicit in the judgment of the Full Bench in appeal, is violative of comity between instrumentalities and is not permissible unless substantiated by facts. It has been well said that suspicion is the upas tree under whose shade reason fails and justice dies. We permit ourselves these observations only because the learned Chief Justice who spoke for the Full Bench did use words which did not indict but did suspect :

A We wish to record that it was stated for Respondents 4 and 5 in W.A. No. 222 and 245 of 1979 that the marks of the Diploma Test were communicated to the principals on / before the last date for receipt of applications and received by them on 31-3-1979. *There was nothing to show whether the communication was an* B *open or an authenticated one* and we are doubtful to say no more whether at acquisition of qualification for eligibility and weightage, subsequent to the last date for application can save an applicant who did not have these on the said date. We are clear that Ext. P3 cannot have the effect of overriding the effect of clauses 12 and 13 C (k) of the Prospectus.

(emphasis supplied)

We will scan the soundness of this criticism in due course.

It is fair to state now that we have sketched the backdrop, what the further facts are and what the High Court's verdict is. We may D abbreviate the narration because we substantially agree with the main legal point decided by the High Court. Regrettably, its ultimate direction has thrown the academic year in post-gradute Opthalmology into disarray and even wastage. Welfare-oriented judicial process must be constructive in its objective, must be geared to order as its goal and must pave the way for resultant con- E tentment, avoiding negative writs which, in practice, prove to be congealing commands. Indeed, the High Court, on the crucial question, has more or less correctly stated the law regarding denial of opportunity for 'outsiders' and consequently found the admission to the courses all wrong, but through its judgment, has F jettisoned students who are half-way through their courses and directed fresh admissions on new policies yet to be evolved, with little chance of any one getting through the examinations or even admissions during this academic year consistently with the university regulations and governmental tardiness. We cannot countenance such negativity without some effort at rescue through G the court writ since a whole year of opthalmology study at the post-graduate level may well be lost to the State, what with the enormous investment in running such courses that the universities have laid out and the people's need for such specialists. The Full Bench decision of the High Court, in its ultimate effect, has left behind it a fall-out of demolition :

H As a result of our above discussion and conclusion we allow N.A. No. 222 of 1979 and set aside the judgment of the learned Judge and the rank list for admission to

the post-graduate courses in Opthalmology, and *quash the selections made on the basis of the said list.*

We were rather distressed at having to quash the selections of budding youngsters to the specialised courses. Such thoughts prevailed with us in the Full Bench decision in *State of Kerala and Anr.* v. *Rafia Rahim* (1978 KLT 369). While the petitioners in those cases won the battle, they were denied the fruits of victory. We see no ground for a repetition of the same treatment to the petitioners before us. Particularly it is so, because some of them had filed the writ petitions before the selections, and some had obtained interim orders that the selections shall be finalised only subject to the result of the writ petitions in this court. We cannot lightly pass over these aspects. *We would accordingly quash the selections made and directly a fresh selection to the courses, in accordance with law and in the light of the observation contained in this judgment.*

Whatever might be the passion for correct law and provocation on account of governmental indifference, the court, in our view, must use its power to correct error and promote order and not strike down an illegal error without going forward to affirmative action which may minimise injury generally. Indeed, the judicial process, in its creative impulse, must hesitate to scuttle, salvage wherever possible and destroy only when the situation is beyond retrieval-life-giving facts forgotten by the High Court when quashing the admissions for the year. This positive perspective justifies the final direction that we issue in the concluding para of this judgment, if we may anticipate the nature of the relief we have moulded.

Some more facts may now be narrated merely to illumine the ground on which we are disposing of these appeals. Indeed, our anxiety to hasten the pace of justice and reduce the damage to the courses under way has persuaded us into hearing full arguments at the earliest stage conceivable. Having recently discussed a similar issue in *Dr. Jagadish Saran's case* (1) we desist from elaborately examining the merits of one of the major issues raised here. Abridged facts, condensed examination and brief directions will suffice, although arguments have been full and helpful.

The number of seats for the post-graduate degree course in Opthalmology available for the year 1979-80 was *six*, of which one belonged

(1) [1980] 2 S.C.R. 831

A to a Scheduled Caste/Scheduled Tribe candidate, another to a tutor working in a medical college. The State was left with four seats. The High Court has clarified that one of the students, Dr. Gopinathan Nair, was so meritorious that none challenged his admission. Three seats and six contenders, was the musical chair *scenario.*

B The story thus begins with three seats for post-graduate opthalmology and the whole exercise is confined to allotment of these seats in conformity with the equal opportunity rule which is constitutionally inviolable. The selection committee, acting on the guidelines, had to award 10 marks extra for those who had a post-graduate diploma—a reasonable recognition of an additional accomplishment C relevant to the object of excellence in the post-graduate degree course. So, no one has attacked the propriety of this addition. On the contrary, both sides have relied on this qualification, the battle being over the subsidiary issue of whether the appellants before us, whose admission to the courses has been undone by the High Court were entitled to reckon in their favour the possession of a D diploma the certificate for which was issued to them only after the last date for applications for the post-graduate degree. We will presently state the events which give rise to this argument. Right or wrong, the Selection Committee did admit three students who undoubtedly possessed diplomas and, if the marks eligible on that score were to be tacked on, the selections were unassailable except E at the instance of candidates from universities outside Kerala and one of whom did successfully challenge the selections before the High Court.

Had the final shape of the High Court's order been left intact it would have meant that all those doing their course would be out F and the elaborate process of framing fresh rules would involve discussion and debate, consultation and formulation, and then invitation for applications, only to find that, at the end of this excursion, everybody has missed the bus since time does not stand still until government implements the High Court's will.

G The major target of attack before the High Court was the 2% reservation for the entire country's candidate population from outside Kerala in what was called the "open merit pool". The reason for the nullification of the parsimonious 'percentage for 'outside' candidates in the open merit pool has been stated by the High Court thus :

H > Despite our anxiety, we are afraid we cannot salvage the principle of selection introduced by the Government under clause 5(c) as amounting to a rational classifi-

cation based on intelligible differentia having a rational nexus with the object sought to be served. Whether intentionally or otherwise, it strikes us as clever device to oust the 'outside' University Graduates from the general merit pool and to confine them to an illusory scheme of reservations.

We have dealt with the policy of institutional reservations paring down the availability of seats for candidates from other universities, in *Dr. Jagadish Saran's case* (*supra*). Although in that decision we ultimately desisted from striking down the formula adopted by the Delhi University with a view to avoiding a stalemate for the year, we did direct that University to reconsider the whole problem of admissions and reservations in terms of Arts. 14 and 15 and concretise the constitutional guidelines in that behalf. Having regard to the ratio in the above case, we are not inclined to reverse the view of the Full Bench of the Kerala High Court in the judgment under appeal *in so far as it has taken the view extracted above.* Even so, we feel the need to pursue the matter further because we must design the relief with the least disturbance and not annul the course for the year as a legal consequence.

The scheme of reservation of a paltry 2% for candidates in the whole country outside the two universities of the State has not been substantiated as sufficient fulfilment of Arts. 14 and 15. Fundamental rights of candidates do not depend on the grace of governments and Indians are not aliens in their own motherland when asking for seats on the score of equal opportunity. A host of good reasons may weigh with the State in formulating preferences, reservations and other cases of choice provided they do not outrage Arts. 14 and 15, or, indeed, as suggested by this Court in the *Thomas case*(1) may promote the process of equalisation as a dynamic phase of equality. What is paramount is equal opportunity for each.

The Government, in its wisdom, made provision for scheduled castes/tribes, backward *classes*, students from the colleges of Kerala and other categories and, after working out these enclaves of exclusivism and immunity from national competition on sheer merit, wound up with a magnificent 2% of the total seats by way of homage to "equal opportunity" open to all Indian candidates put together (less Kerala candidates).

Can it be that, while sloganising against the parochial doctrine of "sons of the soil", States policy in higher education does not concede more than 2% to Indian candidates *qua* Indians who are

(1) *Kerala* v. *N. M. Thomas*, [1976] 2 S.C. C. 310.

not otherwise sheltered by the dykes of reservations ? The High Court was obviously dissatisfied [with the governmental policy of 2% for "open" seats which was more a mockery of national integrity, read with equal opportunity, than a sincere respect for the foundational faith enshrined in Arts. 14 and 15. You cannot lay wreath and claim to garland if we may put the point in poignant imagery. Therefore, the High Court struck down the formula for selection because it regarded that a higher proportion of seats for all in "open competition" was a constitutional necessity. We do not delve into this aspect at greater length or scan the *pros* and *cons* of the point canvassed because we have already decided in *Dr. Jagadish Saran and Ors.* v. *Union of India* (Supra) what guidelines should govern admissions to medical colleges at the higher levels. We, therefore, do not propose to interfere with the holding of the High Court that 2% for "outsiders" is not sustainable in law. But, we must, even here, caution the Kerala State that an enlightened policy of admission to institutions of higher studies in harmony with the constitution must be formulated if it is not to be guilty of contributing to the confusion in college campuses and "student litigation" which paralyse educational life.

Even though we desist from demolishing the reasoning of the High Court on the trivial 2%, we cannot appreciate the negative stance or note of nullity adopted in the final relief. Remedial jurisprudence is benign judge power. Law in action being a healing art, we must strive to avoid driving out the students half-way through their course and to see that no costly seat for advanced studies in which the community as a whole has a stake is wasted. We do not think the court should give up the search for alternatives. Actually, we persuaded counsel on both sides to make a constructive approach. So viewed, it became feasible for us to reach a reasonable and viable solution to the problem, as will be presently explained. In conclusion, we agree with the High Court that 2% in the 'merit pool' for 'outside' candidates is not shown to be rational and so the 'outsider candidates (to use the High Court's expression) should have been considered even beyond 2%. But how far and under what conditions is for the State to consider. (see *Dr. Jagdish Saran, supra*).

Now we come up against the other limb of the argument which appealed to the High Court. The three candidates already admitted to the Opthalmology course secured their seats on the basis of 'diploma marks'. Had they no diplomas they would have been screened out. The High Court has taken the view that the diplomas of the appellants should have been excluded from consideration by the Selection Committee. Why? The ground is given by the Full Bench in appeal thus :

Under clause 13(k) of the application form, which we have extracted earlier, all certificates required had to be produced with the application. Clause 12 enjoins summary rejection for non-compliance. All of which, only seem to indicate that the diploma certificate of weightage must accompany the application. Where it did not, as in this case, accompany the application, there was no right in the Government or special Secretary to over look the defect and direct the weightage to be given even to those who did not have the diploma as was attempted to be done by Ext. P3 letter referred to earlier. Assuming, without deciding that the 'Prospectus' and the notification ware a 'law' we would remind ourselves of the caution administered by the Supreme Court that an unannounced law like Ext. P3 cannot bind, and that it is against the principles of natural justice to penalise a citizen on such 'law vide *Harla* v. *State of Rajasthan* (AIR 1951) SC 467. If acquisition of qualification for eligibility or weightage were to be looked into subsequent to the last date, we should think that only an open and official or authentic declaration of result by the university, or perhaps on official intimation of declaration of result alone can serve the purpose. The direction in Ext. P3 to give weightage to the Kerala University graduates would certainly not serve the purpose, and was wrong and illegal and has vitiated the selection.

Bluntly expressed, the court took the rather pharisaic view that "the diploma certificate for weightage must accompany the application. Where it did not, as in this case, accompany the application there was no right in the government or Special Secretary to overlook the defect and direct the weightage to be given even to those who did not have the diploma as was accepted to be done by Ext. P3 letter referred to earlier". An oblique suggestion that the Government Secretary's communication was not authentic and, therefore, invalid is also part of the reasoning of the learned judges. With great deference, we express our difference. It is common case that the diploma holding students who had been given admission to post-graduate opthalmology by the selection committee had secured higher marks than the diploma-holding students who had been refused admission by that committee. But the High Court cancelled the marks awarded to the three students who had been granted admission by the selection committee on round that their diploma certificates were not obtained before

A the last date of application, the intimation to the selection committee by the Secretary to Government was 'unlaw', and, therefore, the special marks added to their score had to be deleted. If this stand of the High Court were right, the three students who were currently doing their course would have to get out and since the entire selection had formally been set aside, no one also would be B able to get any admission until revised rules were made. The upshot would be that the three seats available for higher opthalmology would be wholly wasted and the losers would be the students and the State. Should this be ? We think not. The real reason, apart from some suspicion, which weighed with the High Court in disC regarding the diplomas was that the prospectus and the prescriptions there in were law and could not be deviated from even a wee-bit and, therefore, the non-production of the certified copies of the diplomas along with the applications for admission excluded the candidates from eligibility to the addition of 10 marks. Even if it were not law, an official declaration of university results, not official communication D to the selection committee would be essential. In our view, this over-stress on literality undermines the substantiality of the guidelines in the prospectus. Here the learned single Judge was right.

There is nothing unreasonable nor arbitrary in adding 10 marks for holders of a diploma. But to earn this extra 10 marks, the diploma must be obtained at least on or before the last date for appliE cation, not later. Proof of having obtained a diploma is different from the factum of having got it. Has the candidate, *in fact*, secured a diploma before the final date of application for admission to the degree course ? That is the primary question. It is prudent to produce evidence of the diploma along with the application, but that is secondary. Relaxation of the date on the first is illegal, not so on the F second. Academic excellence, through a diploma for which extra mark is granted, cannot be denuded because proof is produced only later, *yet before the date of actual selection.* The emphasis is on the diploma, the proof thereof subserves the factum of possession of the diploma and is not an independent factor. The prospectus does G say :

> (4)(b) : 10% to Diploma holders in the selection of candidates to M.S., and M.D., courses in the respective subjects or sub-specialities.
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> 13. Certificates to be produced :— In all cases true copies of the following documents have to be produced :—
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> H xx xx xx
>
> (k) Any other cetificates required along with the application.

This composite statement cannot be read formalistic fashion. Mode of proof is geared to the goal of the qualification in question. It is subversive of sound interpretation and realistic decoding of the prescription to telescope the two and make both mandatory in point of time. What is essential in the possession of a diploma before the given date; what is ancillary is the safe mode of proof of the qualification. To confuse between fact and its proof is blurred perspicacity. To make mandatory the date of acquiring the additional qualification before the last date for application makes sense. But if it is unshakeably shown that the qualification has been acquired before the relevant date, as is the case here, to invalidate this merit factor because proof, though indubitable, was adduced a few days later but before the selection or in a manner not mentioned in the prospectus, but still above board, is to make procedure not the hand made but the mistress and form not as subservient to substance but as superior to the essence.

Before the selection committee adds special marks to a candidate based on a prescribed ground it asks itself the primary question : has he the requisite qualification? If he has the marks must be added. The manner of proving the qualification is indicated and should ordinarily be adopted. But, if the candidate convincingly establishes the ground, though through a method different from the specified one, he cannot be denied the benefit. The end cannot be undermined by the means. Actual excellence cannot be obliterated by the choice of an incontestable but unorthodox probative process. Equity shall overpower technicality where human justice is at stake.

The present case is a capital illustration of nominalism battling with realism for judicial success. Both sides admit that the appellants before us had secured diplomas. They further admit (ignoring for a moment the submission on 2% for outsiders) that if the diploma scores were added, the applicants, by the measure of marks, deserve to be selected. provided the diploma obtained in the examination *held in* 1979 is within time. Then, why did the High Court upset their selection? Because the certificates of diploma were not attached to the applications and communication by the Registrar of the University to the selection committee was an unauthorised mode of proof, deviating from the prospectus, though authentic in fact. Two flaws vitiate this verbally virtuous approach. True the prospectus directs that certificates shall be produced along with the applications for admission. The purpose obviously is to have instant proof of the qualification.

A We are aware that when a statute vests a public power and *conditions* the manner of exercise of that power than the law insists on that mode of exercise alone. We are here unconcerned with that rule. A method of convenience for proving possession of a qualification is merely directory. Moreover, the prospectus itself permits government to modify the method, as the leanred single B Judge has pointed out. In this view, we see nothing objectionable with the government directive to the selection committee, nor in the communication to the selection committee by the university, nor even in their taking into consideration and giving credit for diplomas although the authentic copies of the diplomas were not attached to the application for admission. A hundred examples of absurd C consequences can be given if the substance of the matter was to be sacrificed for mere form and prescriptions regarding procedures.

It is notorious that this formalistic, ritualistic, approach is unrealistic and is unwittingly traumatic, unjust and subversive of the D purpose of the exercise. This way of viewing problems dehumanises the administrative, judicial and even legislative processes in the wider perspective of law for man and not man for law. Much of hardship and harassmant in Administration flows from over-emphasis on the external rather than the essential. We think the government and the selection committee rightly treated as directory (not mandatory) E the mode of proving the holding of diplomas and an mandatory the actual possession of the diploma. In actual life, we know how exasperatingly dilatory it is to get copies of degrees, decrees and deeds, not to speak of other authenticated documents like mark-lists from universities, why, even bail orders from courts and government orders from public offices. This frustrating delay was by-passed by the State F Government in the present case by two steps. Government informed the selection committee that even if they got *proof* of marks only after the last date for applications but before the date for selections they could be taken note of and secondly the Registrars of the Universities informed officialy which of the candidates had G passed in the diploma course. The selection committee did not violate any mandatory rule nor act arbitrarily by accepting and acting upon these steps. Had there been anything dubious, shady or unfair about the procedure or any *mala fide* move in the official exercises we would never have tolerated deviations. But a prospectus is not scripture and commonsense is not inimical to inter- H preting and applying the guidelines therein. Once this position is plain the addition of special marks was basic justice to proficiency measured by marks.

We thus reach the conclusion that the three candidates who had been eventually admitted by the selection committee could not be ousted merely for the reason that the certificate of diploma had not been produced together with the application for admission. Nor, indeed, could government be faulted for issuing a directive to the selection committee that applications from students of the diploma course could be considered subject to the condition that they would "produce the diploma certificates before finalising the selection to post-graduate courses". The equity of this instruction of the government comes into bold relief when we realise that no party in this Court has a case that the candidates admitted by the selection committee did not secure a diploma in opthalmology.

Even so, there is a snag. Who are the diploma-holders eligible for 10 extra marks ? Only those who, at least by the final date for making applications for admissions possess the diploma. Acquisition of a diploma later may qualify him later, not this year. Otherwise, the dateline makes no sense. So, the short question is when can a candidate claim to have got a diploma? When he has done all that he has to do and the result of it is officially made known by the concerned authority. An examinee for a degree or diploma must *complete* his examination—written, oral or practical—before he can tell the selection committee or the court that he has done his part. Even this is not enough. If all goes well after that, he cannot be credited with the title to the degree if the results are announced only after the last date for applications but before selection. The second condition precedent must also be fulfilled, viz., the official communication of the result before the selection and its being brought to the ken of the committee in an authentic manner. May be, the examination is cancelled or the marks of the candidates are withheld. He acquires the degree or diploma only when the results are officially made known. Until then his qualification is inchoate. But once these events happen his qualification can be taken into account in evaluation of equal opportunity provided the selection committee has the result before it at the time of—not after—the selection is over. To sum up, the applicant for post-graduate degree course earns the right to the added advantage of diploma only if (a) he has *completed the diploma examination on or before the last date for the application,* (b) the result of the examination is also published before that date, and (c) the candidate's success in the diploma course is brought to the knowledge of the selection committee before completion of selection in an authentic or acceptable manner. The prescription in the prospectus that a certificate of the

A diploma shall be attached to the application for admission is directory, not mandatory, a sure mode, not the sole means. The delays in getting certified copies in many departments have become so exasperatingly common that realism and justice forbid the iniquitous consequence of defeating the applicant if, otherwise than by a certified copy, he satisfies the committee about his diploma. There B is nothing improper even in a selection committee requesting the concerned universities to inform them of the factum and get the proof straight by communication therefrom—unless, of course, this facility is arbitrarily confined only to a few or there is otherwise some capricious or unveracious touch about the process.

C Judged by the above tests it is conceded that while the Calicut University's diploma-holders had completed their examination *before* the last date for M.D. applications and produced the certificate before the selection, the Kerala University diploma-holder *completed* his diploma examination including public action of results only *after* the last date for applications and produced the certi- D ficate before the selection. By this token he is ineligible for admission because his diploma result was published only after the last date for applications. The accident of time has cheated him even as in human affairs generally, be it individual or collective, fortune ebbs and flows, influenced critically by happenstances of time and circumstances of life. That is the relativity of Life, if one may look at problems E philosophically. We, therefore, hold that appellant Nos. 2 & 3 are entitled to admission and their appeal must succeed. By the same token the appeal of appellant No. one must be dismissed.

To dismiss an appeal is merely to declare that judicial remedy will not issue and not that by other processes justice should not be F sought or granted. From the humane perspective and with a view to helping appellant No. one and to pursue his relief through the University or other appropriate State agency, we directed the impleadment of the Indian Medical Council which is the statutory body concerned, at the national level, with higher medical degrees and G courses. The Medical Council has not appeared before the court though its presence would have helped the forensic process to heal the fractured academic course. But we cannot wait longer. It behoves the State to give academic justice—not legal remedy—to appellant No. 1 if circumstances permit, having regard to the fact that, with diploma qualification, he has spent months in doing his H opthalmology degree course. In law he fails, in justice he need not, if marginal adjustments by increasing one seat more were possible without injury to academic efficiency. What we mean is that though

appellant No. 1 has no legal claim to a seat, the overall circumstances will merit compassionate consideration, and we direct the Kerala University and the Indian Medical Council to permit him to complete his course by adding one more seat, for this year only, to the Opthalmic degree course.

On this basis there is one seat vacant in the Trivandrum Medical College. To whom should it be allotted? There are three 'outsiders' and there is one seat available. Ordinarily, the best applicant is one who has the highest marks and the seat must be awarded to her i.e. Dr. Naomi J. Vettath. She has not filed any writ petition although denied admission. Among the three only Dr. Gopalakrishnan has chosen to challenge the rejection of admission. So Sri T.S. Krishnamurthy Iyer contends that the only seat available for allotment should be confirmed to the only applicant who has cared to challenge by writ petition and those who have not cared to impugn the admission scheme in court should be ignored as having given up the pursuit.

Shri T.S. Krishnamurthy Iyer relies on the ruling in *A. Periakaruppan* v. *State of Tamilnadu* (1) to support his special plea to award the seat to Dr. Goppala Krishnan, who has got less marks than the non-litigant Dr Naomi. Hegde, J in the above case did observe :

> There are about 80 persons, who, we are told, are in the waiting list. Some of the unsuccessful applicants had moved the High Court of Madras for relief similar to that sought by the petitioners herein. But it appears, their writ petitions have been dismissed. Some out of them have intervened in the petitions. Other non-selected candidates have evinced no interest in challenging the selections made. In the circumstances, it is reasonable to assume that they have abandoned their claim and it is too late for them to press their claim.

Certainly, this limited approach strengthens the submission of Shri Krishnamurthy Iyer. The force of the reasoning in *Periakaruppan's case* (supra) consists in the probability that a party who does not litigate manifests apathy for the enforcement of his rights. The logic is simple. He who does not promptly pursue his remedy may reasonably be assumed to have lost interest in gaining admission to the course. If this were a universal proposition, Dr. Gopalakrishnan could be allotted the only vacant seat. But, on a suggestion from the court, the Principal of the Medical College, Trivandrum ascertained the wishes of Dr. Naomi J. Vettath and Dr.

(1) [1971] 3 S.C.R. 449.

A Joggy Joseph who are diploma-holders from universities outside Kerala and are currently working as doctors in hospitals. Dr. Gopalakrishnan unlike the two others, is working as an opthalmologist in a private hospital. All the three have indicated their wish to continue in the post-graduate degree course in opthalmology when the Principal enquired of them, although only Dr. Gopalakrishnan B has chosen to assert his rights in court.

In this dilemma, we consider that while the observations in *Periakaruppan's case* (supra) are entitled to great weight, it is conceivable that Dr. Naomi who has out-distanced the other two in marks and is desirous of joining the post-graduates course might have been pre- C vented by indigence from litigating for her right. Such a bright student who has much more merit than the other two should not suffer for the sole reason that she has not come to court. This ground does not operate in favour of Dr. Joggy Joseph who has a slight edge over Dr. Gopalakrishnan and is in general practice, not in opthalmology, nor has he chosen to challenge the selection, in short, while we should D be guided by the observations in *Periakaruppan's case* (supra) we are reluctant to overlook the superior claim of Dr. Naomi. While transfixed between these two candidates—Dr. Naomi and Dr. Gopalakrishnan—for the one seat that is available, we were given to understand by Shri Abdul Khadar appearing for the State that very E probably there will be facilities enough in the Medical College, Trivandrum and Medical College, Calicut to accommodate one extra candidate in the opthalmology course if it were to be confined to this year as a special case. The only other agency which has a voice in this matter is the Indian Medical Council which is a party before us but even after repeated notices has not indicated its willing- F ness to appear. We think that a practical course which will meet the ends of justice, following the reasoning in *Pariakaruppan's case* (supra) and the realistic approach made in *State of Kerala* v. *Kumari T.P. Roshana and Anr.* (1) will be to direct the Principals of the two medical colleges, viz., Trivandrum and Calicut together to accommodate two more candidates in the postgraduate degree G course in opthalmology for this year.

Shri Abdul Kadar, counsel for the State, after taking time to consult his client made a statement in Court that so far as the State Government is concerned, they are willing to take in, for the post-graduate opthalmology course for this year, two more H candidates in the Medical College, Trivandrum and the Medical College, Calicut together. This means that the Government is

(1) [1979] 2 S.C.R. 974.

satisfied that, as a special case, sufficient facilities can be found for accommodating Dr. Naomi and Dr. Gopalakrishnan. The Indian Medical Council appeared in Court through one of its officers after a notice was issued to it explaining the purpose for which that Council was being summoned, namely, to tell the Court whether, from a technical angle, it would be feasible to direct two more candidates to be absorbed in the post-graduate opthamology course. The officer, on behalf of the Indian Medical Council stated that from the point of view of the Medical Council there was no objection to that course and it would concept to such additional accommodation of two candidates if the Court felt it just to do so.

We, therefore, direct the State of Kerala and the Principal of the Trivandrum Medical College, who is the convener of the Selection Committee, as well as the two Universities concerned, to admit into the post-graduate opthalmology course Dr. Naomi and Dr. Gopalakrishnan for this year. The two applicants will report within 10 days from today for such admission and the admission will be accorded to them. The Principal of the Trivandrum Medical College will inform Dr. Naomi about this direction of the Court.

Last there should be any further confusion we make it clear that the two candidates who according to our earlier direction will continue their course, will not be disturbed. Dr. Skaria who got his diploma from the Trivandrum Medical College will be permitted to continue in the light of the compassionate considerations we have earlier mentioned.

To conclude, we hold that the 2% open seats for the candidates from all the Universities of India outside Kerala runs counter to the constitutional directive of equal opportunity and the preambular emphasis on national integrity and the State will do well to fashion a formula in terms of the guidelines given in *Dr. Jagdish Saran's Case* (1). After all, lines of poetry may drive home rules of constitutionality vigorously (2)

Pity the nation

Divided into fragments

Each fragment deeming itself a nation.

(1) Writ Petition No. 214 of 1979 decided on 28-1-1980.

(2) Khalil Gibran.

A Although the selection formula may be bad for violation of Art. 14, it is possible to reconstruct for this year a practical admission formula. That is precisely what we have done, overruling the High Court's approach which, in our view but with all respect, is a little too pedantic. In the result, the appellants 2 and 3 who took their diploma from the Medical College, Calicut will be entitled to continue B their course. Appellant No. 1 will move the two universities, the Indian Medical Council and the Kerala Government for permission to continue his studies in the exigencies of the case and in the light of the observations we have made above. Dr. Naomi and Dr. Gopalakrishnan will be assigned a seat each in one or other two Medical Colleges by the Principal of the Medical College, C Trivandrum who is the convener of the selection committee.

Finally, we make it clear once again that the only branch which has fallen for our examination is the degree course in Opthalmology. No other department or course is sought to be upset. The Court is not a bull in a china shop and we restrict the order D we have made to the solitary department of Opthalmology and wish to leave undisturbed all the other studies in progress.

We must express our distress at being driven to patch-work solutions because of the academic crisis created by the State in working out its programme of selection and hope that time will not be lost E in giving a fresh and fundamental look at the problem so that litigative history may not repeat itself.

N.K.A.