SENEVIRATNE AND ANOTHER
v:
UNIVERSITY GRANTS COMMISSION AND ANOTHER

SUPREME COURT
SAMARAWICKREMA J., WEERARATNE J., AND WANASUNDERA J.
S.C. APPLICATION NO. 88/1980.
OCTOBER 6 AND 7, 1980.

Fundamental rights - Equality of opportunity - University admissions - National policy in higher education - Directive principles of State Policy - Relevancy in interpretation and operation of fundamental rights -Constitution, Articles 12(1), 27(2) and 126 - Interpretation of the Constitution - Principles applicable.

The 1st Respondent (the University Grants Commission) established by the Universities Act No. 16 of 1978 decided that admissions to the Universities for the year 1980 would be from students chosen by application of a ratio to successful candidates in the two General Certificate of Education "A" Level examinations held in 1979 and the following further basis of selection.

(a) 30 per centum of available places on merit, islandwide;

(b) 55 per centum of available places distributed amongst the 24 Revenue Districts, on the ratio the population figure of each District bears to the total national population;

(c) 15 per centum to be apportioned in the discretion of the Commission between 13 Revenue Districts which were considered to be educationally under-privileged.

In these proceedings, the 2nd petitioner who was seeking entrance to the Medical Faculty, through his next-friend, the 1st. petitioner, challenged the application of the 55 per cent district-wise allocation as being discriminatory and violative of his fundamental right to equality before the law enshrined in Article 12 (1) of the Constitution. He claimed that merit should be the sole criteria for University admission.

The Universities Grants Commission whilst conceding that merit was a relevant factor, disputed that it was the sole criterion. The Commission relying inter-alia on Article 27(2)(b) and (h) of the Constitution claimed that it was entitled to impose the 55 per centum district-wise selection so as to make available the limited number of places in the Universities to as wide a number of qualifying candidates as possible from various parts of the country so that access to higher education provided by the State will be distributed equitably and also in accordance with the national interests and policies.

Held :

(i) The University Grants Commission was entitled to have regard to national policy and the national interest in formulating its policy of admissions to Universities. Merit is not the sole criterion. It is a matter of discretion to the authority running an educational institution to indicate the sources from which admissions should be made, after having an over-all assessment of the country's needs and taking into account persons or

classes who may be under-privileged. The criteria adopted for classification should, however, not be arbitrary and should bear a rational relation to the object intended. The district-wise allocation withstood this test and did not violate Article 12(1) of the Constitution.

(ii) It is a settled principle of construction of a legal document such as a Constitution that it must be considered as a whole. The Directive Principles of State Policy contained in Chapter VI of the Constitution must be given due recognition, and proper allowance made for their operation and functioning as part and parcel of the Constitution. They are in the nature of an instrument of instructions which both the legislature and executive must respect and follow.

Cases Referred to :

1. *Dr. Rienzie Perera* v. *University Grants Commission* (1978-79-80) 1 Sri L. R. page 128 ——.
2. *Rajendran* v. *State of Madras* A.I.R. 1968 Supreme Court 1012.
3. *Durairajan* v. *State of Madras* A.I.R. 1951 Madras 120.
4. *Duraiarajan* v. *State of Madras* A.I.R. 1951 Supreme Court 226.
5. *Balaji* v. *State of Mysore* A.I.R. 1963 Supreme Court 649.
6. *Purshottam* v. *Desai* A.I.R. 1956 Supreme Court 20.
7. *Budhan Choudhry* v. *State of Bihar* A.I.R. 1955 Supreme Court 191.
8. Dalmia's Case A.I.R. 1958 Supreme Court 538.
9. *Surendrakumar* v. *State of Rajasthan* A.I.R. 1969 Raj 182.
10. *Subhashini* v. *State of Mysore* A.I.R. 1966 Mysore 40.
11. *Chitra Ghosh* v. *Union of India* A.I.R. 1970 Supreme Court 35.
12. *Vasundara* v. *State of Mysore* A.I.R. 1971 Supreme Court 1439.
13. *State of Andhra Pradesh* v. *Balaram* A.I.R. 1972 Supreme Court 1375.
14. *State of Andhra Pradesh* v. *Narendra Nath* A.I.R. 1971 Supreme Court 2560.
15. *N. Rao* v. *Principal, Medical College,* A.I.R. 1962 A.P. 2.
16. *Sagar* v. *State of Andhra Pradesh* A.I.R. 1968 A.P. 1965.
17. *Chanchala* v. *State of Mysore* A.I.R. 1971 Supreme Court 1762.
18. *Pandit* v. *State of Maharashtra* A.I.R. 1972 Bombay 242.
19. *Rita Kumar* v. *Union of India* A.I.R. 1973 Supreme Court 1050.
20. *Singh* v. *Dharbanga Medical College* A.I.R. 1969 Patna p. 11.

21. *Kesavananda Sharati* v. *State of Kerala* A.I.R. 1973 Supreme Court 1461.

22. *State of Kerala* v. *Thomas* A.I.R. 1976 Supreme Court 490.

23. *Fetechand Himmatlal* v. *State of Maharashtra* A.I.R. 1977 Supreme Court 1825.

24. *Pathumma* v. *State of Kerala* A.I.R. 1978 Supreme Court 771.

25. *Bakke* v. *University of California* U.S. Reports (1978) Vol: 57 L. Ed. 2d. 750.

26. *Kumari* v. *State of Mysore* A.I.R. 1971 Supreme Court 1439.

APPLICATION Under Article 126 of the Constitution

V.S.A. Pullenayagam with *Faiz Musthapha, Miss M. Kanapathipillai, Miss C. Abeysekera* and *Miss D. Wijesundera* for the Petitioners.

K. N. Choksy with *H. Jayamaha, Luckshman de Alwis and Miss A. Dharmaseeli* for 1st respondent.

The 2nd respondent Attorney-General was not represented.

Cur. adv. vult.

October 27th, 1980.
WANASUNDERA J.

This case would be of interest not only to the immediate parties, but also to the State and a number of others who may be equally affected by our decision.

The 2nd petitioner, who is a minor (hereinafter referred to as the petitioner) appearing through his guardian, the 1st petitioner, has filed this application under Article 126 of the Constitution challenging one of the criteria laid down by the University Grants Commission (the 1st respondent) for the selection of students for admission to the Universities. The University Grants Commission had determined that admission to the Universities for the year 1980, to state briefly, should be on the following basis:-

(a) 30% on merit;

(b) 55% on the ratio of population figures of residents in the 24 revenue districts;

(c) 15% to be apportioned at the discretion of the Grants Commission on 13 revenue districts which are considered to be under-privileged.

The petitioner has had his early education at Sripali Vidyalaya in Horana. In 1972, he had sat for an island-wide competitive public examination for the "Navodaya" Scholarships which entitled a successful student admission to any school of his choice. Winning this scholarship, the petitioner chose and was admitted to the Rahula Vidyalaya, Matara, where he continued his studies.

In 1975, the petitioner sat for the G.C.E. (Ordinary Level) Examination and, having performed creditably, he was able to secure a place at the premier secondary school in Colombo, namely Royal College. In April 1978, the petitioner sat for the G.C.E. (Advanced Level) Examination and obtained 'C' grades in Zoology, Botany and Physics, and a pass in Chemistry. On these results, the petitioner was entitled to a place in the faculty of biological science at Vidyodaya University, but, since the petitioner's ambition was to pursue a course of medical studies, he decided to forego this opportunity and have another try at the same examination to obtain the necessary qualification. He sat again in April 1979 for the G.C.E. ('A' Level) Examination and obtained a 'A' grade in Botany and 'C' grades in Physics, Chemistry and Zoology. The petitioner has stated - and this has not been denied - that at this examination he not only obtained the required qualifying marks of 160 for admission to the University, but also secured an aggregate of 245 marks, which would rank him high in the order of merit.

It is common ground that there are only 400 places available for students in the medical course. The petitioner believes that he would be placed among the first 340 in the order of merit and that if the principle of merit or excellence is applied, and the reservation of 55% places on a district basis is not applied, he would in all probability secure a place for a course in medical studies. The petitioner therefore challenges the application of the 55% district-wise allocation as being discriminatory and violative of the fundamental right of equality before the law.

It may be mentioned here that the 30% reservation on merit, which is also one of the other criteria, underwent modification due to the fact that in 1979 there were two G.C.E. ('A' Level) examinations. Since these two examinations were considered different, one from the other, in some respects, it was decided to make admissions on a ratio of 7:3 between the two examinations, based on the order of merit. The imposition of this ratio was challenged before this Court in *Dr Rienzie Perera* v. *The University Grants Commission* [1], and the Supreme Court struck down the imposition of the ratio as being violative of the equal protection clause. In a subsequent application, the Supreme Court by a

majority decision refused leave when it was sought to canvass the above decision. The 30% principle has not been put in issue before us in this case by either party. In fact they both rely on it and we therefore do not intend in any way to deal with that matter in this judgment.

Mr. Pullenayegum who appeared for the petitioner has submitted that the criteria of the 55% reservation on a district-wise basis is a departure from the merit principle which should be the governing principle in this matter. The present classification, he submits, is discriminatory and is violative of Article 12(1) of our Constitution. He further stated that in any event the allocation of the 55% of the places on the basis of the general population figures in the several districts is unreasonable and arbitrary and bears no rational relation to the primary object of selection, which is to secure the admission of the best talent. Mr. Pullenayegum relied heavily on certain Indian authorities, particularly the Supreme Court judgment in *Rajendran* v. *State of Madras,* [2] in support of his submissions. It is therefore necessary to examine the Indian authorities in some detail. But, as a background to the understanding of the Indian case law, a few preliminary remarks about the nature and contents of the corresponding provisions of the Indian Constitution may be useful.

Equivalent to Article 12(1) of our Constitution is Article 14 of the Indian Constitution. Corresponding to our Article 12(2) is Article 15 of the Indian Constitution. In addition, the Indian Constitution has numerous other provisions which enables the State to provide special educational facilities for the Scheduled Castes, Scheduled Tribes and for socially and economically backward people. For example, Article 29(2) of the Indian Constitution contains a prohibition against denial of admission into educational institutions of the State or those State-aided, on the grounds of religion, race, caste or language. This embodies one particular aspect of the equality principle of Article 15. Articles 46, 340, 341 and 342 are directory provisions enabling the State to promote the educational and economic interests of Scheduled Castes, Scheduled Tribes and weaker sections of the community. Further, Article 16(4) makes express provision permitting the State to make reservations in respect of employment in favour of backward classes of citizens. Our Constitution, on the other hand, does not have these additional provisions. We have a general equality clause similar to the Fourteenth Amendment of the U.S. Constitution; and if special treatment has to be given to any special class or category, this will have to be justified under what is called the "theory of classification".

In view of the multiplicity of provisions in the Indian Constitution reiterating the concern for Scheduled Castes and Scheduled Tribes, we find that practically all legislation enacted to promote these special interests have scarcely been challenged in the courts and whenever challenged they have been treated sympathetically. But, when attempts were made to benefit other under-privileged persons, the position taken by the Indian courts would be found to be somewhat different.

I have already referred to the provisions of Article 16(4) of the Indian Constitution dealing with employment, which enables special reservations to be made in favour of any backward class of citizens. In *Dorairajan v. State of Madras,*[3] the High Court of Madras noted the absence of a similar provision in Article 29 which deals with admission to schools, and for that reason struck down a discriminatory allocation of places in medical and engineering colleges to certain backward classes. When this case came before the Supreme Court[4], Das, J., observed -

> "Seeing, however, that Cl. (4) was inserted in Art. 16, the omission of such an express provision from Art. 29 cannot but be regarded as significant. It may well be that the intention of the Constitution was not to introduce at all communal considerations in matters of admission into any educational institution maintained by the State or receiving aid out of State funds."

In consequence of this judgment, the First Constitutional Amendment came to be enacted in 1951, which introduced, inter alia, a new sub-Article (4) to Article 15, worded as follows :-

> "(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

Incidentally, in *Balaji* v. *State of Mysore,* [5], where the Supreme Court had occasion to examine this provision, it held that this provision should be construed narrowly and the "back-wardness" referred to must be both social and educational and not either social or educational, thereby indicating that the Indian courts would generally be averse to further exceptions to the equality principle.

Broadly speaking, the position in Indian law seems to be somewhat different from the situation here or the position under the American law. In India we find that there is specified in the Constitution itself a ready-made classification of certain under-privileged groups, whereas it is not so with us. As far as India is concerned, it is only when the State, by legislation or otherwise, seeks to add other categories also as under-privileged to what has already been specified would such additional classification face a challenge in Courts. Both here and in America, since the Constitutional provisions do not specify or describe any class or category whatsoever that should be given special treatment, classification in this area is inevitable and necessary and must be sanctioned unless unreasonable. In India, it seems to me that in view of the express provisions already classifying certain groups, the courts have been wary and careful about newer categories and the courts have generally evinced an unwillingness to admit further exceptions to the equality principle. This fact, I think, should be kept in mind when reading the Indian authorities. None the less, when these Indian cases are read discriminatingly, it would be found that they contain useful discussions of the broad principles that govern this type of situation. These cases are undoubtedly of great persuasive value and well worth careful study.

With these preliminary observations, I shall now turn to the decision in *Rajendran* v. *State of Madras* referred to earlier. This was in fact the sheet anchor of Mr. Pullenayegum's case. It is on the basis of this decision that the petitioner has urged that in the admission of students to educational institutions, it is merit and merit alone that should be used as the yard stick. The Government of Madras, in this case, had formulated certain rules for the selection of students for admission to the first year Integrated M.B.B.S. course at the various Medical Colleges run by the Government. As in this country, the numbers seeking admission were greatly in excess of the number of places available for them at the Universities.

Rule 2 of these rules specified a reservation of 10 seats for certain categories, which are not relevant here. Rule 4 reserved a certain number of places for Scheduled Castes and Scheduled Tribes. Rule 6 reserved a number of places for women. These rules, though they ran counter to the principle of merit, were not challenged since it was possible to relate them to certain provisions of the Constitution. Rule 5 provided reservations for socially and economically backward classes. This rule was challenged, but upheld by the Supreme Court. The significance of this fact must not be over-looked. We see here the Supreme Court

upholding the reservation of a quota for the socially and economically backward persons, which clearly offends the merit principle. The petitioners succeeded in their challenge of Rule 8. This rule provided that the seats reserved in the general pool should be allocated among the various districts on the basis of the ratio of the population of each district to the total population of the State. There is some superficial resemblance between this rule and the criterion of admission we have been called upon to consider.

It would be observed that, over and above the categories expressly mentioned in the Constitution, Rule 8 was in the nature of an additional classification. It was for the State, therefore, to justify this further classification by placing the required material before Court and submitting the proper legal arguments. It would however appear that the challenge to Rule 8 was barely met and the only serious submission put forward by the State was to the effect that there were better educational facilities in the city of Madras, as compared to other districts, and that students from the city would have a distinct advantage over the others. Apparently, the State authorities had formulated the rule on a sort of rough and ready basis without the support of such facts and figures that would enable it to stand up in a court of law. The Court observed:-

> "This in our opinion is no justification for districtwise allocation, which results in discrimination, even assuming that candidates from Madras city will get a larger number of seats in proportion to the population of the State. That would happen because a candidate from Madras city is better. If the object is to attract the best talent, from the two sources, districtwise allocation in the circumstances would destroy that object. Further, even if we were to accept this contention that would only justify allocation of seats between the city of Madras on one side and the rest of the State on the other and not a district-wise allocation throughout. But apart from this, we are of opinion that the object being what we have indicated, there is no reason why there should be discrimination which would go against the candidates from Madras city. We may add that candidates who pass from Madras city need not all be residents of the city for it is common knowledge that schools and colleges in the capital city attract students from all over the State because of better educational facilities."

The Court went on to say as follows :-

"We are satisfied therefore that the State of Madras has made out no case for districtwise allocation of seats in medical colleges. We are also satisfied that such allocation results in discrimination and there is no nexus between this territorial distribution and the object to be achieved, namely, admisslon of the best talent from the two sources already indicated. We are therefore of opinion that allocation of seats on districtwise basis is violative of Article 14."

The reference in the judgment to certain other features of the case and the restrained language in the above passage seem to suggest that the Judges were not seeking to lay down any general principles, but that their decision was intended to be limited to the facts of that case. As I have indicated earlier, the Indian Constitution, unlike our Constitution, makes express provision permitting a departure from the strict equality provision in the case of a number of classes and categories of persons considered under-privileged or backward. If further classification is sought to be made over and above that, as was sought to be done in this *Madras* case, there is a heavy burden on the State to establish its case and it will have to be justified at a level above the ordinary. It will have to be justified at almost a national level or at the level of the Fundamental Directive Principles of the State. In the absence of such a higher objective being sought or being established, the Court was no doubt compelled to apply the principle of merit as the test for admission.

But, this Madras decision cannot in any event be interpreted to mean that a provision cannot be made for a socially or educationally backward class, for this very ruling upholds it. Rule 8 was not so much that the students outside the metropolis were backward, but merely that Madras city had better educational facilities. As regards classifications on territorial or geographical bases, there are cases of the Supreme Court from the inception of the Constitution, showing that this is a permissible method of classification. For example, in *Purshottam* v. *Desai,* [6] S. R. Das, C.J., observed -

"....While Art. 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation....

The classification may be founded on different bases; namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration."

Chief Justice Das repeated this statement in *Budhan Choudhry v. State of Bihar,* [7]. The leading case in this regard is, of course, *Dalmia's* case, [8] where the Supreme Court reiterated its view that a classification may be founded on different bases, namely geographical or according to objects or occupations or the like, using almost the identical language referred to above. In fact, in *Rajendran's* case (*supra*) itself, the Court mindful of the fact, adverted to it, lest its decision be construed otherwise, and said -

> "We may add that we do not mean to say that territorial classification is always bad under all circumstances. But there is no doubt that districtwise classification which is being justified on a territorial basis in these cases is violative of Article 14, for no justification worth the name in support of the classification has been made out."

This understanding of *Rajendran's* case is confirmed when it is seen in the perspective of later decisions of the Supreme Court and High Courts which have sought to explain the real basis of the ruling. The trend of later decisions has been to contain the ruling in *Rajendran's* case to those particular facts. I shall now turn to some of those later cases.

In *Surendrakumar* v. *State of Rajasthan,* [9] there was reserved in the Medical Colleges of the State, places for the children of (a) doctors, vakils and para-medical staff, (b) political sufferers, (c) members of Parliament, (d) special cases to be nominated by the Government. Under this last head, places were reserved for the children of defence personnel. While the Court struck down the first three categories as violative of the equality clause, it upheld the reservation in (d). The petitioners relied on the ruling in *Rajendran's* case in support of their arguments. The Court however rejected that submission and referred to the judgment in *Subhashini* v. *State of Mysore,* [10], where a similar reservation had been upheld and Justice Hedge in distinguishing the Madras case had said -

> "Reservations made in favour of children or wards of the men in armed services, and ex-servicemen including those who were in the armed services during the second world war were challenged as being discriminative in character. The classification made is a valid one. The said reservation is clearly in national interest. The criticism about that reservation shows how short-sighted one could be when blinded by selfishness. The petitioners were not well advised in taking up such extreme positions."

The Court in *Surendrakumar's* case (*supra*) went on to say :

> "No doubt in *Rajendran's* case their Lordships of the Supreme Court were pleased to observe that the object of selection can only be to secure the best possible material for admission to Colleges subject to the provision for socially and educationally backward classes. But it must be recollected that this observation was made in view of the facts and circumstances of that case and their Lordships have themselves observed at another place in that judgment that the object to be achieved in a case of the kind with which we are concerned is to get the best talent for admission to the Medical College. A situation like the present in which the question of a national interest has cropped up was not at all present before their Lordships while dealing with the question of districtwise allocation of seats in the matter of admission to Colleges. While judging the reasonableness of any law or executive act of the Government we cannot ignore the demand of the times and the interest of the nation as a whole. National interest in our humble opinion is the paramount consideration and has an important bearing on the question of constitutionality and validity of law which we may be called upon to consider."

In *Subhashini's* case (*supra*), Mysore High Court held that the classification based on lawful state policy is not violative of Article 14. The Court added that there is nothing unconstitutional in making reservations for students from other States, cultural scholars of Indian origin domiciled abroad, Colombo Plan scholars, students of Indian origin migrating from Burma, students from Asian and African countries and Union territory. It would be the same in the case of children of men of the armed services of ex-servicemen and those who have shown exceptional skill and aptitude in sports and games. It will be observed that none of those reservations could be justified on the merit principle.

In 1970 the Supreme Court had occasion to refer to *Rajendran's* case again when dealing with the case of *Chitra Ghosh* v. *Union of India,* [11]. It concerned admissions to the Maulana Azad Medical College, New Delhi, which was a State educational institution. The intake of students was small - there being only 125 places annually. The Government, by making certain reservation, restricted the admissions further. There were the following reservations :-

(1) 15% for Scheduled Castes candidates.

(2) 5% for Scheduled Tribes candidates.

(3) 25% for women.

(4) For Government nominees from the following categories :-

(a) children of specified Union territories;

(b) children of government servants posted abroad;

(c) cultural scholars;

(d) Colombo Plan scholars;

(e) Thailand scholars;

(f) Jammu and Kashmir scholars.

The appellants had obtained about 62.5% marks and were domiciled in Delhi. According to them, they were entitled to admission on the basis of merit and would have been so admitted but for the reservations. It was their further contention that the nominees who gained admission had obtained less percentage of marks than the appellants. They challenged these reservations as being violative of the equality clause since the merit principle had been disregarded. The Court said -

"The first group of persons for whom seats have been reserved are the sons and daughters of residents of Union territories other than Delhi. These areas are well known to be comparatively backward and with the exception of Himachal Pradesh they do not have any Medical College of their own. It was necessary that persons desirous of receiving medical education from these areas should be provided some facility of doing so. As regards the sons and daughters of Central Government servants posted in Indian Missions abroad it is equally well known that due to exigencies of their service these persons are faced with lots of difficulties in the matter of education. Apart from the problems of language, it is not easy or always possible to get admission into institutions imparting medical education in foreign countries. The Cultural, Colombo Plan and Thailand scholars are given admission in medical

institutions in this country by reason of reciprocal arrangements of an educational and cultural nature. Regarding Jammu & Kashmir scholars it must be remembered that the problems relating to them are of a peculiar nature and there do not exist adequate arrangements for medical education in the State itself for its residents. The classification in all these cases is based on intelligible differentia which distinguishes them from the group to which the appellants belong.

It is the Central Government which bears the financial burden of running the Medical College. It is for it to lay down the criteria for eligibility. From the very nature of things it is not possible to throw the admission open to students from all over the country. The Government cannot be denied the right to decide from what sources the admission will be made. That essentially is a question of policy and depends inter alia on an overall assessment and survey of the requirements of residents of particular territories and other categories of persons for whom it is essential to provide facilities for medical education. If the sources are properly classified whether on territorial, geographical or other reasonable basis, it is not for the courts to interfere with the manner and method of making the classification.

The next question that has to be determined is whether the differentia on which classification has been made has a rational relation with the object to be achieved. The main purpose of admission to a Medical College is to impart education in the theory and practice of medicine. As noticed before the sources from which students have to be drawn are primarily determined by the authorities who maintain and run the institution, e.g., the Central Government in the present case.....it is difficult to see how that classification has no rational nexus with the object of imparting medical education and also of selection for the purpose."

In 1971 the same question came up for decision again before the Supreme Court in *N. Vasundara* v. *State of Mysore,* [12]. The petitioner challenged a rule for admission to a Medical College which required a student to have not less than 10 years' residence in the State to be eligible for admission. The petitioner relied on *Rajendran's* case (*supra*), while the Attorney-General of India, who appeared for the respondents, sought justification for the rule in

Chitra Ghosh's case (*supra*) - both Supreme Court decisions. Clearly the two cases were inconsistent.

The Supreme Court appears to have taken the view that *Rajendran's* case must be strictly limited to the facts of the case and it did not purport to lay down the broader principles applicable to an admission situation. Commenting on *Rajendran's* case, the Supreme Court said -

> "The argument that candidates coming from various districts would settle down in those districts to serve the people there was not accepted, because there was no material on the record giving facts and figures suggesting that candidates from a particular district would generally settle down in that district. It was not even so stated in the affidavit filed on behalf of the State of Mysore (Madras) in that case. The Court, however, took care to clarify the legal position by adding:
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> 'We may add that we do not mean to say that territorial classification is always bad under all circumstances. But there is no doubt that districtwise classification which is being justified on a territorial basis in these cases is violative of Article 14, for no justification worth the name in support of the classification has been made out'."

The Supreme Court then quoted with approval two excerpts from *Ghosh's* case, and referring to them said -

> "According to this observation which merely re-affirms the settled law, if the sources are properly classified on a reasonable basis, then Courts are not expected to interfere with the manner and method of making the classification. Reasonable basis of course must mean that the basis is not arbitrary or fanciful, but bears a just, rational and intelligible relation with the object sought to be achieved by the classification."

In concluding, the Court said -

> "The need and demand for doctors in our country is so great that young boys and girls feel that in the medical profession they can both get gainful employment and serve the people. The State has therefore to formulate with reasonable foresight a just scheme of classification for imparting medical education to the available candidates

> which would serve the object and purpose of providing broad-based medical aid to the people of the State and to provide medical education to those who are best suited for such education. Proper classification inspired by this consideration and selection on merit from such classified groups therefore cannot be challenged on the ground of inequality violating Article 14."

The requirement for a period of ten years' residence was therefore held to be valid. This goes quite contrary to the merit principle advocated by Mr. Pullenayegam. It will be apparent from this that the Supreme Court, departing from the narrow ruling in *Rajendran's* case (*supra*), has formulated broader principles that should apply in respect of admission cases. The legal analysis contained in these two cases, which has been affirmed and developed in later decisions to which I shall presently refer, seems to indicate that in the first instance it is permissible for the State or governing authority of an educational institution to classify the sources from which students will be drawn for admission. This is in the nature of a policy decision and the State or authority is given a wide latitude in the matter. For this purpose, it is well within the power of the State to take into consideration matters of national interest or national policy. But this classification of sources should not be on an unreasonable basis. The principle of merit or excellence is by no means abandoned. First there would be proper classification, then there would be selection strictly on merit. The merit principle can also be directly applied as the still later cases show where admission is based on a common entrance examination and not strictly by way of indicated "sources". Where the students are required to sit for a common entrance test to gain admission, selection must be made on merit and merit alone. The distinction between these two types of situations is vital and must be borne in mind if we are to understand the Indian decisions correctly.

In *State of Andhra Pradesh* v. *Balaram,* [13] (which is a decision of the Supreme Court subsequent to *Rajendran's* case) many of the issues that arise for consideration in the case of admissions to schools and colleges came up for determination. The facts of this case are of a complex nature and it would be useful to set them out in some detail.

The State of Andhra Pradesh had made certain rules for the selection of candidates for admission to the Government Medical Colleges in the State. Rule 1 mentioned that a limited number of places were available - namely 550 seats. Rule 2 dealt with certain reservations. They were for -

(a) Scouts and Guides;

(b) Children of armed services and ex-servicemen;

(c) Scheduled Castes and Scheduled Tribes;

(d) Women.

Rule 3 set out the nature of the basic educational qualification. Rule 4 made provision for the basis of selection, which was upon the results of an entrance examination. This should be noted as it constituted the controlling factor in the decision. Rule 5 elaborated the earlier rule and provided for the application of the principle of merit upon a Master list prepared on the result of the Entrance Examination. Rule 6 reiterated that admission would be on the basis of the Entrance Examination. Over and above the merit principle, Rule 7 provided for a method of distribution of the available places, and Rule 8 dealt with the mode of such allotment. It was as follows :-

(1) 40% to the Pre-University Course Students (P.U.C.).

(2) 40% to the High Secondary Course Students (H.S.C.).

(3) 5% to M.Sc. and B.Sc. students.

(4) 4% to the reservations in Rule 2.

(5) 11% in order of merit from the General Pool.

Rule 10 stated that all reservations would be subject to the order of merit.

It should be noted that admission in this case was clearly on the basis of a Common Entrance Examination although the applicants came from different backgrounds. The reservations of quotas were superadded to the Common Entrance Test.

The challenge to these rules began in a somewhat surprising manner. Of all things, the requirement of the Entrance Examination for admission came in for attack, first. It was suggested that admissions should have been made from the "sources", without the requirement of an Entrance Examination. This was the first matter that the Court was called upon to decide. The Supreme Court, upon an appeal by the State, held that it was lawful for the Government to prescribe the requirement of an

Entrance Examination as the mode of selection for admission.- *State of Andhra Pradesh* v. *Narendra Nath* [13]. In consequence of this decision, the State published a list of candidates selected on the basis of the Entrance Examination.

Thereupon petitions were filed attacking the list. This is *Balaram's* case [13]. In this case a P.U.C. candidate challenged the allocation of 40% of the seats for the H.S.C. students. The reservation for Backward Classes was also attacked. The High Courts upheld these objections. In the Supreme Court, however, the reservation for Backward Classes was upheld, but it agreed with the High Court that the reservations of 40% places for the H.S.C. students was invalid.

It was contended by the State that P.U.C. and H.S.C. students formed two separate categories, and unless such a reservation was made H.S.C. candidates would not be able to secure an adequate number of places in the Medical Colleges. It was further submitted that, as the Medical Colleges were run by the Government, it was open to the Government to specify the sources from which the candidates would be selected. In short, it was sought to defend the rule on the basis that it constituted a description of the "sources".

The Supreme Court conceded that these students can be said to constitute two different categories. But it said that once the rules had specified that there was to be a Common Entrance Test and the selections would be based on such common test, a reservation of 40% for the H.S.C. students cannot be justified. The decision of the Supreme Court brings out the distinction, referred to earlier, between "sources" on the one hand and the requirement of passing a Common Entrance Test on the other. In the latter case the courts would insist on the application of the merit principle. In the course of its judgment, the Supreme Court examined a number of decided cases, including the Madras case of *Rajendran* v. *State of Madras* (*supra*), and explained those cases in the light of their present decision.

The first decision the Supreme Court referred to was *Nageswara Rao* v. *Principal Medical College, Guntur,* [15]. In this case a rule of the Andhra Government provided that admission for the Pre-medical Course in Medicine should be from two categories, namely, students from Multi-purpose Colleges and students from Pre-University Courses on the basis of merit. Although this was so stated, nevertheless a reservation of 1/3rd of the number of seats was made in favour of the Multi-purpose students. When this reservation was challenged before the High Court, it was found

that these two courses were not comparable, and accordingly the reservation was upheld. Commenting on *Nageswara Rao's* case, the Supreme Court said that that case had no Common Entrance Test as in *Balaram's* case (which was then before them) and added that the selection in *Nageswara Rao's* case was made on the basis of marks which the respective student had obtained in their previous course of study.

The Supreme Court then went on to discuss another decision from the Andhra High Court - *P. Sagar* v. State *of Andhra Pradesh* [16] where a similar reservation on the basis of a "source" had been upheld. Commenting on that case, the Supreme Court observed :-

> "Here again, it is to be stated that there was no common entrance test for all the candidates belonging to the P.U.C. and H.S.C. categories. On the other hand, the selections were made on the basis of the marks obtained by them in their qualifying examinations. It was further held in the said decision that even on the basis that the qualifying examinations taken by the P.U.C. and H.S.C. candidates were equal, still the reservation is not valid as discriminatory under Article 14 of the Constitution. But here again it is to be noted that selections were made on the basis of marks obtained in a common Entrance Test held for all the candidates uniformly. This decision is also, more or less similar to the one in AIR 1962 Andh Pra 212."

The Supreme Court also referred to the fact that in an appeal to the Supreme Court in *Sagar's* case, the decision of the High Court on the above ground was not canvassed, but the appeal was taken on another point - 1968 A.I.R. (S.C.) 1379.

The Supreme Court next referred to one of its own previous decisions, namely, *Chitra Ghosh* v. *Union of India*, [11], already referred to in this judgment. After quoting extensively from the judgment in *Ghosh's* case, the Court observed:

> "On this analogy, the counsel urged, the present classification of P.U.C. and H.S.C. into two categories and the reservation of 40% for H.S.C. candidates are valid. In our opinion, the above decision does not lead to the result contended on behalf of the State. The special circumstances and the reasons for making the reservation to enable the Central Government to make nominations so that candidates belonging to those categories can get adequate representation by way of admission in the Medical Colleges

have been elaborately adverted to by this court and it is on that basis that this court accepted the classification as valid. It was further held that the said classification has got a rational relation to the object sought to be achieved. The object was stated to be to impart medical education to the candidates belonging to those groups or areas where adequate facilities for imparting such education were not available. But the point to be noted in the said decision is that in respect of other candidates, who are not governed by any reservation, the selection was on the basis of merit, namely, the marks obtained by them. On the other hand, in the case before us, though a uniform Entrance Test has been prescribed for both the P.U.C. and H.S.C. candidates, still the selection is not made on the basis of the marks obtained in the Entrance Test. On the other hand, the selections are made after disregarding those marks."

The last two sentences above, it would be observed, set out in the most forthright form the basic principles applicable to the present type of case.

The Supreme Court then proceeded to consider a still later decision of the Supreme Court, namely, *Chanchala* v. *State of Mysore,* [17] where the Court had to determine the validity of a Universitywise scheme of distribution of seats in the Medical College run by the State. Mysore State had three Universities, namely, Karnatak, Mysore and Bangalore Universities. The available seats were distributed among these three Universities. It was contended that by reason of this distribution, candidates obtaining lesser marks from one University could obtain admission to the Medical College at the expense of others from another University who may have scored much higher. In short, the selection should be on the order of merit. In rejecting this submission, the Court had said -

"Further, the Government which bears the financial burden of running the Government Colleges is entitled to lay down criteria for admission in its own Colleges and to decide the sources from which admission would be made, provided of course, such classification is not arbitrary and has a rational basis and a reasonable connection with the object of the rules. So long as there is no discrimination within each of such sources, the validity of the rules laying down such sources cannot be successfully challenged ..... In our view the rules lay down a valid classification. Candidates passing through the qualifying examination held by a University form a class by

themselves as distinguished from those passing through such examination from the other two Universities. Such a classification has a reasonable nexus with the object of rules, namely, to cater to the needs of candidates who would naturally look to their own University to advance their training in technical studies, such as medical studies. In our opinion, the rules cannot justly be attacked on the ground of hostile discrimination or as being otherwise in breach of Article 14."

After citing this quotation, the Supreme Court in *Balaram's* case commented-

"It will be seen that the above decision has emphasized that the selection which was made on the basis of the marks obtained in the nation held by each of the Universities was valid and the distribution of seats in the Medical Colleges Universitywise was also valid in view of the different standards adopted by each University. Again it is to be noted in the said decision, there was no question of all the students of the three Universities taking a common Entrance Test on the basis of which a selection was made."

So we find that in 1972 the Supreme Court of India, drew a distinction in the clearest terms, on the one hand between the case of direct admission based on a reasonable classification of "sources" and on the other where the applicants for admission must submit themselves to a common Entrance Test over and above whatever basic qualifications they may have. In the latter case, it stands to reason that the principle of admission should be merit and selections must be on the order of merit. In the former case, the law appears to give the governing bodies sufficient latitude to classify the sources from which students would be drawn to fill the vacancies and in so far as the classification is concerned, it would be sufficient if the classification is not arbitrary but is found to bear a reasonable relation to the object of the rule. Such an object could well include the discharge of a duty to afford facilities for education to such persons, groups, classes or areas as are handicapped or have been denied such facilities.

That this is the prevailing view of the Indian Courts is reflected in decisions of the various State High Courts. For example, in *Pandit* v. *State of Maharashtra,* [18] a rule framed by the Government of Maharashtra for the pooling together of the seats at the B.J. Medical College and the Miraj Medical College was challenged. The impugned Rule 2 stated that for the purpose of admission to

the B.J. Medical College and the Miraj Medical College the seats at the two Medical Colleges should be pooled together and distributed between the two colleges in the proportion of the number of students registered for the Pre-professional Examination (Medical) at the Poona University and the Shivaji University at Kolhapur.

The petitioner accepted the pooling of seats but urged that the allocation on the basis of students registered for the examination had no nexus with the object of securing the best students for admission. Once again a claim is staked for the merit principle. It was the petitioner's case that, but for this requirement, he would have been able to secure admission as he had obtained 66.8% marks in the Pre-professional Examination (Medical) in 1970 and that in 1969, in the absence of such an arrangement, students with 65% marks had been admitted. The Court said -

> "The students of two Universities form two distinct classes in view of the separate examinations conducted by the said Universities. The Government of Maharashtra wanted to provide fair opportunities to students of the Universities by equitably allotting the seats available at Poona and Miraj. The nature and object of classifying the students into two classes as students of Poona University and Shivaji University cannot be, therefore, assailed as contravening Art. 14 or 15 of the Constitution. The classification is based on intelligible differentia and is reasonable having regard to the existence of these two Universities and their history. The basis adopted by the Government has a relevant connection with the object sought to be achieved by the Government, viz., of allocating certain seats in the Poona B.J. Medical College to the students of Shivaji University because the Government is not in a position to provide more seats in the Miraj Medical College for the time being.
>
> The question of admitting the best students on the basis of their merits arises only after the said object of allocation is fulfilled. The petitioner has no right to ask for any relief from this Court on the ground that the allocation so made by the Government of the seats in Poona B.J. Medical College works against him. Poona B.J. Medical College admittedly is a College run by the Government. It is for the Government to lay down the criteria for eligibility. The Government cannot be denied the right to decide from what sources the admission will be made. It is open to them, therefore, to admit the students from Shivaji

University into that College, if they find it impossible to give fair opportunity to the students of that University. A somewhat similar question arose in a recent case in *Chitra Ghosh* v. *Union of India* (11) where Mr. Justice Grover speaking for the Court laid down :-

'That essentially is a question of policy and depends inter alia on an overall assessment and survey of the requirement of residents of particular territories and other categories of persons for whom it is essential to provide facilities for medical education. If the sources are properly classified whether on territorial, geographical or other reasonable basis it is not for the courts to interfere with the manner and method of making the classification'."

Rita Kumar v. *Union of India,* (19) is another decision of the Supreme Court which is relevant to the matter. In this case the two petitioners had failed to get admission to follow a course in medicine. The Indian Government had introduced a scheme whereby a certain number of seats in Government Medical Colleges were reserved for repatriates from Burma, Sri Lanka, Mozambique and new emigrants from Bangaladesh. The scheme itself was not challenged. But what was attacked was an administrative decision by the Selection Committee, which was taken on policy grounds to give the places to those repatriates who had arrived in India within five years of the date of selection, in preference to earlier arrivals. There were a mere 27 places and all were filled by such later arrivals. The petitioners were earlier arrivals and they had obtained a first class and 64.3% and 62% marks respectively. Those who were selected were placed lower down. The Court observed:

"It is true that the petitioners are repatriates like some of the respondents but there is a difference between the two categories as the petitioners had come to India earlier while the respondents had immigrated much later. The former were more re-settled than the latter and since the object of the rule creating reservations of seats was rehabilitation and re-settlement it cannot be said that the classification so made administratively had no reasonable nexus to the object in view. The respondent candidates were also repatriates though, it is true, they received a lesser percentage of aggregate marks than the petitioners. If both the categories had been placed in similar circumstances it would have been possible to urge that there has been discrimination. But since the petitioners and their families

have been better settled and rehabilitated than the respondents and their families it was open to the Selection Committee to decide administratively how best the purpose of rehabilitation of repatriates could be served. In our view, therefore, the discrimination is not invalid.."

On the basis of authorities referred to above, the legal position pertaining to this matter may then be restated as follows:- It is a matter of discretion to the authority running an educational institution to indicate the sources from which admissions should be made, after having made an overall assessment of the needs of the country and taking into account particularly the position of persons or classes of persons who may be under-privileged or handicapped. In seeking to classify, however, the criteria adopted should not be arbitrary, but must bear a rational relation to the object intended.

The objects can include matters of national interest and national policy. Even where sources are indicated, there is a need that they bear a reasonable relation to the objects sought to be achieved, for example, in *R.S. Singh* v. *Dharbanga Medical College,* [20] where two categories - B.Sc. (Hons) candidates and H.Sc. 'pass' candidates - were indicated with a preference for the B.Sc. (Hons) candidates, the Court, after scrutinising the nature of the subjects required and the pass marks concerned, said that the distinction drawn between the B.Sc. (Hons) and the B.Sc. 'pass' had no relevance in fact, since it was possible for a B.Sc. 'pass' candidate to obtain better marks in the prescribed subjects in the qualifying examinations than a B.Sc. (Hons) candidate. The Court, while holding that it may be possible to separate the two groups, held that the classification cannot be justified in those circumstances.

There is the second type of case where the basis of admission is the requirement that students should submit themselves to a common entrance test. In this type of case, the normal presumption is that admissions must necessarily be made on the order of merit or excellence. To superadd any further condition would obviously negate the merit principle and is therefore impermissible unless a very strong case can be made out to justify it.

On the weight of these subsequent decisions, it is clear that *Rajendran's* case must be limited to the peculiar facts of that case and cannot be relied upon as having any wider application. In fact, Mr. Choksy, in the course of his submissions, drew our attention to a statement in Seervei's well known Commentary on the Indian Constitution to the effect that the later cases have in substance

overruled the decision in *Rajendran's* case - Seervai, CONSTITUTION OF INDIA, 2nd Edn., Vol. I, p.300. This is also the conclusion I have arrived at independently upon a careful reading of the relevant case law.

Going back to Mr. Pullenayegam's submissions in Court, I would like to mention at this stage that the legal position he put to us was more extreme than the one taken up in the petition. Mr. Pullenayegam virtually based his entire argument on the ruling in *Rajendran's* case. Neither did he in the course of his submission refer specifically to the 15% reservation for the under-privileged districts, nor seek to relate it or explain it in the light of the merit principle he was advocating.

A perusal of his petition shows that the 15% reservation was conceded by him. In paragraph 13 of his petition, the petitioner has stated:

> "The petitioner, while accepting in principle the apportionment of 15% of available vacancies among areas with inadequate educational facilities as it does recognise merit, states that he is entitled to be considered on the basis of the aggregate marks received by him to fill 340 places (that is to say the balance places available after accounting for the 60 places reserved for educationally backward areas) without any other restriction."

The effect and implications of this concession must be taken account of. It means that merit cannot constitute the sole criterion for admission. It is also an admission that a departure from the merit principle has been validly made in this case and that it is valid to the extent of the 15%. This concession to a great degree blunts the force of his submissions on the merit principle.

What remains therefore for us to determine now is not the question whether it is legally permissible to depart from the merit principle, but whether the 55% reservation too could be justified on a rational basis. This then assumes more of a factual aspect relating to the degree of backwardness involved rather than a pure legal issue of the application of the principle of merit. In short, the issue is just one of classification and its reasonableness. The 1st respondent has averred that the 55% reservation was imposed "to make available the limited number of places to as wide a number of qualifying candidates as possible from various parts of the country, so that access to high education provided by the State will be equitably distributed and also subserve the objectives of the

national interest and policies." In making this decision, the administration also took account of the fact that the application of the merit principle as the sole criterion would "confer an unfair advantage on students in the cities and towns who, by reason of their mere residence, have the advantage of better secondary educational facilities at the hands of the State.

Assuming then that the State or the educational authority - in this case the University Grants Commission, which is a corporate body having an independent status - is given a latitude to determine the sources in respect of admission, it is then necessary to find out whether the classification that is impugned bears a rational relation to the objects sought to be achieved.

The Chairman of the University Grants Commission has, in his affidavit, placed before us certain facts and figures justifying the decision of the Grants Commission. We find that students are called upon to sit for a Common Entrance Examination for admission to the Universities, but admissions are made on the results of the G.C.E. ('A' Level) Examination, which are normal public examinations conducted by the Department of Education and not by the University authorities. According to the material before us, in 1979 a total number of 107,114 students sat these two examinations, i.e. 73,877 for the April 1979 G.C.E. ('A' Level) and 33,237 for the August 1979 G.C.E. ('A' Level) Examinations. Of this 107,114, the number who obtained the qualifying marks of 160 was 29,659.

Students entering the University are divided into four streams - Arts, Commerce, Bio-Science and Physical Science - depending on the subjects passed. The students who enter the medical faculties belong to the Bio-Science stream. In the 1979 April Examination 18,743 candidates sat offering Bio-Science subjects, and for the August 1979 Examination there were 12,857 such candidates. Of this total of 31,600 candidates, only 6,750 obtained qualifying marks, i.e. 4,863 and 1,887 at the April and August Examinations respectively.

The Higher Educational Institutions, i.e. the Universities, have only an aggregate of 995 places for Bio-Science Courses in 1980. Out of this total, only 400 places are available for medical studies and the rest are allocated among other faculties, namely, dental surgery, veterinary science, agriculture and bio-science.

Mr. Kalpage has said that due to the limited number of seats that are available for higher education, the University Grants

Commission had to devise an appropriate scheme of selection so as to distribute the few places to as wide a number of qualified candidates as possible from various parts of the country, so that access to higher education provided by the State will be equitably distributed and subserve the objectives of the national interests and policies. His affidavit contains the following statements :-

> "Whilst merit in academic attainment is a criterion which the University Grants Commission recognises and gives due weight to by virtue of the facts that the Advanced Level Examination is treated as the qualifying examination and 30% of available places is reserved for merit on an all island basis and the 55% and the 15% are also allocated on merit within the districts, nevertheless, by reason of the educational-socio-economic circumstances of Sri Lanka and the unequal secondary educational facilities presently provided mainly by the Government (referred to above), the determination of entry to the Universities based solely and entirely on the aggregate of raw marks of a candidate cannot be accepted as the only criterion for higher education in Sri Lanka. The University Grants Commission has to have an over-all picture of the nation's requirements in devising a scheme of admission, so that socio-economic objectives of higher education in Sri Lanka could be identified on a long-term national basis and implemented, in conjunction with the constitutional rights of individuals and the constitutional requirement of equal access to education at all levels, within the aforesaid practical restrictions as to the number of places available.
>
> Primary and secondary education is provided by the State as aforesaid. Prior to political Independence, secondary education was mainly available in urbanised localities through private schools, primarily in the western and the northern coastal belts. These institutions were based on the British system of education and catered to the English-speaking urban minority in the country. The monastic institutions (Pirivenas) had declined throughout the 450 years of foreign rule. The bulk of the population had to be content with an inferior education provided in the vernacular schools existing in the other parts of the country. This dualism in education persisted until the creation of a unified system of education. The adoption of Universal franchise in 1931 released an egalitarian ideology, which viewed privilege in education as a social inequity. In 1945, the Government introduced free

education from the kindergarten to the University to meet the popular demand for democratisation of education. During the 'fifties and the 'sixties, educational facilities were provided by the Government in different parts of the country at an accelerated pace, in consequence of which school enrolment registered a phenomenal increase. The introduction of Sinhala and Tamil as the media of instruction swelled the number of students outside the towns and cities. Pupil numbers rose from 1.4 million in 1950 to 3.1 million in 1979 out of a national population of 14.4 million. Corresponding to the phenomenal growth in student enrolment in the school level, the number seeking admission to Higher Educational Institutions registered a sharp increase. For example, the aggregate number of students who sat the G.C.E. (Advanced Level) Examination in April and August 1979 was approximately 107,000. Of these, approximately 30,000 students attained the minimum requirement for University admission. Unfortunately, higher educational facilities have not kept pace with the expansion in education at the primary and the secondary school levels, and the total number of University places available for 1980 is only 4,900.

Students who qualify for admission all expect University places so as to better equip themselves for employment opportunities. Notably in the under-developed countries, such as Sri Lanka, very few people, if at all, pursue education for the sole purpose of acquiring knowledge for its own sake. On the contrary, the overwhelming majority educate themselves for the primary purpose of securing employment. This is also true of those gaining University admission - their chief motivation being to better equip themselves for employment at a future date. Regrettably, the less urbanised and the rural sectors of Sri Lanka not only suffer from an inadequacy of educational facilities, but are also handicapped by a paucity of employment opportunity. This paradoxical feature is the root cause of much social and economic discontentment in the country, as was evinced by the Insurgency of 1971. In order to remedy these drawbacks, successive Governments of Sri Lanka have, through legislative and other means such as decentralized budgeting, pursued a policy of greater decentralization of the administration and the national effort, of educational, medical and other facilities, and the creation of job opportunities outside the towns and the cities for the development and the benefit of the less urbanised and the rural areas.

In all these circumstances, the University Grants Commission cannot fill the limited number of available places on the sheer results of a qualifying examination alone. To do so will be to negative the objectives of state sponsored higher education in Sri Lanka, to put it out of gear of national requirements and policies, and also to confer an unfair advantage on students in the cities and towns who by reason of their mere residence have the advantage of better secondary educational facilities at the hands of the State.

The University Grants Commission accordingly decided that the scheme of admission set out hereinafter will be best adopted to meet the objectives of higher education and the over-all national needs. The apportionment of the 55% to the districts based on the ratio of the total population of the district to the total national population will not only secure the aforesaid objective but will ensure also that within such quota the more populated districts (with the consequent higher school-going population) will secure greater representation within this 55%. The distribution of the 55% geared to the number of students qualifying in each district was not adopted by the Commission for the reasons set out hereinafter in paragraph 43 below.

In Sri Lanka, quite apart from the shortage in the number of available places and the factors referred to above, certain cogent factors of an educational nature have to be considered. One such factor is that the qualifying examination is conducted in three languages. This gives rise to examiner-variability, particularly when there are over 100,000 candidates. In turn, this leads to the lack of uniform examination standards not only as between the three media, but also within a subject in any given medium. With a view of remedying this, in or about 1970 the then Government on representations made to it had taken a decision that students should be admitted to science-based courses on different minimum mark levels applicable to each of the three language media."

In paragraph 43 of his affidavit, Mr. Kalpage has given further reasons why the 55% principle was based on the ratio of the total population of the district. This basis was criticised by Mr. Pullenayegam, but he made no reference to this cogent explanation. Para.43 states:

"In reply to paragraph (15) of the Petition, I state that 55% of the available places would be apportioned to the 24 administrative districts in the ratio of the total population of the district to the national population. The apportionment of the 15% to the under-privileged districts would also be done on the same basis. The general population (as distinct from the school-going population or the number attaining the minimum requirement for admission) was chosen as the basis for allocation of places for the reason that in a country like Sri Lanka, where several constraints, such as the lack of uniformity of educational facilities and the imbalance in the levels of income, the adoption of any population figure, other than the general population figure, would be arbitrary and unrealistic. The school-going population would depend to a very large extent on the availability of schools and their accessibility to children of school-going age. For example, in as much as there would be no bus-travelling public along a route on which no buses run, there would be no school-going population in a human settlement or in a contiguous group of such settlements which has no school. The number of students attaining the minimum requirement for admission is likewise an unrealistic figure in that it is based upon the school-going population which for the reasons earlier stated is by itself unrealistic. Thus, in an area where no school is available, there would be no school-going population, and for the same reason there would be no students attaining the minimum requirement for admission. In certain districts, schools are situated far apart and are not accessible to several settlements in the district. Furthermore, the adoption of the general population figure will also ensure, at the same time, that districts having larger populations and consequently a greater number of school-going children will obtain a larger number of places within the 55%. It also ensures at the same time that undue weightage is not given to developed districts which have educational facilities in excess of what is justified by the population of the district."

In the course of his submissions, Mr. Pullenayegum wished to refer to an article dealing with University admissions contained in the Sri Lanka Journal of Social Sciences of December 1978, in which, he said, districtwise allocation of places was examined and discredited.

Mr. Choksy objected to this material as it is neither referred to in the petition nor in the written submissions filed by the petitioners.

Mr. Choksy also complained that he has had no opportunity of challenging the various statements contained in the article. We however allowed Mr. Pullenayegum to refer to it in the course of his address. In so far as this article deals with certain historical and factual matters, I do not think there is room for disagreement, but one is certainly entitled to one's own interpretation of these facts or to draw inferences that may well be different from those of the writer.

One thing the article does show is that since 1970 successive governments have had to face a mounting problem of University admission. The first attempt at a solution was a proposal for science based courses to have different minimum mark levels for the three different media. This gave rise to a lot of criticism and had to be abandoned. Then Mediawise standardization which was proposed in 1972 came into operation in 1973. Since this method also created acrimonious debate, in 1974 mediawise standardization was supplemented by a 100% "district quota" system, and this continued till 1975. In practice, however, this system was applied with certain modifications.

There was so much public criticism and mounting dissatisfaction with this scheme, that the question of University admission became the concern of the Government at Cabinet level. A Committee of the National Planning Council -The Sectoral Committee on Social Overheads Mass Media & Transport, presided over by Mr. Pieter Keuneman and consisting of two other Cabinet Ministers -then went into this matter.

The Sectoral Committee had before them a report from a special committee of officials who were well-known in the field of education. The committee of officials recommended a scheme of admission based on a 30% merit and 70% district basis. This is very close to the present position. The Sectoral Committee, however, was not prepared to accept this proposal. On the other hand, it suggested a scheme which was 70% on merit and 30% on district quotas. Of this 30%, 15% was to be reserved for certain backward areas, i.e., Anuradhapura, Amparai, Badulla, Hambantota, Mannar, Moneragala, Nuwara Eliya, Polonnaruwa, Trincomalee and Vavuniya. It would be observed that these backward areas are practically the same as those districts for which 15% has now been reserved. The Sectoral Committee recommendations were on the basis of standardization of marks, subjectwise. This would make a substantial difference to the ratios and would not make them in any way equivalent to what is suggested by the petitioner. The Sectoral Committee itself realised

that its recommendations were only a "stop gap". As part of its recommendations, it advocated the need for immediate action by the Education Authorities to establish well-equipped and well-staffed schools in the provinces. When the Sectoral Committee recommendations came before the Cabinet, the Cabinet made further modifications, namely, that there should be both mediawise and subject-wise standardization. This once again had the effect of granting weightage to backward areas. Both the Sectoral Committee decision and the Cabinet decision were, of course, in the nature of policy decisions. In fact, the article Mr. Pullenayegam referred to is entitled "The Politics of University Admission". In 1976, the Committee of Experts reviewed the recommendations of the Sectoral Committee and stated that the Sectoral Committee percentages worked hardships and they reiterated that the basis should be 30% on merit and 70% on district basis, as at present.

After the present Government came into power, due to considerable agitation on this matter, a Ministerial Committee, as shown in document R3, had decided on the following scheme as the most equitable in the present circumstances :-

(1) 30% on merit.

(2) 55% districtwise on basis of population.

(3) 15% for the 12 under-privileged districts.

This was intended to be a temporary measure, valid for admission in 1979 and to be reviewed thereafter. As regards admissions for 1980, the respondent has stated in paragraph 30 that -

> "The scheme of admission for the year 1980 had in law to be made by the University Grants Commission. The Commission considered the various factors referred to earlier ..... the previous schemes of admission, the objectives of higher education in Sri Lanka, national requirements and policies, and the views expressed at a seminar held at the SLFI attended by Heads of Schools from several parts of the Island, University staff and parents and decided on or about 25th April 1980 in consultation with the Admissions Committee and the Minister of Higher Education to maintain the scheme of admission implemented in 1979 subject to the following two alterations :-

(1) that Puttalam be added to the list of educationally under-privileged districts making a total of 13 such districts; and

(2) that as the candidates had qualified for admission in 1980 on the basis of two Advanced Level Examinations held in 1979, the allocation of places was to be proportionate as between the two examinations."

Implicit in this recital of facts are two matters which it is necessary to bear in mind for the purpose of this case. First, that since 1970, due to certain educational socio-economic circumstances, a departure from selection purely on marks obtained at an examination was thought to be compelling and necessary, and successive Governments, educationalists and officials have tried ways and means of devising a scheme of admission to the Universities, which would enable a wider dispersal of this privilege while combining it at the same time with the principle of excellence. The districtwise quota and the standardization mediawise or subjectwise were some of the techniques employed for this purpose. None of the schemes so devised have been found to be satisfactory, nor could it be hoped that a lasting solution, or a solution that would satisfy all persons, could be found in the context of the present conditions in the country.

The next matter to note is that the so-called inequality in the schemes and the state of inequality for which these schemes were devised have been a carry over from the past and have remained to plague successive governments. This Government has inherited this situation from a previous Government which, it should be remembered, also functioned under a democratic Constitution which provided for the equal protection of the law. The present arrangement does not create inequalities for the first time, but is a measure taken as a solution to existing inequalities of which the State must take due cognizance. That these imbalances in our system of education factually exist has been proved to our satisfaction by the documents R4, R5 and the other material placed before us by the Grants Commission. This evidence is practically all one way and the petitioner has made no serious attempt to show that the position is otherwise.

The University Grants Commission has also submitted that it has to conform to national policy and more especially relied on Chapter VI of the Constitution which sets out the "Directive Principles of State Policy and Fundamental Duties". Mr. Choksy drew our

attention to the provisions of Article 27(2), paragraphs (a), (b), (d), (e), (f) and particularly to paragraph (h) of the Constitution. Article 27(2)(b) and (h) would read as follows:

> "(2) The State is pledged to establish in Sri Lanka a democratic Socialist society, the objectives of which include -
>
> (b) the promotion of the welfare of the People by securing and protecting as effectively as it may, a social order in which justice (social, economic and political) shall guide all the institutions of the national life.
>
> (h) the complete eradication of illiteracy and the assurance to all persons of the right to Universal and equal access to education at all levels."

We may compare this with the Directive Principles contained in the Indian Constitution. Article 46 of the Indian Constitution is worded as follows :-

> "The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

Mr. Pullenayegam has relied on certain *dicta* in *Dorairajan's* case, referred to earlier, and contended that that case also established the proposition that the Directive Principles must be sub-ordinated to the fundamental rights. As shown earlier, the decision in *Dorairajan's* case is explicable on the basis of a narrow rule of 'statutory' interpretation. Even if there was substance in Mr. Pullenayegam's submission, Mr. Choksy referred us to a later case of the Indian Supreme Court in which he said a very different emphasis is placed on the Directive Principles. In fact, there are a number of decisions of the Indian Supreme Court which are at variance with Mr. Pullenayegam's submission.

In *Kesawananda Bharati* v. *State of Kerala* [21] all the Judges constituting the Bench had in one voice given the Directive Principles a place of honour in the Constitution. The Directive Principles, they said, "constitute the conscience of the Constitution". In *State of Kerala* v. *Thomas,* [22] Fazal Ali, J., observed -

"In view of the principles adumbrated by this Court, it is clear that the Directive Principles form the fundamental feature and the social conscience of the Constitution and the Constitution enjoins upon the State to implement these Directive Principles. The directives thus provide the policy, the guidelines and the end of socio-economic freedom and Arts. 14 and 16 are the means to implement the policy to achieve the ends sought to be promoted by the Directive Principles."

In *Fetechand Himmatlal* v. *State of Maharashtra,* [23] the Court observed -

"Incorporation of Directive Principles of State Policy casting the high duty upon the State to strive to promote the welfare of the People by securing and protecting as effectively as it may a social order in which justice - social, economic and political - shall inform all the institutions of the national life is not idle print but command to action."

In *Pathumma* v. *State of Kerala,* [24] the case cited by counsel for the respondent, in the main judgment in which four Judges concurred, the Court observed -

"Courts interpret the constitutional provisions against the social setting of the country so as to show a complete consciousness and deep awareness of the growing requirements of the society, the increasing needs of the nation, the burning problems of the day and the complex issues facing the people which the legislature in its wisdom, through beneficial legislation seeks to solve. The judicial approach should be dynamic rather than static, pragmatic and not pedantic and elastic rather than rigid. It must take into consideration the changing trends of economic thought, the temper of the times and the living aspirations and feelings of the people. This court while acting as a sentinel on the *qui vive* to protect fundamental rights guaranteed to the citizens of the country must try to strike a just balance between the fundamental rights and the larger and broader interests of society, so that when such a right clashes with the larger interest of the country, it must yield to the latter."

The case also enumerated a series of guide lines to determine the reasonableness of a restriction that is imposed on a fundamental right. The Court said, *inter alia,* that for this purpose

it can legitimately take into consideration the Directive Principles of State policy. Another relevant guide line is that the restriction must not be arbitrary or of an excessive nature so as to go beyond the requirement of the interests of the general public. There should also be a direct and proximate nexus or a reasonable connection between the restriction and the object sought to be achieved. More significant for the present case is another test the Court advocated, namely, that the nature of reasonableness must be viewed not only from the point of view of the citizen, but regard must be had also to the problem before the authorities and the object sought to be achieved by the order or directions.

It is a settled principle of construction that when construing a legal document the whole of the document must be considered. Accordingly, all relevant provisions of the Constitution must be given effect to when a constitutional provision is under consideration and, when relevant, this must necessarily include the Directive Principles. It has been said that the Directive Principles are in the nature of an instrument of instructions which both the Legislature and executive must respect and follow. The expressive language in the above citations is intended to emphasise the fact that these provisions are part and parcel of the Constitution and that the courts must take due recognition of them and make proper allowance for their operation and function.

Before I pass from the authorities relied on by counsel to other matters, I should like to make a few observations on the American case of *Bakke* v. *University of California* [25] cited by Mr. Pullenayegam. This was the first of the cases relating to what has come to be termed "reversed discrimination". Although the *Bakke* case deals with admission to an educational institution, there is woven into it other strands that complicate the issue and make it significantly different from the present case. It involves not only the question of backwardness in education but also racial and colour problems. Admittedly the United States has had to and has still to contend with a serious race problem. Although the Supreme Court decisions of the last few decades on racial questions are undoubtedly progressive, the same unfortunately cannot be said of some of the earlier decisions. The *Bakke* case may well indicate the prospect of another shift in judicial thinking of the U.S. Supreme Court on racial questions. The judgment is unsatisfactory at least in one respect, namely, that it is a compromise judgment with the Court divided equally 4 : 4, with Justice Powell exercising what Mr Pullenayegam dubbed "the swing vote". Justice Powell appears to have agreed with one side on one issue and with the second group in the other issue. This

case seems to me to be in the nature of a trial of strength between the libertarian element on the one hand and the conservative element on the other of the Supreme Court with the result left indecisive. The effect of the *Bakke* decision is that the reservation of quotas as such is unconstitutional. But the earlier constitutional advances were not wholly abandoned for the ultimate effect of the ruling is that it would be permissible to take into account the racial element not as a conclusive factor, but as one among others, in deciding on admission.

It is still too early to say in what direction the future decisions of the U.S. Supreme Court will tend, but I am sure that the *Bakke* case may slow down the process of the affirmative action programmes that came into being in consequence of the water-shed decision in *Brown* v. *Board of Education* in 1954. *Brown's* case declared that racial segregation was unlawful. Thereafter, all forms of racial discrimination came to be prohibited by law. Affirmative action programmes were devised to ensure true equality, i.e., equality in fact, since it had dawned on right thinking people that mere theoretical equality was inadequate and that it was necessary to give effect not only to the letter of the law but also to its spirit.

The coloured people are economically disadvantaged and do not have the same opportunities of access to higher education, skilled jobs and the professions; so that, to apply the equality clause in a theoretical manner, without making allowance for the legacy of racial discrimination, would be to misapply the constitutional guarantee of equality. Happily, in a more recent case, *Weber* v. *The Kaiser Aluminium Company*, the U.S. Supreme Court, in a very close decision, upheld a training and promotion plan established by the employer corporation for skilled workers, which made provision for two lists - one white and one black - with opportunity for promotion alternately. This latest judgment has given some indication that the progress attained by the previous decisions may not be altogether reversed and that the affirmative action programmes may still be upheld in some measure. American decisions relating to racial matters have to be approached with the greatest caution.

If the equality provisions are interpreted in a purely theoretical or formal manner as suggested by the petitioner, the result would be mere "formal justice or pure procedural justice". Such a narrow view overlooks the substantive content of the equality clause which is the desire for fairness and social justice inherent in the democratic and social structure outlined in our Constitution. To

translate the concept of equality into reality, courts are compelled to resort to principles of redress when the facts and circumstances before them reveal social inequalities and contingencies. The development of what is called affirmative action programmes in the U.S. and compensatory justice in India, along with the provision in the Indian Constitution for quotas for backward and handicapped persons, is a manifestation of this intention.

The issue before us is indeed a momentous one. It is the question of admission, or the denial of such admission, to an institute of higher learning. This is a matter of great import to the individual, society and the State. Higher education is the pathway to the fulfilment of selfhood. It will enable a person to realise his potentialities so that he may enjoy the dignity and worth as a man and citizen and allow him to take his proper place in the community.

I am deeply sensible of the predicament in which a great number of young persons, among whom many are of undoubted talent, are now placed. Mr. Pullenayegam illustrated the injustice of the present scheme by indicating the position of his client, *vis a vis* his fellow students in the provinces whom his client had to leave behind because of his superior performance in his studies. Today, Mr. Pullenayegam said, his client may well lose his place to a student who lagged behind in an outstation and may be placed two hundred places below him in the order of merit. On the other hand, Mr. Choksy asked whether the thousands of students in the rural areas, who have been denied the basic facilities of education, should be denied access to the halls of learning and whether all the places at the Universities should be virtually earmarked for students from the metropolis, where the Government had lavished so much of its resources in the form of well-equipped and well-staffed schools? Mr. Pullenayegam's client, if he is in a Colombo school, cannot be singled out for special treatment and must be content with the criteria that applies to every other student in Colombo and, as Mr. Choksy said, the plight of his erstwhile colleagues also deserve our sympathy and concern.

In *Pathumma's* case referred to earlier, the Indian Supreme Court, in enunciating the broad principles applicable to this type of case, observed -

> "In other words, the idea of classification is implicit in the concept of equality because equality means equality to all and not merely to the advanced and educated sections of the society. It follows, therefore, that in order to provide

equality of opportunity to all citizens of our country, every class of citizens must have a sense of equal participation in building up an egalitarian society, where there is peace and plenty, where there is complete economic freedom and there is no pestilence or poverty nor discrimination and oppression, where there is equal opportunity to education, to work, to earn their livelihood so that the goal of social justice is achieved."

Recent history, to which I have made reference, reveals that the increasing numbers of students pressing for admission to the Universities, and the woeful lack of teachers and facilities in most of the provinces have compelled the authorities to modify the merit principle to meet the ends of social justice. No one would dispute that other things being equal, it is the merit principle alone that should govern the admission of students to the University. The departure from that principle, though unfortunate, was inevitable. These were indeed hard decisions, matters of policy, left to the discretion of those who are entrusted with the power of administration. In my view, the University Grants Commission has tried to act as fairly as possible in this matter and had endeavoured to distribute, on a rational basis, a percentage of seats among the great mass of students who are handicapped - through no fault of their own - by being denied adequate teachers, laboratories and other facilities in the schools they attend.

The following matters mentioned by the 1st respondent may be specially noted in this connexion. The present criteria ensures that every student admitted to the Universities will have the basic qualifying marks of 160, and none so qualified can gain admittance. Although the merit principle applies in respect of 30% of the places in its vigour, the authorities have tried to maintain it as far as possible by applying it also within the respective categories coming under the other two criteria. Further, in the districtwise allocation, students in Colombo, Kandy, Jaffna should be able to secure additional places on population figures, thus giving further opportunities to merit candidates. Probably there is some truth in the statement that success in the qualifying examination does not necessarily indicate intelligence or the capacity to benefit from a University education and that the availability or non-availability of educational facilities can and does make a big difference in the performance of a student.

I am therefore of the opinion that the University Grants Commission was entitled to have regard to national policy and national interest in formulating its policy of admissions to the

Universities. I am also of the view that the petitioner was well advised to admit that there were candidates "who have been handicapped by attendance at educationally backward institutions". This has been established beyond doubt and does not seem to be confined only to the 13 districts. The statistics before us relating to staffing and facilities between the schools in the cities and towns and the schools in rural areas show such a gross discrepancy as to be distressing and disturbing. This material fairly substantiates the averments in the affidavit of the 1st respondent.

Having regard then to the principles of law enunciated by me earlier, the University Grants Commission enjoys a wide discretion in laying down the criteria for admission to the Universities. In the present instance it involves the indication of the source from which admissions will be made. The classification formulated by the University Grants Commission bears a reasonable relation to the objects it has in view. It is only when such classification can be regarded as "actually and palpably unreasonable and arbitrary" will the courts review that decision. I am unable to say that of the present scheme.

In coming to this conclusion I am not unmindful of the fact that this judgment may cause considerable hardship to many students. This Court would be going outside its judicial powers, were it to substitute its own judgment for that of the University Grants Commission on what is essentially a matter of policy and which has been properly entrusted for decision to that body. When a similar submission was made in *Kumari* v. *State of Mysore,* [26] the Supreme Court of India observed -

> "But cases of hardship are likely to arise in the working of almost any rule which may be framed for selecting a limited number of candidates for admission out of a long list. This however would not render the rule unconstitutional. For relief against hardship in the working of a valid rule the petitioner has to approach elsewhere because it relates to the policy underlying the rule."

All these lines of inquiry lead up to the conclusion that this application must fail. I would accordingly dismiss this petition. I would make no order however as regards costs.

SAMARAWICKREMA, J. — I agree.
WEERARATNE, J. — I agree.

Application dismissed