CHAPTER-4

NOTABLE CASES IN THE CONSTITUTIONAL REALM

Challenge to the Kerala High Court Act:

Courts attach great sanctity to legislative enactments. However, it cannot give up its own duty to determine the constitutionality of a statute. In 1961, a Full Bench of the High Court of Kerala, consisting of Chief Justice K. Sankaran and Justices, S. Velu Pillai and C.A. Vaidialingam, decided an important case in which the validity of the Kerala High Court Act was questioned. The rules pertaining to the internal working of the High Court was also a topic of this litigation. An appeal arose out of a suit which was valued at more than Rs.1000. An order passed by the *munsiff* court at Karunagapplly in execution of the decree in a suit, was the subject matter of an appeal in the sub-court at Quilon. It was against the appellate order of the latter that a second appeal was filed before the High Court, on 5 February, 1959. During that time, the Travancore-Cochin High Court Act (Act V of 1125, as amended by Act I of 1952) was in force. By virtue of that legislation, a single judge of the High Court was empowered to hear only such of the second appeals that came within the prescribed limit of clause(c) of sub-section (4) of section 20 of the said Act. Every appeal valued at Rs.1000 or less from an appellate decree and every appeal from an appellate order where the subject matter of the suit was valued at Rs.1000 or less, did came under

this category. Second appeals which were beyond the aforesaid limitations were to be heard by a Division Bench consisting of two judges[1].

The sub-section (2) of section 11 of the Kerala Civil Courts Act[2] had raised the pecuniary jurisdiction of *munsiff* courts to Rs.5000. Section 13 of the above Act had provided for appeals from decrees and orders of *munsiff*' court to be heard before the District Court. The District Court was also empowered to entertain appeals from the decrees and orders of a subordinate judge's court, provided the suit value did not exceed Rs.7500. Second appeals under the above two categories were also provided for by section 12 of the said Act. The upper limit of the valuation of a second appeal was changed by an amendment of section 13 of the Civil Courts Act. This was a result of the Kerala Civil Courts (Amendment) Act[3]. As a consequence of section 4 of the amending Act, the pecuniary limit of Rs.7500 as stipulated in the parent Act was raised to Rs.10, 000. However, prior to the passing of Kerala Civil Courts (Amendment) Act, the Kerala High Court Act[4] was passed. The latter got the assent of the President of India on 6th February, 1959. The Act came into force on 9 March, 1959. Section 9 of the new Act repealed the provisions of the Travancore-Cochin High Court Act (as amended by Act I of 1952) in so far as they relate to matters provided in the Kerala High Court Act.

By virtue of the new High Court Act, a single judge was able to hear even those second appeals which were to be heard by a Division Bench under the Travancore-Cochin High Court Act. In accordance with this provision, the present appeal was

posted for hearing before a single judge. When the appeal was taken up for hearing, the counsel for the appellant objected to it by claiming that the single Bench had no jurisdiction to it, and, that a Division Bench ought to hear the appeal, instead. It was contended that the appellant had obtained a vested right to have the appeal heard by a Bench of two judges, and, that it was not being denied by the Kerala High Court Act.[5]

When the case was taken up by the Division Bench the counsel for the appellant questioned the validity of the Kerala High Court Act. The State Legislative Assembly was told to have transgressed its legislative competence. However, the High Court opined that 'Administration of Justice' was included in the State List alone, and that the State Legislature was competent to enact laws defining and regulating the jurisdiction and powers of the High Court. Thus, the allegation of the State Legislature having trespassed into the legislative domain of the Union Parliament was rejected. The Court examined the Kerala High Court Act and the purpose for which it was passed, and observed that the 'Constitution and Organization of the High Court' was not in any way affected by the Act. Section 3 of the Act dealt with the powers of a single judge and enumerated the matters that could be heard and disposed by such a Bench. Section 4 was concerned with matters which were to be heard and disposed by a Bench of two judges.[6] Section 5 had provided for an appeal to a Bench of two judges against a judgement or order passed by a single judge in the exercise of original jurisdiction and also against the judgement or order of a single judge in the exercise of appellate jurisdiction, where the judge happens to declare that the case was one fit for appeal. Section 6 empowered the Chief Justice to bring any matter under the purview of a Full

Bench. Section 7 dealt with the procedure to be followed in cases referred to the Full Bench on a question of law. Section 8 provided for the hearing of urgent matters during the vacation period of the High Court. Section 9 stated that the provisions of the Travancore-Cochin High Court Act in so far as they relate to matters provided in the Kerala High Court Act, shall stand repealed. The High Court observed that the new Act had merely provided for the internal working of the High Court by providing a law to regulate the practice and procedure of the Court including the power to be exercised by the judges sitting alone or in Division Benches. Thus the High Court saw the Kerala High Court Act to the wholly within the competence of the State Legislative Assembly.[7]

The High Court also examined the question whether the Kerala High Court Act had the effect of taking away any vested right which the appellant and others had at the time when the said Act came into force. The Court observed that the appellants themselves had no case that the vested right of appeal which they had, prior to the passing of the Kerala High Court Act, had been taken away by any of the provisions of the same Act. The new Act was told to have preserved the right which was available to the appellants under sections 96 and 100, of the Code of Civil Procedure. The new High Court Act had provided for the hearing and disposal of certain classes of appeals by a single judge, contrary to the earlier practice of referring such appeals to a Bench of two judges. The question therefore, was whether the appellant had a vested right to get his appeal heard by a particular number of judges. The Court observed that the rules regulating the internal working the High Court pertaining to its practice and procedure could not confer any such right on the litigant. The Bench opined that the

change brought about in the rules of procedure of the Court does not affect any vested or substantive right of a litigant, and that, those rules were to have retrospective effect. Thus it was explicitly stated that the variation in the number of judges hearing the case and rendering the decision, did not prejudice the right of the appellant to have a decision by the High Court. The High Court maintained that the appellant's right was only to appeal to the High Court and not to a Bench consisting of a particular number of judges.[8] The case was thus decided on 28 March, 1961.

The Covenant and the State:

In 1962, a Bench consisting of Justices, T.K. Joseph and M.S. Menon decided over an important constitutional matter. One Ravivarma Raja had in 1958 succeeded in getting a favourable decree from the subordinate judge at Parur. The former had sought a declaration to the effect that the liability of the state of Travancore to pay an annuity to his family had devolved on the State of Kerala. A single judge Bench of the Kerala High Court had affirmed the decision of the subordinate judge. An appeal by the State of Kerala against the decision of Justice S. Velu Pillai came up for consideration before a Bench consisting of Chief Justice M.S. Menon and Justice T.K. Joseph. The Advocate General argued for the dismissal of the suit on grounds of it being not maintainable. He opined that the formation of the United State of Travancore-Cochin on 1-7-1949 and birth of the State of Kerala on 1-11-1956, by virtue of the States Reorganization Act, 1956, were acts of state and that no municipal forum had the right to entertain the said suit.[9]

The High Court declared the formation of the United State of Travancore and Cochin to be an act of state. It was told that the rulers of the two ex-principalities had given up their sovereignty over their respective territories, and vested it in the ruler the new United State through the Covenant. The Court also affirmed that the new sovereign was competent to accord recognition to an existing right in the conquered or ceded territories. It also added that the said laws were liable to be examined by the municipal courts of the absorbing State.[10]

It was observed that the United State of Travancore and Cochin did not stop the payment of annuity on the formulation of that State, and that it continued to pay the annuity till 10-1-1955. The significance of Ordinance No.1 of 1124 M.E (1949), which was promulgated by the Rajpramukh of the United State, was asserted in this regard. Clause 7 of the said Ordinance had dealt with the effect of the formation of the United State by explicitly stating that the formation of the new entity shall not affect any right, privilege, obligation or liability acquired, accrued or incurred prior to the appointed day. The said Ordinance was later replaced by Act VI of the 1125 M.E (1950). Section 7 of the said Act was also to the same effect. The High Court also stated that the formation of the State of Kerala was an act of state. The States Reorganization Act, 1956, was termed as a piece of legislation in the exercise of the powers conferred on the Union Parliament by Articles 3 & 4 of the Constitution of India. Finally, on 20 September, 1962, the appeal was dismissed with costs.[11]

In 1963, the then Chief Justice M.S. Menon along with Justice T.K. Joseph decided an important case in which too, the matters relating to the Covenant were raised. The Registrar of the High Court of Travancore had entered into an agreement on 28 February, 1947, with one Ramachandran Nair for the printing of the records of the High Court along with the judgments and orders of the subordinate courts. Pursuant to the said agreement, the printing of the records commenced and continued to do so till 1 July, 1949. On that day the two States of Travancore and Cochin merged to form a new entity named, The United State of Travancore and Cochin. It was an admitted fact that on and from that date, no printing work of the High Court was entrusted to Ramachandran Nair. A protracted correspondence ensued between the two parties. It began with the communication dated 16 July, 1949 addressed by the respondent (Ramachandran Nair) to the Registrar of the High Court and ended with a letter written by the latter to the former, dated 17 October, 1950. On being frustrated and let down, the respondent issued a suit notice addressed to the Chief Minister of the United State of Travancore-Cochin. This elicited a reply from the Chief Secretary to the Government, wherein the respondent was informed that the agreement referred to by the latter in his notice, had ceased to be enforceable on the formation of the High Court of the United State of Travancore-Cochin.[12]

On 30 June, 1952 a suit was instituted against the United State, in which the respondent claimed the arrears due to him for work already done before 1 July, 1949. A sum of Rs.1, 70,000 was claimed as damages for the alleged breach of the agreement by the State. On 4 March, 1953, the respondent obtained a preliminary

decree for the arrears due to him. Later on 21 November, 1956, the respondent entered into an agreement with the State of Kerala which brought the whole matter under the purview of two arbitrators, namely, H. Ramakrishna Iyer and K.C. Abraham, both of whom were formerly, judges of the State High Court. The arbitrators awarded to the respondent a sum of Rs.47, 500/- with three percent interest. When this award was filed in Court, the appellant (State of Kerala) demurred and took two objections, one on 27 May, 1957 and the other on 5 October, 1957. The State contented before the subordinate judge that the arbitrators had misconducted themselves or the proceedings. However, these objections excepting the one pertaining to the award of three percent interest on the sum of Rs.47, 500, were overruled by the subordinate judge. As the award of interest was held to the unsustainable, the provision stipulating for interest in the award was set aside. The arbitration award was passed on 22 April, 1957.[13]

The State of Kerala filed appeal against the lower court's decree, in the High Court. The State (appellant) took the stand that the award passed by the arbitrators was liable to be set aside on the ground that the two of them, who gave a unanimous decision had misconducted themselves or the proceedings. The appellant took refuge under clause (a) of Section 30 of the Arbitration Act, 1940. It was alleged that the arbitrators had misconstrued the terms of the agreement signed between the Registrar of the High Court and the respondent. The arbitrators were also criticized for having failed to note that the said contract was subject to Rule 574 of the Civil Courts Guide, 1944. However, the High Court negated the contentions raised by the State. The

Bench threw light on clause 12 of the above said agreement which had specifically stated that the agreement was to be in force for a period of ten years from the commencement of the work. Rule 574 of the Civil Courts Guide had provided that the contracts entered into for the purpose of printing records, could be terminated at will by either party, on one month's notice. However the High Court took notice of the specific averment in paragraph 5 of the plaint that the contract was to subsist for ten years and that it was not terminable during that period except in case of default as was contemplated in clause 8 of the contract. The two written statements filed on behalf of the State (one on 13 January, 1953 and another on 3 September, 1953) had not raised any contention to the effect that the period of ten years was untenable. The State also pleaded that the Registrar was incompetent to enter into a contract which stipulated a term of ten years. The High Court noted that this very contention was not even raised before the arbitrators. As such, the question of the arbitrators having misconducted themselves or the proceedings by not considering that plea, was rejected.[14]

The High Court upheld the view that the Convent entered into by the Rulers of Travancore and Cochin for the formation of the United State of Travancore-Cochin constituted an act of state. It was also stated that the respondent would not be justified in placing any reliance on Article 3 (b) of the Covenant.[15] (The said clause read as follows- "all duties and obligators of the Ruler of either of the covenanting States pertaining of incidental to the Government of that State shall devolve on the United State, and shall be discharged by it"). The State had argued before the subordinate

judge that the respondent was trying to enforce Article 3 of the Covenant, which, according to the appellant, the respondent was not entitled to, on account of the Covenant being an act of state. The subordinate judge had decreed against the State in this regard. Strangely, the State had not raised this contention earlier. Neither the two written statements which were filed in answer to the plaint, nor the two objections taken to the award on 27 May nor 5 October, 1957, did have any such reference to that effect. This point was not at all raised before the arbitrators. The High Court upheld the subordinate judge's refusal to consider the said belated defense which was raised for the first time before the latter.

Ordinance I of 1124 M.E (1949) was promulgated by the Rajpramukh of the United State of Travancore and Cochin. Section 7 of the said Ordinance had provided that the formation the United State would not affect any right, privilege, obligation or liability acquired, accrued or incurred prior to the appointed day (1 July, 1949). It was also further provided in the same section that formation of the United State was not to affect any penalty, forfeiture or punishment, incurred in respect of any offence committed against the existing laws of Travancore or Cochin, prior to 1 July, 1949. Investigation and legal proceedings in that regard were to be continued and punishments imposed as if the United State had not been formed. Sections 3 and 4 of the Ordinance had provided for the continuance of the then existing laws of Travancore and Cochin, in the respective portions of the United State. By virtue of these provisions, contracts entered into between the citizens of Travancore and those of Cochin, became enforceable by the application of laws that were in force in the two

states. Section 7 had further provided for making those laws binding on the United State of Travancore and Cochin.[16]

The United State of Travancore and Cochin acceded to the Indian Constitution by becoming a Part-B State. This was an act of state. Article 295(2) had explicitly stated that the Government of each State specified in part-B of the First Schedule of the Constitution of India, was to be the successor Government of the corresponding Princely State regarding all property and assets, and all rights liabilities and obligations arising out of any contract or otherwise, other than those referred to in clause (1) of Articles 295. The High Court remarked that the contracts referred to in clause (1) of Article 295 of the Constitution, were not relevant for the purpose of the case. Later, a reorganization of the States took place which lead to the abolition of Part-B States. As a result, the United State of Travancore-Cochin became a part of Kerala State. At this juncture, suitable provisions were made in sections, 87, 88 and 91 of the States Reorganization Act, to serve the same purpose as was intended by section 7 of Ordinance I of 1124 M.E (1949) The High Court opined that the former citizens of the erstwhile principalities of Travancore and Cochin should not be treated as aliens to the United State. It was also told that there could be no act of state against it's owns citizens. The Bench observed that there was nothing to indicate that the United State of Travancore-Cochin had repudiated the obligations of the former entities of Travancore and Cochin. The Covenant and the above Ordinance had envisaged the continuance of the good Government in accordance with laws that were prevailing in the State. The United State was deemed to have assumed the obligation of the States

of Travancore and Cochin, by virtue of Section 7 (6) of the Ordinance I of 1124 M.E (1949).[17]

It was observed that there was no express provision in Ordinance I of 1124 M.E (1949) or in Act VI of 1125 M.E[18] (1950) that those statues were binding on the State. It was due to the necessary implication of section 7 of the above two Ordinances that made the agreement signed between the Registrar of the High Court and the respondent, binding on the United State. Meanwhile, the High Court repelled the contention that the appellant (State) was not answerable for the breach of the contract. The High Court examined the three grounds which had been relied on for contending that the contract had become frustrated. They were the location of the High Court of the United State of Travancore and Cochin at Ernakulam, the assumption by a court of jurisdiction over the area which formed the territory of the State of Cochin and the promulgation of rules for printing by the High Court of the United State. However, these were disapproved by the Bench. Attention was drawn to the clause 6 of the Agreement which had specifically provided for the respondent to adhere himself to all instructions which were laid down in the Civil Courts Guide and all other rules and orders passed from time to time, relating to the matter of printing.[19]

The High Court found itself unable to discern any fundamental alteration in the nature of the contract. It opined that the performance of the contract after the formation of the United State was not radically different from its performance before that date. It was

also observed that the claim of the respondent was for a sum of Rs.1, 70,000, while, he was awarded only Rs.47, 500. The case was thus dismissed on 5 April, 1963.[20]

The Constitution and the Legislature:

In 1963, an important constitutional matter was raised before the High Court by M. Kunjukrishnan Nadar, a member of the Kerala State Legislative Assembly. He was elected from the Parassala constituency in the mid-term polls held during February, 1960. On 23 November, 1963, he wrote to the Speaker of the Assembly to the effect that he was intending to devote more time for meditation and religious activities and that he would not be able to continue as a member of the State Legislature. The letter also requested the Speaker to consider the same as that of resignation of M. Kunjukrishnan Nadar from the membership of the State Legislative Assembly with effect from 1-12-1963. Subsequently, on 26 November, 1963, the Speaker read the said letter in the Legislative Assembly, and announced that the resignation was going to take effect on 1st December, 1963. However, on 29 November, 1963, M. Kunjukrishnan Nadar wrote to the Speaker, withdrawing the letter of resignation of 23 November, 1963. The new letter was received by the Speaker on 30 November, 1963. Strangely, it was not given heed to, as the Kerala Gazette dated 10 December, only had a notification informing the resignation of M. Kunjukrishnan Nadar from the membership of the Kerala State Legislative Assembly with effect from 1 December, 1963. Matters thus made a legal confrontation inevitable.[21]

M. Kunjukrishnan Nadar approached the Kerala High Court to get the notification published in the Gazette of 10 December, 1963 declared null and void. According to him, the letter dated 23 November, 1963 only evidenced an expression of an idea that he might resign on 1 December, 1963 and that it was not a valid resignation in writing, as provided by Article 190 of the Constitution of India. The Court was told that the idea of resignation was changed before it was given effect to and that the intimation of this change was communicated by the letter dated 29 November, 1963. The petitioner's prayer to the High Court under Article 226 of the Constitution was not only to declare the said Gazette notification to be null and void but also declare that the petitioner continued to be a member of the Kerala Legislative Assembly. A counter affidavit was filled by the Assistant Secretary of the Legislative Secretariat, on behalf of the Speaker. It was told that latter had accepted the letter of resignation as evidenced by his initials on the letter dated 23 November, 1963 and as evidenced further by his reading of the said letter announcing the resignation of the petitioner in the Assembly, on 26 November, 1963. On those facts, it was contended that the petitioner's resignation had taken effect and that the same could not be recalled by the petitioner. Two letters, which were addressed to the Speaker on the subject, other than the two already cited were brought to the attention of the High Court. The first of the newly produced letters dated 5 December, 1963, spoke of the petitioner referring to his letter of resignation and its subsequent withdrawal. In it, the petitioner spoke of having reconsidered the whole matter and the letter concluded with him requesting the Speaker for to accept his letter of resignation. The other letter dated 12 December, 1963, contained a claim by the petitioner, addressed to the Speaker, that the former had not resigned his seat by 'writing under his hand' as required by Article 190(3) of

the Constitution. Contending that his seat had not become vacant, M. Kunjukrishnan Nadar requested the Speaker to permit him to continue as a member of the Legislative Assembly with all its privileges.[22]

Article 190(3)[23] of the Constitution of India stated that if a member of a House of Legislature of a State becomes subject to any of the disqualifications mentioned in clause (1) of Article 191 or happens to resign his seat by writing under his hand addressed to the Speaker or the Chairman, as the case may be, his seat shall thereupon become vacant.

The counsel for M. Kunjukrishnan Nadar argued that a prospective resignation was not contemplated in the aforesaid Article and that the petitioner's letter of 23 November, 1963, being expressed to take effect only on 1 December, 1963, was not a letter of resignation in accordance with the provisions of Article 190(3). It was pleaded before the Bench, that the letter dated 23 November, 1963, could be constructed only as an expression of an intention to resign in the future, and that even if it be taken as a valid letter of resignation, it, having been withdrawn before the date it was designated to came to effect, had become inoperative. Thereby, it was claimed that the petitioner's seat in the Legislative Assembly had not become vacant. Examining the contents of the letter, the judge opined that the letter of 23 November, 1963 had a positive expression of an actual resignation, absolute in itself. The fact that the said letter was to take effect on a specified future date, was told to have, not militated against the determined character of the letter. Thus, the High Court overruled the contention that

the said letter was not one of resignation as such, but only an expression of intention to resign in future. Referring to the denial contained in the petitioner's letter of 12 December, 1963, the High Court noted that the petitioner's counsel had conceded the fact of the letter dated 23 November as satisfying two requisites a valid resignation.[24]

At the same time, the Court held that the expression 'addressed to the Speaker' in Article 190(3) meant 'conveyed to the Speaker', and not mere naming of the Speaker in the heading of the letter. Article 190(3) also stated that if a member resigns his seat by writing under his hand addressed to the Speaker "his seat shall thereupon become vacant". The counsel for M. Kunjukrishnan Nadar argued that the word 'thereupon' meant 'immediately or without delay or lapse of time'. Rejecting the argument, the Court opined that 'thereupon' meant upon that or inconsequence of that. Elaborating on the matter, the Bench opined that if the letter of resignation was expressly made to take effect on a specified day, the seat becomes vacant on such specified day only and not immediately on its receipt by the Speaker.[25]

The Rules of Procedure and Conduct of Business in the Kerala Legislative Assembly made by the House under Article 208 (1)[26] of the Constitution of India and published in the Kerala Gazette dated 3 January, 1961, was cited in this regard. The High Court also threw light on the fact that the provision in Article 101(3)[27] of the Constitution, for resignation of seats in the Union Parliament was virtually identical in expression, with that in Article 190(3), and that the rule for resignation made by the Parliament under

Article 118[28] was also virtually identical with Rule 162 made by the Kerala Legislative Assembly.

Finally, the Court held that the petitioner's letter 23 November, 1963, resigning his seat in the Assembly on 1st December, was a mute letter till the latter date. On 29 November, i.e., before it became effectual, the letter was withdrawn by the petitioner. This fact was very much acknowledged by the Speaker himself, whose receipt of the said letter was admitted in the counter affidavit filed on his behalf. The High Court viewed it as the neutralization of the latent vitality in the earlier letter dated 23 November. The withdrawal was told to nullify the entrustment or deposit of the letter of resignation in the hands of the Speaker. The Court stated that the absence of a specific provision for withdrawal of a prospective resignation in the Constitution or the Rules was immaterial. It was also noted that the subsequent letters which were addressed by the petitioner to the Speaker (on 5 and 12 December), contained no fresh resignation by the former; instead, they referred to the letter of 23 November. On 21 January, 1964, while concluding the proceedings, the High Court declared that there was no valid letter of resignation on the material date, i.e., 1 December, 1963, to be given effect to. The petitioner's seat in the Legislative Assembly was told to have not become vacant. The impugned notification issued on 5 December, 1963, published in the Gazette dated 10 December, 1963, was accordingly declared null and void. However the petitioner was denied he costs in the petition for not having disclosed all material correspondence pertaining to his resignation.[29]

Contempt of Court:

In 1968, Chief Justice P.T. Raman Nayar and Justices, K.K. Mathew and T.S. Krishnamoorthy Iyer sitting on the Bench decided a case filed against the then Chief Minister of Kerala, E.M.S. Namboodiripad. The Chief Minister cast aspersions on the character and outlook of the judiciary, at a press conference held on 9 November, 1967. Judges were told to be guided by class prejudices and individual idiosyncrasies. The content of the Chief Minister's statement was reported in newspapers of 10 November, 1967. The petitioner was a member of the Bar Council of Kerala. According to him the said statement by the Chief Minister constituted serious contempt of court which was intended to undermine the confidence of the people in the efficacy of courts, thereby challenging the authority of law. The President of the Kerala Advocate's Association, too, impleaded himself in the case. The counter affidavit of the respondent more or less dealt with his political philosophy. It affirmed that his was merely a fair criticism of the system of judicial administration with a view to making it conform to democracy, egalitarianism and socialism. The respondent claimed to have cast no aspersion on any particular judgement or any particular judge. It was further contended that the statement had neither undermined the dignity of the courts nor scandalized the judiciary of the State. On the above grounds, it was claimed that the statement of the Chief Minister did not amount to contempt of court. The Advocate General supported the arguments of the respondent.[30]

The High Court observed that the controversial statement was made by the respondent in his capacity as the Chief Minister of the State and that it was intended to

reach the public through newspapers. The respondent did admit to the fact that it was made for the purpose of educating public opinion. Reacting to the views expressed by the respondent, the Bench opined that it was not fair and reasonable criticism. The statement was told to be a calumny calculated to undermine the confidence of the public in the courts and in the administration of justice. The respondent's statement to the effect that judiciary was an instrument of oppression, was termed false and wicked.[31]

Chief Justice P.T. Raman Nayar held the respondent guilty of grave contempt of court. The statement of the latter was held to be capable of undermining the confidence of the public in the courts. The judge took serious note of the fact that the respondent had not only refrained from expressing regret but also expressed his determination to persist in upholding his declared ideological position, irrespective of personal risks.[32]

However, Justice K.K. Mathew differed with the above view. He threw light on the statement of the respondent in the latter's affidavit that his statement at the press conference had no tendency to impair the administration of justice. It was further explained in the affidavit itself, that he had only made a critical evaluation of the system of judicial administration of the day and that the statement at the press conference was only a reiteration of the ideas upheld by his party, the Communist Party of India (Marxist). The respondent had submitted that judiciary was only one of the organs of the State which were the servants of the people of India. Justice Mathew opined that a general proposition deduced from a theory of Marx and Engels and

applicable to the judiciary in all capitalistic states of the world, could hardly amount to scandalizing a court or judge. It was also told that the respondent's statement was to be viewed from the background of his political philosophy. Justice Mathew explicitly stated that he might not be agreeing with the respondent's theory of state or the deductions regarding the character of the judiciary, and that his disagreement had nothing to do with the right of the respondent to express it. Justice Mathew opined that a general proposition akin to the one in question would not tend to impair the administration of justice.[33]

The petitioner had contended that conscious partiality had been attributed to the judges by the respondent's statement at the press conference that judges were guided and dominated by class hatred, class interests and class prejudices and where the evidence was balanced between a well-dressed pot bellied rich man and a poor, ill-dressed and illiterate person, judges instinctively favour the former against the latter. However, Justice Mathew opined that a fair reading of the statement as a whole need not lead to the above conclusion. He observed that the statement did not necessarily mean that the judge instinctively favours the rich, in weighing the evidence.[34]

Justice Mathew preferred the interpretation that when the evidence appeared equally balanced, the instinctive tendency of a judge is to decide the case in favour of the rich as against the poor. It was also noted that the respondent had not imputed any conscious partiality to any judge. There was not even an allegation that the respondent was motivated by malice to any judge. In his affidavit itself, he had stated that his

intention was not to scandalize any court or judge or impute any improper motive to judges or challenge the validity of individual judgements pronounced by them. He had also stated that the judgements and orders of courts should be obeyed until the whole system of administration of justice was changed. The respondent did contend that he had every right to convert the people to his creed by the democratic method of public discussion. It was held that when there is good faith and absence of malice, when no improper motive has been attributed, and when there is no intention to bring the administration of justice to disrepute, the question of the tendency of the speech is immaterial.[35] Justice K.K. Mathew affirmed that the respondent was not guilty of contempt of court. Justice T.S. Krishnamoorthy Iyer, however, agreed with the reasoning of Chief Justice P.T. Raman Nayar. The former too, held the respondent guilty of contempt of court. As a result, the respondent was sentenced to a fine of Rs.1000 or to undergo simple imprisonment for a month.[36] The verdict of the High Court was delivered on 9 February, 1968.

Implications beyond the borders:

In 1969, a Bench consisting of the then Chief Justice M.S. Menon and Justices, P. Govindan Nair and V. Balakrishna Eradi, decided a unique case having its roots far beyond the borders of India, and which had been under the purview of a foreign court of law. Dr. Chacko Pulparampil an Indian citizen had gone to West Germany (Federal Republic of Germany) in 1958, to pursue a course in medicine. In the course of time, he fell in love with a German, Margarita Maria who was also studying medicine in the same institution. Their mutual affection resulted in their marriage according to the Civil

Law on 20 December, 1963, and in accordance with the ecclesiastical rites on 29 December, 1963. Their daughter Konstanze was born on 15-7-1964 and the second child the son, Thomas Markus was born on 22-2-1966. Unfortunately, matters had begun to deteriorate from early August, 1965, onwards. According to the husband, he was disturbed by the conduct of the mother-in-law and the brother-in-law, towards him, which had compelled him to leave their home. Soon, the matter was brought before the German Courts. The father asked for access to his children, while, the mother sued for divorce. An agreement arrived with the consent of the Court, regarding the father's access to his siblings, was not to the former's satisfaction. The wife was told to have broken the terms of the above agreement. A fresh agreement too, failed. On 22 July, 1966, Dr. Chacko pleaded for an order from the Guardianship Court. Soon, both the parties agreed on new terms (pertaining to access to their children), on 9 August, 1966.[37]

Meanwhile, the divorce petition filed by Margaret Maria had been dismissed on 22-6-1966, as it was not established that the husband by his fault had disturbed their marital life so deeply that normal relations could not be expected to be resumed. The mother appealed against the said order. While that appeal was pending, the father, on the application of the mother, was ordered to pay maintenance to the children. This took place on 18-10-1966. Not long after on 27 December, 1966, the father took out the children in accordance with the terms of the last agreement. However, instead of returning them to the mother at the stipulated time, Dr. Chacko drove them in a taxi to Dusseldorf Airport and flew to India. After making frantic enquiries, the mother moved

a petition before the Appeal Court, the very next day. She obtained an order that the father should hand over the custody of the children to her. Later, on 21 April, 1967, the appeal taken by the father from the order directing maintenance to the children was dismissed. The mother came to know about the whereabouts of the husband and the children from a letter that she received from the husband's stepmother, in November, 1987.[38]

Margarita Maria reached India and came to Cochin on 19 December, 1967. But unfortunately, her attempts to contact her children did not materialize. The determined mother approached the Kerala High Court for justice. The petition was heard by a Full Bench consisting of the then Chief Justice M.S. Menon, and Justices, P. Govindan Nair and V. Balakrishna Eradi. It was argued on behalf of the petitioner, that the Agreement reached between her and Dr. Chacko, on 9 August, 1966, was nevertheless an order passed by the German Court, when they were residing in Germany. This point was disputed by the first respondent (Dr. Chacko), who contended that the said document was nothing more than an agreement. At this juncture, the High Court observed that both the spouses and their children were resident in Germany, when the above agreement came into being on 9 August, 1966. That the father had earlier moved the German Court was told to give the latter jurisdiction and competence to pass on order binding on the former. The High Court, in fact, upheld the contention that the Agreement of 9 August, 1966, was an order of Court. It was affirmed that a decree passed on consent was as much binding upon the parties as a decree passed otherwise.[39]

The High Court faced the question of deciding the custody of the children who were born of an Indian father and who were present in India, along with the pertinent question of respecting and honouring the orders of the German Court. It was decided to respect the order of the German Court and allow the petition unless such a course was detrimental to the welfare of the children. The Bench found it arguable that even when the children remained in the control of the mother the legal custody continued with the father and that if the latter takes the children from the mother, it could not be illegal. However, the Court, with a word of caution, declared that the above logic was not applicable in all cases and under all circumstances. A unilateral breach of trust by the father or the mother was told to be unacceptable. It was emphatically asserted that an agreement accepted by a court of competent jurisdiction and embodied in an order of that court, could neither be ignored nor flouted with impunity by one of the spouses. The removal of the children by the father against the terms of the agreement of 9 August, 1966, that too in a clandestine manner was very much criticized. The first respondent was told to be callously indifferent to the feelings of the petitioner, in this regard.[40]

The High Court asserted that nothing in the Guardians and Wards Act, 1890 or in the Travancore Christian Guardianship Act[41], 1941, stood in the way of it exercising its jurisdiction. Finally, after thoroughly examining all the facets of the case, the High Court decided to entrust the children to the petitioner (their mother), subject to certain safeguards which the Court thought to be necessary. The petitioner was asked to

execute a bond to the High Court to produce the children whenever so ordered by the latter. She was to obtain and sent a report from the concerned parish priest, once in every three months, to the High Court, having details of the children's health and welfare. She was also told to send a copy of the above report to the first respondent, the father. The Registrar of the High Court was to be informed of the address of her residence from time to time. Moreover, the German Consulate authority in Madras was asked to provide an undertaking to the effect that they were willing to render all possible assistance for the implementation of any order of the High Court from time to time, within the frame work of the German law. The petitioner was forbidden to take the children outside West Germany without the permission of the High Court, excepting when they were to be brought to India. She was also told to bring her children to India, once in three years, at her own expense, during which period the father was to have access to the children, based on the terms which the High Court was to frame. Likewise, the father was to have access to the children even in West Germany if the former happens to visit that place. The whole question of custody was told to be liable for review at the end of three years, when the children were to be brought to India.[42]

Life and Liberty: The first post-Emergency writ petition

The most unforgettable judgement of the Kerala High Court was delivered by a Bench having Justices, P. Subramonian Poti and V. Khalid, on 13 April, 1977. The case was the first writ petition entertained by the Kerala High Court after the lifting of the National Emergency. The petitioner T.V. Eachara Varier, a resident of Cochin was

formerly Professor of Hindi at the Government Arts and Science College, Calicut. His son, P. Rajan was a final year student of the Regional Engineering College, Calicut, during the academic year 1975-76. On 1 March 1976, Rajan, who was then staying in the College Hostel, was taken into Police custody. On the very same day, the Principal of the College, Professor Bahauddin informed the petitioner about the said incident through a registered letter. Not knowing the reason for his son's arrest, the petitioner made enquiries to various Police officers in this regard. Through such efforts, it became known that Rajan was arrested under the directions of the Deputy Inspector General of Police, of the Crime Branch at Trivandrum. On 10 March, 1976, the petitioner met the then Home Minister of Kerala, K. Karunakaran, whereupon the latter promised to look into the matter. This promise turned out to be a hollow one. Petition was sent to the Home Secretary not once, but thrice. However, there was neither a reply nor an acknowledgement. The petitioner wanted to know at least the whereabouts of his son so that the sufferings of his family could be alleviated. He continued with his efforts in this direction.[43]

Representations were made in this regard to the President of India, the Union Home Minister and all the Members of Parliament from Kerala. The President of India informed the petitioner of the former having referred the matter to the Chief Secretary of Kerala. Similar representations to the Prime Minister of India and others too, proved to be futile exercise. Two of the Members of Parliament from Kerala, namely, A.K. Gopalan and V. Vishwanatha Menon, had informed the petitioner about the intimation they had received from the Prime Minister and Union Home Minister in the said matter.

Moreover, the issue was raised in the Lok Sabha and the Rajya Sabha, by the Members of Parliament, Samar Mukerji and V. Viswanatha Menon, respectively. Meanwhile, the latter provided the petitioner a copy of the intimation received from the Home Minister of Kerala, to the effect that the release of Rajan was under consideration. The hapless father searched in vain for his son in the three Central Jails of Kerala along with various other Police Camps. The then Chief Minister of Kerala, C. Achutha Menon had personal knowledge of the arrest and detention of Rajan. On one occasion, the former had expressed his helplessness in the matter to the petitioner, on the ground that the issue was being dealt with by the then Home Minister, himself. K. Karunakaran was a candidate in the then just concluded general elections. He was told to have referred to Rajan in some of the public meetings to the effect that the latter was being kept in detention due to his involvement in a murder case. Citing the above statement, the petitioner put forward the case that his son should have been produced before a Magistrate under the provisions of the Code of Criminal Procedure inspite of Articles 21 and 22, having remained suspended during the Emergency[44].

The Home Secretary to the Government of Kerala and the Inspector General of Police, were the first and second respondents, respectively. The Deputy Inspector General (Crime Branch) was the third respondent. The then Minister for Home Affairs, K. Karunakaran, was impleaded as the fourth respondent, while the District Superintendent of Police of Calicut was the fifth one. Counter affidavits were filed by the respondents, individually.

The first respondent did admit to the receipt of petitions from T.V. Eachara Varier by the State Home Department. That the petitioner got no communication or even an acknowledgement from the Government was not denied in the said counter affidavit. It was further told that copies of the said petitions were forwarded to the Inspector General of Police, for enquiry into the allegations made therein. In their counter affidavits, the Inspector General of Police and the Deputy Inspector General of Police denied the arrest of Rajan by the Police. It was claimed that Rajan had not been arrested by any Police Officer of the State. K. Karunakaran, who had by then become the Chief Minister of Kerala, also filed a counter affidavit denying the averments in the petitioner's affidavit. While admitting to have met the petitioner (on 30-3-76) and to have written a letter to Viswanatha Menon M.P, he denied having acknowledged the arrest and detention of Rajan. He also denied having spoken about Rajan in public meetings.[45]

The District Superintendent of Police, Calicut, averred that Rajan was not wanted in any of the cases then investigated and that the latter was not in the custody of any of the Police Officers. The fifth respondent also denied arresting Rajan in connection with the investigation of crime No.19 of 1976 of Kayanna Police Station. While admitting his presence at the Kayanna investigation camp from 28-2-1976 to 12-3-1976, he stated that Rajan had not been brought for investigation to the camp by any Police Officer. However, he acknowledged having heard of Rajan having involved in extremist activities from one Muraleedharan, a college-mate of Rajan. Muraleedharan was said to be absconding from the College from 16-9-1975. The District Superintendent of

Police also claimed about Rajan having absconded from the College on grounds of the latter having apprehended Police action against him after Joseph Chali, a student of the Regional Engineering College, Calicut, was arrested and detained under MISA. Rajan was alleged to have helped some of the accused in the Kayanna Police Station attack case. The High Court faced a peculiar situation as it was being called upon to undertake the task of finding out the truth or otherwise of the detention itself. The Court decided to embark upon the examination of the facts to in order to ascertain whether Rajan was actually taken into Police custody or not. The Additional Advocate General, T.C.N. Menon, who appeared on behalf of the respondents, did not oppose the venture of the Court.[46]

The first and foremost question considered by the Court was, whether Rajan was taken into Police custody on 1 March 1976. It was observed that there was considerable evidence supporting the petitioner's contention in this regard. The Original Petition was filed in the High Court on Friday, 26 March, 1977. It was moved on the very next sitting of the Court, on 28 March. A day after the said petition was moved, K. Karunakaran who had by then become the Chief Minister of Kerala, stated on the floor of the Legislative Assembly that Rajan had never been arrested. After the filing of counter affidavits by the respondents, the petitioner filed a reply affidavit along with affidavits of 12 persons who were evidently supportive of the case of the petitioner. Easwara Iyer was the petitioner's counsel.[47]

The examination of Professor Bahaddin revealed many facts. He told the Court that it was the acting Chief Warden who had on 1-3-1976, reported to him that Rajan and Joseph Chali had been arrested. On the same day itself, Professor Bahuddin informed the parents of the two said students through registered letters, about the fate of their wards. Relevant papers in this regard were produced before the Court by the Principal himself. However, it was observed that he was not a witness to the actual arrest and that he had spoken about the report being made to him at 7am by the acting Chief Warden, Dr. Ramakrishnan. Rajan was said to have been taken from the college premises in a van by about 6.30 am on 1-3-1976. The attendance register of the College for the final year class also showed the absence of Rajan from 1-3-1976 onwards. Available evidence showed that just before he was taken into custody, Rajan had only returned to the Hostel after attending the University Arts Festival. It was admitted that the Police had came to the Regional Engineering College on 1 March, 1976 for interrogating another student Joseph Chali. The Court refused to believe that the story of the arrest of Rajan by the Police was a fabricated one.[48]

Witnesses, who gave affidavits supporting the averments made by the petitioner, were examined in the Court. Except for some minor negligible discrepancies in their individual depositions, the crux of their statements before the Bench was more or less, the same. Through these evidences, it became very clear that Rajan and Joseph Chali were taken from the College in a Police van. Sub-Inspector Sreedharan of the Crime Branch and Constable Raghavan Nair were present at the venue. The two boys were taken to a nearby lodge. From there, Rajan was taken to the Kakkayam Travellers

Bungalow where he was tortured in a room by six policemen, one among whom being Sub-Inspector Pulikkodan Narayanan. Rajan was thereafter removed from the said room on him becoming unconscious.[49]

Attempts were made to magnify the discrepancies in the statements of the witnesses. However, the Court opined that there was no material discrepancy. The claim a witness of him having been detained for twelve days at Kakkayam Camp was taken serious note of by the Court. Another witness too spoke of being detained at the same camp. These two witnesses claimed to have seen Joseph Chali and Rajan, respectively, at the Kakkayam Camp.[50]

The Court opined that the evidence of Prosecution witness (No.9) substantiated the petitioner's case. The said witness had categorically stated in his affidavit that he was detained in the Kakkayam Camp for a number of days and that he saw Rajan there. The arrest of the above witness on 28-2-1976 and his subsequent detention at Kakkayam was not refuted by the counsel for the respondents. It was this witness who admitted to have seen Rajan being tortured by six policemen led by Sub Inspector Pulikkodan Narayanan. Earlier, another prosecution witness (No.7) had claimed to have seen Joseph Chali at Kakkayam Camp. This witness himself was taken into custody at 9.30 pm on 1-3-1976. He was first taken to Kunnamangalam Police Station and later to the Kakkayam Police Camp. The Additional Advocate General did point out certain discrepancies in the evidence given by the above witnesses. However, no attempt was made on his part to indicate that the evidence of these witnesses was

unreliable. After an overall appreciation of the oral evidence, the High Court concluded that Rajan was indeed taken from the Regional Engineering College on 1-3-1976 by the Police and was latter tortured by six policemen including and Sub Inspector Pulikkodan Narayanan at the Kakkayam Travelers' Bungalow. Answering a question posed by the Court, T.C.N. Menon the Additional Advocate General submitted that K. Karunakaran was not denying the fact of the petitioner meeting him, but, that the former was only denying having admitted about the arrest of Rajan. The Court however, gave credence to the petitoner's contention in this regard. The fact that the counsel for the respondents, T.C.N. Menon refrained from cross examining the petitioner even on being offered for the same, was taken serious note of by the Bench. During the course of the hearing, the High Court lamented, that during the period relevant to the case, the citizen had no protection from the court and had to depend on the good sense and fairness of the Executive. The Court also expressed displeasure over the statement of the fifth respondent, K. Lakshmana who claimed to have been throughout present at the Travellers'Bungalow at Kakkayam, that, Rajan was not taken into custody. Overwhelming evidence to the contrary, was already present before the Court. Strangely, the fifth respondent, who also happened to be the District Superintendent of Police, did not offer himself for cross examination.[51]

The Additional Advocate General had informed the Court about a proposal to appoint a Commission of Enquiry with regard to the questions raised in the petition. The Bench was not at all impressed with this belated gesture, and therefore refused to abdicate its function to adjudicate on the petition.[52] Finally the High Court affirmed that

Rajan was indeed taken into custody from the premises of the Regional Engineering College Hostel on 1-3-1976 and that he was taken to Kakkayam Tourist Bungalow where he was seen on 2-3-1976. The very next pertinent question which engaged the attention of the court was whether Rajan was still in Police custody. Having found that he was taken into Police custody, he was deemed to continue in such custody, unless otherwise shown.

The Additional Advocate General pleaded strenuously against the issuance of the writ of *habeas corpus* on grounds that the respondents were likely to be found guilty for something for which they themselves were not personally responsible. T.C.N. Menon further urged that superior Police Officers should not be penalized for the supposed misconduct of some of their subordinates. However, the Court refused to entertain the said argument. Finally, a writ of *habeas corpus* was issued to the respondents directing them to produce Rajan in the High Court on 21 April, 1977. Fully concurring with the judgement of Justice P. Subramonian Poti, Justice V. Khalid opined that the Bench was not interested to find the guilt of any particular person, but the truth regarding the fate of Rajan. He also observed that there had been an attempt at suppressing the truth rather divulging it.[53] The case raised a huge political storm which unseated the then Chief Minister of Kerala, K. Karunakaran. That Rajan was not alive became as clear as daylight. As a result, a criminal case was filed against the arrest, torture and murder of Rajan. Soon, at the request of the accused, the case was transferred to the Coimbatore Sessions court. There were almost a hundred witnesses among whom eighty were victims of torture at the Kakkayam camp. Holding that the

charge against the accused was not proved beyond doubt, the court exempted them from the charge of murder and sentenced them to one year simple imprisonment. The accused appealed against the verdict before the Madras High Court and they were acquitted.[54]

END NOTES

1. *The Acts and Ordinances of Travancore-Cochin 1952*, pp.1-4.
2. *Kerala Gazette Extraordinary No.4*, dt. 12/1/1957.
3. *Kerala Gazette* dt. 26/3/1959.
4. *Kerala Gazette Extraordinary* dt. 14/2/1959.
5. 1961 KLT.275
6. *Ibid.*
7. *Ibid.*
8. *Ibid.*
9. 1963 KLT.323
10. *Ibid.*
11. *Ibid.*
12. 1963 KLT.1000
13. *Ibid.*
14. *Ibid.*
15. The Covenant

16. Ordinance 1 of 1124 M.E.

17. *Ibid.*

18. *The Travancore-Cochin code, Vol.1,* pp.125-30.

19. 1963 KLT.1000

20. *Ibid.*

21. 1964 KLT.140

22. *Ibid.*

23. D.D. Basu, *Shorter Constitution of India, Vol.2,* p.1127.

24. 1964 KLT.140

25. *Ibid.*

26. D.D. Basu, *Shorter Constitution of India, Vol.2,* p.1152.

27. D.D. Basu, *Shorter Constitution of India, Vol.1,* p.720.

28. *Ibid.,* pp.745-46.

29. 1964 KLT.140

30. 1968 KLT.299

31. *Ibid.*

32. *Ibid.*

33. *Ibid.*

34. *Ibid.*

35. *Ibid.*

36. *Ibid.*

37. 1969 KLT.174

38. *Ibid.*

39. *Ibid.*

40. *Ibid.*

41. *The Acts and Proclamations of Travancore, Vol.12,* pp.374-84.

42. 1969 KLT.174

43. 1977 KLT.335

44. The Emergency was the darkest chapter in the history of free India.

45. 1977 KLT.335

46. *Ibid.*

47. *Ibid.*

48. *Ibid.*

49. *Ibid.*

50. *Ibid.*

51. *Ibid.*

52. *Ibid.*

53. *Ibid.*

54. Eachara Varier, *Memories of a Father,* pp.48-50.