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

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

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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.

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[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.

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[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;

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[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. <u>The preliminary objection by the Union of India</u>

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]

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[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. The scope of Article 30

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]

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[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

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[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

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[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.

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[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

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[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. <u>Indicia for a Minority Educational Institution</u>

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

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[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.

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[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

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[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

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

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[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

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[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

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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.
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> 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

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[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:

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[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

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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?

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[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.

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[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. <u>Indicia for the 'establishment' of a minority educational institution</u>

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

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[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

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[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

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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,

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[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

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[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. <u>The decision of this Court in *Prof. Yashpal*</u>

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

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[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]

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[Sanjiv Khanna]

…………………………………………J
[J B Pardiwala]

…………………………………………J
[Manoj Misra]

New Delhi;
November 8, 2024