LAWCHAKRA.IN

2024 INSC 856

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE/ORIGINAL JURISDICTION

Civil Appeal No. 2286 of 2006

Aligarh Muslim University **…Appellant**

Versus

Naresh Agarwal & Ors. **…Respondents**

With
Civil Appeal No. 2321 of 2006

With
Civil Appeal No. 2320 of 2006

With
Civil Appeal No. 2318 of 2006

With
Special Leave Petition (C) No. 32490 of 2015

With
Writ Petition (C) No. 272 of 2016

With
Civil Appeal No. 2861 of 2006

Signature Not Verified
Digitally signed by SANJAY KUMAR
Date: 2024.11.08 13:01:08 IST
Reason:

With
Civil Appeal No. 2316 of 2006

With

Civil Appeal No. 2319 of 2006

With
Civil Appeal No. 2317 of 2006

And With
T.C. (C) No. 46 of 2023

J U D G M E N T

Dr Dhananjaya Y Chandrachud, CJI

Table of Contents

A. Background 5

B. The reference and related events 10

C. Submissions 19

D. Issues 33

E. Analysis 36

i. The preliminary objection by the Union of India 36

ii. The scope of Article 30 39

a. The purpose of Article 30(1) 44

b. The 'special protection' guaranteed by Article 30(1) 49

iii. Indicia for a Minority Educational Institution 55

iv. Applicability of Article 30 to a 'University' established before the commencement of the Constitution 64

a. Article 30(1) applies to educational institutions established before the commencement of the Constitution 65

b. There is no difference between 'Universities' and 'colleges' established before the commencement of the Constitution 69

c. The minority character of the institution is not ipso facto surrendered upon the incorporation of the University 77

d. 'Minority' as on the commencement of the Constitution 88

v. Indicia for the 'establishment' of a minority educational institution ..91

vi. Impact of Entry 63 of List I on the minority status of educational institutions 103

vii. The decision of this Court in *Prof. Yashpal*.....107

viii. The amendment of the NCMEI Act in 2010 112

ix. Registration under the Societies Registration Act.....114

F. Conclusion 115

1. Article 30 of the Constitution of India guarantees to religious and linguistic minorities, the right to establish and administer educational institutions of their choice. The issues which arise for adjudication in this reference pertain to the criteria to be fulfilled to qualify as a minority educational institution for the purpose of Article 30(1) of the Indian Constitution.

A. Background

2. In 1977, the Muhammadan Anglo-Oriental College was established in Aligarh. The college was a teaching institution affiliated to the Calcutta University at first and subsequently to the Allahabad University. The imperial legislature passed the Aligarh Muslim University Act 1920.[1] The enactment, as the preamble indicates, "established and incorporated" Aligarh Muslim University[2]. The AMU Act was amended by the Aligarh Muslim University (Amendment) Act 1951[3] and Aligarh Muslim University (Amendment) Act 1965[4]. The amendments related to the religious instructions of Muslim students[5] and the administrative set-up of the university[6]. Proceedings under Article 32 of the Constitution were instituted before this Court for challenging

[1] "AMU Act"
[2] "AMU"
[3] "1951 Amendment Act"
[4] "1965 Amendment Act"
[5] Section 8 was amended to stipulate that it would be unlawful for the University to adopt or impose any test of religious belief for admission or recruitment except where the religious test was made a condition for benefaction. The amended proviso to the provision stipulated that nothing in the Section shall be deemed to prevent the provision of religious instruction to those who consent to it. Section 9 which empowered the Court to mandate religious instruction for Muslim students was deleted by the amendment. Section 23(1), which provided that all members of the Court would be Muslims, was also deleted.
[6] Section 23 of the AMU Act was amended to delete clauses (2) and (3). By this amendment, the powers of the Court were significantly reduced. The Court which was the supreme governing body of the University now only had the power to advise the Visitor or any other authority of the University on matters which may be referred to it for advice and exercise powers assigned to it by the Visitor. The powers of the Court were instead placed in the hands of the Executive Council. The composition of the Court (which was an all-Muslim body) was also amended. The process of constituting the Court and the Executive Council was also amended.

the constitutional validity of the 1951 Amendment Act and the 1965 Amendment Act. A Constitution Bench in the decision in **S Azeez Basha** v. **Union of India**[7] upheld the constitutional validity of the Amendments. The petitioners made a three-fold argument: (a) AMU was established by Muslims, who are a religious minority for the purposes of Article 30(1); (b) Article 30(1) guarantees Muslims the right to administer the University established by them; and (c) the 1951 and 1965 Amendments are violative of Article 30(1) to the extent that it infringed the right of the Muslim community to administer the institution. Article 30 is extracted below:

> "30. Right of minorities to establish and administer educational institutions.—(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.
>
> (1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.
>
> (2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language."

The amendments were also impugned on the ground that they violated Articles 14, 19, 25, 26, 29 and 31 of the Constitution.

[7] AIR 1968 SC 662

3. The Union of India opposed the petitions, arguing that the Muslim minority did not have the right to administer AMU since they had not established the institution. It was submitted that AMU was established by Parliament. That being the case, it was contended that the amendments were not violative of Article 30(1).

4. A Constitution Bench dismissed the writ petitions in **Azeez Basha** (supra). The challenge on the ground of violation of Article 30(1) was rejected on the following grounds:

   a. The phrase "establish and administer" in Article 30(1) must be read conjunctively. Religious minorities have the right to administer those educational institutions which they established. Religious minorities do not have the right to administer educational institutions which were not established by them, even if they were administering them for some reason before the commencement of the Constitution;

   b. The word "establish" in Article 30(1) means "to bring into existence";

   c. AMU was not established by the Muslim minority for the following reasons:

      i. AMU was brought into existence by the AMU Act, which was enacted by Parliament in 1920. Section 6 of the AMU Act provides that the degrees conferred to persons by the University would be recognised by the government. This provision indicates that AMU was established by the Government of India because the Muslim

minority could not have insisted that the degrees conferred by a university established by it ought to be recognized by the Government. The AMU Act may have been passed as a result of the efforts of the Muslim community but that does not mean that AMU was established by them;

ii. The conversion of the College to the University was not by the Muslim minority but by virtue of the 1920 Act; and

iii. Section 4 of the AMU Act by which the MAO College and the Muslim University Association were dissolved, and the properties, rights and liabilities in the societies were vested in AMU shows that the previous bodies legally ceased to exist;

d. Since the Muslim community did not establish AMU, it cannot claim a right to administer it under Article 30(1). Thus, any amendment to the AMU Act would not be *ultra vires* Article 30 of the Constitution;

e. The argument that the administration of the University vested in the Muslim community though it was not established by them was rejected. The administration of AMU did not vest in the Muslim minority under the AMU Act for the following reasons:

i. Although all the members of the Court (which was the supreme governing body in terms of Section 23 of the AMU Act) were required to be Muslims, the electorate (which elected the members of the Court) did not comprise exclusively of Muslims;

ii. Other authorities of AMU such as the Executive Council and the Academic Council were tasked with the administration of the University and were given significant powers. The members of these bodies were not required to be Muslims;

iii. The Governor General (who was the Lord Rector) was also entrusted with certain "overriding" powers concerning the administration of the University. The Governor General was not required to be a Muslim. In terms of Section 28(3), the Governor General had overriding powers to amend or repeal the Statutes. The Governor General possessed similar powers with respect to amending or repealing Ordinances. In terms of Section 40, the Governor General had the power to remove any difficulty in the establishment of the University; and

iv. The Visiting Board which consisted of the Governor of the United Provinces, the members of the Executive Council and Ministers were not necessarily required to be Muslims;

f. The term "establish and maintain" in Article 26 must be read conjunctively, like the phrase "establish and administer" in Article 30. Assuming that educational institutions fall within the ambit of Article 26, the Muslim community does not have the right to maintain AMU because it did not establish it; and

g. The impugned amendments do not violate Articles 14, 19, 25, 29 and 31.

B. The reference and related events

5. In 1981, a two-Judge Bench of this Court in **Anjuman-e-Rahmaniya** v. **District Inspector of Schools**[8] was faced with a question of whether V.M.H.S Rehmania Inter College is a minority educational institution. By an order dated 26 November 1981, the Bench questioned the correctness of **Azeez Basha** (supra) and referred the matter to a Bench of seven Judges, in the following terms:

> "After hearing counsel for the Parties, we are clearly of the opinion that this case involves two substantial questions regarding the interpretation of Article 30(1) of the Constitution of India. The present institution was founded in the year 1938 and registered under the Societies Registration Act in the year 1940. **The documents relating to the time when the institution was founded clearly shows that while the institution was established mainly by the Muslim community but there were members from the non-Muslim community also who participated in the establishment process. The point that arises is as to whether Art. 30(1) of the Constitution envisages an institution which is established by minorities alone without the participation for the factum of establishment from any other community. On this point, there is no clear decision of this court.** There are some observations in S. Azeez Basha & ors. Vs. Union of India 1968(1) SCR 333, but these observations can be explained away. **Another point that arises is whether soon after the establishment of the institution if it is registered as a Society under the Society Registration Act, its status as a minority institution changes in view of the broad principles laid down in S. Azeez Basha's case. Even as it is several jurists including Mr. Seervai have expressed about the correctness of the decision of this court in S. Azeez Basha's case. Since the point has arisen in this case we think that this is a proper occasion when a larger bench can consider the entire aspect fully. We,**

[8] W.P.(C) No. 54-57 of 1981

> **therefore, direct that this case may be placed before Hon. The Chief Justice for being heard by a bench of at least 7 judges so that S. Azeez Basha's case may also be considered and the points that arise in this case directly as to the essential conditions or ingredients of the minority institution may also be decided once for all.** A large number of jurists including Mr. Seervai, learned counsel for the petitioners Mr. Garg and learned counsel for respondents and interveners Mr. Dikshit and Kaskar have stated that this case requires reconsideration. In view of the urgency it is necessary that the matter should be decided as early as possible we give liberty to the counsel for parties to mention the matter before Chief Justice."
>
> (emphasis supplied)

The above extract indicates that the following three questions were of concern to this Court: (i) the essential conditions or ingredients of a minority educational institution; (ii) whether the expression 'establish' in Article 30 means that the institution should be established only by a minority without any association by other communities; and (iii) whether the registration under the Societies Registration Act 1860 after the establishment of the institution alters its character.

6. About a month after the order referring the matter to a Bench of seven Judges, the AMU Act was amended. On 31 December 1981, the Aligarh Muslim University (Amendment) Act 1981[9] received the assent of the President. Various provisions of the AMU Act were amended, including the long title and preamble from which the words "*establish and*" were omitted.[10] Section 2(l) which defined the term 'University' was also amended.[11] After the

[9] AMU (Amendment) Act 1981
[10] AMU (Amendment) Act 1981, Section 2
[11] AMU (Amendment) Act 1981, Section 3

amendment, 'University' was defined to mean "*the educational institution of their choice established by the Muslims of India, which originated as the Mohammedan Anglo-Oriental College, Aligarh, and which was subsequently incorporated as the Aligarh Muslim University.*" The amendment included Section 5(2)(c) by which the University was required to promote "*the educational and cultural advancement of the Muslims of India*"[12].

7. In 2002, an eleven-Judge Bench of this Court in **TMA Pai Foundation** v. **State of Karnataka**[13] heard a batch of tagged matters which included **Anjuman-e-Rahmaniya** (supra). This Court formulated a question which reflected the reference made in **Anjuman-e-Rahmaniya** (supra). The question was as follows: what is the indicia for an educational institution to be a minority education institution to which the rights in Article 30 would apply:

> "3(a) What are the indicia for treating an educational institution as a minority educational institution? Would an institution be regarded as a minority educational institution because it was established by a person(s) belonging to a religious or linguistic minority or its being administered by a person(s) belonging to a religious or linguistic minority?"

8. Despite framing the question arising from the reference, this Court did not answer it in **TMA Pai** (supra). The decision stated that a regular Bench would adjudicate the question. However, the regular Bench disposed of the matters before it on 11 March 2003 without answering the question.

[12] AMU (Amendment) Act 1981, Section 4
[13] (2002) 8 SCC 481

9. Separately, AMU proposed a policy for admission into its post-graduate medical course by which 50% of the seats were reserved for Muslim candidates. The proposal was accepted by the Union of India. Proceedings were initiated under Article 226 for challenging the constitutional validity of the reservation policy.

10. The petitioners argued that the reservation policy by which 50% of the seats were earmarked for Muslims was unconstitutional because AMU was not a minority educational institution in view of the judgment of this Court in **Azeez Basha** (supra). They averred that the amendments to Sections 2(l) and 5(2)(c) of the AMU Act by the AMU (Amendment) Act 1981 attempted to overrule the judgment in **Azeez Basha** (supra) without altering the basis of the decision in that case. In response, AMU contended that the AMU (Amendment) Act 1981 had the effect of changing the basis of **Azeez Basha** (supra) and that AMU was a minority institution after the amendment, and thus was entitled to reserve seats for candidates from the Muslim community.

11. A Single Judge of the Allahabad High Court in the decision in **Dr. Naresh Agarwal** v. **Union of India** declared the reservation policy unconstitutional on the following grounds:[14]

    a. The basis for the decision in **Azeez Basha** (supra) was Sections 3, 4, and 6. These provisions were not amended by the AMU (Amendment) Act 1981. The deletion of the word ‘establish’ from the long title and the preamble, and the amendment to the definition of the term ‘University’ in

[14] 2005 SCC OnLine All 1705

Section 2(l) are not sufficient to hold that AMU is a minority institution under Article 30;

b. The Muslim community willingly surrendered the right to administer the University to statutory bodies;

c. The amendment to Section 2(l) is a legislative action which encroaches on judicial power and is akin to Parliament functioning as an appellate court or tribunal. To prevent Section 2(l) from being struck down for overruling **Azeez Basha** (supra), it is necessary to read down the term "established" in the amended AMU Act as referring to MAO College; and

d. AMU, not being a minority institution, is not entitled to the protection of Article 30 and shall not provide for reservation on the basis of religion as this would amount to a violation of Article 29(2).

12. The Court declared AMU's reservation policy unconstitutional and directed the cancellation of the admissions made under this policy. It directed the University to conduct a fresh entrance examination without reservation on the basis of religion.

13. The judgement in appeal by a Division Bench of the Allahabad High Court was reported as **Aligarh Muslim University** v. **Malay Shukla**.[15] The Division Bench affirmed the judgment of the Single Judge, with some modifications. AN Ray, C.J. speaking for the Division Bench held that:

[15] Judgment in Special Appeal No 1321 of 2005 and connected matters, High Court of Allahabad

a. When the minority status is not assumed or admitted, the factor of administration and control by non-minority groups becomes important. The indicia for the determination of whether an educational institution is a minority educational institution is (i) who established it; (ii) who is responsible for administration; and (iii) the purpose of the establishment;

b. By amending Section 2(l), Parliament attempted to overrule the decision in **Azeez Basha** (supra). This amendment does not change the basis of that decision because the incorporation of the University was not the sole factor which influenced the decision;

c. Section 5(2)(c) is discriminatory. Further, it does not change the basis of the decision in **Azeez Basha** (supra);

d. The removal of the words “establish and” from the long title and preamble of the AMU Act is impermissible because **Azeez Basha** (supra) held that incorporation and establishment are intimately connected. Permitting the omission of the word “establish” may give rise to doubts as to whether incorporation alone is sufficient for the surrender of the minority character of the institution;

e. AMU is not merely a university but a field of legislative power in Entry 63 of List I of the Seventh Schedule to the Constitution. Section 2(l) modified the definition of a word in an entry in the Seventh Schedule. The definition of a word in the Constitution cannot be altered except through a constitutional amendment. The AMU (Amendment) Act 1981 therefore suffers from lack of legislative competence; and

f. Parliament lacks the authority to create a minority institution. Only a minority can do so and courts may declare whether a minority has succeeded in establishing an institution under Article 30.

14. Ashok Bhushan, J. concurred with AN Ray, C.J. in a separate judgment. The learned Judge observed that the institution must have been both established and administered by a minority to seek the protection of Article 30(1). The 1981 Amendment, in his view, has dealt with the establishment component of the judgment but has left the administration component untouched. Further, the learned Judge agreeing with Chief Justice Ray observed that the requirements for a minority to establish an institution cannot be secured by merely altering the definition of the institution and the long title and the preamble of the Act. In view of the findings detailed above, the Court declared that AMU was not a minority institution within the meaning of Article 30 and struck down Sections 2(l) and 5(2)(c) as amended by the AMU (Amendment) Act 1981. The High Court held that the removal of the words “establish and” from the long title and preamble was invalid and restored them. It affirmed the conclusion of the Single Judge that the reservation policy was unconstitutional. However, it overruled the direction issued by the Single Judge to AMU to cancel the admission of students who had already been accommodated in the University on the basis of the reservation policy.

15. On 12 February 2019, while hearing the appeal against the judgment of the Division Bench, a three-Judge Bench of this Court presided over by Chief Justice Ranjan Gogoi noticed that the High Court relied on the decision in

Azeez Basha (supra). It also noticed that the reference in **Anjuman-e-Rahmaniya** (supra) on the correctness of **Azeez Basha** (supra) was yet to be determined. The observations in **Azeez Basha** (supra) that the words "establish" and "administer" in Article 30(1) must be read conjunctively were referred to. Having noticed all of the above, the three-Judge Bench observed that the correctness of the question arising from the decision in **Azeez Basha** (supra) is unanswered:

> "1. This Court in **S. Azeez Basha and Anr.** Vs. **Union of India**, *inter alia,* has observed as follows:
>
> > "It is to our mind quite clear that Art. 30(1) postulates that the religious community will have the right to *establish and administer* educational institutions of their choice meaning thereby that where a religious minority established an educational institution, it will have the right to administer that. An argument has been raised to the effect that even though the religious minority may not have established the educational institution, it will have the right to administer it, if by some process it had been administering the same before the Constitution came into force. We are not prepared to accept this argument. The Article in our opinion clearly shows that the minority will have the right to administer educational institutions of their choice provided they have established them, but not otherwise. The Article cannot be read to mean that even if the educational institution has been established by somebody else, any religious minority would have the right to administer it because, for some reason or other, it might have been administering it before the Constitution came into force. The words "establish and administer" in the Article must be read conjunctively and so read it gives the right to the minority to administer an educational institution provided it has

> been established by it. …….We are of the opinion that nothing in that case justifies the contention raised on behalf of the petitioners that the minorities would have the right to administer an educational institution even though the institution may not have been established by them. The two words in Art. 30(1) must be read together and so read the Article gives the right to the minority to administer institutions established by it. If the educational institution has not been established by a minority it cannot claim the right to administer it under Art. 30(1)."
>
> […]
>
> 8. The said facts would show that the **correctness of the question arising** from the decision of this Court in **S. Azeez Basha** (supra) has remained undetermined.
>
> 9. That apart, the decision of this Court in Prof. Yashpal and another vs. State of Chhattisgarh and others and the amendment of the National Commission for Minority Educational Institutions Act, 2004 made in the year 2010 would also require an authoritative pronouncement on the aforesaid question formulated, as set out above, **besides the correctness of the view expressed in the judgment of this Court in S. Azeez Basha (supra) which has been extracted above**."
>
> (emphasis supplied)

16. The three-Judge Bench then referred the matter to a seven-Judge Bench.

17. When this matter was taken up for hearing, the Union of India sought to withdraw its appeal against the decision of the Division Bench of the Allahabad High Court.[16] This Court is competent to hear the present case

[16] Civil Appeal No. 2318 of 2006, Supreme Court of India

even if the Union of India was permitted to withdraw its appeal because the other appellants continue to press their case.

C. Submissions

18. The petitioners broadly contend that the decision in **Azeez Basha** (supra) is not correct, and that AMU is a minority institution. The submissions of the learned counsel on behalf of the petitioners and the intervenors are summarized below.

19. Dr. Rajeev Dhawan, learned senior counsel made the following submissions:

    a. The Union of India's recent attempt to withdraw its appeal against the minority status of AMU contradicts its consistent position since 1981;

    b. **Azeez Basha** (supra) is no longer good law because:

        i. It failed to recognize that the words *'establish' and 'administer'* are not preconditions to define a minority but the consequential rights that flow from such a recognition;

        ii. The assumption that universities lose their minority status when recognized by a statute conflicts with the right of minorities to establish educational institutions;

        iii. It recognized the role of the Muslim community in the establishment of AMU but held that its origins and administration were rooted in legislation. This interpretation could restrict the recognition of minority institutions under Article 30;

iv. Its restrictive interpretation of the word 'establish' in Article 30(1) is contrary to the expansive view adopted by subsequent judgments; and

v. This decision has been superseded by subsequent decisions like **TMA Pai** (supra), which emphasized that the religious character of an institution cannot be stripped down by government interventions.

c. Upholding **Azeez Basha** (supra) could jeopardize the minority status of several educational institutions, including recognized minority institutions like St. Stephen’s College and Christian Medical College;

d. Minority rights were acknowledged by the State before the adoption of the Constitution through various legislative enactments like the Indian Councils Act of 1909, and the Government of India Acts of 1919 and 1935, which provided reservations to Muslims, Sikhs, and Christians in the legislature;

e. The formation of AMU was characterized as a "movement" rather than a "surrender" by the Mohammedan Anglo-Oriental College. Provisions in the AMU Act, including the transfer of assets, liabilities, and special provisions for Muslim students, underscore the continuation of minority rights with the establishment of AMU;

f. Entry 63 in the Union List of the Seventh Schedule to the Constitution deals with the competence of the Union to make laws regarding AMU

and BHU but does not determine who established or administers the universities. Article 30, which guarantees minority rights, cannot be negated merely because the institution is of national importance in terms of Entry 63;

g. The evolution of the AMU Act can be broken down into four phases: pre-1951 with Muslim administration, the 1951 Amendment aligning with the Constitution, the 1965 Amendment diluting minority status, and attempts to restore minority status in 1972 and 1981;

h. While the 1951 amendment aligned the Act with the Constitution by removing compulsory religious education, the 1965 amendment diluted minority administration by reducing "the Court" to an advisory role, shifting the supreme governing authority to the "Visitor" and the President of India; and

i. Amendments in 1972 and 1981 aimed to restore AMU to minorities. The 1981 amendment explicitly stated that AMU was "established by the Muslims of India" and aimed to promote Muslim educational and cultural advancement. The 1981 amendment accommodated a democratic setup, focusing on the institution's original purpose rather than numerical representation.

20. Mr Kapil Sibal, learned senior counsel made the following submissions:

a. The enactment of the Act of 1920 marked the formal recognition of the MAO "College" as the Aligarh Muslim University, reflecting a crucial legislative step in its evolution into a full-fledged University;

b. Compliance with regulatory requirements, constitutionally grounded in Article 19(6), is crucial for university status. However, adherence to these regulations does not diminish the right guaranteed by Article 30 to minorities to establish institutions of their choice;

c. Article 30 grants religious and linguistic minorities the autonomy to establish and administer institutions of their “choice”. Institutions covered by Article 30 have the flexibility to choose their administrative set-up, even if it includes individuals outside the minority community. This choice is solely vested in the institution;

d. Assessing the numerical composition within the administration is inadequate to determine its minority status. Minority institutions have the prerogative to include non-minorities in their administration while maintaining their minority status. St. Stephen’s College, Delhi, despite having a Christian representation of less than 5 per cent, maintains its classification as a minority institution;

e. The crucial factor for recognizing an educational institution as a Minority educational institution lies in its genesis, focusing on three key aspects:

   i. the purpose for which it was founded (educational advancement of the minority community);

ii. the identity of the founders and major fund providers (being substantially from the concerned minority); and

iii. the concept's initiation by a member of the minority,

f. Provisions within the AMU Act focus on governance structures, academic standards, and prevention of maladministration. These statutory measures primarily relate to the administration of the University and do not alter the constitutional fact of its establishment by a minority;

g. "Establish" under Article 30 must be interpreted to mean ‘found’. The word does not cover the conversion process from a college to a university through the AMU Act;

h. AMU was established with the objective of providing quality education specifically to Muslims. The exclusivity of such institutions in offering education tailored to the needs of minorities was not adequately considered by **Azeez Basha** (supra);

i. The denial of reservation to institutions like AMU results in fewer degrees and job opportunities, exacerbating socio-economic disparities within minority groups;

j. The founders of AMU satisfactorily fulfilled the five-step criteria laid down in **TMA Pai** (supra) to ascertain the right to administer. The criteria related to admission policies, fee structures, governance, faculty appointments and disciplinary action;

k. The objective of establishing AMU was to obtain the status of an independent university and not demonstrate allegiance to colonial authorities;

l. A minority institution can accede to some regulations to maintain a particular standard of education. With that, the institution also retains the right to challenge any invasive restrictions imposed on it; and

m. The imperial government never interfered with the administration of the University after it was incorporated. MAO College was also supervised by the British government even when it was not a university. MAO College was acknowledged as a minority institution under **Azeez Basha** (supra).

21. Mr Salman Khurshid, learned senior counsel made the following submissions:

a. Adopting a 'political, moral reading' of Article 30 would facilitate a broader interpretation of the term 'established'. Ronald Dworkin's definition of a 'political moral reading' involves invoking moral principles about political decency and justice for interpreting constitutional provisions[17];

b. Aligarh Tehzeeb represents a distinctive cultural ethos cultivated by the AMU. This unique cultural identity encompasses traditions, values and practices that have evolved within the university;

[17] Reliance was placed on Ronald Dworkin, "The Moral Reading of the Constitution" (March 21, 1996).

c. The concept of takeover in the context of educational institutions can be categorized into non-consensual and consensual takeovers. In the case of AMU, there was a consensual takeover, where changes and amendments were made to its structure and character through a process that involved the University's participation and consent; and

d. AMU was founded by members of the community. The societies formed for this purpose had a crucial role in the establishment and evolution of the University, contributing resources, support and a collective vision that shaped the identity and character of AMU.

22. Mr. Shadan Farasat, learned counsel submitted that:

a. The purpose of Article 30 rests primarily on two grounds:

i. The ability to retain the minority identity;

ii. The ability to fully participate in the national mainstream;

Azeez Basha (supra) adopts an approach by which the institution could either retain the minority status or integrate into the national mainstream and lose it;

b. The Indian secularism model allows state involvement in religious activities without compromising their character;

c. In advocating for a broader interpretation of 'establish' in Article 30, there is a need to distinguish between 'establish' and 'incorporate' to better preserve constitutional protection for minority educational institutions.

The AMU Act of 1920 only “incorporated” AMU. This is fundamentally different from the establishment of the institution;

d. Stripping away the minority character of AMU would diminish its significant place in history since the institution has led to:

   i. The creation of a Muslim-educated middle class; and

   ii. The education of women.

e. The validity of the 1981 amendment should not be considered in this case. The Parliament enacted it to reinstate AMU's minority status, which is now being contested by the current Union government. Considering the Union's arguments requires reassessing Parliament's reasoning behind the law.

23. Mr MR Shamshad, learned counsel submitted that an inclusive definition of ‘minority educational institutions’ includes universities established and administered by minorities.

24. The respondents broadly submitted that **Azeez Basha** (supra) is good law, and that AMU is not a minority institution. They argued that AMU was established by Parliament. The submissions of the learned counsel on behalf of the respondents and the intervenors are summarized below.

25. Mr R Venkataramani, Attorney General for India appearing for the Union of India, made the following submissions:

a. The right guaranteed by Article 30 can only be exercised if there is legislation in place to enable the establishment and administration of minority institutions. This legislation should empower minorities to form institutions under constitutional provisions; and

b. While Article 30 guarantees minorities certain rights, they are not exempt from other constitutional requirements, particularly regarding reservation.

26. Mr Tushar Mehta, Solicitor General of India appearing for the Union of India, made the following submissions:

a. **Azeez Basha** (supra) correctly recognized the choices available to AMU in 1920. It had the choice of either affiliating with another university or surrendering its minority status to the imperial government;

b. Under the AMU Act, AMU voluntarily surrendered its minority institution status to the imperial government. This is shown by the historical context of the Aligarh Split, where the institution's leaders chose cooperation with the British government over retaining its Muslim character;

c. The British government exerted control over AMU, as evidenced by provisions in the 1920 Act. The Lord Rector had significant authority in the administration of the institution. The Act dissolved the previous governing body and transferred property and decision-making authority to secular government authorities;

d. The 1920 Act was a substantive statute which dealt with the specifics of the administration of the institution. The administration of the institution predominantly vested with the non-minority;

e. The British government mandated that AMU should not be a religious institution and should be controlled by secular authorities;

f. Amendments in 1951 made the 1920 Act consistent with constitutional provisions. This affirmed that AMU was established by statute, not by the minority community;

g. Justice M.C. Chagla in the course of legislative debates in 1965 stated that AMU was neither established nor administered by minorities. **Azeez Basha** (supra) correctly held that AMU surrendered its minority status to the British Government;

h. The validity of the 1981 amendment is questionable, as it is contrary to previous judicial decisions;

i. The 1981 reference sought clarity on the definition of a minority educational institution. The reference did not include the question of whether AMU is a minority educational institution. Legal challenges in 2005 regarding reservations for Muslims in postgraduate programs led to the current reference. This reference also focused on a specific legal question without reopening factual controversies;

j. The term *"establish"* under Article 30 should be interpreted to mean tangible and manifest establishment. The indicia to decide the minority

character of an institution contemplated under Article 30(1) of the Constitution, must include the following:

i. The institution/university must necessarily be established and administered by the minority community; and

ii. The institution/university should be established by the minority, for the minority and as a minority institution.

k. There are concerns about the potential misuse of minority status without a strict standard of actual establishment. The drafting history of fundamental rights under Articles 29 and 30 consistently uses “establish” and “administer” conjunctively and further expresses apprehensions about an over-expansive interpretation of these Articles;

l. The genesis of an institution does not determine its minority status. Legislative enactments are the final authority on the establishment, as seen in legislations where the minority status is explicitly recognised;

m. The reliance on **St. Stephen’s** (supra) is self-defeating since this Court applied the standard of administrative control as an indicia in that case. The involvement of the Government in AMU's establishment, clear intent and specific provisions indicate the national and non-minority character of the institution;

n. The Nation Commission for Minority Educational Institution Act 2004[18] and its Amendment in 2010 provide that an institution needs to be established and administered by minorities to be a minority educational institution. The said definition is not under challenge; and

o. The consequence of recognising AMU as a minority educational institution is that seats cannot be reserved for the other categories of the Scheduled Castes/Scheduled Tribes/Socially and Educationally Backward Classes.

27. Mr Rakesh Dwivedi, learned senior counsel submitted that:

a. For a community to be considered a "minority," it must fulfil three criteria:

i. It must be numerically lesser than the majority;

ii. It cannot be the ruling group even if it is numerically smaller; and

iii. The group itself should identify as a minority.

b. Muslims were not recognized as a minority during British rule, as Hindus and Muslims were considered equals. Syed Ahmed Khan, the founder of Mohammedan Anglo-Oriental College, claimed in a letter that the Muslim community never considered itself as a minority and instead as rulers prior to the British government;

c. Judgments of this Court have held that Article 30(1) applies to institutions that were established before the commencement of the

[18] "NCMEI Act"

Constitution. However, these decisions dealt with colleges and schools and not a University. Article 30(1) does not apply to a University that was established before the commencement of the Constitution because a University before the enactment of the University Grants Commission 1956 could only have been established by the Government and not a person; and

d. **Azeez Basha** (supra) was a standalone and statute-specific judgment. Overruling it would disrupt the Union's control over AMU, constituting “public mischief”. The precedent set by the case should only be overturned if there is a substantial risk to public interest, which is not the case here.

28. Mr. Neeraj Kishan Kaul, learned senior counsel submitted that:

a. The correctness or validity of **Azeez Basha** (supra) was not within the purview of the reference order, which solely aimed to clarify the meaning of "established and administered" under Article 30;

b. Parliament cannot deny a fact by creating legal fiction in a subsequent legislation. The 1981 amendment only attempted to change who “established” the University but made no change in the provision related to the administration of the University. It attempted to rewrite history by altering the recognition of the University's establishment;

c. AMU's inclusion as an institution of national importance under Entry 63 of the Union list gives the Union government sole authority over it.

Altering AMU's status would require a constitutional amendment rather than a legislative amendment; and

d. Over the past decades, there has been no demand for minority status for AMU, as evidenced by legislative actions in 1951 and 1965. The demand for minority rights now would conflict with existing reservation rights for Scheduled Castes, Scheduled Tribes, and Socially and Economically Backward Classes.

29. Mr Guru Krishnakumar, learned senior counsel made the following submissions:

a. The "new sovereign," presumably referring to contemporary legislative and executive authorities, holds the discretion to determine the approach towards minority rights. This implies that decisions regarding minority rights are subject to the interpretation and judgment of current governing bodies;

b. H.V. Kamath in the Constituent Assembly advocated for parliamentary legislation on universities to demonstrate their impartial and non-communal nature. Similarly, Naziruddin Ahmed, a member of the Muslim League in the Constituent Assembly, asserted that universities were rightly under the Union's jurisdiction; and

c. A fact established by legislation cannot override a fact recognised by the Court.[19]

30. Mr Vijay Navare, learned senior counsel submitted that granting minority status to AMU would undermine Parliament's authority and interfere with powers vested under Entry 63.

31. Ms. Archana Pathak Dave, learned senior counsel submitted that AMU was created 'by the Statute' (Act 21 of 1920) and not 'under the Statute'.

32. Mr. Nachiketa Joshi, learned counsel submitted that the Rajya Sabha debates related to the amendments of 1981 reveal a misconception that this Court in **Azeez Basha** (supra) neglected AMU's history before 1920. The amendment failed to alter the foundational aspect of **Azeez Basha** (supra), which is centred on the Muslim community's concessions to the terms of the British Government.

D. Issues

33. The petitioner and the respondents disagree on whether this Bench must determine if AMU is a minority educational institution. In **Anjuman-e-Rahmaniya** (supra), the two-Judge Bench referred the question of the essential ingredients of a minority education institution. This was the core issue which was referred to the Constitution Bench. The other two questions which were formulated, that is, the meaning of the phrase “establish” and the impact of registration under the Societies Registration Act 1860 after the

[19] Reliance was placed on Indira Sawhney (II) v. Union of India & Ors, AIR 2000 SC 498.

establishment of the institution are in essence, subsets of the core issue. The question of the indicia for recognising an educational institution as a minority educational institution was reflected in question 3(a) framed in **TMA Pai** (supra). Thus, neither was **Anjuman-e-Rahmaniya** (supra) nor **TMA Pai** (supra) concerned with the factual situation in **Azeez Basha**: that is, whether AMU is a minority education institution.

34. The 2019 reference order also limits the reference to the legal aspects arising from the decision in **Azeez Basha** (supra) and not the factual aspects of the decision relating to AMU. This is clear from the passages from the 2019 reference order extracted above, particularly paragraphs 8 and 9. Paragraph 8 states that the correctness of the "question arising from" **Azeez Basha** (supra) has "remained undetermined". The paragraph indicates that the 2019 reference order must be read along with the previous references in both **Anjuman-e-Rahmaniya** (supra) and **TMA Pai Foundation** (supra). Paragraph 9 mentions that the correctness of the view in **Azeez Basha** (supra) "which has been extracted above" requires an authoritative pronouncement. The paragraph from **Azeez Basha** (supra) extracted in the 2019 reference order deals with the question of indicia to be considered a minority educational institution. It is evident upon a reading of the reference orders that only the question of the criteria to be fulfilled to qualify as a minority educational institution is referred to this Bench.

35. From the order in **Anjuman-e-Rahmaniya** (supra) referring the judgment in **Azeez Basha** (supra) to a larger Bench, the question formulated in **TMA Pai** (supra) and the 2019 Reference order, the question that must be decided by this Bench is what are the ingredients, indicia or criteria for an educational institution to be considered a minority educational institution under Article 30. The following issues must be answered for this purpose:

    a. Whether an educational institution must be both established and administered by a linguistic or religious minority to secure the guarantee under Article 30;

    b. What are the criteria to be satisfied for the 'establishment' of a minority institution? Whether Article 30(1) envisages an institution which is established by a minority with participation from members of other communities;

    c. Whether a minority educational institution which is registered as a society under the Societies Registration Act 1860[20] soon after its establishment loses its status as a minority educational institution by virtue of such registration; and

    d. Whether the decision of this Court in **Prof. Yashpal** v. **State of Chhattisgarh**[21] and the amendment of National Commission for Minority

[20] "Societies Registration Act"
[21] (2005) 5 SCC 420

Educational Institutions Act 2005[22] in 2010 have a bearing on the question formulated above and if so, in what manner.

E. Analysis

i. The preliminary objection by the Union of India

36. The Union of India advanced a preliminary objection to the reference. It argued that the order dated 26 November 1981 in **Anjuman-e-Rahmaniya** (supra) by which the matter was referred to a Bench of seven Judges is "wholly bad in law." It relies on the decision of a Constitution Bench in **Central Board of Dawoodi Bohra Community** v. **State of Maharashtra**[23] to argue that the two-Judge Bench of this Court in **Anjuman-e-Rahmaniya** (supra) could not have referred the correctness of the decision rendered by the Constitution Bench in **Azeez Basha** (supra) directly to a Bench of seven Judges. It was suggested that the two-Judge Bench ought to have referred the matter to a Bench of equal strength to the decision the correctness of which is doubted, that is, a Bench of five Judges. The Union of India argued that only a Bench of five Judges could have referred the matter to a Bench of seven Judges.

37. In **Central Board of Dawoodi Bohra Community** (supra), a Constitution Bench discussed the legal precepts which apply to orders of reference and reiterated the position of law as below:[24]

[22] "NCMEI Act"
[23] (2005) 2 SCC 673
[24] Central Board of Dawoodi Bohra Community (supra) [12]

a. Decisions of this Court rendered by a Bench of larger strength are binding on Benches of a less or equal strength;

b. If a Bench of lower strength is doubtful about the correctness of a judgment delivered by a Bench of larger strength, it cannot disagree or dissent from the view taken by the larger Bench. In case of doubt, it can invite the attention of the Chief Justice of India to its opinion and request the Chief Justice to list the matter before a Bench, the strength of which is greater than that which delivered the judgment which has been doubted;

c. The correctness of the view taken by any Bench can only be doubted by a Bench of equal strength. The matter will then be placed for hearing before a Bench of greater strength;

d. There are two exceptions to the rules discussed above:

   i. The discretion of the Chief Justice is not bound by the rules. As the master of the roster, the Chief Justice may list any case before any Bench of any strength;

   ii. Despite the rules discussed above, if a particular case has come up for hearing before a Bench of larger strength and that Bench is of the opinion that the judgment of the Bench of lower strength requires reconsideration or correction, or is otherwise doubtful of its correctness, it may dispense with the need for a reference in the

terms described above or an order of the Chief Justice and hear the matter for reasons given by it.

38. The position of law laid down in **Central Board of Dawoodi Bohra Community** (supra) is correct. Decisions of a larger Bench are binding precedent, and judicial discipline and propriety dictate that Benches of lower strength must adhere to such decisions. This will also avoid inconsistencies in the development of law. Questions concerning the correctness of judgments must ordinarily be referred only by a Bench which is equal in strength to the Bench whose judgment is doubted. We also agree with the two exceptions to this rule, as detailed by this Court in **Central Board of Dawoodi Bohra Community** (supra). They must remain exceptions and not transmogrify into the rule itself.

39. The three issues which required an authoritative pronouncement in **Anjuman-e-Rahmaniya** (supra), were not directly a point of contention in **Azeez Basha** (supra). However, the decision would have a bearing on them. Doubting the correctness of the opinion in **Azeez Basha** (supra), without disagreeing with it, the two-Judge Bench requested that the matter may be placed before the Chief Justice of India for being heard by a Bench of seven Judges. This falls within the permissible limits laid down in **Central Board of Dawoodi Bohra Community** (supra) as explained in point (b) of paragraph 37. Further, the Solicitor General has also stated that he is not pressing the Union's preliminary objection. The order of reference dated 12 February 2019, too, noted that although a three-Judge Bench could not ordinarily refer

a case directly to a seven-Judge Bench, it was doing so in this case because the question was already referred to a Bench of seven Judges but was not answered. The reference order notes:

> "10. Ordinarily and in the normal course the judicial discipline would require the Bench to seek a reference of this matter by a Five Judges Bench. However, having regard to the background, as stated above, when the precise question was already referred to a Seven Judges Bench and was, however, not answered, we are of the view that the present question, set out above, should be referred to a Bench of Hon'ble Seven Judges.
>
> 11. Consequently and in the light of the above, place these matters before the Hon'ble the Chief Justice of India on the administrative side for appropriate orders."

40. This Court will hear the questions referred to a seven-Judge Bench for these reasons.

ii. <u>The scope of Article 30</u>

41. The fundamental rights enshrined in the Constitution do not operate in silos. In **A.K. Gopalan** v. **State of Madras**,[25] the majority judgment of this Court held that fundamental rights operate to the mutual exclusion of one another. In other words, each fundamental right was understood as being distinct and unrelated to the others. This view of Part III of the Constitution was later rejected in **Rustom Cavasjee Cooper** v. **Union of India**,[26] which held that Part III "weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields:

[25] AIR 1950 SC 27
[26] (1970) 1 SCC 248

they do not attempt to enunciate distinct rights."[27] **Maneka Gandhi** v. **Union of India**[28] affirmed that **Rustom Cavasjee Cooper** (supra) overruled the majority judgment in **A.K. Gopalan** (supra). Thus, the scope of the right of "minorities to establish and administer educational institutions" must be identified in the background of the other cultural and religious rights guaranteed by the Constitution.

42. Articles 25 to 28 are placed under the heading 'Right to freedom of religion'. Article 25(1) stipulates that all persons are equally entitled to freedom of conscience, the right to freely profess, practice or propagate religion. This is subject, however, to public order, morality, health and other provisions of Part III of the Constitution. Clause (2) of Article 25 provides that nothing in Clause (1) would affect the operation of any existing law or prevent the State from enacting a law regulating or restricting any economic, financial, political or secular activity, which may be associated with religious practice, and legislation providing for social welfare reform or opening Hindu religious institutions of public character to all classes and sections of Hindus. Article 26 guarantees religious denominations or a section of them, the right to establish and maintain institutions for religious and charitable purposes, manage their own affairs in the matter of religion, to own and acquire movable and immovable property, and administer such property in accordance with law. The rights are subject to public order, morality and health. Article 27 mandates that no one shall be compelled to pay any taxes, the proceeds of which are

[27] (1970) 1 SCC 248 [52]
[28] (1978) 1 SCC 248

to be specifically appropriated in payment of expenses for the promotion and maintenance of any particular religion or religious denomination.

43. Article 28, deals with the rights of individuals and secures to them *vide* clause (3), the right not to take part in any religious instructions that may be imparted in any educational institution recognised by the State or receiving aid of the State funds. The provision stipulates that a person need not attend religious worship conducted in such institution or any premises attached thereto unless he wishes to do so, and if such person is a minor, upon the consent of his guardian. Clause (1) of Article 28 restricts educational institutions wholly maintained out of the State funds[29] from imparting 'religious instructions'. However, clause (2) to Article 28 stipulates that clause (1) will not apply to an educational institution which is administered by the State but was established under an endowment or trust which required religious instruction to be imparted in such institution. The clause recognises the distinction between 'establishment' and 'administration' of an institution.

44. Articles 29 and 30 under the heading 'Cultural and Educational Rights', are two provisions which specifically confer rights on a section of citizens residing in the territory of India or a part thereof, having a distinct language, script, or culture. Some would say that these are in nature of special privileges, yet in substance, they are in the nature of guarantees and protections given by the Constitution not to any specific denomination by identity, but to any section of

[29] The expression *'wholly maintained out of the State funds'* has been interpreted in *DAV College v. State of Punjab (II)*, (1971) 2 SCC 269, to mean an institution which receives grants for its expenditure that may be wholly maintained out of the State funds even though it receives a fee for affiliation or holding examination as *quid pro quo*.

the citizens which can be distinguished on the basis of language, script or culture. Clause (1) of Article 29 gives them the right to conserve, secure and extol their language, script or culture. The clause underscores the right to conserve and nurture the language, script or culture. Clause (2) of Article 29 is a negative right which stipulates that no citizen shall be denied admission on the grounds of religion, race, caste, language, or any of them in any educational institution maintained by the State or receiving aid out of the State funds.

45. Though the heading of Article 29 states that it is a provision for the protection of the interest of minorities, the substantive portion stipulates that the right is available to "any section of citizens" residing in India and having a distinct language, script or culture of their own. Thus, Article 29 applies to non-minorities as much as it applies to minorities, provided that the sections have a distinct language, script and culture of their own.[30] Similarly, Articles 25 to 28 also do not make a distinction between majority and minority religious sections. The provisions guarantee the right to freedom of religion to both minorities and non-minorities. Article 25 recognises the right of **all persons** to freedom of conscience and the right to freely profess, practice and propagate religion. Article 26 recognises the right of **every religious denomination** or any section thereof to manage its religious affairs. The provisions of Article 28 also do not distinguish between a minority and a non-minority educational institution. The provisions apply equally to educational

[30] See Ahmedabad St. Xavier's College Society v. State of Gujarat, (1974) 1 SCC 717, (9J) [Chief Justice Ray writing for himself and Justice Palekar [5,6], Justice Khanna [73], Justice Mathew writing for himself and Justice YV Chandrachud [125, 126]; Rev. Father W Proost v. State of Bihar [5J] (1969) 2 SCR 73 [8,9]

institutions established by religious and linguistic minorities and non-minorities.[31]

46. The provisions noted above, whether they refer to individual rights or denomination rights are manifestations that India is a pluralistic society with different religions, practices, cultures and languages. These provisions which are in the nature of rights and guarantees, also prescribe the ambit of State interference.

47. Article 30 consists of three clauses. Clause (1) states that all minorities whether based on religion or language, shall have a right to establish and administer educational institutions of their choice. Clause (1)(a) deals with the provision for compulsory acquisition of any property for an educational institution established and administered by a minority. We are not concerned *per se* with the said clause. Clause (2) of Article 30 provides that the State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority whether based on religion or language.

48. The two crucial expressions which arise for consideration and interpretation in this decision are the words 'establish' and 'administer' used in clause (1) of Article 30. These two words and expressions have to be interpreted in the

[31] See TMA Pai (supra) [88-90;144]; "144 […] As in the case of a majority-run institution, the moment a minority institution obtains a grant of aid, Article 28 of the Constitution comes into play. When an educational institution is maintained out of State funds, no religious instruction can be provided therein. Article 28(1) does not state that it applies only to educational institutions that are not established or maintained by religious or linguistic minorities. Furthermore, upon the receipt of aid, the provisions of Article 28(3) would apply to all educational institutions whether run by the minorities or the non-minorities. […] Just as Articles 28(1) and (3) become applicable the moment any educational institution takes aid, likewise, Article 29(2) would also be attracted and become applicable to an educational institution maintained by the State or receiving aid out of State funds."

context of clause (1) to Article 30 which confers a guarantee and protection to minority communities based on religion or language.

a. The purpose of Article 30(1)

49. A brief reference to the drafting history of the provision will help us discern the purpose of the provision. On 19 April 1947, the Minorities Sub-Committee (which was appointed to examine and propose changes to the draft clauses of the fundamental rights Committee) submitted the interim report to the Chairperson of the Advisory Committee on Minorities and Fundamental Rights.[32] The Minorities Sub-Committee recommended*, inter alia,* the inclusion of a constitutional provision that stipulated that all minorities, whether based on religion, community or language **shall be free** to establish and administer educational institutions of their choice.[33] However, when the first Draft of the Constitution was submitted by the Drafting Committee to the President of the Constituent Assembly, the provision guaranteed a **right** to establish and administer educational institutions.[34] This change in the language of the provision is crucial to understanding the scope of the provision. The provision guaranteed a purely negative group right to religious and linguistic minorities against the State with the use of the words "shall be free", that is, the right to ensure that the State does not discriminate against minorities who wish to establish and administer educational institutions.

[32] B. Shiva Rao, The Framing of India's Constitution: Select Documents [Vol II, The Indian Institute of Public Administration] 207
[33] Ibid [273]
[34] Draft Constitution of India 1948, Article 23(a)

However, upon the use of the phrase 'right', the possibility of interpreting the provision as a guarantee of a positive right arose.

50. It cannot be disputed that Article 30(1) guarantees the minority educational institutions, the right to not be discriminated. In fact, Article 30(2) is a facet of the principle of non-discrimination of minorities. The Article provides that the State shall not discriminate in granting aid to educational institutions or discriminate on the ground that it is under the management of a religious or linguistic minority. The question is whether the use of 'right' in Article 30(1) also guarantees a 'special right' in addition to the right to non-discrimination.

51. While there is no doubt that Article 30 protects the rights of minorities, this Court has in numerous judgments conceptualised varied reasons for the constitutional guarantee. In **Ahmedabad St. Xavier's College Society** v. **State of Gujarat**[35], a nine-Judge Bench discussed the objective of the provision in detail. Chief Justice Ray writing for himself and Justice Palekar observed that Article 30 ensures equality between the majority and the minority, which would be denied in the absence of a special provision.[36] Justice HR Khanna cast the purpose of the provision in terms of substantive equality and observed that Article 30 guarantees 'special rights' to give minorities a 'sense of security'. The learned Judge observed that the real effect of the provision was to "ensure the preservation of the minority institutions by guaranteeing the minorities autonomy […] in administration."[37]

[35] (1974) 1 SCC 717
[36] Ibid [8,9]
[37] Ibid [77]

Justice Mathew, writing for himself and Justice YV Chandrachud, also traced the purpose to the guarantee to substantive equality for minorities. The learned Judge observed that it will be impossible to protect the group identity of minorities and prevent the assimilation of identities in the absence of a provision guaranteeing substantive equality.[38]

52. Justice Mathew referred to the Advisory opinion of the Permanent Court of International Justice on Minority Schools in Albania to draw on the purpose of providing additional guarantees for minorities[39]. In this judgment, a crucial principle regarding equality and differential treatment for minority groups was articulated. The Permanent Court of International Justice observed that true equality might necessitate differential treatment to establish equilibrium between different situations:

> "Whereas equality in fact may involve the necessity of differential treatment in order to attain a result which establishes an equilibrium between different situations. It is easy to imagine cases in which equality of treatment of the majority and of the minority whose situation and requirements are different, would result in inequality. The equality between the members of the majority and of the minority must be effective, genuine equality…"

53. This perspective underscores the imperative to enable minorities to maintain their distinctive characteristics and fulfil their specific needs. The case in

[38] Ibid [131-133]; "132.The problem of the minorities is not really a problem of the establishment of equality because if taken literally, such equality would mean absolute identical treatment of both the minorities and the major ities. This would result only in equality in law but inequality in fact. The distinction need not be elaborated for it is obvious that "equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of differential treatment in order to attain a result which establishes an equilibrium between different situations."

[39] Minority Schools in Albania, Advisory Opinion, PCIJ Series A/B no 64, ICGJ 314 (PCIJ 1935), 6th April 1935, League of Nations; Permanent Court of International Justice.

question involved the abolition of all private schools, a measure challenged primarily by the minority. The Court emphasized that the rationale for the protection of minorities aimed at preserving their unique attributes. To achieve this objective, it deemed two aspects crucial. Firstly, it stressed the importance of ensuring that members of minority groups enjoy complete equality with other nationals of the state. Secondly, it emphasized the necessity of providing minority groups with appropriate means for preserving their racial peculiarities, traditions and national characteristics.

54. Distinct and diverse languages and religions have inherent value. It is also indisputable that cultures are often entangled with language and religion. The Constitution recognises that people who practise such religions or speak such languages who find themselves in the minority must not be at a disadvantage because of their numbers.

55. That being said, the purpose of Article 30 is not solely to enable religious minorities to impart religious instruction. Article 30 extends to secular education as well. That minorities may wish to impart secular and religious instruction side by side may be one aspect of the matter. Another equally relevant aspect is that minorities may wish to impart secular education in a manner that is conducive to the practice of their religion or harmonious with it, even if religious instruction does not form part of the curriculum. In this way, the right of linguistic and religious minorities to equality is protected.

56. The nine-Judge Bench in **St. Xavier's** (supra) held that Article 30(1) is in pursuance of the anti-discrimination and substantive equality facets of the

equality doctrine.[40] In **TMA Pai** (supra), Chief Justice Kirpal writing for the majority of the eleven-Judge Bench observed that a law that discriminates based on whether the institution is established by a minority or a majority is unconstitutional for violation of Article 30. The Chief Justice observed that, however, the provision should not lead to reverse discrimination.[41] This observation on a cursory view seems to indicate that the Court has taken a volte-face by shifting from a special rights/substantive equality approach of the provision to an anti-discrimination/formal equality reading of the provision. However, a closer examination reveals that the observations of the majority in **TMA Pai** (supra) were in line with the precedents that viewed the provision as a guarantee of a 'special right'. This is evident from the interpretation of the interrelationship between Article 29(2) and Article 30. One of the issues in that case was whether Article 29(2) which provides that no person shall be denied admission in State aided educational institution only on the grounds of religion, race, caste, language or any of them is applicable to minority

[40] St. Xavier's (supra) Chief Justice Ray for himself and Justice Palekar [9]; Justice HR Khanna [77]; Justice Mathew for himself and Justice YV Chandrachud [131-133]

[41] "138. As we look at it, Article 30(1) is a sort of guarantee or assurance to the linguistic and religious minority institutions of their right to establish and administer educational institutions of their choice. Secularism and equality being two of the basic features of the Constitution, Article 30(1) ensures protection to the linguistic and religious minorities, thereby preserving the secularism of the country. Furthermore, the principles of equality must necessarily apply to the enjoyment of such rights. No law can be framed that will discriminate against such minorities with regard to the establishment and administration of educational institutions vis-à-vis other educational institutions. Any law or rule or regulation that would put the educational institutions run by the minorities at a disadvantage when compared to the institutions run by the others will have to be struck down. At the same time, there also cannot be any reverse discrimination. It was observed in *St. Xavier's College case* [(1974) 1 SCC 717 : (1975) 1 SCR 173] at SCR p. 192 that : (SCC p. 743, para 9)
"The whole object of conferring the right on minorities under Article 30 is to ensure that there will be equality between the majority and the minority. If the minorities do not have such special protection they will be denied equality."
In other words, the essence of Article 30(1) is to ensure equal treatment between the majority and the minority institutions. No one type or category of institution should be disfavoured or, for that matter, receive more favourable treatment than another. Laws of the land, including rules and regulations, must apply equally to the majority institutions as well as to the minority institutions. The minority institutions must be allowed to do what the non-minority institutions are permitted to do."

education institutions. The opinion of the majority held that the denial of admission to non-minorities in minority institutions to a "reasonable extent" is not violative of Article 29(2) since it "preserves the minority character of the institution".[42] Thus, Article 30, beyond preventing the State from discriminating against religious and linguistic minorities who wish to establish educational institutions also guarantees a 'special protection'.

b. The 'special protection' guaranteed by Article 30(1)

57. This purpose of Article 30 was further expanded in **PA Inamdar** v. **State of Maharashtra**[43], where a seven-Judge Bench observed that the provision is better understood as a 'protection' and/ or a 'privilege' of the minority rather than an abstract right.[44] What is the special guarantee that Article 30 provides educational institutions established by religious and linguistic minorities which is not otherwise available to non-minorities?

58. Until the judgment of the eleven-Judge Bench in **TMA Pai** (supra), the right to establish and administer educational institutions was interpreted as a right that was exclusively available to religious and linguistic minorities by virtue of Article 30. In **TMA Pai** (supra), the right of **every citizen** to establish and administer educational institutions was traced to Article 19(1)(g)[45], which guarantees the freedom to practise any profession, or to carry on any

[42] TMA Pai (supra) [133]
[43] (2005) 6 SCC 537
[44] PA Inamdar (supra) [100]; Also see St. Stephen's (supra) [28,30(1), 59]
[45] TMA Pai (supra) [Chief Justice Kirpal 19-20]; Chief Justice Kirpal authoring the majority opinion observed that Article 19(1)(g) covers activities of citizens in respect of which income or profit is generated. The learned Judge observed that "the establishment and running of an educational institution where a large number of persons are employed as teachers or administrative staff, and an activity is carried on that results in the imparting of knowledge to the students, must necessarily be regarded as an occupation." [para 25]

occupation, trade or business. The eleven-Judge Bench also traced the right of 'every' religious denomination (of both the majority and the minority) to establish and administer educational institutions to Article 26(a) which guarantees the right to establish and maintain institutions for religious and 'charitable' purposes. Charitable purposes was interpreted to include education.[46]

59. The rights guaranteed by Articles 19(1)(g) and 26(a) can be reasonably restricted on the grounds in Articles 19(6) and 26 respectively. An educational institution established and administered by any citizen can be regulated on the grounds stipulated in Article 19(6) which includes the ground of professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade, business.[47] An educational institution established by a religious denomination (without any element of profit[48]) can be regulated on grounds of public order, morality and health. As opposed to these two provisions, Article 30 does not circumscribe the right on any grounds. This Court has, however, consistently emphasised that the right guaranteed by Article 30 is not absolute.

---

[46] TMA Pai (supra) [Chief Justice Kirpal 26]; "26.The right to establish and maintain educational institutions may also be sourced to Article 26(*a*), which grants, in positive terms, the right to every religious denomination or any section thereof to establish and maintain institutions for religious and charitable purposes, subject to public order, morality and health. Education is a recognized head of charity. Therefore, religious denominations or sections thereof, which do not fall within the special categories carved out in Articles 29(1) and 30(1), have the right to establish and maintain religious and educational institutions. This would allow members belonging to any religious denomination, including the majority religious community, to set up an educational institution."

[47] The right of citizens of establish and administer educational institutions does not prevent the State from making any law relating to: (a) professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade, business; (b) carrying on by the State or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial of citizens or otherwise.

[48] PA Inamdar [6]

60. In **Rev. Sidhajbhai Sabhai** v. **State of Bombay**[49], a Constitution Bench observed that Article 30 is absolute and cannot be restricted on any grounds such as in Article 19. However, in the very next sentence this Court observed that the right can be restricted on the grounds of efficiency of instruction, discipline, health, sanitation, morality and public order.[50] It must be noticed that these grounds resemble the grounds for restraint prescribed in Articles 19(6) and 26.

61. The inconsistency of the observations in **Rev. Sidhajbahi** (supra) was set right in **State of Kerala** v. **Very Rev. Mother Provincial**[51]. The six-Judge Bench differentiated between restrictions on the autonomy of a minority institution and the standard of education.[52] The former is impermissible in view of the protection under Article 30(1). The latter was traced to the regulation of the profession which is covered by Article 19(6). Thus, regulation of a minority educational institution is permissible on the grounds in Article 19(6). However, the regulation must not infringe the minority character of the educational institution. Article 30(1) is absolute in that sense. Justice Khanna's concurring opinion in **St. Xavier's** (supra) also highlighted this point. The learned Judge observed that reasonable restrictions can be imposed to ensure that a minority educational institution is an institution of excellence. The examples given by the Judge included ensuring regular payment of salaries and audit of accounts.[53] The distinction between

[49] 1962 (3) SCR 837
[50] 1962 (3) SCR 837 [849]
[51] (1970) 2 SCC 417
[52] Ibid [9, 10]
[53] St. Xavier's [91]

regulation which affects the minority character and a regulation in pursuance of 'national interest' was also drawn by the opinion of the majority in **TMA Pai** (supra).[54] National interest was interpreted to include public safety, national security and national integrity, preventing the exploitation of students or the teaching community, and application of general laws such as laws on taxation, sanitation and social welfare.[55] The principle that can be inferred from the above precedents is that regulations that may be justified on the grounds stipulated in Articles 19(6) and 26 may fall foul of Article 30 if they infringe the 'minority character' of the institution.[56] This is the 'special right' or 'protection' which the Constitution guarantees minority education institutions.

62. The right to administer was considered in some depth in **St. Xavier's** (supra) by Chief Justice AN Ray and Justice HR Khanna. Justice Khanna emphasised that the right to administer an institution is to effectively manage and conduct the affairs of the institution. The learned Judge held that it means shaping the institution in congruence with their vision and ideas for best serving the interests of both the community and the institution. Chief Justice AN Ray, on the other hand, observed that the right to administer has four components: (a) the right to choose its managing or governing body; (b) the right to choose the teachers; (c) the right not to be compelled to refuse admission to students; and (d) the right to use its properties and assets for the benefit of its own institutions. The right to administer as guaranteed under Article 30(1) ensures autonomy in administration and the right of choice which

[54] TMA Pai (supra) [107]
[55] PA Inamdar (supra) [119]; TMA PAI [136]
[56] See PA Inamdar (supra)[92,122]

may not otherwise be available to a non-minority institution. The right to administration, however, does not grant a *carte blanche* to flout or disregard the regulations and controls established by statute, which are essential for protecting the larger public interest and maintaining educational standards. Thus, the right to administer is not impaired by factors such as rules and regulations prescribing the proper utilization of State funds, qualifications of the teachers, their remuneration and benefits, eligibility criteria for admission of students, attendance requirements and the threshold to pass the exams conducted by the board/university to which the college or school is affiliated. What is barred is the interference in the internal management and overall control of the institution. At the same time, we must clarify that a minority institution can employ non-minority employees. Non-minority individuals can be teachers or even hold the position of the academic or institution head. To hold otherwise, would amount to interference with the choice, as envisaged by Article 30(1).

63. This proposition was clearly elucidated by the seven-Judge Bench in **PA Inamdar** v. **State of Maharashtra**[57] which was formed to cull out the *ratio decidendi* of the eleven - Judge Bench in **TMA Pai** (supra). The degree of interference of the State in the administration of an educational institution differs based on whether the institution receives aid or recognition from the Government or whether the institution was established by a minority. In **PA Inamdar** (supra), this Court discussed the extent of State interference in an

[57] (2005) 6 SCC 537

(i) unaided and unrecognised/unaffiliated minority institution; (ii) unaided minority institution seeking recognition; and (iii) aided minority institution. In the case of the first class, the seven-Judge Bench held that the minority 'can exercise the right to heart's content'. Institutions that fall within the first class could even fill all the seats with students from their community.[58] With respect to the second class, this Court held that the State cannot interfere in the day to day administration, including the essential ingredients of management, admission of students, recruiting staff and charging of fees.[59] This Court held that the regulation must be reasonable and for the purpose of ensuring that the institution is effective for the minority and others who resort to it.[60] For institutions that fall within the third class, the State can only regulate the proper utilisation of the grant without diluting the minority status of the educational institution.[61]

64. Thus, the position that emerges is that: (i) the regulations must be relevant to the purpose of granting recognition (in the case of a State-recognised institutions) and aid (in the case of Government aided institutions); and (ii) the effect of the regulation must not infringe the minority character of the institution.

65. From the discussion above, the following principles emerge :

    a. The purpose of Article 30(1) is to ensure that the State does not discriminate against religious and linguistic minorities which seek to

[58] PA Inamdar (supra) [120]; TMA Pai (supra) [145]
[59] Ibid [121]
[60] ibid [122]
[61] PA Inamdar [123]; TMA Pai [143]

establish and administer educational institutions ("the non-discrimination" purpose); and

b. The purpose of Article 30(1) is also to guarantee a 'special right' to religious and linguistic minorities that have established educational institutions. This special right is the guarantee of limited State regulation in the administration of the institution. The State must grant the minority institution sufficient autonomy to enable it to protect the essentials of its minority character. The regulation of the State must be relevant to the purpose of granting recognition or aid, as the case may be. This special or additional protection is guaranteed to ensure the protection of the cultural fabric of religious and linguistic minorities.

iii. Indicia for a Minority Educational Institution

66. To recall, the petitioners while challenging the 1951 and 1965 amendments to the AMU Act in **Azeez Basha** (supra) argued that the amendments were violative of the right to administration guaranteed by Article 30(1). The Union of India responded to the argument with the submission that the Muslim minority cannot claim the right to administration since it did not 'establish' the institution. Opposing this argument, the petitioners in **Azeez Basha** (supra) submitted that Article 30(1) guarantees the 'right to administer' an educational institution to minorities even if it was not established by them, if by "some process, it had been administering the same before the Constitution came into force." The argument of the petitioners was rejected. This Court held that the words "establish" and "administer" must be read conjunctively, that is, the

guarantee of the right to administration is contingent on the establishment of the institution by religious or linguistic minorities. In this context, the following observations were made:

> "It is to our mind quite clear that Art. 30(1) postulates that the religious community will have the right to *establish and administer* educational institutions of their choice meaning thereby that where a religious minority establishes an educational institution, it will have the right to administer that. An argument has been raised to the effect that even though the religious minority may not have established the educational institution, it will have the right to administer it, if by some process it had been administering the same before the Constitution came into force. We are not pre-pared to accept this argument. The Article in our opinion clearly shows that the minority will have the right to administer educational institutions of their choice provided they have established them, but not otherwise. The Article cannot be read to mean that even if the educational institution has been established by somebody else, any religious minority would have the right to administer it because, for some reason or other, it might have been administering it before the Constitution came into force. **The words "establish and administer" in the Article must be read conjunctively and so read it gives the right to the minority to administer an educational institution provided it has been established by it**.
>
> …
>
> We are of opinion that nothing in that case justifies the contention raised on behalf of the petitioners that the minorities would have the right to administer an educational institution even though the institution may not have been established by them. The two words in Art. 30(1) must be read together and so read the Article gives the right to the minority to administer institutions established by it."
>
> (emphasis supplied)

The Constitution Bench in **St. Stephen's** (supra) reiterated this interpretation of the phrases 'establish' and 'administer' in Article 30(1).[62]

67. Let us refer to Article 19(1)(a) to understand what it means to conjunctively read two words in a provision. Article 19 guarantees the fundamental right to free speech and expression. The guarantee of the freedom of expression is, however, not dependent on the freedom of speech. They are two separate rights. However, the situation differs with regard to the rights to establish and administer outlined in Article 30. It is settled that the rights to establish and administer must be read conjunctively and not disjunctively. This Court has not doubted this interpretation in any of the judgments subsequent to **Azeez Basha** (supra).[63]

68. The question is whether the conjunctive reading of the words "establish" and "administer" would also mean that for an educational institution to be a minority institution, it should have been both established and administered by a minority. In **Azeez Basha** (supra), the Constitution Bench held that the institution must be both established **and** administered by the minority. The Constitution Bench framed the following three questions to determine if AMU was a minority educational institution:

[62] St Stephen's [28] "It should be borne in mind that the words "establish" and "administer" used in Article 30(1) are to be read conjunctively. The right claimed by a minority community to administer the educational institution depends upon the proof of establishment of the institution. The proof of establishment of the institution, is thus a condition precedent for claiming the right to administer the institute."
[63] Manager, St. Thomas UP School v. Commr. & Secy, to general Education Dept., (2002) 2 SCC 497; St. Stephen's (supra); DAV College trust & Management Society v. State of Maharashtra, (2013) 4 SCC 14; SP Mittal v. Union of India, (1983) 1 SCC 51

a. Whether on the reading of the AMU Act, the University was established by the Muslim minority;

b. Whether the right to administer the University ever vested in the minority; and

c. If (b) is affirmative, whether the right to administer the University was surrendered when AMU was established.

69. The issue before this Bench is the indicia for an educational institution to be a minority educational institution. Should it be proved that the institution was established by the minority, or it was administered by the minority, or both? The petitioners and the respondents agree that the words 'establish' and 'administer' must be read conjunctively. They argue that administration is a sequitur to establishment. However, they disagree on the test to be applied to identify a minority education institution. The petitioners argue that the only indicia for a minority educational institution is that it must be established by a minority, while the respondents argue that the dual test of establishment and administration must be satisfied.

70. Before proceeding further, it is relevant to note the provisions of the NCMEI Act. The NCMEI Act was enacted in 2004 to constitute a National Commission for minority educational institutions and to provide for matters connected or incidental to it. Section 10 of the NCMEI Act was amended in 2006. The amended provision prescribed a procedure for the establishment of a minority

educational institution.[64] Thus, there can be no ambiguity about the minority status of educational institutions established after the enactment of NCMEI (Amendment) Act 2006. However, that is not the case for institutions which were established before the 2006 Amendment. How do we identify if an educational institution established before 2006 is a minority educational institution?

71. Article 30 does not prescribe conditions which must be fulfilled for an educational institution to be considered a minority educational institution. Article 30 confers two group rights on all linguistic and religious minorities: the right to establish an educational institution and the right to administer an educational institution. This right can be exercised by an individual belonging to a group or a collection of persons.[65] As observed above, the provision guarantees both a positive and negative right. Thus, the provision, in addition to ensuring that the State does not discriminate against the minority community also guarantees the minority educational institution certain

[64] "10. Right to establish a Minority Educational Institution.- (1) Any person who desires to establish a Minority Educational Institution may apply to the Competent authority for the grant of the no objection certificate for the said purpose.
(2) The Competent authority shall, -
(a) on perusal of documents, affidavits or other evidence, if any;
(b) after gving an opportunity of being heard to the applicant, decide every application filed under sub-section (1) as expeditiously as possible and grant or reject the application, as the case may be:
Provided that where an application is rejected, the Competent authority shall communicate the same to the applicant.
(3) Where within a period of ninety days from the receipt of the application under sub-section (1) for the grant of no objection certificate,-
(a) the Competent authority does not grant such certificates; or
(b) where an application has been rejected and the same has not been communicated to the person who has applied for the grant of such certificate,
It shall be deemed that the Competent authority has granted a no objection certificate to the applicant.
(4) The applicant shall, on the grant of a no objection certificate or where the Competent authority has deemed to have granted the no objection certificate, be entitled to commence and proceed with the establishment of a Minority Educational Institution in accordance with the rules and regulaitons, as the case may be, laid down by or under any law for the time being in force.
[65] Mother Provincial (supra)

guarantees. The institution is guaranteed the right of lesser State regulation and greater autonomy in the administration of the educational institution. The right to establish an educational institution guaranteed to the minority is not a special right. That, as held in **TMA Pai** (supra) (as explained in the preceding section), is a right which is available to every citizen under Article 19(1)(g) and to minority and non-minority religious denominations under Article 26. The special right that the provision guarantees to religious and linguistic minorities relates to the administration of educational institutions "of their choice". The expression "of their choice" is of an expansive nature indicating that the choice extends to the full range of educational institutions.

72. Article 30(1) cannot extend to a situation where the minority community which establishes an educational institution has no intention to administer it. A religious or linguistic community may establish an educational institution and yet not administer it. This is evident from Article 28(2) of the Constitution which states that Article 28(1) will not apply to an educational institution which is administered by the State but was established under an endowment or a trust which require religious instruction to be imparted. It is quite possible that a member or a group belonging to the minority community wishes to establish an institution but intends to accept greater State regulation and lesser autonomy for the community. In that case, putting a 'minority' tag on such an educational institution merely because it has been established by a person or a group belonging to a religious or linguistic minority would not be permissible under Article 30(1). An educational institution established by a minority, whether linguistic or religious, can give

up their right to claim the benefit under clause (1) of Article 30. The right can be given up consciously by waiver. This may occur where administration has been consciously and willingly entrusted to the State. Therefore, to determine whether an educational institution is a minority educational institution, a formalistic test such as to whether it was established by a person or group belonging to a religious or linguistic minority is not sufficient. The tests adopted must elucidate the purpose and intent of establishing an educational institution for the minority. Both the establishment and the administration by the minority must be fulfilled cumulatively for that.[66]

73. In **Azeez Basha** (supra), the Constitution Bench referred to the judgment in **The Durgah Committee, Ajmer** v. **Syed Hussain Ali**[67], for the proposition that even if a minority established an educational institution, it may lose the concomitant right of administration in certain circumstances. The relevant observations are extracted below:

> "We should also like to refer to the observations in *The Durgah Committee, Ajmer v. Syed Hussain Ali*. In that case this Court observed while dealing with Art. 26(a) and (d) of the Constitution that even if it be assumed that a certain religious institution was established by a minority community it may lose the right to administer it in certain circumstances. We may in this connection refer to the following observations at p. 414 for they apply equally to Art. 30(1):
>
> > "If the right to administer the properties never vested in the denomination or had been validly surrendered by it or had otherwise been effectively and irretrievably lost to it, Art. 26 cannot be successfully invoked."

[66] See Section E(v) of this judgment for an expansive elucidation of the indicia.
[67] (1962) 1 S.C.P 383

74. In **Azeez Basha** (supra), in addition to determining if AMU was established by a Muslim minority, this Court also determined whether it was ever administered by them or if the administration was validly surrendered by them, on the basis of the above observations.

75. The context of the above observations in **Durgah Committee** (supra) and its application to the interpretation of Article 30(1) needs to be clarified. In that case, the constitutional validity of the Durgah Khwaja Saheb Act 1955[68] was challenged by the Khadims of the tomb for violation of Article 26(c) and Article 26(d) of the Constitution. To offer a brief background, Khwaja Saheb was a saint who came to India at the end of the 12th Century AD and settled in Ajmer. A tomb in the form of a kutcha structure was built immediately after his death. However, there were no endowments at this time. Akbar, the Mughal emperor, took interest in the tomb and rebuilt it. Documents also indicate that eighteen villages were endowed to the Durgah. During this period, a descendant of the Saint functioned as the Sajhadanashin and Mutawalli. During the rule of Shahjahan, the office of Sajhadanashin and Mutawalli were separated. The Mutawalli was solely made responsible for the management of the properties of the Durgah and was appointed by the Ruler. Over the years, this model was not altered. The Mutawalli was always appointed by the Government in power.

76. Section 4(1) of the Durgah Act dealt with the appointment of a Committee in which the administration, control and management of the Durgah Endowment

[68] "Durgah Act"

would vest. The members of the Committee would be appointed by the Central Government. These two provisions were challenged on the ground they were *ultra vires* Article 26(c) and Article 26(d). In this context, the Constitution Bench observed that the denomination will not have a right to administer the property if it never had the right to administer it; if it had been surrendered; or if it had been irretrievably lost:

> "37. […] In other words, if the denomination never had the right to manage the properties endowed in favour of a denominational institution as for instance by reason of the terms on which the endowment was created, it cannot be heard to say that it has acquired the said rights as a result of Article 26(c) and (d)…If the right to administer the properties never vested in the denomination or had been validly surrendered by it or has otherwise been effectively and irretrievably lost to it Article 26 cannot be successfully invoked. […]"

77. On the facts of the case, the Constitution Bench observed that the endowments were made on such terms that did not confer the right to manage the properties to the denomination. This Court held that the right to administer the property could not be claimed if the terms of the endowment did not confer administration to the denomination.

78. **Azeez Basha** (supra) relied on the decision of the Constitution Bench in **Durgah Committee** (supra) which dealt with clauses (c) and (d) of Article 26 which guarantee the right of any religious denomination to own property and administer such property. They were not made in the context of Article 26(a) by which the right to establish and maintain institutions is conferred on religious denominations.

79. A parallel could have been drawn between the right guaranteed by Article 26(a) and Article 30(1), which is what this Court in **Azeez Basha** (supra) attempted to do. However, a parallel cannot be drawn between clauses (c) and (d) of Article 26, and Article 30(1). The rights differ in nature and scope. Article 26(d) guarantees the right to administer property in 'accordance with law'. The provision does not confer any special right to administration as in the case of minority educational institutions.

iv. Applicability of Article 30 to a 'University' established before the commencement of the Constitution

80. Mr Rakesh Dwivedi, senior counsel appearing for the respondents made two submissions on the application of Article 30 to educational institutions which were established before the commencement of the Constitution. First, he urged that the claimant must prove that they were a linguistic or religious minority when the institution was established and not when the Constitution commenced; and second, before the Constitution was adopted, Universities (unlike schools and colleges which could be established by persons) could only be established by the Imperial Government. Thus, Universities which could not have been established by persons before the Constitution was adopted cannot, according to the submission, claim a right under Article 30. The observations in **re Kerala Education Bill**[69], **Rev. Bishop SK Patro** v. **State of Bihar**[70] and **St. Stephen's** (supra) that Article 30(1) applies to educational institutions which were established before the Constitution was

[69] 1958 SCR 995
[70] (1969) 1 SCC 863

adopted were distinguished on the ground that those cases dealt with colleges and schools, and not Universities. The learned Attorney General also made a similar argument. He submitted that in the absence of a legal competence to establish a given class of institutions (that is, universities), the question of availing of all attendant rights and claims in relation to Article 30 cannot arise. In the subsequent sections, we will answer the following two questions:

a. Whether 'universities' established before the commencement of the Constitution are excluded from the purview of Article 30(1); and

b. Whether those who established an educational institution have to prove that they were a minority at the time of establishment.

a. Article 30(1) applies to educational institutions established before the commencement of the Constitution

81. **In re the Kerala Education Bill 1957** (supra), a seven-Judge Bench of this Court held that Article 30 applies to educational institutions which predate the Constitution. This Court held that the right to administer guaranteed by Article 30(1) is wide enough to cover educational institutions established both before and after the Constitution was adopted:

> "22. … There is no reason why the benefit of Article 30(1) should be limited only to educational institutions established after the commencement of the Constitution. The language employed in Article 30(1) is wide enough to cover both pre-Constitution and post-Constitution institutions. It must not be overlooked that Article 30(1) gives the

> minorities two rights, namely, (a) to establish, and (b) to administer, educational institutions of their choice. The second right clearly covers pre-Constitution schools just as Article 26 covers the right to maintain pre-Constitution religious institutions. …"

82. Although the opinion in that case was rendered in exercise of the advisory jurisdiction of this Court under Article 143, it has immense persuasive value.[71] The judgment in **In re Kerala Education Bill** (supra) has held the field for many decades. Subsequent decisions of this Court have also relied on it. The decision in **Azeez Basha** (supra) observed that Article 30 would be "robbed of much of its content" if it were held to apply only to educational institutions established after the commencement of the Constitution.[72] The Constitution Bench in **SK Patro** (supra) also held the same. In that case, an educational institution which was established in 1854 received the protection of the rights guaranteed by Article 30(1).[73] In **St. Stephen's** (supra), a Constitution Bench held that St. Stephen's College which was established in 1881 is a minority educational institution for the purposes of Article 30(1).

83. A distinction between educational institutions established before and after the commencement of the Constitution cannot be made for the purposes of Article 30(1). Article 30 will stand diluted and weakened if it is to only apply prospectively to institutions established after the commencement of the Constitution. The protection and guarantee, if made applicable to only institutions established after the commencement of the Constitution, would

[71] In re Special Courts Bill, (1979) 1 SCC 380
[72] Azeez Basha [19]
[73] SK Patro [17]

debase and defile the object and purpose of the provision. The adoption of the Constitution reflects a break from the system of sovereign and potentate government under the colonial regime and the dawn of governance based on the rule of law. It secures to the minority educational institutions, rights under the Constitution from the date of its commencement.

84. The Constitution annihilates the vestiges of colonial rule as reflected in Article 395. Article 395 repeals the two enactments that established the system of governance in pre-independent India: the Indian Independence Act 1947 and the Government of India Act 1935. Article 395 repudiates the chain of colonial continuity and symbolises constitutional autochthony by repealing the Indian Independence Act 1947. At the same time, Article 372 represents the thread of continuity even when a new system of governance is put in place. Article 372 stipulates that all laws which were in force in the territory of India before the commencement of the Constitution will continue in force. However, the only caveat was that the laws must not be inconsistent with the provisions of the Constitution. Laws that are violative of the provisions of Part III would be void to the extent of the inconsistency.[74] It is crucial to note that Article 13(1) renders the laws to the extent of contravention *void* and not *void ab initio.* Thus, the Constitution does not fully overhaul the system of governance and administration. Rather, it only ensures that the governance is in accordance with the rules prescribed in the Constitution. To put it in legal terms, Article 13(1) has a retroactive effect and not a retrospective effect. A

[74] Constitution of India, Article 13(1)

provision is retrospective if it alters the position of law before its enactment/commencement. It is retroactive if it imposes new results for previous actions.[75] Upon the commencement of the Constitution, citizens received the protective cover of Part III. Article 372 read with Article 13(1) stipulates that laws which pre-date the Constitution are unconstitutional if they contravene the fundamental rights.[76] The provisions do not stipulate that laws which pre-date the Constitution cannot receive the additional protection which the fundamental rights offer. The right to administration in Article 30(1) is one such protection.

85. What is the scope of Article 30 when read in the context of Article 372 read with Article 13? Any law enacted by the Imperial Legislature which discriminates against linguistic and religious minorities in the establishment and administration of educational institution would be void. This is the scope of the provision vis-à-vis Articles 372 and 13 when Article 30 is purely read as a negative right. But, this Court has also interpreted the Article as a 'special rights' provision guaranteeing additional protection to educational institutions established by minorities. Thus, educational institutions established by religious and linguistic minorities before the commencement of the Constitution will also receive the special protection guaranteed by Article 30(1): the right to administration without the infringement of their minority character.

[75] SEBI v. Rajpur Nagpal,(2023) 8 SCC 274 [99-102]
[76] See Keshavan Madhava Menon v. State of Bombay, AIR 1951 SC 128

86. If the argument as propounded is accepted, we will have two sets of minority educational institutions, one established before the commencement of the Constitution which is deprived of the guarantee given under Article 30(1), and those established after the commencement of the Constitution which are entitled to the benefit and guarantee given under Article 30(1). We do not think the Constitution envisages such incongruous and unpalatable differences in rights guaranteed under Article 30(1).

b. There is no difference between 'Universities' and 'colleges' established before the commencement of the Constitution

87. The next argument which needs to be addressed is whether 'universities' established before the commencement of the Constitution could receive the protection of Article 30(1). To recall, the petitioners argued that prior to the commencement of the Constitution, the law did not confer the power to establish a university on a person. It was argued that the power only vested in the Imperial Legislature and thus, no person could have "established" a university.

88. The educational policy in pre-independent India must be referred to provide a brief context on the distinction between universities and colleges. One of the distinctions between a college and a university is the ability of the latter to confer degrees to students as evidence of their proficiency in subjects which they have studied and for which they are assessed. On 19 July 1854, the Court of Directors of the East India Company submitted a despatch[77] to the

[77] "Woods Despatch"

Governor-General of India in Council on the subject of General Education in India. The despatch recommended the incorporation of Universities by Acts of the Legislative Council of India. The first University established in India was the University of Calcutta. It was established by Act No. II of 1857, passed by the Legislative Council of India. The preamble to the enactment provides that the University at Calcutta was to be established for the purpose of awarding academic degrees to persons who have acquired proficiency in subjects. Subsequently, the Legislative Council of India enacted Act No. XXII of 1857 to establish and incorporate the University at Bombay for the same purpose. In 1857, the University at Madras was established.[78] In 1860, an Act was passed to give the Universities of Calcutta, Madras and Bombay, the power of conferring degrees in addition to those degrees provided for in the earlier enactments. The Legislative Council of India passed sixteen other enactments[79] for the establishment of universities before the commencement of the Constitution.

89. The University Grants Commission Act 1956[80] was enacted a few years after the commencement of the Constitution. The UGC Act provides the power to confer degrees even to institutions which are not established by an enactment. Section 2(f) defines a University as educational institutions established or incorporated by or under a Central Act, a Provincial Act or a

[78] Act No. XXVII of 1987
[79] The Punjab University Act 1992, the Allahabad University Act 1887, The Mysore University Regulation 1916, The Patna University Act 1917, The Firman of Osmania University 1918, The Lucknow University Act 1920, The Delhi University Act 1922, The Nagpur University Act 1923, The Agra University Act 1926, The Annamalai University Act 1926, University of Tranvancore Promulgation Act 1937, The Utkal University Act 1943, The Gauhati University Act 1947, The Maharaja Sayajirao University of Baroda Act 1949, The Gujarat University Act 1949; The Visva-Bharati Act 1951; The Jadavpur University Act 1955.
[80] "UGC Act"

State Act, and includes any such institution as may, in consultation with the University concerned, be recognized by the Commission in accordance with the regulations made in that behalf under the Act. Section 3 states that the Central Government may, on the advice of the UGC, declare by notification that any institution for higher education shall be deemed to be a University for the purposes of the Act. All the provisions of the UGC Act would apply to deemed-to-be-Universities just as they apply to universities.[81] Under the UGC Act, an institution (which is not a university or deemed-to-be university) can be specially empowered by an Act of Parliament to confer degrees.[82]

90. Two facets emerge from the above discussion. First, only Universities can confer degrees[83]; and second, before the enactment of the UGC Act, the University had to necessarily be incorporated by a legislation for the degrees conferred by them to be recognised. Thus, the argument of the petitioners narrows down to one aspect. According to the submission, a member or community belonging to a minority despite making efforts through representation, mobilisation and participation to establish a University cannot be regarded to have 'established' a Minority educational institution for the purpose of Article 30(1) only because the University was incorporated through a legislation. A brief analysis of the nature of Universities is necessary to unravel this paradox.

[81] UGC Act, Section 3
[82] UGC Act, Section 22
[83] Also see St. David's College, Lampeter v. Ministry of Education, 1951 All ER 559

PART E

91. The Wood despatch noted that the purpose of universities upon their establishment was to confer academic degrees on students as evidence of attainment of proficiency in the branch of study.[84] Universities were instituted, "not so much to be in themselves places of instruction, as to test the value of the education obtained elsewhere".[85] Affiliated colleges and other institutions educated students and sent them to universities where their proficiency was to be tested.[86] This limited role of Indian Universities upon their establishment was recognised in the statutory enactments which incorporated the first three Universities in India. The preamble to Act No. II of 1857 which established and incorporated the University at Calcutta, Act XXII of 1857 which established and incorporated the University at Bombay, and Act XXVII of 1857 which established and incorporated the University at Madras stipulated that the Universities were established to ascertain (through an examination) those persons who had acquired proficiency in different branches. This was the only power conferred upon Universities.[87] The enactments also provided that only candidates who were authorised through a certificate from one of the institutions authorized by them shall be a candidate for the degree.[88] However, the University at Punjab incorporated in 1882 had greater scope. In 1869, an institution styled the Lahore University College (and the Punjab University College later) was established in pursuance of the wishes of the Chiefs, Nobles and influential classes of Punjab. Act XIX of 1882 incorporated

[84] Charles Wood, The despatch of 1854 on General education in India. [25];
[85] Report of the Indian Universities Commission 1902 [7]
[86] Willium Hunter, Report of the Indian Education Commission 1882 [25-26] " Hunter Commission"
[87] See Section XIII and XIV of the enactments; Also see Section 14 of Act No. XVIII of 1887 that established the University at Allahabad
[88] Section XII of the enactments.

the University at Punjab by which the college was converted into a University to confer degrees. The University at Punjab was, thus, the first teaching University in India.

92. On 12 January 1902, the Government of India issued a resolution to appoint a commission to "inquire into the condition and prospects of the Universities established in British India; to consider and report upon any proposals […] for improving their constitution and working […]". The Report of the Commission discussed the necessity of establishing teaching Universities, where better provision for advanced courses of study could be made.[89] In 1904, Act No. VIII of 1904 was enacted to amend the law relating to the Universities at Bombay, Calcutta, Madras and Allahabad. Section 3 of the Act provided that the University shall have the power to make provision for, *inter alia,* the instruction of students and the power to appoint University professors and Lecturers. Universities that were incorporated subsequent to Act No. VIII of 1904 had the power to instruct students in addition to conducting examinations to confer degrees.[90] However, teaching universities also had to be incorporated through a legislative enactment because they would have the power to confer degrees recognised by the Government.

93. It is in this background that we should decide if Universities established before the enactment of the UGC Act could be covered by Article 30(1). It is true that the intervention of the imperial legislature was necessary to incorporate a

[89] Report of the Indian Universities Commission 1902 [24, 25]
[90] See Section 4 of Osmania University Act, preamble and Section 4(1) of the Lucknow University Act 1920; preamble to the Delhi University Act 1922 which states that it established and incorporates a teaching and affiliating University; Section 4(1) of the Delhi University Act 1922; Section 4(1) of the Nagpur University Act 1923

university before the commencement of the Constitution. The intervention of the State legislature was necessary after the commencement of the Constitution until the enactment of the UGC Act [91]. The intervention of the legislative body was required to 'incorporate' universities because the degrees conferred by them would be recognised by the Government. This was required even for the incorporation of teaching universities. However, could it be argued that no person had the power to 'establish' a university merely because the intervention of the legislative body was required for the incorporation of the institution? Could it be argued that a university was 'established' by the legislature merely because it enacted a legislation incorporating it?

94. The words 'incorporation' and 'establishment' cannot be used interchangeably. They connote different meanings. 'Incorporation' signifies the legal existence of the institution.[92] In contrast, 'establishment' signifies the founding or bringing into existence of the institution.[93] The possibility of distinguishing the establishment and incorporation of universities arose with the advent of teaching Universities. Two kinds of institutions were incorporated as teaching universities. They consisted of institutions which were established and incorporated at the same time, and institutions in which the establishment of the institution predated its incorporation. Universities in the latter category, however, were teaching colleges converted into teaching

[91] See Entry 11 of List II to the Seventh Schedule to the Constitution prior to Constitution(Forty-second Amendment) Act 1976
[92] Oxford Dictionary defines the word 'incorporated' as formed into business company with legal status
[93] Oxford Dictionary defines establish as 'to start or create an organization, a system.'

universities. The University at Punjab is one such example. The Annamalai University would also fall in this category. In the case of Annamalai University, the Hon'ble Diwan Bahadur Sir S.R.M Annamalai Chettiyar had established and was maintaining colleges around Chidambaram in Tamil Nadu. The college was converted to a University through the enactment of Annamalai University Act 1928.[94] The 'establishment' and 'incorporation' of these universities was distinct. The incorporation of the University was necessary to confer degrees recognised by the Government. However, there was an institution that pre-dated the incorporation of the University that continued to exist even after the incorporation. Thus, the instance of conversion of teaching collages to teaching universities elucidates the distinction between the "establishment" and "incorporation" of educational institutions.

95. The word 'establish' as used in Article 30(1) cannot and should not be understood in a narrow and legalistic sense. The words used in clause (1) of Article 30 have to be interpreted in view of the object and purpose of the article, and the guarantee and protection it confers. The guarantee and protection are not dependent on the basis or the manner in which the legal requirements were/are complied with, rather it concerns the persons who have founded and created the establishment. The incorporation by a statute or the procedure and requirements in law are not determinative factors. The persons behind it, that is, the promoters and founder(s) are important. They should belong to a linguistic or a religious minority. There will always be

[94] See the preamble of the Annamalai University Act 1928

individuals and groups instrumental in catalysing and setting up the institution. Thus, giving a legal character to an educational institution through state or sovereign action, it does not *ipso facto* follow that the university so established deprives the group of persons/individuals the guarantee under clause (1) of Article 30 of the Constitution. Universities are as much educational institutions as schools and colleges. The interpretation in **Azeez Basha** (supra) confers a legalistic meaning to the word 'established', sans the context of clause (1) of Article 30. No distinction exists between universities and other educational institutions such as schools and colleges for the purpose of Article 30(1).

96. The following conclusions emerge from the discussion above:

a. The teaching universities and colleges serve the common function of educating students. No distinction between the two can be drawn for the purposes of Article 30(1) which guarantees minorities the right of greater autonomy in the administration of educational institutions to curate a model of education which best serves the interests of the community; and

b. The submission that a person did not have the power to 'establish' a university before the enactment of the UGC Act is rejected. The words establishment and incorporation cannot be interchangeably used. They connote different meanings. The former refers to **founding** an institution, which in the case of teaching colleges that were converted to universities would refer to any person or community who undertook the efforts the establish the teaching college.

c. The minority character of the institution is not ipso facto surrendered upon the incorporation of the University

97. The Solicitor General argued that **Azeez Basha** (supra) — correctly understood — holds that the Muslim minority surrendered its rights as a denominational institution before the Constitution was adopted by approaching the imperial legislature to recognise the degrees. He argued that the decision tacitly recognised the fact that two broad groups existed during the freedom struggle. The first of these groups was determined to conduct their affairs without assistance from or reference to the imperial legislature. It set up institutions which granted degrees which were not recognised by the imperial government. They did not seek recognition of the degrees granted by their institutions at that time. Instead, such institutions (and the degrees granted by them) were recognised post-independence. Examples of such universities include Shantiniketan; the predecessor of IIT Roorkee. In contrast, the second group chose to collaborate with the imperial government and sought recognition of the degrees awarded by its universities. Having approached the imperial government for such recognition, the second group surrendered their denominational status (comparable to minority status under Article 30). It was submitted that the founders of AMU formed a part of the second group. While MAO College may have been of a denominational character, it has been urged that the incorporation of the institute as AMU resulted in the surrender of rights. Since we are only dealing with the principles of law, we will address this argument without referring to the factual aspects submitted by the learned Solicitor General. In short, the argument is

that the minority character of an educational institution is surrendered upon the incorporation of the institution.

98. The minority character of institutions cannot be rejected if they were conferred a legal character by a statute enacted prior to 1950. The enactment was necessary to award degrees recognized by the British government, allowing graduates to gain degree recognition and secure employment. The enactment of the statute is a ministerial and a legislative act, which confers juristic personality as well as legal rights in terms of the law in force. The statute grants the power to the educational institution to confer the degrees. The incorporation by way of statute is a legal requirement. That being the case, we will not accept the argument that compliance with legal requirement would tantamount to the 'establishment' of an institution by the Legislature, and thereby the linguistic and religious minority forgo the guarantees and protection under clause (1) of Article 30 of the Constitution.

99. In the same vein, the state may also provide for the mode by which educational institutions may be set up or established. For instance, it may require that a society registered under the Societies Registration Act or a public trust constituted in accordance with law is a pre-requisite to establishing a school.[95] The state may also issue a certificate of recognition

[95] See, for instance, Section 20A of the Andhra Pradesh Education Act 1982 read with Rule 14(4) of the Andhra Pradesh Right of Children to Free and Compulsory Education Rules 2010.
Section 20A: "*20-A. Prohibition of individual to establish institutions.—On and from the commencement of the Andhra Pradesh Education (Amendment) Act, 1987 no individual shall establish a private institution: Provided that this section shall not have any effect on any private institution established by an individual and recognized by the competent authority prior to such commencement].*"
Rule 14(4): *"(4) The District Educational Officer, on being satisfied that the school fulfils the norms and standards prescribed under section 19 and section 25 of the Act, shall issue the recognition certificate in Form-2 as shown in the appendix. The certificate shall be for a period of three years and shall be issued within 30 days from the date of making application for recognition. The certificate of recognition shall be*

to the school (or other educational institution) meeting the relevant criteria. It may also require schools to register with the authorities.[96] Certain steps as mandated by law may be a *sine qua non* for setting up educational institutions.

100. In the absence of these prerequisites (such as registration with the competent authorities), the educational institution will have no existence in the eyes of the law. It is only upon compliance with these requirements that the institution assumes the legal form mandated by the regulatory provisions of the law.

101. It is true that many persons or groups founded universities which awarded degrees which were not recognised by the imperial government. The existence of this option and the fact that others chose this path in colonial times cannot shape the contours of the right under Article 30 in independent India. This is because the recognition of degrees was and is essential not only to the success of the university but more importantly, to the success of its graduates. Recognition of the degrees or qualifications held by persons who have completed courses from universities is essential to professional development. It is impossible to avail of employment opportunities if the degree that one holds is not recognised.

102. This interpretation has also found support in numerous judgments of this Court. Judgments of this Court have previously expounded on the importance

---

issued subject to following conditions: (a) The school is run by a society registered under the Societies Registration Act, 1860 (21 of 1860), or a public trust constituted under any law for the time being in force; …"

[96] See, for instance, Section 30 of the Karnataka Education Act 1983: "*30. Educational institutions to be registered.- (1) Save as otherwise provided in this Act, every local authority institution and every private educational institution established on or before the date of commencement of this Act or intended to be established thereafter, shall notwithstanding anything contained in any other law for the time being in force, be registered in accordance with this Act and the rules made thereunder. (2) No person or local authority shall establish or as the case may be, run or maintain an educational institution requiring registration under this section, unless such institution is so registered*."

of recognition or affiliation of a College. It is only with the affiliation of the college with the University that a student could be awarded a degree upon the completion of the course of study. The degree, beyond being a testament of a personal achievement, is necessary for their professional growth. In **in re the Kerala Education Bill 1957** (supra), this Court expounded on the importance of recognition and observed as follows:

> "32. […] Without recognition, therefore, the educational institutions established or to be established by the minority communities cannot fulfil the real objects of their choice and the rights under Article 30(1) cannot be effectively exercised. The right to establish educational institutions of their choice must, therefore, mean the right to establish real institutions which will effectively serve the needs of their community and the scholars who resort to their educational institutions. There is, no doubt, no such thing as fundamental right to recognition by the State but to deny recognition to the educational institutions except upon terms tantamount to the surrender of their constitutional right of administration of the educational institutions of their choice is in truth and in effect to deprive them of their rights under Article 30(1). We repeat that the legislative power is subject to the fundamental rights and the legislature cannot indirectly take away or abridge the fundamental rights which it could not do directly and yet that will be the result if the said Bill containing any offending clause becomes law."

103. In **Rev. Sidhajbhai** (supra), this Court reiterated that regulations which may impose conditions for the recognition of the educational institution must be directed towards making the institution effective, while retaining its character as a minority institution. The dual test laid down in this case to assess the validity of such regulations is that the regulations must be reasonable and regulate the educational character of the institution while being conducive to making it an effective vehicle of education. An educational institution does not

lose its minority character merely because it subjects itself to regulatory measures essential to avail the benefit of recognition/affiliation, or grant in aid, provided these controls are designed to maintain the standards of education and larger public interest.

104. The decision of the seven Judge Bench in **In re the Kerala Education Bill** (supra) was followed by a six Judge Bench in **Rev. Sidhajbhai Sabhai** (supra). This aspect was overlooked in **Azeez Basha** (supra) which was decided by a bench of five judges. The importance of recognition and affiliation cannot be understated. The position of law even at the time of the decision in **Azeez Basha** (supra), as held **in re the Kerala Education Bill 1957** (supra), was that recognition on terms tantamount to the surrender of the right to administer the institution was a violation of Article 30(1). For **Azeez Basha** (supra) to hold that the minority character of the institution is surrendered upon enactment by central imperial legislation is to hold that the recognition of its degrees would result in the denial of the right under Article 30, reducing the choice available to a religious or linguistic minority. This would be in the teeth of settled law on the subject as well as Article 30(1). **Azeez Basha** (supra) failed to notice this aspect of the decision in **In re the Kerala Education Bill 1957** (supra) discussed above and the decision in **Rev. Sidhajbhai** (supra).

105. Further, the decisions of this Court subsequent to **Azeez Basha** (supra) have not disturbed the relevant part of the precedents in **In re the Kerala Education Bill 1957** (supra) and **Rev. Sidhajbhai** (supra). **Azeez Basha**

(supra) is the lone case which stands apart in the long line of cases on this subject. In **St. Xavier's** (supra), the majority of the nine-Judge Bench held that an unconstitutional condition of surrendering the minority character in exchange for affiliation or recognition cannot be imposed.

106. Presently, the decision of eleven Judges in **TMA Pai** (supra) holds the field on the subject and is binding on this Court. It, too, unequivocally affirms the proposition of law discussed above. One of the many relevant paragraphs in this regard is extracted below:

> "70. … The object of establishing an institution has thus been to provide technical or professional education to the deserving candidates, and is not necessarily a commercial venture. In order that this intention is meaningful, the institution must be recognized. At the school level, the recognition or affiliation has to be sought from the educational authority or the body that conducts the school-leaving examination. … A college or a professional educational institution has to get recognition from the university concerned, which normally requires certain conditions to be fulfilled before recognition. **It has been held that conditions of affiliation or recognition, which pertain to the academic and educational character of the institution and ensure uniformity, efficiency and excellence in educational courses are valid, and that they do not violate even the provisions of Article 30 of the Constitution; but conditions that are laid down for granting recognition should not be such as may lead to governmental control of the administration of the private educational institutions**."
>
> (emphasis supplied)

107. Compliance with the legal requirement to secure a benefit provided by the State cannot be on terms that require the relinquishment of fundamental rights. An interpretation that leans towards this consequence must not be

adopted. Thus, the minority character of an educational institution could not have been denied merely because it was converted to a University through a legislative enactment.

108. In **Azeez Basha** (supra), this Court recognised the efforts of the Muslim community towards the establishment of AMU's predecessor, the MAO College, as well as towards the enactment of the AMU Act but held that the central imperial legislature established AMU, and not the Muslim community. In effect, it held that the enactment of the AMU Act rendered any previous action undertaken by the Muslim community towards the establishment of AMU irrelevant.

109. The reasoning of the Court hinged on the fact that the Muslim minority could have established a university and awarded degrees but could not have insisted upon governmental recognition of its degrees. The Court held that the fact that AMU was brought into existence by a statute which mandated the recognition of its degrees meant that the central imperial legislature established it. Since the correctness of the reasoning of the Court is being considered in these proceedings, it is extracted below:

> "22. There was nothing in 1920 to prevent the Muslim minority, if it so chose, to establish a university; but if it did so the degrees of such a university were not bound to be recognised by Government. … The Aligarh University was also in the same way established by legislation and it provided under Section 6 of the 1920 Act that "the degrees, diplomas and other academic distinctions granted or conferred to or on persons by the University shall be recognised by the Government as are the corresponding degrees, diplomas and other academic distinctions granted by any other university incorporated under any enactment". It is clear therefore that even though the Muslim minority could have established at Aligarh in 1920 a university, it could not insist that degrees granted by such a

> university should be recognised by Government. Therefore when the Aligarh University was established in 1920 and by Section 6 its degrees were recognised by Government, an institution was brought into existence which could not be brought into existence by any private individual or body for such individual or body could not insist upon the recognition of the degrees conferred by any university established by it. The enactment of Section 6 in the 1920 Act is a very important circumstance which shows that the Aligarh University when it came to be established in 1920 was not established by the Muslim minority, for the minority could not insist on the recognition by Government of the degrees conferred by any university established by it.
>
> 23. … There was no Aligarh University existing till the 1920 Act was passed. It was brought into being by the 1920 Act and must therefore be held to have been established by the Central Legislature which by passing the 1920 Act incorporated it. The fact that it was based on the M.A.O. College, would make no difference to the question as to who established the Aligarh University. The answer to our mind as to who established the Aligarh University is clear and that is that it was the Central Legislature by enacting the 1920 Act that established the said University. As we have said already, the Muslim minority could not establish a university whose degrees were bound to be recognised by Government as provided by Section 6 of 1920 Act : that one circumstance along with the fact that without the 1920 Act the University in the form that it had, could not come into existence shows clearly that the Aligarh University when it came into existence in 1920 was established by the Central Legislature by the 1920 Act. It may be that the 1920 Act was passed as a result of the efforts of the Muslim minority. But that does not mean that the Aligarh University when it came into being under the 1920 Act was established by the Muslim minority."

110. In **Azeez Basha** (supra), this Court observed that the term 'establish' means 'to bring into existence' and not any of the other dictionary meanings that is, to ratify, confirm, settle, found, or create. Adopting a formalistic interpretation, the Bench held that AMU was not established by the Muslim minority since it was brought 'into existence' by the Central Legislature. In **Mother Provincial** (supra), another Constitution Bench which was decided before **Azeez Basha** (supra) interpreted the word 'establish' to mean to found an institution, which

offers a broader interpretation.[97] In our view, it is inconsequential whether the word means 'to bring into existence' or 'to found'. We have held above that the enactment of a legislation to incorporate a university would not repudiate the minority character. The Court must pierce the veil of the statute to identify if the institution intended to retain its minority character even upon incorporation.

111. The respondents further submitted that the long title and the preamble of the enactment must be used to determine if the minority established the institution. A comparison was drawn between the preamble of the AMU Act and statutes by which other universities were incorporated. For example, the preamble of the Annamalai University Act 1928 stipulates that the founder of the college, Shri Annamalai Chettiyar, handed over the college with the property and a fund of twenty thousand rupees to the local Government for the establishment of a University. The preamble also recognises that he and his heirs would be entitled to certain powers and privileges in the University. However, in contrast, the preamble of the AMU Act 1920 stated that it is an enactment to 'establish' and 'incorporate' a University.

112. We do not agree with this submission. It cannot be argued that a university was established by Parliament merely because the long title and preamble of the statute incorporating the university states that it is an Act to establish and incorporate. If such a formalistic interpretation is adopted, fundamental rights

[97] 8. […] Establishment here means the bringing of an institution and it must be by a minority community. It matters not if a single philanthropic individual with his own means, **founds** the institution or the community at large contributes the funds." (emphasis supplied)

would be made subservient to legislative language. The preamble of the Annamalai University Act certainly provides context to the incorporation of the University and brings out the distinction between incorporation and establishment. However, the courts in the absence of such an elaborate preamble must not be ready to conclude that Parliament established the University. The courts must identify the circumstances surrounding the incorporation of the University (including through a reading of the statute) to identify who established the university. Formalism must give way to actuality and to what is real.

113. The written submissions filed on behalf of the Union of India place reliance on **Dalco Engg. (P) Ltd.** v. **Satish Prabhakar Padhye**[98] to argue that the term 'establish' means "coming into existence by virtue of a statutory enactment". It suggests that the institution owes its existence to the legislature if the long title to an enactment states that it is an act to "*establish and incorporate"*.

114. In **Dalco** (supra), the question before this Court was whether companies incorporated in terms of the Companies Act 1956 were bound by the norm contained in Section 47 of the same enactment. Section 47 stipulated that an 'establishment' shall not dispense with or reduce in rank an employee who acquires a disability during their service.[99] Section 2(k) of the same statute defined 'establishment' in the following terms:

[98] (2010) 4 SCC 378

[99] Section 47, Companies Act 1956: "47. Non-discrimination in government employment.—(1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service:
Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits:

> "2. Definitions.—In this Act, unless the context otherwise requires,—
>
> …
>
> (k) 'establishment' means **a corporation established by or under a Central, Provincial or State Act,** or an authority or a body owned or controlled or aided by the Government or a local authority or a government company as defined in Section 617 of the Companies Act, 1956 (1 of 1956) and includes Departments of a Government;"
>
> (emphasis supplied)

115. After analysing the precedents, this Court held that Section 2(k) referred to companies which owe their existence to a statute. It held that without such a statute, the company would not exist. It held that the term "established by or under" in Section 2(k) referred to companies which are created by statutes and not ones which are merely governed by statutes after coming into existence. This court, therefore, held that companies incorporated and registered under the Companies Act 1956 are not necessarily established by it.

116. **Dalco** (supra) does not have a bearing on the interpretation of the term "establish" in Article 30 because it was concerned with the interpretation of the term "established **by or under a Central, Provincial or State Act**" as it occurs in a parliamentary statute. The words "establish and incorporate" in

---

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.
(2) No promotion shall be denied to a person merely on the ground of his disability:
Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."

the long title of enactments must be read together holistically to understand the import of the expression. The other cases[100] relied on by the Union of India in this respect are not applicable to the question before us for similar reasons.

d. 'Minority' as on the commencement of the Constitution

117. Mr Dwivedi submitted that an educational institution to be a minority educational institution must have been established by a linguistic or religious minority at the time of establishment. He proposed that the following tests must be satisfied to determine if the community was a minority:

a. The numerical test:[101] Which community ruled the country when the university was established? Is the community which seeks to claim the right under Article 30 a minority compared to the former?

b. The qualitative test of non-dominance:[102] Even if the community which seeks to claim the right under Article 30 was in a numerical minority, was it in a non-dominant position in the state at the point of time at which the institution was established?

c. The test of self-assessment: Did the specific persons who established the educational institute consider themselves to be a minority?

[100] Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi (1975) 1 SCC 421; Vaish Degree College v. Lakshmi Narain (1976) 2 SCC 58; S.S. Dhanoa v. MCD (1981) 3 SCC 431
[101] See opinion of Justice Ruma Pal in TMA Pai (supra)
[102] See opinion of Justice Quadri in TMA Pai (supra)

118. A preliminary question must be answered before addressing the feasibility and legality of adopting the above tests. What should be the relevant **point** to determine if the educational institution that was founded before the commencement of the Constitution was established by a minority? Should it be determined based on the time of establishment, the time of the commencement of the Constitution, or the time when the right was claimed.

119. Before the commencement of the Constitution, there was no concept of minority institutions, both linguistic and religious. The guarantee and the protection given by the Constitution are applicable on the date when the Constitution was adopted. It is on this date that it must be determined if the right under Article 30 accrues. However, when the question of whether the educational institution was **established** by a linguistic or a religious minority arises, we will have to relate back to the point in time when the institution was established. It would be immaterial that back then the educational institution was not granted the status and treated as a linguistic or a religious minority institution. Thus, the details of the persons who had established the institution, though earlier in point of time, is relevant and determines the character of the institution. Such interpretation would do justice to Article 30(1) and not deny and rob minority educational institutions of constitutional guarantees.

120. The question of whether they qualify as a ‘minority’ has to be answered with reference to the date of enforcement of the Constitution. The Constitution upon its adoption guaranteed fundamental rights to specific groups such as ‘persons’, ‘citizens’, ‘religious and linguistic minorities’, ‘women’, ‘the

Scheduled Castes' and 'Scheduled Tribes'. These groups consist of such members as conceived by the Constitution. For example, Part II of the Constitution and provisions of the Citizenship Act 1955 enacted in pursuance of the power provided under Article 11 stipulate conditions for acquiring citizenship. Only those persons who satisfy the conditions prescribed can enforce the rights guaranteed to citizens as a class. Similarly, the President in exercise of the power under Article 341 may notify castes, tribes or groups that would be Scheduled Castes for the purposes of the Constitution.

121. The only criteria that is prescribed for right-bearers under Article 30 is that they should be linguistic or a religious minorities. The courts have, however, specified what constitutes a minority. Chief Justice Kirpal, writing for the majority of the eleven-Judge Bench in **TMA Pai** (supra) observed that the minority must be determined based on the test of numerical minority within the State.[103] If a group or community is required to prove that it was a religious or linguistic minority at the time of establishment of the institution (where the institution was established before the commencement of the Constitution), it would lead to a situation where the fundamental right is conferred upon a group other than the one intended by the Constitution. The demography of the Dominion of India underwent a drastic change upon partition. The Constitution, through Article 30(1), confers a right on those communities that were disadvantaged upon the commencement of the Constitution and not the group that was disadvantaged in pre-independent India.

[103] TMA Pai (supra) [81]

122. We reject the argument that the test of whether an educational institution is a minority institution must be examined based on whether the community or the group which had established the institution was a minority at the time of its establishment in pre-independent India. The purpose of the provision as highlighted in the preceding sections is to ensure that the minorities are able to preserve and promote their linguistic and religious culture. For this purpose, the status of the group/community, that had established the institution, on the date of commencement of the Constitution should be considered. The test of establishment will apply to future situations on the day when new educational institutions are established. The protection under clause (1) of Article 30 cannot be denied to institutions established before the commencement of the Constitution for the reason that at the time of establishment in pre-independent India, the founders were not aware that they would receive protection of Article 30(1).

123. Having addressed the preliminary arguments on the applicability of Article 30, we will now proceed to formulate the indicia for the **establishment** of an educational institution.

v. Indicia for the 'establishment' of a minority educational institution

124. In this section of the judgment, we will answer two questions: (i) the indicia for 'establishment' of a minority educational institution; and (ii) the burden and degree of proof required to prove 'establishment' of a minority educational institution.

125. In **SK Patro** (supra), the question before the Constitution Bench was whether Church Missionary Society Higher Secondary School was a minority educational institution. It was contended that the school was established by the Church Missionary Society, London and not the local residents of Bhagalpur. The Bench relied on the following evidence to conclude that the School was established by the local Christians:

    a. The correspondence and resolutions indicated that a permanent home for the Boys School was set up on property acquired by local Christians and in buildings erected from funds collected by them[104];

    b. The institution and the land on which it was built and the balance in the local fund were handed over to the Church Missionary Society[105]; and

    c. Though substantial assistance was obtained from the Church Missionary Society London, it could not be said that the school was not established by local residents only because of that[106].

126. In **Mother Provincial** (supra), this Court observed that the intention to found an institution for the benefit of the minority community must be present. In **St. Stephen's** (supra), a Constitution Bench determined whether St. Stephen's College is a minority educational institution. St Stephen's College is a constituent college of Delhi University. The Bench held that the college was

[104] SK Patro (supra) [15]
[105] ibid [15]
[106] ibid [16]

established by the Indian Christian community based on the following material:

a. The purpose of establishing the educational institution emerged from the Report of 1878 to the Cambridge Brotherhood. The purpose of founding the college was to ensure that graduates from St. Stephen's Mission School could be given the benefit of Christian teachings in college[107];

b. The buildings depicted the Christian orientation of the college[108]

c. The motto of the college is "Ad Dei Gloriam", that is the glory of god[109];

d. There is a chapel in the college campus, where religious instruction is imparted[110];

e. The Constitution of the college reflects its Christian character. It states that the object of the college is, *inter alia*, to offer instruction on doctrines of Christianity[111], the original members of the society were mostly Christians[112], and the composition of the society reflects its Christian character where a large number of Christian members of the Church of North India are a part of it[113]; and

f. The Governing Body has a distinct christian character. The Supreme Council comprises of members of the Church of North India. Their role

[107] St Stephen's (supra) [30]
[108] Ibid [31-32] Foundation stone has the inscription :"to the glory of god, and the advancement of sound, learning and religious education"; a cross was placed in the new building.
[109] ibid [33]
[110] ibid [34]
[111] Memorandum of the Society and Rules, Clause 2
[112] Memorandum of the Society and Rules, Clause 4
[113] ibid [35]

is to look after the religious and moral instruction to students[114]. The administration vests with the Governing Body which predominantly consists of Christians. Though three of the thirteen members of the Governing Body may be non-Christians, that does not dilute the Christian character of the institution.

127. The decisions in **Mother Provincial** (supra), **SK Patro** (supra) and **St. Stephen's** (supra) emphasise that the indicia for establishment must elucidate the minority character of the educational institution. What is the meaning of the phrase 'minority character'? Are special rights guaranteed by Article 30(1) only if educational institutions are established 'for' the minorities, towards the purpose of protecting minority interests? If yes, when can the courts be certain that the above two conditions are satisfied? That is, what are the 'core essentials' of minority character? We will answer this by referring to judicial decisions on four questions. Clarity over the essentials of the minority character will help us ascertain the indicia for 'establishment' of a minority educational institution.

128. The first question that arose in earlier cases was whether a minority educational institution must be established towards the conservation of the distinct language, script or culture of linguistic and religious minorities protected by Article 29(1). In **Rev. Father W. Proost** v. **The State of Bihar**[115], a Constitution Bench answered the question in the negative. The Bench held that Article 30(1) covers a minority educational institution which is established

[114] ibid [36]
[115] (1969) 2 SCR 73

to conserve culture and language. However, that need not be the **only** purpose for the establishment of the institution. This Court held that the scope of Article 30(1) cannot be restricted by Article 29(1).[116] In **St. Xavier** (supra), the majority of the nine-Judge Bench approved this interpretation.[117]

129. The second question that arose in earlier decisions was whether an educational institution would retain its minority character even if non-minorities are admitted in it. Would a Muslim minority education institution retain its minority character when it admits students from other faiths in the institution? **In re the Kerala Education Bill 1957** (supra), a seven-Judge Bench held that a minority educational institution would not lose its minority character by merely admitting students belonging to non-minorities and that the provision contemplates an institution with a 'sprinkling of outsiders'.[118] This position was further fortified in **TMA Pai** (supra). In **TMA Pai** (supra), Article 29(2) and Article 30(1) were read harmoniously to hold that Article 29(2) would apply to a limited extent to minority educational institutions as well.[119] Thus, an aided minority educational institution is mandated to admit

---

[116] Rev. Father W Proost v. State of Bihar [5J] (1969) 2 SCR 73;
[117] See footnote 30 of this judgment.
[118] "By admitting a non-member into it the minority institution does not shed its character and cease to be a minority institution. Indeed the object of conservation of the distinct language, script and culture of a minority may be better served by propagating the same amongst non-members of the particular minority community."
[119] "149. […] As observed quite aptly in *St. Stephen's case* [(1992) 1 SCC 558] (at SCC p. 608, para 85) "*the fact that Article 29(2) applies to minorities as well as non-minorities does not mean that it was intended to nullify the special right guaranteed to minorities in Article 30(1)*". The word "only" used in Article 29(2) is of considerable significance and has been used for some avowed purpose. Denying admission to non-minorities for the purpose of accommodating minority students to a reasonable extent will not be *only* on grounds of religion etc., but is primarily meant to preserve the minority character of the institution and to effectuate the guarantee under Article 30(1). **The best possible way is to hold that as long as the minority educational institution permits admission of citizens belonging to the non-minority class to a reasonable extent based upon merit, it will not be an infraction of Article 29(2), even though the institution admits students of the minority group of its own choice for whom the institution was meant. What would be a reasonable extent would depend upon variable factors, and it may not be advisable to fix any specific percentage.** The situation would vary according to the type of institution and the nature of education that is being imparted in the institution. Usually, at the school level, although it may be possible to fill up all the seats with students of the minority group, at the higher level, either in colleges or

students from other faiths and that in itself does not erode the minority character of the institution.

130. The third question was whether a minority education institution would lose its minority character when secular education is taught. In **In re Kerala Education Bill** (supra) and **St. Xavier's** (supra), this Court held that the word 'choice' in Article 30(1) expands the scope of the provision to include not only religious but also secular education.[120]

131. The fourth question was whether it is essential that religious instruction must be provided in a minority educational institution. In **TMA Pai** (supra), this Court held that Article 28 equally applies to minority educational institutions.[121] Thus, if the minority institution has received aid from the State wholly or in part, no student can be forced to participate in religious

---

in technical institutions, it may not be possible to fill up all the seats with the students of the minority group. However, even if it is possible to fill up all the seats with students of the minority group, the moment the institution is granted aid, the institution will have to admit students of the non-minority group to a reasonable extent, whereby the character of the institution is not annihilated, and at the same time, the rights of the citizen engrafted under Article 29(2) are not subverted. It is for this reason that a variable percentage of admission of minority students depending on the type of institution and education is desirable, and indeed, necessary, to promote the constitutional guarantees enshrined in both Article 29(2) and Article 30. [emphasis supplied]

[120] In re Kerala Education Bill (supra) [23] "23. […] the right conferred on such minorities is to establish educational institutions of their choice. It does not say that minorities based on religion should establish educational institutions for teaching religion only, or that linguistic minorities should have the right to establish educational institutions for teaching their language only. What the article says and means is that the religious and the linguistic minorities should have the right to establish educational institutions of their choice. There is no limitation placed on the subjects to be taught in such educational institutions. As such minorities will ordinarily desire that their children should be brought up properly and efficiently and be eligible for higher university education and go out in the world fully equipped with such intellectual attainments as will make them fit for entering the public services, educational institutions of their choice will necessarily include institutions imparting general secular education also."; St. Xavier's (supra) [Chief Justice Ray for himself and Justice Palekar, 8]; [Justice HR Khanna, 96]; [Justice Beg, 197]; [Justice Dwivedi, 236];

[121] See TMA Pai (supra) [88-90;144]; "144 […] As in the case of a majority-run institution, the moment a minority institution obtains a grant of aid, Article 28 of the Constitution comes into play. When an educational institution is maintained out of State funds, no religious instruction can be provided therein. Article 28(1) does not state that it applies only to educational institutions that are not established or maintained by religious or linguistic minorities. Furthermore, upon the receipt of aid, the provisions of Article 28(3) would apply to all educational institutions whether run by the minorities or the non-minorities. […] Just as Articles 28(1) and (3) become applicable the moment any educational institution takes aid, likewise, Article 29(2) would also be attracted and become applicable to an educational institution maintained by the State or receiving aid out of State funds."

instruction. Similarly, a minority educational institution which is fully maintained out of State funds cannot provide religious instruction. Even here, a harmonious construction of Article 28 and Article 30(1) was adopted.

132. The discussion above elucidates that the 'minority character' of the institution is not a rigid concept. The provision does not contemplate institutions which are exclusively for the benefit of members from the minority community. A minority institution established by a religious or linguistic minority need not be solely for their students or only for the purpose of teaching the tenets of their religion or language. The issue of whether an institution is a minority institution should not be determined purely on the basis of the number of their students or the teaching staff. Such an interpretation is contrary to precedent.

133. A holistic and realistic view should be taken keeping in mind the objective and purpose of the provision. Based on the above principles laid down by Benches of co-equal strength and larger Benches of this Court on the components of the 'minority character', the following inferences can be drawn:

    a. The existence of a religious place for prayer and worship is not a necessary indicator of the minority character because institutions wholly maintained out of State funds are constitutionally barred from providing religious instructions; and

    b. The existence of religious symbols in the precincts of the educational institution are not necessary to prove the minority character because educational institutions could be established for minorities to provide secular education without imparting any lessons on religion.

134. As discussed above, ‘establishment’ or formation of an institution can be at any point of time and even before the commencement of the Constitution. If an institution was established before the commencement of the Constitution, the enquiry on the question of ‘establishment’ must relate back to the date when the institution was established or formed to ascertain whether it would qualify as a minority institution upon the commencement of the Constitution.

135. To determine who established the institution, the Courts must consider the genesis of the educational institution. For this analysis, the Courts must trace the origin of the idea for the establishment of the institution. The Court must identify who was the brain behind the establishment of the educational institution. Letters, correspondence with other members of the community or with government/State officials and resolutions issued could be valid proof for establishing ideation or the impetus to found and establish. The proof of ideation must point towards one member of the minority or a group from the community.[122]

136. The second indicia is the purpose for which the educational institution was established. Though it is not necessary that the educational institution must have been established **only** for the benefit of a religious or linguistic minority community, it must **predominantly** be for its benefit. It is not necessary that education must be provided in the language spoken by the minority or on the religion of the minority. For example, it is not necessary that an educational institution established for the Tamils in Uttar Pradesh must necessarily

[122] Mother Provincial (supra)

prescribe Tamil as the language of instruction. However, it must be proved that the institution was established for the benefit of the tamil-speaking community. This indicia could be proved by a reference to private communication or speeches about the necessity of establishing an educational institution for the community and a recognition of the educational difficulties faced by the community.

137. The third test is tracing the steps taken towards the implementation of the idea. Information on who contributed the funds for its creation, who was responsible for obtaining the land, and whether the land was donated by a member of the minority community or purchased from funds raised by the minority community for this purpose or donated by a person from some other community specifically for the establishment of a minority educational institution are elements that must be considered. Similar questions must be asked of its other assets. Other important questions are: who took the steps necessary for establishing the institution (such as obtaining the relevant permissions, constructing the buildings, and arranging other infrastructure)? It is also important to note that the state may grant some land or other monetary aid during or after the establishment of the educational institution. If the land or monies were granted after the establishment, the grant would not have the effect of changing the minority character of the institution. Minority institutions are not barred from receiving aid save at the cost of their minority status.[123] If the land or monies are granted at the time of

[123] TMA Pai (supra) [141]

establishment, the circumstances surrounding the establishment must be considered as a whole to determine who established the institution. The presence of a grant must not be automatically interpreted as leading to the erasure of a claim to minority status.

138. The next question is whether the administrative structure of the educational institution is an indicia for the establishment of a minority educational institution. We have already held above that an educational institution is a minority educational institution if it is **established** by a religious or linguistic minority. We have clarified that it is not necessary to prove that administration vests with the minority to prove that it is a minority educational institution because the very purpose of Article 30(1) is to grant special rights on administration as a **consequence** of establishment. To do otherwise, would amount to converting the consequence to a pre-condition. The right to administer is guaranteed to minority educational institutions to enable them to possess sufficient autonomy to model the educational institution according to the educational values that the community wishes to emphasise. It is not necessary that the purpose can only be implemented if persons belonging to the community helm the administrative affairs. This is so particularly because a minority institution may wish to emphasise secular education. The founders or the minority community may choose to populate the managing board (or a comparable authority) responsible for the day-to-day administration of the institution with persons belonging to the same community. However, they are not compelled to do so. They may wish to appoint persons who do not belong to their community but who they deem fit for the proper administration of the

institution. This may be the case for professional colleges which offer specialised courses such as law, medicine, or architecture, where the founders may not possess the knowledge, experience, or insight necessary to manage or administer the institution personally.

139. The test to be adopted by the Court is whether the administrative set up of the educational institution affirms the minority character of the institution. If the administrative structure of the educational institution does not reflect its minority character or when it does not elucidate that the educational institution was established to protect and promote the interests of the minority, it may be reasonably inferred that the purpose was not to establish an educational institution for the benefit of the minority community.

140. We may specifically deal with a scenario of an educational institution established before the commencement of the Constitution. The test of administration should be evaluated in praesenti, that is, on the date of the commencement of the Constitution. An institution to be a minority institution must satisfy the criteria of being 'administered' as a minority institution on the date of commencement of the Constitution, and being a minority institution on the date of formation. Even if an educational institution was established by the minority for the purposes of the community, we must assess the impact of any subsequent events that altered the character of the institution before the commencement of the Constitution. We have in section E(iv)(c) held that the statutory incorporation of the institution does not *ipso facto* amount to a surrender of the minority character of the institution. We have held that the

Court must pierce the veil to identify if the University was established by a minority for the purpose of promoting the interest of the community. The Court may on a holistic reading of the statutory provisions relating to the administrative set-up of the educational institution deduce if the minority character or the purpose of establishment was relinquished upon incorporation. The question is whether the regulatory measures wrest the administrative control from the founders of the institution. This is a question of fact which must be determined on the facts of each case. The Court must make that determination upon a comprehensive analysis of the administrative framework which includes host of factors such as the representation of the interests of the community in the administrative set-up.

141. Taken together, these are the main indicia which assist the Court in determining who established an educational institution under Article 30. However, the complex nature of establishing an educational institution is not lost on us. Undoubtedly, there can be no straitjacket formula which may be applied. The above indicia of establishment must be considered as a whole, along with any relevant facts which are available to the Court. The matter must be considered in totality and competing factors must be weighed against each other depending on the facts and circumstances of each institution.

142. The above indicia must be proved through the submission of cogent material. Reliance must be placed on primary sources such as office documents, letters and resolutions or memorandums issued to implement the resolutions. Secondary sources must only be used to corroborate the primary sources.

The onus to prove that the educational institution was established by a minority is on the claimants.

143. One of the questions referred to this Bench was whether Article 30(1) envisages an institution which is established by minorities alone without participation from any other community? This question was based on the facts as observed by this Court in **Anjuman-e-Rahmaniya** (supra) where some persons from communities other than the Muslim community had contributed to the establishment of the educational institution. That case has been finally adjudicated and the issues which arose in it do not survive. Nothing in Article 30 prevents some persons from other communities in contributing to the establishment of an institution by a minority. There may be persons hailing from different communities who are concerned about the need for minority educational institutions and lend their assistance in some form – be it by contributing monies or otherwise. Their participation and involvement would not preclude Article 30 from being applicable to such institutions provided that the minority community continues to shoulder the core of the responsibility of establishing an educational institution.

vi. <u>Impact of Entry 63 of List I on the minority status of educational institutions</u>

144. Entry 63 of the Union List to the Seventh Schedule to the Constitution deals with the institutions known at the commencement of the Constitution as Benares Hindu University, Aligarh Muslim University and Delhi University. Notably, the entry also indicates that Parliament may enact laws which pertain

to any other institutions which are declared by law to be institutions of national importance.[124]

145. Entry 63 of List I had its genesis in Entry 13 of List I to the Seventh Schedule to the Government of India Act 1935. Entry 13 read as "Benares Hindu University and the Aligarh Muslim University". Entry 17 of List II read as "Educations including Universities other than those specified in paragraph 13 of List I". The Federal Legislature had the power to enact laws with respect to BHU and AMU while the Provincial Legislatures had the power to enact laws to establish new Universities and amend the legislation through which Universities were established and/or incorporated, except for the laws relating to AMU and BHU.[125]

146. The Constitution of India adopted a similar model of division of legislative power as regards the subject at hand. The State Legislature had the power to enact laws with respect to education, including Universities by virtue of Entry 11 of List II of the Seventh Schedule to the Constitution. This power was subject to Entries 63,64 and 65 of List I and Entry 25 of List III. By the Constitution (Thirty-second Amendment) Act 1973, Entry 63 was amended to include the University established in pursuance of Article 371-E[126].[127] Subsequently, by the Constitution (Forty-second Amendment) Act 1976,

---

[124] Entry 63: "The institutions known at the commencement of this Constitution as the Benares Hindu University, the Aligarh Muslim University and the Delhi University, and any other institution declared by Parliament by law to be an institution of national importance."
[125] The Government of India Act 1935, Section 100
[126]Article 371-A Establishment of Central University in Andhra Pradesh.- Parliament may by law provide for the establishment of a University in the State of Andhra Pradesh.
[127] Entry 63 subsequent to the enactment of the Constitution (Thirty-second Amendment) Act 1973: "The institutions known at the commencement of this Constitution as the Benares Hindu University, the Aligarh Muslim University and the Delhi University; the University established in pursuance of Article 371-E any other institution declared by Parliament by law to be an institution of national importance."

Entry 11 of List II was deleted and a similar subject was placed in Entry 25 of List III[128]. Both Entry 11 of List II (prior to its omission) and Entry 25 of List III (as it currently stands) were made subject to the provisions of Entries 63, 64 and 65 of List I. The effect of this was that Parliament retained the exclusive power to legislate upon AMU, BHU and Delhi University in Entry 63 of List I and the subjects which fall within the scope of Entries 64 and 65 notwithstanding the broader or more general entries in the Seventh Schedule which include Universities.

147. In the Government of India Act 1935, the Federal Legislature only had the power to legislate upon AMU and BHU. However, the scope of Parliament's legislative domain over education and Universities was enlarged in the Constitution of India. In addition to Entry 63, Parliament also has the power to legislate upon educational institutions which fall within the ambit of Entries 64 and 65. Entry 64 deals with institutions of scientific or technical education financed by the Government of India wholly or in part and declared by Parliament by law to be institutions of national importance. Entry 65 deals with Union agencies and institutions for (i) professional, vocational or technical training, including the training of police officers; (ii) the promotion of special studies or research; and (iii) scientific or technical assistance in the investigation or detection of crime. Thus, Entries 64 and 65 deal with institutions which provide education in specific fields. Another crucial point is that by virtue of Entries 63 and 64, Parliament has the power to legislate upon

[128] Entry 25: "Education, including technical education, medical education and universities, subject to the provisions of Entries 63, 64, 65 and 66 of List I; vocational and technical training of labour."

institutions which are declared by law to be institutions of national importance. While Entry 64 provides broad criteria for declaring an institution to be of national importance, Article 63 does not contain similar indicia.

148. The question is whether the inclusion of a University as an institution of 'national' importance amounts to an abrogation of its minority character. The declaration of an institution as one of national importance does not amount to a change in the minority character of the institution. This is for multiple reasons. First, Entries in the Lists in the Seventh Schedule delineate the legislative competence of Parliament and of the legislatures of the States. As discussed in the preceding sections of this judgment, the State may regulate various aspects of education and educational institutions. The field of legislative competence over universities does not amount to a surrender of minority character. The distribution of legislative competence between Parliament and the State legislatures does not bear upon the minority character of the institution. Second, as a matter of principle, nothing prevents a minority educational institution from being an institution of national importance. The qualities denoted by the terms "national" and "minority" are not at odds with each other nor are they mutually exclusive. The former indicates that the institution has a pan-India or national character, as opposed to relatively more local or regional institutions. It is indicative of the importance of the institution on the national stage. The latter is evidence of the religious or linguistic background of the founders and the constitutional rights which vest in them. Each term indicates distinct attributes which are not antithetical to one another. A university may well be both national and ergo, of national

importance, as well as minority in character. There is no reason why a minority educational institution cannot also be an institution of national importance. Third, Entries 63 and 64 provide Parliament with the power to declare an institution to be of national importance. An interpretation that an institution of national importance cannot be a minority institution would amount to rendering the fundamental right guaranteed by Article 30(1) subservient to the legislative power of Parliament. Parliament can in terms of Entries 63 and 64 declare any institution to be of national importance.[129] If the submission of the respondents is accepted, such a declaration would automatically exclude the institution(s) from the scope of Article 30(1).

vii. The decision of this Court in *Prof. Yashpal*

149. Question (d) formulated in these proceedings requires the Court to assess whether the decision in **Prof. Yashpal** (supra) has a bearing on the other questions and if so, in what manner. It is therefore necessary to advert to the facts and decision in that case. Various writ petitions challenged certain provisions of the Chhattisgarh Niji Kshetra Vishwavidyalaya (Sthapana Aur Viniyaman) Adhiniyam 2002.[130] Section 5 of this statute empowered the state government to incorporate and establish a university by issuing a notification in the Gazette. Section 6 permitted such a university to affiliate any college or other institution or to set up more than one campus with the prior approval of

[129] See The Jawaharlal Institute of Postgraduate Medical Education and Research, Puducherry Act 2008; The Institutes of Technology Act 1961; The Indian Institutes of Management Act 2017; National Institutes of Technology, Science, Education and Research Act 2007; The Indian Institutes of Information Technology Act 2014; See https://www.education.gov.in/institutions-national-importance
[130] "Chhattisgarh Act"

the state government. The state government established more than a hundred universities under the Chhattisgarh Act.

150. The petitioners in that case submitted that:

a. The universities established under the Chhattisgarh Act had no buildings or campuses and were running from tenements consisting of a single room or a single floor in a building. Basic infrastructure (such as classrooms, libraries, and laboratories) was absent. Despite this, the universities were empowered to award degrees;

b. The state government did not exercise any supervision over these universities and was establishing them in a mechanical manner, without assessing the infrastructure, teachers, or other resources of each of them;

c. The UGC was unable to exercise any control over these universities due to the scheme of the Chhattisgarh Act and was made a redundant body;

d. These universities were offering courses and degrees which were not a part of the Schedule to the UGC Act. This was in violation of Section 22 of the UGC Act as well as the Schedule;

e. These universities were offering professional courses without obtaining permission or approval from regulatory bodies such as the All India Council of Technical Education, Medical Council of India and Dental Council of India; and

f. These universities conferred degrees without obtaining the requisite permission from statutory bodies. These degrees would not be recognised by professional organisations or other employers. The students who were awarded such degrees would therefore not only suffer financially but would also have lost the time spent completing these courses.

151. In response, the State of Chhattisgarh submitted that it was competent to enact the statute under challenge in view of Entry 32 of List II of the Seventh Schedule to the Constitution[131]. It argued that the universities were established on the basis of the representations made by the sponsoring body as set out in the project reports. However, it admitted that some of these universities did not meet the minimum standards expected of educational institutions, giving rise to serious concerns about the academic interest of the students. It stated that it therefore amended the Chhattisgarh Act in 2004. After the amendments, a large number of universities were de-notified because they failed to comply with the amended statute. Finally, it argued that the writ petitions ought to be dismissed because the concerns raised in them no longer subsisted after the amendments in 2004 and the consequent denotification of many universities.

152. This Court analysed the relevant entries in the Lists of the Seventh Schedule to the Constitution as well as the UGC Act and held that Sections 5 and 6 of

[131] "32. Incorporation, regulation and winding up of corporations, other than those specified in List I, and universities; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies."

Chhattisgarh Act were *ultra vires* the Constitution and liable to be struck down for the following reasons:

a. The term "university" occurring in the three Lists of the Seventh Schedule must mean an institution with adequate facilities and resources for advanced learning and research. The standard of teaching and education must be such as would befit a university. The power conferred on state legislatures with respect to the incorporation of universities must be exercised only with respect to institutions which would in substance amount to universities. The Chhattisgarh Act did not provide for the establishment of universities in the true sense. Rather, it conferred the legal status of a university to mere institutions or project reports and permitted them to issue degrees. In doing so, it clothed an institute which is not a university and cannot amount to a university (because of a lack of infrastructure and resources) with the juristic personality of a university. This is not contemplated either by Entry 32 of List II or Entry 25 of List III. Sections 5 and 6 of the Chhattisgarh Act were a fraud on the Constitution;

b. Although Entry 32 of List II and Entry 25 of List III empower the state legislatures to enact laws concerning the incorporation of universities, the whole gamut of the university including teaching, quality of education, curriculum and examinations, would not come within the purview of the state legislature because of Entry 66 of List I. Entry 66 of List I concerns the coordination and determination of standards in

institutions for higher education or research and scientific and technical institutions. Parliament alone is competent to enact legislation which pertains to Entry 66 of List I. The UGC Act was enacted in pursuance of this entry;

c. A statute enacted by the state legislature which stultifies or has the effect of nullifying a statute validly enacted by Parliament would be *ultra vires*. The Chhattisgarh Act made it impossible for the UGC to perform its duties and to ensure the coordination and determination of standards in terms of the UGC Act; and

d. The expression "established **or** incorporated" in Sections 2(f), 22 and 23 of the UGC Act must be read as "established **and** incorporated" insofar as private universities are concerned. This is necessary in order to give effect to the purpose of the UGC Act.

153. The decision of this Court in **Prof. Yashpal** (supra) will not have a bearing on this case for the following reasons:

a. The interpretation of a statutory provision cannot influence the interpretation of a provision of the Constitution. The Constitution is the basic or fundamental law of the country. It controls all other laws;

b. The decision in **Prof. Yashpal** (supra) was rendered in the context of institutions which were given the status of universities by the operation of law but which existed only on paper, without any facilities, and offered some courses which were not approved by the relevant authorities. The

purpose of this Court reading "established or incorporated" as "established and incorporated" was to prevent such institutions from being given the status of universities in the absence of essential features of universities. It was to ensure that institutions which were accorded the status of universities existed in actuality; and

c. The distinction between the meaning of the term 'establish' and that of the term 'incorporate' was not effaced by this interpretation. Article 30 uses the word 'establish.' The indicia for determining whether an institution is a minority educational institution for the purposes of Article 30 would depend only upon whether the minority community in question established the educational institution.

viii. <u>The amendment of the NCMEI Act in 2010</u>

154. The NCMEI Act was enacted in 2004 to constitute a National Commission for minority educational institutions and to provide for matters connected or incidental to it. Section 3 mandates the constitution of the National Commission For Minority Educational Institutions.[132] Section 11 details the functions of the Commission which include advising the Central or State governments on questions related to the education of minorities which may be referred to it; *suo motu* enquiries or enquiries based on petitions instituted by minority educational institutions; and intervening in proceedings before courts (with the leave of the court) which concern the deprivation or violation of the educational rights of minorities. Section 12 empowers the Commission

[132] "Commission"

to adjudicate disputes between a minority educational institution and university regarding affiliation and confers upon it the power of a civil court trying a suit in certain matters. Section 12B empowers the Commission to hear appeals against orders of authorities established by the Central or State governments, which reject applications for the grant of minority status filed by educational institutions. The Commission also has other powers.[133] Section 10 prescribes the procedure to establish a minority educational institution. In terms of the provision, any person who desires to establish a minority educational institution has to apply to the competent authority for the grant of a no objection certificate for the purpose. The competent authority would upon the perusal of documents, affidavits or other evidence and after giving the applicant an opportunity to be heard either allow or reject the application.

155. The NCMEI Act was amended in 2010.[134]

156. Section 2(g) defined a 'minority educational institution' as reproduced below:

> "(g) "Minority educational institution" means a college or institution (other than a University) established or maintained by a person or group of persons from amongst the minorities;"

In 2010, Section 2(g) was amended to read as follows:

> "(g) "Minority educational institution" means a college or an educational institution established and administered by a minority or minorities;"

[133] Sections 12D and 12E, NCMEI Act.
[134] See the National Commission for Minority Educational Institutions (Amendment) Act 2010.

157. Two material changes were made to Section 2(g) in 2010. The first was the removal of the words “other than a University” from the definition. The NCMEI Act did not extend to universities prior to 2010. The amendment in that year widened the ambit of the Act and made its provisions applicable to minority universities as well. The second change was the replacement of the term “established **or** maintained” with “established **and** administered.” The amendment in 2010 to the definition of a minority educational institution in Section 2(g) cannot impact the interpretation of Article 30(1). In the preceding sections, we have held that establishment by a minority is the only indicia for a minority educational institution. Section 10 of the NCMEI Act recognises this by prescribing the procedure to ‘establish’ a minority educational institution. The amendment to the definition of a minority educational education in Section 2(f) only recognises the right guaranteed by Article 30(1). It recognises that a minority educational institution once established is also administered by them.

ix. Registration under the Societies Registration Act

158. The question is whether a minority educational institution which is registered as a society under the Societies Registration Act soon after its establishment loses its status as a minority educational institution by virtue of such registration.

159. As discussed in Section B of this judgment, this question was referred to a larger Bench by this Court in **Anjuman-e-Rahmaniya** (supra). This question was referred because the institution in that case was founded in 1938 and

was registered under the Societies Registration Act in 1940. The judgment in **Anjuman-e-Rahmaniya** (supra) has been rendered and the case has been disposed of. This judgment will therefore not have a bearing on that case. Moreover, the parties in the present proceedings have not addressed this Court as to question (c) nor does the question have a bearing on the other questions referred. In these circumstances, we are of the opinion that this question is not required to be answered.

F. Conclusion

160. In view of the above discussion, the following are our conclusions:

a. The reference in **Anjuman-e-Rahmaniya** (supra) of the correctness of the decision in **Azeez Basha** (supra) was valid. The reference was within the parameters laid down in **Central Board of Dawoodi Bohra Community** (supra);

b. Article 30(1) can be classified as both an anti-discrimination provision and a special rights provision. A legislation or an executive action which discriminates against religious or linguistic minorities in establishing or administering educational institutions is *ultra vires* Article 30(1). This is the anti-discrimination reading of the provision. Additionally, a linguistic or religious minority which has established an educational institution receives the guarantee of greater autonomy in administration. This is the 'special rights' reading of the provision;

c. Religious or linguistic minorities must prove that they established the educational institution for the community to be a minority educational institution for the purposes of Article 30(1);

d. The right guaranteed by Article 30(1) is applicable to universities established before the commencement of the Constitution;

e. The right under Article 30(1) is guaranteed to minorities as defined upon the commencement of the Constitution. A different right-bearing group cannot be identified for institutions established before the adoption of the Constitution;

f. The incorporation of the University would not *ipso facto* lead to surrendering of the minority character of the institution. The circumstances surrounding the conversion of a teaching college to a teaching university must be viewed to identify if the minority character of the institution was surrendered upon the conversion. The Court may on a holistic reading of the statutory provisions relating to the administrative set-up of the educational institution deduce if the minority character or the purpose of establishment was relinquished upon incorporation; and

g. The following are the factors which must be used to determine if a minority 'established' an educational institution:

   i. The indicia of ideation, purpose and implementation must be satisfied. First, the idea for establishing an educational institution

must have stemmed from a person or group belonging to the minority community; second, the educational institution must be established predominantly for the benefit of the minority community; and third, steps for the implementation of the idea must have been taken by the member(s) of the minority community; and

ii. The administrative-set up of the educational institution must elucidate and affirm (I) the minority character of the educational institution; and (II) that it was established to protect and promote the interests of the minority community.

161. The view taken in **Azeez Basha** (supra) that an educational institution is not established by a minority if it derives its legal character through a statute, is overruled. The questions referred are answered in the above terms. The question of whether AMU is a minority educational institution must be decided based on the principles laid down in this judgment. The papers of this batch of cases shall be placed before the regular bench for deciding whether AMU is a minority educational institution and for the adjudication of the appeal from the decision of the Allahabad High Court in **Malay Shukla** (supra) after receiving instructions from the Chief Justice of India on the administrative side.

162. The reference is disposed of in the above terms.

163. Pending applications, if any, stand disposed of.

……CJI
[Dr Dhananjaya Y Chandrachud]

……J
[Sanjiv Khanna]

……J
[J B Pardiwala]

……J
[Manoj Misra]

New Delhi;
November 8, 2024

REPORTABLE

IN THE SUPREME COURT OF INDIA
ORIGINAL AND CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2286 OF 2006

ALIGARH MUSLIM UNIVERSITY ... APPELLANT (S)

VERSUS

NARESH AGARWAL AND OTHERS ... RESPONDENT (S)

WITH

CIVIL APPEALS NO. 2316-2321 of 2006

CIVIL APPEAL NO. 2861 OF 2006

CIVIL APPEAL NO. ____ OF 2024
(Arising out of SLP No. 32490 of 2015)

WP(C) NO. 272 OF 2016

T.C. (C) No. 46 of 2023

JUDGEMENT

SURYA KANT, J.

Table of Contents

I. Background 4

A. History of minority rights 4

B. The Constitutional scheme 14

C. Brief history of AMU 19

D. Challenge to the constitutionality of the 1951 and 1965 Amendment Acts 29

E. History of discordance with Azeez Basha 37

II. Contentions of the parties 41

III. Issues for determination 45

IV. Analysis 47

F. Issue I: What are the requisite parameters of reference to a larger bench? 47

G. Issue II: Whether the Appellant has the locus standi to bring the present challenge? 55

H. Issue III: What are the tests to seek protection under Article 30? 62

I. Issue IV: What is the meaning of 'establish' in Art. 30? 66

J. Issue V: What is the meaning of 'administer' in Article 30? 84

K. Issue VI: Whether the Union of India is obligated to defend the AMU Amendment Act, 1981? 90

V. Areas of divergence 91

VI. Conclusion 100

1. A three-judge bench presided over by the then Chief Justice of India *vide* order dated 12.02.2019, passed in ***Aligarh Muslim University v. Naresh Agarwal,***[1] (**2019 Reference Order**) made this reference to a Bench of Seven Judges, with a view to:

i. To determine the correctness of the question arising from the decision of this Court in ***S. Azeez Basha v. Union of India***,[2] which had ruled against the minority status sought to be accorded to the Aligarh Muslim University (**AMU**).

ii. To determine question 3(a) formulated in ***TMA Pai Foundation v. State of Karnataka,***[3] which postulates that:

> *"Q. 3. (a) What are the indicia for treating an educational institution as a minority educational institution? Would an institution be regarded as a minority educational institution because it was established by a person(s) belonging to a religious or linguistic minority or its being administered by a person(s) belonging to a religious or linguistic minority?*
> *This question need not be answered by this Bench, it will be dealt with by a regular Bench."*; and

iii. Whether the decision of this Court in ***Prof. Yashpal v. State of Chhattisgarh,***[4] and the amendment in 2010 to the National Commission for Minority Educational Institutions Act, 2004 (**NCMEI Act**) have any bearing on the aforesaid questions formulated?

2. The fulcrum of this reference revolves around the interpretation of Article 30 of the Constitution of India, which deals with the right of minorities to set up educational institutions. We have had the benefit of perusing the erudite opinion authored by Hon'ble the Chief Justice Dr. D.Y. Chandrachud. While the said opinion comprehensively addresses each issue with depth and clarity, we have expressed a differing view on

---

[1] *Aligarh Muslim University v. Naresh Agarwal,* (2020) 13 SCC 737.
[2] *S. Azeez Basha v. Union of India*, (1968) 1 SCR 833.
[3] *TMA Pai Foundation v. State of Karnataka*, (2002) 8 SCC 481, para 18.
[4] *Prof. Yashpal and Anr. v. State of Chhattisgarh and Ors.,* (2005) 5 SCC 420.

the interpretation of certain aspects, given the significant constitutional implications involved. Recognizing the weight of these issues, we have chosen to offer our own perspective, though we acknowledge the thoroughness and diligence with which Hon'ble the Chief Justice has approached this complex matter.

3. Before we lay down the indicia under Article 30 to determine whether an institution has a minority character and ought to be afforded protection, we deemed it appropriate to embark on a substantive analysis of the issues involved, and will begin by undertaking a comprehensive examination of the multifaceted nature of minority rights, both in India and internationally.

I. BACKGROUND

A. ***History of minority rights***

4. The basis of defining the term 'minorities' and bestowing associated rights on them have varied significantly across different eras and regions. Indicators such as religion, nationality, ethnicity, and race frequently emerge as markers of minority status across the world. In contrast, the Indian perspective on minorities is broadly categorized as religious and linguistic minorities.

A.1. Global history of minority rights

5. The idea of minority rights can generally be traced back to the 'Peace of Westphalia', a set of treaties concluded in the mid-17th century, which sought to give rights to certain religious minorities in newly ceded territories post-war.[5] Hence, globally, the concept of minority rights broadly emerged along the fault lines of religion.

[5] Jennifer Jackson Preece, "*Minority rights in Europe: from Westphalia to Helsinki*" Review of International Studies (1997), Vol. 23, pp. 75–92; Joseph B. Kelly, "*National Minorities in International Law"*, Denv. J. Int'l L. & Pol'y, (1973) Vol. 3, pp. 253; Liebich, Andre. "*Minority as Inferiority: Minority Rights in Historical Perspective*" Review of International Studies, (2008) Vol. 34, no. 2, pp. 243–63.

6. However, the focus on religion changed subsequently with the rise of nationalism in Europe. Since national identities emerged as the primary means of distinguishing insiders from outsiders, the concept of minorities in different instruments—such as the 1815 Final Act of Congress of Vienna—was defined in terms of national groups.[6]

7. As national identities began to take shape, the notion of minority rights became increasingly intertwined with the quest for international legitimacy. By the time of the 1878 Congress of Berlin, the question of minorities had become a crucial factor in the emergence of new nation-states beyond Western Europe. These States, requiring international recognition, were accordingly required to demonstrate a willingness to comply with a *'standard of civilization'*, which included the protection of minority rights.[7] This was not merely a moral obligation but a strategic tool for gaining acceptance within the global community. Nations such as Greece, for example, were compelled by powers like France, Great Britain, and Russia to uphold minority rights as a condition for their recognition and support.[8]

8. This momentum of bestowing rights to minorities continued to gain further traction across Europe. For instance, Hungary's Parliament first proclaimed minority rights in July 1849,[9] followed by their formal codification into Austrian law in 1867. Similarly, Belgium joined the movement in 1898. Although this era did not achieve universal respect for minority rights, it marked a pivotal shift, with these categories of rights increasingly taking centre stage in international negotiations and settlements, particularly in the aftermath of conflicts.

---

[6] Ibid.
[7] G. Gong, "The Standard of Civilization in International Society" Oxford University Press, (1984).
[8] Greece Liberated– London Protocol, (United Kingdom, France & Russia) (adopted on 03 February, 1830).
[9] Mazohl, Brigitte, "*Equality among the Nationalities' and the Peoples (Volksstämme) of the Habsburg Empire*", Constitutionalism, Legitimacy, and Power: Nineteenth-Century Experiences Chapter 9, Oxford University Press (2014).

9. The mid-19th century also witnessed the gradual upliftment of historically-oppressed groups, such as the African-Americans, who constituted the largest minority in the United States. The American Civil War of the 1860s culminated in the issuance of the Emancipation Proclamation by Abraham Lincoln in 1863. This landmark decree effectively abolished slavery and guaranteed freedom to all African-Americans. This progress was further bolstered by the 14th Amendment of 1868, which granted various civil rights to all citizens.[10]

10. This trajectory of liberation extended into the early 20th century, with the League of Nations making the establishment of a minority state system one of its key priorities. The new Nation-States that emerged in East-Central Europe post-1919 were so ethnographically diverse that recognising minority rights became essential. The victorious powers understood that ethnic dissatisfaction with the territorial *status quo* could potentially escalate into domestic and even international violence. Thus, the rights of minorities became a prerequisite for independence, as well as a condition for war reparations or admission into the League of Nations. A notable example is the Polish Minority Treaties of 1918, which granted special and presumably temporary rights in areas such as education, allowing minorities to read and learn their preferred languages.[11]

11. The growing significance of minority rights during this period is further exemplified by several cases before the Permanent Court of International Justice (**PCIJ**). In a 1923 case of the ***Rights of Minorities in Upper Silesia***, the PCIJ affirmed that individuals should have the autonomy to decide their minority affiliation.[12] Similarly, in the 1930 ***Greco-Bulgarian communities case***, the PCIJ emphasized the rights

---

[10] Holloway, Jonathan Scott, *"Civilization, race, and the politics of uplift"*, African American History: A Very Short Introduction, Chapter 4, (Oxford University Press) (2023).
[11] Treaty of Peace with Poland [Polish Minorities Treaty], (adopted on 28 June 1919).
[12] *Rights of Minorities in Upper Silesia (Germ. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 15 (Apr. 26) (Permanent Court of International Justice).

of minorities to uphold and preserve their traditions, clarifying that a 'community' under the subject-Convention referred to a group united by race, religion, language, and traditions, and that such a community could possess property distinct from any individual comprising it.[13] Further, in ***Minority Schools in Albania***, decided in 1935, the PCIJ explored the interrelation between minority status and cultural identity while addressing the religious and educational autonomy enjoyed by the Greek communities of Albania.[14] The PCIJ concluded that the essence of minority treaties was to ensure *de facto* equality for minorities, thus enabling them to maintain their cultural distinctiveness through a specialized minority regime.

12. In this manner, the historical development of minority rights from the 16th to 20th centuries illustrates a progressively advancing standard of rights accorded to these groups. Initially, minority status was primarily defined by religious affiliation; however, over time, nationality and linguistic identity became key criteria. This evolution reflects a broader international understanding of minority groups. There have been instances where the dominant majority has also actively sought to empower these minorities, highlighting the complex interplay between oppression and advocacy throughout history.

A.2. Minority rights in India

13. The trailing analysis put forth hereinabove sets the context to hereafter understand the Indian experience with minority rights. However, any discussion of minority rights in India must begin with appreciating its unique and vibrant nature, characterized by its rich mosaic of cultures, religions, and languages.

---

[13] *Greco-Bulgarian "Communities"*, Advisory Opinion, PCIJ Series B. No 17 (Permanent Court of International Justice, 1928).
[14] *Minority Schools in Albania*, Advisory Opinion, PCIJ Series A/B no 64, ICGJ 314 (Permanent Court of International Justice, 1935).

14. As a melting pot of cultures, India is home to a diverse array of different communities. One such example is the Parsis, who came to India from Persia—escaping persecution by the then Arab conquerors—and have since established themselves as one of the most prosperous communities in India.[15] Another important minority is the Sikhs, who follow Sikhism, which "*is believed to be a deep synthesis of divine virtues, ceaseless, remembrance, relentless service of mankind, equality of mind, and ephemeral nature of the world besides the defiance of tyranny and fighting for righteousness*".[16] These instances, among others, provide ample historical evidence supporting India's tradition of tolerance, as embodied in the notion of '*Vasudeva Kutumbakam'*,[17] where all communities have flourished and seamlessly integrated into Indian culture.

15. It was only with the advent of British rule in India that longstanding religious, caste, linguistic and regional ethnic tribal entities that had existed in India for centuries began to receive renewed scrutiny.[18] The late 19th century, particularly after the Revolt of 1857, saw an increasing incorporation of Indians into the colonial government. This increasing inclusion of Indians in British institutions forced imperialists to address how Indians were to be represented, leading to the concept of group-based representation.[19] They were initially defined by religious terms—evident in the first Indian Census of 1872, which classified Indians by religion—the representation later expanded to include caste and racial categories. Subsequent censuses further

---

[15] Dosabhoy Framjee, "History of the Parsis: including their manners, customs, religion and present position" Volume 2, Discovery Publishing House, (1986).
[16] *Sehajdhari Sikh Federation v. Union of India and others*, 2011 SCC Online P&H 17374.
[17] Justice R. A. Jahagirdar (Retd.), "*Secularism: the Road Behind and the Road Ahead*," Secularism: Collected Works, Rationalist Foundation, pp. 9.
[18] Rochana Bajpai, "Debating Difference: Group Rights and Liberal Democracy in India, Oxford University Press, (2011).
[19] Ibid.

sought to amalgamate oppressed castes of India into a single all-India category of 'Depressed Classes'.[20]

A.2.1. The concept of linguistic minorities

16. History indicates that during the British Rule, Hindi was sought to be projected as the language of the majority community.[21] In this vein, the British decided to introduce the permissive use of the Devanagari script in the Courts of the North-Western Provinces and Oudh, with a view to undermine the influence of the Mughal elites.[22] From the late 19th century onwards, there seemed to be murmurs against the perceived imposition of Hindi language, in regions where other languages were spoken. These concerns were endeavoured to be redressed by reorganising and carving out new States, predominantly on linguistic considerations, such as, for instance, the division of the States of Bihar and Odisha.[23]

17. The reorganization of the States based on linguistic differences gained momentum with the appointment of the Indian Statutory Commission, and subsequently, in April 1938, when a resolution was passed by the Madras Legislative Assembly, unsuccessfully recommending the establishment of four new Provinces from the former Madras Presidency. Ultimately, the States Reorganisation Act, 1956 enabled the division of States on a linguistic basis, aligning administrative boundaries with the linguistic identities of the population.

---

[20] Sumit Mukherjee, *"Conceptualisation and Classification of Caste and Tribe by the Census of India,"* Journal of the Anthropological Survey of India, (2013), Vol. 62 no. 2 pp.807.
[21] Tariq Rahman, "*Punjabi Language during British Rule,*" International Journal of Punjab Studies (2007).
[22] Amit Ranjan, "*How Hindi came to dominate India*" The Diplomat, (06 May, 2017) available at https://thediplomat.com/2017/05/how-hindi-came-to-dominate-india/.
[23] Fazal Ali, Report of the States Reorganisation Committee (1955), available at https://www.mha.gov.in/sites/default/files/State%20Reorganisation%20Commisison%20Report%20of%201955_270614.pdf.

A.2.2. The concept of religious minorities

18. In addition to linguistic minorities, the question of rights and privileges for religious minorities also gained prominence. The genesis of this category of minority rights in India can be traced back to the 1909 Morley-Minto Constitutional Reforms, which introduced separate electorates and reserved quotas to protect the interests of one of the minority communities within the evolving political framework.[24] Following this development, the British government extended similar provisions to other communities, as well as the Depressed Classes, thereby institutionalizing measures for their representation and protection.[25]

19. Subsequently, political organisations seeking to leverage the 1919 Montagu-Chelmsford reforms played a crucial role in consolidating minority identities.[26] The principle that eventually emerged for Indian representation in colonial institutions was that minority groups should be represented in proportion to their population size.[27] The primary demand of these groups was to secure safeguards against potential dominance by the Congress or the majority community in Indian politics.

20. The 1928 Simon Commission further solidified the foundation of minority rights by recommending the continuation of separate electorates.[28] At the same time, the 1928 Nehru Report, which influenced the framing of a Constitution for India, laid great emphasis on the safeguards of minorities.[29] However, in a significant departure

---

[24] Meetika Srivastava, "*Evolution of the System of Public Administration in India from the Period 1858- 1950: A Detailed Study Highlighting the Major Landmarks in Administrative History Made During this Period*" (2009), available at https://ssrn.com/abstract=1482528.
[25] Dick Kooiman, "*Communalism and Indian Princely States: A Comparison with British India*" Economic and Political Weekly (1995) Vol. 30 No. 34 pp. 2123-2133.
[26] Ibid.
[27] Francesca R. Jensenius, "*Mired in Reservations: The Path-Dependent History of Electoral Quotas in India*" The Journal of Asian Studies (2015) Vol. 74 No. 1.
[28] McMillan, Alistair, "*Standing at the Margins: Representation and Electoral Reservations in India*" Oxford University Press (2005).
[29] Ibid.

from the 1916 Lucknow Pact,[30] the Committee rejected the Muslim League's demands for separate electorates, noting that communal protection was no longer necessary for Hindus and Muslims.[31]

21. Historical events reveal that after the failure of Round Table Conference of 1930 and 1932, the Colonial Government firstly proposed the Communal Award followed by the Government of India Act, 1935, which was the last major colonial constitutional exercise prior to Independence. This Act reserved seats in Provincial Legislatures for a total of thirteen communal and socio-economic categories.[32] The 1940s then witnessed intense political debates centred on the 'minority question,' with various parties negotiating the extent of concessions to be granted to minority communities.[33]

A.2.3. Deliberations by the Constituent Assembly of India

22. The developments of the last few decades of British rule in India *vis-à-vis* minority rights directly contributed to the discussions in the Constituent Assembly Debates and the formalisation of safeguards for minorities within the Indian Constitution.[34] In fact, it strengthened the belief of the makers of the Indian Constitution that the Indian State must be formally committed to protecting the distinct cultural, linguistic and religious practices of various communities.[35]

23. Thus, to streamline the complex task of drafting the Indian Constitution, the Constituent Assembly decided to work through specialized committees. Among these, the Advisory Committee on Fundamental Rights, Minorities, etc., was formed under the leadership

---

[30] Owen, Hugh "*Negotiating the Lucknow Pact*", Journal of Asian Studies, (1972) Vol. 31 No. 3 pp. 561–87.
[31] Proceedings of the Indian Round Table Conference (12th November, 1930–19th January, 1931).
[32] Rochana Bajpai, *supra note 18.*
[33] Krishna, K.B., The Problem of Minorities in India or Communal Representation in India, G. Allen and Unwin, (1939).
[34] Rochana Bajpai, "*Constituent Assembly Debates and Minority Right*" Economic and Political Weekly, (2000) Vol. 35 No. 21-22.
[35] Ibid.

of Sardar Vallabhbhai Patel, having proportional representation from all major minority groups.[36] Given the broad mandate of this Committee, it was further divided into five Sub-Committees, one of which was the Minorities Sub-Committee, chaired by Dr. H.C. Mookherjee, a prominent Christian leader.[37]

24. Soon after, the Advisory Committee prepared the '*Report on Minority Rights'*, which recommended that elections to all legislatures be conducted on the basis of joint electorates, with reservations for specified minorities.[38] Additionally, the Report also proposed reservation in recruitment for minorities. The Report further incorporated suggestions for establishing Constitutional and Administrative mechanisms to address the challenges faced by minorities in India.

25. The discussions on the Draft Constitution, initiated by Dr. Ambedkar on 21.02.1948, intended to give special attention to minority rights.[39] This then led to the insertion of 'Special Provisions Relating to Minorities' (Part XIV – Articles 292 to 301) into the Draft Constitution. This was in addition to the protections granted to all citizens under the Chapter of Fundamental Rights.[40] The proposed Part XIV instead intended to provide political reservations for Muslims, Indian-Christians, Anglo-Indians, Scheduled Castes, and Scheduled Tribes. Additionally, it envisioned special protection for Anglo-Indians with respect to educational institutions and also addressed minority claims in the realm of public recruitment.[41] Finally, it sought to include

---

[36] Navin Pal Singh, Dr. Balvinder Singh Slathia, "*Intricacies of Educational and Cultural Rights of Minorities in India: Efficacy of Constitutional Safeguards*" UGC Care Journal (2020) Vol. 43, no.4.
[37] Ibid.
[38] Rochana Bajpai, *supra* note 18.
[39] Rochana Bajpai, *supra* note 34.
[40] Kamlesh Kumar Wadhwa, Minority Safeguards in India, Thomas Press (India) Limited, (1975).
[41] Ibid.

administrative checks to ensure the effective implementation and functioning of these constitutional safeguards.

26. However, these provisions sought to be incorporated under Part XIV were short-lived. The harsh realities of the communal violence following the partition of the Indian subcontinent into India and Pakistan greatly impacted one and all. The conflicts, violence, exploitation, general public disorder and lawlessness during the migration exercise resulted in the deaths of almost one million people, with an estimated displacement of approximately ten to twenty million people.[42]

27. Naturally, the aftermath of these events sent shockwaves throughout the country. It profoundly affected the Constituent Assembly and the Drafting Committee, particularly in regard to the recognition of communal minority rights.[43] Prior to the Partition, the Assembly had granted religious reservations in legislative bodies. However, these reservations were done away with post-Partition.[44] The prevailing sentiment was that such measures could foster separatist tendencies and were inconsistent with the principles of a Secular Democratic State. This view was also supported by various Muslim members of the Constituent Assembly.[45] For instance, Mohammad Ismail Khan stated:[46]

> *"[…]* ***Because this reservation of seats would only keep alive Communalism and would be ineffectual as a safeguard for the Muslim minorities or for the matter of that for any other minorities.*** *I congratulate the majority community, that they have not taken advantage of their superiority in numbers, by utilising this device for their*

[42] "*Partition of 1947 Continues to Haunt India, Pakistan*" Stanford Report (2019) available at https://news.stanford.edu/stories/2019/03/partition-1947-continues-haunt-india-pakistan-stanford-scholar-says.
[43] B Shiva Rao (ed), The Framing of India's Constitution, Vol. I-V, Indian Institute of Public Administration, (1967).
[44] Ibid.
[45] Christina George, "*Begum Aizaz Rasul: The only Muslim Woman to oppose minority reservations in the Constituent Assembly"* The Indian Express, (14 February, 2018), available at https://indianexpress.com/article/gender/begum-aizaz-rasul-the-only-muslim-woman-to-oppose-minority-reservations-in-the-constituent-assembly-5057096/.
[46] Constituent Assembly Debate, Speech by Mohammad Ismail Khan, (26 May 1949).

> *own purposes.* ***The Muslims have been thinking for some time that this reservation was wholly incompatible with responsible Government*** *and I may say that when Provincial autonomy was introduced in the provinces for the first time the Muslims soon began to realize the separate representation was not going to be an effective safeguard for the protection of their interests […]"*
>
> [Emphasis supplied]

28. Similarly, Tajamul Hussain also emphatically voiced: [47]

> *"Mr. President, Sir,* ***reservation of seats in any shape or form and for any community or group of people is, in my opinion, absolutely wrong in principle. Therefore I am strongly of opinion that there should be no reservation of seats for anyone and I, as a Muslim, speak for the Muslims. There should be no reservation of seats for the Muslim community****. (Hear, Hear). I would like to tell you that in no civilised country where there is parliamentary system on democratic lines, there is any reservation of seats. […]"*
>
> [Emphasis supplied]

29. Eventually, the Constituent Assembly dropped the proposals to grant varied rights to linguistic and religious minorities, and retained only Articles 29 and 30 to assuage their concerns. These two Fundamental Rights under Part III nonetheless represent a watershed moment in the jurisprudence of minority rights worldwide.

B. ***The Constitutional scheme***

30. The majority of minority rights within the Indian Constitution are encapsulated in Part III under the sub-section on '*Cultural and Educational Rights*'. This section includes: (***i***) the right of any section of citizens with a distinct language, script, or culture to conserve the same under Article 29; and (***ii***) the right of linguistic and religious minorities to establish and administer educational institutions of their choice under Article 30.

---

[47] Constituent Assembly Debate, Speech by Tajamul Hussain, (26 May 1949).

31. This focus on cultural and educational rights does not diminish the broader protections offered by the Constitution, which includes positive discrimination and affirmative action. Notable amongst these are Articles 15 and 16, which provide reservations to ensure equality of opportunity, and Articles 25 to 28, for the safeguard of religious freedoms. In addition, Articles 350A and 350B were incorporated shortly after independence in 1956 to further protect linguistic minorities. These provisions established administrative shields to support language rights and ensure their preservation within the broader framework of the Indian State.

32. Given this context, Article 29 protects linguistic minorities and their right to conserve their languages, and Article 30 bestows positive rights to religious and linguistic minorities, allowing them to establish and administer educational institutions. These provisions read as follows:

> *"**29. Protection of interests of minorities**.—*
> *(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.*
> *(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."*

> *"**30. Right of minorities to establish and administer educational institutions**.—*
> *(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.*
> *(1A) In making any law providing for the compulsory acquisition of any property of any educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.*
> *(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language."*

33. Other provisions in the Constitution of India, such as Article 19, for instance, also provide a similar freedom to establish educational institutions. However, the distinguishing and unique nature of Article 30 lies in its broader protection against State intervention. The interplay of these Articles has been thoroughly examined by an eleven-judge bench of this Court in ***TMA Pai (supra)***:

> *"18. With regard to the establishment of educational institutions, three articles of the Constitution come into play. Article 19(1)(g) gives the right to all the citizens to practise any profession or to carry on any occupation, trade or business; this right is subject to restrictions that may be placed under Article 19(6). Article 26 gives the right to every religious denomination to establish and maintain an institution for religious purposes, which would include an educational institution. Article 19(1)(g) and Article 26, therefore, confer rights on all citizens and religious denominations to establish and maintain educational institutions. There was no serious dispute that the majority community as well as linguistic and religious minorities would have a right under Articles 19(1)(g) and 26 to establish educational institutions. In addition, Article 30(1), in no uncertain terms, gives the right to the religious and linguistic minorities to establish and administer educational institutions of their choice."*

34. The distinction between broader rights such as Article 19 and Article 30, is thus clearly visible. Though Article 19 grants all citizens the right to establish institutions, it does not indemnify these institutions from State intervention in their administration and allows reasonable restrictions in the interests of the public. In contrast, Article 30 provides a specific right for religious minorities to establish and administer educational institutions without significant State interference. Additionally, whereas Articles 25 to 28 grant general rights to religious denominations, Article 30 specifically protects the rights of religious minorities.

B.1. Relevant case laws on the interpretation of Article 30

35. While the judicial interpretation of the scope and nuances of Article 30 will be discussed later in relevant parts of the judgement, a brief note of the landmark edicts that have been enumerated on this provision can be laid out. Over the course of several decades, through multiple judicial pronouncements and interpretations, the Supreme Court has held that the right provided under Article 30 is not absolute. An eleven-judge bench in ***TMA Pai (supra)*** and a seven-judge bench in ***P.A. Inamdar v. State of Maharashtra,***[48] have held that while the minority community possesses the right to administer the educational institutions, the State may impose reasonable regulations for the benefit of these institutions. Similarly, five-judge benches in ***Islamic Academy of Education v. State of Karnataka***[49] and ***St. Stephen's College v. University of Delhi***[50] have held that the State can prescribe general rules regarding merit in admissions. This view was seconded in ***Secy., Malankara Syrian Catholic College v. T. Jose***,[51] which held that general regulations regarding service conditions of employees could also be imposed.

36. In that sense, several judicial pronouncements have sought to explain the scope of Article 30 and clarify the extent of the protection granted.

B.2. Statutory Scheme

37. Apart from constitutional guarantees and rights, the Indian Parliament has also adopted several legislations to protect the rights of minorities. The National Commission for Minorities was established as a statutory body under the aegis of the National Commission for Minorities Act, 1992. Section 9(1) of the Act mandates the Commission to perform various functions, including, but not limited to, monitoring the implementation of safeguards for minorities, as provided in the

---

[48] *P.A. Inamdar v. State of Maharashtra,* (2005) 6 SCC 537.
[49] *Islamic Academy of Education and Anr. v. State of Karnataka and Ors.*, (2003) 6 SCC 697.
[50] *St. Stephen's College v. University of Delhi,* (1992) 1 SCC 558.
[51] *Secy., Malankara Syrian Catholic College v. T. Jose & Ors.,* (2007) 1 SCC 386.

Constitution, and laws enacted by Parliament and State Legislatures. The Commission is also responsible for making recommendations to the Central and State Governments for the effective implementation of these safeguards to protect minority interests. Additionally, it is tasked with addressing specific complaints regarding the deprivation of minority rights and safeguards and addressing such matters with the appropriate authorities.

38. A significant development which flows from Article 30 is also the enactment of the NCMEI Act, which governs minority educational institutions. The NCMEI Act was enacted in 2005 to, *inter alia*, engender the rights of a minority educational institution to seek recognition as an affiliated college to a Scheduled University and to provide a forum for dispute resolution. In this manner, the NCMEI Act gave greater credence to Article 30 and aided its efficient implementation.

39. In 2006, the NCMEI Act was amended, and the scope of the Commission was expanded further. In addition to protecting the rights of minority educational institutions, the Commission was now endowed with the power to determine and declare whether an institution is a minority institution. Under Section 2(f), minorities have been defined in the NCMEI Act as: "*a community notified as such by the Central Government.*" Employing this definition, the Central Government has so far notified Muslims, Christians, Sikhs, Buddhists, Parsis and Jains as minority communities.[52]

40. Having examined the development of minority rights, as well as the Constitutional and Statutory scheme, it is pertinent at this juncture, to

[52] Ministry of Human Resource Development, No. F.7-5/2005-MC(P) (Notified on 18 January, 2005) available at https://www.education.gov.in/sites/upload_files/mhrd/files/Notification18012005.pdf; Ministry of Minority Affairs, S.O. 267(E) (Notified on 27 January, 2014) available at https://ncm.nic.in/legislations/Gazette_JainInclusion_27Jan2014.pdf.

briefly touch upon the history of AMU and analyze the events leading to the instant matter.

C. ***Brief history of AMU***

41. The history of AMU begins after the founding of the Muhammaden Anglo-Oriental (**MAO**) College at Aligarh in 1875 by Sir Syed Ahmad Khan. It seems that by the year 1895, MAO College had begun to experience considerable decline. It faced governmental pressure to increase student fees and make examinations more difficult, leading to a decrease in student enrolment and endowments.[53] The death of Sir Syed in 1898 further intensified the situation, creating a sense of distrust among the benefactors of the college and a power vacuum.[54]

42. History further suggests that in 1898, the Sir Syed Memorial Fund was created with the goal of raising funds to pay off the debts of the College and to create an endowment to establish a university. The then Lieutenant Governor of the North-Western Provinces is said to have promised aid and support in the management of the College, provided that there was a stable governing body for the same directly under government supervision. The record further indicates that, by 1903, the fund collection drive had raised enough money to meet the College's needs and restore its stability.[55]

43. At the 'All India Muhammadan Educational Conference' in Calcutta, the idea of establishing a university in Aligarh sparked significant deliberations and gained momentum. Some proposed a pan-India, affiliating university,[56] while others advocated for a university

---

[53] Theodore Beck, "The Principal's Annual Report for 1898—99" ('Principal's Report), (1898—99), *Muhammadan Anglo-Oriental College Magazine* (Aligarh) (MAOCM), and *Aligarh Institute Gazette* (Aligarh) (AIG), New Series VII, No. 11 (15 July 1899) (At this time the two journals were temporarily merged).

[54] Shamim Akhtar, "*Aligarh: From College to University*" Proceedings of the Indian History Congress (2018-19) Vol. 79, pp. 623.

[55] *Muhammadan Anglo-Oriental College Magazine* (Aligarh) MAOCM, VII, (January 1899), pp. 15-21.

[56] Rafiuddin Ahmad, 'The Proposed Muslim University in India', The Nineteenth Century, XLIV (1898), 915-21.

completely in line with Muslim ideals, with mandatory religious instruction and administration in consonance with Islamic principles.[57]

44. However, nothing tangible happened on the ground level for multifarious reasons. In early 1910, efforts to establish a university at Aligarh resurfaced. Once the requisite funds had been collected, a committee was established to draft the constitution for the proposed university, designating the Viceroy as the chancellor and placing governance in the hands of a Muslim Court of Trustees. The matter of affiliation was cursorily mentioned only in the context of the powers of approval by various authorities. Finally, after long drawn-out negotiations between relevant stakeholders, in September 1920, the Aligarh Muslim University Act, 1920 (**AMU Act, 1920**) was passed by the Central Legislature of British India.

C.1. Features of the AMU Act, 1920

45. The AMU Act, 1920 which came into force with effect from 29.07.1920, comprising 40 sections and 23 statutes, was a comprehensive piece of legislation that meticulously regulated various aspects of AMU. The Statement of Objects and Reasons accompanying the Act clearly articulated its purpose: "*to incorporate this University, to indicate its functions, to create its governing bodies and to define their functions*." In essence, the AMU Act, 1920 was focused on establishing the University and making it operational by setting up its Governing Bodies and outlining their respective functions.

46. Broadly, there were four important Governing Bodies, i.e., the Executive Council, the Academic Council, the Court, and other Officers such as the Lord Rector, Vice Chancellor, Pro-Vice Chancellor, etc.

[57] Theodore Beck, *supra* note 53; MAOCM and AIG, *supra* note 53.

47. Without expressing any opinion on the interpretation of its provisions or the legislative policy of the AMU Act, 1920, we deem it fit to encapsulate some relevant provisions.

48. In this light, the role and authority of the Lord Rector was delineated in Section 13, which states as follows:

> *"13. (1) The Governor General shall be the Lord Rector of the University.*
>
> *(2) The Lord Rector shall have the right to cause an inspection to be made by such person or persons as he may direct, of the University, its buildings, laboratories, and equipment, and of any institution maintained by the University, and also of the examinations, teaching and other work conducted or done by the University, and to cause an inquiry to be made in like manner in respect of any matter connected with the University. The Lord Rector shall, in every case, give notice to the University of his intention to cause an inspection or inquiry to be made and the University shall be made entitled to be represented thereat.*
>
> *(3) The Lord Rector may address the Vice-Chancellor with reference to the result of such inspection and inquiry, and the Vice-Chancellor shall communicate to the Court the views of the Lord Rector with such advice as the Lord Rector may be pleased to offer upon the action to be taken thereon.*
>
> *(4) The Court shall communicate through the Vice-Chancellor to the Lord Rector such action, if any, as it is proposed to take or has been taken upon the result of such inspection or inquiry.*
>
> *(5) Where the Court does not, within reasonable time, take action to the satisfaction of the Lord Rector, the Lord Rector may, after considering any explanation furnished or representation made by the Court issue such directions as he may think fit, and the Court shall comply with such directions."*

49. Similarly, the authority and responsibility of the AMU Court was stated under Section 23:

> *"23. (1) The Court shall consist of the Chancellor, the Pro-Chancellor and the Vice Chancellor for the, time being, and such other persons as may be specified in the Statutes:*

Provided that no person other than a Muslim shall be a member thereof.

(2) The Court shall be the supreme governing body of the University and shall have the power to review the acts of the Executive and the Academic Councils (save where such Councils have acted in accordance with powers conferred on them under this Act, the Statutes or the Ordinances) and shall exercise all the powers of the University not otherwise provided for by this Act, the Statutes and the Ordinances and the Regulations.

(3) Subject to the provisions of this Act, the Court shall exercise the following powers and perform the following duties, namely:—
(a) of making Statutes and of amending or repealing the same;
(b) of considering Ordinances;
(c) of considering and passing resolutions on the annual report, the annual accounts and the financial estimates;
(d) of electing such persons to serve on the authorities of the University and of appointing such officers as may be prescribed by this Act or the Statutes; and
(e) of exercising such other powers and perform such other duties as may be conferred or imposed upon it by this Act or the Statutes."

50. The Executive Council, under Section 24, was touted to be the executive body of the University. With its constitution, term of office of members and powers and duties prescribed by the AMU Statutes. Similarly, the Academic Council, being the academic body of AMU, would have the control and general regulation and be responsible for the maintenance of standards of instruction and for the education, examination, discipline and health of students, apart from the conferment of degrees.

51. The power to make the AMU Statutes was set out in the following manner under Section 27:

"27. Subject to the provisions of this Act, the Statutes may provide for all or any of the following matters, namely: -
(a) The conferment of honorary degrees and the appointment of Patrons, Vice-patrons and Rectors;

(b) The institution of Fellowships, Scholarships, Exhibitions, Medals and Prizes;
(c) The terms of office, and the method and conditions of appointment of the officers of the University;
(d) The designations and powers of officers of the University;
(e) The constitution, powers and duties of the authorities of the University;
(f) The classification and mode of appointment of teachers of the University;
(g) The institution and maintenance of Halls;
(h) The constitution of Provident and Pension Funds for the benefit of the officers, teachers and servants of the University;
(i) The maintenance of a register of registered graduates;
(j) The instruction of Muslim students in the Muslim religion and theology;
(k) The establishment of Intermediate colleges and schools; and
(l) All matters which by this Act are to be or may be prescribed by Statutes."

52. In similar parlance, the power to make Ordinances was incorporated within Section 29:

"29. Subject to the provisions of this Act and the Statutes, the Ordinances may provide for all or any of the following matters namely: -
(a) The courses of study to be laid down for all degrees, diplomas and certificates of the University;
(b) The conditions of the award of fellowships, scholarships, studentships, exhibitions, medals and prizes;
(c) The conditions under which students may be admitted to the degree or diploma courses and to the examinations of the University and shall be eligible for degrees and diplomas;
(d) The admission of students to the University;
(e) The terms of office and terms and management of appointment and duties of Examining Bodies, Examiners, and Moderators and the conduct of examinations;
(f) The conditions of residence of students of the University, and the levying of fees for residence in Halls;
(g) The conditions under which women may be exempted from attendance at lectures and tutorial classes;
(h) The fees to be charged for courses of study in the University and for admission to the examinations, degrees, and diplomas of the University;
(i) The maintenance of discipline among the students of the University;

(j) The regulation and management of any Intermediate colleges and schools maintained under Section 12; and
(k) All matters which by this Act or the Statutes are to be or may be provided for by the Ordinances."

C.2. Features of the 1951 Amendment Act

53. With the dawn of independence, the AMU Act was amended in 1951 through Act No. LXII of 1951 (**1951 Amendment Act**). A significant change was the replacement of the Lord Rector, previously held by the Governor General, with the position of 'Visitor'. At that time, the term 'Governor General' had pertinently been substituted by 'President of India' *vide* the Adaptation of Laws Order, 1950. Section 13 delineated the authority of the Visitor, and was thus amended as follows:

"13. (1) The President of India shall be the Visitor of the University.

(2) The Visitor shall have the right to cause an inspection to be made by such person or persons as he may direct, of the University, its buildings, laboratories, and equipment, and of any institution maintained by the University, and also of the examinations, teaching and other work conducted or done by the University, and to cause an inquiry to be made in like manner in respect of any matter connected with the University.

(2A) The Visitor shall in every case give notice to University of his intention to cause an inspection or inquiry to be made, and the University be entitled to appoint representative who shall have the right to be present and be heard at such inspection or inquiry.; and

(3) The Visitor may address the Vice-Chancellor with reference to the result of such inspection and inquiry, and the Vice-Chancellor shall communicate to the Executive Council the views of the Visitor with such advice as the Visitor may be pleased to offer upon the action to be taken thereon.

(4) The Executive Council shall communicate through the Vice-Chancellor to the Visitors such action, if any, as it is proposed to take or has been taken upon the result of such inspection or inquiry.

(5) Where the Executive Council does not, within reasonable time, take action to the satisfaction of the Visitor, the Visitor

may, after considering any explanation furnished or representation made by the Executive Council issue such directions as he may think fit, and the Executive Council shall comply with such directions.

(6) Without prejudice to the foregoing provisions section, the Visitor may, by order in writing, annul any proceeding of the University which is not in conformity with this Act, the Statutes or the Ordinances: Provided that before making any such order, shall call upon the University to show cause why such an order should not be made, and, if any cause is shown within a reasonable time, shall consider the same."

54. The AMU Court under Section 23 embodied the following:

"23. (1) The Court shall consist of the Chancellor, the Pro-Chancellor and the Vice Chancellor and the Pro-Vice Chancellor (if any) for the, time being, and such other persons as may be specified in the Statutes.

(2) The Court shall be the supreme governing body of the University and shall have the power to review the acts of the Executive and the Academic Councils (save where such Councils have acted in accordance with powers conferred on them under this Act, the Statutes or the Ordinances) and shall exercise all the powers of the University not otherwise provided for by this Act, the Statutes and the Ordinances and the Regulations.

(3) Subject to the provisions of this Act, the Court shall exercise the following powers and perform the following duties, namely:—
(a) of making Statutes and of amending or repealing the same;
(b) of considering Ordinances;
(c) of considering and passing resolutions on the annual report, the annual accounts and the financial estimates;
(d) of electing such persons to serve on the authorities of the University and of appointing such officers as may be prescribed by this Act or the Statutes; and
(e) of exercising such other powers and perform such other duties as may be conferred or imposed upon it by this Act or the Statutes."

55. It would be relevant to also note the amendment made to Statute making power under Section 27:

"27. Subject to the provisions of this Act, the Statutes may provide for all or any of the following matters, namely:

(a) the constitution, powers and duties of the authorities of the University;
(b) the election and continuance in office of the members of the said authorities, including the continuance in office the filling of vacancies of members, and all other matters relative to those authorities for which it may be necessary or desirable to provide;
(c) the appointment, powers, and duties of the officers of the University;
(d) the constitution of a pension or provident fund and the establishment of an insurance scheme for the benefit of the officers, teachers and other employees of the University;
(e) the conferment of honorary degrees;
(f) the institution of fellowships, scholarships, studentships exhibitions, medals and prizes;
(g) the withdrawal of degrees, diplomas, certificates and other academic distinctions;
(h) the establishment and abolition of Faculties, Departments, Halls, Colleges and other institutions;
(i) the conditions under which Colleges and institutions. may be admitted to privileges of the University and for the withdrawal of such privileges;
(j) the establishment of High Schools and other institutions in accordance with the provisions of section 12; and all other matters which by this Act are to be or may be provided by the Statutes."

56. Similar amendment was carried out to the Ordinance making power under Section 29, which was to the following effect:

"29. (1) Subject to the provisions of this Act and the Statutes, the Ordinances may provide for all or any of the following matters, namely:
(a) the admission of students to the University and their enrolment as such;
(b) the courses of study to be laid down for all degrees, diplomas and certificates of the University:
(c) the award of degrees, diplomas, certificates and other academic distinctions, the qualifications for the same and the means to be taken relating to the granting and obtaining of the same;
(d) the fees to be charged for courses of study in the University and for admission to the examinations, degrees, diplomas of the University; and
(e) the conditions of the award of fellowships, scholarships, studentships, exhibitions, medals and prizes;

(f) the conduct of examinations, including the terms of office and manner of appointment and the duties of examining bodies. examiners and moderators:
(g) the maintenance of discipline among the students of the University:
(h) the conditions of residence of the students of the University;
(i) the special arrangements, if any, which may be made for the residence, discipline and teaching of women students and the prescribing for them of special courses of studies;
(j) the giving of religious instruction;
(k) the emoluments and the terms and conditions of service of teachers of the University;
(l) the maintenance of High Schools and other institutions in accordance with the provisions of section 12;
(m) the supervision and inspection of Colleges and other institutions admitted to the privileges of the University under section 12A; and
(n) all other matters which by this Act or the Statutes, are to be or may be provided for by the Ordinances.

(2) The Ordinances in force immediately before the commencement. of the Aligarh Muslim University (Amendment) Act, 1951, may be amended, repealed or added to at any time by the Executive Council provided that-
(i) No ordinance shall be made affecting the conditions of residence or discipline of students except after consultation with the Academic Council;
(ii) No ordinance shall be made-
(a) affecting the admission or enrolment of students or prescribing examinations to be recognised as equivalent to the University examinations, or
(b) affecting the conditions, mode of appointment or duties of examiners or the conduct or standard of examinations or any course of study, -
unless a draft of such Ordinance has been proposed by the Academic Council.

(3) The Executive Council shall not have the power to amend any draft proposed by the Academic Council under the provisions of sub section (2) but may reject the proposal or return the draft to the Academic Council for reconsideration, either in whole or in part together with any amendments which the Executive Council may suggest.

(4) Where the Executive Council has rejected the draft of Ordinance proposed by the Academic Council, the Academic Council may appeal to the Central Government and the Central Government may, by order, direct that the proposed

Ordinance shall be laid before the next meeting of the Court for its approval and that pending such approval it shall have effect from such date as may be specified in the order:
Provided that if the Ordinance is not approved by the Court at such meeting, it shall cease to have effect.

(5) All Ordinances made by the Executive Council shall be submitted as soon as may be, to the Visitor and the court, and shall be considered by the Court at its next meeting and the Court shall have power, by a resolution passed by a majority of not less than two-thirds of the members voting, to cancel any Ordinance made by the Executive Council, and such Ordinance shall, from the date of such resolution. cease to have effect,

(6) The Visitor may, by order, direct that the operation of any Ordinance shall be suspended until he has had an opportunity of exercising his powers of disallowance, and any order of suspension under this sub-section shall cease to have effect on the expiration of one month from the date of such order or on the expiration of fifteen. days from the date of consideration of the Ordinance by the Court, whichever period expires later.

(7) The Visitor may, at any time after an Ordinance has been considered by the Court, signify to the Executive Council his dis-allowance of such Ordinance, and from the date of receipt by the Executive Council of intimation of such disallowance, such Ordinance shall cease to have effect."

C.3. Features of the 1965 Amendment Act

57. The Act was further amended by the Act No. 19 of 1965 (**1965 Amendment Act**). Most significantly, it revised the powers of the Court. Section 23 was accordingly amended as follows:

"23. (1) The Court shall consist of the Chancellor, the Pro-Chancellor and such other persons as may be specified in the Statutes:

(2) The functions of the Court shall be-
(a) to advise the Visitor in respect of any matter which may be referred to the Court for advise;
(b) to advise any other authority of the University in respect of any matter;
(c) to perform other such duties and exercise such other powers as may be assigned to it by the Visitor or under this Act."

58. Further, Section 28 was amended in terms of a shift in Statute making power:

> *"286. (1) The first Statutes are those set out in the Schedule.*
>
> *(2) The Executive Council may make new or additional Statutes or may amend or repeal the Statutes; but every new Statute or addition to the Statutes or any amendment or repeal of a Statute shall require the previous approval of the Visitor who may sanction or disallow it or return it to the Executive Council for further consideration."*

59. Having now outlined the legal history of the AMU Act, 1920 as amended till 1965 and the sequence of relevant events, we now turn to the verdict rendered by the five-judge Constitution Bench in ***Azeez Basha (supra)***, which constitutes the *sine qua non* of the present reference.

D. ***Challenge to the constitutionality of the 1951 and 1965 Amendment Acts***

60. Shortly after the amendment in 1965, the constitutionality of the 1951 and 1965 Amendment Acts was challenged before this Court, which led to the decision in ***Azeez Basha (supra)***. The constitutionality of these statutory enactments was primarily examined on the anvil of Article 30 of the Constitution of India, to determine whether AMU could fulfil the litmus test of being a minority educational institution.

D.1. Contentions proffered by the parties therein

D.1.1. Contentions of the Petitioners

61. Briefly, the Petitioners in ***Azeez Basha (supra)*** contended that:

a. AMU was established by the Muslim minority and therefore, the Muslims had the right to administer it. Insofar as the 1951 and 1965 Amendment Acts take away or abridge any part of that right, they are *ultra vires* Article 30(1).

b. Article 26 would not apply to educational institutions for there is a specific provision in Article 30(1) with respect to educational institutions and therefore, institutions for charitable purposes in Article 26 (a) refer to institutions other than educational ones.

c. Article 14 of the Constitution was violated because the terms of the Act establishing Benares Hindu University (**BHU**) were not the same as the terms of the AMU Act, 1920. Further, other universities, such as Delhi, Agra, Allahabad, Patna, and Benares, have a certain elective element, unlike AMU.

d. Article 19 of the Constitution was violated because the 1965 Amendment Act deprived Muslims of their right to manage AMU and of the right to hold the property vested in AMU by the AMU Act, 1920.

e. *Vide* the 1965 Amendment Act, the Muslim minority was deprived of their property, under Article 31(1), as the composition of the Court was changed from the terms of the 1920 Act.

f. The 1951 and 1965 Amendment Acts violated Articles 25 and 29 of the Constitution.

D.1.2. Contentions of the Respondents

62. Conversely, the Respondents submitted that:

a. AMU was established in 1920 by the AMU Act, 1920 and this establishment was not by the Muslim minority, but by the Government of India (**GoI**) by virtue of a Statute. Thus, the Muslim minority could not claim any Fundamental Right to administer AMU under Article 30(1).

b. Since AMU was established by the GoI, the Parliament had the right to amend that Statute as it thought fit. There was no question of taking away the right to administer under the 1951 and 1965 Amendment Acts, as the Muslim minority never had the right of administration.

c. Though the Court of AMU was to be composed entirely of Muslims, under the AMU Act, 1920, they were not given the right to

administer the university. It was to be administered by the authorities established under the AMU Act, 1920.

D.2. Issues formulated

63. While this Court in ***Azeez Basha (supra)*** did not explicitly outline the issues, a plain reading of the decision reveals the following key issues that were broadly addressed:

a. Whether a 'university' established prior to the Constitution coming into force could be construed to be an educational institution included within the ambit of Article 30?
b. What is the meaning of the term 'establish' in Article 30 and whether AMU was established by the Muslim minority?
c. Whether AMU was administered by Muslims?
d. Whether the 1951 and 1965 Amendment Acts were violative of other Articles contained in Part III of the Constitution?

D.3. Key holdings in Azeez Basha (supra)

64. In the decision of ***Azeez Basha (supra)***, the Constitution Bench adjudicated that AMU was not a minority institution for the purposes of Article 30(1) of the Indian Constitution. Since the conclusion of this case forms the bedrock of the present challenge, it is essential to discuss the key holdings of this judgment.

65. In this regard, the Court held that to be a minority institution under Article 30, such an institution must have been both established and administered by the minority community. In other words, it noted that the test provided under Article 30 is conjunctive, and an institution cannot enjoy autonomy to such an extent unless it satisfies both the prongs of establishment as well as administration by the minority community. This Court thus opined that:

> *"19. […] The Article in our opinion clearly shows that the minority will have the right to administer educational institutions of their choice provided they have established*

them, but not otherwise. The article cannot be read, to mean that even if the educational institution has been established by somebody else, any religious minority would have the right to administer it because, for some reason or other, it might have been administering it before the Constitution came into force. The words "establish and administer" in the article must be read conjunctively and so read it gives the right to the minority to administer an educational institution provided it has been established by it […]"

66. Having held so, this Court then proceeded to analyze each issue separately.

D.3.1 Whether universities established pre-Constitution could be included within the ambit of Article 30?

67. This Court in ***Azeez Basha (supra)*** firstly observed that the term 'educational institution' in the Constitution had a wide expanse, and that universities, which would be institutions that could confer degrees, would be covered under the wide import of this term. It further observed that though some private universities in pre-Constitution India did not have government recognition, this would not disentitle them from being covered under the category of an 'educational institution'.

68. Further, relying on the decision in ***In re the Kerala Education Bill,***[58] it held that if Article 30 were to be interpreted such that it covered only educational institutions established after the coming into force of the Constitution, it would rob Article 30 of its very meaning. In this vein, it held as follows:

"19. … The words "establish and administer" in the article must be read conjunctively and so read it gives the right to the minority to administer an educational institution provided it has been established by it. In this connection our attention was drawn to In re; The Kerala Education Bill, 1957 where, it is argued, this Court had held that the minority can administer an educational institution even though it might not

[58] *In re the Kerala Education Bill, 1957,* 1958 SCR 995.

have established it. ***In that case an argument was raised that under Article 30(1) protection was given only to educational institutions established after the Constitution came into force. That argument was turned down by this Court for the obvious reason that if that interpretation was given to Article 30(1) it would be robbed of much of its content.*** *... It is true that at p. 1062 the Court spoke of Article 30(1) giving two rights to a minority i.e. (i) to establish and (ii) to administer. But that was said only in the context of meeting [t]he argument that educational institutions established by minorities before the Constitution came into force did not have the protection of Article 30(1). We are of opinion that nothing in that case justifies the contention raised of behalf of the petitioners that the minorities would have the right to administer an educational institution even though the institution may not have been established by them. ..."*

[Emphasis supplied]

D.3.2 What is the meaning of the term 'establish' and whether AMU was 'established' by the Muslim community?

69. The Court in ***Azeez Basha (supra)*** interpreted the term 'establish' in Article 30 to mean 'to bring into existence.' To determine whether AMU was established by the Muslim community, the Court examined the legal framework for the establishment of a university. It was found that prior to independence, a private individual could create a university independently, with State intervention only required for the purposes of recognition of the degree conferred. In this context, it observed that though Muslims had the option to establish a university without any state involvement, they opted for State intervention to secure degree recognition. Consequently, this Court concluded that AMU was established *vide* the AMU Act, 1920, which was enacted by the then Parliament. It therefore held that AMU was established by an act of the Central Legislature and not by the Muslim community:

"22. There was nothing in 1920 to prevent the Muslim minority, if it so chose, to establish a university; but if it did so the degrees of such a university were not bound to be recognised by Government. It may be that in the absence of recognition of the degrees granted by a university, it may not

have attracted many students, and that is why we find that before the Constitution came into force, most of the universities in India were established by legislation. […] It is clear therefore that even though the Muslim minority could have established at Aligarh in 1920 a university, it could not insist that degrees granted by such a university should be recognised by Government. Therefore, when the Aligarh University was established in 1920 and by Section 6 its degrees were recognised by Government, an institution was brought into existence which could not be brought into existence by any private individual or body for such individual or body could not insist upon the recognition of the degrees conferred by any university established by it. The enactment of Section 6 in the 1920. Act is a very important circumstance which shows that the Aligarh University when it came to be established in 1920 was not established by the Muslim minority, for the minority could not insist on the recognition by Government of the degrees conferred by any university established by it."

"26. […] But if the M.A.O. College was to be converted into a university of the kind whose degrees were bound to be recognised by Government, it would not be possible for those who were in-charge of the M.A.O. College to do so. That is why the three institutions to which we have already referred approached the Government to bring into existence a university whose degrees would be recognised by Government. The 1920 Act was then passed by the Central Legislature and the university of the type that was established thereunder, namely, one whose degrees would be recognised by Government, came to be established. ***It was clearly brought into existence by the 1920 Act for it could not have been brought into existence otherwise. It was thus the Central Legislature which brought into existence the Aligarh University and must be held to have established it.*** *It would not be possible for the Muslim minority to establish a university of the kind whose degrees were bound to be recognised by Government and therefore it must be held that the* ***Aligarh University was brought into existence by the Central Legislature and the Government of India. If that is so, the Muslim minority cannot claim to administer it, for it was not brought into existence by it.*** *[…]"*

[Emphasis supplied]

D.3.3 Whether AMU was 'administered' by the Muslim community?

70. This Court in ***Azeez Basha (supra)*** then examined the AMU Act, 1920 in greater detail and determined that the Act did not grant administrative control of the University to the Muslim community. It observed that members of the AMU Court were elected by individuals who made donations exceeding INR 500, a category which included non-Muslims as well. Furthermore, the Lord Rector, who was the Governor-General, held overriding powers concerning administrative matters. Additionally, various bodies, such as the Executive Council and the Academic Council, possessed significant authority over the University's affairs. Based on this analysis, the Court concluded that AMU did not meet the administrative criteria required by Article 30 and, therefore could not be recognized as a minority institution:

> *"28. It appears from para 8 of the Schedule that even though the members of the Court had to be Muslims, the electorates were not exclusively Muslims. For example, sixty members of the Court had to be elected by persons who had made or would make donations of five hundred rupees and upwards to or for the purposes of the University. Some of these persons were and could be non-Muslims. Forty persons were to be elected by the Registered Graduates of the University, and some of the Registered Graduates were and could be non-Muslims, for the University was open to all persons of either sex and of whatever race, creed or class. Further fifteen members of the Court were to be elected by the Academic Council, the membership of which was not confined only to Muslims."*
>
> *"29. Besides there were other bodies like the Executive Council and the Academic Council which were concerned with the administration of the Aligarh University and there was no provision in the constitution of these bodies which confined their members only to Muslims* ***. It will thus be seen that besides the fact that the members of the Court had to be all Muslims, there was nothing in the Act to suggest that the administration of the Aligarh University was in the Muslim minority as such. Besides the above, we have already referred to Section 13 which showed how the Lord Rector, namely, the Governor-General had overriding powers over all matters relating to the administration of the University. Then there was Section 14 which gave certain over-riding powers to the***

Visiting Board. The Lord Rector was then the Viceroy and the Visiting Board consisted of the Governor of the United Provinces, the members of his Executive Council, the Ministers, one member nominated by the Governor and one member nominated by the Minister in charge of Education. These people were not necessarily Muslims and they had overriding powers over the administration of the University. *Then reference may be made to Section 28(2)(c) which laid down that no new statute or amendment or repeal of an existing statute, made by the University, would have any validity until it had been approved by the Governor-General-in-Council who had power to sanction, disallow or remit it for further consideration. Same powers existed in the Governor-General-in-Council with respect to ordinances. Lastly reference may be made to Section 40, which gave power to the Governor-General-in-Council to remove any difficulty which might arise in the establishment of the University.* ***These provisions in our opinion clearly show that the administration was also not vested in the Muslim minority; on the other hand it was vested in the statutory bodies created by the 1920 Act, and only in one of them, namely, the Court, there was a bar to the appointment of any one else except a Muslim, though even there some of the electors for some of the members included non-Muslims. We are therefore of opinion that the Aligarh University was neither established nor administered by the Muslim minority and therefore there is no question of any amendment to the 1920 Act being unconstitutional under Article 30(1) for that Article does not apply at all to the Aligarh University."***

[Emphasis supplied]

D.3.4 Whether any other Articles of Part III were violated?

71. This Court analysed the 1951 and 1965 Amendment Acts in consonance with other Articles enshrined in Part III of the Constitution, and arrived at the following conclusions:

a. Article 26(a) also bestows the right to 'establish and maintain'. However, since AMU was not established by the minority, the right to maintain does not arise.

b. Article 26 (c) and (d) provides the right to acquire and keep assets. However, the assets of AMU vest in the University and not in the Muslim minority, following the passing of the AMU Act, 1920.

c. Articles 25 and 29 are not affected in any manner by either of the Amendment Acts.

d. Article 14 of the Constitution is not violated as there exists a difference in the administrative structure of one university when compared with another. This cannot be construed to be discriminative and is a matter of legislative policy.

e. The right to form associations as espoused under Article 19 is not affected by the Amendment Acts.

f. Article 31(1) is also not violated, since the property vested in AMU is not the property of the Muslim minority. It was voluntarily vested in AMU by MAO College and the Muslim University Association. The money of the Muslim University Foundation Committee was also voluntarily surrendered to the Government to facilitate the establishment of AMU through the AMU Act, 1920. Thus, at the time of coming into force of the Constitution, no right of the Muslim minority existed in property vested with AMU, and it cannot be said that the Amendments deprived the Muslim minority of the same.

E. ***History of discordance with Azeez Basha***

72. Having analysed ***Azeez Basha (supra)***, it is imperative to also take into account the decisions proffered by this Court in other relevant cases to holistically understand the background of the reference before this Court. Post the decision in ***Azeez Basha (supra)*** came the 1972 Amendment Act *vide* Act No. 34 of 1972 (**1972 Amendment Act**), introducing several significant changes.

73. Thereupon, the first discordant note was struck by a two-judge bench of this Court in ***Anjuman-e-Rahmaniya v. District Inspector of Schools***.[59] That was a case where this Court was considering the minority status of an institution established by a society registered under the Societies Registrations Act, 1860. The question raised therein

[59] *Anjuman-e-Rahmaniya v. District Inspector of Schools*, W.P.(C) No. 54-57 of 1981.

pertained to whether such registration would be determinative against the minority status of this institution. In this regard, this Court broadly formulated the following two issues for adjudication:

i. Whether Article 30(1) of the Constitution envisages an institution which is established by minorities alone without the participation for the factum of establishment from any other community?

ii. Whether soon after the establishment of the institution if it is registered as a society under the Societies Registration Act, 1860, its status as a minority institution changes in view of the broad principles laid down in ***Azeez Basha (supra)***?

74. The Court then doubted the correctness of ***Azeez Basha (supra)*** and referred the case to the Chief Justice for placement before a seven-judge bench, as several jurists including Mr. Seervai had expressed their doubts on the correctness of the said decision. The bench considered it appropriate, in a way, to direct constituting of a larger bench to consider the entire aspect fully.

75. The issue pertaining to the correctness of such reference made by the two-judge bench, has been dealt with greater detail in paragraphs 83 to 99 of this judgement. Almost immediately thereafter, came the 1981 Amendment Act, through Act No. 62 of 1981 (**1981 Amendment Act**), which finalized the current framework of the AMU Act and reversed some of the changes introduced by the 1972 Amendment Act.

76. Almost two decades after the reference in ***Anjuman (supra)***, came the *magnum opus* decision of the eleven-judge bench of this Court in ***TMA Pai (supra)***. In this case, the Court was tasked with analysing the different facets of Article 30, including the extent of intervention permissible by the State and the meaning of the term 'minority'. Notably, the Court framed a question similar to the reference in

***Anjuman* (*supra*)** but held that the question is to be decided by a regular bench:

> *"Q. 3. (a) What are the indicia for treating an educational institution as a minority educational institution? Would an institution be regarded as a minority educational institution because it was established by a person(s) belonging to a religious or linguistic minority or its being administered by a person(s) belonging to a religious or linguistic minority?*
> *This question need not be answered by this Bench, it will be dealt with by a regular Bench."*
>
> [Emphasis supplied]

77. Soon thereafter, *vide* an order dated 11.03.2003, a two-judge bench finally disposed of the petitions that remained pending in ***Anjuman (supra)***, with the broad directions that:

> *"These matters are covered by the decision of a Constitution Bench of this Court in Writ Petition No. 317/1993-T.M.A. Pai Foundation & Ors. Etc. Vs. State of Karnataka & Ors. Etc. and connected batch decided on 3·1 11 October, 2002.*
> *All statutory enactments, orders, schemes, regulations will have to be brought in conformity with the decision of the Constitution Bench of this court in T.M.A. Pai Foundation's case decided on 31.10.2002. As and when any problem arises the same can be dealt with by an appropriate Forum in an appropriate proceeding.*
> *The Writ Petitions are disposed of according[ly]."*

78. Hence, though ***Anjuman (supra)*** was disposed of, the correctness of ***Azeez Basha (supra)*** was left to be answered. Ultimately, the question of the minority status of AMU was raised again in the present batch of appeals in the 2019 Reference Order, which arose out of a challenge laid to different judgements rendered by the High Court of Judicature at Allahabad, holding that in view of ***Azeez Basha (supra)*** AMU is not a minority institution. A three-judge bench of this Court therefore examined the trajectory of judicial decisions and noted that the correctness of ***Azeez Basha (supra)*** remains undecided. This Court also noted that apart from ***Azeez Basha (supra)***, two other aspects required an authoritative pronouncement: (***i***) The decision in ***Prof.***

Yashpal (supra), wherein this Court had held that a private university can only be established by a separate Act or by a compendious Act where the legislature specifically provides for the establishment of the said university; and (***ii***) The 2010 Amendment of the NCMEI Act, prior to which, the definition of minority educational institutions excluded a university. However, the 2010 Amendment thereafter deleted this exclusion. Accordingly, for an authoritative pronouncement of these issues, the case was referred to the present seven-judge bench of this Court. The relevant part of the 2019 Reference Order is extracted below:

> *"8. The said facts would show that the correctness of the question arising from the decision of this Court in S. Azeez Basha (supra) has remained undetermined.*
>
> *9. That apart, the decision of this Court in Prof. Yashpal and another vs. State of Chhattisgarh and others[2] and the amendment of the National Commission for Minority Educational Institutions Act, 2004 made in the year 2010 would also require an authoritative pronouncement on the aforesaid question formulated, as set out above, besides the correctness of the view expressed in the judgment of this Court in S. Azeez Basha (supra) which has been extracted above.*
>
> *10. Ordinarily and in the normal course the judicial discipline would require the Bench to seek a reference of this matter by a Five Judges Bench. However, having regard to the background, as stated above, when the precise question was already referred to a Seven Judges Bench and was, however, not answered, we are of the view that the present question, set out above, should be referred to a Bench of Hon'ble Seven Judges.*
>
> *11. Consequently, and in the light of the above, place these matters before the Hon'ble the Chief Justice of India on the administrative side for appropriate orders."*

79. Having understood the background of the challenge and the reference before this seven-judge bench, we shall now turn to the submissions made by the parties in support of their stance on the matter.

II. CONTENTIONS OF THE PARTIES

Appellant's submissions:

80. Dr. Rajeev Dhavan, Mr. Kapil Sibal, Mr. Salman Khurshid, Mr. Nikhil Nayyar, and Mr. Shadan Farasat, Learned Senior Advocates, appeared for AMU. Their contentions are detailed hereinbelow:

a. In the context of Article 30, the term 'minority' means a community that constitutes less than fifty percent of the population in the State where the educational institution is situated. This standard was laid down in ***TMA Pai (supra)***. Per this standard, Muslims are a minority in the State of Uttar Pradesh. Moreover, the status of Muslims as a minority was evident even before the Constitution came into force, as they were already being afforded reservation in legislative organs.

b. To claim protection under Article 30, the minority community is only required to prove that it established the institution. The question of administration, on the other hand, is not relevant in determining the minority character of an institution. It is a right that flows once the institution is established as a minority institution, thus making it a consequence and not a pre-requisite. In other words, the test under Article 30 is not conjunctive, and the claimant is not required to necessarily prove that the institution was being administered by the minority community.

c. The word 'establish' should be interpreted widely since it is the only protection available to minorities. 'Establishment', under Article 30, is the meeting of minds of the community for the purpose of taking forward the idea that ultimately results in the university being set up. Thus, the genesis of the institution must be considered while examining the word 'established.' In contrast, the word 'established' used in the AMU Act, 1920 refers to

recognition for incorporation and is not the same as the term 'establish' used in Article 30.

d. The term 'administration' does not mean cent percent control over the institution by the minority community. The State can prescribe reasonable regulations for the management of minority institutions. Administration merely requires overall control. The minority community, in this regard, has the choice to ask others to administer on their behalf.

e. Under Article 30, the term 'establish' requires the genesis of the institution to be linked to the minority community. AMU meets this criterion since it originated as MAO College, which was established and administered by Muslims. The desire to convert MAO College to AMU came from the Muslim community, having gathered funds from the Muslim community. Further, AMU was established with the desire of the Muslim community to have their own university. Therefore, AMU can be said to have been established by the Muslim community.

f. The establishment of AMU was an exercise completed by the Muslim community, and the AMU Act, 1920 merely conferred statutory recognition to such an establishment. It was not a creation of the Statute but was rather an acknowledgement by a Statute. Merely because a university was incorporated through State action cannot confer or take away from its nature, as every juristic entity is a creation of State action.

g. The administration of AMU was also under the control of Muslims. All members of the AMU Court were required to be Muslims, and its powers were further strengthened by the 1981 Amendment Act. The administration, which entails overall control, remains with the Muslim community. Even if it were determined that external

members had administrative roles, it would not jeopardize the university's minority status. This is because the Muslim community retains the right to reclaim administrative control, as Fundamental Rights cannot be waived.

h. Lastly, the Union of India (**UOI**) cannot be allowed to challenge its own statutory enactment, i.e., 1981 Amendment Act. Such a summersault in its stance cannot be permitted merely because of a change in the political regime. Furthermore, the UOI has not substantiated the reason for such a *volte-face*. Thus, its approach lacks *bona fides,* and the UOI, particularly the Attorney General for India, is obligated to defend such an act of Parliament. Hence, it cannot take a stand against the minority status of AMU.

Respondents' submissions:

81. Mr. R. Venkataramani, Learned Attorney General for India, Mr. Tushar Mehta, Learned Solicitor General of India, Mr. K. M. Nataraj and Mr. Vikramjit Banerjee, Learned Additional Solicitor Generals of India, Mr. Rakesh Dwivedi, Mr. N. K. Kaul, Mr. G. K. Kumar, Mr. Vinay Navare, Mr. Sridhar Potaraju and Ms. Archana P. Dave Learned Senior Advocates, appeared on behalf of the Respondents. Their arguments are detailed hereinbelow:

a. A bench of two judges could not have directly referred the matter to a bench composed of seven judges in ***Anjuman (supra)*** and as such, the reference itself ought to be construed as bad in law. Further, the reference only sought clarity on the definition of a minority institution under Article 30 of the Constitution and did not include examination of whether AMU is a minority educational institution.

b. Challenging the *locus standi* of the Appellant, it was argued that Muslims do not constitute a minority community. For a

community to be a minority, it should not just be numerically less than the majority but should also be politically non-dominant. Per this test, Muslims were a numerically larger group than the pre-independence dominant class, i.e., Christians. Hence, Muslims do not have the *locus* to invoke Article 30. In any case, the institutions that were formed prior to the coming of the Constitution cannot claim minority status because there was no such Fundamental Right when such institutions were created.

c. To claim protection under Article 30, the minority community must prove that the institution was both established and is being administered by the community. Merely proving that the minority community established the institution is not enough to claim the status of a minority institution.

d. The word 'establish' in Article 30 means bringing an institution into existence. For this, the Court must see if the institution in its legally operational form could have existed 'but for' the Statute. If the Statute accorded legal operationalization to the institution, the establishment would be attributed to the legislature and not the minority community.

e. The *de facto* position of the minority's role in administration is irrelevant to determining administration by a minority. The Court must see various relevant indicia of administrative control, including who controls the decisions regarding admission, levy of fees, governing council, the appointment of staff, disciplinary powers, and ordinances and statutes.

f. The meaning of 'establish' in Article 30 is bringing an institution into existence. AMU was brought into existence by the then Central Legislature, through the AMU Act, 1920. The Constituent Assembly Debates also do not expressly identify AMU as a minority

institution within the ambit of Article 30. This indicates that the drafters intended to establish the university's national character. To this day, the UOI contributes over a thousand crores to AMU, which has resulted in a complete metamorphosis of the university. Finally, the Preamble to the AMU Act, 1920 reflects that AMU was brought into existence by the Act and not by the Muslim community.

g. The AMU Court only has residuary powers, not administrative powers. There is no majority of Muslims in the AMU Court, as only 32 out of 180 or more members are Muslims. Except for the AMU Court, no other body or authority is required to be Muslim. Moreover, various administrative functions are vested with bodies such as the Executive and Academic Councils and the Visitor, which are characteristically governmental or external. Even if there are a few Muslim members present in any of the bodies, it was simply an initiative by the State to instil confidence in the community and to ensure their participatory role without giving them any significant control. Hence, AMU is not being administered by the Muslim community.

h. The contention that the Attorney General for India must defend the 1981 Amendment Act is flawed, especially when the same does not exist in the eyes of law—the same having been struck down by the Allahabad High Court. Regardless, the present dispute is not limited to *inter se* the parties, but involves questions of constitutional interpretation and national importance. Hence, the primary duty of the UOI is to assist the Court and not to defend an amendment in the Act, which is *per se* unconstitutional.

III. ISSUES FOR DETERMINATION

82. Thus, in our considered opinion, the instant reference, based on the question of the tests required to be fulfilled by an institution, for

seeking protection under Article 30 of the Constitution of India, can be broken down into the following segmented questions of law and fact:

Prefatory issues

I. What are the requisite parameters of reference to a larger bench?

What matters were intended to be addressed by the larger bench, in ***Anjuman (supra)****; What are the facets required to be considered by a regular bench for making a reference is made to a larger bench; What are the powers entrusted to the Chief Justice of India in such circumstances?*

II. Whether Appellant has the *locus standi* to bring the present challenge?

It is essential to examine whether the Appellant can invoke Article 30 in the first place. In this regard, various sub-issues that may arise are: (a) Can Article 30 be invoked by institutions set up before the Constitution?; (b) Is it necessary for the whole of the minority community to file the claim, or can an individual or group of individuals also bring a claim?; and (c) Would Muslims be considered a 'minority'?

Questions on constitutional interpretation

III. What are the tests to seek protection under Article 30 of the Constitution?

It is necessary to examine the requirements that must be met for claiming protection under Article 30. The relevant question in this regard is whether the expressions 'establishment' and 'administration' should be read conjunctively or disjunctively?

IV. What is the meaning of the term 'establish' in Article 30?

Article 30 does not define the term 'establish'. The pertinent questions are: (a) What is the scope and meaning of this term?; (b) Can a university be established without statutory intervention? If not, whether the recognition of a university by a Statute amounts to establishment by the Legislature? and (c) Is there any conflict in the opinions of this Court in ***Azeez Basha (supra)*** *vis-à-vis* ***Prof. Yashpal (supra)*** *and the provisions of the NCMEI Act?*

V. What is the meaning of the term 'administer' in Article 30?

Akin to the term 'establish', the term 'administer' is also not defined. It is necessary to understand its meaning, along with its scope. In other words, the question is whether the presence of members of the non-minority community within the management would necessarily mean that the minority community is not administering the institution?

VI. Whether AMU satisfies the test of 'establish' and 'administer' and is thus entitled to the protection under Article 30?

VII. Whether the Union of India is obligated to defend the AMU Amendment Act, 1981?

IV. ANALYSIS

Prefatory Issues

F. ***Issue I: What are the requisite parameters of reference to a larger bench?***

83. The issue concerning the power of a regular bench to refer a matter to a larger bench must be examined in light of the order passed in ***Anjuman***

(supra), which opined that ***Azeez Basha (supra)*** required reconsideration by a larger bench and proceeded to refer it to a seven-judge bench. To this end, the Respondents have vehemently contended that such reference was bad in law and should be declared so.

84. In this vein, we have identified two key aspects of this issue: (***i***) what were the issues identified in ***Anjuman (supra)*** which were intended for the larger bench to address; and (***ii***) whether the manner of making such a reference was legally sound.

F.1. Issues that were intended to be addressed by the larger bench

85. At the outset, it is crucial to determine whether the bench in ***Anjuman (supra)*** intended to restrict the reference in such a way that the seven-judge bench would only analyse the criteria necessary for an institution to qualify as a minority institution under Article 30 of the Constitution. For the sake of clarity and despite the risk of repetition, we find it essential to put forth the relevant extract from the observations made in ***Anjuman (supra)***:

> *"After hearing counsel for the Parties, we are clearly of the opinion that this case involves two substantial questions regarding the interpretation of Article 30(1) of the Constitution of India. The present institution was founded in the year 1938 and registered under the Societies Registration Act in the year 1940. The documents relating to the time when the institution was founded clearly shows that while the institution was established mainly by the Muslim community but there were members 5 from the non-Muslim community also who participated in the establishment process. The point that arises is as to whether Act. 30(1) of the Constitution envisages an institution which is established by minorities alone without the participation for the factum of establishment from any other community. On this point, there is no clear decision of this court. There are some observations in S. Azeez Basha & ors. Vs. Union of India 1968(1) SCR 333, but these observations can be explained away: Another point that arises is whether soon after the establishment of the institution if it is registered as a Society under the Society Registration Act, its status as a minority institution changes in view of the broad principles*

> *laid down in S. Azeez Basha's case.* ***Even as it is several jurists including Mr. Seervai have expressed about the correctness of the decision of this court in S. Azeez Basha's case. Since the point has arisen in this case we think that this is a proper occasion when a larger bench can consider the entire aspect fully. We, therefore, direct that this case may be placed before Hon. The Chief Justice for being heard by a bench of at least 7 judges so that S. Azeez Basha's case may also be considered and the points that arise in this case directly as to the essential conditions or ingredients of the minority institution may also be decided once for all.*** *A large number of. jurists including Mr. Seervai, learned counsel for the petitioners Mr. Garg and learned counsel for respondents and interveners Mr. Dikshit and Kaskar have stated that this case requires reconsideration. In view of the urgency it is necessary that the matter should be decided as early as possible we give liberty to the counsel for parties to mention the matter before Chief Justice."*
>
> [Emphasis supplied]

86. A plain reading of these observations reveals that the two-judge bench in ***Anjuman (supra)*** doubted the correctness of the decision in ***Azeez Basha (supra)*** and the principles enunciated therein. The bench while questioning the holding in ***Azeez Basha (supra)***, also borrowed strength from the views expressed by some jurists.

87. In ***Azeez Basha (supra)***, the issue pertained to the constitutional validity of the AMU 1951 and 1965 Amendment Acts. While questioning the correctness of the decision in ***Azeez Basha (supra)***, it is evident that the reference in ***Anjuman (supra)*** also insinuated that potential errors may have occurred in the analysis of the constitutionality of those enactments. The reference seeking to re-open the issues settled in ***Azeez Basha (supra)***, thus, necessarily means not only to re-examine the correctness of that decision but also an attempt to revisit the constitutionality of the AMU 1951 and 1965 Amendment Acts.

88. Importantly, the key term used in the reference order in ***Anjuman (supra)*** is '*and*', which is clearly used to state that both '*Azeez Basha's*

case may also be considered' ***and*** '*the ingredients of a minority institution*' should be examined definitively. Such an analysis would also have to consider the question posed in ***TMA Pai (supra)*** under 3(a) regarding the criteria required for an institution to qualify as a 'minority institution' under Article 30 of the Constitution, and consequently, as to whether, AMU fulfils such criteria or not.

89. We therefore find it difficult to align ourselves with the opinion expressed by Hon'ble the Chief Justice, according to which the reference before us was limited to determining only the criteria an educational institution must meet under Article 30 of the Constitution. However, given the Hon'ble Chief Justice's decision to further refer the matter pertaining to AMU to a regular bench, we have confined our views to discerning the relevant indicia under Article 30, so as to avoid binding or influencing the regular bench that will ultimately decide the factual issues.

F.2. Manner of making reference to a larger bench

90. The two-judge bench in ***Anjuman (supra)***, after expressing doubt about the correctness of ***Azeez Basha (supra)*** and its principles, referred the matter for reconsideration to a larger bench. Additionally, the bench in ***Anjuman (supra)*** specifically stated that the larger bench reviewing ***Azeez Basha (supra)***—a decision by a five-judge bench—should consist of seven judges. The decision further directed that the matter be placed before the Hon'ble Chief Justice for appropriate directions.

91. Such a reference, to our mind, is not consistent with the established norms of judicial propriety. There are several reasons which substantiate this school of thought. For instance, Order VII Rule 2 of the Supreme Court Rules, 1966 as applicable during the time of the reference stated:

> *"Where in the course of the hearing of any cause, appeal or other proceeding, the Bench considers that the matter should be dealt with by a larger Bench,* ***it shall refer the matter***

to the Chief Justice, <u>who shall thereupon constitute such a Bench</u> for the hearing of it."

[Emphasis supplied]

92. In this regard, it is imperative to refer to the findings of the Constitution Bench in ***Central Board of Dawoodi Bohra Community and another v. State of Maharashtra and another***,[60] which while adjudicating the correctness of previous decisions on the Bombay Prevention of Excommunication Act (Act 42 of 1949), also laid down pertinent principles on the procedure for making references. The decision in ***Dawoodi Bohra (supra)*** essentially clarified the framework concerning how a reference should be made, particularly when a bench of lesser strength doubts the correctness of a decision by a larger or co-equal bench. It held that:

> *"12. Having carefully considered the submissions made by the learned senior counsel for the parties and having examined the law laid down by the Constitution Benches in the abovesaid decisions, we would like to sum up the legal position in the following terms :-*
>
> ***(1) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength.***
>
> ***(2) A Bench of lesser quorum cannot doubt the correctness of the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.***
>
> *(3) The above rules are subject to two exceptions:*

[60] (2005) 2 SCC 673.

> *(i)* ***The abovesaid rules do not bind the discretion of the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength****; and*
>
> *(ii) In spite of the rules laid down hereinabove, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way of exception (and not as a rule) and for reasons given by it, it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of Chief Justice constituting the Bench and such listing. Such was the situation in Raghubir Singh and Ors. and Hansoli Devi and Ors. (supra)"*
>
> [Emphasis supplied]

93. The principles enunciated in ***Dawoodi Bohra (supra)*** re-enforce the provisions of the Supreme Court Rules referred to earlier, and also reiterate the well-established principles based upon doctrines of predictability, consistency, finality and the principle of *stare decisis*. The two-judge bench in ***Anjuman (supra)***, ought to have understood and applied the law, consistent with these principles. The two-judge bench in ***Anjuman (supra)*** being of lesser strength than the five-judge bench in ***Azeez Basha (supra)***, lacked the authority to explicitly question the correctness of ***Azeez Basha (supra)*** and refer the matter to a seven-judge bench.

94. In ***Anjuman (supra)***, the bench not only referred the matter but also specified the numerical strength of the bench to which it should be referred, with a further direction that the matter be placed before the Chief Justice for the limited purpose of notifying the composition of the seven-judge bench. With utmost respect at our command, we do not appreciate as to how a two-judge bench could dictate its viewpoint to the Chief Justice of India. This, to our mind, effectively impaired the Chief Justice's authority as the master of the roster. Allowing such a practice would enable benches of lesser strength, such as a two-judge

bench, to undermine the decisions of larger benches, potentially even an eleven-judge bench. This would also place the Chief Justice in an untenable position, who would be bound by a judicial order while acting in an administrative role, leading to procedural complications and embarrassment.

95. We reiterate that such actions completely undermine the principle of *stare decisis,* a well-established doctrine that mandates the consistent application of legal principles once pronounced by authoritative courts. This principle is rooted in the idea that once a court has determined a rule applicable to a specific set of circumstances, it should be followed in all future cases involving substantially similar facts.[61] *Stare decisis et non quieta movere*—which means to stand by things decided and not disturb settled matters. Accordingly, the importance of precedents and *stare decisis* as fundamental features of our legal system requires that law laid down by higher courts be followed by coordinate or co-equal benches, and most certainly by smaller benches and subordinate courts.

96. The very purpose of these principles is to ensure predictability and stability in judicial decisions, thereby upholding the Rule of Law. It is trite law that when legal precedents are consistently followed, the law remains stable and strengthened, rather than being disrupted at every opportunity.[62] Consistency and finality in judicial orders foster greater confidence and trust in the judicial system, which is the need of the hour. The mere fact that another interpretation may be possible does not warrant unsettling well-established law that has long governed the field.[63] Deviation from these long-settled principles, leads to a situation marred by uncertainty and instability, vitiating any sense of finality.

---

[61] *Krishen Kumar v. Union of India*, (1990) 4 SCC 234.
[62] *State of Uttar Pradesh v. Ajay Kumar Sharma*, (2016) 15 SCC 292.
[63] *Shanker Raju v. Union of India*, (2011) 2 SCC 132.

97. In this light, we respectfully disagree with the opinion of Hon'ble the Chief Justice that the reference in ***Anjuman (supra)*** passes muster. Such a reading risks opening the floodgates to further complexity and disruption, where smaller benches could disregard established principles and overturn decisions of larger benches. This would erode the concept of well-settled principles and destabilize the legal framework, as each judgment would strive to chart new directions, undermining legal certainty and continuity. Ironically, the reference in ***Anjuman (supra)*** strikes through the very core of ***Dawoodi Bohra (supra)*** and the law laid therein.

98. We thus have no hesitation in holding that it is the Chief Justice of India alone, who is the custodian of the authority to determine the composition of benches, and, in public or national interest, place a matter before any bench he deems appropriate, even in the absence of any reference. That being so, the 2019 Reference Order issued by a three-judge bench, which included the then Chief Justice of India, cannot be faulted. Consequently, based on that order, we consider it appropriate to proceed with the determination of some of the issues concerning the constitutional challenge.

99. We also respectfully disagree with the opinion of Hon'ble the Chief Justice in paragraph 39 of his draft judgement, according to which, ***Anjuman (supra)*** has merely 'doubted' and not 'disagreed' with ***Azeez Basha (supra)***. It seems to us that the terms 'doubt' and 'disagree' broadly carry similar connotations. It is difficult to doubt a judicial opinion unless we disagree with the correctness of its contents and substance. Similarly, a disagreement would originate only when such opinion is shrouded with doubts on law or on facts.

G. ***Issue II: Whether the Appellant has the locus standi to bring the present challenge?***

100. The Respondents have countered the Appellant's *locus standi* to invoke Article 30. They have argued that there was no such Fundamental Right available at the time when AMU was established. It is their assertion that since Fundamental Rights are not retrospectively applicable, and considering AMU was established before the Constitution, it cannot claim protection under Article 30. In addition, the Respondents have challenged the Appellant's *locus* on the ground that Muslims did not constitute a 'minority' in 1920.

101. The Appellant has controverted the Respondents' objections by arguing that even pre-Constitution institutions can invoke the right under Article 30 and that Muslims did indeed constitute a minority in the State of Uttar Pradesh at the relevant time because they were numerically lesser when compared to other communities. Accordingly, the Appellant contended that it has the *locus standi* to enforce the right granted by Article 30.

102. These contentions thus merit a determination as to whether a claim can be brought under Article 30 in the first place.

G.1. Locus of pre-Constitution institution

103. It is a settled principle of law that Fundamental Rights are not retrospectively applicable.[64] The Constitution of India was framed in a social context that marked a significant departure from an exacting colonial regime to a system based on rights and self-governance. Hence, the legal milieu in these two regimes inevitably differed, with the Constitution imposing more stringent restrictions on governmental actions. Consequently, if the previous actions of the colonial

[64] Sushila Rao, "*The Doctrine of Eclipse in Constitutional Law: A Critical Reappraisal of its Contemporary Scope and Relevance*" National Law School of India Review, (2006) Vol. 18 No. 1 pp. 49.

government were to be tested on the touchstone of the Constitution, nearly all such acts would need to be overturned.

104. Such a wholesale invalidation of past actions would have far-reaching consequences. It could undermine the stability of the legal system, as people's lives and rights—such as property rights, contractual relationships, etc.—have been shaped by those earlier actions. Hence, the social and economic disruption resulting from such a scenario would be severe. Furthermore, the retrospective application of Fundamental Rights could also lead to a legal quagmire, where Courts would be crippled with cases in which relevant documents and evidence might no longer be available. Moreover, such an unscrambling of the egg might nearly be impossible in some instances, such as cases of criminal convictions from decades ago.

105. The non-retrospective application of Fundamental Rights therefore is a pragmatic principle aimed at ensuring effective governance in society without being hindered by ghosts from the past.

106. At this point, it is essential to distinguish between retrospective and retroactive laws. A retrospective law imposes new obligations or rights on transactions that have already been completed. In contrast, retroactive legislation applies to ongoing transactions, affecting obligations that arise after the law's enactment, even if the transactions began beforehand.[65] For example, if a law prohibits houses from having more than two floors and requires existing houses exceeding this limit to be demolished, it is retrospective. If the law only affects houses under construction when it comes into force, it is retroactive.

107. While the retrospectivity of Fundamental Rights is generally restricted, their application on transactions that arose before and continued post-1950 are not. The temporal boundary in the application of

[65] *SEBI v. Rajkumar Nagpal*, (2023) 8 SCC 274, para 98-102.

Fundamental Rights prevents pre-Constitution violations from being agitated, and it does not proscribe institutions created before the Constitution to plead their rights post its enactment. If we were to hold otherwise, it would lead to an untenable situation where a significant portion of the population or institutions with a long history would be excluded from the protection of Fundamental Rights simply because they existed before 1950.

108. Similarly, practices prevailing before 1950 but prohibited afterwards must be struck down if it does not align with the constitutional ethos. The significance of 26.01.1950 lies in its role as a golden date for eradicating unconstitutional practices and safeguarding the rights guaranteed under Part III of the Constitution. It would then accordingly follow that if an institution was established and administered by minorities as on 26.01.1950, such an institution would be entitled to seek protection under Article 30.

109. We cannot therefore accept the Respondent's contention that the Appellant's claim should be disallowed merely because Article 30 did not exist at the time AMU was established. Applying such an interpretation would be absurd and legally unjust. While certain institutions might have been set up during the pre-Constitutional era, the Court cannot turn a blind eye to their rights that are duly protected by the Constitution.

110. In this regard and especially in the context of Article 30, we find more than adequate support from a five-judge bench decision of this Court in ***Right Rev. Bishop S.K. Patro v. State of Bihar***,[66] which relied on the opinion proffered by the seven-judge bench in ***Kerala Education Bill (supra)*** and held:

> *"7. […]* ***The guarantee of protection under Article 30 is not restricted to educational institutions established after the Constitution: institutions which had been***

[66] *Right Rev. Bishop S.K. Patro v. State of Bihar*, (1969) 1 SCC 863.

established before the Constitution and continued to be administered by minorities either based on religion or language qualify for the protection of the right of minorities declared by Article 30 of the Constitution*. In Re the Kerala Education Bill, 1957 [(1959) SCR 995] Das, C.J., observed at p. 1051:*

*"**There is no reason why the benefit of Article 30(1) should be limited only to educational institutions established after the commencement of the Constitution****. The language employed in Article 30(1) is wide enough to cover both pre-constitution and post-constitution institutions. It must not be overlooked that Article 30(1) gives the minorities two rights, namely, (a) to establish, and (b) to administer, educational institutions of their choice. The second right clearly covers pre-constitution schools just as Article 26 covers the right to maintain pre-constitution religious institutions."*

[Emphasis supplied]

111. In conclusion, while Fundamental Rights cannot be applied retrospectively to disrupt pre-constitutional practices, the Appellant is not barred from asserting a claim under Article 30 as long as the necessary conditions of this provision are met. Individuals or institutions who qualify to be protected through a Fundamental Right as of 26.01.1950 are entitled to enforce these rights under Article 32. Therefore, the Appellant's *locus standi* cannot be dismissed on this basis.

112. In addressing the issue of *locus*, two more key questions arise: (***i***) whether a small group of individuals from a community can bring a claim under Article 30, as opposed to requiring the entire community to assert the claim collectively?; and (***ii***) whether the Muslim community in the present case were presumed to be a 'minority' at the time AMU was established? Each of these points are analysed separately below.

G.2. Locus of individuals from the minority community

113. The Respondents have countered the Appellant's *locus* on the ground that they cannot plead the right under Article 30 since they are not the

representative of the entire Muslim community. Hence, it is essential to analyse whether Article 30 can be invoked by a few individuals of the minority community.

114. Under the Indian Constitution, the framework of rights can be broadly divided into three classes based on who holds the right and who can exercise it:

a. The *first* category, known as 'individual rights', encompasses rights available to all individuals and can be claimed by them. An example of such a right is the right to privacy, which pertains to all individuals and can be asserted by any individual.

b. The *second* category, termed 'group rights' in India, consists of rights available to individuals, provided they belong to a specified group. An example of such a right could be the right of reservation provided to individuals belonging to certain classes. In this regard, this Court has held:

> *"407. Unless the creamy layer is removed, OBCs cannot exercise their group rights. The Union of India and other respondents argued that creamy layer exclusion is wrong because the text of the Ninety-third Amendment bestows a benefit on "classes", not individuals.* ***While it is a group right, the group must contain only those individuals that belong to the group.*** *I first take the entire lot of creamy and non-creamy layer OBCs. I then remove the creamy layer on an individual basis based on their income, property holdings, occupation, etc. What is left is a group that meets constitutional muster.* ***It is a group right that must also belong to individuals, if the right is to have any meaning. If one OBC candidate is denied special provisions that he should have received by law, it is not the group's responsibility to bring a claim. He would be the one to do so. He has a right of action to challenge the ruling that excluded him from the special provisions afforded to OBCs. In this sense, he has an individual right. Group and individual rights need not be mutually exclusive. In this case, it is not***

one or the other but both that apply to the impugned legislation."[67]

[Emphasis supplied]

As elucidated in the extract above, such group rights are possessed by an individual, and such individual can assert their claim to exercise these rights. The individual does not need to demonstrate that the group as a whole is affected and may exercise such rights in their singular capacity.

c. The *third* category, which we would like to refer to as collective rights, includes rights that belong to groups as a whole and can only be exercised by those groups collectively. An example of such a right could be the right of a country to vote in the UN General Assembly.[68] Such rights belong to the entire nation as a community and are not contingent on whether individual citizens of the nation are individually exercising this right. Another example of such a category is the right of a country to be free from intervention by other countries, which also belongs to and is to be exercised by the nation as a whole.[69] Unlike the previous two categories, the bearer of these rights is a collective unit and not individual constituents. Accordingly, the right can be claimed by the community at large or by an individual representing the entire community.

115. Based on the foregoing discussion, we believe that the right ensconced under Article 30 belongs to the second category, namely, it is granted to a minority community at large but can be exercised by an individual or a group of individuals. This right does not fit into the first category because Article 30 specifically aims to uplift and protect certain minority communities, making membership in such a community a necessary pre-condition. At the same time, however, it is also distinct

---

[67] *Ashoka Kumar Thakur v. Union of India,* (2008) 6 SCC 1, para 407.
[68] Charter of United Nations (signed on 26 June, 1945) Art. 27.
[69] Lukas Meyer et. Al. (ed.), Rights, Culture, and the Law, Oxford University Press (2003) pp. 181.

from the third category because the protection envisaged in Article 30 is toward individuals belonging to such a community and not the entire community as one single entity. Thus, while the right exists for the benefit of the whole community, it can be exercised *qua* its individual members rather than requiring collective action by the whole community.[70]

116. Having said that, it is important to emphasize that the technical issue of who can invoke Article 30 should not be used to oust the claim at the threshold. Procedure, ultimately, is the handmaiden of justice. This is especially true for contentions regarding *locus* and who can invoke a particular provision, especially when there is public interest at stake. Unless there is a risk of collusion between the parties or the Court believes that the interest of all the stakeholders might not be adequately represented and there might be some 'invisible victims', the Court typically refrains from scrutinizing who has invoked the constitutional provision and whether the claimant represents the entire community. Constitutional Courts are envisaged as liberal platforms where vital questions regarding the violation of Fundamental Rights can be analysed without being bogged down by procedural technicalities. In that sense, the substance of the claim usually takes precedence over its form, instead of the form foreclosing the substance at the very outset.

117. The locus *standi* of the Appellant is thus not undermined on this count as well.

G.3. What is a 'minority' community?

118. Since during the course of hearing, or otherwise, the Respondents have not provided any reliable figures or substantial evidence to counter the Appellant's position, it appears that it is not necessary to determine this issue at this stage, when only legal issues are being resolved.

---

[70] *Right Rev. Bishop S.K. Patro, supra* note 66.

119. Having answered the prefatory issues of *locus* and maintainability, we now proceed to delve into the contours of Article 30 of the Constitution and make an endeavor to explain the true meaning of the expressions 'establish' and 'administer'.

Questions regarding constitutional interpretation

H. *Issue III: What are the tests to seek protection under Article 30?*

120. When posed with the question of whether the prongs of 'establishment' and 'administration' ought to be construed conjunctively or disjunctively in determining whether it is a minority institution, the Appellant sought to contend that minority administration of their institution is merely discretionary and that they are not bound to satisfy the twin test. They instead urged that the prong of administration, would not be a prerequisite for determining the minority status of an educational institution.

121. The Respondents, on the other hand, assailed that for an institution to claim the protection proffered under Article 30, the minority community would have to demonstrate the two prongs of 'establishment' and 'administration' of the institution conjunctively.

122. Having considered the rival submissions tendered by the parties as well the language of the provision itself, it is evident that 'establishment' and 'administration' are qualitatively distinct: while the former deals with the history of the institution, the latter deals with the control over the institution, at present. Accordingly, 'establishment' is temporally fixated, while 'administration' requires analysis over a continuous span of time, both during and post-establishment.

123. Of these two aspects, the necessity of the prong of establishment is not in dispute. Both parties agree that an institution must be established

by the minority community. This issue is also largely settled by various judicial precedents of this Court, which have held that establishment by minority is a necessary pre-requisite for claiming the right under Article 30.[71] The question, however, has been raised in regard to the administration prong. The Respondents have argued it to be a pre-requisite for invoking Article 30, while the Appellant has argued it to be the result of such an invocation.

124. We find that both the Appellant and Respondents are right, but only to the extent that administration is both a pre-requisite and the result. In this respect, it mirrors its counterpart, Article 29, under the section '*Cultural and Educational Rights*'. Article 29 makes the distinctiveness of culture a pre-requisite for invoking its provision, and once invoked, it bestows the right to conserve such distinctiveness. Similarly, Article 30 outlines administration by the minority community as a pre-requisite for invoking the provision, ultimately granting the right to continue such administration free from unreasonable government interference.

125. There are multifarious reasons behind upholding administration as a pre-requisite rather than merely a right or result. *First*, if Article 30 were contingent only on the establishment by the minority community, it would render the provision susceptible to significant misuse. In a bid to attain special protection under Article 30, majority communities could purchase or takeover institutions established by minorities and then administer such institutions with reduced State interference in perpetuity. This will potentially lead to all communities ultimately enjoying the special right guaranteed by Article 30, denuding the very purpose of this Article.

---

[71] *Kerala Education Bill, 1957, supra* note 58*; State of Kerala vs. Very Rev. Mother Provincial,* (1970) 2 SCC 417, para 8*; S.P. Mittal vs. Union of India,* (1983) 1 SCC 51, para 137; *Dayanand Anglo Vedic* (*DAV) College Trust and Management Society v. State of Maharashtra,* (2013) 4 SCC 14.

126. *Second*, it is clear that Article 30 carves out an exception to the general power of the Government to regulate and intervene in educational institutions. It has also been defined broadly, extending to all religious and linguistic minorities, potentially encompassing a significant portion of India's population. If not interpreted narrowly, Article 30 would undermine governmental control over educational institutions and compromise the quality of higher education.

127. Therefore, if the institutions not administered by minorities were also brought under the purview of Article 30, it could face misuse by institutions camouflaging as minority institutions when, in reality, they are not. I find support to this view in ***A.P. Christian Medical Educational Society v. Govt. of A.P.***,[72] which held:

> *"8. […]* ***The government, the University and ultimately the court have the undoubted right to pierce the 'minority veil' — with due apologies to the corporate lawyers — and discover whether there is lurking behind it no minority at all and in any case, no minority institution. The object of Article 30(1) is not to allow bogies*** *to be raised by pretenders but to give the minorities 'a sense of security and a feeling of confidence' not merely by guaranteeing the right to profess, practise and propagate religion to religious minorities and the right to conserve their language, script and culture to linguistic minorities, but also to enable all minorities, religious or linguistic, to establish and administer educational institutions of their choice.* ***These institutions must be educational institutions of the minorities in truth and reality and not mere masked phantoms*** *[…] What is Important and what Is imperative is that there must exist some real positive index to enable the institution to be identified as an educational institution of the minorities […]."*
>
> [Emphasis supplied]

128. Several other existing case laws support the notion that administration too, ought to be regarded as a pre-requisite. For instance, In ***St.***

---

[72] *A.P. Christian Medical Educational Society v. Govt. of A.P & Anr.,* (1986) 2 SCC 667, para 8.

Stephen's College (supra), a five-judge bench of this Court analysed the facets regarding both establishment and administration of St. Stephen's College under the Delhi University Act, to conclude whether it could be characterised as a minority institution. In ***DAV College (supra)*** a two-judge bench reiterated the principle that administration has to be exercised by the minority community. This view was also reinforced by another two-judge bench in ***T. Varghese George v. Kora K. George***.[73] Similarly, in ***Manager, Rajershi Memorial Basic Training School v. State of Kerala***,[74] the Kerala High Court held that an institution merely being founded by a member of a minority community is insufficient, and it has to be administered by the minority community in question.

129. All of these cases support the legal principle that for an institution to claim protection under Article 30, it should have a 'real positive indicia' and must not be a mere sham. It is, therefore, permissible to 'pierce the veil' in order to ascertain the real character of the institution, as the minority status cannot be bestowed on illusionary claims.

130. Lastly, it is an established principle of statutory interpretation that a provision has to be read as a whole, and the accompanying text may be employed in interpreting the meaning of another clause.[75] This principle is particularly relevant in the present case, as Article 30(1A) specifically defines an institution "*referred to in Clause 1*" and mentions it to be an institution that is both established '*and*' administered by a minority:

> *"(1A) In making any law providing for the compulsory acquisition of any property of an* ***educational institution established and administered by a minority, referred to in clause (1)****, the State shall ensure that the amount fixed by or determined under such law for the acquisition*

[73] Dr. *T. Varghese George v. Kora K. George and Ors.,* (2012) 1 SCC 369.
[74] *Manager, Rajershi Memorial Basic Training School v. The State of Kerala and Anr.,* 1972 SCC OnLine Ker 111, para 4.
[75] Justice GP Singh, Principles of Statutory Interpretation, Lexis Nexis (2016), 14th edn.

of such property is such as would not restrict or abrogate the right guaranteed under that clause."

[Emphasis supplied]

131. Since the term '*and*' has been consciously employed instead of '*or*', it is clear that the text of the provision itself envisages the conditions to be read conjunctively. To hold to the contrary would require reading down an original provision of the Constitution, which the Court must refrain from doing.

132. Considering that institutions claiming any benefit under Article 30 must satisfy this two-pronged test, it is trite to say that the terms 'establishment' and 'administration' under Article 30 are conjunctive.

I. ***Issue IV: What is the meaning of 'establish' in Art. 30?***

133. The Appellant has argued that the term 'establish' in Article 30 means who 'founded' the institution. It is their assertion that if the genesis of the institution can be traced back to the minority community, the institution would satisfy the test of being a minority institution.

134. *Per contra*, the Respondents ascribe a different meaning to the term 'establish' and argue that the Court must evaluate as to who created the institution. If the institution owes its existence to the Statute, then it would mean that the institution was established by the Legislature and not by the minority community.

135. In due consideration of these opposing views, the central issue for our determination, therefore would be to ascertain the meaning of the term 'establish' in Article 30 and determine what the relevant *indicia* should be, in order to determine on facts as to whether or not an institution is established by the minority community.

136. Previously, a six-judge bench of this Court had conducted a similar exercise in ***State of Kerala v. Very Rev. Mother Provincial***[76] and defined the term establish as the 'bringing into being of an institution':

> "*8. Article 30(1) has been construed before by this Court. Without referring to those cases it is sufficient to say that the clause contemplates two rights which are separated in point of time. The first right is the initial right to establish institutions of the minority's choice.* ***Establishment here means the bringing into being of an institution and it must be by a minority community****. It matters not if a single philanthropic individual with his own means, founds the institution or the community at large contributes the funds.* ***The position in law is the same and the intention in either case must be to found an institution for the benefit of a minority community by a member of that community****. It is equally irrelevant that in addition to the minority community others from other minority communities or even from the majority community can take advantage of these institutions. Such other communities bring in income and they do not have to be turned away to enjoy the protection*"
>
> [Emphasis supplied]

137. Hence, as rightly held by this Court, the term 'establish' means bringing the institution into existence for the benefit of the minority community. However, we must ask ourselves as to when an institution can be said to have come into existence, and what it means to establish it for the benefit of the community. Each of these prongs have been analysed separately below.

I.1. Bringing into existence—meaning and factors

138. In this regard, the Appellant and Respondents both suggested that an institution comes into existence at a single point in time but disagreed on what that exact point should be. The Appellant suggested looking back into the genesis of the institution to determine when it was 'founded' or when the idea was conceived. In contrast, the Respondents argued against going back in time and instead urged that the

[76] *Mother Provincial*, *supra* note 71, para 8.

institution should be considered established the moment it was operationalized. According to them, if the institution was operationalized by virtue of a statute, then it was established at that specific point by the Legislature.

139. To clarify these divergent views, it might be helpful to consider analogous situations. For instance, if the question is about when a photograph taken with an analogue camera comes into existence, one perspective would argue that it is created when the photograph is clicked, while the other would assert that it only exists when the photo is finally printed on paper. Similarly, in the context of a melody, one side might argue that it comes into existence when it is composed, whereas the other side could contend that it only comes into being when it is finally performed. Or in the context of art, one perspective could be that a painting comes into existence when the idea is conceived, and the other side could be that it is only when it is fully completed.

140. We believe that both sides are partly right and partly wrong. They are right in considering both the genesis of the institution and the point of sanction by the statute for operationalizing the institution as relevant factors to determine establishment. However, they are incorrect in asserting that coming into existence is an event frozen at a single point in time. Instead, we believe that coming into existence operates in a continuum, which requires the analysis of the entire gamut of relevant factors that brought the institution into being. The essence of existence—be it that of an educational institution or a photograph, melody, or an art as instantiated above—is a multi-faceted and an ontological question that cannot be answered by artificially fixating it at a specific time with a bright-line test. Since there are several factors that contribute towards the existence of the educational institution, at no point can we say that the institute came into existence as soon as one specific factor was fulfilled. Such an exercise would highlight one

factor while discounting the importance of others, which would be arbitrary and irrational. Instead, the correct approach requires an appraisal of the entirety of facts—i.e., the origin, the point of finality, and the whole process in between—to reach an understanding about the establishment.

141. Hence, while the parties are right in pointing out the relevant factors of genesis and the statutory sanction, the analysis of who establishes the educational institution has to go beyond them to cover all aspects holistically. Since these factors would be a question of fact that would differ from case to case, giving a laundry list of all such aspects would be erroneous in law. However, to determine whether the minority community has established the institution or not, a few illustrative factors that the Courts have considered in the past include:

a. The genesis of the institution and who conceptualized the idea;

b. The gathering of resources and who provided the requisite finances for creating the institution;[77]

c. Who contributed towards the infrastructure of the institution to provide it with a physical existence;[78]

d. The framing of charter documents and who imparted the purpose to the institution;[79]

e. In case government approvals were required, who made the initial efforts in taking those permissions and fulfilling the necessary compliances; and

f. Post the approval of the government, who undertook the initial steps in forming the administrative bodies,[80] hiring teachers,

[77] *Right Rev. Bishop S.K. Patro*, *supra* note 66, para 15-16.
[78] *St. Stephen's College*, *supra* note 50, para 31.
[79] Ibid, para 35.

admitting students, passing the first statutes and ordinances, ensuring regular compliances, etc., for operationalizing the institution.

I.1.1. Caveat to these factors

142. In regard to these factors and any additional ones that may be relevant based on the specifics of each case, there are two important qualifications to note. *First*, as was previously stated, none of these factors individually would be determinative of the minority status; the analysis must be holistic, and the factum of existence must be seen in a continuum instead of fixating on one factor and point of time. In several instances, Courts have clarified that the absence of certain factors, such as the institution not being constructed by the minority community[81] or receiving external financial assistance,[82] does not negate the minority character of the institution. These decisions reiterate that the presence or absence of a single factor should not alter the Court's overall conclusion.

143. *Second*, the analysis concerning who fulfils each individual factor should not aim at creating absolutes, i.e., the Court must not mandate that the minority community must be single-handedly responsible for fulfilling the role prescribed by that factor. It could be the case that the community takes aid of external parties for setting up the institution, but still takes the lead role in such establishment. If we were to hold that such aid would take away the minority character of the institution, we would, in effect, be laying down a requirement that the community must work in silos and that no member belonging to any other community should provide any assistance in achieving its purpose. This would squarely contravene the very spirit of our Constitution,

---

[80] Ibid, para 35-40.
[81] *Rt. Rev. Dr. Aldo Maria Patroni v. Assistant Educational Officer*, 1973 SCC OnLine Ker 60, para 7; *A. Raju and Ors. v. Manager, Nallor Narayana L.P. Basic School & Ors.,* 2019 SCC OnLine Ker 16483, para 6-7; *T.M.A. Pai, supra* note 3, para 11.
[82] *Right Rev. Bishop S.K. Patro, supra* note 69, para 16; *Dipendra Nath Sarkar v. State of Bihar & Ors.*, 1960 SCC OnLine Pat 205, para 14.

which permits—or rather encourages—other communities to work in tandem with minority communities for their upliftment. In a cohesive society like ours, cooperation for mutual development is a shared moral responsibility. Hence, the mere presence of external aid is a factor which would not obviate the minority character of the institution.

144. That being said, the converse must also hold true. If the leading role in establishing an institution is played by an external party, mere contributions from a member of the minority community would not be sufficient to attribute the establishment itself to the minority. To hold otherwise would expose the protection given under Article 30 to potential misuse, allowing institutions established by the majority community to claim minority status based on some insignificant contribution from the minority community. The test should therefore rather focus on who takes a leading and decisive role in fulfilling the relevant criteria for establishing an institution.

145. To determine whether the minority community established the institution, the Court should thus examine whether it was indeed that community which brought the institution into existence. This involves assessing who played the leading role from the institution's inception, through the process of making its creation a reality, and finally, in making it operational.

146. Having understood the meaning of 'bringing into existence', we shall now revisit the Respondent's argument that if an institution is being created by Statute, then it cannot be said to have been brought into existence by the minority community since in that, case it is the Legislature which establishes the university. This particular element requires some detailed analysis, not only because it was vehemently argued by both sides but also because, as confirmed by this Court in ***Prof Yashpal (supra)***, a University can only be created by or under a Statute.

147. Having said that, if we were to hold that statutory intervention means that the Parliament 'establishes' the university and not the minority community (as was held in ***Azeez Basha (supra)***), it would mean that the minority community would never be able to qualify the 'establishment' prong under Article 30. This would concomitantly lead to the conclusion that minorities can never establish a university under this provision. Such a conclusion would run contrary to the amendment to the NCMEI Act, which includes universities also under the ambit of minority educational institutions. Therefore, to render *quietus* to this issue, we shall discuss whether the Statute does, in fact, bring an institution into existence.

I.1.2. Statutory intervention and establishment of an institution

148. In this regard, it is important to note that statutory intervention exists as a sliding scale, which can differ based on the kind of institution. Broadly, there are three such categories of institutions: *first*, those which are 'registered in accordance' with the statute; *second*, which are 'recognized' by the statute; and *third*, which are 'created by' the statute. Each of these are analysed separately below.

I.1.2.1. Registered in accordance with the statute

149. To establish an institution as a juristic entity, it is possible that the minority community uses a form of organization provided under a statutory framework. For instance, to establish an institution as a company, the community might utilize the provisions of the Companies Act, 2013; for a society, it would perhaps be the Cooperative Societies Act, 1912, and so on. In case such a statutory framework is used by the community, the question arises who truly brings the institution into existence—the community or the statute that is used to create the institution?

150. This question is no longer *res integra* and has been effectively answered in ***Dalco Engg. (P) Ltd. v. Satish Prabhakar Padhye***,[83] wherein this Court held:

> "*20.* ***A "company" is not "established" under the Companies Act. An incorporated company does not "owe" its existence to the Companies Act****. An incorporated company is formed by the act of any seven or more persons (or two or more persons for a private company) associated for any lawful purpose subscribing their names to a memorandum of association and by complying with the requirements of the Companies Act in respect of registration.* ***Therefore, a "company" is incorporated and registered under the Companies Act and not established under the Companies Act****. Per contra, the Companies Act itself establishes the National Company Law Tribunal and the National Company Law Appellate Tribunal, and these two statutory authorities owe their existence to the Companies Act.*"
>
> [Emphasis supplied]

151. Hence, as rightly held in the aforementioned case, using a statutory framework does not necessarily mean that the organization is established by the statute. If that were so, all companies under Companies Act, 2013 would become government companies, leading to an absurd consequence that does not hold water.

152. The Statutes that are used merely as a tool by the minority community to register their institution under the statutory framework do not thus take away the community's role in bringing the institution into existence.

I.1.2.2. Recognized under the Statute

153. The second kind of Statutes are those that provide recognition to already existing institutions. This is usually true for Statutes providing affiliation to colleges with universities. Once the college affiliates itself to a university, it will have to fulfil the statutory requirements prescribed under the relevant statute of the university. Would such a

---

[83] *Dalco Engg. (P) Ltd. v. Satish Prabhakar Padhye and Ors.,* (2010) 4 SCC 378, para 20.

statutory intervention then mean that the institution has been brought into existence by that Statute?

154. This question has also been lucidly answered by this Court in ***Executive Committee of Vaish Degree College v. Lakshmi Narain,***[84] where a similar contention was raised that after being affiliated with the university, Vaish Degree College became a statutory body that was created by the statute. Rejecting this view, the Court held that:

> "***Here a distinction must be made between an institution which is not created by or under a statute but is governed by certain statutory provisions for the proper maintenance and administration of the institution****. There have been a number of institutions which though not created by or under any statute have adopted certain statutory provisions, but that by itself is not, in our opinion, sufficient to clothe the institution with a statutory character. […]*
>
> *It is, therefore, clear that there is a well-marked distinction between a body which is created by the statute and a body which after having come into existence is governed in accordance with the provisions of the statute.* ***In other words the position seems to be that the institution concerned must owe its very existence to a statute which would be the fountainhead of its powers. The question in such cases to be asked is, if there is no statute would the institution have any legal existence. If the answer is in the negative, then undoubtedly it is a statutory body, but if the institution has a separate existence of its own without any reference to the statute concerned but is merely governed by the statutory provisions it cannot be said to be a statutory body*** *[…].*"
>
> [Emphasis supplied]

155. Hence, if an institution possesses legal existence independent of the statute, then the Statute merely recognizes an existing institution and does not 'establish' it. This kind of Statute also does not take away the role of the minority community in bringing the institution into

---

[84] *Executive Committee of Vaish Degree College and Anr. v. Lakshmi Narain and Ors.* (1976) 2 SCC 58, para 10.

existence. Accordingly, just because a college is affiliated with a university and follows its statutory requirements, it would not deprive the institution of its minority character. This was also stated in ***St. Stephens (supra)***, where this Court held:

> "*41.* ***It was contended that St. Stephen's College after being affiliated to the Delhi University has lost its minority character. The argument was based on some of the provisions in the Delhi University Act and the Ordinances made thereunder. It was said that the students are admitted to the University and not to the College as such. But we find no substance in the contention****. In the first place, it may be stated that the State or any instrumentality of the State cannot deprive the character of the institution, founded by a minority community by compulsory affiliation since Article 30(1) is a special right to minorities to establish educational institutions of their choice […]*"
>
> "*45. From these and other relevant provisions of the Act and Ordinances, we have not been able to find any indications either in the general scheme or in other specific provisions which would enable us to say that the College is legally precluded from maintaining its minority character. That in matters of admission of students to Degree courses including Honours courses, the candidates have to apply to the College of their choice and not to the University and it is for the Principal of the College or Dean of Faculties concerned to take decision and make final admission. It is, therefore, wrong to state that there is no admission to the College but only for the University. The procedure for admission to Post Graduate courses is of course, different but we are not concerned with that matter in these cases.*"
>
> [Emphasis supplied]

156. It may also be relevant at this stage to examine instances of such universities, which, under law, are mandated to be operationalized by a Statute. We may, in this regard, usefully refer to the University Grants Commission Act, 1956 (**UGC Act**) which provides as follows:

> "*22. Right to confer degrees—*
>
> *(1)* ***The right of conferring or granting degrees shall be exercised only by a University established or incorporated by or under a Central Act, a Provincial Act or a State Act*** *or an institution deemed to be a University under Section 3 or an institution specially*

empowered by an Act of Parliament to confer or grant degrees.
(2) Save as provided in sub-section (1), no person or authority shall confer, or grant, or hold himself or itself out as entitled to confer or grant, any degree.
(3) For the purposes of this section, "degree" means any such degree as may, with the previous approval of the Central Government, be specified in this behalf by the Commission by notification in the Official Gazette.

23. Prohibition of the use of the word "University" in certain cases.—
No institution, whether a corporate body or not, other than a University established or incorporated by or under a Central Act, a Provincial Act or a State Act shall be entitled to have the word "University" associated with its name in any manner whatsoever*:*
Provided that nothing in this section shall, for a period of two years from the commencement of this Act, apply to an institution which, immediately before such commencement, had the word "University" associated with its name."
[Emphasis supplied]

157. Since the UGC Act mandates that degrees can be conferred only by those universities that are established 'by or under' a statute, it is a necessary corollary that the university must be operationalized by a statute itself in order to validly confer the degrees. Given that the legal existence in this context flows directly from the statute, the question thus arises: does this mean that the minority community does not bring such universities into existence, and that they are instead established by the legislature? Indeed, ***Azeez Basha (supra)*** says so. Contrarily, the NCMEI Act, as amended from time to time, enables a minority community to establish a university on its own. There being an apparent inconsistency between the two, the question that arises for further consideration is as to which perspective accurately reflects the correct position—***Azeez Basha (supra)*** or the NCMEI Act?

Azeez Basha (supra) v. the NCMEI Act: The curious case of bringing universities into existence

158. In this regard, one needs to note the nuance between legal recognition and other facets of existence. As was discussed before, existence covers other aspects apart from legal sanction. Especially for universities, this Court, in the case of ***Prof. Yashpal (supra)***, held that the Statute shall not give legal sanction unless it is satisfied that there exist enough infrastructural facilities within the institution:

> "*44. […]* ***When the Constitution has conferred power on the State to legislate on incorporation of university, any Act providing for establishment of the university must make such provisions that only an institution in the sense of university as it is generally understood with all the infrastructural facilities, where teaching and research on a wide range of subjects and of a particular level are actually done, acquires the status of a university****. […]"*
>
> *45. The State Legislature can make an enactment providing for incorporation of universities under Entry 32 of List II and also generally for universities under Entry 25 of List III.* ***The subject "university" as a legislative head must be interpreted in the same manner as it is generally or commonly understood, namely, with proper facilities for teaching of higher level and continuing research activity. An enactment which simply clothes a proposal submitted by a sponsoring body or the sponsoring body itself with the juristic personality of a university so as to take advantage of Section 22 of the UGC Act and thereby acquires the right of conferring or granting academic degrees but without having any infrastructure or teaching facility for higher studies or facility for research is not contemplated by either of these entries****. Sections 5 and 6 of the impugned enactment are, therefore, wholly ultra vires, being a fraud on the Constitution."*
>
> *46. […] In the absence of any campus and other infrastructural facilities, UGC cannot take any measures whatsoever to ensure a proper syllabus, level of teaching, standard of examination and evaluation of academic achievement of the students or even to ensure that the*

students have undergone the course of study for the prescribed period before the degree is awarded to them."

[Emphasis supplied]

159. Similarly, while Regulation 3.1 of the University Grants Commission (Establishment of and Maintenance of Standards in Private Universities) Regulations, 2003 also states that universities have to be established by a statute, the very definition of the term 'private university' in Regulation No. 2.1 clarifies that the university is established albeit 'through' the legislation, but 'by' a private body:

"*3.1. Each private university* ***shall be established by a separate State Act*** *and shall conform to the relevant provisions of the UGC Act, 1956, as amended from time to time.*"

"*2.1.* ***"Private university" means a university duly established <u>through</u> a State / Central Act <u>by a sponsoring body</u>*** *viz. a Society registered under the Societies Registration Act 1860, or any other corresponding law for the time being in force in a State or a Public Trust or a Company registered under Section 25 of the Companies Act, 1956.*"

[Emphasis supplied]

160. In addition to these provisions, it is also imperative to take into consideration that the role of sponsoring bodies is explicated in further detail in various state legislations. For instance, the Uttar Pradesh Private Universities Act, 2019, sets out in detail the steps that the sponsoring body must take to receive sanction for establishing a university. The body is required to create an endowment fund, possess certain specified areas of land, construct buildings, install equipment, appoint professors, plan curriculum and other activities, make rules for the functioning of the university, and comply with other norms.[85] Subsequently, such a body is then required to apply for the sanction by

[85] Uttar Pradesh Private Universities Act, 2019, Section 3.

furnishing the requisite details.[86] Only once the government is satisfied with the necessary compliances by the sponsoring body, does it grant the sanction and incorporates it under the statute.[87] Therefore, even though the final legal existence is sanctioned through the statute, it is the private body which initiates and fulfils other essential roles.

161. A similar situation existed in India prior to independence. During this pre-independence era, the very nature of universities was in a state of flux. Up until the 1920s, universities primarily functioned as administrative units rather than teaching institutions. Accordingly, they were established by the State as government bodies to exercise control over all the colleges in the respective provinces. This factum is acknowledged by the Saddler Commission of 1917-19, which noted:

> "*These territorial limits have been deemed necessary in the past, mainly for the following reasons. In the first place, the functions of the older universities in India have demanded them.* ***So long as each of these universities is engaged, subject to Government control, in administrative rather than teaching functions, it necessarily follows that its boundaries should be as far as possible co-terminous with those of a province*** *[…]* ***The self-contained provincial university affords some administrative conveniences. Because it exercises direct control over Government colleges, gives grants-in-aid to others, and is deeply interested in the secondary school system, Government is necessarily hampered in carrying out these duties if the affiliation and inspection of colleges within its area and the recognition of schools situated within its territorial jurisdiction are in any respect under the authority or in the hands of another Government and university****."*[88]
>
> [Emphasis supplied]

162. However, in order to expand the scope of education and to accommodate growing demand, there was a legitimate need to change the role of the university from mere administrative bodies to

[86] Ibid, Section 4.
[87] Ibid, Section 7.
[88] M.E. SADLER, *Calcutta University Commission 1917-1919*, Chapter XXIX.

institutions of learning. Hence, while there was hitherto monopoly exercised by government universities,[89] it permitted private players to approach the government and seek the setting up of a university. As recognized by the Saddler Commission, BHU was the first of its kind.

163. In due parlance, the University Commission Report of 1929 also acknowledged this change, and it was noted that various learning universities had come into being.[90] In order to establish a university whose degree would be recognized by the government, they were required to be established through a statute.[91] Universities that were established in native states were also created through the sanction of the ruler.[92] Even though some native groups did establish universities without the statute, their degrees were not recognized, consequently leading to them being less attractive centres of learning.[93]

164. That means that while universities were still required to seek a government's sanction for recognition of degrees, the statutes were limited to their legal existence. There are other essential components as well, to determine the status of a university. As was also briefly explicated in ***Prof. Yashpal (supra)***,[94] a university in essence, is also an organized body that serves as a centre of higher education by linking students and teachers. For it to exist in that form, it is necessary for someone to ideate, plan, gather the resources, take approvals, and

---

[89] Henry Sharp, "The *Development of Indian Universities*" JOURNAL OF THE ROYAL SOCIETY OF ARTS, (1925), Vol. 73, No. 3778 pp. 523.

[90] INDIAN STATUTORY COMMISSION, Interim Report- Review of Growth of Education in British India, Calcutta, Government of India, central Publication Branch (1929) pp. 123, available at https://archive.org/details/dli.csl.1000/page/n157/mode/2up?view=theater

[91] Dr. Vishwanath Pandey (editor), FOUNDER OF BANARAS HINDU UNIVERSITY: PANDIT MADAN MOHAN MALVIYA, Publication Cell, Banaras Hindu University (2006), pp. 19, available at https://web.archive.org/web/20120412191310/http://www.bhu.ac.in/MMMMM.pdf .

[92] *The Handbook of Indian Universities*, published by Inter University Board India (1928), pp. 255, available at https://archive.org/details/handbookofindian029307mbp/page/n269/mode/2up?view=theater; Syed Akbar, "Controversy over Osmania University Centenary as Firman says it was founded in 1918, THE INDIAN EXPRESS (23 November, 2017) available at https://timesofindia.indiatimes.com/city/hyderabad/controversy-over-osmania-university-centenary-as-firman-says-it-was-founded-in-1918/articleshow/61762699.cms.

[93] INDIAN STATUTORY COMMISSION, *supra* note 90, pp. 121.

[94] *Prof. Yashpal*, *supra* note 4, para 20-22.

functionalize the institution once the sanction is received.[95] This materiality was also briefly alluded to by the University Commission of 1948, when it said that:

> "*The Annamalai University* ***owes its inception*** *to the generosity of the late Annamalai Chettiar of Chettinad. The Banaras and the Aligarh Universities have had large endowments given by princes and commoners. The Calcutta University has had endowments given by such eminent persons as P.C. Ray, Rash Behari Ghose and Tarakanath Palit; while Bombay has had large endowments from the Singhania and Tata Trusts besides endowments from several other philanthropic citizens; the University of Nagpur has had a large endowment under the Laxminarayan Trust, Fund and the Madras University has for the first time been given a generous endowment by Dr. Alagappa Chettiar.* ***The new university at Saugor owes its existence to a donation of Rs. 2,000,000 from Sir Hari Singh Gaur which is regarded as a first instalment.***"
>
> [Emphasis supplied]

165. Hence, even when the legal existence—i.e., the authority to grant degrees—comes from an external body or legislature, it is an important but not the sole facet that constitutes a University. Further, the legislative object and intent of such a Statute would be a determinative factor in ascertaining the nature of the University. If it were solely responsible for the creation of the university, the statute might assume a size larger than the University. Instead, since the concept of a university encompasses numerous other factors beyond legal sanction, these factors also contribute to its existence, and the statute is one of them. Consequently, the presence of this external factor does not render the entire existence attributable to the Legislature.

166. It seems to us that when the UGC Act or colonial laws mandated universities to be created by statutes, those who intended a university, including the minority community, were not absolved from complying with other relevant factors so as to bring the university into being. We

[95] *Dr. Vishwanath Pandey, supra* note 91.

therefore do not find any conflict between the amended provisions of the NCMEI Act, UGC Act, and the holding in ***Prof. Yashpal (supra).*** Each holds its own independent and distinct field and operates validly within that sphere. The minority community thus can establish a university under Article 30,[96] provided it fulfils the norms of the UGC—i.e., gets legal sanction to create the university through a statute. To the extent that ***Azeez Basha (supra)*** holds to the contrary, it deserves to be modified and clarified.

167. Having held so, we will now analyse the third category of institutes, which are 'created by' the legislature itself.

I.1.2.3. Created by the statute

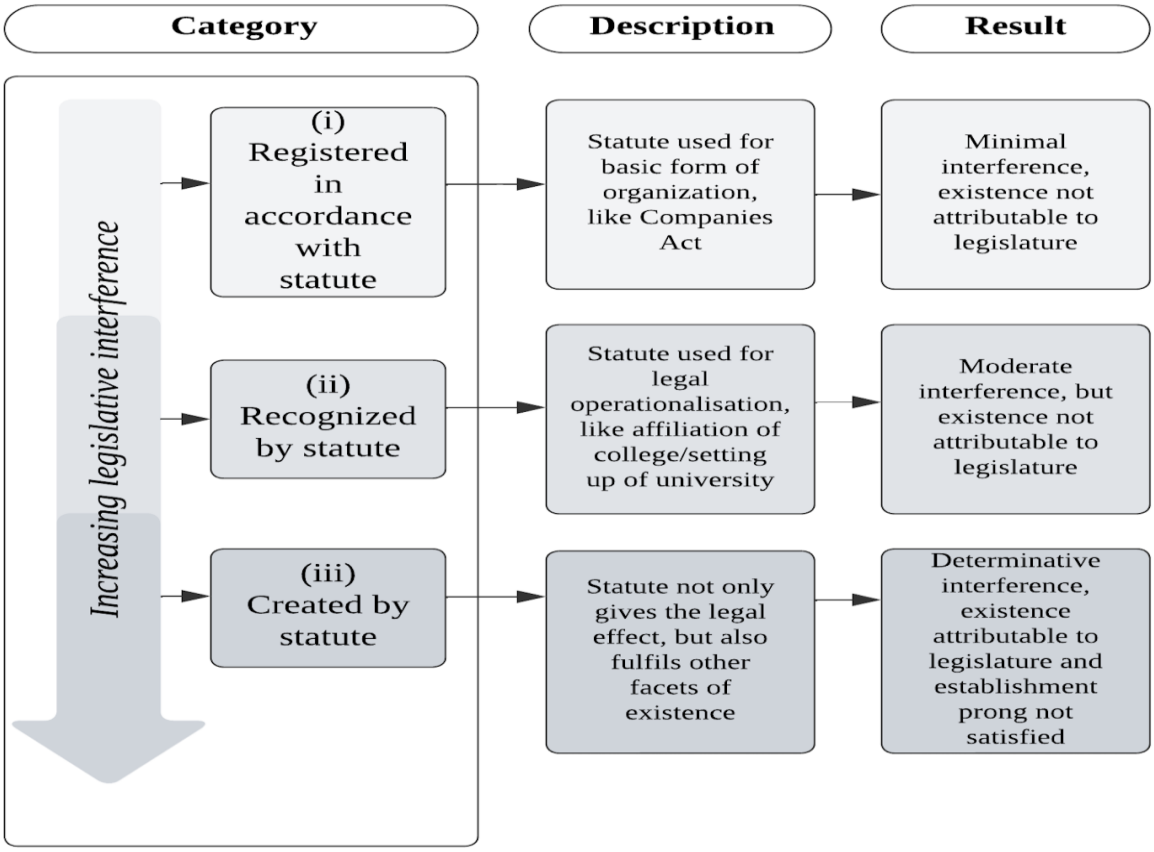
168. The previous section showed that an institution would not owe its existence to the legislature itself, provided that other facets apart from legal operationalization are fulfilled by another body. However, it may also happen that the Government itself may fulfil the other aspects by perhaps ideating the institution, providing funds and infrastructure for its set-up, making its charter documents, and finally operationalizing it through different bodies. In case the leading role in the different factors instantiated in paragraph 141 of this judgement is played by the Legislature itself or through the Executive Government, then it will be said to have brought the institution into existence and not any private individual or community.

169. The distinction between the second and third categories of institutions (i.e., those recognized by statute versus those created by statute) is thus one of degree and a matter of fact. While both types of institutions may appear on paper to be established under a statute, only a thorough analysis of their backgrounds can illuminate whether they belong to the second category—i.e., where the statute merely operationalizes the institution or to the third category—where their very

[96] Uttar Pradesh Private Universities Act, 2019, Section 2(p).

existence is attributable to legislative action. Depending on such analysis, the Court can conclude whether the institution meets the establishment prong under Article 30 or not.

170. To sum up the entire discussion on the spectrum of legislative interference pictorially:



I.2 Establishment shall be for the benefit of the community

171. There can hardly be any quarrel that, for fulfilling the establishment prong, it is not sufficient that the institution was brought into existence by the community, but it must be further proved that it was for the benefit of that community. For this purpose, it is essential to analyse the overall functioning of the institution and the primary objective for which it has been established. For instance, where the institution admits members of other communities; also teaches secular courses;[97]

[97] *In Re: The Kerala Education Bill, supra* note 58; para 23; *Rev. Father W. Proost and Ors. v. State of Bihar and Ors.*, (1969) 2 SCR 73, para 8; *Ahmedabad St. Xaviers College Society and Anr.* v. *State of Gujarat and Anr.*, AIR 1974 SC 1389, para 10.

or if it is working merely as a commercial entity that does not admit students of its own community; or working primarily towards the development of its community, it would be antithetical to the very purpose of Article 30 to grant such an institution minority status.

172. This has been clarified by various judgements of this Court, which held that the purpose of Article 30 is to ensure the upliftment of the minority community by providing them with a congenial atmosphere for education.[98] If the institution is not aligned with this purpose, it would not be covered under the purview of Article 30 and would not enjoy extra administrative autonomy, even if its existence is owed to a minority community.

173. To conclude the discussion on the meaning of 'establish', for an institution to fulfil the establishment prong under Article 30, it is necessary for it to have been brought into existence by the minority community and must be working towards the benefit of that community.

J. ***Issue V: What is the meaning of 'administer' in Article 30?***

174. The parties are not unanimous on the meaning of the term 'administer' as contained in Article 30 of the Constitution. The Appellant sought to assail that the term 'administer' essentially refers to who has overall control over the university. The parties argued that the mere fact that the State regulates the institution does not take away the 'administration' from the community. The Respondents, on the other hand, proffered that the 'administer' prong requires the minority community to control essential factors of the institution, such as admission to the institution, fee structure, appointment of teachers, etc.

---

[98] *In Re: The Kerala Education Bill, supra* note 58; Para 32; *P.A. Inamdar, supra* note 48, para 97.

175. Before venturing onto understanding what is included in administration, it is necessary to first understand what it does not include. Various judicial precedents, including the decision in ***TMA Pai (supra)***, have held that the term 'administration' does not include maladministration. In other words, while the minority community has the right to administer the institution, the regulatory measures imposed by the State that merely regulate the educational standards are not included within the right of 'administration'.[99]

176. To this end, the State has the power to prescribe, *inter alia*: compliance requirements of the government for granting recognition to the university, if they largely and substantially leave unimpaired the right of administration in regard to internal affairs of the institution;[100] general laws of the land applicable to all persons, such as laws relating to taxation, sanitation, social welfare, economic regulation, public order and morality, or general regulations regarding welfare of students and teachers;[101] regulations requiring transparency and merit in admission procedure;[102] regulations restricting charging of capital fee;[103] regulations which mandate that there is a govt. nominee in admission process, that fix merit criteria for minority students, or which mandate that the vacant seats shall go to non-minority students;[104] etc.

177. Similarly, this Court has held that in a minority institution, there can be a sprinkling of outsiders in administration, and the mere presence of

---

[99] *Very Rev. Mother Provincial*, *supra* note 71, para 9-10; *Gandhi Faiz-e-am-College v. University of Agra and Anr.*, (1975) 2 SCC 283, para 40; *Kolawana Gram Vikas Kendra v. State of Gujarat and Anr.*, (2010) 1 SCC 133.

[100] *All Saints High School v. Govt. of A.P. and Ors., (1980) 2 SCC 478, para 5.*

[101] *TMA Pai Foundation*, *supra* note 3, para 136 and 161; *P.A. Inamdar, supra* note 48. Para 94; *Secy., Malankara Syrian Catholic College, supra* note 51.

[102] *TMA Pai Foundation*, *supra* note 3, para 161; *Christian Medical College Vellore Assn. v. Union of India*, (2020) 8 SCC 705.

[103] *P.A. Inamdar, supra* note 48, Para 140; *Modern School v. Union of India and Ors.*, (2004) 5 SCC 583; *Father Thomas Shingare and Ors. v. State of Maharashtra and Ors.*, (2002) 1 SCC 758.

[104] *Andhra Kesari College of Education v. State of A.P.*, (2019) 9 SCC 457, para 6.9.

members of the non-minority community does not take away the minority character of the institution.[105]

178. However, at the same time, there is a core part of 'administration' that should remain in control of the minority community. As has been discussed before during the discussion on the conjunctive and disjunctive nature of the test incorporated within the text of Article 30 (*Issue III*), this is necessary to prevent the potential misuse of this provision. The question that now arises is when would 'administration' be said to have been taken away from the minority community?

179. To this end, the very concept of 'administration' is inherently fluid, and a specific definition is likely to be underinclusive. Determining whether a minority community exercises control over an institution is a factual question that varies from case to case. Although there is no definitive test to ascertain whether administration lies with the minority community, various judicial precedents provide indicators that may be considered relevant.

180. Similar to the test to determine 'establishment', these indicators alone may not conclusively establish whether the administration rests with the minority community. Instead, a cumulative and holistic analysis of these factors can assist the court in making its determination.

181. To instantiate, illustrative factors which are likely to take away administration of minority community from the institution include, *inter alia*:

i. Management staff is not answerable to the founders, or an external person has *veto* over their selection.[106] The lack of control over such selection would have significant weight since it is a post of prime importance around which administration revolves, i.e.,

[105] *In Re: Kerala Education Bill*, *supra* note 58; *Society for Unaided Private Schools of Rajasthan v. Union of India*, (2012) 6 SCC 1, para 57.
[106] *Very Rev. Mother Provincial*, *supra* note 71, para 19.

he/she is the hub on which all spokes of the institution's wheels are set around.[107]

ii. There are outside authorities in the governing body of the managing committee[108] with wide powers over the other members; [109]

iii. Minority community does not have any right over determining the overall fee structure of the institution;[110]

iv. Minority community does not have the final say over administration, such that over the management committee comprising of members of the minority community, there is an appeal to an outside member; [111]

v. Minority community does not have any say over the medium of instruction;[112]

vi. Regulation prescribes reservation for unaided minority institutions;[113]

vii. Minority community does not have the right to choose the governing body and to choose teachers or admit students;[114]

---

[107] *Secy., Malankara Syrian Catholic College*, *supra* note 51, para 22-28; *Board of Secondary Education and Teachers Training v. Jt. Director of Public Instructions*, (1998) 8 SCC 555, para 3; *Ivy C.Da. Conceicao v. State of Goa and Ors.*, (2017) 3 SCC 619, para 16; *The Manager, Corporate Educational Agency v. James Mathew and Ors.*, (2017) 15 SCC 595; *R. Sulochana Devi v. D.M. Sujatha & Ors.*, (2005) 9 SCC 335, para 26.
[108] Dr. *T. Varghese George, supra* note 73, para 37.
[109] *All Saints High School, supra* note 100.
[110] *Icon Education Society v. State of M.P. and Ors.*, 2023 SCC OnLine SC 289; *Islamic Academy of Education v. State of Karnataka and Ors.*, 2003 6 SCC 697; *Cochin University of Science & Technology and Anr. v. Thomas P. John and Ors.*, (2008) 8 SCC 82, para 16.
[111] *Lilly Kurian* v. *Sr. Lewina and Ors.,* AIR 1979 SC 52.
[112] *State of Karnataka and Anr. v. Associated Management of English Medium Primary & Secondary Schools and Ors.*, (2014) 9 SCC 485.
[113] *Society for Unaided Private Schools of Rajasthan v. Union of India and Anr.*, (2012) 6 SCC 1, para 62; *Pramati Educational & Cultural Trust and Ors. v. Union of India and Ors.*, (2014) 8 SCC 1, para 55.

viii. Removal of an employee requires the approval of an outside member who has the discretion to withhold such consent;[115]

ix. The minority community does not have a say in appointment of administrative authorities of the university such as the Vice Chancellor, Pro-Vice Chancellor, Registrar etc.;

x. The minority institution entirely depends on government aid; and

xi. The minority community does not have the right to deploy properties and assets for the benefit of the institution.[116]

182. It thus emerges that the minority community must largely be free from external control and must have broad autonomy to mould the institution's functioning and administration per their idea of what would be best for the community.[117] If the long-term administrative factors and the day-to-day sundry decisions do not lie with the community, it would mean that the institution is being administered by an outside authority and not by the minority community. As already elucidated, while the minority community can be subjected to general regulations regarding the betterment of such management, and while there can be a sprinkling of outsiders, administration itself cannot be taken away from the minority community. This is perhaps best explained in ***Gandhi Faiz-e-am-College v. University of Agra***,[118] where this Court held:

> "***16.*** *The discussion throws us back to a closer study of Statute 14A to see if it cuts into the flesh of the management's right or merely tones up its health and habits. The two requirements the University asks for are that the managing body (whatever its name) must take in (a) the*

---

[114] Dr. *T. Varghese George, supra* note 73, para 19.
[115] *G. Vallikumari v. Andhra Education Society*, (2010) 2 SCC 497, para 17; *Frank Anthony Public School Employees' Assn. v. Union of India and Ors.*, (1986) 4 SCC 707, para 18.
[116] *Ahmedabad St. Xavier's College Society, supra* note 97, para 19.
[117] *St. Stephen's College, supra* note 50, para 46.
[118] *Gandhi Faiz-e-am-College, supra* note 99, para 16.

> *Principal of the College; (b) its seniormost teacher.* ***Is this desideratum dismissible as biting into the autonomy of management or tenable as ensuring the excellence of the institution without injuring the essence of the right?*** *On a careful reflection and conscious of the constitutional dilemma, we are inclined to the view that this case falls on the valid side of the delicate line.* ***Regulation which restricts is bad; but regulation which facilitates is good. Where does this fine distinction lie? No rigid formula is possible but a flexible test is feasible. Where the object and effect is to improve the tone and temper of the administration without forcing on it a stranger, however superb his virtues be, where the directive is not to restructure the governing body but to better its performance by a marginal catalytic induction, where no external authority's fiat or approval or outside nominee is made compulsory to validate the Management Board but inclusion of an internal key functionary appointed by the autonomous management alone is asked for, the provision is salutary and saved, being not a diktat eroding the freedom of the freedom****."*
>
> [Emphasis Supplied]

183. Notably, for such administration to lie with the community, it is not enough if the decisions are taken by a member of such a community. If these decisions lie with the community but there is an outside authority with the power to change these decisions, it would imply that the minority community does not have pervasive control over the administrator, and its status is merely that of a paper tiger.[119] Conversely, if there are outside authorities and the minority community does not have the power to oversee or reverse the decisions of such authorities, it would again imply that control lies externally. In other words, the administration shall cover both the active and the reactive aspects, such that the minority community can take active steps to effect changes in the institution without outside restriction and can also *veto* decisions taken or changes made from the outside.

184. Consequently, in order to satisfy the requirements of Article 30, a minority community must retain both *de jure* and *de facto* control over

[119] *Lilly Kurian, supra* note 111.

the institution. It is insufficient for the community to simply have a minority member appointed by the majority for administrative roles; this does not confer genuine control. If the minority member's position can be revoked at any time by the majority, the real power of administration does not lie with the minority community. Allowing Article 30 protection under such circumstances would create legal unpredictability, as non-minority institutions could temporarily appoint minority members to exploit the benefits. To meet the administration test, the minority community must therefore first have visible *de jure* control over the institution.

185. Similarly, mere *de jure* control over the institution may not be sufficient on its own. It is possible that, to secure protection under Article 30, a minority community might be nominally granted administrative power while actual control is exercised behind the scenes by individuals outside the community. Such a scenario would amount to a façade of minority administration, failing to satisfy the test of genuine physical control over the management. Thus, the need arises for both aspects of control over the educational institution.

186. To summarize, the test for administration under Article 30 involves identifying who holds effective and overall control within the institution. While external authorities may assist in its administration, the decisive influence and control must rest with members of the minority community. To meet this test, the minority community must exercise both active and reactive control, ensuring that administrative powers are genuinely held in both *de jure* and *de facto* terms.

K. ***Issue VI: Whether the Union of India is obligated to defend the AMU Amendment Act, 1981?***

187. Before parting, we would like to fairly acknowledge that both sides to the present dispute, aggressively argued on the issue as to whether the UOI could be allowed to change its stance and challenge its own

statute. While the Appellant urged that the UOI and the Learned Attorney General for India are obliged to defend the 1981 Amendment Act, the Respondent maintained that such support would run antithetical to constitutional values.

188. We have pondered over the submissions and are of the view that the controversy has been rendered academic. In our considered opinion, all the legal issues, including those relating to constitutional interpretation have already been answered effectively. In all fairness, the parties also rendered their full assistance in the context of the factual issues as well, especially in terms of whether or not AMU is entitled to the protection of Article 30 of the Constitution. This second limb of the controversy however, will be resolved by the Regular Bench, and to this extent we are respectfully in tandem with the opinion rendered by Hon'ble the Chief Justice of India.

V. AREAS OF DIVERGENCE

189. In light of the above discussion, we find ourselves at variance with Hon'ble the Chief Justice of India on the following issues:

189.1. Whether the opinion of the seven-judge bench in ***Kerala Education Bill (supra)*** *which according to Hon'ble the Chief Justice, was followed by a six-judge Constitution bench in* ***Rev. Sidhajbhai Sabhai v. State of Bombay****,*[120] *has been overlooked in* ***Azeez Basha (supra)****?*

a. In ***Kerela Education Bill (supra)***, this Court, in no uncertain terms opined that: (***i***) "*there is no reason why the benefit of Article 30(1) should be limited only to educational institutions established after the commencement of the Constitution. The language employed in Article 30(1) is wide enough to cover both pre-Constitution and post-Constitution institutions*."; and (***ii***) "*Article 30(1) gives two*

[120] *Rev. Sidhajbhai Sabhai v. State of Bombay,* 1963 (3) SCR 837.

rights to the minorities, (1) to establish and (2) to administer educational institutions of their choice. The right to administer obviously cannot include the right to maladminister. The minority cannot surely ask for aid or recognition for an educational institution run by them in unhealthy surroundings, without any competent teachers, possessing any semblance of qualification, and which does not maintain even a fair standard of teaching or which teaches matters subversive of the welfare of the scholars…"

b. In ***Sidhajbhai Sabhai (supra)***, the challenge was laid to a government order directing that "*80% of the total number of seats in non-Government Training Colleges should be reserved for School Board teachers deputed by the Government…*" In this regard, the six-judge Constitution Bench held that "*unlike Article 19, the fundamental freedom under Clause (1) of Article 30, is absolute in terms; it is not made subject to any reasonable restrictions of the nature the fundamental freedoms enunciated in Article 19 may be subjected to. All minorities—linguistic or religious—have, by virtue of Article 30(1), an absolute right to establish and administer educational institutions of their choice; and any law or executive direction which seeks to infringe the substance of that right under Article 30(1) would to that extent be void. This, however, is not to say that it is not open to the State to impose regulations upon the exercise of this right...*"

c. What comes to light in ***Sidhajbhai Sabhai (supra)*** is that the bench therein did not rely upon the opinion delivered by the seven-judge bench in ***Kerala Education (Bill)*** and rather distinguished it, as the latter was relied on by the State. The Constitution bench in ***Sidhajbhai Sabhai (supra)*** thus took pains to explain that the opinion in ***Kerala Education Bill (supra)*** was distinguishable and that it "*is not an authority for the proposition submitted by the Additional Solicitor General that all regulative measures which are*

not destructive or annihilative of the character of the institution established by the minority, provided the regulations are in the national or public interest, are valid…"

d. We now turn to examine whether the five-judge bench in ***Azeez Basha (supra)*** failed to follow the principles opined in ***Kerala Education Bill (supra)*** or those laid down by the six-judge bench in ***Sidhajbhai Sabhai (supra)***. In so far as ***Kerala Education Bill (supra)*** is concerned, ***Azeez Basha (supra)*** categorically holds that the protection of Article 30(1) was not restricted only to educational institutions established after the Constitution came into force. Such a restrictive interpretation was held to be contrary to the opinion delivered in ***Kerala Education Bill (supra)*** and was bolstered with strong language that "*if that interpretation was given to Article 30(1) it would be robbed of much of its content'*." The bench further held that the expressions 'establish' and 'administer' must be read conjunctively, in response to a plea that even if an educational institution was not established by minorities, it could still be administered by them under the ambit of Article 30. This view, which has been consistently affirmed in the later decisions as well, in our considered opinion, is the correct interpretation of Article 30(1).

e. As regard to ***Sidhajbhai Sabhai (supra)*** it was neither cited nor was particularly relevant in the context of the controversy that arose for consideration in ***Azeez Basha (supra)***.

f. Most pertinently, the decision in ***Sidhajbhai Sabhai (supra)*** is no longer a good precedent, to the extent of disapproval of its view by the 11-judge bench in ***TMA Pai (supra)***, in this regard.

g. We therefore see no discordance between ***Kerala Education Bill (supra)*** and ***Sidhajbhai Sabhai (supra)*** on the one hand and ***Azeez Basha (supra)*** on the other.

*189.2. Is there any conflict between **Azeez Basha (supra)** and the principles enunciated in **TMA Pai (supra)**?*

a. A conjoint reading of paragraphs 106 to 108 of the draft judgement circulated by Hon'ble the Chief Justice, gives an impression that ***Azeez Basha (supra)*** has had some collision with the subsequent eleven-judge Constitution bench in ***TMA Pai (supra)***. In this regard, Hon'ble the Chief Justice has relied on paragraph 70 (the majority opinion by Chief Justice Kirpal, as his Lordship then was). We are, however, unable to find any such perceived conflict between the two decisions. ***TMA Pai (supra)*** considered the scope of regulating the right of administering government aided private minority institutions from paragraph 82 onwards. Pursuantly, in paragraph 93, the bench therein formulated the following questions:

> *"93. Can Article 30(1) be so read as to mean that it contains an absolute right of the minorities, whether based on religion or language, to establish and administer educational institutions in any manner they desire, and without being obliged to comply with the provisions of any law? Des Article 30(1) give the religious or linguistic minorities a right to establish an educational institution that propagates religious or racial bigotry or ill will amongst the people? Can the right under Article 30(1) be so exercised that it is opposed to public morality or health? In the exercise of its right, would the minority while establishing educational institutions not be bound by town planning rules and regulations? Can they construct and maintain buildings in any manner they desire without complying with the provisions of the building by-laws or health regulations?"*

b. After due discussion and a detailed reference to ***Kerala Education Bill (supra)*** and ***Sidhajbhai Sabhai (supra)***, the Constitution Bench in ***TMA Pai (supra)*** answered these questions in paragraph 107 which reads as follows:

> *"107. The aforesaid decision does indicate that the right under Article 30(1) is not so absolute as to prevent the government from making any regulation whatsoever. As already noted hereinabove, in Sidhajbhai Sabhai's case, it was laid down that regulations made in the true interests of efficiency of instruction, discipline, health, sanitation, morality and public order could be imposed. If this is so, it is difficult to appreciate how the government can be prevented from framing regulations that are in the national interest, as it seems to be indicated in the passage quoted hereinabove. Any regulation framed in the national interest must necessarily apply to all educational institutions, whether run by the majority or the minority. Such a limitation must necessarily be read into Article 30. The right under Article 30(1) cannot be such as to override the national interest or to prevent the government from framing regulations in that behalf.* ***It is, of course, true that government regulations cannot destroy the minority character of the institution or make the right to establish and administer a mere illusion; but the right under Article 30 is not so absolute as to be above the law. It will further be seen that in Sidhajbhai Sabhai's case, no reference was made to Article 29(2) of the Constitution. This decision, therefore, cannot be an authority for the proposition canvassed before us.****"*
>
> [Emphasis supplied]

c. It may thus be seen that the decision in ***Sidhajbhai Sabhai (supra)***, which holds that the "*fundamental freedom under Clause (1) of Article 30, is absolute in terms; it if; not made subject to any reasonable restrictions*" has in fact been expressly disapproved by ***TMA Pai (supra)***. In essence, ***Sidhajbhai Sabhai (supra)*** has thus lost its binding nature, in that context.

189.3. Whether a two-judge bench would be competent to make a reference to a larger bench of seven-judges? Whether the Constitution bench in ***Dawoodi Bohra (supra)*** *has been correctly construed by Hon'ble the Chief Justice of India in his opinion?*

a. In order to avoid any repetition, we wish to mention here that an elaborate answer to the aforesaid question has been given under '*Issue I*' from paragraphs 83 to 99 of our judgement. In essence, the reference by the two-judge bench to a larger bench of seven-judges is totally impermissible; such a recourse is directly in the teeth of the dictum of the Constitution bench in ***Dawoodi Bohra (supra)***. Such an attempt by a two-judge bench is hit by: (***i***) the doctrine of predictability; (***ii***) the doctrine of finality; (***iii***) the principle of judicial propriety; and (***iv***) the doctrine of *stare decisis*.

b. Further, there is no substantial difference between 'doubting' a larger bench or 'disagreeing' with such a judgement. 'Doubt' and 'disagreement' both originate from a tentative opinion which is in conflict with the reasons already assigned by the larger bench. There cannot be disagreement without doubting the correctness and there cannot be a doubt unless you disagree with the reasons.

c. Most importantly, entertaining a reference by a two-judge bench doubting a larger bench would dilute the authority and position of the Chief Justice of India as enjoyed upon Article 145 read with Order VII Rule 2 of the Supreme Court Rules, 1966, as was then applicable.

189.4. What is the true import of Entry 63 of List I of the Constitution?

a. The Seventh Schedule derives its relevance from Article 246 of the Constitution. This provision is included in Chapter I of Part XI of

the Constitution, which deals with the relationship between the Union and the State and defines their legislative relations.

b. It may be seen that Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh schedule, known as the Union List. In this vein, Entry 63 of List I reads as follows:

> *"63.* ***The institutions known at the commencement of this Constitution as the Benares Hindu University, the Aligarh Muslim University*** *and the Delhi University; the University established in pursuance of article 371E; any other institution declared by Parliament by law to be an institution of national importance."*
>
> [Emphasis supplied]

c. Entry 63 has two significant components which we can broadly label as procedural and substantive. The former, i.e., the procedural feature, flows from Article 246 and reiterates that the Parliament is the sole Competent Authority for legislating to declare any other institution to be an institution of National Importance

d. The first component of Entry 63 is a substantive part, which is a constitutional declaration of BHU and AMU, to be institutions of National Importance. The opening part of Entry 63 manifestly indicates that the Constituent Assembly was determined to confer such an elevated status on both, BHU and AMU.

e. The second component of Entry 63 on the other hand, permits the Parliament to declare any other institution also to be an institution of national importance. It seems from the language of Entry 63 that the Parliament has no power to take away the status of an institute of national importance conferred upon BHU or AMU, save and except by following the route of an amendment to the

Constitution itself. Though the Parliament can declare any other institution as an institution of National Importance through the route of Article 246; such plenary legislative power cannot be invoked to take away the status of an institution of National Importance, accorded by the Constitution.

190. Having delineated the issues of disagreement with the opinion of Hon'ble the Chief Justice, we may hasten to add that one of the conclusions assigned in ***Azeez Basha (supra)***, is such that it deserves to be revisited. We say so for the reasons that:

a. In this regard, ***Azeez Basha (supra)*** rightly holds that the expression 'educational institutions' is of very wide import and would also include universities. It has correctly understood that a religious minority has the right to establish a university under Article 30(1). ***Azeez Basha (supra)*** is also right in observing that there was no law in India before the Constitution came into force, which prohibited any private individual or body from establishing a university. ***Azeez Basha (supra)*** further holds that no private individual or body could, prior to 1950, insist that the degrees of any university established by them must be recognised by government. This position continued even after the enactment of University Grants Commission Act, 1956.

b. ***Azeez Basha (supra)*** however, seems to be erroneous to the extent it holds that since Section 6 of the Aligarh Muslim University Act, 1920 (**AMU Act, 1920**) provided that the degrees conferred by the university would be recognised by government, consequently, "*an institution was brought into existence which could not be brought into existence by a private individual or body…*" ***Azeez Basha (supra)*** might therefore not be correct in its entirety and as a general principle of law, to hold that even if the AMU Act, 1920 was passed as a result of the efforts of the Muslim

minority it "*does not mean that the Aligarh University when it came into being under the 1920 Act was established by the Muslim minority*".

c. In this context, it is our considered opinion that the establishment of a university, whether as a minority institution or as a religion neutral institution of high standard, is a complex and mixed question of law and fact. The legislative intent behind the establishment of a university or an institution will have a significant role in determining the status of such an institution. For instance, if the Preamble or the Statement of Objects and Reasons of a Statute explicitly states that the University or the institution concerned is intended to be established and shall be administered by a minority community, we see no reason as to why such a University or institution would be denuded of its minority character merely because it was created through legislative means.

d. Conversely, if the Legislature by itself (particularly, post-Constitution) decides to establish an institution where besides preserving the culture, values, traditions, language and conventions of a religious or linguistic minority community, it promotes other streams of education without any barrier to children belonging to other religions, it will be highly debatable to discern whether such a university can take refuge under the protective umbrella of Article 30.

191. Having laid down the broad principles to be followed to determine as to whether AMU qualifies as a minority institution within the meaning of Article 30, we leave it for the regular bench to determine such status, in light of the parameters laid down in our opinion. We, therefore, do not deem it appropriate to express any final view as to whether or not AMU is a minority institution within the meaning of Article 30 of the

Constitution. Accordingly, we refrain ourselves from determining the factual issue enumerated as '*Issue No. VII*'.

VI. CONCLUSION

192. Thus, drawing upon the comprehensive analysis presented in the preceding sections, we thus hold that:

a. There is no conflict between the seven-judge bench opinion in ***Kerala Education Bill (supra)*** and the five-judge Constitution Bench in ***Azeez Basha (supra)*** on the other.

b. The six-judge Constitution Bench in ***Sidhajbhai Sabhai (supra)***, laying down that the right under Article 30 is absolute and unconditional, is not the correct principle of law; the judgement is no more binding in nature and stands effectively overruled in ***TMA Pai (supra)***, to that extent. Consequently, ***Azeez Basha (supra)*** does not suffer from any legal infirmity on the premise that it did not cite or follow ***Sidhajbhai Sabhai (supra)***.

c. There is no substantial difference between 'doubting' or 'disagreeing' with a judgement. That being so, the reference by a two-judge bench in ***Anjuman (supra)*** doubting the correctness of the five-judge bench in ***Azeez Basha (supra)*** and referring it to a seven-judge bench suffers from multiple illegalities, including judicial impropriety.

d. In view of the dictum of the Constitution Bench in ***Dawoodi Bohra (supra)***, a two-judge bench has no authority whatsoever to doubt or disagree with a judgement of the larger bench, and directly refer the matter to a bench having a numerically greater strength than the matter so doubted. The reference by the two-judge bench in ***Anjuman (supra)*** is nothing but a challenge to the authority of the Chief Justice of India being the master of the roster and in derogation of the special powers enjoyed upon under

Article 145 of the Constitution read with Order VII Rule 2 of the Supreme Court Rules, 1966 (as was applicable). Consequently, the said reference is not maintainable. However, the subsequent reference dated 12.02.2019, in which the then Hon'ble Chief Justice of India was the presiding judge, is maintainable.

e. The reference in ***Anjuman (supra)*** to a seven-judge bench for the reconsideration of the five-judge decision in ***Azeez Basha (supra)*** is bad in law and ought to be set aside.

f. The Constitution Bench in ***Azeez Basha (supra)***, when it holds that since Section 6 of the AMU Act, 1920 stipulates that degrees conferred by AMU would be recognised by the Government, it could not have been 'brought into existence by a private individual or body', is seemingly incorrect. Accordingly, and for the reasons assigned in paragraphs 190 (b) and (c), the said decision to that extent is hereby modified and clarified.

g. The minority institutions established in the pre-Constitution era are also entitled to the protection conferred by Article 30.

h. Educational institutions, with reference to Article 30 include universities as well.

i. In order to seek protection under Article 30 of our Constitution, the minority institution must satisfy the conjunctive test, namely that it was established by a minority community and has been/is being administered by such a community.

j. The true import and meaning of the expressions 'establish' and 'administer', which comprise the very core of Article 30, are to be construed and understood strictly in accordance with the indicia in paragraphs 141 and 181.

k. The question pertaining to whether AMU satisfies the above-mentioned test of 'establish' and 'administer' so as to seek protection of Article 30 of the Constitution, and which will concomitantly entail a mixed question of facts and law, will be determined by a Regular Bench.

193. The reference is answered in the above terms. Ordered accordingly.

..... J.
[SURYA KANT]

NEW DELHI
DATED: 08.11.2024

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL/ APPELLATE JURISDICTION

CIVIL APPEAL NO.2286 OF 2006

ALIGARH MUSLIM UNIVERSITY ... APPELLANT

VS.

NARESH AGARWAL & OTHERS ...RESPONDENTS

WITH

CIVIL APPEAL NO.2321 OF 2006

ALIGARH MUSLIM UNIVERSITY ... APPELLANT

VS.

ANUJ GUPTA & OTHERS ...RESPONDENTS

WITH

CIVIL APPEAL NO.2320 OF 2006

ALIGARH MUSLIM UNIVERSITY ... APPELLANT

VS.

VIVEK KASANA & OTHERS ...RESPONDENTS

WITH

CIVIL APPEAL NO.2318 OF 2006

UNION OF INDIA ... APPELLANT

VS.

MALAY SHUKLA & OTHERS ...RESPONDENTS

WITH

SPECIAL LEAVE PETITION (C) NO.32490 OF 2015

SYED ABRAR AHMAD ... APPELLANT

VS.

ALIGARH MUSLIM UNIVERSITY & OTHERS ...RESPONDENTS

WITH

WRIT PETITION (C) NO.272 OF 2016

ASHRAF MATEEN & OTHERS ... APPELLANT

VS.

ALIGARH MUSLIM UNIVERSITY & OTHERS ...RESPONDENTS

WITH

CIVIL APPEAL NO.2861 OF 2006

ALIGARH MUSLIM UNIVERSITY OLD BOYS' ALUMNI ASSOCIATION ... APPELLANT

VS.

NARESH AGGARWAL & OTHERS ...RESPONDENTS

WITH

CIVIL APPEAL NO.2316 OF 2006

HAJI MUQEET ALI QURESHI ... APPELLANT

VS.

MALAY SHUKLA & OTHERS ...RESPONDENTS

WITH

CIVIL APPEAL NO.2319 OF 2006

ALIGARH MUSLIM UNIVERSITY ... APPELLANT

VS.

MALAY SHUKLA & OTHERS ...RESPONDENTS

WITH

CIVIL APPEAL NO.2317 OF 2006

ALIGARH MUSLIM UNIVERSITY … APPELLANT

VS.

MANVENDRA SINGH & OTHERS …RESPONDENTS

AND

TRANSFER CASE (C) NO. 46 OF 2023

ANOOP PRABHAKAR & OTHERS … APPELLANTS

VS.

UNION OF INDIA & OTHERS …RESPONDENTS

J U D G M E N T

DIPANKAR DATTA J.

PROLOGUE

1. There is a saying, *"the past refuses to lie buried"*. Possibly, no other case would demonstrate the validity of this statement more poignantly.

2. A Constitution Bench of 5 (five) Judges of this Court delivered its verdict in the celebrated case of ***Union of India vs. Tulsiram Patel***[1] on 11th July, 1985, i.e., a little less than 40 (forty) years back. As the youngest member of the bench, Hon'ble M.P. Thakkar, J. (as His Lordship then was) expressed lament in the following words:

> "178. A benevolent and justice-oriented decision of a three-Judge Bench of this Court, rendered ten years back in a group of service matters, *[D.P.O., Southern Railway* v. *T.R. Challappan, (1976) 3 SCC 190]*, is sought to be overruled by the judgment proposed to be

[1] (1985) 3 SCC 398

delivered by my learned Brother Madon, J., with which, the majority appear to agree. *Challappan* having held the field for such a long time, it would have been appropriate if a meeting of the Judges constituting the Bench had been convened to seriously deliberate and evolve a consensus as to whether or not to overrule it. A 'give' and 'take' of ideas, with due respect for the holders of the opposite point of view (in a true democratic spirit of tolerance), with willingness to accord due consideration to the same, would not have impaired the search for the true solution. Or hurt the cause of justice. The holders of the rival view points could have, perhaps, successfully persuaded and converted the holders of the opposite point of view. Or got themselves persuaded and converted to the other point of view.

179. Brother Madon, J., to whom the judgment was assigned by the learned Chief Justice, also appears to suffer heart-ache on the same score, for, in his covering letter dated July 6, 1985 forwarding the first instalment of 142 pages he says:

> '...I regret to state that the draft judgment could not be sent to you earlier. The reason was that as we did not have a meeting to discuss this matter, I did not know what would be the view of my other Brothers on the large number of points which fall to be determined in these cases, except partly in the case of two of my Brothers with whom by chance I got an opportunity to discuss certain broad aspects....'

If only there had been a meeting in order to have a dialogue, there might have been a meeting of minds, and we might have spoken in one voice. Failing which, the holders of the dissenting view point could have prepared their dissenting opinions. That was not to be. On the other hand, it has so transpired, that, the full draft judgment running into 237 pages has come to be circulated in the morning of July 11, 1985, less than 3 hours before the deadline for pronouncing the judgment. There is a time compulsion to pronounce the judgment, on 11th July, 1985, as the learned Chief Justice who has presided over the Constitution Bench is due to retire on that day, and the judge-time invested by the five Judges would be wasted if it is not pronounced before his retirement. The judge-time would be so wasted because the entire exercise would have to be done afresh. The neck-to-neck race against time and circumstances is so keen that it is impossible to prepare an elaborate judgment presenting the other point of view within hours and circulate the same amongst all the Judges constituting the Bench in this important matter which was heard for months, months ago. I am, therefore, adopting the only course open to me in undertaking the present exercise.

180. '*Challappan'*, in my opinion, has been rightly decided. And there is no compulsion to overrule it— ***"

I regret to find myself in the same unenviable position Hon'ble M.P. Thakkar, J. was placed in ***Tulsiram Patel*** (supra).

3. Hearing of these appeals and petitions commenced on 9th January, 2024. Spread over 8 (eight) days of marathon hearing, learned senior counsel/counsel advanced erudite arguments in respect of a reference which this Bench of 7 (seven) Judges has been called upon to answer. Judgment was reserved on 1st February, 2024. The task of authoring the judgment had not been assigned to me, which obviously left me with no other option but to wait for the draft opinion to reach my residential office. While the wait continued, it is only on 17th October, 2024 that the draft opinion authored by the Hon'ble the Chief Justice of India[2], being the presiding Judge of the Bench, numbering 117 pages was placed on my desk. Aware of the deadline of 10th November, 2024 (the day the HCJI would demit office) within which the final judgment had to be pronounced, the task of reading the learned dissertation started right away squeezing out time from the long hours that had to be spent in getting ready for the matters on board for each day and in conducting proceedings in court. No sooner had I completed reading the draft opinion, came a revised draft opinion of the HCJI spread over almost the equal number of pages. It reached my residential office in the evening of 25th October, 2024, i.e., on the eve of the short Diwali break. *Inter alia*, there was one very significant change in the revised draft. While in the first draft "*the test laid down"* by a Constitution Bench of 5 (five) Judges of this

[2] HCJI, hereafter

Court in ***S. Azeez Basha and Anr. vs. Union of India***[3] *"to determine if an educational institution is entitled to the guarantee under Article 30(1)"* of the Constitution of India[4] was proposed to be overruled, in the revised draft the view taken in ***Azeez Basha*** (supra) *"that an educational institution is not established by a minority if it derives its legal character through a statute"* has been proposed to be overruled. The effect of the revised draft opinion of the HCJI is the defenestration of the view taken in ***Azeez Basha*** (supra) that Aligarh Muslim University[5] is not a minority institution. Such view has stood its ground for the last more than 50 (fifty) years. It is the only decision of this Court where Article 30(1) was considered and law laid down keeping establishment and administration of a pre-independence era university in perspective as distinguished from schools and colleges, which have been the subject matter of other Constitution Bench decisions. Utilising the short Diwali break, the draft opinions were read many times over together with perusal of the materials on record to decide whether the erudite opinion of the HCJI commended acceptance by me. On 2nd November, 2024, came another few pages from the office of the HCJI containing corrections effected in quite a few of the paragraphs of the revised draft opinion in track changing mode with paragraph 72 being altogether deleted.

[3] (1968) 1 SCR 833
[4] Constitution
[5] "AMU" or "University", hereafter, depending upon the context

4. Difficult though it is to disagree with any opinion penned by the HCJI, which has always been a product of thorough research and high intellect and is thoughtfully expressed, I could not persuade myself to completely agree with the opinion expressed in the revised drafts and the whole of the proposed conclusions recorded therein. This is when I had decided to pen my own opinion encapsulating my thoughts in brief having regard to the very short time at my disposal.

5. While on the task of preparing the draft opinion and completing it for circulation, arrived separate draft opinions of Hon'ble Surya Kant, J. and Hon'ble Satish Chandra Sharma, J. on 6th November, 2024. Rummaging through the draft opinions penned by Their Lordships, I felt inclined to substantially agree with the thoughts and conclusions expressed therein. However, in view of disagreements on a couple of points, coupled with my inability to be *ad idem* with the noteworthy progressive approach of the HCJI, writing a separate opinion (which was already in progress and was nearing completion) seemed all the more the better, the safer and the easier option.

6. I do not grudge getting very little time to express my views in the manner I would have wished to express. Had it not been a race against time to circulate the opinion by 6th November, 2024, the limit I had set for myself and assured to the HCJI, the opinion could have been much better articulated and more compact. But my pain is truly reflected in the passage from ***Tulsiram Patel*** (supra) quoted above and how, despite all the advancements in the justice delivery system

that we proudly boast of having introduced, in a way history seems to have repeated itself. Here, a Constitution Bench of 7 (seven) Judges had apparently embarked on a voyage to interpret Article 30(1) of the Constitution navigating through considerable weight of materials without any physical or virtual meeting of the members of the Bench post-reservation of judgment, not to speak of meeting of minds, either immediately after hearing was concluded or even 9 (nine) months thereafter (either collectively or even in small groups of four-five) to explore which acceptable direction should the outcome sail. A common venue for a purposeful and effective dialogue where members of the bench could freely express their points of view, an attempt to share thoughts and to exchange opinions, a 'give' and 'take' of ideas, in true democratic spirit to build up a consensus - all these seem to have taken a backseat, having regard to the immense pressure of work which we, the HCJI and the other Judges on the bench, have undertaken during the time ever since the judgment was reserved. Judicial and administrative works of varied nature, which I need not dilate here, also weighed me down to such an extent that sending a request to the HCJI for a meeting of all the colleagues at this stage would have been too late to make a difference (if at all it were to happen). Alas, without any insightful and constructive discussion of the rival contentions in the presence of all the members comprising this Bench of 7 (seven) Judges, it is

only individual opinions of 4 (four) Judges that could be crafted and circulated for perusal and approval.

7. That being said, after circulation of my draft opinion, all the Judges forming the quorum had the occasion to meet together for a little while on 7th November, 2024, when it emerged that the opinion of the HCJI, as circulated, had the concurrence of 3 (three) Judges[6] and I was part of the minority trio (3 out of 7) with a distinct perspective. As the narrative would reveal, my view diverges from the other 2 (two) Judges in the minority.

8. Since it was revealed in the aforesaid meeting that my view did not align with the majority, my draft opinion warranted certain changes and such changes have been incorporated in this final opinion without changing the core foundation thereof.

THE REFERENCE

9. This Constitution Bench of 7 (seven) Judges has been constituted by the HCJI pursuant to a reference made by a bench of 3 (three) Judges of this Court *vide* order dated 12th February, 2019[7] in ***Aligarh Muslim University vs. Naresh Agarwal and Ors.***[8]. Though the said order is ostensibly the referral order necessitating constitution of this Bench, in reality, the reference has its roots in an order dated 26th November, 1981 passed by a bench of 2 (two) Judges of this

[6] majority opinion, hereafter
[7] Civil Appeal No. 2286/2006
[8] (2020) 13 SCC 737

Court in ***Anjuman-e-Rahmania and Ors. vs. Distt. Inspector of School and Ors.***[9]. I am inclined to the view, based on my reading of the orders in ***Anjuman-e-Rahmania*** (supra) and ***Aligarh Muslim University*** (supra), that the former order could well qualify as the referral order for the reference and the latter the re-referral order for the re-reference (to be referred hereafter as such for clarity). The reasons, therefor, are not far to seek and would unfold as one proceeds to read this opinion.

10. At the outset, I find it significant to record that this Bench has been addressed by at least half a dozen senior counsel/counsel on why the decision in ***Azeez Basha*** (supra) ought to be reconsidered and overruled. In the context of the decision dated 5th January, 2006[10] rendered by the High Court of Judicature of Allahabad[11] in an intra-court appeal[12], the issue assumes some importance and it is indeed essential to consider whether ***Azeez Basha*** (supra) should at all be reconsidered merely because of the two referral orders coupled with the fact that the issues are before a Constitution Bench of 7 (seven) Judges of which the HCJI is the presiding Judge. If the orders of reference are found to be *ex facie* flawed and *non-est*, as the learned Solicitor General and other senior counsel who addressed the Bench

[9] Writ Petition (Civil) Nos. 54-57 of 1981
[10] 2006 SCC OnLine All 2207
[11] High Court, hereafter
[12] Special Appeal No. 1324/2005

on behalf of the respondents have urged us to hold, the re-reference would be plainly incompetent.

11. In the cacophony of dissonant notes, one ought not to forget that the hallmark of a judicial pronouncement is its stability and finality. I am reminded of what the HCJI speaking for the bench in ***Supertech Ltd. vs. Emerald Court Owner Residents Association***[13] said, - *"judicial verdicts are not like sand dunes which are subject to the vagaries of wind and weather"*. There cannot be any doubt that this Court has extensive powers to correct an error or to review its decision, but such correction / review ought not to be at the cost of the doctrine of finality. An issue of law can be overruled by a subsequent decision but a decision on questions of fact should not be reopened once it has been finally sealed in proceedings relating to the same subject matter.

12. Also, the doctrine of *stare decisis* has to be given due credence. Hon'ble H.R. Khanna, J (as His Lordship then was) while being part of a Constitution Bench and agreeing with the majority opinion in ***Maganlal Chhaganlal (P) Ltd. vs. Municipal Corpn. of Greater Bombay***[14], made telling observations reading as follows:

> "22. I must also utter a note of caution against the tendency to lightly overrule the view expressed in previous decisions of the Court. It may be that there is a feeling entertained by certain schools of thought, to quote the words of Cardozo, that
>
> '... the precedents have turned upon us and are engulfing and annihilating us — engulfing and annihilating the very devotees that

[13] (2023) 10 SCC 817
[14] (1974) 2 SCC 402

> worshipped at their shrine. So the air is full of new cults that disavow the ancient faiths. Some of them tell us that instead of seeking certainty in the word, the outward sign, we are to seek for something deeper, a certainty relative and temporary, a writing on the sands to be effaced by the advancing tides. Some of them even go so far as to adjure us to give over the vain quest, to purge ourselves of these yearnings for the unattainable ideal, and to be content with an empiricism that is untroubled by strivings for the absolute.' (*See page 9 Selected Writings of Benjamin Nathan Cardozo by Margaret E. Hall.*)

At the same time, it has to be borne in mind that certainty and continuity are essential ingredients of rule of law. Certainty in law would be considerably eroded and suffer a serious set back if the highest court of the land readily overrules the view expressed by it in earlier cases, even though that view has held the field for a number of years. In quite a number of cases which come up before this Court, two views are possible, and simply because the Court considers that the view not taken by the Court in the earlier case was a better view of the matter would not justify the overruling of the view. The law laid down by this Court is binding upon all courts in the country under Article 141 of the Constitution, and numerous cases all over the country are decided in accordance with the view taken by this Court. Many people arrange their affairs and large number of transactions also take place on the faith of the correctness of the view taken by this Court. It would create uncertainty, instability and confusion if the law propounded by this Court on the basis of which numerous cases have been decided and many transactions have taken place is held to be not the correct law. This Court may, no doubt, in appropriate cases overrule the view previously taken by it but that should only be for compelling reasons.
***"

(emphasis supplied)

Sadly, these are dicta which very few tend to remember not to speak of applying the same.

13. I have noted that as per the draft opinion of the HCJI, the question as to whether AMU *"is a minority educational institution must be decided based on the principles laid down in this judgment"*. In view of such proposed order, and since it is also the majority opinion now and thus final, it is a foregone conclusion that history would be rewritten and declaration of AMU by this Court as a minority educational institution is only a matter of time.

14. Not only is ***Azeez Basha*** (supra) a judicial verdict more than half a century old on the status of AMU vis-à-vis minority rights, but it has a strong foundational basis and is anchored in robust legal reasoning. It has withstood, so to say, the vagaries of wind and weather and stands tall as a pyramid in the desert. The decision was rendered by Judges of the pre-independence era who, apart from being no less knowledgeable than us, were people having grown up while India was struggling for independence and (must have) witnessed such struggle from close quarters. I cannot lay claim to match their wisdom and experience; but without being unduly overawed by the stature of the Judges on the bench and viewing the reasons assigned in ***Azeez Basha*** (supra) for not declaring AMU as a minority educational institution, a University which was established in 1920 and whose status from inception till the Constitution came into effect has remained unchanged, I consider it prudent to say that the view taken therein, in the given facts and circumstances, is indeed a plausible view which demands due deference rather than the view being overruled at this distance of time. A relook at it for recasting of the opinion cannot be resorted to, as I presently propose to demonstrate, without throwing asunder all the established doctrines in the wake of referral orders which themselves bear the mark of invalidity on their foreheads.

15. However, before I venture to consider the orders of reference/re-reference, a glance at what ***Azeez Basha*** (supra) decided would not be inapposite.

16. In ***Azeez Basha*** (supra), this Court considered the legal sustainability of the 1951 and 1965 amendments to the Aligarh Muslim University Act, 1920[15]. These amendments were challenged as violative of the Fundamental Rights enumerated, *inter alia*, under Articles 26 and 30 of the Constitution. In such decision, it was held by this Court both on facts as well as law that AMU cannot be declared a minority institution. It was held that AMU was not established by a minority community, as it was the creature of a statute. The right under Article 30(1) was interpreted so as to give the linguistic and religious minorities the right to administer the institutions which were established by the minority community. Building on this argument, the Court further stated that a minority would not enjoy the rights of administering the institution not established by it, merely because it might have been administering it before the Constitution came into force. The phrase "establish and administer" in Article 30 has to be read conjunctively and there is no precedent which holds that it can be read disjunctively. The Court further went on to hold that in 1920, there was nothing to stop the Muslim community from establishing a university if they so desired. The nucleus of AMU was Mohammedan

[15] AMU Act, hereafter

Anglo-Oriental College[16], an institution under the Allahabad University. The conversion of MAO College to AMU was not undertaken or effectuated by the Muslim community, but by the force of statute. Therefore, this Court declared that AMU was established by the Central Legislature of British India.

17. Through ***Azeez Basha*** (supra), this Court distinguished its earlier Constitution Bench decision in ***Re: Kerala Education Bill***[17]. An argument was raised therein that only minority institutions established post the commencement of the Constitution could be granted the protection under Article 30(1). This Court in ***Re: Kerala Education Bill*** (supra) held that any institution, whether established before or after the commencement of the Constitution, could be afforded the protection under Article 30(1) as Article 30(1) would lose much of its content if interpreted so narrowly. But it was pointed out that in ***Re: Kerala Education Bill*** (supra), this Court never held that the terms "administer" and "establish" can be read disjunctively.

18. The decision in ***Azeez Basha*** (supra) was doubted in ***Anjuman-e-Rahmania*** (supra), and was referred to a bench of 7 (seven) Judges for reconsideration. That proceeding germinated from an unconnected writ petition filed by an institution registered under the Societies Registration Act, 1860[18] and was hardly related to the issue of the minority character of AMU. In fact, the question of law arising

[16] MAO College, hereafter
[17] 1959 SCR 995
[18] Societies Act, hereafter

for decision in the writ petition under Article 32, briefly captured in the order dated 26th November, 1981, would show that there was no factual similarity with that in ***Azeez Basha*** (supra).

19. It is, therefore, considered proper to read the referral order in its entirety for facility of proper understanding of what the bench of 2 (two) Judges in ***Anjuman-e-Rahmania*** (supra) had in mind and what was the ultimate direction. The said order reads as follows:

> "After hearing counsel for the Parties, we are clearly of the opinion that this case involves two substantial questions regarding the interpretation of Article 30(1) of the Constitution of India. The present Institution was founded in the year 1938 and registered under the Societies Registration Act in the year 1940. The documents relating to the time when the institution was founded clearly shows that while the institution was established mainly by the Muslim community but there were members from the non-muslim community also who participated in the establishment process. The point that arises is as to whether Act. 30(1) of the Constitution envisages an institution which is established by minorities alone without the participation for the factum of establishment from any other community. On this point, there is no clear decision of this court. There are some observations in S. Azeez Basha & ors. Vs. Union of India 1968 (1) SCR 333, but these observations can be explained away. Another point that arises is whether soon after the establishment of the institution if it is registered as a Society under the Society Registration Act, its status as a minority institution changes in view of the broad principles laid down in S. Azeez Basha's case. Even as it is several jurists including Mr. Seervai have expressed about the correctness of the decision of this court in S. Azeez Basha's case. Since the point has arisen in this case we think that this is a proper occasion when a larger bench can consider the entire aspect fully. We, therefore, direct that this case may be placed before Hon. The Chief Justice for being heard by a bench of at least 7 judges so that S. Azeez Basha's case may also be considered and the points that arise in this case directly as to the essential conditions or ingredients of the minority institution may also be decided once for all. A large number of jurists including Mr. Seervai, learned counsel for the petitioners Mr. Garg and learned counsel for respondents and interveners Mr. Dikshit and Kaskar have stated that this case requires reconsideration. In view of the urgency it is necessary that the matter should be decided as early as possible we give liberty to the counsel for parties to mention the matter before Chief Justice."
>
> (emphasis supplied)

20. Ever since the mid-fifties of the last century, the entire functional strength of Judges of the Supreme Court of India has never assembled to decide any case. The last time the entire strength of 8 (eight) Judges did assemble was in 1954, when the Constitution Bench decided two writ petitions under Article 32 of the Constitution in ***M. P. Sharma vs. Satish Chandra***[19]. It is well known that while discharging its judicial duties, owing to administrative exigency and practical expedience, the Supreme Court of India functions through separate benches. Although voices of the benches could be different on a common point of law, yet, the reasons and the ultimate conclusions are treated as the view-point of the Supreme Court. No matter the strength, all these voices bear the symbol of the Supreme Court. It is also well known that it is the power of the Chief Justice of India, on the administrative side, to determine appropriate numerical strength of the benches. However, the mere fact of this Bench having a numerical strength of 7 (seven) Judges and presided over by none other than the Chief Justice of India does not necessarily make it competent to decide the re-reference, if the orders of reference/re-reference are found to be seriously flawed and no such reference/re-reference should have or could have been made in the first place. I presently proceed to assign my view-point in support of my conclusion that the reference as well as the re-reference is incompetent.

[19] (1954) 1 SCC 385

21. The discussion on why the order in ***Anjuman-e-Rahmania*** (supra) is completely flawed and, thus, should not have any bearing on the re-reference must start with the decision in ***Lala Shri Bhagwan vs. Shri Ram Chand***[20]. Deprecating the approach of a Single Judge of the relevant high court, who had taken upon himself the task of deciding whether earlier decisions of Division Benches of the same high court ought to be reconsidered and revised based on his perception that such decisions stood impliedly overruled by a decision of this Court, Hon'ble P.B. Gajendragadkar, CJ. (as His Lordship then was) speaking for a bench of 3 (three) Judges observed:

> "18. *** It is hardly necessary to emphasise that considerations of judicial propriety and decorum require that if a learned Single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a Single Judge, needed to be reconsidered, he should not embark upon that enquiry sitting as a Single Judge, but should refer the matter to a Division Bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety. It is to be regretted that the learned Single Judge departed from this traditional way in the present case and chose to examine the question himself."

22. It is true that this Court had the occasion to make the above observations arising out of the concern that the healthy principles of judicial decorum and propriety had not been followed by a Single Judge of a high court who had departed from the traditional way. However, what is significant and follows from the above passage is that a Single Judge, even if he is not in agreement with the view of a

[20] [1965] 3 SCR 218

Division Bench which is binding on him, cannot refer the case straightaway to a larger bench; at the most, he may refer the case to a Division Bench or, in a proper case, direct placing of the papers before the Chief Justice to take a call on whether constitution of a larger bench is warranted or not. A Single Judge cannot decide the case himself by not following the binding decision of the Division Bench, with which he disagrees or has a doubt about its correctness. The position of law that emerges is that constitution of the bench, whether it be a combination of 2 (two), 3 (three) or more, must be left to the Chief Justice. However, there could be no valid reason as to why what was observed in the aforesaid excerpt by His Lordship would not *proprio vigore* apply to Judges of this Court too.

23. The principle is simple. Whether it be the Supreme Court, or the high courts, it is beyond any shadow of doubt that a decision of a bench of greater strength is binding on a bench of lesser strength. Our system of administration of justice aims at certainty in the law and that can be achieved only if Judges do not ignore decisions by courts of coordinate authority or of superior authority. This is not to say that the bench of lesser strength is denuded of the authority or competence to distinguish the decision of greater strength based on consideration of facts that are involved.

24. It has, however, been considered uniformly to be an act of breach of judicial propriety and discipline if a bench of lesser strength [of 2 (two) Judges] casts doubt in respect of a decision rendered by a

bench of greater strength [of 5 (five Judges] and a request is made to the Chief Justice of India to constitute a still larger Bench [of 7 (seven Judges]. This concept was extensively ratiocinated in ***Central Board of Dawoodi Bohra Community vs. State of Maharashtra***[21]. Hon'ble R.C. Lahoti, CJ. (as His Lordship then was), speaking for the Bench held:

> "12. Having carefully considered the submissions made by the learned Senior Counsel for the parties and having examined the law laid down by the Constitution Benches in the abovesaid decisions, we would like to sum up the legal position in the following terms:
> (*1*) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength.
> (*2*) A Bench of lesser quorum cannot disagree or dissent from the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.
> (*3*) The above rules are subject to two exceptions: (*i*) the abovesaid rules do not bind the discretion of the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength; and (*ii*) in spite of the rules laid down hereinabove, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way of exception (and not as a rule) and for reasons given by it, it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of the Chief Justice constituting the Bench and such listing. Such was the situation in *Raghubir Singh*[22] and *Hansoli Devi*[23]."
>
> (emphasis supplied)

[21] (2005) 2 SCC 673
[22] (1989) 2 SCC 754
[23] (2002) 7 SCC 273

25. In ***Hansoli Devi*** (supra), the Constitution Bench of 5 (five) Judges followed the earlier decision of the Constitution Bench of 5 (five) Judges in ***Pradip Chandra Parija vs. Pramod Chandra Patnaik***[24]*.* It was held in ***Pradip Chandra Parija*** (supra) that judicial discipline and propriety demands that a bench of 2 (two) learned Judges should follow a decision of a bench of 3 (three) learned Judges. But if a bench of 2 (two) learned Judges concludes that an earlier judgment of a bench of 3 (three) learned Judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is to refer the matter before it to a bench of 3 (three) learned Judges setting out the reasons why it could not agree with the earlier judgment and if the bench of 3 (three) learned Judges also comes to the conclusion that the earlier judgment of a bench of 3 (three) learned Judges is incorrect, then a reference could be made to a bench of 5 (five) learned Judges. In view of such decision, the Constitution Bench in ***Hansoli Devi*** (supra) held the very reference itself made by 2 (two) learned Judges to be improper.

26. ***Campaign for Judicial Accountability and Reforms vs. Union of India***[25] is also a Constitution Bench decision of recent origin of 5 (five) Judges. In a somewhat different context, the bench ruled that *"there cannot be any kind of command or order directing the Chief Justice of India to constitute a particular Bench"*.

[24] (2002) 1 SCC 1
[25] (2018) 1 SCC 196

27. These decisions of high authority seek to reinforce the principles of judicial discipline, propriety and comity, which have been followed by the courts since time immemorial. Permitting a bench of lesser strength to doubt a decision given by a bench of greater strength and to refer a given issue to a still larger bench would be in the teeth of principles which are well-established and well-entrenched. Doctrines of precedents and *stare decisis* provide a level of certainty to individuals appearing before the court and bring a degree of objectivity in a largely subjective decision-making process. The litigant needs to have confidence that the legal position which has been chiselled on the tapestry of law by legal precedents will not be unceremoniously blown away through subsequent judicial commands, which could be ill-advised, like the vagaries of wind and weather. It would behove this Court to remember the legal maxim *interest republicae ut sit finis litium*, i.e., it is in the interest of the State that there be an end to litigation, and the importance of not disturbing legally sound precedents without following the procedure established by law.

28. Although ***Pradip Chandra Parija*** (supra), ***Hansoli Devi*** (supra) and ***Central Board of Dawoodi Bohra Community*** (supra) are later decisions and were not in existence when the order in ***Anjuman-e-Rahmania*** (supra) was made by the bench of 2 (two) Judges, it matters little. The principle flowing from ***Lala Shri Bhagwan*** (supra) bound the bench of 2 (two) Judges in ***Anjuman-e-Rahmania***

(supra). The law laid down, in the decisions post ***Anjuman-e-Rahmania*** (supra), is neither expressly nor even impliedly made to operate prospectively. Besides, it seems elementary though it requires to be restated that a bench sitting in a combination of 2 (two) Judges is bound by what is laid down by a Constitution Bench of 5 (five) Judges and should the bench of lesser strength have valid reasons to disagree with the view expressed by the latter bench of 5 (five), the former bench of 2 (two) cannot straightway make a reference for being placed before a Constitution Bench of greater numerical strength. I am left to wonder how the bench of 2 (two) Judges in ***Anjuman-e-Rahmania*** (supra) could at all request that the case be placed before a bench of at least 7 (seven) Judges. Without a doubt, what the bench in ***Anjuman-e-Rahmania*** (supra) did was not only plainly impermissible in law but the referral order answers the test for holding a judgment *per incuriam*. If *"doubting the correctness of the opinion in* ***Azeez Basha*** *(supra), without disagreeing with it"* could permit the bench in ***Anjuman-e-Rahmania*** (supra) to request the Chief Justice of India to place the matter for being heard by a bench of 7 (seven) Judges and such a course of action were held to be permissible and within the limits of ***Central Board of Dawoodi Bohra Community*** (supra), as proposed in the majority opinion (paragraph 39 of the revised draft) - I am afraid, tomorrow, a bench of 2 (two) Judges, referring to opinions of jurists [as in ***Anjuman-e-Rahmania*** (supra)] could well

doubt the 'basic structure' doctrine and request the Chief Justice of India to constitute a bench of 15 (fifteen) Judges. The reasoning in the majority opinion, with due respect, appears to be based on an incomplete reading of paragraph 12(2) of ***Central Board of Dawoodi Bohra Community*** (supra), extracted supra. Though the second sentence of the said paragraph is a bit ambiguous, but the same - read harmoniously with the other sentences - would lead to the inevitable conclusion that even in case of a doubt being expressed by a bench of 2 (two) Judges in respect of the ratio laid down by a bench of 5 (five) Judges, the case on a reference being made (with sufficient reasons) ought to be first placed before a bench of 3 (three) Judges, and not to a bench of either 5 (five) or 7 (seven) Judges. If, indeed, the proposed view in the majority opinion were accepted, all the precedents referred to above would stand overruled and a legal principle, which hitherto no bench of this Court did, would be laid down and, in the process, the floodgates for unmeritorious references opened. In my humble view, that would be an incorrect and improper approach. Hence, for the foregoing reasons and for all intents and purposes, the order of reference in ***Anjuman-e-Rahmania*** (supra) must be regarded as completely flawed and *non-est*.

29. One other interesting feature draws attention. The bench in ***Anjuman-e-Rahmania*** (supra), perceiving the matter to be urgent, granted liberty to the counsel for the parties to mention the matter before the Chief Justice of India for an early decision but the file

seems to have gathered dust ever since. There is hardly any material on record to suggest that either the incumbent Chief Justice of India or any of the successive Chief Justices of India for the next 20 (twenty) years, thought it fit to direct the office to dust the dust for a bench of 7 (seven) Judges to be constituted to decide the issue that was referred, assuming that question 3(a) formulated for an answer by the Constitution Bench of 11 (eleven) Judges in ***T.M.A. Pai Foundation and ors. vs. State of Karnataka and ors.***[26] was inspired by the order in ***Anjuman-e-Rahmania*** (supra). *Res ipsa loquitur!*

30. The contention that the said order in ***Anjuman-e-Rahmania*** (supra) was acted upon and the bench in ***T.M.A. Pai Foundation*** (supra) being called upon to address question 3(a) could be traced to the order in ***Anjuman-e-Rahmania*** (supra), apart from being incorrect, pales into insignificance for primarily two reasons. In ***T.M.A. Pai Foundation*** (supra), initially 9 (nine) questions were framed[27], later 10 (ten) questions were framed[28] and finally 11 (eleven) questions were framed by the bench of 11 (eleven) Judges. Neither does one find reference in the said orders framing questions to any decision/order of this Court including ***Anjuman-e-Rahmania*** (supra) nor is the order in ***Anjuman-e-Rahmania*** (supra) referred to in the entire judgment in ***T.M.A. Pai Foundation*** (supra). To say

[26] (2002) 8 SCC 481
[27] (2002) 8 SCC 713
[28] (2002) 8 SCC 712

that question no. 3(a) was framed because of ***Anjuman-e-Rahmania*** (supra) appears to be thoroughly misconceived. While ***T.M.A. Pai Foundation*** (supra) did not answer question 3(a), the Regular Bench too was not persuaded to decide the same as it appears from its order dated 11th March, 2003 in ***Shahal H. Musaliar and Anr. vs. Union of India and Ors.***[29]. The proceedings in ***Anjuman-e-Rahmania vs. District Inspector*** effectively stood closed by the order of this Court dated 11th March 2003.

31. Significantly, ***T.M.A. Pai Foundation*** (supra) came to be considered by two more Constitution Bench decisions of this Court, viz. ***Islamic Academy of Education vs. State of Karnataka***[30] and ***P.A. Inamdar vs. State of Maharashtra***[31] not too long thereafter. The former decision does record that the Constitution Bench of 5 (five) Judges was constituted to clarify doubts/anomalies, if any, arising from varied interpretation of the majority view in ***T.M.A. Pai Foundation*** (supra) by the parties. The Constitution Bench of 7 (seven) Judges in the latter decision has also recorded that post ***T.M.A. Pai Foundation*** (supra), petitions flooded the high courts as well as this Court to resolve issues which were not answered by the bench of 11 (eleven) Judges. Relevance of ***Islamic Academy of Education*** (supra) and ***P.A. Inamdar*** (supra) lies in the fact that these decisions attempted to iron out creases arising from the

[29] Writ Petition (C) No.331 of 2005
[30] (2003) 6 SCC 697
[31] (2005) 6 SCC 537

decision in ***T.M.A. Pai Foundation*** (supra). If indeed question 3(a) required an answer, I would be persuaded to think that either ***Islamic Academy of Education*** (supra) or ***P.A. Inamdar*** (supra) would have answered it. That the Constitution Benches did not attempt to answer question 3(a) should leave none in doubt that the said question did not merit an answer.

32. After the order dated 11th March 2003 of disposal in ***Shahal H. Musaliar*** (supra), the matter lay dormant for a period of time; it was resuscitated when AMU, through its Executive Council, passed a resolution dated 19th May 2005, reserving 50% seats in postgraduate programmes for Indian Muslims. This resolution was challenged before the High Court invoking its writ jurisdiction. Both the Single Judge and the Division Bench of the High Court held that the reservation, sought to be made, could not be enforced. The Division Bench, relying on ***Azeez Basha*** (supra), went even further than the Single Judge and set aside the 1981 amendment to the AMU Act. The Division Bench observed that the 1981 amendment sought to side step ***Azeez Basha*** (supra) without removing the basis on which ***Azeez Basha*** (supra) was rendered. The judgment of the Division Bench was carried in appeal before this Court by AMU and it is on such appeal that the re-referral order was passed by the bench of 3 (three) Judges, which I propose to note now.

33. On 12th February, 2019, the bench of 3 (three) Judges in ***Aligarh Muslim University*** (supra), after noticing the aforesaid

developments, proceeded to hold that *"the correctness of the question arising from the decision of this Court in S. Azeez Basha (supra) has remained undetermined"*. The order that followed such observation reads as under:

> "9. That apart, the decision of this Court in Prof. Yashpal and another vs. State of Chhattisgarh and others and the amendment of the National Commission for Minority Educational Institutions Act, 2004 made in the year 2010 would also require an authoritative pronouncement on the aforesaid question formulated, as set out above, besides the correctness of the view expressed in the judgment of this Court in S. Azeez Basha (supra) which has been extracted above.
> 10. Ordinarily and in the normal course the judicial discipline would require the Bench to seek a reference of this matter by a Five Judges Bench. However, having regard to the background, as stated above, when the precise question was already referred to a Seven Judges Bench and was, however, not answered, we are of the view that the present question, set out above, should be referred to a Bench of Hon'ble Seven Judges.
> 11. Consequently and in the light of the above, place these matters before the Hon'ble the Chief Justice of India on the administrative side for appropriate orders."

34. Why I perceive the re-referral order to suffer from the same invalidity and to be untenable is this. Apart from ***Anjuman-e-Rahmania*** (supra) being *non-est* for the reason adverted to above, neither the bench of 11 (eleven) Judges in ***T.M.A. Pai Foundation*** (supra) nor the Regular Bench of 2 (two) Judges considered it necessary to answer question 3(a). The order dated 11th March, 2003 observing that the question could be answered should a problem arise in future did put a quietus, for the time being, to question 3(a), as formulated, as well as provided finality *qua* what was said about ***Azeez Basha*** (supra) in ***Anjuman-e-Rahmania*** (supra). Once the issue attained finality, in my respectful opinion, the bench of 3 (three) Judges could

not have reopened the same issue. It could be revisited in exceptional circumstances and that too, in a manner known to law. No intra-court appeal being available in the Supreme Court and in the absence of any allegation of fraud having vitiated the process of decision making, and there being no occasion for exercise of the inherent powers of the Court, it would have been most appropriate for the bench of 3 (three) Judges on 12th February, 2019 not to refer to ***Azeez Basha*** (supra) at all. What the bench of 3 (three) Judges did, so to say, was sort of making an order as if it were exercising appellate jurisdiction over the decision in ***T.M.A. Pai Foundation*** (supra), the order dated 11th March 2003, ***Islamic Academy of Education*** (supra) and ***P.A. Inamdar*** (supra) [last two without being noticed]. Significantly, the re-reference was made citing the necessity to consider the decision in ***Prof. Yashpal vs. State of Chhattisgarh***[32] and the amendment of the National Commission for Minority Educational Institutions Act, 2004[33] which, as per the majority opinion, have no real bearing with regard to the issue under consideration. Indeed, even if the decision in ***Prof. Yashpal*** (supra) and the 2004 Act were to make any difference to the legal position, hitherto settled, reference to that limited extent only could be justified with a call to answer question 3(a), extracted supra, independently and without referring to ***Azeez Basha*** (supra).

[32] (2005) 5 SCC 420
[33] NCMEI Act, hereafter

35. An issue which has some bearing on the correctness or otherwise of the decision in ***Azeez Basha*** (supra) [assuming that the order in ***Anjuman-e-Rahmania*** (supra) was valid and did form the ground for framing question 3(a)], if consciously has not been decided in course of a previous round of litigation, would it give rise to an occasion for a subsequent bench to hold that the issue should be decided because it has not been decided? Exercise of jurisdiction by a bench of lesser strength would not permit such an approach. That the bench of 3 (three) Judges was presided over by none other than the then Chief Justice of India did not make things better and ameliorate the circumstances. With due respect and utmost humility at my command, although the Chief Justice of India is *primus inter pares* and on the administrative side has powers and authority which no puisne Judge has, the Chief Justice of India while discharging judicial functions on the bench with a puisne judge or judges may not enjoy any power greater than what the puisne judge or judges forming the quorum has/have in authoring judgments/ passing orders. Therefore, the re-referral order merely by reason of the presence of the Chief Justice on the bench did not get sanctified. It was not that the bench of 3 (three) Judges were not alive to the settled law and the principles of judicial propriety, discipline and comity; yet, any doubt touching upon the correctness or otherwise of the view expressed in ***Azeez Basha*** (supra), if at all, should not have been sought to be resolved by referring the matter directly to a bench

of 7 (seven) Judges. Such an order of reference, apart from being in the teeth of ***Pradip Chandra Parija*** (supra), ***Hansoli Devi*** (supra) and ***Central Board of Dawoodi Bohra Community*** (supra), could not have been justified by reasoning that earlier, the issue had been referred to a bench of 7 (seven) Judges. It was incumbent on the bench while hearing ***Aligarh Muslim University*** (supra) to examine whether the referral order made in ***Anjuman-e-Rahmania*** (supra) was legal and valid. Answering the said question could have obviated the need for a further referral. Nothing much turns on the fact that all of us are now sitting in a combination of 7 (seven) Judges. The ***Anjuman-e-Rahmania*** (supra) referral order being *non-est*, to my mind, any order premised thereon is also *non-est*. At best, the bench of 3 (three) Judges in ***Aligarh Muslim University*** (supra) could have required a bench of 5 (five) Judges to reconsider whether question 3(a), which fell for consideration in ***T.M.A. Pai Foundation*** (supra), does at all require an answer [not in the light of whatever ***Azeez Basha*** (supra) had held while interpreting Article 30(1)] and only upon formation of an opinion that it does, should the further referral been made to a bench of 7 (seven) Judges to maintain judicial propriety, discipline and comity. The course of action adopted in ***Aligarh Muslim University*** (supra), thus, does not commend to me to be in accordance with established principles of law and should have well been avoided, being unnecessary. However, I repeat, any issue arising out of the law laid down in ***Azeez Basha*** (supra) was not

open to be referred once again even after noticing that the earlier endeavours to overturn ***Azeez Basha*** (supra) had proved abortive.

36. More often than not, this Court treats procedure as a hindrance towards attaining justice rather than treating it as a guardrail to ensure fairness and non-arbitrariness while conducting judicial proceedings. It must be remembered that at times, leaving aside the urge to render substantive justice without following the laid down procedure, it is perhaps advisable to follow the procedure as the means towards the end.

37. Thus, I have no hesitation in holding that the referral orders of this Court are *ex-facie* not in accordance with law and the re-reference in itself is equally incompetent and unnecessary as well.

38. Notwithstanding what I have opined above in support of my viewpoint that the referral orders are invalid and the references incompetent, *albeit* for technical reasons, there is a weightier reason for declaring the referral orders fragile. That is on the merits and I would immediately proceed to say why.

39. ***Anjuman-e-Rahmania*** (supra) talked of two substantial questions that arose before it. The first was, whether Article 30(1) of the Constitution envisages an institution which is established by minorities alone without the participation for the factum of establishment from any other community. This question was formulated recording that there was no clear decision of this Court. Secondly, whether the status of an institution as a minority

institution, which soon after its establishment is registered as a society under the Societies Act, would change in view of the broad principles laid down in ***S. Azeez Basha*** (supra). ***Aligarh Muslim University*** (supra) had the occasion to observe that question 3(a) which was formulated for an answer in ***T.M.A. Pai Foundation*** (supra) coincidentally reflected the questions referred by ***Anjuman-e-Rahmania*** (supra).

40. In ***TMA Pai Foundation*** (supra), question 3(a) was:

> *"3(a) What are the indicia for treating an educational institution as a minority educational institution? Would an institution be regarded as a minority educational institution because it was established by a person(s) belonging to a religious or linguistic minority or its being administered by a person(s) belonging to a religious or linguistic minority?"*

41. To recount, the reference order duly took note of question 3(a) and the fact that ***TMA Pai Foundation*** (supra) did not decide it. Now, two questions arise: (i) whether there is any decision prior to ***Anjuman-e-Rahmania*** (supra) which had directly decided the first point? And (ii) whether the point touching the Societies Act, i.e., a minority educational institution being registered under the Societies Act could have any bearing on the question decided by ***Azeez Basha*** (supra) by equating the former with a case where a university is established by an enactment?

42. Insofar as the first question is concerned, ***State of Kerala vs. Very Rev. Mother Provincial***[34], which is of course another decision of the Constitution Bench of 6 (six) Judges of this Court rendered more than half a century back, and has never been doubted by any subsequent bench, provides the answer. The essence of the law laid down therein is that the minority institution should have been established for the benefit of a minority community by a member of that community. Attention of the bench of 2 (two) Judges in ***Anjuman-e-Rahmania*** (supra) was not invited to this direct answer to the question it posed and one is left to wonder whether the reference would have at all been made if ***Very Rev. Mother Provincial*** (supra) was cited. There being no reference in ***Anjuman-e-Rahmania*** (supra) of ***Very Rev. Mother Provincial*** (supra), a binding decision, certainly the said decision of the Constitution Bench had not been placed before the bench of 2 (two) Judges by the set of very learned senior counsel appearing before it who agreed with the bench on the question of (in)correctness of ***Azeez Basha*** (supra). Regarding the second question, there cannot be any comparison of chalk and cheese. I have no hesitation to hold that the case dealt with by ***Azeez Basha*** (supra) and the one arising for decision in ***Anjuman-e-Rahmania*** (supra) were fundamentally different and in stark contrast with each other. Therefore, even on merits, there was no good reason to make a

[34] (1970) 2 SCC 417

reference for being placed before a bench of 7 (seven) Judges which ***Anjuman-e-Rahmania*** (supra) ordered.

43. Now turning to ***Aligarh Muslim University*** (supra), I have been unable to comprehend as to how question 3(a) could be said to coincidentally reflect the questions referred by ***Anjuman-e-Rahmania*** (supra). As evident from a bare reading of question 3(a), it had two parts: the first is, what is the indicia for treating an educational institution as a minority educational institution? Secondly, would an institution be regarded as a minority educational institution because it was established by a person(s) belonging to a religious/linguistic minority or its being administered by a person(s) belonging to a religious/linguistic minority?

44. In any event, *qua* question 3(a), why did the bench of 11 (eleven) Judges in ***TMA Pai Foundation*** (supra) not consider necessary to even attempt to answer it and relegate the same to the Regular Bench of 2 (two) Judges? Was it too trivial a question not meriting an answer or was there some other reason? Though the answer is not too obvious, the answer to the second part of question 3(a) seems to be firm and clear that the conjunction 'and' between 'establish' and 'administer' in Article 30(1) cannot be read as 'or' for the reasons that I seek to highlight a little later.

45. If one were to form the opinion that the question as to indicia for treating an educational institution as a minority educational institution was traceable to ***Anjuman-e-Rahmania*** (supra), that can

only happen if the said order were misread or some additional words were read into it.

46. It is one thing to identify indicia, i.e., indicia that are already existing. However, if indicia have to be formulated, i.e., created, by us in course of these proceedings, are we not discrediting the earlier Constitution Bench decisions on minority status vis-à-vis rights under Article 30(1) premised on an implicit indicia, though not expressly declared as such? It is considered most inappropriate that the first part of question 3(a) has engaged our attention in the present discussions and deliberations.

47. I am firm in my conviction that the reference and the re-reference, for all the reasons discussed above, do not require a decision.

TREATING THE REFERENCE TO BE VALID

48. Since the issue of correctness of the decision in ***Azeez Basha*** (supra) has been argued before us and carries immense significance for the future, I deem it proper to give due consideration to it treating the reference to be valid and legal. The minority character of AMU as well as the contours of rights under Article 30(1), assuming the same to be under a cloud of uncertainty, needs to be cleared. Hence, in my own way, I seek to bring clarity and finality to the issue through this opinion.

49. The majority opinion has sought to lay down the indicia and left it for an appropriate bench to be constituted by the Chief Justice of India

for deciding whether AMU is a minority or not. Hon'ble Surya Kant and Hon'ble Satish Chandra Sharma, JJ. also seem to have proceeded to dispense with the factual inquiry of whether or not AMU is a minority educational institution and focussed on the indicia to determine the applicability of Article 30(1).

50. Respectfully, I cannot bring myself to traverse the same path. After almost 9 (nine) months the judgment came to be reserved, it pricks my conscience to send the matter back once again to an appropriate bench; more so, after both sides have exhaustively addressed us on the very issue as to whether AMU answers the characteristics of a minority institution. In present times, when there is a lot of emphasis on pendency of cases and expeditious disposal thereof, precious judicial time would be wasted if the same issue has to be agitated yet again when such time could be well utilised in answering other pressing questions of law. I feel the urge to decide here and now, based on whatever indicia we identify or formulate, as well as the circumstances - antecedent, attending and surrounding – of the relevant time, as to whether AMU is a minority educational institution or not. I feel equipped to do so on account of extensive evidence having already been led by both sides.

THE INDICIA

51. In the majority opinion, the indicia for treating an educational institution as a minority educational institution are these:

I. Ideation of establishment: The brain behind the establishment of the institution, as gauged from, *inter alia*, correspondence and government resolutions, should be a member of the minority community.

II. Purpose: The institution should have been established predominantly for the benefit of the minority community, as opposed to solely for their benefit.

III. Implementation: The implementation of the idea to establish the institution, with respect to raising of funds, acquisition of land, etc. has to be examined. State aid in the same, would not adversely affect the minority status of the institution.

IV. Administration: The right to administer flows as a consequence of the institution having been established by the minority. Thus, it is not required that the institution be administered by the minority, but what is essential is that the administrative structure reflects the minority character of the institution.

52. Hon'ble Surya Kant, J. has, however, identified the indicia as follows:

I. Article 30(1) provides for a twin fold test – establishment and administration.

II. Establishment is to be understood as coming into existence of the institution, which is to be holistically gauged from examination of factors, *inter alia*, who is responsible for the genesis of the idea, accumulation of funds, framing of charter documents of the

educational institution, procuring of government approvals. In such acts, the minority community must play a decisive role.

III. Incorporation of a university under a statute would not necessarily mean that the institution is a creature of statute, unless it is the Government which has played the decisive role in ideation, funding, implementation and operationalising the institution.

IV. Establishment has to be for the benefit of the minority community.

V. Administration, at its core, has to vest with the minority community. This would include within its fold long term administrative roles and day to day sundry decisions. The minority community should thus be vested with both, *de jure* and *de facto* control.

53. Hon'ble Satish Chandra Sharma, J. has in His Lordship's draft opinion laid out a threefold indicia:

I. The minority community must play a predominant role, almost to the point of exclusion of all other forces, in tangibly bringing about the entirety of the institution into existence.

II. The purpose of the institution must be to predominantly serve the interests of the minority community, irrespective of the form of education provided.

III. The actual functional, executive, and policy administration should rest with the minority community. The real decision making authority of the institution should be the minority community.

54. While the majority opinion seems to have identified establishment as the sole indicium, Hon'ble Surya Kant and Hon'ble Satish Chandra Sharma, JJ. have laid equal stress on administration apart from establishment as the indicia. Inasmuch as the broad criteria which can be used to assess the status of an educational institution is concerned, I express my agreement with the indicia laid out by Their Lordships.

55. Taking a cue from the above indicia, what comes to mind is that a seed, by itself, cannot germinate into a plant without being sown in the soil. It is the farmer's endeavours of watering, nourishing and caring for the seed, not the sheer existence of the seed itself, which results in the emergence of the tree. Similarly, mere ideation by itself amounts to little if it is not backed by action or implementation. Ideation and conceiving of an idea are mere seeds, while the work of gathering resources, acquiring land, establishing an administrative structure, recruiting teachers, and admitting students are akin to the planting and nurturing required for those seeds to grow into a flourishing tree. Educational institutions, like all other institutions, are an outcome of the coalescence of resources, actions, and meticulous planning by the people "establishing" it.

56. Indicia is a term often used in various disciplines including law to describe signs or symptoms that suggest the presence of something. When we say that 'x' is the indicia of 'y', it could be so that 'x' could be the definite indicium of 'y' (implying a comprehensive or exclusive

indicator); at the same time, it may not necessarily imply that 'x' is the only indicator of 'y' (exhaustiveness) or that 'x' guarantees the presence of 'y' (certainty) or 'x' is unique to 'y' (specificity). However, to suggest that, 'x' is the definite indicum of 'y', it may not be appropriate in the present context where I can identify multiple indicia for concluding whether AMU answers the characteristics of a minority educational institution.

57. Certain broad indicia, which are universally applicable, may be applied prospectively to facilitate identification of minority institutions. However, any indicium or the indicia, as identified or formulated, for treating an institution as a minority institution may not be exhaustive so as to cater to all situations. Previous decisions of this Court, as earlier discussed, have also determined the minority character of educational institutions vis-à-vis Article 30, as per indicia tailored to the specific factual matrices. It could be well-nigh difficult, if not impossible, to fix indicia without regard to a whole lot of relevant facts and circumstances, which might have escaped notice or may not have been visualized. In my humble opinion, a flexible framework rather than a rigid one-size-fits-all model is always desirable and essential for accurately assessing minority institution status. Having regard to special features that each minority institution is most likely to have, a nuanced approach would be required to identify minority institutions by balancing the general guidelines with unique institutional circumstances. The indicia, which

have been proposed, could partly inform classification of minority institutions but a tailored evaluation is all the more necessary to account for distinct characteristics which each such institution is associated with; more so, when AMU is unique in itself and its status is under consideration as a standalone institution.

58. Having clarified my stance on the general indicia which should prospectively govern the evaluation of minority educational institutions, I shall now endeavour to be punctilious in assessing the status of AMU bearing in mind its unique institutional characteristics.

59. However, my consideration of the indicia must be preceded by this philosophical musing. If, indeed, indicia for treating an educational institution as a minority educational institution have not been either identified or formulated by any previous decision of this Court and this is the first time an attempt to so identify/formulate is being made, can the tests laid down in ***Azeez Basha*** (supra) which are facts specific be held invalid? My answer would be in the negative.

60. Nonetheless, the search for the truth must continue appreciating all the relevant factors.

ESTABLISHMENT OF AMU

61. AMU traces its origins to its institutional predecessor, MAO College which was established on 08th January, 1877. The establishment of MAO College was spearheaded by late Sir Syed Ahmed Khan[35], a national leader who envisioned the idea of a modern and Western

[35] Sir Syed, hereafter

educational institution for the Muslim community, distinct from the traditional madrasas, which otherwise prevailed. There is no contest to the fact that that MAO College was established specifically for the educational advancement of the Muslims; it is what comes thereafter which is the point of contention and calls for being noticed, to the extent relevant, and addressed.

62. Upon Sir Syed's death in 1898, the Muslim community in his honour started collecting funds with the goal to raise a sum of Rs 1,00,000/- (Rupees one lakh only) so that MAO College could evolve into a university. It is the appellants' submission that over a period of 22 (twenty-two) years, the Muslim community, through the Muslim University Association, collected a staggering sum of Rs 30,00,000/- (Rupees thirty lakh only) which finally led the British Government to agree with the demands for a university, leading to the establishment of AMU in 1920.

63. Travelling down memory lane, one is bound to trace the emergence of the movement for a Hindu university which, over a period of time, took shape with the establishment of the Banaras Hindu University[36] through a similar statute, viz. the Banaras Hindu University Act, 1915[37]. Despite all the efforts of Sir Syed, who did not consider Muslims to be in any way inferior, and the later endeavours to have a university established with full control being exercised by the

[36] BHU, hereafter
[37] BHU Act, hereafter

Muslim community, refusal of the imperial government to succumb to the demand was a blow to the aspirations that many of the leaders of the Aligarh movement harboured. There emerged two disputing factions within the Aligarh movement – that of the Loyalists headed by Aftab Ahmad Khan and the other by Maulana Mohammad Ali, the latter being vexed with the increasing control of the imperial government over the proposed AMU. Once the BHU Act had been passed leading to establishment of the BHU, the Loyalists realised that they were caught between the devil and the deep sea, i.e., they either accede to the British envisioning of AMU, which was under overwhelming government control, or they stick to their demands and lose out on the proposed university altogether. Writ large was the fact that since BHU had not been granted the right of affiliation, it seemed to be inevitable that the proposed Muslim university will also be governed by similar such provisions governing BHU. In a decisive meeting of the Muslim University Association, the decision was put to a vote and the Loyalists emerged the winner, leading to the eventual walkout of the dissenting faction headed by Maulana Mohammad Ali, who would go on to establish Jamia Milia Islamia. A salient feature of Jamia was that it was independently funded and thrived without any aid from the imperial government. Registered in 1939 as Jamia Milia Islamia Society, the institution was deemed to

be a University under section 3 of the University Grants Commission Act, 1956[38] in 1962.

64. Much would turn on this piece of historical evidence while appreciating whether AMU was an institution established by the Muslim community.

65. Further, in British India, the legislative framework governing educational institutions was such that schools and colleges, such as MAO College, could be established by private persons, but universities in particular were exclusively within the domain of the Governor General-in-Council[39]. Though there existed no legal bar to the establishment of universities by private individuals or societies, the British Government granted recognition only to degrees issued by universities which were creatures of statute. It is the appellants' submission that in such a context, the appellants had no recourse but to obtain the concurrence of the British Government, if Sir Syed's dream was ever to be realised. It is pressed that the British Government enacted the AMU Act only upon furnishing of adequate funds by the Muslim community, and hence, though AMU was a statutory institution, it was argued to be established by the Muslims, for the Muslims.

66. Article 30(1) of the Constitution guarantees to minorities, religious and linguistic, the right to establish and administer educational

[38] UGC Act, hereafter
[39] GGIC, hereafter

institutions of their choice. The provision, at a glance, has the following three components:

(i) Existence of a minority community – either religious or linguistic,

(ii) the minority community has the right to establish an educational institution; and

(iii) the minority community has the right to administer an educational institution.

67. It is no longer *res integra* that even institutions established prior to the Constitution would be eligible to seek the protection of Article 30(1), as was expressed by this Court in ***Re: The Kerala Education Bill, 1957*** (supra) at p. 1051:

> "There is no reason why the benefit of Article 30(1) should be limited only to educational institutions established after the commencement of the Constitution. The language employed in Article 30(1) is wide enough to cover both pre-constitution and post-constitution institutions. It must not be overlooked that Article 30(1) gives the minorities two rights, namely, (a) to establish, and (b) to administer, educational institutions of their choice. The second right clearly covers pre-constitution schools just as Article 26 covers the right to maintain pre-constitution religious institutions."
>
> (emphasis supplied)

AMU, though established during pre-Constitution days, it was contended that it is thus eligible to seek the protection of Article 30(1).

68. Having regard to such contention, it is necessary to examine the aspect of establishment. To understand how and why AMU came to be established, a perusal of the Statement of Objects and Reasons to the Act, and its Preamble, is necessitated:

"An Act to establish and incorporate a teaching and residential Muslim University at Aligarh."

"WHEREAS it is expedient to establish and incorporate a teaching and residential Muslim University at Aligarh, and to dissolve the Societies registered under the Societies' Registration Act, 1860, which are respectively known as the Muhammadan Anglo-Oriental College, Aligarh, and the Muslim University Association, and to transfer to and rest in the said University all properties and rights of the said Societies and of the Muslim University Foundation Committee."

69. While on the subject, a study of contrasts would be of profit, if one were to examine the founding Acts of one contemporary university, i.e., the Annamalai University Act, 1928[40]. It would also be of profit to examine the Visva Bharati Act, 1951[41], which came to be enacted immediately after India attained independence.

70. The 1928 Act records as follows:

"AND WHEREAS the Hon'ble Diwan Bahadur Sir S.R.M. Annamalai Chettiyar has established and is maintaining colleges at and near Chidambaram in which higher instruction is imparted in English, Tamil and Sanskrit studies;
AND WHEREAS the said Sir Annamalai Chettiyar has agreed with the Local Government to hand over the said institutions together with all the properties attached thereto and further to give a sum of twenty lakhs of rupees for the purposes of establishing and maintaining at Annamalainagar a Teaching and Residential University wherein he and his heirs shall be entitled to certain powers and privileges;"

(emphasis supplied)

71. The 1951 Act, similarly, pays homage and specifically recognises its founder, 'Kabiguru' to millions of his ardent followers in his state of birth and beyond, as follows:

"2. Declaration of Visva-Bharati as an institution of national importance.—Whereas the late Rabindranath Tagore (Thakur) founded an institution known as Visva-Bharati at Santiniketan in the district of Birbhum in West Bengal the objects of which are such as to make the

[40] 1928 Act, hereafter
[41] 1951 Act, hereafter

institution one of national importance, it is hereby declared that the institution known as 'Visva-Bharati' aforesaid is an institution of national importance and is as such hereby constituted as a University."
(emphasis supplied)

72. It is evident upon bare perusal of the above extracts that while establishing the respective universities, which are obviously statutory creations, the 1928 Act and the 1951 Act categorically recognise establishment of the respective predecessor institution by its founder. Annamalai University and Visva Bharati University are synonymous with Sir Annamalai Chettiar and Gurudeb Rabindra Nath Thakur, respectively; however, the AMU Act is woefully bereft of the same or similar recognition. The AMU Act is conspicuously silent on two major elements which the appellants argue was what brought AMU into existence – the contributions of Sir Syed and that of the donations collected *en masse* from the Muslim community in order to establish the erstwhile MAO College. If the institution was truly founded by the minority community, as contended by the appellants, there is no reason why the Preamble would not have been drafted in a similar manner so as to highlight the same. I am unable to subscribe to the majority opinion of recognition of the respective founders in the 1928 Act and the 1951 Act being of no relevance.

73. It would be further apposite to examine the enactments establishing two other minority universities. Firstly, the Sam Higginbottom University of Agriculture, Technology and Sciences, Uttar Pradesh Act,

2016, whose Preamble decisively recognises the establishment of the said university by the minority Christian community, as follows:

> "An Act to establish and incorporate a Teaching, Research and Extension University with a view to upgrade and reconstitute the existing Sam Higginbottom Institute of Agriculture, Technology and Sciences (Deemed-to-be- University), Allahabad, established and administered by the Ecumenical Minority Christian Society namely the Sam Higginbottom Educational and Charitable Society, Higginbottom House, 4- Agricultural Institute, Allahabad-211007, Registered under the Society Registration Act, 1860 in the State of Uttar Pradesh, and to provide for natters connected therewith or incidental thereto."

74. Secondly, the preamble of Era University, Lucknow, Uttar Pradesh Act, 2016, unambiguously recognises the minority character of the institution by stating that:

> *"Preamble*
> *An Act to establish and incorporate a teaching University sponsored by Era Educational Trust duly established and administered by the members of Muslim Minority community,*
> ***
> *2. Definitions—In this Act, unless the context otherwise requires*
> ***
> *(t) 'Trust' means the Era Educational Trust, established and administered by the members of Muslim Minority community, in the year 1995 for imparting education, having its office at 88, Victoria Street (Tulsi Das Marg), Lucknow a 'not for profit' Trust registered in the office of Sub-Registrar-I Lucknow under the Indian Trust Act, 1882."*
>
> (emphasis supplied)

75. Thus, these enactments are in stark contrast to the AMU Act, insofar as they categorically recognise the factum of establishment and administration of the universities by the respective minority community.

76. Proceeding further, section 7 of the AMU Act states that:

> *"The University shall invest and keep invested in securities in which trust funds may be invested in accordance with the law for the time being in force relating to trusts in British India a sum of thirty lakhs of rupees as a permanent endowment to meet the recurring charges of the University other than charges in respect of Fellowships, Scholarships, Prizes and rewards…"*
>
> (emphasis supplied)

Therefore, the sum of Rs 30,00,000/- (Rupees Thirty lakh only) collected by donations across the country was not spent in the establishment of AMU; rather, it was to be used as a fund to meet recurring expenditure. The appellants have repeatedly underscored the contribution made by the Muslim community, motivated to do the same by a systematic and sustained effort on the part of Sir Syed, in the setting up of AMU. The impact of such a monetary contribution cannot be gainsaid, but can the same be equated to establishment of AMU? I think not. The efforts of the Muslim community in leading to the establishment of AMU were no doubt monumental in spearheading the movement, and perhaps without such efforts AMU would never have become a reality, but this cannot by any stretch of imagination mean that the community itself established AMU.

77. There is no contest that MAO College was a minority institution, but AMU would not be endowed with the same characteristic solely on account of tracing its lineage from MAO College. The same is evidenced by section 4 of the AMU Act, which is reproduced hereinbelow:

> *"4. From the commencement of this Act-*
> *(i) The Societies known as the Muhammadan Anglo-Oriental College, Aligarh, and the Muslim University Association shall be dissolved, and all property, moveable and immoveable, and all rights powers and*

privileges of the said Societies and all property, moveable and immoveable, and all rights, powers and privileges of the Muslim University Foundation Committee shall be transferred to and vest in the University and shall be applied to the objects and purposes for which the University is incorporated;
(ii) All debts, liabilities and obligations of the said Societies and Committees shall be transferred to the University and shall thereafter be discharged and satisfied by it;
(iii) all references in any enactment to either of the said Societies and Committee shall be construed as references to the University;
(iv) any will, deed or other document, whether made or executed before or after the commencement of this Act, which contains any bequest, gift or trust in favour either of the said Societies or of the said committee shall, on the commencement of this Act, be construed as if the University was therein named instead of such Society or Committee;
(v) subject to any order which the Court may make, the buildings which belonged to the Muhammadan Anglo Oriental College, Aligarh, shall continue to be known and designated immediately before the commencement of this Act;
(vi) Subject to the provision of this Act, every person employed immediately before the commencement of this Act in the Muhammadan Anglo-Oriental College, Aligarh, shall hold employment in the University by the same tenure and upon the same terms and conditions and with the same rights and privileges as to pension and gratuity as he would have held the same under the Muhammadan Anglo-Oriental College, Aligarh, if this Act had not been passed;"

(emphasis supplied)

Thus, the societies, from which the appellants contend AMU inherited its minority character, stood dissolved upon the AMU Act coming into force. AMU was, thus, an institution unto itself, distinct from MAO College. There was a clear and statutory break from the antecedent history, and the character of AMU as it were, has to be examined on its own merit.

78. The appellants have relied on a number of decisions to contend that a university could also be a minority institution, foremost of which was ***St. Stephen's College vs. University of Delhi***[42]*.* However, all the

[42] (1992) 1 SCC 558

precedents relied on, have as their focus of discussion colleges and not universities. Though both are educational institutions which come under the ambit of Article 30(1), they are not synonymous with each other and are markedly different, particularly in one aspect, i.e., universities only can confer degrees while colleges cannot unless, as in present days, a college is also deemed to be a university and can award degrees. MAO College when it existed, established by Muslim individuals, could not confer degrees and it was only Allahabad University, of which MAO College was an affiliated college, that could award degrees.

79. As rightly contended by the learned Attorney General, the private individuals who had set up MAO College were not legislatively competent to establish a university in the first place. Being devoid of the authority to establish, the power to do which was the sole preserve of the British Government, the establishment of AMU could not possibly be owed to the Muslim community. An example of this is section 6 of the AMU Act, which stated that degrees conferred by AMU would be recognised by the Government. The provision states:

> *"6. Recognition of degrees. – The degrees, diplomas and other academic distinctions granted or conferred to or on persons by the University shall be recognised by the Central and State Governments as are the corresponding degrees, diplomas and other academic distinctions granted by any other University incorporated under any enactment."*

As has been discussed, the only universities whose degrees were recognised by the Government were those established by statute.

Degrees issued by private universities were not recognised by the British Government. The degrees issued by AMU being officially recognised, it could not, as a logical corollary, be said that AMU was established by the Muslim community. The university being brought into existence solely by virtue of the statute, its establishment could not be owed to anything other than the statute.

80. Provisions of the AMU Act have been highlighted to show that bodies such as the Court were to be comprised entirely of Muslim members. However, such bodies could not be said to have *established* AMU.

81. Black's Law Dictionary[43] defines 'establish' as:

> "**establish**, vb. (14c) 1. To settle, make, or fix firmly; to enact permanently <one object of the Constitution was to establish justice>. **2. To make or form; to bring about or into existence** <Congress has the power to establish Article III courts>. **3.** To prove; to convince <the House managers tried to establish the President's guilt>."
>
> (emphasis supplied)

82. The appellants advocated for the verb "to establish" to be interpreted widely so as to mean "to found". While this Court has time and again interpreted words of statutes in a liberal manner so as to align them with legislative intent, the interpretation canvassed by the appellants, insofar as "to establish" is to be equated with "to found", demands an implausibly expansive reading of Article 30(1). It is a primary rule of interpretation that statutes must be interpreted as they are, and auxiliary connotations must not be read into the provision, unless

[43] 9th Edition

there is reason established for doing so. The two words are very distinct in their purport and understanding. The Constituent Assembly, in its legislative wisdom, chose specifically to use the words 'to establish" in Article 30(1); interpreting it in a manner so wide as to change its meaning altogether would be doing the Constitution and its framers a disservice. A perusal of the decisions of this Court, which shall be discussed henceforth, categorically evinces that this contention is untenable in law.

83. In ***Very Rev. Mother Provincial*** (supra), this Court explained 'establishment' by categorically holding that it refers to the factum of bringing into existence of the university, and not the founding of the institution:

> *"8. Article 30(1) has been construed before by this Court. Without referring to those cases it is sufficient to say that the clause contemplates two rights which are separated in point of time. The first right is the initial right to establish institutions of the minority's choice. Establishment here means the bringing into being of an institution and it must be by a minority community. It matters not if a single philanthropic individual with his own means, founds the institution or the community at large contributes the funds. The position in law is the same and the intention in either case must be to found an institution for the benefit of a minority community by a member of that community. It is equally irrelevant that in addition to the minority community others from other minority communities or even from the majority community can take advantage of these institutions. Such other communities bring in income and they do not have to be turned away to enjoy the protection."*
>
> (emphasis supplied)

84. Hon'ble V.N. Khare, J. (as His Lordship then was) in ***T.M.A. Pai Foundation*** (supra) observed as follows:

> *"**254.** The expression 'to establish' means to set up on permanent basis. The expression 'to administer' means to manage or to attend to the running of the affairs…"*

(emphasis supplied)

85. This Court, in ***A.P. Christian Medical Educational Society vs. Govt. of A.P.***[44], emphasized the importance of piercing the veil to gauge whether an institution is truly a minority educational institution, by stating as follows:

> *"8. It was seriously contended before us that any minority, even a single individual belonging to a minority, could found a minority institution and had the right so to do under the Constitution and neither the government nor the University could deny the society's right to establish a minority institution, at the very threshold as it were, howsoever, they may impose regulatory measures in the interests of uniformity, efficiency and excellence of education. The fallacy of the argument insofar as the instant case is concerned lies in thinking that neither the government nor the University has the right to go behind the claim that the institution is a minority institution and to investigate and satisfy itself whether the claim is well-founded or ill-founded. The government, the University and ultimately the court have the undoubted right to pierce the 'minority veil' — with due apologies to the corporate lawyers — and discover whether there is lurking behind it no minority at all and in any case, no minority Institution. The object of Article 30(1) is not to allow bogies to be raised by pretenders but to give the minorities 'a sense of security and a feeling of confidence' not merely by guaranteeing the right to profess, practise and propagate religion to religious minorities and the right to conserve their language, script and culture to linguistic minorities, but also to enable all minorities, religious or linguistic, to establish and administer educational institutions of their choice. These institutions must be educational institutions of the minorities in truth and reality and not mere masked phantoms. They may be institutions intended to give the children of the minorities the best general and professional education, to make them complete men and women of the country and to enable them to go out into the world fully prepared and equipped. They may be institutions where special provision is made to the advantage and for the advancement of the minority children. <u>They may be institutions where the parents of the children of the minority community may expect that education in accordance with the basic tenets of their religion would be imparted by or under the guidance of teachers, learned and steeped in the faith. They may be institutions where the parents expect their children to grow in a pervasive atmosphere which is in harmony with their religion or conducive to the pursuit of it. What is important and what is imperative is that there must exist some real positive index to enable the institution to be identified as an educational institution of the minorities. We have already said that in the present case apart from the*

[44] (1986) 2 SCC 667

half a dozen words 'as a Christian minorities' institution' occurring in one of the objects recited in the memorandum of association, there is nothing whatever, in the memorandum or the articles of association or in the actions of the society to indicate that the institution was intended to be a minority educational institution. As already found by us these half a dozen words were introduced merely to found a claim on Article 30(1). They were a smoke-screen."

(emphasis supplied)

86. It is thus evident that establishment is a question of fact and has to be proved as such. The factum of establishment cannot, thus, be solely determined by intention of the minority community alone; rather, it has to be factually established in words and deeds and functioning of the university.

87. ***Azeez Basha*** (supra) categorically dealt with the factum of AMU's establishment to conclude that AMU was not established by the Muslim community, in the following manner:

"It is true, as is clear from the 1920-Act, that the nucleus of the Aligarh University was the M.A.O. College, which was till then a teaching institution under the Allahabad' University. The conversion of that college (if we may use that expression) into a university was however not by the Muslim minority; it took place by virtue of the 1920-Act which was passed by the Central legislature. There was no Aligarh University existing till the 1920- Act was passed. It was brought into being by the 1920-Act and must therefore be held to have been established by the Central Legislature which by passing the 1920-Act incorporated it. The fact that it was based on the M.A.O. College, would make no difference to the question as to who established the Aligarh University. The answer to our mind as to who established the Aligarh University is clear and that is that it was the Central Legislature by enacting the 1920-Act that established the said University."

(emphasis supplied)

88. This Court in ***Azeez Basha*** (supra) having held, upon an exhaustive analysis of the facts and circumstances presented before it, that AMU

was brought into existence by the Central Legislature by virtue of the AMU Act, I see no infirmity warranting the view taken therein to be overruled. And, this being the settled position for more than half-a-century by now, it is not worthwhile to interfere with the same at this distance of time notwithstanding the attempts to have it removed.

ADMINISTRATION OF AMU

89. The other element enumerated under Article 30(1) is 'administer'. Administration, like establishment, is a question of fact. The minority community needs to prove, through material evidence, the fact of administration by the community.

90. Before delving into the factual scenario, it is necessary to grasp what are the elements of administration. To fully appreciate what administration entails, it would be opportune to go through treatises and the previous articulations of this Court on the topic.

91. The eleventh edition of Black's Law Dictionary defines the term "administration" as:

> administration, n. (14c) 1. The management or performance of the executive duties of a government, institution, or business; collectively, all the actions that are involved in managing the work of an organization. 2. In public law, the practical management and direction of the executive department and its agencies…."
>
> (emphasis supplied)

92. This Court in ***Ahmedabad St. Xavier's College Society vs. State of Gujarat***[45] has provided an unambiguous rubric to understand what the "right to administer" entails:

[45] (1974) 1 SCC 717

> *"19. The entire controversy centres round the extent of the right of the religious and linguistic minorities to administer their educational institutions. The right to administer is said to consist of four principal matters. First is the right to choose its managing or governing body. It is said that the founders of the minority institution have faith and confidence in their own committee or body consisting of persons elected by them. Second is the right to choose its teachers. It is said that minority institutions want teachers to have compatibility with the ideals, aims and aspirations of the institution. Third is the right not to be compelled to refuse admission to students. In other words, the minority institutions want to have the right to admit students of their choice subject to reasonable regulations about academic qualifications. Fourth is the right to use its properties and assets for the benefit of its own institution."*
>
> (emphasis supplied)

93. The articulation of 'right to administer' provided by this Court in the abovementioned decision is supplemented by the decision in ***TMA Pai Foundation*** (supra), where this Court outlined what rights constitute the right to administer and establish:

> *"50. The right to establish and administer broadly comprises the following rights:*
> *(a) to admit students;*
> *(b) to set up a reasonable fee structure;*
> *(c) to constitute a governing body;*
> *(d) to appoint staff (teaching and non-teaching); and*
> *(e) to take action if there is dereliction of duty on the part of any employees."*

94. What can be culled out from the above discussion is that administration means carrying out all the functions, which are essential for functioning of an institute. Even if some regulatory interference by the State does exist, it cannot be said that the community is not administering the institute merely because there is some superficial interference in the working of the institution by the State. Only when the State enjoys a

deep and pervasive control over the functioning of an institution, it can be said that the State is administering the institution.

95. However, to substantiate the argument that a certain community has been administering an institute, it has to be illustrated that the overall governance of the institute is under the control of the community. Administration vis-à-vis a university consists of making decisions with regard to hiring of faculty, admitting and subjecting students to take lessons and examinations, fee structures, disciplinary proceedings for the teaching and non-teaching staff and other miscellaneous day-to-day operations which are needed to keep the university operating optimally.

96. The test which needs to be satisfied in order to establish that a university is administered by a minority community is the test of ultimate control.

97. The administrative functions of AMU are broadly carried out by five bodies:

a) Visitor (erstwhile Lord Rector);

b) Visiting Board;

c) Executive Council;

d) Academic Council; and

e) Court of AMU.

98. AMU Act, as it stood in 1920, prior to the amendments, did not provide for a mechanism for Muslims to administer the University. Section 13 of the AMU Act provided for the Governor General of British India to be

the Lord Rector (now Visitor). The Lord Rector had been bestowed with the ultimate control and superintendence of the University. Section 14 provided for the Visiting Board, which was responsible for ensuring that the University is functioning in accordance with the act, ordinances, and rules. The composition of the Visiting Board did not reflect any special dispensation being made for Muslim control over the board.

99. There have been extensive submissions on the nature of the Court of AMU, and much reliance has been placed by the appellants on section 23(2) of the AMU Act. According to the appellants, the Court of AMU is the supreme governing body of the university. At first blush, this submission by the appellants seems reasonable; however, on closer examination of the statute, this submission cannot be accepted. Section 23(2) gives only residuary powers to the Court of AMU over matters not explicitly provided for in the AMU Act and rules of the University. If sections 13 and 23 are read jointly, the clear picture which emerges is that the Court of AMU is subservient to the Lord Rector; as the Lord Rector had been given the power to overrule the Court of AMU under section 13(5) of the Act.

100. Deep involvement of the State is demonstrated through the Governor-General/Governor in all major activities of the University, such as establishing colleges, promulgating ordinances, and superintendence over the Executive and the Academic Councils.

101. The governing structure of AMU gives me compelling indications to hold that there is a deep and pervasive control of the State over the

administration of the University. The governance structure, funding, admissions, and appointments in the University demonstrates an involvement of the State which goes way beyond mere regulatory oversight and into its absolute control over the administration of the University.

102. Hence, I find myself being drawn to the irresistible conclusion that AMU has not been administered by a minority community at any point in time. The Act places the ultimate control of the University with the Central Government and the Central Government and its predecessor have been administering AMU since 1920.

CONJUNCTIVE INTERPRETATION OF ESTABLISH AND ADMINISTER

103. Now that the two aspects of establishment and administration have been examined individually, it is apposite to investigate whether the two rights, as guaranteed by the Constitution, have to be read as disjunctive or conjunctive rights. In view of the consensus on the point that 'and' between 'establish' and 'administer' has to be read and understood as 'and' and not 'or', the discussion is rendered practically academic. However, some discussion on the topic is considered worthwhile having regard to the re-referral order in ***Aligarh Muslim University*** (supra).

104. The Constitutional Debates on the drafting of Article 30 have been brought to the fore by the respondents, and while the provision underwent multiple revisions, what remained constant was the use of the word "and" in the phrase "establish and administer". This is

also evident from the Hindi version of Article 30(1) in Devnagari script, reading as follows:

शिक्षा संस्थाओं की स्थापना और प्रशासन करने का अल्पसंख्यक-वर्गों का अधिकार।	**30.** (1) धर्म या भाषा पर आधारित सभी अल्पसंख्यक-वर्गों को अपनी रुचि की शिक्षा संस्थाओं की स्थापना और प्रशासन का अधिकार होगा।

A perusal of Article 30(1) in Hindi reveals that the conjunction used to connect establish (स्थापना) and administer (प्रशासन) is "और", i.e., "and" as opposed to the word "या" which means "or". It is well settled that the word "and" connotes a conjunctive nature whereas the word "or" connotes a disjunctive meaning. Though the terms can be, in exceptional circumstances, interchangeably interpreted with the aim of fulfilling the legislative intent, there is nothing in the provision, which impels us to read and understand the word other than what is conveyed by its ordinary meaning. Therefore, this Court in multiple decisions has interpreted the right to establish and administer as conjunctive rights rather than disjunctive.

105. The perusal of the Hindi version also buttresses the position that establishment has to only be read as so, rather than being expansively interpreted as founding. This is evident from the use of the word "स्थापना" by the Constitution framers, which means 'to establish' rather than the use of the word "उद्भावना" which means 'to conceive' or 'to found'. As discussed above, words have to be

interpreted literally, unless the context requires otherwise, which in this case, it does not.

106. This Court, in ***Dayanand Anglo Vedic (DAV) College Trust and Management Society vs. State of Maharashtra***[46], held that:

> "34. After giving our anxious consideration to the matter and in the light of the law settled by this Court, we have no hesitation in holding that in order to claim minority/linguistic status for an institution in any State, the authorities must be satisfied firstly that the institution has been established by the persons who are minority in such State; and, secondly, the right of administration of the said minority linguistic institution is also vested in those persons who are minority in such State. The right conferred by Article 30 of the Constitution cannot be interpreted as if irrespective of the persons who established the institution in the State for the benefit of persons who are minority, any person, be it non-minority in other place, can administer and run such institution."
>
> (emphasis supplied)

107. A similar view was echoed by this Court in ***St. Stephen's*** (supra), wherein it was held that:

> "28. There is by now, fairly abundant case law on the questions as to 'minority'; the minority's right to 'establish', and their right to 'administer' educational institutions. These questions have arisen in regard to a variety of institutions all over the country. They have arisen in regard to Christians, Muslims and in regard to certain sects of Hindus and linguistic groups. The courts in certain cases have accepted without much scrutiny the version of the claimant that the institution in question was founded by a minority community while in some cases the courts have examined very minutely the proof of the establishment of the institution. It should be borne in mind that the words 'establish' and 'administer' used in Article 30(1) are to be read conjunctively. The right claimed by a minority community to administer the educational institution depends upon the proof of establishment of the institution. The proof of establishment of the institution, is thus a condition precedent for claiming the right to administer the institution."
>
> (emphasis supplied)

[46] (2013) 4 SCC 14

108. Finally, reference to ***Azeez Basha*** (supra) again, is considered relevant. The argument raised before the Court was a bit different in the sense that right to administer AMU was claimed by almost abandoning the claim that AMU was established by the minority community. It was held that:

> "It is to our mind quite clear that Article 30(1) postulates that the religious community will have the right to establish and administer educational institutions of their choice meaning thereby that where a religious minority establishes an educational institution, it will have the right to administer that. An argument has been raised to the effect that even though the religions (sic, religious) minority may not have established the educational institution, it will have the right to administer it, if by some process it has been administering the same before the Constitution came into force. We are not prepared to accept this argument. The Article in our opinion clearly shows that the minority will have the right to administer educational institutions of their choice provided they have established them, but not otherwise. The article cannot be read, to mean that even if the educational institution has been established by somebody else, any religious minority would have the right to administer it because, for some reason or other, it might have been administering it before the Constitution came into force. The words 'establish and administer' in the article must be read conjunctively and so read it gives the right to the minority to administer an educational institution provided it has been established by it. In this connection our attention was drawn to In re: The Kerala Education Bill, 1957 [(159) SCR 995] where, it is argued, this Court had held that the minority can administer an educational institution even though it might not have established it. In that case an argument was raised that under Article 30(1) protection was given only to educational institutions established after the Constitution came into force. That argument was turned down by this Court for the obvious reason that if that interpretation was given to Article 30(1) it would be robbed of much of its content. But that case in our opinion did not lay down that the words 'establish and administer' in Article 30(1) should be read disjunctively, so that though a minority might not have established an educational institution it had the right to administer it. It is true that at p. 1062 the Court spoke of Article 30(1) giving two rights to a minority i.e. (i) to establish and (ii) to administer. But that was

said only in the context of meeting the argument that educational institutions established by minorities before the Constitution came into force did not have the protection of Article 30(1). We are of opinion that nothing in that case justifies the contention raised of behalf of the petitioners that the minorities would have the right to administer an educational institution even though the institution may not have been established by them. The two words in Article 30(1) must be read together and so read the Article gives this right to the minority to administer institutions established by it. If the educational institution has not been established by a minority it cannot claim the right to administer it under Article 30(1).”

(emphasis supplied)

109. The above passage has been quoted by the bench of 3 (three) Judges in ***Aligarh Muslim University*** (supra). Having read the said passage in between the lines, I have utterly failed to find any infirmity in the process of reasoning by the Constitution bench while dealing with the arguments that were raised before it.

110. In any event, leaving aside ***Azeez Basha*** (supra), it is amply clear that this Court has consistently read Article 30(1) to provide conjunctive, rather than separate and disjunctive, rights. The interpretation of Article 30 in the manner sought to be projected in the majority opinion, would mean that even an institution, though established by the minority, but has never been administered by it would reap the protection granted by Article 30(1). Such a result is exactly what was warned against by this Court in ***A.P. Christian Medical Educational Society*** (supra). The right to ‘administer’ accruing to the minority community only upon the factum of ‘establish’ having first been proven leaves but one with the

unescapable conclusion, that the right to establish and the right to administer are twin rights, and cannot be read in isolation from one another. Any other interpretation would lead to consequences that were far from what the Constituent Assembly did intend.

111. The majority opinion, though extensive, seems to have created an existential impasse, akin to the Chakravyuh orchestrated by Dronacharya. While it is mentioned in paragraph 73 of the revised draft opinion that *"Article 30(1) cannot extend to a situation where the minority community which establishes an educational institution has no intention to administer it"*, it has been opined at paragraph 156 (could also be 155) that *"In the preceding sections we have held that establishment by a minority is the only indicia for a minority educational institution"*. To my mind, these two positions create an inherent contradiction which is as perplexing to solve as the Chakravyuh was for Abhimanyu, inasmuch as it lays out mutually exclusive positions of law which cannot possibly co-exist. In view thereof, a question comes to my mind that if a minority community establishes an educational institution and thereafter abandons its administration to rank outsiders, can such an institution be said to merit protection under Article 30(1), if establishment is the only indicium, as held in the majority opinion? From the paradoxical legal test laid out above, the answer remains elusive.

ENTRY 63 OF LIST I

112. There is yet another issue that demands attention: what is the impact of including AMU in List I, Entry 63[47] of the Seventh Schedule of the Constitution, and what are the implications of its designation as 'institution of national importance'?

113. Apart from AMU, BHU also finds pride of place in Entry 63. Respect and honour, in equal measure, as well as equal status as institutions of national importance were bestowed on these two universities (having religious imprint in their respective titular description), which were established by the end of the second decade of the century in which India attained independence from colonial rule, mandating that it is Parliament which can exercise its legislative authority over them without any constraints or qualifications.

114. When the Constitution was being drafted, AMU was not remotely relatable to being considered as a minority institution. The framers of the Constitution proceeded on that basis and included AMU in Entry 63 of List I not only as an institution in respect whereof laws could be framed by the Parliament but also, by necessary implication, designated AMU as an institution of national importance.

115. A brief reference to the Constituent Assembly Debates would be apt at this stage. While deliberating on Entry 63 (originally Entry 40, List

[47] 63. The institutions known at the commencement of this Constitution as the Banaras Hindu University, the Aligarh Muslim University and the Delhi University, and any other institution declared by Parliament by law to be an institution of national importance.

I of the Seventh Schedule to the Draft Constitution of India), Mr. Naziruddin Ahmad remarked:

> "I have slightly altered my amendment to suit the change introduced by Dr. Ambedkar in his own amendment. I submit that Dr. Ambedkar's amendment would unduly enlarge the jurisdiction of the Centre and many things which would be otherwise cognizable by the Provinces would now, by virtue of the words which I seek to delete, be included within the jurisdiction of the Centre. The Banares Hindu University and the Aligarh Muslim University have been regarded from their very inception as institutions of a national character and importance and therefore they have been rightly regarded so far as national institutions and they have been rightly placed under the jurisdiction of the Union."[48]

116. The foresight of the Constituent Assembly is, thus, evident in that the Assembly aimed to preserve and reinforce the national and secular character of AMU. By incorporating AMU within Entry 63 of List I in the Seventh Schedule, the Assembly decisively entrenched its secular and national identity through constitutional enactment. Consequently, any remnants of affiliation to a specific community were deliberately eliminated.

117. *"Aligarh Muslim University is not a theological convent. It is a university, and a university cannot function as a communal institution"*, observed Mr. M.C. Chagla [one of the most (if not the most) reputed and respected Chief Justices of the High Court of Bombay] serving as the Minister of Education, Government of India

[48] *Constituent Assembly Debates*, Volume 9, 30th August 1949 (9.127.209)

at the time, while addressing Parliament during the debate on the AMU (Amendment) Bill, 1965—a bill that was ultimately enacted by Parliament[49]. Excerpts from Mr. Chagla's speech in the Parliament[50] read as under:

> *"In my opinion, the Aligarh Muslim University is a national institution, an institution of national importance. There are four Central universities: there is the Banaras Hindu University; there is the Aligarh Muslim University; there is the Delhi University; and there is the Visvabharati University. All these institutions are institutions of national importance. If you look at the Seventh Schedule entry 63 therein is very significant; entry 63 of List I of the Seventh Schedule gives the power to the Parliament to legislate […]*
>
> *My submission to this House is that Aligarh University has neither been established nor is being administered by the Muslim Community. […] You had first the Muslim college which was founded by Sir Syed Ahmed. Sir Syed Ahmed has asked the British Government of those days to establish a university and the British Government established the University. Therefore, the establishment of the institution was by the legislature and not by the community […] Now I cannot understand how it can be said that the administration is in the hands of the minorities. The administration of the University depends upon the law. During the British times it depended upon this Act. After independence it depends upon the Act, as had been amended by the Parliament. Does Mr. Anthony suggest that it is open to the Aligarh University or the Muslim community to change the administration of the university even to the slightest degree and go contrary to what the Parliament has laid down? If the minority had the right to administer the Aligarh University, then it can have any administration it liked; it can change the administration and it can close down the University; it can change the constitution of the court or the Executive Council. Can it do so? Even the constitution of the court, of the executive council and of the academic council is regulated and not by the minority committee but by the Parliament. There is another aspect of the matter which Mr. Anthony has completely forgotten. He has attached great importance to the fact that under the Act of 1920, the British Government, as a concession, said that the court shall consist wholly of Muslims. Now everybody know that the University is administered by the executive council and not by the court. The court of course is the supreme authority and it is like a show-piece. It meets once a year; lots of people come there and make speeches and pass resolutions. But the day-to day administration, selection, appointments, and so on are carried on by the executive council and it is significant that even in the British days it was not provided that the executive council shall consist only of Muslims. That clearly shows that the British*

[49] *Lok Sabha Debates*, Twelfth Session, Third Series Vol. XLIV – No. 9, 27th August 1965
[50] *Lok Sabha Debates*, Twelfth Session, Third Series Vol. XLIV – No. 9, 27th August 1965

Government did not concede the argument. Although there is no Constitution then the arguments is now advanced by Mr. Anthony that the minority has a right to administer a particular institution. I say that this institution was not established by the minority; nor is it being administered by the minority community. That is the legal position as far as Article 30 is concerned."[51]

(emphasis supplied)

118. Prof. Nurul Hasan, a reputed historian, followed in the footsteps of Mr. M.C. Chagla as the Minister of Education. This is what Prof. Hasan had to say in Parliament:

> *"**Regards the third objection that as a minority institution it is only Muslims who should be on the Court and on the Executive Council and they should have an exclusive hand in the management of the University, hon Members are aware of the writ which had been filed in the Supreme Court. It has since been withdrawn. Mr. Chagla has expressed his opinion on the legal aspect of the matter. He thinks that this University was not established by the minorities, but by Parliament and, therefore, this objection is not right. As far as interpretation of the Constitution is concerned, I see no reason to differ from the interpretation given by him. I do feel, however, that the spirit underlying the Constitution should not be lost sight of. As far as the objection that there should be only Muslims, who should manage the affairs of the University, is concerned, I know that one of our learned colleagues, Shri P. N. Sapru, has been on the Executive Council of the University for quite a number of years."*

119. The inclusion of AMU in Entry 63 of List I conferred upon it a distinct status of being an "institution of national importance". The Constitution itself did not categorize AMU as either a minority institution or otherwise. Following the adoption of the Constitution in 1950, amendments were promptly enacted to the AMU Act in 1951 and again in 1965. These amendments were designed to align with

[51] *Lok Sabha Debates,* Twelfth Session, Third Series Vol. XLV- No. 13, 2nd September 1965

constitutional provisions and to reflect the status of AMU as an "institution of national importance".

120. Entry 63 grants exclusive legislative authority over the specified universities therein to Parliament, and to any other institution declared by Parliament by law to be an institution of national importance. The scheme of Entry 63, which constitutionally designates AMU, BHU and Delhi University as institutions of national importance, is sufficient to indicate that AMU is not a minority institution. Absence of specific names of universities other than the ones in Entry 63 or anywhere else in the Constitution cements AMU's distinctive status as an institution of national importance, with its national and non-minority character at the forefront. There could be other institutions of national importance, even institutions which have minority character, but such institutions being designated by ordinary laws would never reach the elevated status of AMU.

121. As clearly distinguishable from other entries in the three lists forming part of Schedule VII, which only provide the vast field of subjects pertaining to which laws could be enacted by the Centre/the States, it is essential to interpret Entry 63 of List I not merely as a field over which Parliament has the authority to make a law but also as a Constitutional provision of recognition of certain institutions as 'institutions of national importance'. The language of the Entry explicitly designates these institutions with a unique status, thereby affirming their designation as universities of national importance.

Thus, it would be inappropriate to construe this Entry solely as a legislative subject without acknowledging its broader implications.

122. In light of the above, an institution having secular traits which was designated as one of national importance by the framers of the Constitution and enshrined in the Constitution adopted in 1950, cannot be retroactively reclassified as a minority Muslim institution in 2024 without violating the secular principles that underpin our Constitution. Such a reclassification would fundamentally conflict with the secular ethos embedded in our Constitutional framework, which upholds the equal status of all institutions irrespective of religious affiliation. The original intent was to recognize these institutions for their national significance, and altering this status now would undermine the foundational values of secularism and equality that guide our Constitutional order.

123. Moreover, universities of national importance, such as AMU, cannot be subordinated to the control of any minority community or particular group. Their national character necessitates that they remain under the jurisdiction of the Central Government to ensure that their operations and management align with their designated national significance. This is crucial as the Central Government provides full funding for these institutions, which is vital for their continued existence. The control of the Central Government and the Parliament's jurisdiction to legislate on AMU could in a way be terminated if the minority community is conceded the right to close

down AMU even. A 'right to administer' (although may not include the 'right to maladminister') could include the 'right not to administer' and, thus, bring about a closure of AMU. This would not be in the greater national interest.

124. AMU's status having been firmly established upon the adoption of the Constitution through its inclusion in Entry 63 of List I, any alteration of AMU's status—particularly as executed by the Amendment of 1981— is untenable. Any such modification must be effected through an appropriate Constitutional amendment under Entry 63 of List I, adhering to the procedure set forth in Article 368 of the Constitution and such changes cannot be made merely by amending the relevant statute, i.e., the AMU Act. Under these circumstances, the intention of the framers of the Constitution to affirm the national and secular character of AMU may not be altered, particularly not in the manner proposed by the appellants.

125. None of us on the bench was born within a decade of India attaining independence. What was the pre-independence scenario is, thus, not known to any one of us. Whatever we know is through our ancestors or books and treatises on the subject. We have not been trained to decide any issue based on our personal knowledge. However, judicial notice can of course be taken of facts specified in section 57 of the Evidence Act, 1872 (currently, section 52 of the Bharatiya Sakshya Adhiniyam, 2023) which would include matters of public history based on appropriate books or documents of reference but the court,

if it is called upon by a person, may refuse to take judicial notice of any fact unless and until such person produces any such book or document as it may consider necessary to enable it do so. There is, however, no such tether insofar as debates of the Constituent Assembly or proceedings of Parliament are concerned. Judicial notice thereof can be taken without any reservation and what have been debated, as seen from documented records, are assumed to be correct. Does that mean that the courts are bound to accept the contents of the debates as portrayal of the correct position on facts? The answer may not be in the affirmative in all cases. But, although courts are not bound to accept the speeches of members of the Constituent Assembly or the members of the Parliament including ministers, made on the floor of the Parliament, as unvarnished and unimpeachable truth, the speeches are of sufficient persuasive value and if, the factual accuracy of the contents of such speeches are not shown to be questionable or incorrect, there is no reason as to why the court should feel shy to rely on them. Mr. M.C. Chagla, followed by Prof. Nurul Hasan, was emphatic on the floor of the Parliament that AMU was not a minority institution. I have not been impressed upon to hold, with reference to any credible material shown by the appellants, that what the ministers said was factually incorrect, they were nowhere near the truth or their speeches were 'a long shot from reality'. Based on post-independence events like these speeches as well as other evidence that is available, which provide sufficient

ground to hold that AMU is not a minority institution, the voyage to change history through a judicial pronouncement may not be continued further.

126. The discussion on this topic ought to end by quoting Sahibzada Aftab Ahmad Khan, former Vice Chancellor of AMU[52]:

> "It is only fair to observe that no other national institution in India has shown such a liberal and catholic spirit in actual practice as has been the consistent policy of this institution from its start up to the present time. We have always had a good number of Hindu students, and the first graduate, in the late M.A.O. College, was a Hindu who took his degree in 1880.Thus if there is any institution in India, which can truly be called national and all-India in character, it is this University which deserves the sympathy and support not only of the Muslim community but of the people of India as a whole."

APPLICABILITY OF *PROF YASHPAL* (SUPRA) AND THE NCMEI ACT

127. In the revised draft opinion, it has been proposed to be held that the decision in ***Prof Yashpal*** (supra) will not have a bearing on the question referred herein, since the decision was rendered in the context of universities existing only on paper, and thus, mandated that institutions be established and incorporated so as to ensure their material existence. It has been opined by the HCJI that the decision does not efface the distinction between the words "established" and "incorporated", with Article 30's only indicia being that of establishment.

[52] *History of the Aligarh Muslim University, Khaliq Ahmad Nizami, p. 110, Idarah-i-Adbiyat-i-Delli, Delhi, 1995.*

128. With respect to the NCMEI Act, upon consideration of the original and the post-amendment definition of a minority educational institution, it has been proposed to be held that a statutory amendment cannot determine the interpretation of Article 30(1). In other words, the issue referred need not be decided on the basis of the amended definition of minority educational institution.

129. The opinion on the applicability or relevance of the decision in ***Prof Yashpal*** (supra) is accepted. However, the opinion on how the NCMEI Act has to be read, in particular section 2(g), in the light of the opinion earlier expressed that establishment is the only indicia and not coupled with administration is difficult to accept for reasons elaborated before.

130. However, since ***Prof Yashpal*** (supra) and the NCMEI Act are not relevant for deciding the reference, it is an indicium that reference to the same by the bench of 3 (three) Judges in ***Aligarh Muslim University*** (supra) was redundant and constitutes another reason for the re-reference to be held invalid.

131. Hon'ble Surya Kant J. has extensively dealt with the interplay among the reference, NCMEI Act amendment, UGC Act, and the holding in ***Prof Yashpal*** (supra). ***Azeez Basha*** (supra) holds that a university established by the legislature cannot have the character of a minority institution, however, the NCMEI Act provides for establishment of minority universities; to compound matters, as per the UGC Act degrees can only be conferred by universities that are established "by

or under" a statute. In ***Prof Yashpal*** (supra), this Court held that a statute would not give legal sanction to a university unless certain infrastructural facilities were already in place. To resolve this apparent contradiction, His Lordship has clarified and modified ***Azeez Basha*** (supra) to the extent that in the new legal regime a university established "by or under" a statute can have a minority character as long as it fulfils the requirements under the UGC Act. According to His Lordship, a university could either be (i) recognised by statute, (ii) brought into existence by statute, (iii) created by statute. It is only if the university falls into the third category that it is prevented from assuming the character of a minority educational institution due to it being a creature of statute. With this reasoning, His Lordship has harmonised the amended portions of the NCMEI Act, the UGC Act, and the holding of ***Prof. Yashpal*** (supra) while simultaneously modifying ***Azeez Basha*** (supra) to that extent. Resultantly, a minority community can establish a university under Article 30, if it complies with the rigours of the UGC Act.

132. When ***Azeez Basha*** (supra) was decided, the UGC Act and the NCMEI Act were not on the statute-book. Hence, the decision therein was based on the facts and circumstances before the Court. The test that was laid may not apply to present day facts and circumstances, which are governed by the UGC Act and the NCMEI Act.

CONCLUDING REMARKS

133. Judges of the Supreme Court of India are no doubt the final arbiters in resolving disputes and differences between the parties; however, the recent judicial trend of eschewing all that is old, for the sake of progress and constitutional dynamism, is disturbing. We, the Judges, at times tend to forget the confines of our own jurisdiction and that we too, like every other human, are fallible. We are meant to be guided in our approach by Constitutional morality and the words of the architects of the Constitution. Facilitating history to be re-written, more than a century later by a judicial opinion, is not what we, as Judges, are supposed to do. Additionally, in matters such as the one under consideration, there is no warrant for the thought process to gain ground that Judges of this Court who had authored opinions in the relevant past were wrong and that the present generation of Judges are correct. Judicial deference, in my view, ought to have leaned towards the interpretation of Article 30(1) that has stood the test of time for almost 75 (seventy-five) years since the Constitution has been in existence.

134. It is doubtful whether any of us, as Judges, would lay a claim to be omniscient. The limitations of a Judge's expertise would negate any assertion of authority in extra-legal areas as well as to claim special knowledge of what the canvas was prior to 1920 when AMU came to be established. Conscious as I am of my limitations, it would be a misadventure on my part to agree with the majority opinion and

command the appropriate bench to determine whether AMU was established by the minority community based on the indicium proposed therein, post-independence decisions of this Court and liberal ideas of present times, without there being credible material of proof that AMU, all along, was perceived as an educational institution established 'by the Muslim community', as distinguished from 'for the Muslim community', even during the pre-Constitution days. Whether or not an educational institution has been established by a particular community has to be judged bearing in mind all antecedent, attending and surrounding circumstances of the relevant time. No one can claim with certainty that the entirety of the dialogue/correspondence/incidents/events, which did precede the establishment of AMU, have been placed before us and that too with cent percent accuracy. Such being the state of affairs, we ought not to substitute historical facts by our appreciation of half-baked evidence. Notwithstanding the knowledge, erudition and eminence that some of us have been gifted with, I am sceptical as to whether any of us can claim to be more learned than those who played significant roles in framing of the Constitution. It is not as if they were wholly unaware of the circumstances of the yesteryears. If 'establish' were to be read as 'found', there is no reason as to why the framers did not express themselves differently by using 'to found' instead of 'to establish' or, in the alternative, both - but one after the other.

135. Tinkering with understanding of a Constitutional provision, which has been consistent and has stood the test of time since its inception, in the name of interpretation and overruling of longstanding precedents is too frequent an occurrence which judicial activism has brought about, sometimes unnecessarily, in the past couple of decades. It is time that we refrain from such an approach, unless absolutely required, and allow the people's will to prevail and the Constitution to reign supreme.

136. Turning to the point of indicia, the tests employed for identifying post-Constitution minority educational institutions cannot be the same as for identification of pre-Constitution institutions, more so when a college established by the minority is elevated to the status of a university upon establishment and incorporation through statute. There can be no dispute that an educational institution undoubtedly established prior to the Constitution coming into force by a minority community, either based on religion or language, and administered as well by such community would be entitled to the protection envisaged in Article 30(1). However, if there is a serious doubt as to who established the educational institution and how it was established, question of piercing of the minority veil does not arise in the absence of any concept of minority when the institution came to be established. One has to understand, in this regard, the purpose for which the minority community is sought to be extended protection post-Constitution era. The dominant purpose is to protect the

minority from the domination of the majority. Until independence of India was achieved, irrespective of whether a 'native' so called was a Hindu or a Sikh or a Muslim or a Christian or a Jain or a Buddhist or a Zoroastrian, each individual irrespective of his faith was the subject of colonial rule with little freedom. The concept of minority being totally absent in those days, extending the protective umbrella of Article 30 to AMU by proposing to hold that establishment by a minority is the only indicia for a minority educational institution without any indicia as to administration of such institution would be inherently contradictory to the terms of such article and susceptible to invalidity. Formulating indicia now without there being a holistic consideration of all relevant factors ought not to be embarked upon by the Court as a task particularly when earlier benches, including benches larger than this one, have jettisoned the issue.

137. Though schools, colleges and universities are all known to be educational institutions, their purposes and direction are different. Depending upon the areas of focus and emphasis, they vary in importance too. Education remains largely incomplete without a basic bachelor's degree, which a student obtains by qualifying in the relevant examination conducted by the university to which the college, where he studied, is affiliated. One other major distinguishing feature is the way each institution is created. In the days with which we are concerned, a school or college could be privately created but not a university. To 'found' an institution such

as a school or a college or a university cannot be equated with its 'establishment'. Conscious of such limitation, the argument of construing Article 30(1) in a manner such that the verb 'to establish' does not call for being read in a narrow and formalistic sense and in its expansive reading ought to take within its fold 'to found' would only beg the question that AMU was not established but, at best, found by the Muslim community.

138. The parties having agreed that the words 'establish' and 'administer' must be read conjunctively, there can be little doubt that administration has to necessarily follow establishment. It is axiomatic that to enjoy the protection that Article 30(1) guarantees, the right of the minority community to administer an educational institution can be claimed only if the educational institution is established by it. Also, Article 30(1) cannot extend to a situation where the minority community which establishes an educational institution shows no or little intention to administer it. This being the unequivocal position in law, it would be an indicium as to whether the educational institution, apart from being established by the minority, was or is being administered by the minority.

139. For the purposes of Article 30, the right to establish and the right to administer must go hand in hand. Once established, administration of the institution begins. In order to attract the protection guaranteed by Article 30, it would not be sufficient for the minority community to say that though it might have established the institution, whether to

administer it or not is a choice given by the article itself so much so that the administration can be wholly left to even a non-minority community. Only those institutions which are established by the minority community and are being administered by such community may exercise their choice of whether to establish a school or a college or a university as well as the manner and mode of management of such institution. These are of course tests which need to be applied to specific institutions which have not been brought into existence through a statute. If any institution is a creature of a statute, various other circumstances need to be holistically considered. Whether or not AMU is a minority institution presents a unique case bearing no similarity with any other pre-independence university.

140. Having regard to the state of affairs existing in India during the last quarter of the nineteenth century and the first two decades of the twentieth century, there can be no disagreement that both the Hindus and the Muslims were aspiring to have universities to cater to the needs of their respective communities. The imperial government, however, was not prepared to give up an inch and hand over control of the proposed universities to either community. The Hindus relented and BHU came to be established in 1915. The Muslims too wished to have a university but the degree of control sought to be exercised by the imperial government brought about the rift, referred to earlier. What followed was sort of a compromise. The Muslim community relented in the same manner the Hindus had relented to

get BHU established, leading to the process for establishment of AMU. The Loyalists mixed priority with pragmatism. Prioritisation meant focus on the most essential thing, i.e., establishment of AMU, and by being pragmatic, they recognised their limitations of being unable to administer a university. Once AMU came to be established through statute and became a body corporate, there was a total relinquishment of all claims. The land used for AMU was a public land; the funds for AMU were sourced to public money; the person at the helm of administration was the Rector, who was none other than the Governor General; and the sum of Rs. 30 lakh that belonged to the Muslim community and which they were prepared to spend for AMU was kept as the reserve fund, etc.

141. Assuming that the verb 'to establish' could be read as 'to found', although I found no warrant to so read, it is clear that the Muslim community had no intention to administer AMU which was left to be worked out as per the AMU Act.

142. There are a couple of other aspects, which must not escape notice.

143. First, AMU is a creature of a statute and is engaged in discharging public duties. By passage of time, AMU happens to be one of the foremost Central Universities in the country. It is, however, entirely dependent on finances allocated by the Central Government. It is mandatorily required to function as per the AMU Act as well as provisions of other enactments. There can, thus, be no doubt that AMU is an Article 12 authority. Being an Article 12 authority, it is

bound by all the articles in Part III of the Constitution which impose duty upon it *inter alia* to ensure equality and fairness in all its actions including Article 29(2). In the present context, Article 30(1) cannot be divorced from Article 29(2). The scope of 'choice' of the minority as in Article 30(1), if at all it has established AMU, could diminish for an institution such as AMU, for, it is always subject to the Constitutional provisions and the enactment that has created it. Whatever the Constitution as well as the AMU Act now provides or could provide in future, would represent the will of the people of India, and not the will of the minority. It, therefore, admits of no doubt that in administrative, functional and financial matters, the control of AMU vests in assigned entities not designated by the minority community. This being the status of AMU, it would be an indicium of not being an educational institution over which and in respect whereof the minority has a choice to administer it in the manner the minority prefers.

144. Secondly, regard must be had to how ***TMA Pai Foundation*** (supra) answered questions 5(a), 5(b) and 5(c). The declaration of law seems to be clear that the minority community administering an aided minority educational institution does not enjoy full liberty to act as per its choice in matters relating to admission of students. Admission has to be on the basis of merit and it will also be permissible for the Government to provide that consideration should be shown to the weaker sections of the society.

145. Reservation is an element of substantive justice, and to deny it to the SC/ST community, does not bode well for the compliance of Article 15. We should be careful not to abridge the rights enumerated in Article 15 in our quest to expand and solidify the rights provided in Article 30. The architects of the Constitution were acutely aware of the stratified nature of our society. To minimise this stratification, the framers made a concerted effort towards integrating various communal identities into a composite national identity of "Indians". The immediacy of this exercise can be garnered from the preamble to the Constitution, where we find the idea of fraternity, a brotherhood of Indians.

146. The idea of substantive equality, which arose as a remedy to the historical injustices suffered by the members of the SC/ST community, was central to this new national identity. This national identity is manifested in institutions such as AMU, which has pioneered the idea that India and its institutions, belong, and are open to all Indians, irrespective of caste, creed, religion, or sex. To remove an institution like AMU from this national project would hurt India's integrity and the idea of fraternity among its citizens.

147. The appellants have argued that the Constitution is a living document which needs to evolve with time and this Court has not only the power but also the duty to read and interpret the Constitution to reflect the aspirations of the people of this county. The doctrine of progressive realisation of rights has been this Court's north star for over several

decades. This Court has "found" rights which were not explicitly set forth in Part III of the Constitution. For better or for worse, the Constitution in the present form is substantially different than the Constitution which was adopted by the Constituent Assembly. Hence, there are no inherent or constitutional limitations before us to expand the scope of Part III of the Constitution in suitably appropriate cases.

148. However, that is quite different than what the appellants are asking us to do in the present case. Acceptance of their arguments will result in this Court engaging in historical revisionism. Anyone claiming that historical facts can be changed by judicial fiat, is sorely mistaken. Courts are the custodian of the "truth" and cannot create an alternative version of the "truth", which are not supported by historical facts. To do so would be thoroughly unjust, arbitrary, and unreasonable. Allowing Courts to create alternative facts in support of a pre-determined conclusion would obliterate the creditability of this Court among the citizenry. Facts cannot be created by the stroke of a pen, and to attempt to do that, 100 years later, would be a misguided endeavour.

CONCLUSION

149. In the light of the above discussion, the claim of the appellants cannot stand. AMU was neither established by any religious community, nor is it administered by a religious community which is regarded as a minority community; hence, AMU does not qualify as a minority institution. Protection under Article 30(1) of the Constitution is, thus,

not available. This submission of the appellants has no historic, legal, factual, or logical basis.

150. In terms of clause (5) of Article 145 of the Constitution, it is my firm opinion that not only do the references not require an answer, it is also declared that AMU is not a minority educational institution and that the appeals seeking minority status for it should fail.

ACKNOWLEDGEMENT

151. Before parting, I express my sincere appreciation for the members of the bar who addressed this bench. Listening to their erudite arguments was indeed enriching. Further, I express gratefulness to my research assistants who worked tirelessly and burned the midnight oil, in tandem with me, to help me win the race against time. The scholarly contributions in books and treatises which were consulted and the artificial intelligence systems now available, which have opened up a whole new world, did provide me with valuable guidance and inputs. The assistance and cooperation received from this Court's library also significantly enhanced this work and has made my opinion richer. I, however, regret my inability to acknowledge the contributors individually.

..... **J.**
(DIPANKAR DATTA)

New Delhi;
8th November, 2024.

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2286 OF 2006

ALIGARH MUSLIM UNIVERSITY …APPELLANT(S)

VERSUS

NARESH AGARWAL & ORS. …RESPONDENT(S)

WITH

CIVIL APPEAL NO. 2321 OF 2006

CIVIL APPEAL NO. 2320 OF 2006

CIVIL APPEAL NO. 2318 OF 2006

CIVIL APPEAL NO. 2024
[Arising out of SLP (C) No. 32490 of 2015]

WRIT PETITION (C) NO. 272 OF 2016

CIVIL APPEAL NO. 2861 OF 2006

CIVIL APPEAL NO. 2316 OF 2006

CIVIL APPEAL NO. 2319 OF 2006

CIVIL APPEAL NO. 2317 OF 2006

TRANSFERRED CASE (C) NO. 46 OF 2023

J U D G M E N T

SATISH CHANDRA SHARMA, J.

TABLE OF CONTENTS

A. PREFACE

B. UNDISPUTED FACTS

C. SUBMISSIONS OF THE PARTIES

C.1 Appellants questioning the correctness of Azeez Basha (1968) 1 SCR 833

C.2 Respondents defending the correctness of Azeez Basha [supra]

C.3 Submissions in Rejoinder

D. SCOPE OF PROCEEDINGS

D.1 Petitions before the Court

D.2 The Anjuman reference

D.3 The present reference

D.4 The parameters on which reference can be made to a larger bench

D.5 A holistic approach

E. ISSUES

F. WHETHER ESTABLISHMENT IS NECESSARY

G. MEANING OF "ESTABLISHMENT" AND THE REAL POSITIVE INDICIA BEHIND

G.1 The existing jurisprudence of this Court

G.2 The founding moment or the genesis argument

G.3 Relevance of "choice" and "intent" in the question of establishment
G.4 The nature of administration at the time of establishment
G.5 Locating the real positive indicia

H. THE AZEEZ BASHA JUDGMENT

H.1 The content of the judgment of Azeez Basha [supra]
H.2 The rationale behind the findings

I. BALANCING CONFLICTING NARRATIVES

J. PRE-INDEPENDENCE UNIVERSITIES AND OTHER INSTITUTIONS

K. THE QUESTION OF ADMINISTRATION AND THE 1920 ACT

L. 'INCORPORATED' OR 'ESTABLISHED' BY OR UNDER A STATUTE

M. EVOLUTION OF AMU AND THE ADVENT OF THE CONSTITUTION

M.1 The amendments made to the 1920 Act
M.2 The Constitution and the question of surrender of rights

N. THE DE-FACTO AND SAFE HAVEN ARGUMENT

O. THE UGC ACT AND YASHPAL

P. NCMEI ACT AND THE AMENDMENT

Q. CONCLUSIONS

1. I have had the privilege and the honour of perusing the erudite and illuminating opinions authored by Hon'ble Chief Justice, Dr. D.Y. Chandrachud and Hon'ble J. Suryakant. Considering that the present matter involved fundamental questions concerning interpretation of the constitutional provisions and the judgments rendered by this Hon'ble Court, I find it necessary to render the present opinion.

A. PREFACE

2. The present larger bench of seven Hon'ble Judges, had assembled in order to adjudicate upon validity of some of the amendments made to the Aligarh Muslim University Act, 1920 [hereinafter referred to as the "**AMU Act**"], through the Aligarh Muslim University Amendment Act, 1981 [hereinafter referred to as "**1981 amendment(s)**"] and the notifications of the Admission Committee dated 10.01.2005, Academic Council dated 15.01.2005 and the Executive Council dated 19.05.2005, providing for reservation to the extent of 50 per cent of seats to be reserved for Muslims of India for admission to post graduate programmes. While adjudicating the validity of the same, various other connected questions of constitutional importance arise which would be discussed in detail hereinunder.

3. The primary question that captures the attention of this Court in the present proceedings is the form, content and

application of Article 29[1] and 30[2] of the Constitution of India, 1950 [hereinafter referred to as "the Constitution"]. The judgments of this Hon'ble Court have settled the law with regard to the effect of the application of Article 29 and 30, specifically the larger bench judgment in case ***T.M.A. Pai Foundation v. State of Karnataka*, (2002) 8 SCC 481**, which is the *locus classicus* on the subject, rendered by a bench of eleven Hon'ble Judges. A co-ordinate bench of seven judges has thereafter distilled the position of law in ***P.A. Inamdar v. State of Maharashtra*, (2005) 6 SCC 537**. The said judgments are a guiding light on the subject and assist the Court in course of the present judgment.

---

[1] Article 29. Protection of interests of minorities.—
(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.
(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

[2] Article 30. Right of minorities to establish and administer educational institutions.—
(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.
(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.
(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

4. While the said judgments amongst others, have cleared the air on the broader interpretation of Article 29 and 30, the question which concerns the present bench is of an atypical nuance, which requires further elaboration and jurisprudential extraction. Considering the unique position that the Aligarh Muslim University [hereinafter referred to as "**the AMU**"] has in the history, the constitutional text and the facts surrounding the birthing of the University itself, this Court was required to interrogate certain aspects of Article 29 and specifically Article 30, which have not necessarily arisen before this Court in any previous case. The specific occasion on which issues of the like arose was in the case concerning the AMU itself in ***S. Azeez Basha v. Union of India*, (1968) 1 SCR 833** (hereinafter referred to as "**Azeez Basha**"), the correctness of which is a subject matter of intense and rigorous debate before this Court in the present proceedings.

5. Article 29 and 30, forming a part of the fundamental rights chapter of the Constitution, represent an important constitutional guarantee available to the citizens of the country. It is a guarantee that embeds cultural diversity, secularism and fairness on the canvas of the Constitution. The judgment in ***TMA Pai* [supra]** describes India as '*a land of diversity – of different castes peoples, communities, languages, religions and culture*'. It was this inherent diversity that perhaps led the Constitution makers to

make specific provisions to guard and celebrate the cultural, religious and linguistic diversity. The Constitution thus provided *minorities*, based on *religion* or *language*, the right to *establish* and *administer*, educational institutions of their *choice*. The right was geared towards educational institutions as it was felt that education forms the bedrock of the identity of the next generation of individuals which would help preserve, protect and further the cultural, religious and linguistic diversity.

6. This diversity is not a coincidence in India and is a product of inherent genetic built of Indian society. The citizens of this land mass, which we call India, or Bharat, are therefore inherently pluralistic and organically imbibe within them the ideals of religious, cultural and linguistic diversity. It is a function of this cultural synthesis that almost accidently and not necessarily by design, the fundamental rights are also provided for in the Constitution at two separate levels or units – the individual; and the group. The rights against arbitrariness, for equality, freedom of speech/ move freely/reside and settle/profession, freedom of life and liberty, freedom of religion, etc. are granted at an individualistic level.

7. At the same time, the freedom of trade, freedom of association, rights against untouchability, right to manage religious institutions and the right *establish* and *administer* educational institutions, are granted to group(s) or specific

groups. The said individual rights and their interplay with groups rights colour the palette of Indian constitutional law and would assist the Court in chartering its future course.

8. The specific rights to the minorities under the Constitution, over and above the existing individual and group rights available to all citizens and/or groups which are agnostic to minority/non-minority classification, are to be theorised within the distinctive context of Indian nationhood. It is necessary to note that India is a "nation", but not in the *euro-centric* sense, which merges linguistic identity with a colonial or medieval past. India is a continuum, it is a civilization that has perpetuated its course through the annals of history, carrying with it the lives and stories of every hue of human existence. India's national identity merges many diverging groups, communities, sects, etc. which often intersect with each other in varying fashions. This diversity does not rob the country of a unified past, a shared history and composite present. It is, in fact, this kaleidoscope of intermingling and off-shooting cultures that builds the national identity or the national character. The uniqueness of India, its nationalism, its shared cultural history and the context in which the Constitution came in to being, gives life to the provisions of Constitution. It is with this broad understanding that this Court would seek to locate the answers to the questions presented before it.

B. UNDISPUTED FACTS

9. There has been a considerable degree of contest over the facts that may be germane in the present matter. The question of establishment of the AMU and the facts surrounding it, the resultant AMU Act, 1920 [as it then stood] and the history of the Mahommedan Anglo-Oriental College [hereinafter referred to as the "MAO College"] have been presented by the parties in their own manner and style. Without adverting to the contested facts or claims, the Court would be benefitted by culling out the uncontested facts which are relevant for the purposes of the present adjudication.

10. The history of modern higher education in India starts from the Charter Act of 1813 of the British Crown which allocated funds for education in British India, leading to the establishment of institutions like the Hindu College in Calcutta in 1817. In 1854, an education policy of the British for British India came in the form of the *Wood's Dispatch,* officially known as the "Despatch on Indian Education". It was a seminal educational policy document issued in 1854 by Sir Charles Wood, the President of the Board of Control for India and marked a significant step in the development of the modern education system in India. The Dispatch advocated for the establishment of universities in major cities and improvements in schools and specifically provided that the "*examinations for degrees will not*

include any subjects connected with religious belief; and the affiliated institutions will be under the management of persons of every variety of religious persuasion."

11. In 1857, Act II, XXII and XXVII were passed by the Imperial Legislative Council [a representative body empowered by the British Parliament to make laws for British India] to establish the first three Universities in India, namely Universities of Calcutta, Bombay and Madras. Thereafter, Act XLVII of 1860, was passed by the Imperial Legislative Council, which expanded the powers of the abovesaid three Universities to grant degrees. As a matter of policy and practice, the British Imperial power in India therefore, set-up Universities through a legislative enactment and resultantly "recognised" such Universities for the purposes the colonial power deemed fit. The legislations mentioned above, provided the British officials significant controlling and regulatory powers to administer the institutions. There has been considerable emphasis on this aspect of the matter and shall be discussed separately in a particular section of the judgment.

12. In 1870, a private committee was set up by the name of Committee for the Better Diffusion and Advancement of Learning among the Muhammadans of India, which submitted its report in 1872. The said Report provided a roadmap for the Muhammadan Oriental College as an institution to promote

Western Arts and Sciences for the education of Muslims in India. In 1873, on the said lines, a Scheme was proposed for the MAO College.

13. On 24.05.1875, the opening ceremony of the MAO College was held in Aligarh. On 08.01.1877, the foundation of the MAO College was laid by Sir Syed. The Rules and Regulations for the Appointment of the Trustees of the MAO College were passed in 1889. The said Rules described the object of MAO College was "primarily the education of Mahomedans and, so far as may be consistent therewith, of Hindus and other persons."

14. In 1902, the Report of the Indian Universities Commission was published. The said report, with regard to MAO College, it was specifically noted that "no obstacle should be placed in the way of denominational colleges, it is important to maintain the undenominational character of the Universities". On 24.03.1904, the Indian Universities Act (VIII of 1904) was passed which unified the pre-existing legislation based University regime in British India, repealed the previous Acts, and brought within its purview the five Universities. It also reconstituted the then existing Governing Bodies of the universities and gave statutory recognition to the 'Syndicates' in the said Universities.

15. From the late 1800s to 1910, several individuals associated with the MAO College propounded various differing ideas for

setting up of a "University". In May 1911, representatives from the MAO College met Harcourt Butler, Member of the Governor-General's Council for the setting up of a "University". From 1911 till 1913-14, the prayer was for the setting up of a predominantly "denominational" University which would be recognised by the British Indian Government. The stances of parties took a sharp turn on the passing of the Benaras Hindu University Act, 1915 [hereinafter referred to as the "BHU Act"] by the Imperial Legislative Council on 01.10.1915 leading to the establishment of the Benares Hindu University [hereinafter referred to as the "BHU"].

16. At the said time, as per the British officials in-charge, the "Benares model" as it was then referred, had to be followed. It is sought to be presented that once the movement to establish the BHU gained prominence and acceptance, the tone and tenor of all sides changed.

17. Separately, there were also considerable disagreements within the various groups of the minority community advocating for a University over issues such as recognition by the British Indian Government and extent of control that the British Indian Government would exercise over any such proposed University. As the said matter also involves minute machinations of the working of the colonial government and the views and counter views of various personalities involved in the process, the parties

before this Court have sought to highlight one aspect over the other. The various conflicting narratives of the process shall be discussed separately in a particular section of the judgment.

18. On 10.04.1916, the informally formed 'Moslem University Committee', which was requesting the British Government to form the University by bringing in an enactment, by a Resolution observed that "it has no other alternative at present, but to accept the principles of the Hindu University Act…". Once the deck was cleared for the in-principle "acceptance" of having a University on the Benares model, the discussions started on the actual draft of the Aligarh Muslim University Bill.

19. Finally, on 27.08.1920, Sir Mian Muhammed Shafi, the education member in the Imperial Legislative Council, introduced the Bill for the establishment of a University and on the same day, sought to refer the Bill to a Select Committee. On 08.09.1920, the Select Committee submitted its Report. On 09.09.1920, Mr. Shafi moved the report of the Select Committee on the Bill to establish AMU in the Indian Legislative Council. Finally, on 14.09.1920, the Aligarh Muslim University Act, 1920 was passed.

20. Till the mid-1920's almost a dozen Universities under legislative enactments had been established in British India[3]. On 23.03.1925, an Inter-University Board was established to facilitate the exchange of professors between these Universities, to serve as an authorised channel of communication and facilitate the coordination of university work, to assist Indian Universities to get recognition for their degrees and diplomas in other countries, etc.

21. In 1935, the Government of India Act, 1935 was enacted by the British Parliament which specifically included provisions relating to the regulation of higher education. It divided legislative powers between the Federal Government and Provincial Governments. In matters related to higher education, both the central and provincial legislatures had the authority to make laws. However, there was a specific legislative entry with regard to "Benares Hindu University" and "Aligarh Muslim University" which vested the Federal Legislature with the exclusive legislative powers over the same under Entry 13, List I, in S. 100, of the Government of India Act, 1935.

[3] University of Calcutta; University of Bombay (now known as University of Mumbai); University of Madras; Panjab University (Established as University College, Lahore. Later, raised to a level of University.); University of Allahabad; University of Mysore; Banaras Hindu University; Patna University; Aligarh Muslim University; University of Lucknow; University of Dhaka; Delhi University; Nagpur University.

22. In 1944, the Central Advisory Board of Education made attempts to formulate a national system of higher education and submitted the "Sargent Report" which recommended the formation of a "University Grants Committee" to coordinated Higher Education in India. In pursuance to the same, in 1945, the Department of Education, Health and Lands vide resolution dated June 4, 1945 established the University Grants Committee to advise the government on the grants to be given to the Central Universities [Delhi, Benares and Aligarh].

23. In 1947, the constitution of the Committee was amended and its scope enlarged by the Department of Education Resolution to empower the Committee to deal with all Universities in India. In 1948, the University Education Commission was set up under the Chairmanship of S. Radhakrishnan "*to report on Indian university education and suggest improvements and extensions that might be desirable to suit the present and future needs and aspirations of the country*". The Commission submitted its Report, whereby it was recommended to reconstitute the University Grants Committee, to expand its membership, include experts on the panel, give powers of visitation, distribution of grant-in aid, etc.

24. In 1951, the AMU Act was amended in order to bring it in line with the Constitution [which came in to force in 1950]. This was simultaneous with similar amendments being carried out to

the BHU Act. The AMU Act was further amended in 1965, 1972 and 1981. The content and the purport of the amendments to the AMU Act over the years shall be discussed in detail in a separate section of the judgment.

25. On 28.12.1952, the Government of India set up an 'interim' University Grants Commission (hereinafter referred to as "UGC") by resolution to advise it on the allocation of grants-in-aid from public funds. On 03.03.1956, the University Grants Commission Act, 1956 [hereinafter referred to as the "UGC Act"] was enacted thereby giving statutory recognition to the UGC.

26. In 1968, the judgment in ***Azeez Basha*** **[supra]** was delivered which held that the AMU was neither established nor administered by the minority community. After the judgement in ***Azeez Basha*** **[supra]** was delivered, the AMU was treated to be a free and open institution as opposed to a minority educational institution. This position continued until 1981 when the Parliament passed The Aligarh Muslim University (Amendment) Act, 1981. This Act made several changes to the provisions of the 1920 Act chief among which was an amendment to Section 2(l) which now read as follows:

> *(l) "University" means the educational institution of their choice established by the Muslims of India, which orginated as the Muhammadan Anglo-Oriental College, Aligarh and which was*

subsequently incorporated as the Aligarh Muslim University."

27. An addition was also made of clause 5(2)(c) dealing with the powers of the University which gave the University power *"to promote especially the educational and cultural advancement of the Muslims of India".* The word "established" was deleted from the long title of the Act and it now read *"An Act to incorporate a teaching and residential Muslim University at Aligarh"* as opposed to the unamended long title i.e., *"An Act to establish and incorporate a teaching and residential Muslim University at Aligarh"*. The Act also empowered the Court of the University to act as the Supreme Governing Body.

28. Consequent to this amendment, no issue arose till 2005, when the Admissions Committee of the University took a decision at its meeting of January 10, 2005 to reserve 50% of seats in the Post Graduate Medical Courses for Muslims. The same was also accepted by the Union of India on February 25, 2005. The Resolutions providing such reservations and the 1981 amendments were challenged before a Single Judge of the Hon'ble High Court of Judicature at Allahabad [hereinafter referred to as the "Allahabad High Court" or "High Court"] on the ground that the amendments amounted to an impermissible legislative overruling of ***Azeez Basha*** **[supra]**.

29. The Single Judge had read down Section 2(l) to mean that the word "established" in that section would refer to the MAO college and not the University. The learned Single Judge further held that the amendment of 1981 did not turn the AMU into a minority institution because ***Azeez Basha*** **[supra]** still held the field. Thereafter, appeals were preferred before a division bench of the Hon'ble High Court.

30. The Ld. Division Bench rendered two separate judgements which concurred entirely on all points of law raised before it. Briefly stated, it was held that the core principle of the ***Azeez Basha*** **[supra]** was that the minority community had requested the British Government to establish the AMU because they wanted governmental recognition of its degrees. It was held that this recognition of historical fact could not be overcome by "an enforced declaration of substantial identity" as given in section 2(l) and as sought to be done by removing the word "establish" from the long title of the Act. Consequently, Section 5(2)(c) was also struck down for being discriminatory since it privileged the advancement of a particular section over others. It was further held that the Parliament had no competence to enact the 1981 Act because only a minority could create a minority institution, Parliament could not.

31. The decision of the High Court was challenged by the University in a Special Leave Petition before this Court. The

Union of India had also challenged the decision of the High Court and had supported the University's stand. On April 24, 2006, a Division Bench of this Court had directed status quo to be maintained in the proceedings after Counsel for the University undertook not to implement the 50% reservation policy until final disposal of the case. The question regarding the status of the university was directed to be considered before a larger bench.

32. Thereafter, the Union had sought to withdraw the appeal filed against the judgement of the High Court on the ground that the historical finding of fact in ***Azeez Basha*** **[supra]** could not have been set at naught by an amending act of the Parliament. On February 2, 2019, a bench of three judges of this Court had directed that the question of correctness of the ***Azeez Basha*** **[supra]** decision should be referred to a bench of Seven Judges. The reference was made directly to seven judges because in the Bench's view, the very same question had been referred before in the case of ***Anjuman-e-Rahmania and Others v. District Inspector of Schools and Others*** W.P. (C) 54-57 of 1981. These writ petitions were heard and disposed of by the Bench in ***TMA Pai Foundation v. Union of India,*** **(2002) 8 SCC 481** but this question was left unanswered. The issue with regard to the scope of the reference shall be discussed separately in detail.

C. SUBMISSIONS OF THE PARTIES

C.1 Appellants questioning the correctness of Azeez Basha [supra]

33. It was submitted by Dr. Rajeev Dhawan, learned Senior Counsel, appearing for the Aligarh Muslim University, that the order dated 26.11.1981 passed by this Court in the case of ***Anjuman-e-Rahmaniya v. District Inspector of Schools, W.P.(C) No. No. 54-57 of 1981*** and the reference order dated 12.02.2019 in the present batch of petitions creates several points of reference for this bench to adjudicate upon, which include the correctness of judgment in ***Azeez Basha* [supra]**, impact of ***Prof. Yashpal v. State of Chhattisgarh*, (2005) 5 SCC 420**, and those relating to National Commission for Minority Educational Institutions Act, 2004 ('NCMEI Act'). However, no specific issues were spelt out in the order dated 12.02.2019.

34. In view of the above, Dr. Dhawan submitted that the issues are required to be framed and then decided by this Bench. According to him, following issues arise in the present matter:

a. Was ***Azeez Basha* [supra]** correctly decided, and whether it suffers from internal contradiction and reasoning on facts and on law?

b. Does ***Azeez Basha* [supra]** need to be reconsidered in light of earlier and subsequent decisions of this Court on Article 30(1)?

c. What is the effect of ***Azeez Basha*** **[supra]** on the future decisions of the Hon'ble Allahabad High Court which applies ***Azeez Basha*** **[supra]** in toto and strikes down the statutory amendments to the Aligarh Muslim University Act 1920 (hereinafter referred to as 1920 Act) through the 1981 Amendment Act as a usurpation of judicial power?

d. What is the effect of NCMEI Act read with the University Grants Commission Act, 1956 ('UGC Act')? Should ***Azeez Basha*** **[supra]** be reconsidered in the light of the NCMEI Act (as amended in 2010) and read with UGC Act as considered in ***Yashpal*** **supra**?

e. Was ***Azeez Basha*** **[supra]** correct in accepting the antecedent historical data on AMU's Muslim character, but denying its constitutional significance while deciding the issue of its minority status, which is at the variance with ***St. Stephen's College v. University of Delhi,*** **(1992) 1 SCC 558** [5-Judge Bench]; ***Rev. Father W Proost v. State of Bihar,*** **(1969) 2 SCR 73** [5-Judge Bench]; and ***Right Rev. Bishop SK Patro v. State of Bihar,*** **(1969) 1 SCC 863** [5-Judge Bench]?

f. Is ***Azeez Basha*** **[supra]** contrary to the constitutional dispensation on rights of minorities under Articles 29 and 30, discerned before the Constituent Assembly Debates and approved in TMA Pai?

35. Further, Dr. Dhawan raised a preliminary objection regarding change of stand of the Union of India insofar as the validity of the 1981 Amending Act is concerned. Having once filed an appeal against the impugned judgment of the Allahabad High Court, the decision to withdraw the same by Union of India and adopting a stand, which is contrary to the pleadings before the Hon'ble High Court is arbitrary, unreasonable and lacks bonafides. Dr. Dhawan submitted that the stance taken by Union of India presently is also contrary to its stance in the case of ***Azeez Basha*** **[supra],** which should not be permitted at this stage.

36. Dr. Dhawan interpreted Articles 26, 29 and 30 of the Constitution to argue that there are three questions, answers to which determine the character of a particular institution i.e., whether a particular institution is a minority institution or not: -

a. What is the origin of the institute?
b. Whether the minority community founded the institution or not?
c. Whether the community in question is minority, either linguistic or religious, in the State or not?

37. Dr. Dhawan assailed the correctness of ***Azeez Basha*** **[supra]**, by making the following submissions. Firstly, it has been held that as per the University Grants Commission Act, 1956, a university can be established only by a statute (enacted either by the Parliament or a State Legislature) and a university

can also be of a minority character. Also, that the university loses its minority character as soon as it is established by a statute. Therefore, there is inherent contradiction in the said judgment. Secondly, while ***Azeez Basha*** **[supra]** recognizes the history, background and antecedent role that the MAO College played in building this institution, the bench, however, ignores it at the end in view of the existence of 1920 Act. The said history and background ought to be appreciated as has been done in case of ***St. Stephen's*** **[supra].** Thirdly, in this respect, ***Azeez Basha*** **[supra]** completely ignores the purpose of the 1920 Act. The said judgment fails to correctly appreciate the salient features of the 1920 Act which demonstrate the minority character of Aligarh Muslim University. Furthermore, ***Azeez Basha*** **[supra]** adopts a very narrow construction of the word "establish" used in Article 30 of the Constitution and further, fails to give reasons to disregard other meanings of the said term. Lastly, ***Azeez Basha*** **[supra]** wrongly concludes that the educational institutions of the minorities converted into, and incorporated as, a university by a statute loses or seizes to retain its minority character. If a minority can establish a university under Article 30(1), and if universities are required to be incorporated under a statute for degrees to be recognised, then it must follow that the minority community is entitled to seek incorporation of its institution as a university.

38. Dr. Dhawan, relying upon the provisions of the 1920 Act, asserted that that it clearly demonstrates the Muslim character of the Aligarh Muslim University. It is further urged that the AMU is the alter ego of MAO College has been recognized by various provisions of the 1920 Act. Dr. Dhawan emphasized that the then Imperial Legislature had incorporated various provisions in the 1920 Act which are clearly intended for the benefit of the Muslim community. It is pointed out that the administration of AMU has been vested with the Muslim minority and that Muslim community had *de jure* and *de facto* control over the management of AMU.

39. Dr. Dhawan asserted that the law laid down in ***Azeez Basha*** **[supra]** ignored the earlier binding decisions of larger benches of this Hon'ble Court and therefore is, *per incuram.* These include the law laid down by a 7-judge bench in the case of ***In Re Kerala Education Bill*****, 1957, (1959) SCR 995** and also by a 6-judge bench in the case of ***Sidhajbhai Sabhai v. State of Bombay*****, (1963) 3 SCR 837.**

40. Furthermore, in view of the subsequent decisions of this Hon'ble Court also, the law laid down in ***Azeez Basha*** **[supra]** does not hold the field anymore. Additionally, it is urged that so far as UGC Act and NCMEI Act (as amended in the year 2010) are concerned, Sections 2(f), 22 and 23 of the former Act read with Sections 2(g) and 10 of the latter Act indicate that a

university can only be established by a statute and apart from them, only those institutions can confer degrees which have been declared as 'deemed to be University' under Section 3 of the UGC Act or which have been specifically empowered as such by an Act of Parliament. A university established by a statute cannot be kept out of the scope of Article 30 of the Constitution. If it is so kept out, then it would mean all tertiary education, except private institutions, will not get the protection of Article 30. As per Dr. Dhawan's reading of ***Azeez Basha*** **[supra],** every minority institution, once given a statutory recognition, will fall outside the ambit of Article 30.

41. Dr. Dhawan referred to the amendments made to the 1920 Act in the year 1981, which, as noted hereinabove, have already been struck down by the Allahabad High Court by the impugned judgment. It is submitted that the validity of the said amendment provisions need not be examined by this Bench and can be later dealt with by the regular bench. As per Dr. Dhawan, presently, the only issue which may be decided is whether ***Azeez Basha*** **[supra]** was correctly decided or not.

42. Dr. Dhawan, referring to the said provisions and the statutes annexed to the 1920 Act, submitted that *de jure* the control of management of the Aligarh Muslim University was and is with the Muslim Community. Further, adverting to certain other facts such as that all Chancellors till date have been

Muslims and 34 out of 37 Vice-Chancellors have been Muslims, it has been pleaded that *de facto* too, the administration of the Aligarh Muslim University has been in the hands of the Muslim community.

43. Mr. Kapil Sibal, learned senior counsel, appearing for the Old Boys' Association, submitted that the judgment in ***Azeez Basha*** **[supra]** failed to consider the history and genesis of the Aligarh Muslim University in the right perspective. While determining the factum of the establishment of the University, historical initiative, impetus, promotion, and purpose behind the institution has to be given due importance, which was not done in ***Azeez Basha*** **[supra]**.

44. It is asserted that ***Azeez Basha*** **[supra]** wrongly concludes that the University was established by the 1920 Act and therefore, it cannot be considered a minority institution. The 1920 Act is not the establishing factum of the University but only a recognition of such establishment, which has been done by the Muslim community at the relevant time. In order to highlight the history and purpose behind the institute, Mr. Sibal relied upon letters exchanged between Sir Syed Ahmed Khan and the relevant authorities of the Government and the debates which took place when the Aligarh Muslim University Bill was being discussed in the Imperial Legislature in the year 1920. In short, the genesis, according to him, includes the following:

a. Inspiration or purpose to set up the institution is by the minority.

b. The steps taken for persuasion are by the minority.

c. The essential paraphernalia or initial funding should be by the minority.

d. Persuading the authorities, by the minority, to accept that fact.

45. Mr. Sibal vehemently argued that the mere presence of "outsiders" in the administration of a minority institution would not deprive the institution from its minority status. He accepted that certain regulations can be imposed by the State on such institution to maintain the stands of excellence, however, those regulations would not affect the minority status of the institution. In contrast, the right of a linguistic or a religious minority under Article 30 to establish and administer an institution "of their choice", which cannot be subject to any regulation, is absolute.

46. Additionally, it is submitted that the only benefit to a particular institute of having a minority character is that the institute has the right to reserve a certain number of seats for students of the said minority community. The said right should not be taken away in the case of Aligarh Muslim University, where *de facto,* majority of students are already of Muslim community.

47. Apart from adopting submission of Dr. Dhawan and Mr. Sibal, Mr. Salman Khurshid, learned senior counsel, appearing for applicants in I.A Nos. 5 & 6 of 2016 in Civil Appeal No. 2286 of 2006 i.e., AMU Lawyers Forum and AMU Old Boys' Association, Delhi Unit, submitted that a moral reading of the Constitution needs to be adopted in the present case. If that is so done, it will follow that the rights under Part III of the Constitution of India are natural to or inherent in a human being. Mr. Khurshid argued that the natural rights are inalienable because they are inseparable from the human personality and have been just preserved by the Constitution. In this context, the rights under Article 30 that the minorities have, as individuals, existed even prior to 1950. As such, these rights cannot be taken away by way of an artificially restricted interpretation of a word like 'establish'.

48. Mr. Shadan Farasat, learned counsel, appearing for the appellant in CA 2316 of 2006 - Haji Muqeet Ali Qureshi vs Malay Shukla, submitted that there is a difference between establishment of an educational institution and the device to bring it into legal existence, which the judgment in ***Azeez Basha*** **[supra]** fails to take note of. The 1920 Act is a device to bring into legal existence the Aligarh Muslim University, which was established by the Muslim Community. Furthermore, the interpretation of Article 30 cannot depend on the existence of a

particular legal regime at any given point, which is the UGC Act in the present case. Mr. Farasat relied upon the data to show that *de facto*, the administration of the AMU has been with persons, majority of whom belong to Muslim community and further that, whether there is reservation of 50% for Muslim Community or not will not make any real difference since the majority of students also has been of Muslim Community.

49. Mr. M R Shamshad, learned counsel appearing for the applicants in I.A. No. 563 of 2024 in Civil Appeal No. 2316 of 2006 i.e., Anjuman-e-Rahmania, submitted that the applicant was the petitioner in ***WP Nos. 54-57 of 1981*** titled as ***Anjuman-e-Rahmania v. Distt. Inspector of School*** in which the order dated 26.11.1981 was passed by Fazal Ali J. questioning the correctness of the judgment in ***Azeez Basha*** **[supra].** In addition to what has already been argued, he submitted that minorities in the country have group rights in the form of rights under Articles 29 and 30 of the Constitution, which must be protected as is done in the case of other group rights available to Scheduled Castes, Scheduled Tribes, OBCs, etc.

C.2 Respondents defending the correctness of Azeez Basha [supra]

50. Controverting the same, on behalf of the parties defending the judgment of the High Court and the correctness of the judgment in ***Azeez Basha*** **[supra]**, Mr. R. Venkataramani, the

learned Attorney General, submitted that the power to establish a university is traceable to Article 30 of the Constitution and because the Aligarh Muslim University was a pre-constitutional university, the Muslim community did not legally have the power to establish it. Only the British Government could have established the University through an act of the Legislature. He has also sought to distinguish the existence of the University from its predecessor, the Mohammedan Anglo Oriental College, as the enabling power to create such a college came from the Societies Registration Act. Ld. Attorney General argues that the words "educational institutions of their choice" used in Article 30 do not by themselves confer a power of establishment independent of legal competence to do so. The Ld. Attorney General argued that ***Azeez Basha*** **[supra]** was correct insofar as it stated that the AMU was not "established" by the Muslim community but by an Act of Legislature.

51. Mr. Tushar Mehta, Solicitor General of India, raised a preliminary objection challenging the very reference itself, holding that a bench of two judges could not have directly referred the matter to seven judges in ***Anjuman*** **[supra]**. The Solicitor General disputed the interpretation of ***Azeez Basha*** **[supra]** put forward by the Appellants whereby it is argued that ***Azeez Basha*** **[supra]** holds that universities established by legislation can never be minority institutions. He accepted that

institutions incorporated by statute can also be minority institutions but submitted that in such a case, the Legislature would include provisions in the Act clarifying the minority character of the institution and AMU Act makes no such provision. He gave the example of the pre-constitution Annamalai University Act, to indicate how the British parliament recognised "founders" of universities, which were eventually taken over by the then Government.

52. The Solicitor General made extensive reference to the provisions of the 1920 Act to argue that the intent was in fact the opposite, that is to have government control over the institution by controlling, *inter alia,* the appointment of important office holders, the composition of administrative bodies, the rule making power of the university etc.

53. The Solicitor General argued that the AMU, despite its name is not really a Muslim University but rather a secular educational institution. Reference was made to the secular nature of the education provided therein, to the history of AMU as a national institution and the correspondences between British officials prior to the passage of the Act to show that their intent was to have significant control over the administration of the educational institution sought to be established. Reference was further made to the Parliamentary debates on the amending acts of 1965 and 1981.

54. It was asserted, through various examples, that in a pre-constitutional context, the British Government had the power to require a community to establish a university on the Government's own terms. It was sought to be argued that the AMU was a secular institution and not a denominational university as the proponents of AMU may have wished for. It was argued that since there was no Article 30 at the said time, there was no right to establish a university free of government control while still seeking governmental recognition of degrees.

55. The Solicitor General took the Court through the history of establishment of Universities in the country. It was argued that the history of universities under British rule to show that government control was a built-in feature so far as educational institutions were concerned. Reference was made to the history of the split between the AMU and the Jamia Milia Islamia to argue that the AMU chose to remain under government patronage while the Jamia was established as a "nationalist" college.

56. It was asserted that it was open to the AMU to remain a college and be free of government control or to establish a university without recognition of its degrees by the government but it chose not to exercise these options. The substance of the submission was that the right of administration was 'surrendered' when the proponents of the AMU accepted establishment by statute of the kind made by the 1920 Act.

57. The Solicitor General made an attempt to distinguish the concept of being established *by* an Act from the concept of being established *under* an Act. The decision in ***Dalco Engineering Pvt. Ltd. v. Satish Prabhakar Padhye*****, (2010) 4 SCC 378,** was cited to urge that the AMU owes the whole of its existence to a statute and thus it cannot be said that the statute was a mere recognition of an existing arrangement. It was argued that through the 1920 Act, the establishment of the AMU was the fresh establishment of an entirely new body.

58. It was argued that the rights of establishment and administration are distinct and separate. Reference in this regard was made to ***Re: Kerala Education Bill, 1957*****, [supra]**. The thrust of the argument was that the institution must be shown to have been established by the minority community. Only when this preliminary fact is proved, would "administration" come into the picture. According to him, the words "establish and administer" must be read conjunctively i.e. there can be no right of administration separate from establishment. The stand that these words are conjunctive is common to all the Respondents. He referred to the Constituent Assembly Debates and to amendments carried out in the NCMEI Act by which the words "establish or administer" were substituted with "establish and administer" in line with the constitutional scheme and ***Azeez Basha*** **[supra]**.

59. It is further argued that an overly-expansive reading of Article 30 would result in educational institutions using the 'cloak' of minority to escape government regulations and therefore, there must be a real positive index which connects the minority community to the institution. Extensive reference is made to ***A.P. Christians Medical Educational Society v. Government of Andhra Pradesh,*** (**1986) 2 SCC 667** and ***St. Stephens College*** **[supra]** to show what might be indicia of minority character of an institute.

60. The Solicitor General supported the interpretation of "establish" put forth in ***Azeez Basha*** **[supra]**, to assert that it was in line with the constitutional intent of Article 30. Since the provision is intended to give a right to specifically to minorities, it was argued that was necessary to show that the institution must have been "actually, tangibly and manifestly brought into being" by a minority.

61. It was asserted that "establishment" is a question of fact and as ***Azeez Basha*** **[supra]** decided this question of fact conclusively, it is not open for the Legislature to reverse a factual finding by bringing a legislation stating otherwise in the form of the 1981 amendment. The Solicitor General, in response to the submissions made on the stand of the Union of India, stated that the Union of India has been consistent in its stand. It was stated that as per the Union of India, the AMU was not a minority

institution even during the hearing of the case of ***Azeez Basha*** **[supra]**. It was further stated that a party can always withdraw the appeal at its discretion and the Union of India can always choose the assist the Court on a question of law.

62. Mr. K.M. Nataraj, learned Additional Solicitor General of India, has submitted a short note wherein it was argued that the Muslim minority surrendered their right to establish the college and opted for the governmental establishment in order to have recognition for its degrees. It was urged that the circumstances in which such surrender was made cannot be gone into by the Court in exercise of its power of judicial review while placing reliance on the judgment in the case of ***Dir. of Endowments Gov. of Hyderabad v. Syed Akram Ali,*** **AIR 1956 SC 60.** He distinguishes the observations regarding impossibility of surrender of such rights made in the case of *A**hmedabad St. Xavier's College Society v. State of Gujarat,*** **(1974) 1 SCC 717** by stating that the said observations applied only in a post-constitutional context. He referred *Black's Law Dictionary 6th Edition* to argue that in ***Azeez Basha*** **[supra],** the court correctly understood the meaning of 'establish'. He further relies on ***State of Kerala v. Very Rev. Mother Provincial,*** **(1970) 2 SCC 417** to argue that the words 'establish' and 'found' have the same meaning.

63. It was further submitted that in order to qualify as a minority educational institution, an institution must be established for the betterment of the minority community and the inclusion of any outsiders must be merely incidental. It was argued that the administrative control must lie with the minority and that on a cumulative understanding it should be clearly visible that the institution in question is actually a minority institution and to a masked phantom as warned of in ***A.P. Christians Medical Educational Society v. Government of Andhra Pradesh,*** **(1986) 2 SCC 667.** He finally submits that the AMU is an institution of national character and hence, it cannot be a minority institution.

64. Mr. Vikramjit Bannerjee, learned Additional Solicitor General of India, briefly traced the history and purpose of incorporating Articles 25-30 from the Constituent Assembly Debates. It was argued that the purpose of these provisions was to instil a sense of confidence in the minorities with a final view to erasing the difference between majority and minority altogether. In that view, allowing an institute of national importance to be classified as a minority institution would go against the principles behind Article 30. To support his stand, he relied on ***Bal Patil v. Union of India***, **(2005) 6 SCC 690**. It was argued that the words "institution of national importance" in Entry 63 of List I must be read keeping in mind the principle of

noscitur a sociis which would indicate that the AMU is intended to be a secular institution open to all.

65. Mr. Rakesh Dwivedi, learned Senior Counsel, submitted that in the pre-constitution era, the sole prerogative of establishing universities lay with the Governor-General-in-Council. He refers to the establishment of a number of Universities during the time of British time to show that all such Universities were established by an Act of the Legislature. It was argued that the intent of a minority in establishing a university was material factor because the ultimate fact of establishment could be only through the Government. It was argued that the Muslim community in the pre-constitution era did not identify as minorities at all. Therefore, it was stated that if the community itself did not accept a minority character, it was not open to confer such a character on them through operation of Article 30 insofar as the AMU is concerned. It was argued that the numerical inferiority is only one aspect of minority status. Other aspects would include whether or not the community was dominant either socially or politically and whether or not it considered itself a minority. He relied on certain reports of the United Nations to reinforce the idea that minority must be defined with respect to socio-political dominance.

66. Mr. Dwivedi referred to history of negotiations between the proponents of a Muslim University and the British

Government to argue that all major demands of the community were rejected and administrative control of the university by the government was a condition precedent for approval. He also referred to the Constituent Assembly Debates to argue that the understanding of the constitution makers was that the AMU was an institution of a national character. It is argued that there is a difference between a university established under an Act by private persons and a university established by an Act. He argued that the AMU is established by the Act and not under the Act by the Muslim community.

67. Mr Neeraj Kishan Kaul, Ld. Senior Counsel, took the stand that the correctness of ***Azeez Basha*** **[supra]** had been referred only to the limited extent of determining whether its holding of the words "establish" and "administer" being conjunctive in Article 30 was correct or not. He argued that the original reference order in ***Anjuman*** **[supra]** only referred the question of whether an institution could be called a minority institution even if certain non-minority individuals had been involved in its establishment. He also relied on the reference order dated 12.02.2019 to argue that the status of AMU had not been referred as a question at all.

68. In support of the conjunctive nature of the words establish and administer, Mr. Kaul relied on ***Hyderabad Asbestos Cement Products v. Union of India***, **(2000) 1 SCC 426** and ***St. Stephens***

[supra] and also on the 2010 amendments to the NCMEI Act referred to above. It was argued that applying a disjunctive test would lead to adverse consequences since it would enable institutions to claim minority status even if they were never administered by minorities. It is submitted that no adverse effect would be caused to the right of minorities to establish universities as a result of ***Azeez Basha*** **[supra]**. It was argued that any university which wanted a minority status was free to do so and in the absence of action by the concerned authorities could take advantage of the deeming provision under the NCMEI Act.

69. Mr. Kaul argued that the creation of the AMU was the creation of a new and distinct entity, not merely the incorporation of an existing institution as a university. The old MAO college had been completely dissolved and its assets and liabilities transferred to the University. It was further stated that the Act used the words "an act to establish" and it did not anywhere state that it was recognising an existing institution.

70. Mr. Kaul defended the correctness of ***Azeez Basha*** **[supra]** by submitting that it had correctly appreciated the antecedent history of the MAO College and the AMU. He next referred to ***TMA Pai*** **[supra]** and the five parameters of administrative control outlined therein i.e. admissions, fees, governing body composition, appointment of staff and disciplinary control over staff. On each of those criteria, it was argued that the real control

was with the government due to the predominant role of the Visiting Board and the Lord Rector. Mr. Kaul argued that the 1981 Act had been correctly struck down by the Allahabad High Court since it did not take away the basis of ***Azeez Basha*** **[supra]** and moreover because legal fictions could not supplant historical facts.

71. Mr. Guru Krishna Kumar, Ld. Senior Counsel, made extensive reference to the history of the AMU to argue that it was never established as a minority institution but as an institution for general and secular education. It was argued that the British Government was consistently opposed to both, the possibility of a denominational character of the university and the proposed power of the university to affiliate colleges. It was argued that the word "Muslim" in the university's name was accepted more out of deference to local sentiment than as an indication of minority character. He also drew the Court's attention to the array of powers exercised both by the Governor-General-in-Council as Lord Rector and the Visiting Board over the University.

72. Mr. Guru Krishna Kumar argued that the fact that the Muslim community approached the then Government for establishing a university is insignificant, as it was not necessary. It was argued that the minority community had the right to establish a college as happened thereafter with the creation of the Jamia Milia Islamia without government interference.

73. It was argued that the muslim community approached the Government since they wanted governmental recognition of their degrees which was possible only if university was established by the Government. He gave examples of certain colleges to show how such colleges were given legal recognition as Universities through Acts of Legislature. By contrast the MAO college was instead dissolved by the 1920 Act and a new entity created in its place.

74. Further, it was argued that the inclusion of the AMU as a specific entry in List I of the Constitution is a clear indication of its All-India character. Even if the university once had the trappings of a minority institution, such inclusion crystallises the secular nature of the university and erases all vestiges of control by one specific community. Reference in this regard is made to ***M. Siddiq (Ram Janambhumi Temple Reference-5J) v. Mahant Suresh Das,*** **(2020) 1 SCC 1.**

75. It was urged that the 1981 amendment indirectly attempted to set aside the judgement in ***Azeez Basha*** **[supra]** without removing the basis of the judgement, which is impermissible. He adds that there cannot be a legislative declaration of fact through an amending Act which operates to set aside a finding of fact by the Supreme Court and that the 1981 Amendment was bad on this count. He relied on ***Indra Sawhney v. Union of India & Anr.,***

(2000) 1 SCC 168 and ***Mullaperiyar Environmental Protection Forum v. Union Of India & Ors, (*2006) 3 SCC 643.**

76. Mr. Vinay Navare, Ld. Senior Counsel, submitted that the judgement in ***Azeez Basha*** **[supra]** is not under challenge, only the principle laid down therein. The findings arrived at in the said judgment cannot be affected by the decision of the present Constitution Bench and only the correctness of the legal principle is in question as a reference does not decide the merits of a dispute *inter se parties* but only the interpretation of a law.

77. It was argued that declaring the AMU to be a minority institution would divest the Parliament of a large part of the power it could otherwise have exercised under Entry 63 of List I. Since the AMU is established by a special statute, it would be "State" within the meaning of Article 12 and hence, cannot be a minority institution. He relies on the judgement in ***Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi***, **(1975) 1 SCC 421.**

78. It was argued that the 1981 amendment relying on the judgement in ***Hotel and Catering Industry Training Board v. Automobile Propriety Ltd,*** **(1968) 1 WLR 1526**. It was argued that the AMU was created by a statute and not under a statute. It was argued that to say that having been established by the Act, the AMU can be governed only in terms of the Act and hence the minority community can make no claim of having established the

AMU since such claim is precluded by the very provisions of the Act. It was argued that since the institution was created by an Act, the words "of their choice" in Article 30 would not be applicable.

79. Mr. Shridhar Potaraju, Ld. Senior Counsel, referred to the requirement of publishing the university's accounts in the official gazette and the submission of the accounts originally to the Lord Rector and after the 1981 amendment to the Parliament. On this basis he argues that the AMU is an open and public university. It was argued that the AMU itself never raised any questions about its character from 1950 until 2005, when for the first time it enacted reservations for Muslims. Until 2005, the AMU was governed by the non-discrimination requirement under Article 29(2) since AMU is under the financial and administrative control of the Government, it is 'State' within the meaning of Article 12 of the Constitution.

80. Ms. Archana Pathak Dave, Ld. Senior Counsel, submitted that the insertion of Section 2(l) by the 1981 amendment was an impermissible exercise of legislative overruling of a judgement. The question of establishment having been settled in ***Azeez Basha*** **[supra]** it cannot be reopened by an amendment act which seeks to take a contrary view on facts.

81. Mr. Yatindra Sharma, Ld. Senior Counsel, reiterated that the university was established and is being administered by the government and not the Muslim community. He goes on to state

that Muslims are in fact not a minority in terms of Article 30 as the said Article applies to electoral minorities i.e. those whose numbers are so few that they cannot influence electoral outcomes. It was argued that even assuming that the changes made in the 1981 amendment take away the basis of ***Azeez Basha*** **[supra],** they are unconstitutional for violating Articles 14, 15 and 29(2) of the Constitution

82. Mr. Anirudh Sharma, learned counsel, submitted that Article 29(2) would stand on higher footing as compared to Article 30(1) and therefore once any institution is covered by Article 29(2), the general right provided therein cannot be unsettled by the specific right under Article 30(1). He has also attempted to distinguish the case of the AMU from that of ***St. Stephens*** **[supra]** by arguing that there were clear indicia of minority character in St Stephens College which are not present in case of the AMU.

83. Mr. Vivek Sharma, learned counsel, briefly submitted and reiterated that the administration of the AMU never vested in the Muslim community and always lay with the government under the 1920 Act.

84. Mr. Nachiketa Joshi, learned counsel, submitted a note which reiterates that it was the choice of the proponents of the AMU to seek government recognition for the AMU's degrees. To that end, they accepted the establishment by the government

instead of establishing the university themselves. It was argued that therefore the benefit of Article 30 cannot be claimed since establishment by the minority was missing. Further, the 1981 amendment was correctly struck down by the Division Bench of the Allahabad High Court as it was an attempt at legislative overruling of a judgement.

85. Mr. Sanjay Kumar Dubey, learned counsel, made reference to the original 1920 legislative council debates to submit that Shri Mohammed Shafi who had tabled the AMU bill had himself stated that this was to be an All-India and national institution. In view of the intent of the original movers of the Bill, the AMU cannot be said to be a minority institution.

C.3 Submissions in Rejoinder

86. In rejoinder, Dr. Rajeev Dhawan, Ld. Senior Counsel, argued that both sides to the dispute agree that the words 'establish' and 'administer' in Article 30(1) must be read conjunctively, and not disjunctively. It was argued that it is also not in issue that the right to administer the educational institution flows from the proof of establishment, although they may exist in different points in time.

87. It was argued that the Respondents' contention that AMU is a *sui generis* institution is not a valid ground to avoid the reconsideration of ***Azeez Basha*** **[supra]**. It was argued that every minority educational institution is a standalone institution to

serve unique needs of their community, which includes catering to the educational needs of their community, conserving their unique script or culture, and achieving standards of excellence.

88. It is further urged that the minorities have been recognized in India even before the Constitution came into force and therefore, to say that Muslim community had no minority 'group' rights before 1950 is fallacious. It is argued that there exists a constitutional premium, as well as a statutory premium (for e.g., Central Educational Institutions (Reservation in Admission) Act, 2006) which is attached to minority exceptions and the minority dispensation. Therefore, it is not just Article 30 which recognizes the minority rights, but if the whole statutory dispensation analysed, it is clear that Parliament has excepted the minorities from Articles 15(5) and 15(6).

89. Additionally, certain other factors have been suggested by Dr. Dhawan, which may be determinative of minority character of a particular institute, which are as follows:

a. Founders should belong to either religious or linguist community;

b. Historical antecedents of the institution which show the active involvement, intention, and contributions of minority founders or the community;

c. Founders' intent to establish an institute should be bona fide, and not devious or dubious and for the benefit of the minority community;

d. Constitutional documents (such as statute, rules, or regulations) read as a whole should show predominance of minority character;

e. Administration of the institution if it is vested in the founders or persons in whom the founders have faith and confidence;

f. Imparting of religious education, or providing for religious instruction and worship

g. Symbols such as the name, architecture, motto, and such other cultural symbols of the minority.

90. It is further submitted that declaration as to a particular institute bearing national importance under Entry 63, List 1 and status as a minority institution operate in different spheres. It is open for the Parliament to declare an institution of national importance because of its academic excellence, strategic and security interests, geographic location, cultural or religious prominence, or even granting aid. Therefore, it is argued that the reasons for granting the tag of 'national importance' may be varied and unrestricted, which are different than the factors determinative of minority character of a particular institute. It

was argued that the declaration under Entry 63, List 1 shall always be subject to the rights under Article 30.

91. Mr. Kapil Sibal, Ld. Senior Counsel, submitted in rejoinder that the minority has a right under Article 30 to administer the institution which it has established, which it may exercise or may not exercise. It is not the duty of the said community to administer once it has established. Therefore, in the present case, even if it is assumed that the administration of AMU is not with the Muslim community, it would not mean that the AMU will cease to be a minority institution since it has been established as such by Muslim community.

92. It was argued that to that extent, the judgment is ***Azeez Basha*** **[supra]** has been decided wrongly. Further, it is urged that if right to administer is exercised and if the Government interferes in such right, the minority institute can challenge such interference on the ground of it being violative of Article 30. Moreover, the Muslim minority wanted to establish a university which could grant degrees of its own which would have to be recognised by the Government. It was argued that subscribing to a regulatory framework that would offer better opportunities to students who enrolled with the institution, is a choice that has no relation to the alleged surrender of minority status.

93. Mr. Shadan Farasat, learned counsel, compared the provisions of all the Acts establishing the Universities, existing

at the relevant time to show that the denominational nature is evident from the level of autonomy granted vis-a-vis, the non-denominational universities of the relevant time and sought to argue that the provisions of the AMU Act clearly depict the minority character of the institution even at the time of inception.

D. SCOPE OF PROCEEDINGS

D.1 Petitions before the Court

94. Before adverting to the legal issues and the contentions raised in the present proceedings, it would be appropriate to define the scope of the present proceedings. The present set of the petition can be divided in the following groups :

i. Batch of eight (8) civil appeals challenging the judgment of Hon'ble Allahabad High Court dated 05.01.2006 [hereinafter referred to as the "Impugned Order"] - Civil Appeal Nos. 2286, 2316, 2317, 2318, 2319, 2320, 2321 and 2861 of 2006;

ii. A transferred case involving a writ petition filed before the Hon'ble Allahabad High Court seeking implementation of reservations in terms of the Central Educational Institutions (Reservation in Admissions) Act, 2006 - Transferred Case (Civil) No. 46 of 2023.

iii. A civil appeal challenging the judgment of the Hon'ble Allahabad High Court dated 16.10.2015 that dismissed the prayer for quo warranto regarding the appointment of the

then Vice Chancellor of Appellant-University - SLP(C) No. 32490 of 2015;

iv. A writ petition under Article 32 seeking a writ or direction to the Appellant - University to follow the regulations laid by University Grants Commission ('UGC') in 2010 on minimum qualifications for appointment of teachers and academic staff - WP(C) No. 272 of 2016

D.2 The Anjuman reference

95. The Aligarh Muslim University Act, 1920 was amended in the year 1965 following some disturbances at the campus. The said amendment was challenged by way of writ petitions filed under Article 32 and disposed off by this Court by way of the judgment in ***Azeez Basha*** **[supra]** [5 Hon'ble Judges]. The judgment dated 20.10.1967 held that the University was not established by the minority community and therefore, it cannot be said to be an institution falling under the expanse of Article 30 of the Constitution.

96. In 1981, Writ Petition No.54-51 of 1981 came up before a bench of two Hon'ble Judges of this Court, which was titled ***Anjuman-e-Rehmania & Ors v. Distt. Inspector of School & Ors.*** In the said petition, this Court was confronted with a question, which is recorded in its order dated 26.11.1981. The relevant portion is reproduced hereunder: -

"The point that arises is as to whether Act. 30(1) of the Constitution envisages an institution which is established by minorities alone without the participation for the factum of establishment from any other community. On this point, there is no clear decision of this court. There are some observations in S. Azeez Basha & ors. Vs. Union of India 1968(1) SCR 333, but these observations can be explained away. Another point that arises is whether soon after the establishment of the institution if it is registered as a Society under the Society Registration Act, its status as a minority institution changes in view of the broad principles laid down in S. Azeez Basha's case. Even as it is several jurists including Mr. Seervai have expressed about the correctness of the decision of this court in S. Azeez Basha's case. Since the point has arisen in this case we think that this is a proper occasion when a larger bench can consider the entire aspect fully. We, therefore, direct that this case may be placed before Hon. The Chief Justice for being heard by a bench of at least 7 judges so that S. Azeez Basha's case may also be considered and the points that arise in this case directly as to the essential conditions or ingredients of the minority institution may also be decided once for all. A large number of jurists including Mr. Seervai, learned counsel for the petitioners Mr. Garg and learned counsel for respondents and interveners Mr. Dikshit and Kaskar have stated that this case requires reconsideration. In view of the urgency it is necessary that the matter should be decided as early as possible we give liberty to the counsel for parties to mention the matter before Chief Justice."

97. The question of law, as noticed above, was referred to bench of seven Hon'ble Judges by a bench of two judges. It may be noted that Hon'ble CJI at that time was not a part of this bench of two Hon'ble Judges. The said group of matters in ***Anjuman*** **[supra]** were placed before a bench of 11 Judges and was heard along with other writ petitions which culminated into the judgment of ***TMA Pai Foundation and Ors. v. State of Karnataka*****, (2002) 8 SCC 481**.

98. The 11 Judges bench, *inter alia*, framed a question vide its order dated 26.11.1981, which reads as under:

> *"3(a) What are the indicia for treating an educational institution as a minority educational institution? Would an institution be regarded as a minority educational institution because it was established by a person(s) belonging to a religious or linguistic minority or its being administered by a person(s) belonging to a religious or linguistic minority?"*

99. Finally, the larger Bench in ***TMA Pai*** **[supra]** opined that "this question need not be answered by this Bench, it will be dealt by a regular Bench." Thereafter, the group of matters in case of ***Anjuman*** **[supra]** came to be disposed of vide order dated 11.03.2003

D.3 The present reference

100. Separately, the present proceedings arise out of the decisions/resolutions of the Admission Committee dated

10.01.2005, the Resolution Passed by the Academic Council dated 15.01.2005 and the Resolution passed by the Executive Council dated 19.05.2005 which provided_reservation to the extent of 50 per cent of seats to be reserved for Muslims of India for admission to post graduate programmes.

101. The Petitioners before the High Court of Judicature at Allahabad [hereinafter referred to as the "Allahabad High Court" or "High Court"] filed writ petitions against the said decisions, while also challenging the amendment made to the AMU Act in 1981. The said writ petition came to be decided by Ld. Single judge of the High Court of Judicature at Allahabad vide Judgment and Order dated 04.10.2005. The said judgment was impugned before the Division Bench of the Hon'ble High Court by way of Special Appeal 1321 of 2005 and connected matters, which was finally decided by the judgment dated 05.01.2006, vide which the High Court dismissed the appeals filed by the appellants therein. The appeals/special leave petitions from the said order are under challenge before this Court.

102. On 12.02.2019, a three Judge Bench has referred the present batch of appeals and petitions to a bench of seven Hon'ble Judges. Considering the intense divergence of opinion on the reference order and the resultant scope of the present proceedings, the said order deserves to be quoted *in extenso* as under :

"3. The issue arising in S. Azeez Basha (supra) was referred to a Seven (07) Judges Bench by an order of this Court dated 26th November, 1981 passed in Writ Petition (Civil) Nos. 54-57 of 1981 [Anjuman-e-Rahmania & Ors. vs. Distt. Inspector of School & Ors.].

4. The aforesaid writ petitions i.e. Writ Petition (Civil) Nos. 54-57 of 1981 were heard along with other connected cases {lead being Writ Petition (Civil) No.317 of 1993 (T.M.A. Pai Foundation and others vs. State of Karnataka and others)] by a bench of Eleven (11) judges, the judgment in which cases is reported in (2002) 8 SCC 481.

5. The question 3(a) which was formulated for an answer in T.M.A. Pai Foundation (supra) which coincidentally reflects the questions referred by the order of this Court dated 26th November, 1981 passed in Writ Petition (Civil) Nos. 54-57 of 1981, is as follows:

> *"3(a) What are the indicia for treating an educational institution as a minority educational institution? Would an institution be regarded as a minority educational institution because it was established by a person(s) belonging to a religious or linguistic minority or its being administered by a person(s) belonging to a religious or linguistic minority?*

6. However, the Bench did not answer the question stating that it will be dealt with by the Regular Bench.

7. The order of the Regular Bench passed on 11th March, 2003, which, for reasons that we need not dilate, did not answer the aforesaid question 3(a) formulated in T.M.A. Pai Foundation (supra).

8. The said facts would show that the correctness of the question arising from the decision of this Court in S. Azeez Basha (supra) has remained undetermined.

9. That apart, the decision of this Court in Prof. Yashpal and another vs. State of Chhattisgarh and others 2 and the amendment of the National Commission for Minority Educational Institutions Act, 2004 made in the year 2010 would also require an authoritative pronouncement on the aforesaid question formulated, as set out above, besides the correctness of the view expressed in the judgment of this Court in S. Azeez Basha (supra) which has been extracted above.

10. Ordinarily and in the normal course the judicial discipline would require the Bench to seek a reference of this matter by a Five Judges Bench. However, having regard to the background, as stated above, when the precise question was already referred to a Seven Judges Bench and was, however, not answered, we are of the view that the present question, set out above, should be referred to a Bench of Hon'ble Seven Judges.

11. Consequently and in the light of the above, ***place these matters before the Hon'ble the Chief Justice of India on the administrative side for appropriate orders.****"*

103. Considering the varying positions taken by various parties before this Hon'ble Court, we have divided the sides in two categories – the ones defending the judgment of the High Court and the ones aggrieved by the judgment of the Hon'ble Court.

D.4 The parameters on which reference can be made to a larger bench

104. The parties defending the judgment of the High Court were at pains to assert that it would not be permissible for the other side to re-agitate the factual findings and facts based legal controversies already decided by a five-Judge bench in ***Azeez Basha*** **[supra]**. The parties defending the judgment of the High Court assert that the *lis* between the parties, as far as the minority status of the AMU is concerned, stands settled by the judgment of ***Azeez Basha*** **[supra]** and cannot be re-opened. As per the said set of submissions, this Court is merely supposed to decide the question of law - Question 3(a), which was formulated for an answer in ***T.M.A. Pai*** **[supra]** without deciding status of the AMU. At the same time, the said parties urged the Hon'ble Court to decide upon the validity of the amendments made to the AMU Act in 1981 which were under challenge before the High Court. The said parties further highlighted the manner in which the matter was referred by the bench of two judges in ***Anjuman*** **[supra]** directly to seven judges was incorrect as the said bench was bound by a judgment of five judges in ***Azeez Basha*** **[supra]**.

105. On the other hand, the parties challenging the judgment of the High Court, pressed that correctness of the view expressed in the judgment of this Court in ***Azeez Basha*** **[supra]** has been specifically referred to a larger bench of seven judges and

therefore, the said issue is moot before this bench. The said parties requested this Court to lay down the law Question 3(a), which was formulated for an answer in ***T.M.A. Pai*** **[supra]** and decide thereupon whether the approach adopted in the judgment of ***Azeez Basha*** **[supra]** was correct or not. At the same time, the said parties urged the Hon'ble Court not to decide upon the validity of the amendments made to the AMU Act in 1981 which were under challenge before the High Court and other decisions of the AMU authorities made in 2005 and leave the same to be decided by a regular bench.

106. At first, it is important to clarify the issue raised by the parties with regard to the reference order in Writ Petition (Civil) Nos. 54-57 of 1981 in ***Anjuman-e-Rahmania & Ors. v. Distt. Inspector of School & Ors***. The said bench of two Hon'ble Judges [without comprising of the Hon'ble Chief Justice of India] referred the judgement of five Hon'ble Judges in ***Azeez Basha*** **[supra]**, directly to a bench of seven Hon'ble Judges. The reason that the Court in ***Anjuman-e-Rahmania & Ors*** **[supra]** provides is that as per the judgement in ***Azeez Basha*** **[supra]**, if after the establishment of an institution, the institution is registered as a society, its status as a minority institution changes. It has been pointed out that the AMU and the decision in ***Azeez Basha*** **[supra]**, had nothing to do with a society or Societies Registration Act as the AMU is governed by way of a standalone

legislation. The other reason the Court in ***Anjuman*** **[supra]** cites for making a reference is the criticism of the judgement by jurists like Mr. Seervai. It has been argued that while opinions of jurists hold persuasive value, the same cannot be a ground for making reference to a larger bench. The reference order in ***Anjuman*** **[supra]** does not point towards a future or previous judgement of equal or larger strength from ***Azeez Basha*** **[supra]**, being contrary to the judgement in ***Azeez Basha*** **[supra]**. In effect, a Bench of two hon'ble Judges has directly referred to the correctness of a decision rendered by five Hon'ble Judges to seven Hon'ble Judges, without the presence of a Chief Justice despite being prima facie bound by the opinion of the larger Bench.

107. A similar situation arose in relation to the judgment of this Court in ***Sardar Syedna Taher Saifuddin Saheb v. State of Bombay,*** **1962 Supp (2) SCR 496**. In the said case, which concerned the powers of excommunication of the head of Dawoodi Bohra community, a five-Judge Bench of this Court, ruled by a majority of 4:1, that the Bombay Prevention of Excommunication Act (Act 42 of 1949) was *ultra vires* the Constitution as it violated Article 26(*b*) of the Constitution and was not saved by Article 25(2).

108. Decades later, on 26-2-1986, a fresh petition was filed seeking reconsideration and overruling of the decision of this

Court in ***Sardar Syedna*** **[supra]** and for issuing a writ of mandamus directing the State of Maharashtra to give effect to the provisions of the Bombay Prevention of Excommunication Act, 1949.

109. The said matter came up for hearing before a two-Judge Bench of this Court which on 25-8-1986 directed "rule nisi" to be issued. On 18-3-1994 a two-Judge Bench directed the matter to be listed directly before a seven-Judge Bench for hearing. On 20-7-1994 the matter did come up before a seven-Judge Bench which adjourned the hearing awaiting the decision in WP No. 317 of 1993 [***T.M.A. Pai*** **(supra)**].

110. On 26-7-2004 IA No. 4 was filed on behalf of Respondent 2 seeking a direction that the matter be listed before a Division Bench of two Judges. Implicitly, the application sought a direction for non-listing before a Bench of seven Judges and rather the matter being listed for hearing before a Bench of two or three Judges as is the normal practice of this Court. In the contents of the application reliance was placed on the Constitution Bench decisions of this Court in ***Bharat Petroleum Corpn. Ltd. v. Mumbai Shramik Sangha,*** **(2001) 4 SCC 448** followed in four subsequent Constitution Bench decisions namely ***Pradip Chandra Parija v. Pramod Chandra Patnaik,*** **(2002) 1 SCC 1**; ***Chandra Prakash v. State of U.P.,*** **(2002) 4 SCC 234;** ***Vishweshwaraiah Iron & Steel Ltd. v. Abdul***

***Gani,* (2002) 10 SCC 437 and *Arya Samaj Education Trust v. Director of Education,* (2004) 8 SCC 30**.

111. The matter was ultimately placed before a bench of five Hon'ble Judges in order to decide that whether the course adopted by the two judge bench, doubting the correctness of a decision rendered by five Hon'ble Judges, was correct. While examining the issue, this Court highlighted the approaches available to the Court in a decision reported in ***Central Board of Dawoodi Bohra Community and Anr. v. State of Maharashtra and Anr,* (2005) 2 SCC 673**.

112. On the question of reference, the Court held that when a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength. A Bench of lesser quorum has only two options :

a. invite the attention of the Chief Justice and request for the matter being placed for hearing before an appropriate bench or;

b. place the matter before a Bench of coequal strength which pronounced the decision laying down the law the correctness of which is doubted.

The only exception to the above said rule is the discretion of the Chief Justice in whom vests the power of framing the roster.

113. In extremely rare cases, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum needs correction or reconsideration, then by way of an exception and for reasons given by it, it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of Chief Justice constituting the Bench and such listing. After discussing the said legal position, this Court in ***Central Board of Dawoodi Bohra Community*** **[supra]**, crystallised the law as under :

> *"12. Having carefully considered the submissions made by the learned senior counsel for the parties and having examined the law laid down by the Constitution Benches in the abovesaid decisions, we would like to sum up the legal position in the following terms :-*
>
> *(1) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength.*
>
> *(2) A Bench of lesser quorum cannot doubt the correctness of the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of coequal strength to express an opinion doubting the correctness of the view*

taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.

(3) The above rules are subject to two exceptions :

(i) The abovesaid rules do not bind the discretion of the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength; and

(ii) In spite of the rules laid down hereinabove, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way of exception (and not as a rule) and for reasons given by it, it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of Chief Justice constituting the Bench and such listing. Such was the situation in Raghubir Singh and Ors. and Hansoli Devi and Ors. (supra)"

In understanding the correctness of the reference in ***Anjuman*** **[supra]**, the said finding in ***Central Board of Dawoodi Bohra Community and Anr.*** **[supra]** is crucial.

114. Further, it has been held by this Court that reference to a larger bench cannot be merely made for the asking or even because another view appears to be a possible view. It in ***Govt. of A.P. v. B. Satyanarayana Rao,*** **(2000) 4 SCC 262**, it was held as under :

> *"**8.** Learned counsel for the respondent attempted to convince us that the decision in the case of State of A.P. v. V. Sadanandam [1989 Supp (1) SCC 574 : 1989 SCC (L&S) 511 : (1989) 11 ATC 391] has to be ignored on the principle of per incuriam as certain relevant provisions of the Rules were not considered in the said case, and in any case this case requires to be referred to a larger Bench of three Judges. The rule of per incuriam can be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue. This is not the case here. In State of A.P. v. V. Sadanandam [1989 Supp (1) SCC 574 : 1989 SCC (L&S) 511 : (1989) 11 ATC 391] the controversy was exactly the same as it is here and this Court after considering para 5 of the Presidential Order of 1975 held that the Government has power to fill a vacancy in a zone by transfer. We, therefore, find that the rule of per incuriam cannot be invoked in the present case.* ***Moreover, a case cannot be referred to a larger Bench on mere asking of a party. A decision by two Judges has a binding effect on another coordinate Bench of two Judges, unless it is demonstrated that the said decision by any subsequent change in law or decision ceases to laying down a correct law.*** *We, therefore, reject*

the arguments of learned counsel for the respondents."

115. In ***Shrimanth Balasaheb Patil v. Speaker, Karnataka Legislative Assembly*** **(2020) 2 SCC 595**, it was held as under :

> ***"157.*** *There is no doubt that the requirements under Article 145(3) of the Constitution have never been dealt with extensively and, more often than not, have received mere lip service* ***, wherein this Court has found existence of case laws which have already dealt with the proposition involved, and have rejected such references.*** *Normatively, this trend requires consideration in appropriate cases, to ensure* ***that unmeritorious references do not unnecessarily consume precious judicial time in the Supreme Court****.*
>
> ***158.*** *In any case, we feel that there is a requirement to provide a preliminary analysis with respect to the interpretation of this provision. In this context, we need to keep in mind two important phrases occurring in Article 145(3) of the Constitution, which are, "substantial question of law" and "interpretation of the Constitution". By reading the aforesaid provision, two conditions can be culled out before a reference is made:*
>
> *(i) The Court is satisfied that the case involves a substantial question of law as to the interpretation of this Constitution;*
>
> *(ii) The determination of which is necessary for the disposal of the case.*
>
> ***160. Any question of law of general importance arising incidentally, or any ancillary question of law having no significance to the final outcome, cannot be considered as a substantial question of***

law. ***The existence of substantial question of law does not weigh on the stakes involved in the case, rather, it depends on the impact the question of law will have on the final determination***. ***If the questions having a determining effect on the final outcome have already been decided by a conclusive authority, then such questions cannot be called as "substantial questions of law"***. *In any case, no substantial question of law exists in the present matter, which needs reference to a larger Bench.* ***The cardinal need is to achieve a judicial balance between the crucial obligation to render justice and the compelling necessity of avoiding prolongation of any lis."***

116. Similarly in ***Joint Commissioner of Income Tax, Surat v. Saheli Leasing & Industries Ltd.*****, (2010) 6 SCC 384**, it was held as under:

> *"(x)* ***In order to enable the Court to refer any case to a larger Bench for reconsideration, it is necessary to point out that particular provision of law having a bearing over the issue involved was not taken note of or there is an error apparent on its face or that a particular earlier decision was not noticed, which has a direct bearing or has taken a contrary view. Such does not appear to be the case herein****. Thus, it does not need to be referred to a larger Bench as in our considered opinion it is squarely covered by the judgment of this Court in Gold Coin [(2008) 9 SCC 622 : (2008) 304 ITR 308]"*

117. In view of the above, the approach adopted in the reference order in ***Anjuman*** **[supra]** was not wholly appropriate. However,

considering the fact that the present reference was made by a separate three judge bench [which consisted of the then Hon'ble Chief Justice], it would be apposite to not be whittled down by the error that may have crept in ***Anjuman*** **[supra]** reference. As far the scope of the present proceedings is concerned, the Court must adopt a sustainable and consistent approach. In this regard, it is clear that this Court needs to provide a clear understanding of the overlapping and intersecting reference orders mentioned above.

118. The expanse and the width of the proceedings before a larger cannot be whittled down by statute like reading of the reference order(s). Order VI Rule 2 of the Supreme Court Rules, 2013 reads as under:

> *"ORDER VI*
> *CONSTITUTION OF DIVISION COURTS AND POWERS OF A SINGLE JUDGE*
> *2. Where in the course of the hearing of any cause, appeal or other proceeding, the Bench considers that the matter should be dealt with by a larger Bench, it shall refer the matter to the Chief Justice, who shall thereupon constitute such a Bench for the hearing of it."*

119. The terms "any cause" and "other proceedings" are of a very wide import and the power of the Chief Justice of India, with regard to references to larger benches has also been judicially re-iterated by numerous constitution benches. A bench of nine

Hon'ble Judges in ***Kantaru Rajeevaru (Right to Religion, In re-9 J.) (2) v. Indian Young Lawyers Association*, (2020) 9 SCC 121**, has held as under :

> ***"27.*** *No matter is beyond the jurisdiction of a superior court of record unless it is expressly shown to be so, under the provisions of the Constitution.* ***In the absence of any express provision in the Constitution, this Court being a superior court of record has jurisdiction in every matter and if there is any doubt, the Court has power to determine its jurisdiction*** *[Delhi Judicial Service Association v. State of Gujarat, (1991) 4 SCC 406] . It is useful to reproduce from Halsbury's Laws of England, 4th Edn., Vol. 10, Para 713, relied upon in the aforementioned judgments, which states as follows:*
>
> > *"713. ... Prima facie, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular court."*
>
> *Undoubtedly there is no bar on the exercise of jurisdiction for referring questions of law in a pending review petition. Therefore, the reference cannot be said to be vitiated for lack of jurisdiction. This Court has acted well within its power in making the reference."*

D.5 A holistic approach

120. It is undoubtedly true that the correctness of the view expressed in the judgment of this Court in ***Azeez Basha*** **[supra]**

has been specifically referred to a larger bench of seven judges. Further it is correct that Court is supposed to decide the question of law - Question 3(a), which was formulated for an answer in ***T.M.A. Pai*** **[supra]**.

121. The status of AMU is in question due to the amendments made to the AMU Act in 1981 and the decisions of the AMU authorities in 2005. The said changes, especially the legislative changes, have taken place after the judgment in ***Azeez Basha*** **[supra]**, and therefore, it is imperative that this Court decides the questions arising therefrom. The validity of the amendments made to the AMU Act in 1981 and decisions of the AMU authorities made in 2005 may be left to be decided by a regular bench.

122. This Court shall therefore decide the Question 3(a), which was formulated for an answer in ***T.M.A. Pai*** **[supra]**. A decision on the said question would naturally have an impact on the correctness, or lack thereof, on the judgment of ***Azeez Basha*** **[supra]**.

123. Once the correctness of the judgment in ***Azeez Basha*** **[supra]**, is under scanner and the Question 3(a) has been decided, the regular bench may decide the status of the AMU especially with regard to the question whether it was "established" by the minority community or not, would have to be adjudicated. The decision on the said question, would lay down the parameters of

scope and extent to which the Parliament could have amended the AMU Act. Once the fate of the 1981 amendments to the AMU Act is decided, the Court would adjudicate upon the validity of actions of the AMU authorities in 2005.

124. In light of the above, despite the strong contest with regard to the correctness of ***Anjuman*** **[supra]**, this bench would be taking a holistic approach to the present reference in deciding the questions present before it.

E. ISSUES

125. In light of the above, the following issues would be decided by the present reference :

i. Whether the bench of two judges in Writ Petition No.54-51 of 1981 titled ***Anjuman-e-Rehmania & Ors v. Distt. Inspector of School & Ors.*** could have referred to the matter to a bench of seven Hon'ble Judges directly, without the Hon'ble Chief Justice of India, being a part of the bench? [*already decided above*]

ii. Whether the "establishment" of an institution by the minority is necessary for the said minority to claim right of administration? To put it different, is "establish" and "administer" used disjunctively or conjunctively in Article 30 of the Constitution?

iii. What is the meaning of the term "establish" in Article 30 of the Constitution and what are the *real positive indicia*

for determining the question of establishment of an institution?

iv. What is the true meaning and purport of the judgment in ***Azeez Basha*** **[supra]**?

v. What must be the approach of the court in balancing the conflicting narratives of history presented before it in such cases?

vi. What was the legislative scenario governing the Universities in India prior to the University Grants Commission Act, 1956 and how does the same impact the judicial enquiry in the present matter?

vii. Whether the Legislature using the terms "establish" and/or "incorporate" in the Preamble of a legislation would be determinative of the question of establishment?

viii. What is the impact of the Constitution coming into force and the subsequent legislative amendments made to the AMU Act on the present proceedings?

ix. Whether the presence of members of the minority community in the governance of the institution, without any necessary legal requirement for the same, would impact the question of the institution falling under Article 30?

x. Whether Article 30 exists to protect institutions from "majoritarianism by default" approach?

xi. Whether the UGC Act, 1956 and the judgement in ***Yashpal*** **[supra]** impacts on the correctness of the judgment in ***Azeez Basha*** **[supra]**?

xii. Whether the NCMEI Act, 2004 impacts on the correctness of the judgment in ***Azeez Basha*** **[supra]**?

126. The following issues and proceedings are however, left to be decided by a regular bench:

i. Whether the AMU was "established" and "administered" by the minority community and therefore entitled to claim protection under Article 30?

ii. Whether the 1981 amendment to the AMU Act, 1920, was an impermissible exercise of legislative power?

iii. Whether the Central Educational Institutions (Reservation in Admissions) Act, 2006, would be applicable to the AMU?

iv. The civil appeal challenging the judgment of the Hon'ble Allahabad High Court dated 16.10.2015 that dismissed the prayer for quo warranto regarding the appointment of the then Vice Chancellor of Appellant-University - SLP(C) No. 32490 of 2015;

v. The writ petition under Article 32 seeking a writ or direction to the Appellant - University to follow the regulations laid by University Grants Commission ('UGC') in 2010 on minimum qualifications for

appointment of teachers and academic staff - WP(C) No. 272 of 2016.

F. WHETHER ESTABLISHMENT IS NECESSARY

127. The first question that needs to be answered is whether an institution needs to be "established" by the minority community in order to claim protection/rights under Article 30? In other words, is it possible for an institution to "acquire" the status of a minority institution without being established as one? While there has not been much contest on the aforesaid question, considering the fact that it has arisen before this Court on numerous occasions and further was one of the factors for the reference in ***Anjuman*** **[supra]**, it would be appropriate that the same is settled for posterity.

128. The first judgment which may provide some assistance in this regard would be the landmark judgment in case of ***Re: Kerala Education Bill, 1957,*** **1959 SCR 995**, rendered by a bench of seven judges wherein this Court deliberated on the prerequisites for invoking Article 30 for the first time. The Court considered the argument presented by the State's counsel, which outlined three conditions necessary to avail the protections and privileges under Article 30(1):

i. The presence of a minority community;

ii. The initiation of the right to establish an educational institution by one or more members of that community '*after the commencement of the Constitution*';

iii. The establishment of the educational institution for the benefit of members of the minority community.

During its examination of these arguments, the Court dismissed the notion that the institution must be established only after the commencement of the Constitution, affirming that institutions established prior to this could still claim such rights. Additionally, the Court clarified that admitting non-minorities into the institution would not alter its minority character.

129. Moreover, while discussing the matter, the Court observed that Article 30(1) confers two distinct rights upon minorities: the right to establish and to administer. This clarification by the Court does not negate the remaining arguments presented by the State, which assert that the establishment of an institution by the minority is essential to assert rights under Article 30. The relevant paragraph of the said judgment, which has been read by both sides in the present case, to further their respective arguments, deserves to be quoted in toto as under:

> ***"22.*** *We now pass on to the main point canvassed before us, namely, what are the scope and ambit of the right conferred by Article 30(1). Before coming to grips with the main argument on this part of the case, we may deal with a minor point raised by*

learned counsel for the State of Kerala. He contends that there are three conditions which must be fulfilled before the protection and privileges of Article 30(1) may be claimed, namely, (1) there must be a minority community, (2) one or more of the members of that community should, after the commencement of the Constitution, seek to exercise the right to establish an educational institution of his or their choice, and (3) the educational institution must be established for the members of his or their own community. We have already determined, according to the test referred to above, that the Anglo-Indians, Christians and Muslims are minority communities in the State of Kerala. We do not think that the protection and privilege of Article 30(1) extend only to the educational institutions established after the date our Constitution came into operation or which may hereafter be established. On this hypothesis the educational institutions established by one or more members of any of these communities prior to the commencement of the Constitution would not be entitled to the benefits of Article 30(1). The fallacy of this argument becomes discernible as soon as we direct our attention to Article 19(1)(g) which, clearly enough, applies alike to a business, occupation or profession already started and carried on as to those that may be started and carried on after the commencement of the Constitution. ***There is no reason why the benefit of Article 30(1) should be limited only to educational institutions established after the commencement of the Constitution. The language employed in Article 30(1) is wide enough to cover both pre-Constitution and post-Constitution institutions. It must not be overlooked that Article 30(1) gives the***

minorities two rights, namely, (a) to establish, and (b) to administer, educational institutions of their choice. The second right clearly covers pre-Constitution schools just as Article 26 covers the right to maintain pre-Constitution religious institutions. *As to the third condition mentioned above, the argument carried to its logical conclusion comes to this that if a single member of any other community is admitted into a school established for the members of a particular minority community, then the educational institution ceases to be an educational institution established by the particular minority community. The argument is sought to be reinforced by a reference to Article 29(2). It is said that an educational institution established by a minority community which does not seek any aid from the funds of the State need not admit a single scholar belonging to a community other than that for whose benefit it was established but that as soon as such an educational institution seeks and gets aid from the State coffers Article 29(2) will preclude it from denying admission to members of the other communities on grounds only of religion, race, caste, language or any of them and consequently it will cease to be an educational institution of the choice of the minority community which established it. This argument does not appear to us to be warranted by the language of the article itself. There is no such limitation in Article 30(1) and to accept this limitation will necessarily involve the addition of the words "for their own community" in the article which is ordinarily not permissible according to well established rules of interpretation. Nor is it reasonable to assume that the purpose of Article 29(2) was to deprive minority educational institutions of the aid they receive from*

the State. To say that an institution which receives aid on account of its being a minority educational institution must not refuse to admit any member of any other community only on the grounds therein mentioned and then to say that as soon as such institution admits such an outsider it will cease to be a minority institution is tantamount to saying that minority institutions will not, as minority institutions, be entitled to any aid. ***The real import of Article 29(2) and Article 30(1) seems to us to be that they clearly contemplate a minority institution with a sprinkling of outsiders admitted into it. By admitting a non-member into it the minority institution does not shed its character and cease to be a minority institution. Indeed the object of conservation of the distinct language, script and culture of a minority may be better served by propagating the same amongst non-members of the particular minority community.*** *In our opinion, it is not possible to read this condition into Article 30(1) of the Constitution."*

130. Thus, the judgement in ***Kerala Education Bill*** **[supra]** does not in any way, detract from the position that the factum of establishment by the minority community was a necessary pre-condition to claim rights/protection under Article 30. There was specific emphasis laid by both sides on the phrase '*sprinkling of outsiders*' which shall be further discussed in a subsequent portion of the judgment.

131. The subsequent judicial decisions and the evolving jurisprudence stemming from the rulings of this Court further solidify the legal position articulated above. Another significant

judgment pertinent to the analysis of the rights conferred under Article 30, particularly addressing the issue at hand, is the verdict in ***State of Kerala v. Very Rev. Mother Provincial*, (1970) 2 SCC 417**. Rendered by a bench of six Hon'ble Judges, this judgment emphasizes how the twin rights of "establishment" and "administration" are sequential in nature under Article 30(1). It elucidates that these rights are temporally distinct, with the act of establishment preceding the entitlement to administration. This interpretation is pivotal in comprehending Article 30(1) and underscores that the right to "administer" an institution arises subsequent to its "establishment" by the minority community. The pertinent excerpts from this judgment are cited below for reference:

> *"**8.** Article 30(1) has been construed before by this Court. **Without referring to those cases it is sufficient to say that the clause contemplates two rights which are separated in point of time. The first right is the initial right to establish institutions of the minority's choice. Establishment here means the bringing into being of an institution and it must be by a minority community.** It matters not if a single philanthropic individual with his own means, founds the institution or the community at large contributes the funds. The position in law is the same and the intention in either case must be to found an institution for the benefit of a minority community by a member of that community. It is equally irrelevant that in addition to the minority community others from other minority communities or even from the majority community can take*

> *advantage of these institutions. Such other communities bring in income and they do not have to be turned away to enjoy the protection.*
> *9. The next part of the right relates to the administration of such institutions. Administration means "management of the affairs" of the institution. This management must be free of control so that the founders or their nominees can mould the institution as they think fit, and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best served. No part of this management can be taken away and vested in another body without an encroachment upon the guaranteed right."*

132. Therefore, the "administration" right is available to the minority community which establishes the institution [or 'their nominees'] implying that "establishing" of institution by the minority is necessary. There has been considerable emphasis on part of the Appellants with regard to the use of the term "found" in the aforesaid paragraphs which shall be discussed in the subsequent part of the judgment.

133. Thereafter, the judgement in ***S.P. Mittal v. Union of India*, (1983) 1 SCC 51** rendered by a bench of five Hon'ble Judges, albeit without much discussion on this specific issue, holds that the establishment of an institution by a linguistic or religious minority is necessary for claiming benefit under Article 30(1). The relevant paragraphs are quoted as under :

*"**137.** The impugned Act does not seek to curtail the rights of any section of citizens to conserve its own language, script or culture conferred by Article 29.* ***In order to claim the benefit of Article 30(1) the community must show : (a) that it is a religious or linguistic minority, (b) that the institution was established by it. Without satisfying these two conditions it cannot claim the guaranteed rights to administer it.***

138. *In Re Kerala Education Bill, 1957 [AIR 1958 SC 956 : 1959 SCR 995 : 1959 SCJ 321] Article 30(1) of the Constitution which deals with the right of minorities to establish and administer educational institutions, came for consideration. The Kerala Education Bill, 1957, which had been passed by the Kerala Legislative Assembly was reserved by the Governor for consideration by the President.*

xxx

142. *On an analysis of the two Articles, Article 29 and Article 30 and the three cases referred to above, it is evident that the impugned Act does not seek to curtail the right of any section of citizens to conserve its own language, script or culture conferred by Article 29.* ***The benefit of Article 30(1) can be claimed by the community only on proving that it is a religious or linguistic minority and that the institution was established by it.***

In the view that we have taken that Auroville or the Society is not a religious denomination, Articles 29 and 30 would not be attracted and, therefore, the impugned Act cannot be held to be violative of Articles 29 and 30 of the Constitution."

134. More recently, in the judgement in ***Dayanand Anglo Vedic (DAV) College Trust and Management Society v. State of Maharashtra,*** **(2013) 4 SCC 14,** a Society claimed to have minority status in the State of Maharashtra as it sought to encourage Hindi, which is a linguistic minority in the said State. While examining the question of law, the Court held that the establishment of an institution as a minority institution is necessary to claim rights under Article 30. The relevant portion of the said judgement is quoted as under:

> *"**29.** Similarly, in S.P. Mittal v. Union of India [(1983) 1 SCC 51 : AIR 1983 SC 1] , this Court held that in order to claim the benefit of Article 30, the community must firstly show and prove that it is a religious or linguistic minority; and secondly, that the institution has been established by such linguistic minority.*
>
> *xxx*
>
> ***34. After giving our anxious consideration to the matter and in the light of the law settled by this Court, we have no hesitation in holding that in order to claim minority/linguistic status for an institution in any State, the authorities must be satisfied firstly that the institution has been established by the persons who are minority in such State; and, secondly, the right of administration of the said minority linguistic institution is also vested in those persons who are minority in such State. The right conferred by Article 30 of the Constitution cannot be interpreted as if irrespective of the persons who established the institution in the State for the benefit of persons who are minority, any person, be it non-minority***

in other place, can administer and run such institution."

135. The aforementioned legal position illustrates that this Court has consistently embraced an approach which mandates the initial establishment of an institution as a minority institution by the minority community to assert minority status. This established legal principle has attained the status of *stare decisis*, which is a fundamental pillar of our legal framework.[4] The doctrine of precedent serves to promote certainty, stability, and continuity within our legal system, particularly in matters concerning societal dynamics, religion, minority rights, and fundamental freedoms.

136. The undoubted reaffirmation of this position is palpable in subsequent judicial decisions, notably in the landmark case of ***TMA Pai*** [**supra]**, wherein the Court refrained from providing a response to question 3(a) on the grounds that it did not warrant constitutional scrutiny by 11 Judges perhaps owing to the firmly established legal position. Apart from the fact that ***TMA Pai*** **[supra]** is binding upon us being a judgment delivered by a larger bench of this Court, neither of the parties have argued that a divergent view ought to be taken in the present case.

[4] *Sakshi v. Union of India*, (2004) 5 SCC 518; *Milkfood Ltd. v. GMC Ice Cream Private Ltd.*, (2004) 7 SCC 288 ; *Narinder Singh v. State of Punjab*, (2014) 6 SCC 466 ; *Shah Faesal v. Union of India*, (2020) 4 SCC 1

137. At this stage, another aspect of the matter may be noted. In the formalised education sector, the majority of educational institutions operating through private means are registered as societies under various Acts. This encompasses a significant number of secular/non-minority institutions established as such. Such institutions, whether aided or unaided, in contrast to minority institutions, whether aided or unaided, are subjected to a significantly higher degree of regulation by the State in various aspects, including curriculum, admissions, teacher appointments, and other factors. Consequently, it is evident that private entities administering minority institutions enjoy a notably higher degree of freedom from such regulation. Hence, there exists a pronounced inclination on the part of non-minority institutions to seek minority status.

138. In the backdrop of this clamour for minority status, if minority status is deemed attainable without necessitating the factum of establishment of an institution by the minority at its inception, it may result in a widespread proliferation of institutions claiming to be minority institutions despite not being established as minority institutions. This could be easily achieved by merely amending the rules or Articles of Association of the society to create a semblance of minority control. If the prerequisite of initial establishment by a minority community is deemed dispensable for invoking protection under Article 30, it

would result in a creation of minority institutions, in name only. On the said count as well, it is necessary to treat the criterion of establishment by the minority community, as essential to claim rights/protection under Article 30.

G. MEANING OF "ESTABLISHMENT" AND THE REAL POSITIVE INDICIA BEHIND

G.1 The existing jurisprudence of this Court

139. The two sides have diverged significantly on the aspect of the meaning of the word "establish" occurring in Article 30. The parties challenging the judgment of the High Court and the correctness of the judgment in ***Azeez Basha*** **[supra]** have argued that the term "establish" cannot have a strict meaning to signify 'to bring into existence'. They argue that the word has various other meanings such as 'to ratify', 'to found', 'to confirm', or 'to settle', as defined in numerous dictionaries or utilized in foreign legal contexts. They further argue that the narrow interpretation of 'establish' solely as '*to bring into existence*' lacks justification as it neglects to analyze Article 30(1) within its context, i.e., the safeguarding of minority rights and nullifies the effect of words '*of their choice*' in Article 30(1). It is further argued that the constrained interpretation of 'establish' is against the judgments in ***Very Rev. Mother Provincial*** **[supra]**, which was endorsed by ***TMA Pai*** **[supra]** and argued for a broader interpretation to the term 'establish', implicitly overturning the narrow perspective of

Azeez Basha **[supra]**. It was strenuously argued that the establishment of an educational institution can be ascertained from the 'intention' of the minority community "to found an institution" of their *choice* and "for the benefit of a minority community by a member of that community."

140. The parties defending the judgment asserted that the meaning of the word "establish" under Article 30 has indeed been understood by this Court consistently to mean to bring into existence. They submit that judgment in ***Azeez Basha*** **[supra]** correctly understands the word "establish" in the common sense it connotes. They argue that any minority community seeking to claim rights under Article 30, needs to necessarily prove that an institution in question was actually, tangibly and manifestly *brought into being* by the minority. It was asserted that the right under Article 30 and the factum of "establishment" is not a function of the "intent" of the minority at the said time or the "choice" of the minority at the said time and is a pure question of fact. It was argued that question of "establishment" cannot be satisfied by some limited effort or actions on part of the minority rather it has to be established that the predominant character of the institution and the predominant efforts in establishing the institution was of the minority only. It was argued that to claim protection under Article 30(1) an institution/university should be

predominantly established by the minority, for the minority and administered as a minority institution.

141. In understanding the meaning of the term "establish" occurring under Article 30, the judgment in the case of ***St. Stephens*** **[supra]** rendered by a bench of five Hon'ble Judges, is crucial. In the said case, the dispute arose due to the College, affiliated with the University of Delhi, had a practice of reserving a certain percentage of seats for Christian students in admissions. Furthermore, St Stephens had also formulated an admissions policy that was at variance with the admission policy of the University as a whole. The circulars issued by the University prescribing the admission schedule and procedure were not being followed in St Stephens on the ground that it was a minority educational institution which had the right to frame its own policy for admissions. Certain students challenged the admission policy of St. Stephens College for being divergent from the University policy. They also challenged the preference given by the college to Christian students. In response, the management of St Stephens retired that as a minority institution, it had the right to administer its own affairs, including the selection of students, to some extent. During the arguments, a question arose as to the status of the institution as a minority institution. The judgement points out towards what has been subsequently referred to as the '*real positive indicia*' for any institution to claim to be an

institution established by a minority. The relevant paragraphs of the said judgment are quoted as under:

> *"**28.** There is by now, fairly abundant case law on the questions as to "minority"; the minority's right to "establish", and their right to "administer" educational institutions. These questions have arisen in regard to a variety of institutions all over the country. They have arisen in regard to Christians, Muslims and in regard to certain sects of Hindus and linguistic groups. The courts in certain cases have accepted without much scrutiny the version of the claimant that the institution in question was founded by a minority community while in some cases the courts have examined very minutely the proof of the establishment of the institution.* ***It should be borne in mind that the words "establish" and "administer" used in Article 30(1) are to be read conjunctively. The right claimed by a minority community to administer the educational institution depends upon the proof of establishment of the institution. The proof of establishment of the institution, is thus a condition precedent for claiming the right to administer the institution.*** *Prior to the commencement of the Constitution of India, there was no settled concept of Indian citizenship. This Court, however, did reiterate that the minority competent to claim the protection of Article 30(1) of the Constitution, and on that account the privilege of establishing and maintaining educational institutions of its choice, must be a minority of persons residing in India. They must have formed a well defined religious or linguistic minority. It does not envisage the rights of the foreign missionary or institution, however, laudable their objects might be. After the*

Constitution, the minority under Article 30 must necessarily mean those who form a distinct and identifiable group of citizens of India. Whether it is "old stuff" or "new product", the object of the institute should be genuine, and not devious or dubious. There should be nexus between the means employed and the ends desired. As pointed out in A.P. Christians Educational Society case [(1986) 2 SCC 667 : (1986) 2 SCR 749] there must exist some positive index to enable the educational institution to be identified with religious or linguistic minorities. Article 30(1) is a protective measure only for the benefit of religious and linguistic minorities and it is essential, to make it absolutely clear that no ill-fit or camouflaged institution should get away with the constitutional protection.

xxx

Origin and Purpose of St. Stephen's College

30. *Surprisingly, the Delhi University in the pleading, has neither denied nor admitted the minority character of the College. But the counsel for the University have many things to contend which will be presently considered. Mr Gupta, counsel for the petitioner in T.C. No. 3 of 1980 has specifically urged that the College was established not by Indian residents, but by foreign Mission from Cambridge and therefore, it is not entitled to claim the benefit of Article 30(1). From the counter-affidavit filed by Dr J.H. Hala — the Principal of the College in W.P. Nos. 13213-14 of 1984 and from the publication of "The History of the College" the following facts and circumstances could be noted: The College was founded in 1881 as a Christian Missionary College by the Cambridge Mission in*

Delhi in collaboration with the Society for the Propagation of the Gospel [SPG] whose members were residents in India. The College was founded in order to impart Christian religious instruction and education based on Christian values to Christian students as well as others who may opt for the said education. The Cambridge Brotherhood with plans of establishing the Christian College in Delhi sent the Cambridge Mission whose members were: Rev. J.D. Murray, Rev. E. Bickarsteth, Rev. G.A. Lefroy, Rev. H.T. Blackett, Rev. H.C. Carlyon and Rev. S.S. Allnutt. Of the said members of the Cambridge Mission, Rev. Allnutt, Rev. Blackett and Rev. Lefroy teamed up with Rev. R.R. Winter of the SPG to establish the College. It will be seen that Cambridge Mission alone did not establish the College. ***The Cambridge Mission with the assistance of the members of the SPG who were residents in India established the College.*** *The contention to the contrary urged by Mr Gupta, counsel for the petitioner in T.C. No. 3 of 1980 is, therefore, incorrect.* ***The purpose of starting the College could be seen from the Report of 1878 to the Cambridge Brotherhood and it states "the students after leaving St. Stephen's Mission School joined non-Christian Colleges and lost touch with Christian teachings … the case would be otherwise if we were able to send them from our school to a College, where the teachings would be given by Christian professors and be permeated with Christian ideas."*** *(F.F. Monk in A History of St. Stephen's College, Delhi, Calcutta, 1935, p. 3). In October 1879 the Cambridge Committee expressed the desirability of imparting instruction also in secular subjects. "It was also felt that the influence of the missionaries would be greatly increased if*

they held classes in some secular subjects and did not conform their teachings to strict religious instruction". (ibid p. 5)

Building

31. *Originally, the College building was housed in hired premises paid for by the SPG. A new building was eventually constructed by the Society for the Propagation of the Gospel wherein the foundation stone bore the following inscription:*

To the Glory of God
And the Advancement of Sound
Learning
And Religious Education

The new building of the College was eventually opened on December 8, 1881, by Rev. Allnutt. On the said building on the front of the porch, at the top of the parapet, a 'cross' in bas-relief was placed and immediately under the bracket the words "Ad Dei Gloriam" had been inscribed which have since been adopted as the College motto.

32. *Today the new College building in the University campus has also a large 'cross' at the top of the main tower and in the front porch is inscribed the St. Stephen's motto "Ad Dei Gloriam" to perpetuate and remind the students the motive and objective of the College, namely, "The Glory of God".*

33. *There is also a chapel in the College campus where religious instruction in the Christian Gospel is imparted for religious assembly in the morning.*

34. *It would thus appear that since its foundation in 1881, St. Stephen's College has apparently maintained its Christian character and that would be evident from its very name, emblem, motto, the establishment of a chapel and its religious*

instruction in the Christian Gospel for religious assembly. These are beyond the pale of controversy.

Constitution of the College

35. It is said that during the early part of the College history, it was managed by the Mission Council — a totally Christian body. Late in 1913 it was registered as a society and a constitution was formulated on November 6, 1913 which was adopted by the SPG Standing Committee and by the Cambridge Committee. The Constitution as it stands today again maintains the essential character of the College as a Christian College without compromising the right to administer it as an educational institution of its choice. The Constitution of the College consists of Memorandum of the Society and Rules. Clause 2 of Memorandum states that "the object is to prepare students of the College for University degrees and examinations and to offer instruction in doctrines of christianity which instruction must be in accordance with the teachings of the Church of North India". Clause 4 sets out the original members of the Society who were mostly Christians. The composition of the Society also reflects its Christian character inasmuch as the Bishop of the Diocese of Delhi is the Chairman of the Society [Rule 1(a)]. Further, two persons appointed by the Bishop of the Diocese of Delhi, one of whom shall be a senior Presbyter of the Diocese, shall be members of the Society [Rule 1(b)]. One person to be appointed by the Church of North India Synodical Board of Higher Education shall also be a member of the Society [Rule 1(g)]. Similar is the position of a person to be appointed by the Diocesan Board of Education [Rule 1(h)]. Two persons to be appointed by the Executive Committee of the Diocese, one of whom shall be a

Presbyter, shall also be members of the Society [Rule 1(i)]. ***The composition of the Society, therefore, indicates the presence of a large number of Christian members of the Church of North India on it.***

Management

36. *The management of the College is being looked after by the Supreme Council and the Governing Body. The Supreme Council consists of some members of the Society, all of whom must be members of the Church of North India or some other church in communion therewith, or any other duly constituted Christian church. They are:*

> ***(a) The Bishop of the Diocese of Delhi, who shall be the Chairman.***
>
> ***(b) Two persons appointed by the Bishop of the Diocese [under Rule 1(b)].***
>
> ***(c) The person appointed by the Church of North India Synodical Board of Higher Education [under Rule 1(g)].***
>
> ***(d) The person appointed by the Diocese Board of Education [under Rule 1(h)].***
>
> ***(e) The Principal of the College (Member-Secretary).”***

37. *Rule 3 of the Society provides that the Supreme Council mostly looks after the religious and moral instruction to students and matters affecting the religious character of the College. The Principal of the College is the Member-Secretary of the Supreme Council. Rule 4 provides that the Principal shall be a member of the Church of North India or of a Church that is in communion with the Church of India. The Vice-Principal shall be appointed annually by the Principal. He shall also*

be a member of the Church of North India or of some other church in communion therewith.

38. *True, Rule 5 provides that the Supreme Council of the College has no jurisdiction over the administration of the College and it shall be looked after by the Governing Body.* ***But the Governing Body is not a secular body as argued by learned counsel for the University. Rule 6 provides that the Chairman of the Society (Bishop of Diocese of Delhi) shall be the Chairman of the Governing Body.*** *The members of the Society as set out in categories, (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l) and (m) of clause (1) shall be the members of the Governing Body. The Chairman and the Vice-Chairman of the Governing Body shall be the members of the Church of North India. Out of categories (a) and (m) in clause (1), only category (k) may be a member of the teaching staff who may not be a Christian. Two members referred under category (l) to be appointed by the Delhi University may not be Christian and likewise, under the category (n) may not be Christian. But the remaining members shall be Christians. Out of thirteen categories, only three categories might be non-Christians and therefore, it makes little difference in the Christian character of the Governing Body of the College. A comparison of Statute 30(c) of the Delhi University at pages 127-28 of Calendar Volume I will show the difference between the Governing Body of other colleges under the Statute as contrasted with St. Stephen's College.*

Principal

39. ***It is again significant to note the difference between the method of appointment of the Principal of St. Stephen's College and all other colleges. The Principal of St. Stephen's College is***

appointed by the Supreme Council and he must be a Christian belonging to Church of North India (Rule 4). *He will exercise control, and maintain discipline and regulation of the College. He will be in complete charge of the admissions in the College assisted by admission committee. But the Principals of other affiliated colleges under Ordinance XVIII clause 7(2) [page 335 Calendar Volume I] are to be appointed by the Governing Body of the College.*

40. The immovable property of the College shall be vested in the Indian Church trustees, who shall merely act as Trustees, and shall have no power of management whatsoever. All other property connected with the College shall be vested in the Society *(Rule 21)."*

142. During the examination of the particular college under consideration, the Court observes that the institution was established by missionaries with the primary purpose of providing Christian religious education - as per paragraph 30. It also observes that the assets and property of the college are legally owned by the church - as described in paragraph 40. The Court also notes that at the time of its inception, the college was under the exclusive management of a body composed entirely of Christians - as outlined in paragraph 35. The Court notices that the rules of the institution's society stipulate that all members must be appointed by Christian organizations - as mentioned in paragraph 35. The Court lays specific emphasis on the fact that the administration of the college is also entrusted to a body

comprised entirely of Christians - as indicated in paragraph 36. The Court notes that the Principal of the college holds an ex-officio position and is required to be a Christian - according to paragraph 39. As far as historical factors are concerned, the Court notes that the construction of the college building was commissioned by a minority community and funded by them - as detailed in paragraphs 31-34. In governance, the Court notes that both the Supreme Council and the Governing Body of the college are predominantly constituted of Christians, with 10 out of 13 members belonging to this religious group - as per paragraphs 37-38.

143. As for ***St. Stephens*** **[supra],** both sides have placed considerable reliance on the aforesaid paragraphs to further their respective cases and see the facts surrounding the establishment of AMU from a particular perspective. In any event, from the said analyses in ***St. Stephens*** **[supra]**, it is clear that the question of establishment is not dependent on a singular factor, rather is a culmination of various aspects surrounding the facts leading up to the establishment of the institution and the form of the institution itself. The factors that the Court found relevant in ***St. Stephens*** **[supra]** form jurisprudential basis of the factual enquiry that ought to be carried out by the Court in such matters. However, the said enquiry cannot be straight-jacketed in all cases and the Court ought to suitably modulate the approach suiting the

needs of the institution in question and the nature of the institution. In simple words, a school or a college or a University may require a significant difference in approach while adjudicating the question of "establishment" by the minority community.

144. The judgment in ***A.P. Christians Medical Educational Society v. Government of Andhra Pradesh, (*****1986) 2 SCC 667** is another specific case wherein the Court interrogated the essentials of an institution claiming to be a minority institution. The Court guarded against false schemes in order to claim protection under Article 30. The relevant paragraphs of the said judgement are quoted as under:

> ***"****A brazen and bizarre exploitation of the naive and foolish, eager and ready-to-be-duped, aspirants for admission to professional collegiate courses, behind the smoke-screen of the right of the minorities to establish and administer educational institutions of their choice — is what this case is about. A society styling itself as the 'Andhra Pradesh Christian Medical Educational Society' was registered on August 31, 1984. The first of the objectives mentioned in the memorandum of association of the society was,*
>
> > *"to establish, manage and maintain educational and other institutions and impart education and training at all stages, primary, secondary, collegiate, post-graduate and doctoral, as a Christian Minorities' Educational Institution".*

Another object was

> *"to promote, establish, manage and maintain Medical colleges, Engineering colleges. Pharmacy colleges. Commerce, Literature, Arts and Sciences and Management colleges and colleges in other subjects and to promote allied activities for diffusion of useful knowledge and training."*

Other objects were also mentioned in the memorandum of association. All that is necessary to mention here is that none of the objects, apart from the first extracted object, had anything to do with any minority*. Even the first mentioned object did not specify or elucidate what was meant by the statement that education and training at all stages was proposed to be imparted in the institutions of that society "as Christian Minorities' Educational Institution". Apparently the words "as a Christian Minorities' Educational Institutions" were added in order to enable the society to claim the rights guaranteed by Article 30(1) of the Constitution and for no other purpose. This will become clearer and clearer as we narrate further facts.*

xxx

7. *Even while narrating the facts, we think, we have said enough to justify a refusal by us to exercise our discretionary jurisdiction under Article 136 of the Constitution.* ***We do not have any doubt that the claim of the petitioner to start a minority educational institution was no more than the merest pretence****. Except the words, "as the Christian Minorities' Educational Institutions" occurring in one of the objects of the society, as mentioned in the memorandum of association, there is nothing whatever to justify the claim of the society*

that the institutions proposed to be started by it were 'minority educational institutions'. Every letter written by the society whether to the Central Government, the State Government or the University contained false and misleading statements. As we had already mentioned the petitioner had the temerity to admit or pretend to admit students in the first year MBBS course without any permission being granted by the government for the starting of the medical college and without any affiliation being granted by the University. The society did this despite the strong protest voiced by the University and the several warnings issued by the University. The society acted in defiance of the University and the government, in disregard of the provisions of the Andhra Pradesh Education Act, the Osmania University Act and the regulations of the Osmania University and with total indifference to the interest and welfare of the students. The society has played havoc with the careers of several score students and jeopardised their future irretrievably. Obviously the so-called establishment of a medical college was in the nature of a financial adventure for the so-called society and its office bearers, but an educational misadventure for the students. Many, many conditions had to be fulfilled before affiliation could be granted by the University. Yet the society launched into the venture without fulfilling a single condition beyond appointing someone as Principal. No one could have imagined that a medical college could function without a teaching hospital, without the necessary scientific equipment, without the necessary staff, without the necessary buildings and without the necessary funds. Yet that is what the society did or pretended to do. ***We do not have any doubt that the society***

and the so-called institutions were started as business ventures with a view to make money from gullible individuals anxious to obtain admission to professional colleges. It was nothing but a daring imposture and sculduggery. By no stretch of imagination, can we confer on it the status and dignity of a minority institution.

8. *It was seriously contended before us that any minority, even a single individual belonging to a minority, could found a minority institution and had the right so to do under the Constitution and neither the government nor the University could deny the society's right to establish a minority institution, at the very threshold as it were, howsoever, they may impose regulatory measures in the interests of uniformity, efficiency and excellence of education.* ***The fallacy of the argument insofar as the instant case is concerned lies in thinking that neither the government nor the University has the right to go behind the claim that the institution is a minority institution and to investigate and satisfy itself whether the claim is well-founded or ill-founded. The government, the University and ultimately the court have the undoubted right to pierce the 'minority veil' — with due apologies to the corporate lawyers — and discover whether there is lurking behind it no minority at all and in any case, no minority institution. The object of Article 30(1) is not to allow bogies to be raised by pretenders but to give the minorities 'a sense of security and a feeling of confidence' not merely by guaranteeing the right to profess, practise and propagate religion to religious minorities and the right to conserve their language, script and culture to linguistic minorities, but also to enable all minorities, religious or linguistic, to establish and administer***

educational institutions of their choice. These institutions must be educational institutions of the minorities in truth and reality and not mere masked phantoms*. They may be institutions intended to give the children of the minorities the best general and professional education, to make them complete men and women of the country and to enable them to go out into the world fully prepared and equipped. They may be institutions where special provision is made to the advantage and for the advancement of the minority children. They may be institutions where the parents of the children of the minority community may expect that education in accordance with the basic tenets of their religion would be imparted by or under the guidance of teachers, learned and steeped in the faith. They may be institutions where the parents expect their children to grow in a pervasive atmosphere which is in harmony with their religion or conducive to the pursuit of it.* ***What is important and what is imperative is that there must exist some real positive index to enable the institution to be identified as an educational institution of the minorities. We have already said that in the present case apart from the half a dozen words 'as a Christian minorities' institution' occurring in one of the objects recited in the memorandum of association, there is nothing whatever, in the memorandum or the articles of association or in the actions of the society to indicate that the institution was intended to be a minority educational institution. As already found by us these half a dozen words were introduced merely to found a claim on Article 30(1). They were a smoke-screen****."*

145. The jurisprudence in ***St. Stephens*** **[supra]** and ***A.P. Christians Medical Educational Society*** **[supra]** requires a *real positive indicia* for an institution to claim to have been established by a minority community. Therefore, it is permissible to 'pierce the veil' in order ascertain the real character of the institution and claims of minority status cannot be bestowed on illusionary claims. This ruling serves as a cautionary reminder that granting the right to administer educational institutions without the prior establishment by minorities could result in unwanted constitutional outcomes. The concerns expressed by the Court could materialize, potentially resulting in a widespread "takeover" of institutions by groups claiming minority status through creative interpretations to seek protection under Article 29 and 30.

146. After delving in to the finer details of the vexed constitutional question and the meaning of the term "establish", it would serve a salutary purpose if one analyses the approach adopted by this Court as and when any institution approached it. In the case of ***Rev. Father Proost v. State of Bihar*****, (1969) 2 SCR 73**, with a bench consisting of five Judges, the Court acknowledges that the institution in question was established by the Catholic minority before extending the safeguards provided under Article 30. The relevant portion of the judgment is as under:

*"**2.** **St. Xavier's College was established by the Jesuits of Ranchi**. It was affiliated to Patna University in 1944. The management of the College vests in a Governing Body consisting of 11 members. They are:*

> *"(i) The Superior Regular of Ranchi Jesuit Mission — President exofficio.*
>
> *(ii-v) Four Counsellors to the Superior Regular to be nominated by the Jesuit Mission authorities.*
>
> *(vi) The Principal of the College — Vice-President and Secretary ex-officio.*
>
> *(vii) One representative of the teaching staff of the College elected by the members of the staff.*
>
> *(viii) One representative of the Patna University.*
>
> *(ix-xi) Three persons to represent Hindu, Muslim and Aboriginal interests."*

The terms of service of religious staff are determined by the Jesuit Mission Authorities, but those of the members of the lay staff including their appointment are determined by the Governing Body. All appointments to the teaching staff, both religious and lay are reported to the Syndicate of the Patna University. The object of founding the College inter alia is "to give Catholic youth a full course of moral and liberal education, by imparting a thorough religious instruction and by maintaining a Catholic atmosphere in the institution". The college is, however, open to all non-catholic students. All non-catholic students receive a course of moral science.

2. *The College was thus founded by a Christian minority and the petitioners claim they have a right*

to administer it a constitutional right guaranteed to minorities by Article 30.

xxx

12. We are, therefore, quite clear that St. Xavier's College was founded by a Catholic Minority Community based on religion and that this educational institution has the protection of Article 30(1) the Constitution. For the same reason it is exempted under Section 48-B of the Act. The petition will therefore be allowed with this declaration but in the circumstances of the case we make no order about costs."

147. In ***Right Rev. Bishop S.K. Patro v. State of Bihar*, (1969) 1 SCC 863** [bench of five Judges], a challenge was laid to an order of the Deputy Director of Education which imposed an obligation on the school to constitute a managing committee to control, administer and manage its affairs. During the discussion, the Court assessed various factors and evidence to ascertain the institution's status as a minority establishment, highlighting the significance of the funding source during its inception. The relevant paragraphs are quoted as under :

*"**8.** It was the case of the State and the parties intervening in the writ petition before the High Court that the school was established by the Church Missionary Society, London, which they claimed was a Corporation with an alien domicile and "such a society was not a minority based on religion or language" within the meaning of Article 30 of the Constitution. On behalf of the appellants in the*

appeal and the petitioners in the two writ petitions filed in this Court, it is claimed that the School was started in 1854 by the local Christian residents of Bhagalpur. They concede that the Church Missionary Society of London did extend financial aid in the establishment of the School, but they contend that on that account, the School did not cease to be an educational institution established by a religious minority in India.

9. *There is on the record important evidence about establishment in 1854 of the Lower Primary School at Bhagalpur. It is unfortunate that sufficient attention was not directed to that part of the evidence in the High Court. The "Record Book" of the Church Missionary Association at Bhagalpur which is Annexure 'D' to Writ Petition No. 430 of 1968 furnishes evidence of vital importance having a bearing on the establishment of the School. It contains copies of letters written from Bhagalpur and minutes of meetings held and the resolutions passed by the Local Council of Bhagalpur. On June 1, 1948, Rev. Vaux informed the Calcutta Corresponding Committee of the Church Missionary Society by a letter that if the Calcutta Society were to establish a School at Champanagar, "local assistance shall not be wanting to the extent of 1000 or 1200 rupees a year, besides providing a school house and residence for the master", and that "At first, for breaking up the fallow ground and setting the school a going the presence of a Missionary of tact and experience may be necessary". On June 26, 1848, Rev. Vaux by another letter informed the Calcutta Corresponding Committee that a special service was held in the Church on June 22, 1848 and thereafter on Friday, June 23, 1848, a meeting was held and contributions*

were invited from persons present including Indian residents, that monthly subscriptions of Rs 202 for the "salary of masters" and other expenses were promised, and that an amount of Rs 1647 was donated for building the school and residence for the master; that the general impression made was so favourable to the cause that he felt justified in assuring the Calcutta Committee that the local Committee were in a position to guarantee certain requisites for making a commencement such as payment of the salary of the School Master and Mistress and the building of a house for their accommodation which may afterwards be enlarged so as to form a suitable residence for a Mission.

10. *By letter, dated July 10, 1848, the Secretary, Calcutta Corresponding Committee, informed Rev. Vaux that they were looking out for a prominent person to commence missionary operations by opening a School "which is indeed a common way of beginning a Mission." In a letter, dated December 22, 1848, written from Bhagalpur it was stated:*

> *"The Society will provide for the Missionary's salary and trust that local funds will provide a residence for him of a suitable kind. All other Mission requirements, such as school teachers etc. should be left to be provided on the spot."*

11. *Then there are minutes of the resolutions passed at a meeting held on October 24, 1849, by the Parent Committee and another resolution, dated October 25, 1851, of the Local Committee, to raise funds, and to determine upon disbursements with the advice of the Missionary to promote the objects of the Mission. In the minutes of the meeting, dated*

> *October 25, 1851, it is recorded that a statement of account of receipts and disbursements up to September 30, 1851, including expenses of a boys' school and salary of masters, "hire of school rooms and furniture" and expenses of a girls' school "including cost of working materials up to date" was submitted.*
>
> ***xxx***
>
> ***15. It appears from this correspondence and the resolutions and the discussions at the meetings that a permanent home for the Boys' School was set up in 1854 on property acquired by local Christians and in buildings erected from funds collected by them. The institution along with the land on which it was built and the balance of money from the local fund were handed over to the Church Missionary Society in 1856. It is also true that substantial assistance was obtained from the Church Missionary Society, London. But on that account, it cannot be said that the School was not established by the local Christians with their own efforts and was not an educational institution established by a minority****."*

148. Thus, this Court affirmed that the protection afforded by Article 30 extends to institutions established before the Constitution following the dictum in ***Kerala Education Bill*** **[supra]**. The Court scrutinized why the institution in question merits recognition as a minority institution, with particular emphasis on examining whether the minority was predominantly involved in its establishment.

149. In ***D.A.V. College v. State of Punjab*, (1971) 2 SCC 269**, the Court expressly notes that the institution in question was established by a community which was minority within the confines of the State of Punjab. Similarly, in ***Ahmedabad St. Xavier's College Society v. State of Gujarat*, (1974) 1 SCC 717**, J. H.R. Khanna's opinion notes that the college in question was established, at the time of its inception, by the minority. Similarly, in ***Gandhi Faiz-e-am-College v. University of Agra*, (1975) 2 SCC 283**, the Court, while extending rights under Article 30, notes that the institution claiming protection was expressly established by the minority.

150. The said approach has been consistently adopted over the past five decades after the judgment in ***Azeez Basha*** **[supra]** [See ***Rt. Rev. Msgr. Mark Netto v. State of Kerala*, (1979) 1 SCC 23**; ***Lily Kurian v. Lewina*, (1979) 2 SCC 124**; ***Christian Medical College Hospital Employees' Union v. Christian Medical College Vellore Association*, (1987) 4 SCC 691**; ***Al-Karim Educational Trust v. State of Bihar*, (1996) 8 SCC 330; *Yunus Ali Sha v. Mohamed Abdul Kalam*, (1999) 3 SCC 676; *Society of St. Joseph's College v. Union of India*, (2002) 1 SCC 273**; ***Secy., Malankara Syrian Catholic College v. T. Jose*, (2007) 1 SCC 386; *Satimbla Sharma v. St Paul's Senior Secondary School*, (2011) 13 SCC 760**].

151. In ***P.A. Inamdar v. State of Maharashtra*, (2005) 6 SCC 537**, seven Hon'ble Judges, were called upon to interpret the judgment in ***TMA Pai*** **[supra]**. While the said inquiry primarily focused on the scope of regulations viz aided/unaided minority institutions, nevertheless, the bench reaffirmed the observations that the determination of whether an institution qualifies as a minority institution, and its character at the time of establishment, should be evaluated against the criterion that it must be envisaged primarily as a minority institution placing reliance on ***Kerala Education Bill*** **[supra]**.

152. Through a survey of the case law cited above, it can be seen that the Court has adopted a varied approach is determining the criteria for discerning the true character of an institution at the time of its establishment. In order to arrive at a finding that an institution was established by the minority for the purposes of Article 30, it has been held that such institution must principally embody a minority character and be instituted to safeguard the minority language, culture, or religion. In some situations, there has also been a specific emphasis on the source of funding being from the minority community or the fact that the management of lands should eventually vest with the minority. Further, the presence of some non-minorities in administration has not been held detrimental if the actual authority rests with the minority community.

G.2 The founding moment or the genesis argument

153. The Appellants have argued that the word "establish" is to be interpreted broadly and would include the parallels drawn with generic phrases such as "genesis of the institution" or the "founding moment of the institution". With regard to the claim that the word "establish" and "found" can be used interchangeably thereby according it with a wider and more generalised meaning, it can be noticed that the Court as a matter lexical variation may have used the terms interchangeably, however, the constitutional meaning of the term cannot be diluted on that count. This is because the word "establish" as used in the Constitution carries a specific meaning. The meaning of the terms occurring in the Constitution ought to have a specific meaning especially when the same occurs under Part III of the Constitution.

154. This Court has consistently held that when the words of a provision are clear and there exists no ambiguity, the same ought to be given their plain and simple meaning. The assertion on part of the Appellant that "establish" ought to be given a wider meaning owing to the context in which it occurs is also unmerited on the same count. It must be noted that the right under Article 30 is an important and exceptional right/protection extended by the Constitution to a specific class, for a specific purpose, in a particular circumstance. The extension of the same over and

beyond what the Constitution contemplates would dilute the constitutional guarantee itself and would be counter-productive to the interests of the minorities themselves.

155. As held by this Court, the objective of Article 30 is not to afford a false sense of security and confidence to pretenders posing as minorities. It was for this reason that this Court in ***A.P. Christian Medical Educational Society*** **[supra]** cautioned against what it referred to as *masked phantoms*. It is imperative to interpret the Constitution in a manner that ensures the sacred protection under Article 30 is extended only to institutions genuinely representing the minority community, in substance and not merely in appearance.

156. From the above it is amply clear that the meaning of the word "establish" under Article 30 has indeed been understood by this Court consistently to mean '*to bring into existence*'. The meaning of "establish" in **Black's Law Dictionary 6th Edn.** is as under:

> *"xxx*
>
> *(3) To found, to create, to regulate; as: "Congress shall have power to establish post-roads and post-offices."*
> *(4) To found, recognize, confirm, or admit; as: "Congress shall make no law respecting an establishment of religion."*
> *(5) To create, to ratify, or confirm; as: "We, the people," etc., "do ordain and establish this constitution."*

> *To settle or fix firmly; place on a permanent footing; found; create; put beyond doubt or dispute; prove; convince.*
> *To bring into being; to build; to constitute; to create; to erect; to form, to found; to found and regulate, to institute, to locate; to make; to model; to organize; to originate; to prepare; to set up."*

157. Similarly, the *Webster's Third New International Dictionary* defines "establish" as – "To bring into existence, create, make, start, originate, found or build as permanent or with permanence in view". The *P.Ramanatha Aiyer's Law Lexicon* defines it as – "*To found, recognize, confirm or admit, to make or form*". The *Black's Law Dictionary, 9th edition* defines it as – "*to settle, make or fix firmly, to enact permanently, to make, form or bring into existence*." The *Bouvier Law Dictionary* defines it as – "*Creation or authorization of an operation or institution. Establishment is the act of creating or recognizing in law or in fact any institution, office, place or person so that the person or thing established has an authority or certain privileges that are recognized by others*". The *Oxford Dictionary of English* defines it as – "*To set up on a firm or permanent basis, initiate or bring about.*" The *Collins English Dictionary and Thesaurus* defines it as – "*To create or set up*". The common thread amongst all the said definition is that "establish" refers to the creation or bringing in to being of a body/institution. It refers to the action or process which involves creation of a new entity. In light of these

considerations, a minority community seeking to assert rights under Article 30 must substantiate that the institution in question was indeed physically, demonstrably, and conclusively brought into existence by the minority.

158. The Appellants urged that the establishment is equivalent to a 'founding moment' in order to further their stance on the facts surrounding MAO College and AMU. This fundamentally ignores the understanding of "establishment" as establishment is not a *moment* rather establishment is a *process*. A process consists of various factors and forces at play, the culmination of which result in the creation of the institution. A moment connotes a singular act or just an idea which, in the opinion of this Court, would not suffice the enquiry under Article 30. A process is a complex sequences of events and actions/inactions on part of various stakeholders which were relevant in the history of the institution at the point of establishment.

159. Further, in cases wherein there are multitude of forces and multiple stakeholders involved during establishment of an institution, the judicial inquiry would have to be suitably calibrated. The Court, in such situations, ought to take a holistic view of the matter and decide the question on totality of factors. The Court needs to weigh the factors and contributory forces in the balance in order to ascertain whether the minority community

was the primary force behind the bringing in to being of the institution.

G.3 Relevance of "choice" and "intent" in the question of establishment

160. At this juncture, it is necessary to understand the meaning of the term "choice" occurring in Article 30 of the Constitution. The term choice, is representative of the decision of minority community as to the nature of the institution it seeks to establish. The choice therefore could be to establish a technical institution, an arts institution, an institution for religious teaching or even a minority institution with largely secular teaching. The "choice" is therefore operationalised by the decision of the minority as to the kind of institution that the minority seeks to establish.

161. In ***Ahmedabad St. Xavier's College Society and Ors. v. State of Gujarat and Ors.*, (1974) 1 SCC 717**, this Court refers to this aspect of "choice" as under :

> *"96. xxx*
> *Clause (1) of Article 30 also contains the words "of their choice". These words which qualify "educational institutions" show* ***the vast discretion and option which the minorities have in selecting the type of institutions which they want to establish.*** *In case an educational institution is established by a* ***minority to conserve its distinct language, script or culture, the right to establish and administer such institution would fall both under Article 29(1) as well as under Article 30(1)****. The minorities can, however, choose to establish an*

educational institution which is purely of a general secular character and is not designed to conserve their distinct language, script or culture. The right to establish and administer such an institution is guaranteed by Article 30(1) and the fact that such an institution does not conserve the distinct language, script or culture of a minority would not take it out of the ambit of Article 30(1)."

162. The "choice" therefore, is with regard to the type of the institution and cannot be conflated with the "administration" of an institution. The assertion that once the choice includes having secular education in the institution, it would be necessary that non-minority persons are appointed for the purposes of teaching and administration is only partially correct. Indeed, when a minority seeks to provide secular education it would have to appoint non-minority teachers and some administration from outside the community, however, the same cannot mean that even the major decision-making, managerial and superior administrative setup can be "outsourced" by the minority. The lower rungs of administration and the teaching staff may certainly be of a non-minority character however, the higher echelons of administration and policy decision making of the institution ought to be in the hands of the minority community to claim minority status. Further, the "intent" of the minority community unless expressed and actually exercised as the "choice", cannot govern the question of establishment.

163. The constitutionally sustainable approach qua the question of "establishment" therefore, cannot hinge only upon the "intent" or "choice" of the minority at the time. The intent and choice may be relevant only to a limited extent and cannot be the controlling factors in the judicial enquiry for determining the question of establishment. The question of establishment is to be adjudicated from a multitude of factors as noticed above and cannot be inferred from bald assertions regarding the "wishes" or "choices" or "efforts" of a minority community.

164. The question of establishment would constitute a factual inquiry to ascertain the predominant forces behind the *bringing in to being* of an institution. Admittedly, the admission or taking help of other members of other communities would not be fatal, but the prominence must be of the minority community in major aspects of the institution. The primary character of the institution and the predominant efforts in its establishment ought to originate from the minority community and must culminate [*come in to being*] through the said community. The "choice" and "wishes" during the *process* of establishment – if not accepted, would clearly indicate that the concerned minority community was not the predominant force behind the institution.

G.4 The nature of administration at the time of establishment

165. The Appellants urge that it is open for a minority community, while exercising *its* choice, to hire teacher and other

administrative staff from non-minority community while establishing a minority institution. There cannot be any doubt with regard to the said proposition however, while the teaching and administrative staff may be drawn from any community, the Court needs to be ultimately ascertain whether such a choice of having a secular staff was exercised by the minority community or was enforced by other stakeholders who were involved in the process of establishment. If the position is the latter, the same would have a significant bearing on the adjudication of the question at hand.

166. At this juncture, it is necessary to understand the meaning of the term "administration" in Article 30. Further, it is important for the Court to delineate the distinction between administrative and academic setup in the concerned institution. The administrative and academic authorities within an educational institution are functionally distinct. The judgment of this Court in ***Ahmedabad St. Xavier's College Society*** **[supra]**, provides some assistance in this regard. The relevant portion of the said judgement is quoted as under :

> *"19. The entire controversy centres round the extent of the right of the religious and linguistic minorities to administer their educational institutions. The right to administer is said to consist of four principal matters.* ***First is the right to choose its managing or governing body.*** *It is said that the founders of the minority institution have faith and confidence in their own committee or body*

consisting of persons elected by them. ***Second is the right to choose its teachers.*** *It is said that minority institutions want teachers to have compatibility with the ideals, aims and aspirations of the institution.* ***Third is the right not to be compelled to refuse admission to students****. In other words, the minority institutions want to have the right to admit students of their choice subject to reasonable regulations about academic qualifications.* ***Fourth is the right to use its properties and assets for the benefit of its own institution****.*

40. ..... The right to administer is the right to conduct and manage the affairs of the institution. This right is exercised through a body of persons in whom the founders of the institution have faith and confidence and who have full autonomy in that sphere. The right to administer is subject to permissible regulatory measures. Permissible regulatory measures are those which do not restrict the right of administration but facilitate it and ensure better and more effective exercise of the right for the benefit of the institution and through the instrumentality of the management of the educational institutions and without displacing the management. If the administration has to be improved it should be done through the agency or instrumentality of the existing management and not by displacing it. Restrictions on the right of administration imposed in the interest of the general public alone and not in the interests of and for the benefit of minority educational institutions concerned will affect the autonomy in administration.

> *41. Autonomy in administration means right to administer effectively and to manage and conduct the affairs of the institutions. The distinction is between a restriction on the right of administration and a regulation prescribing the manner of administration.* ***The right of administration is day to day administration. The choice in the personnel of management is a part of the administration****."*

167. Similarly, ***TMA Pai*** **[supra]** considered the essential elements of the 'right to administer' [although under the heading "Private unaided non-minority educational institutions"] as follows:

> *"50. The right to establish and administer broadly comprises the following rights:*
> *(a) to admit students;*
> *(b) to set up a reasonable fee structure;*
> *(c) to constitute a governing body;*
> *(d) to appoint staff (teaching and non-teaching); and*
> *(e) to take action if there is dereliction of duty on the part of any employees."*

168. Therefore, "administration" and its link with the question of establishment is to be ascertained by locating who exercised the "choice" with regard the crucial aspects of an institution and to what extent was the minority's decision making expressed in the tangible outcomes at the time of establishment. It is at this point that the "choice" of the minority marries itself with the "administration" by the minority community. As stated above, the choice can be said to have been exercised by the minority

community, if the minority community is present in some higher echelons of the administrative setup. Such positioning of the minority community would, in fact, enable the community to exercise its "choice" as the said choice is a function of the decision making of the minority community. If the minority community is not the decision maker in offices of prominence in the institution, the offices which hold the keys to giving character to the institution, the claim of administration or establishment by the minority community would fall flat.

G.5 Locating the real positive indicia

169. In light of the above, in discerning real positive indicia for adjudging the question of establishment, there cannot be a rigid formula; rather, it would rely on various factors depending on the era, type, and nature of the institution under consideration. The following broad parameters can be culled out from the judgments and may be considered by the Court while adjudicating the question of establishment :

i. Firstly, to claim "establishment", the minority community must actually and tangibly bring the *entirety* of the institution into existence. The role played by the minority community must be *predominant*, in fact almost complete to the point of exclusion of all other forces. The indicia which may be illustrative and exhaustive in this regard may be nature of the institution, the legal/statutory basis

required for establishing the institution, whether the establishment required any "negotiation" with outside forces, the role in acquiring lands, obtaining funds, constructing buildings, and other related matters must have been held completely minority community. Similarly, while teachers, curriculum, medium of instruction, etc. can be on secular lines, however, the decision-making authority regarding hiring teachers, curriculum decisions, medium of instruction, admission criteria, and similar matters must be the minority community. The choice of having secular education in the institution must be made expressly by the minority community, demonstrating the link between institution and the persons claiming to establish it.

ii. Secondly, the purpose of the institution must have been to predominantly serve the interests of the minority community or the sole betterment of the minority community, irrespective of the form of education provided and the mode of admission adopted. Therefore, as per the choice of the minority community, an institution may have secular education, but such secular education and the resultant institution, must be predominantly meant for the overall betterment of the minority community.

iii. Thirdly, the institution must be predominantly administered as a minority institution with the actual functional, executive and policy administration vested with the minority. The minority community should determine the selection, removal criteria, and procedures for hiring teaching, administrative staff, and other personnel. The authority to hire and fire staff must be from the minority community. Further, even if teaching or administrative staff may include non-minority persons, the final authority exercising functional, directional, and policy control over these authorities must be from the minority community. This ensures that the thoughts, beliefs, and ideas of the minority community regarding administration are implemented. This represents the real decision-making authority of the institution being the minority community.

170. In ascertaining the aforesaid, it would be open for the Court look at the true purpose behind each of the above factors. The apprehensions expressed in ***A.P. Christian Medical Educational Society*** **[supra]**, enable the Court to *pierce the veil* to determine answers to the factors mentioned above.

171. It is reiterated that the factors mentioned above are not a straight-jacket formula rather illustrative for the Court to develop on a case-to-case basis. Additionally, factors such as

incorporation under a statute as opposed to establishment under a statute would be relevant. The context may vary between pre-Constitution and post-Constitution institutions. The interpretative exercise must be agnostic to generic claims of a 'narrow' or 'broad' construction of constitutional terms. The interpretation must be such that it serves the interests of minorities by protecting genuine minority institutions.

H. THE AZEEZ BASHA JUDGMENT

H.1 The content of the judgment of Azeez Basha [supra]

172. The judgment of the constitution bench of this Court in ***Azeez Basha*** **[supra]** is the cynosure of all eyes in the present case. The parties attacking the judgment of the High Court assert that the approach adopted by the Court in ***Azeez Basha*** **[supra]** to arrive at the finding that the AMU was "neither established nor administered by the Muslim minority" was fraught with errors. Apart from other aspects discussed hereinabove, the judgment was questioned on the ground that it made the rights under Article 30 illusionary as far as Universities are concerned. It was argued that the judgment in ***Azeez Basha*** **[supra]**, despite accepting that a minority community has the right to establish a 'university' under Article 30(1), held that since a university is necessarily required to be established/incorporated by or under a statute, Article 30(1) would not apply. It was also argued that if a minority can establish a university under Article 30(1), and if

universities are required to be incorporated under a statute for degrees to be recognised, then it must follow that the minority community is entitled to seek incorporation of its institution as a university. It was argued that ***Azeez Basha*** **[supra]** holds that a university incorporated by a statute would lose its status as a minority institution and therefore, the reasoning is flawed.

173. The parties defending the judgment of the High Court, in this regard assert that the understanding of the Appellants of the judgment in ***Azeez Basha*** **[supra]** is incorrect as the judgment is not merely premised on the fact that the AMU was established by way of a statute rather the said judgment, in depth, studies the antecedent facts prior to the establishment of the university and the nature of the legislation establishing the university, to ascertain the character of the university at the time of its initial establishment, and thereafter arrives at a factual finding. It is argued that the findings of the judgment in ***Azeez Basha*** **[supra]** are findings of fact at the time of the establishment of the AMU in 1920 and do not lay down any straightjacket formulation of law.

174. Before adverting the countering versions, it is necessary to study the judgment in ***Azeez Basha*** **[supra]**. The judgement can be divided in ten parts. In the first part, the Court notes the broad parameters of challenge before it and the principal arguments by both sides. The Court notes that amendments made to the AMU

Act, 1920 in the years 1951 and specifically 1965, were impugned before it. The Court noted assertion of the Petitioners therein, to the effect that, the AMU was established by the Muslim minority. It was claimed that therefore, the Muslim minority possess the right to administer it, and any provisions within the Acts of 1951 and 1965 that diminish or curtail this right are beyond the scope of Article 30(1) and hence, invalid. The argument of the Union of India at the said time was that the AMU was established by the 1920 Act and therefore, the Parliament possessed the authority to amend that statute as deemed necessary for the advancement of education. It was argued that the minority did not establish the AMU and thus cannot assert the right to administer it. Furthermore, it was contended that the provision in the 1920 Act, stipulating that the Court of the AMU was to be composed entirely of Muslims, did not confer any administration rights upon the Muslim community and the administration remained under the jurisdiction of the secular authorities established by the 1920 Act.

175. The next part of the judgment notes in some detail the history prior to the AMU coming in to being. The said portion is relevant as it represents a specific, fact-based enquiry that the Court carried out. The Court noted that it was "*necessary to refer to the history*" prior to the establishment of the AMU in 1920 in order to "*understand the contentions raised on either side*". The

Court notes the establishment of the MAO College by efforts of Sir Syed Ahmad Khan. The Court notes that the at the end of the 19th century, the idea of establishing a Muslim University gathered strength and by 1911 some funds were collected and a Muslim University Association was established. The Court referred to the parleys that took place between the Association and the Government of India, the condition to collect funds by the Government, and the MAO College and its properties being vested in the proposed university. The Court notes a variety of factors which led to the establishment of the Aligarh University in 1920 by the 1920 Act.

176. In the next part, the Court refers to the provisions of the 1920 Act to ascertain the character of the AMU when it was established in 1920. The Court refers to a large number of sections, including Section 23, which provided for the 'Court' to be a minority body [along with the comment of the Select Committee on the same]. After a detailed analysis of the provisions, ***Azeez Basha*** **[supra]** concludes that the '*final power in almost every matter of importance*' was not with the minority community.

177. Thereafter, the Court discusses the amendments made to the 1920 Act in 1951 and 1965. It specifically notes the amendments made to Section 9 and Section 23 which deal with Islamic education and the all-Muslim member 'Court', wherein

the provisions were altered. It noted that the amendments were made in 1951 to specifically bring the 1920 Act in conformity with the provisions of the Constitution and for the benefit of the University so that it could continue to receive aid from the Government. For the 1965 amendments, it was noted that the 'Court' under Section 23, ceased to be the supreme governing body and the powers of the Executive Council were correspondingly increased. The constitution of the 'Court' was drastically changed making it largely a nominated body.

178. In the next portion, the Court discussed the legal challenge and the position of law under the Constitution. The Court squarely rejects the argument that even though the religious minority may not have established the educational institution, it will have the right to administer it, if by some process it had been administering the same before the Constitution came into force. It held that the '*minority will have the right to administer educational institutions of their choice provided they have established them, but not otherwise*' and that '*words "establish and administer" in the Article must be read conjunctively*'. The Court then referred to certain observations ***Durgah Committee, Ajmer v. Syed Hussain Ali*, (1962) 1 SCR 383**, wherein it was held that even if it be assumed that a certain religious institution was established by a minority community it may lose the right to administer it in certain circumstances.

179. In the next part of the judgment, the Court contextualised the position of educational institutions and specifically Universities in the pre-Constitution and pre-UGC era. The Court notes that a University and a college are different institutions and what distinguishes a university from any other educational institution is that a university grants degrees of its own while other educational institutions cannot. Most critically, the Court noted that at the said time, there was no prohibition against establishment of universities privately however, the degrees of such a "University" would not be recognised by the then British Indian Government. The non-recognition was non-justiciable as establishment of a Government recognised was only through a legislation and there existed no Article 30 or fundamental rights before 1950. The Court emphasized the importance of the recognition from the then Government as it made the value of degree being awarded by such an institution higher. The Court noted that it was only in the year 1956, that the University Grants Commission Act, 1956, prohibited establishment of a University without a statute.

180. In essence, in this critical part of the judgement, the Court noted the two important considerations as under :

i. There was no law prohibiting establishment of a private institution which grants degree without Government intervention or legislation prior to 1956;

ii. The educational institution established with Government intervention and legislation had a significant advantage of British Government's recognition to the degree granted by the institution.

It was this simple understanding of facts as prevalent in pre-Constitution India, that formed the fulcrum of the judgment in ***Azeez Basha*** **[supra]**.

181. On the basis of the said observations, the Court held that the minority community was not prevented in any manner in 1920 from establishing a university if it was not interested in having such University and its degrees recognised by the British Indian Government. The Court also noted that in such a situation, the minority community could not insist that degrees granted by such a university should be recognised by Government. Therefore, on the said basis the Court remarked that when the AMU was established, by virtue of Section 6 of the 1920 Act, its degrees were recognised by Government and in that manner, an institution was brought into existence which could not be brought into existence by any private individual or body.

182. In the next portion, the Court referred to the MAO College as the 'nucleus' of AMU – an expression which has caused considerable controversy in the present proceedings. The Court thereafter notes that the Central Legislature established the AMU through the 1920 Act as the minority could not establish a

university whose degrees were bound to be recognised by Government and that one circumstance was critical. The Court notes that the 1920 Act was passed as a result of the efforts of the Muslim minority but it would not mean that the AMU, as a University granting government recognised degrees in 1920, was established by the Muslim minority.

183. In the next part, the Court renders its opinion on the meaning of the word ‘establish’ to mean "to bring into existence". On the basis of the said meaning, the Court thereafter again ventured into the history surrounding the establishment of the AMU. The Court notes through a historical analysis that the minority community approached the Government to bring into existence a university whose degrees would be recognised by Government. It was thereafter that the British Government took the decision to establish the university, whose degrees it would recognise, in the only manner known to law for establishing such a university at the said time – by passing a legislation. The Court notes that the 1920 Act was then passed by the Central Legislature and the university of that type was established.

184. Thus, the Court held that the University was brought into existence by the 1920 Act for it could not have been brought into existence otherwise. Thus, the Court held that since AMU was not established by the minority, and therefore, the amendments

of 1951 and 1965 cannot be struck down as being unconstitutional under Art. 30(1).

185. Finally, the Court in ***Azeez Basha*** **[supra]**, analyses various provisions of the Act as it then existed and held that administration was also not vested in the Muslim minority rather it was vested in the statutory bodies created by the 1920 Act. It noted that only the 'Court' was minority only body in 1920 [amended in 1951], but the electors for some of the members included non-minorities. On the totality of the factors, the Court held that AMU was neither established nor administered by the minority. The remaining part of the judgment considers the attack on other fundamental rights like Article 26 and Article 19, which may not be germane to the present enquiry.

H.2 The rationale behind the findings

186. This Court has consistently held that the text, context and the totality of the factors, give actual meaning to a judgment. In ***P.S. Sathappan v. Andhra Bank Ltd. & Ors.*****, (2004) 11 SCC 672**, this Court has held as follows:

> *"144. While analyzing different decisions rendered by this Court, an attempt has been made to read the judgments as should be read under the rule of precedents. A decision, it is trite, should not be read as a statute. 145. A decision is an authority for the questions of law determined by it. While applying the ratio, the court may not pick out a word or a sentence from the judgment divorced from the*

context in which the said question arose for consideration. A judgment as is well-known, must be read in its entirety and the observations made therein should receive consideration in the light of the questions raised before it."

In ***Goan Real Estate & Construction Ltd. & Anr. v. Union of India, (2010) 5 SCC 388****, it has been held as under :*

"What is more important is to see the issues involved in a given case, and the context wherein the observations were made by the Court while deciding the case. Observation made in a judgment, it is trite, should not be read in isolation and out of context. It is the ratio of the judgment, and not every observation made in the context of the facts of a particular case under consideration of the court, which constitutes a binding precedent."

187. The Court needs to conduct a careful exercise in ascertaining the true purport and meaning of a judgement. Both sides in the present case have to an extent tried to read the judgment in ***Azeez Basha*** **[supra]** as per their own respective conveniences. As is the case in any adversarial exercise, to an extent, the Court needs to reconcile the varying approaches. The judgment in ***Azeez Basha*** **[supra]** ought to be understood in the correct historical perspective in order to ascertain if it lays down the proposition - that whenever a University is established by way of an enactment, it cannot be a minority institution.

188. From a proper reading presented above, it is incorrect to suggest that the Court in ***Azeez Basha*** **[supra]** adopts an approach which this Court has not adopted in future cases. It is also crucial to note that apart from ***Azeez Basha*** **[supra]** this Court has, in no other case, ever dealt with a situation where a University, which was established by the Legislative Council during the British period, has claimed minority status. In that sense, the judgment in ***Azeez Basha*** **[supra]** and present bench are faced with a unique situation. It is for this reason, the Court in ***Azeez Basha*** **[supra]** had to adopt a suitably modulated approach.

189. The notion that ***Azeez Basha*** **[supra]** categorically prohibits minorities from establishing universities due to statutory requirements is unfounded. The judgment in ***Azeez Basha*** **[supra]** underscores the importance of legislative intent and the specific provisions within statutes in determining the character of an institution at the time of its establishment. The AMU's founding legislation, according to ***Azeez Basha*** **[supra]**, did not designate it as a minority institution, either in character or administration.

190. Furthermore, the judgment in ***Azeez Basha*** **[supra]** correctly emphasizes the absence of UGC regulations at the time of the AMU's establishment and underscores the need to consider historical circumstances highlighting the supreme importance of

Government recognition of degrees at the said time. In essence, the judgement in ***Azeez Basha*** **[supra]** provides crucial insights into the contextual factors influencing the establishment of educational institutions, emphasizing the need for interpretative clarity while considering pre-Constitution and pre-UGC institutions status as minority institutions, especially Universities. It would be unfair to judge the approach of a judgement rendered almost six decades back for the alleged lack of verbosity.

191. The judgment in ***Azeez Basha*** **[supra]** does not preclude minorities from establishing universities but rather highlights the importance of legislative intent and statutory provisions in determining an institution's character. As a matter of law, it is within the purview of the Legislature to enact legislation for the establishment of a minority university, provided that such legislation fulfills the criteria of constituting a statute for a minority university. In such a scenario, the concerned legislation must incorporate provisions that clearly indicate the establishment of the institution by the minority community and confer administrative authority to the minority community.

I. BALANCING CONFLICTING NARRATIVES

192. There is an inherent problem in the study of history. Since the events in history that have already occurred can be highlighted or dimmed depending upon the proclivities of the

writer, the ‘correct’ version of history often remains elusive. Many modern history writers adopt an approach which is known as *Complex Adaptive System*, where the world is seen as an unruly unorganised place in which the sequence of events is complex and unpredictable. The events are characterised by interactions between a host of factors including grand socio-economic forces, geography, actions of persons in power, actions of a random commoner, culture, ideology, technology, fluke etc. The theory provides that history does not follow a predetermined path and can go down multiple ones at the hands of any of the factors mentioned above. While some outcomes remain to be more likely than others, the theory remains that the world is made up of unintended consequences, random shocks and cascading effects of significant and insignificant events both.

193. Both sides in the present case have highlighted their own version of history of the establishment of the AMU and sought highlight specific events which, in their understanding, were crucial in the eventual *establishment* of the AMU. The Appellants contended that the AMU's formation was fundamentally enabled by the proactive involvement, demand, and contributions of the Muslim community. They argued that the 1920 Act essentially transformed the status of 'MAO College' from being affiliated with Allahabad University to an independent entity named 'Aligarh Muslim University' primarily

aimed at imparting Muslim religious education and featuring a Department of Islamic Studies.

194. The Appellants delineated the historical trajectory of AMU into three distinct phases:

A. The period spanning from 1870 to 1877 witnessed the inception of the idea among the Muslim community to establish a university for the upliftment and progress of Muslims, leading to the establishment of MAO College.

B. From 1877 to 1910, the Muslim community fervently advocated for the conversion of MAO College into a university, eventually securing tentative agreement from the Government.

C. The period from 1910 to 1920 saw concerted efforts by the founders of the Muslim University to engage with the Government, culminating in the successful conversion and incorporation of MAO College into Aligarh Muslim University.

195. It was sought to be highlighted that Sir Syed Ahmad Khan envisioned establishing a university in India akin to Oxford and Cambridge to address the educational backwardness among Indian Muslims. In order to achieve this goal:

i. On October 2, 1870, Sir Syed formed the Committee for the Better Diffusion and Advancement of Learned among Mohammadans of India. This committee aimed to

understand why Muslims were not pursuing Western education, identifying reasons such as lack of religious education and non-involvement of Muslims in educational decisions. Consequently, the idea of an educational institution managed by and for Muslims with religious instruction gained traction.

ii. In 1871, Sir Syed established the Mohammadan Anglo-Oriental College Fund Committee to raise funds for the educational institution. The committee's objective was explicitly stated as collecting funds for establishing a college, particularly for the education of Muslims.

iii. The committee resolved to establish Madrasatul Uloom (an Arabic term for educational institution) in Aligarh, which was inaugurated on May 24, 1875. This marked the initial step toward realizing the vision of a university for the Muslim community.

iv. Subsequently, Madrasatul Uloom was established as the Mohammedan Anglo-Oriental College (MAO College) on January 8, 1877, as a registered society. During the laying of the foundation stone, the College Fund Committee addressed the Viceroy and Governor-General of India, expressing the hope that the college would eventually evolve into a university spreading the values of free inquiry, tolerance, and morality.

v. The Rules and Regulations of MAO College emphasized its primary objective as the education of Muslims, while also accommodating Hindus and other communities.

vi. Administration of MAO College was exclusively entrusted to the Muslim community, as evidenced by various resolutions and rules. The Select Committee for the Advancement of Muslim Education, the Fund Committee, and the Trusteeship regulations all mandated Muslim involvement in the institution's governance.

196. The Appellants sought to highlight that in the second phase, the MAO College expanded, and Sir Syed and the Muslim community continued to seek government support for its "conversion" into a university by placing reliance on the following :

i. Sir Syed pursued government support primarily because the Muslim community viewed a degree as essential for success and government employment. This viewpoint was documented in Mr. Altaf Husain Hali's biography of Sir Syed, "Hayat-i-Javed." Justice S Amir Ali also stressed the necessity for the proposed university to be empowered to grant government-recognized degrees.

ii. To further this goal, the College Fund Committee presented a written address to the Viceroy on 18.11.1884, expressing the hope that, with increased funds and

completed schemes, they would seek recognition as an independent university.

iii. After Sir Syed's demise on 27.03.1898, a memorial fund was established on 08.04.1901 to gather funds for elevating MAO College to university status. This endeavor met with success, with Rs. 1,27,000/- collected by 11.11.1901. Additionally, Mr. Syed Jafar Husain initiated the 'one rupee fund' scheme, urging each Muslim to contribute at least one rupee towards the proposed university, resulting in substantial funds being raised.

iv. Various representations were made to the government by the MAO College management and members of the Muslim community, including addresses to the Viceroy on 01.10.1906 and 22.04.1908, seeking assistance in establishing a Muslim university. The 22.04.1908 address emphasized the alignment of their goals with Sir Syed's vision, with significant support from figures like Mr. Justice Mahmood and Mr. Theodore Morison.

v. In 1910, the efforts of the Muslim community garnered in-principle acceptance from the Government of India for the conversion of MAO College into a Muslim University.

197. The Appellants pointed out that in the final phase, the Muslim community continued to collect funds and negotiate with

the government to establish the university, highlighting the following :

i. In 1911, the internal Foundation Committee was formed to establish a University, with the Raja Saheb of Mahmoodabad as its President.

ii. On 18.07.1911, the Secretary of State approved in principle the establishment of a university at Aligarh, subject to the provision of adequate funds and control, based on the recommendation of the Government of India dated 10.06.1911.

iii. The then Government of India, in its letter dated 31.07.1911 to the Foundation Committee, specified that the university could be established only through a bill in the Imperial Legislative Council, expressing willingness to draft the proposed bill in consultation with community representatives.

iv. A draft bill was prepared by the Constitution Committee in August 1911.

v. Negotiations in November 1911 led to a dispatch from the Government of India to the Secretary of State, highlighting the significance of sanctioning a university at Aligarh for the Muslim community.

vi. The negotiations continued, addressing issues such as university affiliation, nomenclature, and the Chancellor's

role. A letter dated 09.08.1912 from the Education Member of the Government acknowledged the community-led initiative and the draft constitution's intent.

vii. In 1915, the Muslim University Association, comprising entirely of Muslim members, was founded to facilitate the conversion of MAO College. The association's efforts were detailed in the MAO College Annual Report 1912-14, highlighting significant funds raised.

viii. The Muslim Community successfully raised Rs. 30 lakhs for the university, as required by the Government.

ix. After prolonged negotiations, the Muslim University Bill was prepared in 1919 and referred to a Select Committee. The committee's report, submitted on 02.09.1920, underscored the Muslim Community's pivotal role in the university's establishment and administration.

x. The Aligarh Muslim University Bill, 1920 was debated in the Indian Legislative Council and passed. The President congratulated the Muslim community on its passage.

xi. Consequently, the Aligarh Muslim University Act, 1920 was enacted, with the Statement of Objects and Reasons acknowledging the significant role of the Muslim community in its establishment.

198. Apart from the above, the Appellants sought to highlight other aspects to highlight minority character of the institution such as :

i. The historical background of the institution, as described above, showcases the evolution MAO College into a full-fledged university through the Aligarh Muslim University Act, 1920. This journey reflects the concerted efforts of the Muslim community, led by visionaries like Sir Syed Ahmad Khan, to address the educational needs and aspirations of Indian Muslims.

ii. The architecture of AMU's buildings, characterized by features such as deep green color, domes, and Qur'anic inscriptions, distinctly embodies its Islamic identity. Photographic evidence presented to the Division Bench of the High Court further underscores this Islamic architectural style.

iii. The emblem of AMU incorporates a Qur'anic verse, serving as both its motto and a symbol of its Islamic heritage.

iv. AMU boasts a University Mosque, a significant religious and cultural landmark within its premises. The Amending Act of 1972 permits the establishment of halls, hostels, specialized laboratories, and research units within a 25 km

radius of the University Mosque, highlighting its central importance.

v. The employment of Muezzins at AMU reflects its commitment to Islamic traditions and practices, contributing to the religious and spiritual ambiance on campus.

vi. Initially, AMU offered separate Departments of Studies for Sunni Theology, Shia Theology, Islamic Studies, Arabic language and literature, Persian, and Urdu. Over time, these departments have expanded to include various disciplines, such as Islamic systems of medicine, Philosophy (with a focus on Islamic Philosophy), and a Center for Quranic Studies, reflecting the university's continued emphasis on Islamic scholarship and education.

vii. AMU has historically accommodated female students to observe purdah (veiling) as per Islamic tradition. Photographs documenting these accommodations provide tangible evidence of the university's efforts to create an inclusive and supportive environment for its female students while respecting their religious beliefs and practices.

199. On the contrary, the parties defending the judgment in ***Azeez Basha*** **[supra]** and the judgment of the High Court, have sought to highlight their own version of events prior to the

establishment of the AMU in order make a case that while the minority community was involved in the process, the establishment of the University was at the primary will and decision of the British Indian Government. The following aspects were highlighted :

i. In 1873, Sir Syed Ahmad Khan proposed substituting the term "college" with "university" in the name of MAO College. However, the government responded by stating that if a "Mohammedan University" were to be established, no financial aid would be provided.

ii. It was brought to the fore that contributions from various sources, including government officials and dignitaries, as well as the donation of land by Lt. Governor Sir John Strachey, underscored the national character of MAO College.

iii. The college, initially dependent on government funds, struggled with significant debt around the time of Sir Syed's death in 1898.

iv. Efforts to establish a university at Aligarh continued, with suggestions from individuals like Prof. Dr. Zia-ud-din, Justice S. Amir Ali, Theodore Morison, Theodore Beck, and Maulvi Rafi-u'd-din, aiming to model it after European universities and offering a blend of Western and Oriental

learning. However, despite proposals for a predominantly minority university, the demands were not fully accepted.

v. The Imperial Government insisted on substantial secular control over the university's establishment, as indicated in correspondences between officials such as JP Hewitt, the Secretary of State, and Sir Harcourt Butler. Despite proposals for affiliating colleges outside Aligarh, such plans were rejected to prevent potential overgrowth and competition with future institutions.

vi. During meetings and conferences, the government's proposal for a university along the lines of the Benares Hindu University was met with disappointment and protest, highlighting the community's desire for autonomy. Eventually, the Muslim University Association voted to accept the government's proposal, aligning the university's setup with that of the Benares Hindu University.

vii. Discussions regarding government recognition of degrees and control over examinations emphasized the need for government oversight to maintain standards. Members of the Regulations Committee agreed to government veto power over the appointment of the University Vice Chancellor, citing the university's envisioned All India character and the desire to avoid local prejudice.

viii. On October 10, 1917, H. Sharp, the Secretary of the Department of Education in the Government of India, outlined several key principles to consider regarding the organization of the proposed university's constitution. Firstly, he suggested following the precedent set by the University of Benares, except for non-essential changes or improvements. Secondly, he emphasized not allowing adherence to the constitution of the Mahomedan Anglo-Oriental College as a basis for deviating from the Benares model. Additionally, he highlighted various political considerations, including the desire to establish Islamic colleges affiliated with Aligarh, potential political movements centered around Aligarh, and the desire for a network of recognized Islamic schools. Other concerns included the desire for autonomy from local government control, political representation within the university's governing bodies, the conferment of inexpensive degrees to increase Muslim graduates, and the potential elimination of European staff members. Sharp also addressed specific aspects of the draft bill, such as the powers of the Governor-General in Council, the role of the Visitor, and the composition and powers of the Court, Senate, and Syndicate.

ix. On January 19, 1918, a letter from Sir E.D. Maclagan, Secretary to the Government of India, highlighted the need for any legislation to establish a Muslim University at Aligarh to conform with the provisions of the legislation passed for the Hindu University at Benares. The letter raised concerns about certain provisions in the draft bill, including compulsory theology instruction for Muslim students and the absence of provisions regarding a Visitor's control over statutes and regulations.

x. On December 19, 1918, a demi-official letter from Mr. Keane mentioned the expectation of a liberal annual grant from the Government of India to the proposed university, similar to the grant given to the Benares Hindu University.

xi. On December 27, 1919, the Government of the United Provinces provided its views on the draft constitution for the proposed Muslim University at Aligarh. The Lieutenant-Governor expressed concerns about granting the Court the power to interpret statutes and suggested limiting the Court's powers to preserve the influence of the Governor-General.

xii. On March 12, 1920, Mr. H. Sharp's letter to Kunwar Maharaj Singh noted that the draft bill would allow the Governor-General in Council to give instructions and

compel the university to follow them regarding the standard of university examinations.

xiii. On May 8, 1920, a telegram compared the Muslim University draft bill with the Benares Hindu University Act, noting differences in the publication of accounts, the approval process for alterations to statutes and ordinances, and the transfer of certain powers from the Visitor to the Governor-General in Council. The telegram emphasized the importance of retaining control over these all-India universities under the Government of India.

xiv. On June 12-13, 1920, a meeting was held to discuss the establishment of Aligarh Muslim University. A large number of points were discussed at the meeting which ultimately ended with the observation that BHU and AMU should be on equal footing regarding their relations with the government.

xv. In a subsequent speech on September 9, 1920, Mr. Shafi presented the report of the Select Committee on the AMU Bill in the Indian Legislative Council. Amendments proposed during the session, such as altering the tenure of key university officials and modifying the ordinance-making process, were met with objections. Concerns were raised about potential anomalies and the balance of power between university bodies and government authorities.

Despite objections, the proposed amendments were put to a vote and rejected by the council.

200. Significantly, another aspect that was highlighted by the parties defending the judgment in ***Azeez Basha*** **[supra]** and the judgment of the High Court, was about the two groups that emerged during the 'negotiations' with the British Indian Government on the minority side and the creation of the Jamia Milia Islamia. It was pointed out as under :

i. Sir Syed's original vision for AMU was deeply rooted in loyalty to the British.

ii. The division within the Aligarh University movement stemmed from the government's refusal to grant the college authority to affiliate with institutions outside Aligarh. Even prior to this, the Ali brothers endeavored to remove pro-government influences from the college administration.

iii. The rift intensified over the denial of affiliating powers to MAO College, exacerbated by events like the annulment of the Bengal partition, perceived by Mahomed Ali as a betrayal of Muslims.

iv. The factions emerged, with Maulana Aftab Ahmed Khan leading those willing to accept the government's terms (the loyalists), including later Mohd. Shafi.

v. Conversely, the opposition, led by Ali Brothers and Hasrat Mohani, advocated for Muslim control of the university and affiliation powers.

vi. The Ali brothers and their followers sympathized with Turkey and opposed British actions during WWI. Mahomed Ali's influence over Aligarh students created challenges for MAO college's principal, Dr. Ziauddin.

vii. After the BHU Act, pressure mounted to accept the government's terms, leading to a split in the movement. Despite the University Foundation Committee's decision to accept government proposals without conditions in April 1917, Mahomed Ali remained opposed to the same.

viii. In 1920, negotiations between the Government and the Aligarh group led to the introduction of the University Bill. Simultaneously, Gandhiji's involvement in the Khilafat movement aimed to mobilize Muslims amidst anti-government sentiments during the Non-cooperation movement started with the co-operation from the Ali Brothers.

ix. The rapid introduction of the AMU bill was aimed to align Muslims with the government amid growing anti-government sentiment. Subsequently, the pro-Khilafat group urged the university to reject government aid, prompting Maulana Mahomed Ali to advocate for non-

cooperation. On October 12, 1920, the Ali brothers and Gandhiji urged the college to cease accepting government aid. Aligarh students actively joined the non-cooperation movement, threatening to nationalize the college.

x. Leaders supporting the non-cooperation movement assured Aligarh students of the college's transformation into a National University, encouraging enrollment. The Deoband Theological School issued a fatwa advising students to leave MAO College and enroll in the proposed National University.

xi. On October 27, the Aligarh Board of Trustees directed Maulana Mohammed Ali and his supporters to vacate college hostels, leading to the college's closure.

xii. Finally, on October 29, 1920, Maulana Mohammed Ali and his followers left the college to establish Jamia Milia Islamia, aimed at countering government influence at AMU. Consequently, the Ali Brothers established Jamia Milia Islamia as an independent institution not subject to government control, contrasting with AMU's dependence on government support.

201. On the basis of the above, it was argued that the judgment in ***Azeez Basha*** **[supra]** correctly recognises the historical context of AMU's establishment and the influence of British recognition on its character. It was argued that the judgement in

***Azeez Basha* [supra]** does not simplicitor conclude that statutory establishment precludes minority status but examines the circumstances preceding AMU's founding to determine its nature as a government-supported institution.

202. Keeping the above factors in mind, the Court must survey the important events and incidents that led to the formation of the AMU. In the conflict of narrative surrounding the century old history, the Court cannot be swayed by one side of the story or the other. In a complex historical context such as this, the Court must weigh carefully the role played by the minority as against that played by the government in establishment of the institution in order to determine who is responsible for the positive fact of such establishment.

203. From a minute study of the aspects highlighted above, it is clear that in some case, there may exist certain factors which point towards efforts made by the minority community to claim to have a denominational University. Further, clearly the real intention of the minority community may indeed have been to have a denominational University for its own use. However, as stated above, intention and efforts are not the complete answer to the question of establishment.

204. If in a given case, there may be other factual factors pointing towards the contrary, highlighting that whatever the intention or the will of the minority community might have been

at the said time, in exchange or during negotiations, if the resultant institution was effectively rendered an open governmental institution [with limited minority aspects], then Article 30 would be out of the picture. An institution with a limited minority aspects/elements cannot be a minority institution. The Court in such a situation, must balance the narratives on a weighing scale and test which forces were stronger during the process of establishment and the resultant institution.

J. PRE-INDEPENDENCE UNIVERSITIES AND OTHER INSTITUTIONS

205. At this juncture, it would be appropriate to refer to the position of educational institutions, specifically Universities, prior to the advent of the Constitution and the UGC Act, 1956. During the said time, the British Indian Government, through legislations passed through provincial legislatures, passed various enactments establishing Universities in various zones/cities. The University of Calcutta, the University of Bombay, the University of Madras, the Panjab University and the University of Allahabad were established through legislations in the 19th century.

206. At the same time, throughout this period, it is noteworthy that a significant number of colleges and similar educational institutions were established across the country, including those

established by minority communities. The said institutions did not aspire to attain “university” status and were content with operating as affiliated colleges to the Universities established by legislation by legislative bodies.

207. Parallelly, prior to the prohibition contained in the UGC Act, 1956, there existed a period wherein the legal landscape lacked statutory constraints preventing the establishment of universities without specific legislative enactments. During this time, it was within the prerogative of any collective body or individuals to establish educational institutions in the nature of universities without legislative intervention.

208. In fact, in the absence of a provision like Section 23 of the UGC Act, 1956, it was open to such institutions to even adopt the titles such as "university" or in some cases "vidyapeeth" or "jamia" asserting their capability to grant degrees. This era witnessed the emergence of numerous universities, predating independence, whose degrees did not carry recognition from the British Government for eligibility in employment within Crown services. Despite this absence of official recognition, many of these institutions rose to prominence, eventually becoming leading national educational establishments.

209. Therefore, the authorities behind the MAO College, had three options :

i. First, request the British Indian Government to establish a university, with the classical British Indian Government's control as in case of other Universities, through a legislation passed by the Imperial Legislative Council or Provincial Legislature. In the said eventuality, the advantage was that the institutions degrees could be recognised by the British Indian Government [and perhaps the world over] however, it would require foregoing of the character and the control over the institution.

ii. Second, continue as the MAO College, affiliated to the Universities already in existence, and persist as a college only [without granting its own degrees] while preserving its control and character as a denominational institution subject to regulatory controls that came along with the affiliation with a legislation-based University;

iii. Thirdly, the MAO College had the option to establish a university/Vidyapeeth/jamia under its own name or any other name without the need for government enactment, albeit without recognition from the British Indian Government. The institution could have chosen to maintain its character and avoid British governmental control.

210. The history of the events as mentioned above, is witness to the decisions taken and path chosen by the stakeholders and the

same would have a bearing on the issue whether the AMU was established as a minority institution or not.

K. THE QUESTION OF ADMINISTRATION AND THE 1920 ACT

211. As stated above, "administration" and its link with the question of establishment is to be ascertained by locating who exercised the "choice" with regard the crucial aspects of an institution and to what extent was the minority's decision making expressed in the tangible outcomes at the time of establishment. As stated above, it is at this point that the "choice" of the minority marries itself with the "administration" by the minority community. As stated above, the choice can be said to have been exercised by the minority community, if the minority community is present in some higher echelons of the administrative setup. Such positioning of the minority community would, in fact, enable the community to exercise its "choice" as the said choice is a function of the decision making of the minority community. If the minority community is not the decision maker in offices of prominence in the institution, the offices which hold the keys to giving character to the institution, the claim of administration or establishment by the minority community would fall flat. It is in this light that the AMU act, 1920 [and as it stood post the Constitution coming into force], would have to be examined.

212. The AMU act, 1920, as enacted, is an interesting piece of legislative drafting. The Act had 40 sections and created a unique

machinery, to administer the AMU. As discussed above, the establishment of the university and the question thereof is also a function of nature of the university established through the Act and the real controlling authorities – both at executive level and staff level. The parties doubting the judgment in ***Azeez Basha*** **[supra]**, sought to highlight some aspects of the 1920 Act in order to further their points.

213. It was pointed out that the Statement of Objects and Reasons and preamble of the Act explicitly articulates its purpose to establish and incorporate a teaching and residential Muslim University while dissolving the Muhammadan Anglo-Oriental College, Aligarh, and the Muslim University Association, transferring all their properties and rights to the new university. It was pointed out that all assets, rights, powers, and privileges of MAO College and its affiliate bodies were fully transferred and vested in AMU. It was pointed out that any references to MAO College or its affiliate bodies in previous enactments or documents are construed as references to AMU. It was pointed out that all employees and staff of MAO College were automatically deemed as employees of AMU with the same tenure, terms, rights, and privileges. It was pointed out that donations received from the Muslim community, totaling thirty lakh rupees, were allocated as the Reserve Fund to be managed by AMU.

214. It was pointed out that all students of MAO College became the responsibility of AMU upon commencement, including the provision of instruction as per the prospectus of Allahabad University. It was pointed out that the First Statutes mandated that the Register of registered graduates include those who had been educated for at least two years at MAO College. Additionally, the Central Legislature incorporated provisions in the AMU Act specifically benefiting the Muslim community, such as the promotion of Oriental and Islamic studies, instruction in Muslim theology and religion, and furtherance of arts, science, and other branches of learning.

215. It was pointed out that the Act allowed for the establishment of intermediate colleges and schools within the vicinity of MAO College to provide instruction in Muslim religion and theology. It was pointed out that regarding administration, the Muslim community had both de jure and de facto control over the management of AMU. It was pointed out that the limitation of the membership to the 'Court' [which is the *supreme governing body*] to Muslims is a significant aspect in that regard.

216. It was highlighted that the Chancellor, Pro-Chancellor, and Vice-Chancellor, being ex-officio members of the 'Court', had to be from the minority community. It was pointed out that the powers vested in the Court to appoint university officers and

frame statutes for the Executive and Academic Councils, and the predominance of Muslims in elected university positions. It was pointed out that additionally, the Act did not require the submission and approval of certain statutes dealing with Muslim education. It was pointed out that the presence of non-Muslims in governing bodies does not diminish the minority character of the university, citing legal precedents. It was pointed out that powers vested in the Lord Rector and the Visiting Board under the Act do not affect the university's minority character and are merely 'regulatory' or 'supervisory' in nature as would be in case of even present-day Universities and their 'Chancellors'.

217. The parties defending the judgment of the High Court pointed out that the 1920 Act provides for government control over the AMU by controlling, inter alia, the appointment of important office holders, the composition of administrative bodies, the rule making power of the university etc. It was pointed out that the Governor General-in-Counsel was appointing authority at the time of inception for the high positions of Chancellor, Pro-Chancellor, and Vice-Chancellor. It was pointed out that powers of the University had 12 sub-clauses, all of which were secular expect for one. It was pointed out that the admissions in the University at the time of inception were made on secular lines. It was pointed out that First Statutes of the University were framed not by the 'Court' but by the British

Indian Legislature and the First Ordinances of the University at the time of inception were also not framed by the minority rather were framed by the non-minority authority of the Governor General-in-Council. It was pointed out that Lord Rector had wide ranging powers and it was the British Indian authorities that had effective, de-facto, policy level control over the AMU and not the minority community at the time of establishment.

218. It is critical to note that the 1920 Act and the nature thereof, also bestows the AMU with its character at the time of inception. The said character at the time of inception would be useful in ascertaining if the institution was predominantly established for the minority community with a '*sprinkling of outsiders*' or not. It may be noted that merely having a faculty or a portion thereof dedicated to a religious discipline would not bestow a larger public entity like a University, with its character. The leading Universities of the world today have faculties for religious studies and enquiry[5]. The said faculties are genuine centres of intellectual and theological enquiry and would also interest persons from other religions in numerous cases. Therefore, having a specific portion carved out in a larger University set-up would not be the defining characteristic of the University. In fact, such a dedicated Faculty in a University would indicate the wide-

[5] Oxford Centre for Hindu Studies (OCHS), Oxford Centre for Islamic Studies, Delhi University's Centre for Hindu Studies

ranging nature of studies the institution. Therefore, the regular bench must examine if the AMU Act, 1920 [and how it stood after the advent of the Constitution], is an enacting establishing an institution which was predominantly minority in character.

L. 'INCORPORATED' OR 'ESTABLISHED' BY OR UNDER A STATUTE

219. At this stage, this Court has to adjudicate another issue that touches upon the question of establishment. It has been argued that the 1920 Act was a mere legislative "veneer" or a token recognition to an already existing entity. On the other hand, it was countered by the argument that there is a difference between a body which is created under a statute as opposed to a body which the statute claims to itself 'establish'. On the basis of the same, it is urged that since the AMU owed its very existence to a statute, it was *established by the statute* only.

220. In this regard, the Court needs to clarify that a legislation [more so a legislation in the pre-independence era] can never be considered to be an inconsequential veneer or a mere recognition/token. A legislation is the will of the sovereign reflected and enacted through a dedicated body. A legislation is always of some consequence and cannot be presumed to be of tertiary importance.

221. Separately, the parties defending the judgment of the ***Azeez Basha*** **[supra]**, place heavy reliance on the judgment in

***Dalco Engineering Pvt. Ltd. v. Satish Prabhakar Padhye*, (2010) 4 SCC 378**, and others[6] to assert that the use of the term 'established' in the phrase 'established by or under an Act' in any statutory enactment creates a deeming fiction which would entail the coming into existence of the entity so established a result of the statutory enactment alone.

222. While testing this argument, it is important to note that the judgment in ***Dalco* [supra]**, was dealing with entities and enactments such as the State Bank of India Act, 1955 or the Life Insurance Corporation Act, 1956 or the State Financial Corporations Act, 1951. The same principle cannot *ipso facto* be lifted and applied in the context of Article 30, especially when it concerns the fundamental rights of citizens.

223. Crucially, as pointed out during arguments, there are other statutes, enacted by the State Legislatures, which recognise the minority character of the institutions through various provisions. In the said statutes, the 'establishment' is done by and under the statute and at the same time, the establishment of the previous institution is recognised to be done by the minority community. For example, The Sam Higginbottom University of Agriculture,

---

[6] *Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi*, (1975) 1 SCC 421 ; *Executive Committee of Vaish Degree College v. Lakshmi Narain*, (1976) 2 SCC 58; *S.S. Dhanoa v. MCD,* (1981) 3 SCC 431; *CIT v. Canara Bank*, (2018) 9 SCC 322

Technology and Sciences, Uttar Pradesh Act, 2016, in this preamble provides as under :

> *"An Act to **establish and incorporate** a Teaching, Research and Extension University with a view to upgrade and reconstitute the existing Sam Higginbottom Institute of Agriculture, Technology and Sciences (Deemed-to-be- University), Allahabad, established and administered by the Ecumenical Minority Christian Society namely the Sam Higginbottom Educational and Charitable Society, Higginbottom House, 4- Agricultural Institute, Allahabad-211007, Registered under the Society Registration Act, 1860 in the State of Uttar Pradesh, and to provide for natters connected therewith or incidental thereto,"*

224. Similarly, The Era University, Lucknow, Uttar Pradesh Act, 2016, and its Preamble provides as follows:

> *"Preamble*
> *An Act to **establish and incorporate** a teaching University sponsored by Era Educational Trust duly established and administered by the members of Muslim Minority community.."*

225. At the same, time, there were other enactments which claimed to have established and incorporated the Universities and still bestowed them with minority characteristics. For example, in the North East Adventist University Act, 2015, in the Preamble, provides as under:

> *"An Act to **establish and incorporate** an University in the State, with emphasis on providing high quality education, training and research in the*

fields of Physical Sciences, Applied Sciences, Life Sciences, Health Sciences, Social Sciences, Bio-Technology, Information Technology, Engineering, Management, Commerce, Communication, Law, Humanities, Languages, Performing Arts and other allied areas, sponsored by the Medical Educational Trust Association Surat of Seventh-day Adventists, and to provide for matters connected therewith or incidental thereto."

226. Similarly, the preamble of The Teerthanker Mahaveer University Act, 2008 reads as under:

"An Act to ***establish and incorporate*** *a Jain Minority Teaching University sponsored by Teerthanker Mahaveer Institute of Management & Technology, Society, Moradabad Uttar Pradesh and to provide for matters connected therewith or incidental thereto."*

227. Therefore, the use of the phrase 'establish and incorporate' by the Legislature may be relevant in the larger enquiry but cannot be said to be determinative of the factum of establishment or not by the minority community. The question of establishment is to be ascertained by a multitude of factors, and especially in case of Universities – the history of the establishment, the nature of the Act, the nature of the University, etc. and the phrase '*establish and incorporate*' would be of limited importance only.

228. Separately, it is noteworthy that there exist alternative paradigms of universities established by legislative bodies[7], which may claim to be minority institutions.

229. The legislative frameworks of statute-based minority Universities were highlighted before this Court, wherein the predominant character of the University is minority-oriented with only peripheral non-minority elements. Therefore, if the intention was to establish or incorporate or recognise a minority University, the Legislatures have incorporated suitable provisions to colour the University with a minority identity.

230. Furthermore, the abovementioned enactments and a perusal of the same underscores that a considerable degree of autonomy was retained by the sponsoring entity, with pivotal decision-making powers vested therein and further in some cases, specific provisions for providing religion-based reservations.

231. The Court may notice another aspect that the 1920 Act in its Preamble provided that it was "*An Act to* ***establish and incorporate*** *a teaching and residential Muslim University at*

[7] The Integral University Act, 2004 ; The Teerthanker Mahaveer University, Uttar Pradesh Act, 2008 ; The North East Adventist University Act, 2015 ; Sam Higginbottom University of Agriculture, Technology and Sciences, Uttar Pradesh Act, 2016 ; The Era University, Lucknow, Uttar Pradesh Act, 2016 ; The Mohammad Ali Jauhar University Act, 2005 ; The Aliah University Act, 2007 ; The Sri Guru Granth Sahib World University Act, 2008 ; The Spicer Adventist University Act, 2014 ; The Khaja Bandanawaz University Act, 2018 ; The Khangchendzonga Buddhist University, Sikkim Act, 2020 ; The Enteral University (Establishment And Regulation) Act, 2008

Aligarh". The said recognition is relevant but cannot be the sole basis of enquiry on either side. A Legislature speaks through the enactment and not merely the Preamble, therefore, the contents of the legislation would be primordial source of information for the enquiry. The amendment made to the 1920 Act in 1981, and the deletion of the words '*establish and*' from the Preamble, cannot therefore alter the pre-existing, pre-occurred factual situation. The regular bench, would therefore, have to analyse the factual situation and arrive at a finding.

M. EVOLUTION OF AMU AND THE ADVENT OF THE CONSTITUTION

M.1 The amendments made to the 1920 Act

232. The statute enacted in 1920 has gone through its own journey and evolution. As far as the evolution of the 1920 Act is concerned, both sides have illustrated the amendments made over the years. The 1951 Amendment Act introduced notable alterations, including the omission of Section 9 from the original 1920 Act, which had sanctioned compulsory instruction in Muslim religion for Muslim students. Further, an amendment to Section 8 allowed for religious instruction for consenting students, aligning with Article 28(3) of the Constitution, which prohibits such instruction in aided institutions. In Section 5(12), which was the residuary clause, the portion dealing with Islamic learning and Muslim theology, along with another portion, was

deleted. Importantly, the lynchpin of the case of the parties challenging the judgment of the High Court and ***Azeez Basha*** **[supra]**, the proviso to Section 23(1) of the 1920 Act [as it then was], which limited 'Court' membership to Muslims, was deleted by the 1951 Amendment Act. As per amendment to Section 15, Governor of the State of Uttar Pradesh became the Chief Rector of the University.

233. The amendment in 1965, more than its content and changes, becomes relevant because of the unusual sparring between two giants of their respective fields – Retd. J. M.C. Chagla [the well-known Retd. Chief Justice of the Bombay High Court and the Education Minister in 1965] and Mr. Frank Anthony [a well-known educationist and Senior Counsel before this Court]. The Bill was introduced in Lok Sabha on 16.08.1965. On 27.08.1965, Mr. J. Chagla presented the reasons behind the amendments. The amendments were thereafter described and were sought to be justified in the context of the occurrences at the University. It was stated that the amendment, to at least some portions, was a temporary measure. Critically, Mr. J. Chagla discussed the 'character of the University' during the said debate. He asserted that the AMU was a 'national institution' of 'national importance' along the lines of the four Central Universities as per Entry 63 of List I of Seventh Schedule. While emphasizing the importance of intellectual enquiry qua Muslim culture in India at

the institution, Mr. J. Chagla highlighted that it was in the context of national and secular India. He referred to the history of the AMU in 1920 and the amendments made in 1951.

234. In response, on the same day, Mr. Anthony raised the issue how the Government had on affidavit claimed that the Article 30 would not apply to the AMU in the proceedings before the Supreme Court [purportedly in a petition challenging the Ordinance preceding the 1965 amendment]. Mr. Anthony, on 01.09.1965, made a detailed speech claiming that the right under Article 30 has two elements – establish and administer – which can be used disjunctively. In his opinion, establishment was not a necessary pre-condition. Mr. Anthony thereafter refers to his own understanding of history of the AMU and refers to the MAO College as the 'nucleus' and asserted that the 1920 Act vested administration with the minority community.

235. Mr. J. Chagla responded to this on 02.09.1965 quippingly claiming that he was '*no longer a practicing lawyer and perhaps my law has become rather rusty. But still I know a little bit of law, particularly constitutional law. I entirely disagree with him* [Mr. Anthony]'. Mr. J. Chagla stated that the AMU was neither established nor administered by the Muslim community. He stated that the AMU was created by a statute, the 1951 amendments and the presence of the AMU in Entry 63, List I of Seventh Schedule makes the same crystal clear. He further gave

numerous examples of how the administration of the institution was not technically with the minority community. He again claimed that the AMU was a national institution and the sovereign legislature had the right to amend the clause. He also remarked that through history, the British ensured that the institution which was financed by Indian money, was open to all communities.

236. The sparring between the two continued on 03.09.1965 as well. Mr. Anthony clearly claimed that he equated establishment with foundation and with '*who founded it. If the minority community founded it, then giving legislative recognition will merely be as I said and I repeat, giving legislative sanction*'. Mr. J. Chagla stated that in law the Parliament cannot make a classification on the basis of religion and therefore, both the AMU and the BHU enactments were amended in 1951. Finally, on 06.09.1965, after short closing speech by Mr. J. Chagla, the amendment was passed. The 1965 Amending Act effected a notable amendment by demoting the Court from its status as the 'supreme governing body' of the University to a consultative body for the Visitor of the University, namely, the President of India.

237. The 1972 amendment made additions to the definition clause. Critically, it added a clause to Section 5 which provides the University with the power *to promote the study of religion,*

civilisation and culture of India. It amended Section 17 to provide that the *Chancellor shall be appointed by the Visitor in such manner as may be prescribed by the Statutes* and amended Section 19 made him the principal executive and academic officer of the University, and shall exercise general supervision and control over the affairs of the University and give effect to the decisions of all the authorities of the University. The powers of the 'Court' were revised but remained significantly curtailed.

238. The amendment in 1981 rescinded Section 23 to its position prior to 1965, which had resulted in the 'Court' being demoted to a consultative body. It amended Section 17 to provide that the Chancellor to be elected by the 'Court'. The 1981 amendment deleted the portion in Section 8 which restricted the University from adopting or imposing any test of religious belief or profession for admissions or appointments as teacher or other office. The 1981 amendment also made three specific changes which are a subject matter of the present petitions and deserve to be quoted in full :

PREVIOUS PROVISION	**AMENDED PROVISION**
(l) "University" means the Aligarh Muslim University	(l) "University" means the educational institution of their choice established by the Muslims of India, which originated as the

	Muhammadan Anglo-Oriental College, Aligarh, and which was subsequently incorporated as the Aligarh Muslim University.
An Act to establish and incorporate a teaching and residential Muslim University at Aligarh. WHEREAS it is expedient to establish and incorporate a teaching and residential Muslim University at Aligarh, and to dissolve the Societies registered under the Societies Registration Act, 1860 (21 of 1860), which are respectively known as the Muhammadan Anglo-Oriental College, Aligarh, and the Muslim University Association, and to transfer to and vest in the said University all properties and	An Act to incorporate a teaching and residential Muslim University at Aligarh. WHEREAS it is expedient to incorporate a teaching and residential Muslim University at Aligarh, and to dissolve the Societies registered under the Societies Registration Act, 1860 (21 of 1860), which are respectively known as the Muhammadan Anglo-Oriental College, Aligarh, and the Muslim University Association, and to transfer to and vest in the said University all properties and rights of the said Societies and of the

rights of the said Societies and of the Muslim University Foundation Committee;	Muslim University Foundation Committee;
5. Powers of the University—The University shall have the following power, namely:- xxx	5. Powers of the University—The University shall have the following power, namely:- xxx 2 (c) to promote especially the educational and cultural advancement of the Muslims of India;

239. From a perusal of the same, it is clear that through a legislative device, the question as to who established the AMU, was sought to be laid out. As stated above, the legislative declaration as to the fact of establishment or incorporation, while relevant, cannot be sole basis of the enquiry required under Article 30. Further, the said amendments may have been without any controversy had the fact as to who established the AMU in 1920 was not already finally decided by this Court in ***Azeez Basha*** **[supra]**. The limitations of the Legislatures, in rendering questions of fact decided by the Court nugatory through a legislative device, would be decided by the regular bench.

M.2 The Constitution and the question of surrender of rights

240. Once the amendments have been discussed, it is important to note the coming in to force of the Constitution and the effect it had on the rights claimed. The parties defending the judgment of the High Court asserted, on the basis of ***Durgah Committee*** **[supra]**, and the reliance placed in ***Azeez Basha*** **[supra]**, that the right to administer was relinquished in 1920 itself and it cannot be revived subsequent to the advent of the Constitution, as it was complete at a juncture when fundamental rights were not operative. Further it was argued that the fundamental rights surrendered prior to the Constitution, cannot be revived after the advent of the Constitution [See ***Sri Jagadguru Kari Basava Rajendraswami of Govimutt v. Commr. of Hindu Religious and Charitable Endowments*****, (1964) 8 SCR 252**; ***Rabindranath Bose v. Union of India*****, (1970) 1 SCC 84**; ***Guru Datta Sharma v. State of Bihar*****, (1962) 2 SCR 292**].

241. On the other hand, the parties challenging the judgment of the High Court, placed reliance on ***St Xavier's*** **[supra]** and ***KS Puttaswamy (Privacy-9 J.) v. Union of India*****, (2017) 10 SCC 1**, to assert that the fundamental rights cannot be surrendered. It was also argued that the events prior to 1920 and the establishment process which culminated in to the 1920 Act, could not have taken away the minority character in the name of legislative recognition as a University.

242. It is necessary to clarify at this juncture that it cannot be said that the fundamental rights can be surrendered by one generation for it to be extinguished from utilization by another generation. Fundamental rights are the bedrock of the Constitution and the Republic and must be perennial and continuing in nature.

243. Further, it is a well-established legal principle that fundamental rights do not possess retrospective effect, and actions that were concluded before the enactment of the Constitution cannot be revisited. In ***Keshavan Madhava Menon v. State of Bombay*, (1951) SCR 228**, it was noted as under:

> *"As already explained, Article 13(1) only has the effect of nullifying or rendering all inconsistent existing laws ineffectual or nugatory and devoid of any legal force or binding effect only with respect to the exercise of fundamental rights on and after the date of the commencement of the Constitution. It has no retrospective effect and if, therefore, an act was done before the commencement of the Constitution in contravention of any law which, after the Constitution, becomes void with respect to the exercise of any of the fundamental rights, the inconsistent law is not wiped out so far as the past act is concerned, for, to say that it is, will be to give the law retrospective effect.… So far as the past acts are concerned the law exists, notwithstanding that it does not exist with respect to the future exercise of fundamental rights."*

Similarly in ***Pannalal Binjraj v. Union of India, 1957 SCR 233*** *it was noted that :*

> *"It is settled that* ***Article 13 of the Constitution has no retrospective effect*** *and if, therefore, any action was taken before the commencement of the provisions of any law which was a valid law at the time when such action was taken, such action cannot be challenged and the law under which such action was taken cannot be questioned as unconstitutional and void on the score of its infringing the fundamental rights enshrined in Part III of the Constitution"*

244. In the absence of any application of Article 30 in 1920, there was no inherent fundamental right to establish a minority institution and neither was there a requirement on the State to provide any recognition to any institution. The argument of the parties defending the judgment of the High Court claiming that the right was "surrendered" by the minority community in 1920 is misplaced. It erroneously assumes that there existed any right in the decade of 1910-1920 when the events concerning establishment of the AMU took place. There is no question of surrendering any right as no such right, even in context of MAO College, ever existed as the British Indian Government was a supreme Imperial power in the country and no person living in India had any constitution-based rights nor was there any such concept. The entirety of the landscape was a function of the largesse of the Executive or the Legislative powers of the British

Indian Government and its bodies. Thus, the question of surrender is illusory and does not arise in the present case.

245. Indeed, fundamental rights could not have been surrendered after 26.01.1950 however, if some events have already happened prior to the same, it is not possible to re-interpret such factual events in a different or a purportedly constitutionally compliant manner. The facts of history cannot be changed by the advent of the Constitution.

246. It is important to clarify at this stage that the said proposition does not entail that pre-Constitution enactments, even enactments providing for taking over of institutions [religious or educational] by the then Legislatures, would be free from the vice of unconstitutionality. The said statutes would always be subject to the overarching constitutional rights and subject to the rigours of Article 13. The present case therefore, does not concern surrender of "rights" rather involves a holistic survey of events leading up to the 1920 Act.

N. THE DE-FACTO AND SAFE HAVEN ARGUMENT

247. It has also been argued by the parties challenging the judgment of the High Court that de-facto, the important authorities like the members of the 'Court' and the Vice-Chancellors of the University have been from the minority community. On the basis of the same, it is asserted that the while

after 1951, there may not have been a specific requirement for the 'Court' to be consisting of the minority community, in reality, the members from the minority community have been appointed in most cases. The same has been read to be a pointer towards the minority character of the institution. On the other hand, the parties defending the judgment of the High Court highlighted that once there exists no such requirement in law, it would be erroneous to base a conclusion on the basis of practice.

248. As a matter of law, a practice or a chance occurrence would not be a factor in deciding the nature of the institution and certainly not relevant to decide the question of establishment. If the institution is not held to have been established by a minority, if by some reason, persons of one community have manned the positions in the administration in an institution, the same would not ascribe character to the institution. For example, if a secular institution was established by a group of persons [which were not predominantly of the minority community], if for some reasons, the Principal/Director of the institution has been from one minority community, the said occurrence could not be said to be enough to declare the institution to be a minority institution. The de-facto position of the AMU, with regard to the electors in the 'Court', the 'Court' or the Vice-Chancellors, would therefore not be the deciding factor for the purpose of the Article 30 question.

249. Apart from the above, it was also asserted that the AMU has, over the years, provided the minorities a haven to gain knowledge in the country, and declaration as a non-minority institution, would be highly detrimental to the same. The said argument, apart from being constricted in approach, is evidently contradictory.

250. The AMU, from the time of its establishment, has never had any sort reservations on the basis of religion all the way up till 2005, which was the first time the said exercise was sought to be carried out. Further, the AMU, after the declaration in ***Azeez Basha*** **[supra]**, at least till 1981 and arguably even thereafter, was always considered to be a non-minority institution. The contention that the AMU serves the interests of the minority community and denial of the protection under Article 30 would jeopardise the same, ignores the fact that the AMU, without being recognized as a minority institution or implementing religion-based reservations for an entire century, has served such a purpose. Therefore, asserting minority status and advocating for religious reservations based on the university's historical contributions to the minority community, appears to be self-contradictory.

251. At this juncture it is also important to deal with another submission to the effect that 'neutral' institutions or non-minority institutions would in the natural course of things be-

'majoritarian'. It was asserted that since such neutral institutions tend to be driven by the assumptions, leanings, and priorities of the majoritarian groups/cultures, Article 30 contemplates constitutionally protecting certain educational spaces from such 'majoritarianism-by-default', guarding their minority character and priorities.

252. The said assertion completely misconstrues the purpose of Article 30 and the nature of non-minority or neutral institutions in the country. The purpose of Article 30 is not to create 'minority only' *ghettos* rather provide positive rights to the minorities to establish educational institutions of their choice and kind. Article 30, as a feature of the Constitution, provides important rights which function within the larger penumbra of fundamental rights. There is substantial interplay, intermixing and balancing of rights *inter se* within the fundamental rights.

253. The Constitution, specifically under the fundamental rights chapter, provides for other rights such as Article 14 [right against arbitrariness], Article 15 [right to equality], Article 16 [right to equality in matters of public employment], Article 19 [fundamental freedoms], Article 21 [right to life and liberty and dignity], Article 21A [right to education], Article 25 [freedom of religion], Article 26 [freedom of religious institutions], etc, all of which contain shades of protection, equality and freedoms, available to minorities as well. Article 30, and the rights

contained thereunder, are therefore, not absolute and certainly do not exist in a *silo*. The other fundamental rights under Chapter III of the Constitution colour the interpretation of Article 30 and vice versa. In this regard, certain paragraphs of the judgement in ***TMA Pai*** **[supra]** would be crucial and require reproduction as under :

> *"148. Both Articles 29 and 30 form a part of the fundamental rights chapter in Part III of the Constitution. Article 30 is confined to minorities, be it religious or linguistic, and unlike Article 29(1), the right available under the said article cannot be availed by any section of citizens. The main distinction between Article 29(1) and Article 30(1) is that in the former, the right is confined to conservation of language, script or culture. As was observed in Father W. Proost case the right given by Article 29(1) is fortified by Article 30(1), insofar as minorities are concerned. In St. Xavier's College case it was held that the right to establish an educational institution is not confined to conservation of language, script or culture. When constitutional provisions are interpreted, it has to be borne in mind that the interpretation should be such as to further the object of their incorporation.* ***They cannot be read in isolation and have to be read harmoniously to provide meaning and purpose. They cannot be interpreted in a manner that renders another provision redundant. If necessary, a purposive and harmonious interpretation should be given.***
>
> ***xxx***
>
> *137. It follows from the aforesaid decisions that even though the words of Article 30(1) are unqualified, this Court has held that at least certain other laws of the land pertaining to health, morality*

and standards of education apply. ***The right under Article 30(1) has, therefore, not been held to be absolute or above other provisions of the law, and we reiterate the same****. By the same analogy, there is no reason why regulations or conditions concerning, generally, the welfare of students and teachers should not be made applicable in order to provide a proper academic atmosphere, as such provisions do not in any way interfere with the right of administration or management under Article 30(1).*

138. As we look at it, Article 30(1) is a sort of guarantee or assurance to the linguistic and religious minority institutions of their right to establish and administer educational institutions of their choice. Secularism and equality being two of the basic features of the Constitution, Article 30(1) ensures protection to the linguistic and religious minorities, thereby preserving the secularism of the country. Furthermore, the principles of equality must necessarily apply to the enjoyment of such rights. No law can be framed that will discriminate against such minorities with regard to the establishment and administration of educational institutions vis-a-vis other educational institutions. Any law or rule or regulation that would put the educational institutions run by the minorities at a disadvantage when compared to the institutions run by the others will have to be struck down. ***At the same time there also cannot be any reverse discrimination.*** *It was observed in St. Xavier's College case at SCR p. 192 that: (SCC p. 743, para 9)*

> ***"The whole object of conferring the right on minorities under Article 30 is to ensure that there will be equality between the majority and the minority.*** *If the minorities do not have such special protection they will be denied equality."*
>
> *In other words, the essence of Article 30(1) is to ensure equal treatment between the majority and the minority institutions. No one type or category of institution should be disfavoured or, for that matter, receive more favourable treatment than another. Laws of the land, including rules and regulations, must apply equally to the majority institutions as well as to the minority institutions. The minority institutions must be allowed to do what the non-minority institutions are permitted to do."*

254. Article 30, therefore, is a reinstatement of constitutional values of Chapter III, specifically in the context of educational institutions. It is clear that the crux of Article 30(1) lies in its mandate to ensure parity between non-minority [or 'neutral'] institutions and minority institutions. Its fundamental aim is to prevent any form of discrimination or preferential treatment, thereby advocating for equal treatment under the law for one and all. This provision underscores that no specific category or type of institution should be disadvantaged or unduly favoured over another within the legal framework.

255. In this light, and under the mandate of ***TMA Pai*** **[supra]**, to assert that the neutral institutions are majoritarian by nature, would be ignore the mandate of other provisions of the

Constitution which specifically provide for equal treatment for all, protect secularism and diversity and protect individuals and communities against arbitrariness.

O. THE UGC ACT AND YASHPAL

256. In relation to the UGC Act, the parties challenging the judgment of the High Court relied upon Section 2(f), Section 3, Section 22, and Section 23, read with the judgment in ***Prof. Yashpal v. State of Chhattisgarh*, (2005) 5 SCC 420**, to assert that universities are necessarily created and chartered through legislative enactments. As per the said provisions, the institutions established in that manner only are legally authorized to utilize the term "University" in their names and confer degrees. Taking this further, it was argued that, if the judgement in ***Azeez Basha* [supra]**, which holds that if any institution is established by virtue of the statute, cannot be a minority institution, because a University has to be established by and under a statute, no University can ever be conferred the status of a minority institution.

257. As already concluded hereinabove, the judgment in ***Azeez Basha* [supra]** ought to be understood in its historical context and does not lay down a proposition that whenever a University is established by way of an enactment, it cannot be a minority institution. The assertion that the establishment and incorporation of a university through legislation inherently preclude it from

being classified as a minority institution is unfounded. Such a contention arises from a misinterpretation of the decision in ***Azeez Basha*** **[supra]**, which was specific to a particular statute and addressed a legislative framework predating the Constitution, enacted by a colonial authority.

258. It was noticed in ***Yashpal*** **[supra]** that a university lacking infrastructure or educational facilities would still have the authority to grant degrees, potentially resulting in significant disorder in coordinating and upholding standards in higher education, which could detrimentally affect the entire nation. Therefore, it was in the larger public interest that this Court, held that the establishment of a university by the State, exercising its sovereign power, ought to occur through a legislative enactment. It held that insofar as private universities are concerned, "established or incorporated" should be read conjunctively and further that "a private university can only be established by a separate Act or by one compendious Act where the legislature specifically provides for establishment of the said university".

259. It can be seen through various enactments[8] that universities are established by the 'sponsor' who designs the administrative framework, considering the minimum requirements outlined in

[8] See The Amity University Uttar Pradesh Act, 2005; The Galgotias University Uttar Pradesh Act, 2011; The Bennett University, Greater Noida, Uttar Pradesh Act, 2016; The Mohammad Ali Jauhar University Act, 2005; The Era University, Lucknow, Uttar Pradesh Act, 2016; Maulana Azad University , Jodhpur Act, 2013.

the regulations. The "sponsor", typically a society, also arranges the necessary properties, including land and buildings. Subsequently, the University may either be recognized as deemed to be a university under Section 3 of the UGC Act, or it may be formally established and incorporated on behalf of the sponsor through a statutory enactment.

260. As stated above, there exists substantial legislative frameworks of minority Universities established by statute. The said statutes highlight the predominantly minority orientation of these institutions with peripheral non-minority elements. As stated above, the said legislative enactments and their examination reveals that a significant level of autonomy was retained by the sponsoring entity, with pivotal decision-making authority vested therein. In some instances, specific provisions were made for religion-based reservations as well through the legislation itself. Therefore, the appropriate Legislature, in its wisdom, can certainly establish, incorporate, or recognize a minority University, and include appropriate provisions to imbue the University with a minority identity. Therefore, the UGC Act or the judgment in ***Yashpal*** **[supra]**, in no manner, come to the aid of the parties challenging the correctness of the judgment in ***Azeez Basha*** **[supra]**.

P. NCMEI ACT AND THE AMENDMENT

261. According to the parties challenging the judgement of the High Court, the error that since a University requires a statute for establishment and statutory establishment renders such University to be non-minority, was furthered under the National Commission for Minority Educational Institutions Act, 2004 (hereinafter referred to as the "NCMEI Act"). The said enactment and its definition clause, excluded universities from being certified as 'Minority Educational Institution'. From 2004-2010, the NCMEI Act defined the word "minority educational institution" as under-

> *"(g) "Minority Educational Institution" means a college or institution (other than a University) established or maintained by a person of group of persons from amongst the minorities;"*

262. Subsequently in 2010, the said definition was amended on two counts : one, the phrase other than a University was deleted and two, the words established and administered was put in the clause taking cue from Article 30. The statement of the Hon'ble Minister while moving the said amendment is illustrative in this regard. The relevant portion is quoted as under :

> *"24.02.2009*
> *THE MINISTER OF STATE IN THE MINISTRY OF HUMAN RESOURCE DEVELOPMENT (SHRI M.A.A. FATMI):…In Section 2 of the Bill, two amendments are proposed in clause (g). First is to do away with the exclusion of Universities in the*

definition of "Minority Educational Institutions". The second proposal is to substitute the words "or maintained by" with the words "and administered by". ***The existing exclusion of a University from the definition of a minority educational institution runs counter to the law laid down by the Supreme Court of India vide Azeez Basha V. Union of India (A.I.R. 1968) substitution of words "or maintained by" with the words "and administered by" Several complaints were received to the effect that non-minorities were advertising the institutes as established by the minorities.*** *Through this amendment this defect is sought to be removed by providing that the institutions should be both established and administered by a person or group of persons belonging to the same minorities. This will also conform to the language used in Article 30 of the Constitution."*

263. Therefore, the amendment in the NCMEI Act provides that Universities can be considered under the provisions of the NCMEI Act and further, there exists a twin requirement of "establishment" and "administration" for claiming minority status in line with ***Azeez Basha*** **[supra]**.

264. According to the parties challenging the judgement of the High Court, since the provisions of the NCMEI Act as amended in 2010 clearly recognize that a University can be a minority institution in terms of Article 30 and post ***Yashpal*** **[supra]**, since a university can only be established by a statute, the purported finding in ***Azeez Basha*** **[supra]** that a university established and

incorporated by a statute cannot be held to be "established" by a minority community for the purposes of Article 30, is erroneous.

265. As stated above, the said assertion is also a product of the erroneous understanding of the judgment in ***Azeez Basha*** **[supra]**. It is reiterated that the judgement in ***Azeez Basha*** **[supra]** does not lay down a proposition that established and incorporated by a statute cannot be held to be "established" by a minority community for the purposes of Article 30. The judgement in ***Azeez Basha*** **[supra]** ought to be understood in its historical context and does not lay down a proposition that if a University is established by way of a legislative enactment, it cannot be a minority institution. In light of the above, the amendment in the NCMEI Act does not come to the aid of the parties questioning the correctness of the decision in ***Azeez Basha*** **[supra].**

Q. CONCLUSIONS

266. In light of the above, the following conclusions can be recorded :

i. The bench of two judges in Writ Petition No.54-51 of 1981 titled ***Anjuman-e-Rehmania & Ors v. Distt. Inspector of School & Ors.*** could not have referred the matter to a bench of seven Hon'ble Judges directly, without the Hon'ble Chief Justice of India, being a part of the bench.

ii. The "establishment" of an institution by the minority is necessary for the said minority to claim right of administration under Article 30. The words "establish" and "administer" are used conjunctively in Article 30 of the Constitution.

iii. The term "establish" in Article 30 means "*to bring into existence or to create*" and cannot be conflated with generic phrases such as "genesis of the institution" or the "founding moment of the institution".

iv. The *real positive indicia* for determining the question of establishment of an institution would have to be developed on a case to case basis with the following broad parameters in mind :

    i. Firstly, to claim "establishment", the minority community must actually and tangibly bring the *entirety* of the institution into existence. The role played by the minority community must be *predominant*, in fact almost complete to the point of exclusion of all other forces. The indicia which may be illustrative and exhaustive in this regard may be the nature of the institution, the legal/statutory basis required for establishing the institution, whether the establishment required any "negotiation" with outside forces, the role in acquiring lands, obtaining

funds, constructing buildings, and other related matters must have been held completely by the minority community. Similarly, while teachers, curriculum, medium of instruction, etc. can be on secular lines, however, the decision-making authority regarding hiring teachers, curriculum decisions, medium of instruction, admission criteria, and similar matters must be the minority community. The choice of having secular education in the institution must be made expressly by the minority community, demonstrating the link between institution and the persons claiming to establish it.

ii. Secondly, the purpose of the institution must have been to predominantly serve the interests of the minority community or the sole betterment of the minority community, irrespective of the form of education provided and the mode of admission adopted. Therefore, as per the choice of the minority community, an institution may have secular education, but such secular education and the resultant institution, must be predominantly meant for the overall betterment of the minority community.

iii. Thirdly, the institution must be predominantly administered as a minority institution with the actual functional, executive and policy administration vested with the minority. The minority community should determine the selection, removal criteria, and procedures for hiring teaching, administrative staff, and other personnel. The authority to hire and fire staff must be from the minority community. Further, even if teaching or administrative staff may include non-minority persons, the final authority exercising functional, directional, and policy control over these authorities must be from the minority community. This ensures that the thoughts, beliefs, and ideas of the minority community regarding administration are implemented in reality. This represents the real decision-making authority of the institution being of the minority community.

In ascertaining the above, it would be open for the Court to look at the true purpose behind each of the above factors and to *pierce the veil*.

iv. The notion that ***Azeez Basha*** **[supra]** categorically prohibits minorities from establishing universities due to statutory requirements is unfounded. The bench in ***Azeez Basha*** **[supra]** and present bench are faced with a unique

situation and needs to adopt a suitably modulated approach. The judgment in ***Azeez Basha*** **[supra]** does not preclude minorities from establishing universities but rather highlights the importance of legislative intent and statutory provisions in determining an institution's character.

v. The minority community may conceptualize the idea of an institution and may advocate for the same, however, if during exchange or negotiation, the actual institution which was established had primacy of governmental efforts and control, then such institution cannot be held to be predominantly established by the efforts and actions of the minority community.

vi. In the pre-independence and pre-UGC era, in the absence of a provision like Section 23 of the UGC Act, 1956, it was open for any institutions to adopt the titles such as "university" or in some cases "vidyapeeth" or "jamia" asserting their capability to grant degrees. The absence of a legislative embargo from private establishment of Universities prior to 1956 would be critical for the scope of enquiry.

vii. The use of the phrase ‘establish and incorporate’ by the Legislature may be relevant in the larger enquiry but cannot be said to be conclusively determinative of the

factum of establishment or not by the minority community. If the intention of the Legislature is to establish or incorporate or recognise a minority University, the Legislatures have incorporated suitable provisions to colour the University with a minority identity.

viii. There were no rights, fundamental or otherwise, prior to the Constitution coming into force and therefore, there is no question of surrendering any right. The British Indian Government was a supreme Imperial power in the country, and the question of surrender is illusionary and does not arise in the present case. The coming into force of the Constitution and fundamental right after 1950, cannot alter the events that occurred during the decade of 1910-1920 which led to the establishment of the AMU.

ix. There is no legal requirement for the AMU 'Court' to be manned by the people from the minority community ever since 1951 and therefore, merely because *de facto* the persons from the minority community may have manned the posts in the institution, would not be relevant to adjudicate the question.

x. The assertion that 'neutral' institutions or non-minority institutions would in the natural course of things be 'majoritarian' or that Article 30 contemplates constitutionally protecting certain educational spaces from

such ‘majoritarianism-by-default’ tendencies, is wholly erroneous. The purpose of Article 30 is not to create ‘minority only’ ghettos rather provide positive rights to the minorities to establish educational institutions of their choice and kind.

xi. Article 30, as a feature of the Constitution, provides important rights which function within the larger penumbra of fundamental rights. There is substantial interplay, intermixing and balancing of rights inter se within the fundamental rights and Article 30 is not absolute and certainly do not exist in a *silo*.

xii. The crux of Article 30(1) lies in its mandate to ensure parity between non-minority [or ‘neutral’] institutions and minority institutions. Its fundamental aim is to prevent any form of discrimination or preferential treatment to non-minority communities, thereby advocating for equal treatment under the law for one and all. This provision underscores that no specific category or type of institution should be disadvantaged or unduly favoured over another within the legal framework.

xiii. To assume that the minorities of the country require some ‘safe haven’ for attaining education and knowledge is wholly incorrect. The minorities of the country have not just joined the mainstream but comprise an important facet

of the mainstream itself. The institutions of national character of the country always serve the interests of the minorities and are diverse centers of learning.

xiv. The UGC Act or the judgment in ***Yashpal*** **[supra]**, in no manner, comes to the aid of the parties challenging the correctness of the judgment in ***Azeez Basha*** **[supra]**.

xv. The amendment in the NCMEI Act does not come to the aid of the parties questioning the correctness of the decision in ***Azeez Basha*** **[supra].**

267. The reference is answered in the above terms. The matters may be placed before an appropriate bench as per the prevailing rules.

…….J.
[SATISH CHANDRA SHARMA]

NEW DELHI
NOVEMBER 08, 2024