REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2286 OF 2006

ALIGARH MUSLIM UNIVERSITY …APPELLANT(S)

VERSUS

NARESH AGARWAL & ORS. …RESPONDENT(S)

WITH

CIVIL APPEAL NO. 2321 OF 2006

CIVIL APPEAL NO. 2320 OF 2006

CIVIL APPEAL NO. 2318 OF 2006

CIVIL APPEAL NO. 2024
[Arising out of SLP (C) No. 32490 of 2015]

WRIT PETITION (C) NO. 272 OF 2016

CIVIL APPEAL NO. 2861 OF 2006

CIVIL APPEAL NO. 2316 OF 2006

CIVIL APPEAL NO. 2319 OF 2006

CIVIL APPEAL NO. 2317 OF 2006

TRANSFERRED CASE (C) NO. 46 OF 2023

J U D G M E N T

SATISH CHANDRA SHARMA, J.

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1. I have had the privilege and the honour of perusing the erudite and illuminating opinions authored by Hon'ble Chief Justice, Dr. D.Y. Chandrachud and Hon'ble J. Suryakant. Considering that the present matter involved fundamental questions concerning interpretation of the constitutional provisions and the judgments rendered by this Hon'ble Court, I find it necessary to render the present opinion.

A. PREFACE

2. The present larger bench of seven Hon'ble Judges, had assembled in order to adjudicate upon validity of some of the amendments made to the Aligarh Muslim University Act, 1920 [hereinafter referred to as the "**AMU Act**"], through the Aligarh Muslim University Amendment Act, 1981 [hereinafter referred to as "**1981 amendment(s)**"] and the notifications of the Admission Committee dated 10.01.2005, Academic Council dated 15.01.2005 and the Executive Council dated 19.05.2005, providing for reservation to the extent of 50 per cent of seats to be reserved for Muslims of India for admission to post graduate programmes. While adjudicating the validity of the same, various other connected questions of constitutional importance arise which would be discussed in detail hereinunder.

3. The primary question that captures the attention of this Court in the present proceedings is the form, content and

application of Article 29[1] and 30[2] of the Constitution of India, 1950 [hereinafter referred to as "the Constitution"]. The judgments of this Hon'ble Court have settled the law with regard to the effect of the application of Article 29 and 30, specifically the larger bench judgment in case ***T.M.A. Pai Foundation v. State of Karnataka*, (2002) 8 SCC 481**, which is the *locus classicus* on the subject, rendered by a bench of eleven Hon'ble Judges. A co-ordinate bench of seven judges has thereafter distilled the position of law in ***P.A. Inamdar v. State of Maharashtra*, (2005) 6 SCC 537**. The said judgments are a guiding light on the subject and assist the Court in course of the present judgment.

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

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

4. While the said judgments amongst others, have cleared the air on the broader interpretation of Article 29 and 30, the question which concerns the present bench is of an atypical nuance, which requires further elaboration and jurisprudential extraction. Considering the unique position that the Aligarh Muslim University [hereinafter referred to as "**the AMU**"] has in the history, the constitutional text and the facts surrounding the birthing of the University itself, this Court was required to interrogate certain aspects of Article 29 and specifically Article 30, which have not necessarily arisen before this Court in any previous case. The specific occasion on which issues of the like arose was in the case concerning the AMU itself in ***S. Azeez Basha v. Union of India*, (1968) 1 SCR 833** (hereinafter referred to as "**Azeez Basha**"), the correctness of which is a subject matter of intense and rigorous debate before this Court in the present proceedings.

5. Article 29 and 30, forming a part of the fundamental rights chapter of the Constitution, represent an important constitutional guarantee available to the citizens of the country. It is a guarantee that embeds cultural diversity, secularism and fairness on the canvas of the Constitution. The judgment in ***TMA Pai* [supra]** describes India as '*a land of diversity – of different castes peoples, communities, languages, religions and culture*'. It was this inherent diversity that perhaps led the Constitution makers to

make specific provisions to guard and celebrate the cultural, religious and linguistic diversity. The Constitution thus provided *minorities*, based on *religion* or *language*, the right to *establish* and *administer*, educational institutions of their *choice*. The right was geared towards educational institutions as it was felt that education forms the bedrock of the identity of the next generation of individuals which would help preserve, protect and further the cultural, religious and linguistic diversity.

6. This diversity is not a coincidence in India and is a product of inherent genetic built of Indian society. The citizens of this land mass, which we call India, or Bharat, are therefore inherently pluralistic and organically imbibe within them the ideals of religious, cultural and linguistic diversity. It is a function of this cultural synthesis that almost accidently and not necessarily by design, the fundamental rights are also provided for in the Constitution at two separate levels or units – the individual; and the group. The rights against arbitrariness, for equality, freedom of speech/ move freely/reside and settle/profession, freedom of life and liberty, freedom of religion, etc. are granted at an individualistic level.

7. At the same time, the freedom of trade, freedom of association, rights against untouchability, right to manage religious institutions and the right *establish* and *administer* educational institutions, are granted to group(s) or specific

groups. The said individual rights and their interplay with groups rights colour the palette of Indian constitutional law and would assist the Court in chartering its future course.

8. The specific rights to the minorities under the Constitution, over and above the existing individual and group rights available to all citizens and/or groups which are agnostic to minority/non-minority classification, are to be theorised within the distinctive context of Indian nationhood. It is necessary to note that India is a "nation", but not in the *euro-centric* sense, which merges linguistic identity with a colonial or medieval past. India is a continuum, it is a civilization that has perpetuated its course through the annals of history, carrying with it the lives and stories of every hue of human existence. India's national identity merges many diverging groups, communities, sects, etc. which often intersect with each other in varying fashions. This diversity does not rob the country of a unified past, a shared history and composite present. It is, in fact, this kaleidoscope of intermingling and off-shooting cultures that builds the national identity or the national character. The uniqueness of India, its nationalism, its shared cultural history and the context in which the Constitution came in to being, gives life to the provisions of Constitution. It is with this broad understanding that this Court would seek to locate the answers to the questions presented before it.

B. UNDISPUTED FACTS

9. There has been a considerable degree of contest over the facts that may be germane in the present matter. The question of establishment of the AMU and the facts surrounding it, the resultant AMU Act, 1920 [as it then stood] and the history of the Mahommedan Anglo-Oriental College [hereinafter referred to as the "MAO College"] have been presented by the parties in their own manner and style. Without adverting to the contested facts or claims, the Court would be benefitted by culling out the uncontested facts which are relevant for the purposes of the present adjudication.

10. The history of modern higher education in India starts from the Charter Act of 1813 of the British Crown which allocated funds for education in British India, leading to the establishment of institutions like the Hindu College in Calcutta in 1817. In 1854, an education policy of the British for British India came in the form of the *Wood's Dispatch,* officially known as the "Despatch on Indian Education". It was a seminal educational policy document issued in 1854 by Sir Charles Wood, the President of the Board of Control for India and marked a significant step in the development of the modern education system in India. The Dispatch advocated for the establishment of universities in major cities and improvements in schools and specifically provided that the "*examinations for degrees will not*

include any subjects connected with religious belief; and the affiliated institutions will be under the management of persons of every variety of religious persuasion."

11. In 1857, Act II, XXII and XXVII were passed by the Imperial Legislative Council [a representative body empowered by the British Parliament to make laws for British India] to establish the first three Universities in India, namely Universities of Calcutta, Bombay and Madras. Thereafter, Act XLVII of 1860, was passed by the Imperial Legislative Council, which expanded the powers of the abovesaid three Universities to grant degrees. As a matter of policy and practice, the British Imperial power in India therefore, set-up Universities through a legislative enactment and resultantly "recognised" such Universities for the purposes the colonial power deemed fit. The legislations mentioned above, provided the British officials significant controlling and regulatory powers to administer the institutions. There has been considerable emphasis on this aspect of the matter and shall be discussed separately in a particular section of the judgment.

12. In 1870, a private committee was set up by the name of Committee for the Better Diffusion and Advancement of Learning among the Muhammadans of India, which submitted its report in 1872. The said Report provided a roadmap for the Muhammadan Oriental College as an institution to promote

Western Arts and Sciences for the education of Muslims in India. In 1873, on the said lines, a Scheme was proposed for the MAO College.

13. On 24.05.1875, the opening ceremony of the MAO College was held in Aligarh. On 08.01.1877, the foundation of the MAO College was laid by Sir Syed. The Rules and Regulations for the Appointment of the Trustees of the MAO College were passed in 1889. The said Rules described the object of MAO College was "primarily the education of Mahomedans and, so far as may be consistent therewith, of Hindus and other persons."

14. In 1902, the Report of the Indian Universities Commission was published. The said report, with regard to MAO College, it was specifically noted that "no obstacle should be placed in the way of denominational colleges, it is important to maintain the undenominational character of the Universities". On 24.03.1904, the Indian Universities Act (VIII of 1904) was passed which unified the pre-existing legislation based University regime in British India, repealed the previous Acts, and brought within its purview the five Universities. It also reconstituted the then existing Governing Bodies of the universities and gave statutory recognition to the 'Syndicates' in the said Universities.

15. From the late 1800s to 1910, several individuals associated with the MAO College propounded various differing ideas for

setting up of a "University". In May 1911, representatives from the MAO College met Harcourt Butler, Member of the Governor-General's Council for the setting up of a "University". From 1911 till 1913-14, the prayer was for the setting up of a predominantly "denominational" University which would be recognised by the British Indian Government. The stances of parties took a sharp turn on the passing of the Benaras Hindu University Act, 1915 [hereinafter referred to as the "BHU Act"] by the Imperial Legislative Council on 01.10.1915 leading to the establishment of the Benares Hindu University [hereinafter referred to as the "BHU"].

16. At the said time, as per the British officials in-charge, the "Benares model" as it was then referred, had to be followed. It is sought to be presented that once the movement to establish the BHU gained prominence and acceptance, the tone and tenor of all sides changed.

17. Separately, there were also considerable disagreements within the various groups of the minority community advocating for a University over issues such as recognition by the British Indian Government and extent of control that the British Indian Government would exercise over any such proposed University. As the said matter also involves minute machinations of the working of the colonial government and the views and counter views of various personalities involved in the process, the parties

before this Court have sought to highlight one aspect over the other. The various conflicting narratives of the process shall be discussed separately in a particular section of the judgment.

18. On 10.04.1916, the informally formed 'Moslem University Committee', which was requesting the British Government to form the University by bringing in an enactment, by a Resolution observed that "it has no other alternative at present, but to accept the principles of the Hindu University Act…". Once the deck was cleared for the in-principle "acceptance" of having a University on the Benares model, the discussions started on the actual draft of the Aligarh Muslim University Bill.

19. Finally, on 27.08.1920, Sir Mian Muhammed Shafi, the education member in the Imperial Legislative Council, introduced the Bill for the establishment of a University and on the same day, sought to refer the Bill to a Select Committee. On 08.09.1920, the Select Committee submitted its Report. On 09.09.1920, Mr. Shafi moved the report of the Select Committee on the Bill to establish AMU in the Indian Legislative Council. Finally, on 14.09.1920, the Aligarh Muslim University Act, 1920 was passed.

20. Till the mid-1920's almost a dozen Universities under legislative enactments had been established in British India[3]. On 23.03.1925, an Inter-University Board was established to facilitate the exchange of professors between these Universities, to serve as an authorised channel of communication and facilitate the coordination of university work, to assist Indian Universities to get recognition for their degrees and diplomas in other countries, etc.

21. In 1935, the Government of India Act, 1935 was enacted by the British Parliament which specifically included provisions relating to the regulation of higher education. It divided legislative powers between the Federal Government and Provincial Governments. In matters related to higher education, both the central and provincial legislatures had the authority to make laws. However, there was a specific legislative entry with regard to "Benares Hindu University" and "Aligarh Muslim University" which vested the Federal Legislature with the exclusive legislative powers over the same under Entry 13, List I, in S. 100, of the Government of India Act, 1935.

[3] University of Calcutta; University of Bombay (now known as University of Mumbai); University of Madras; Panjab University (Established as University College, Lahore. Later, raised to a level of University.); University of Allahabad; University of Mysore; Banaras Hindu University; Patna University; Aligarh Muslim University; University of Lucknow; University of Dhaka; Delhi University; Nagpur University.

22. In 1944, the Central Advisory Board of Education made attempts to formulate a national system of higher education and submitted the "Sargent Report" which recommended the formation of a "University Grants Committee" to coordinated Higher Education in India. In pursuance to the same, in 1945, the Department of Education, Health and Lands vide resolution dated June 4, 1945 established the University Grants Committee to advise the government on the grants to be given to the Central Universities [Delhi, Benares and Aligarh].

23. In 1947, the constitution of the Committee was amended and its scope enlarged by the Department of Education Resolution to empower the Committee to deal with all Universities in India. In 1948, the University Education Commission was set up under the Chairmanship of S. Radhakrishnan "*to report on Indian university education and suggest improvements and extensions that might be desirable to suit the present and future needs and aspirations of the country*". The Commission submitted its Report, whereby it was recommended to reconstitute the University Grants Committee, to expand its membership, include experts on the panel, give powers of visitation, distribution of grant-in aid, etc.

24. In 1951, the AMU Act was amended in order to bring it in line with the Constitution [which came in to force in 1950]. This was simultaneous with similar amendments being carried out to

the BHU Act. The AMU Act was further amended in 1965, 1972 and 1981. The content and the purport of the amendments to the AMU Act over the years shall be discussed in detail in a separate section of the judgment.

25. On 28.12.1952, the Government of India set up an 'interim' University Grants Commission (hereinafter referred to as "UGC") by resolution to advise it on the allocation of grants-in-aid from public funds. On 03.03.1956, the University Grants Commission Act, 1956 [hereinafter referred to as the "UGC Act"] was enacted thereby giving statutory recognition to the UGC.

26. In 1968, the judgment in ***Azeez Basha*** **[supra]** was delivered which held that the AMU was neither established nor administered by the minority community. After the judgement in ***Azeez Basha*** **[supra]** was delivered, the AMU was treated to be a free and open institution as opposed to a minority educational institution. This position continued until 1981 when the Parliament passed The Aligarh Muslim University (Amendment) Act, 1981. This Act made several changes to the provisions of the 1920 Act chief among which was an amendment to Section 2(l) which now read as follows:

> *(l) "University" means the educational institution of their choice established by the Muslims of India, which orginated as the Muhammadan Anglo-Oriental College, Aligarh and which was*

subsequently incorporated as the Aligarh Muslim University."

27. An addition was also made of clause 5(2)(c) dealing with the powers of the University which gave the University power *"to promote especially the educational and cultural advancement of the Muslims of India".* The word "established" was deleted from the long title of the Act and it now read *"An Act to incorporate a teaching and residential Muslim University at Aligarh"* as opposed to the unamended long title i.e., *"An Act to establish and incorporate a teaching and residential Muslim University at Aligarh"*. The Act also empowered the Court of the University to act as the Supreme Governing Body.

28. Consequent to this amendment, no issue arose till 2005, when the Admissions Committee of the University took a decision at its meeting of January 10, 2005 to reserve 50% of seats in the Post Graduate Medical Courses for Muslims. The same was also accepted by the Union of India on February 25, 2005. The Resolutions providing such reservations and the 1981 amendments were challenged before a Single Judge of the Hon'ble High Court of Judicature at Allahabad [hereinafter referred to as the "Allahabad High Court" or "High Court"] on the ground that the amendments amounted to an impermissible legislative overruling of ***Azeez Basha*** **[supra]**.

29. The Single Judge had read down Section 2(l) to mean that the word "established" in that section would refer to the MAO college and not the University. The learned Single Judge further held that the amendment of 1981 did not turn the AMU into a minority institution because ***Azeez Basha*** **[supra]** still held the field. Thereafter, appeals were preferred before a division bench of the Hon'ble High Court.

30. The Ld. Division Bench rendered two separate judgements which concurred entirely on all points of law raised before it. Briefly stated, it was held that the core principle of the ***Azeez Basha*** **[supra]** was that the minority community had requested the British Government to establish the AMU because they wanted governmental recognition of its degrees. It was held that this recognition of historical fact could not be overcome by "an enforced declaration of substantial identity" as given in section 2(l) and as sought to be done by removing the word "establish" from the long title of the Act. Consequently, Section 5(2)(c) was also struck down for being discriminatory since it privileged the advancement of a particular section over others. It was further held that the Parliament had no competence to enact the 1981 Act because only a minority could create a minority institution, Parliament could not.

31. The decision of the High Court was challenged by the University in a Special Leave Petition before this Court. The

Union of India had also challenged the decision of the High Court and had supported the University's stand. On April 24, 2006, a Division Bench of this Court had directed status quo to be maintained in the proceedings after Counsel for the University undertook not to implement the 50% reservation policy until final disposal of the case. The question regarding the status of the university was directed to be considered before a larger bench.

32. Thereafter, the Union had sought to withdraw the appeal filed against the judgement of the High Court on the ground that the historical finding of fact in ***Azeez Basha*** **[supra]** could not have been set at naught by an amending act of the Parliament. On February 2, 2019, a bench of three judges of this Court had directed that the question of correctness of the ***Azeez Basha*** **[supra]** decision should be referred to a bench of Seven Judges. The reference was made directly to seven judges because in the Bench's view, the very same question had been referred before in the case of ***Anjuman-e-Rahmania and Others v. District Inspector of Schools and Others*** W.P. (C) 54-57 of 1981. These writ petitions were heard and disposed of by the Bench in ***TMA Pai Foundation v. Union of India,*** **(2002) 8 SCC 481** but this question was left unanswered. The issue with regard to the scope of the reference shall be discussed separately in detail.

C. SUBMISSIONS OF THE PARTIES

C.1 Appellants questioning the correctness of Azeez Basha [supra]

33. It was submitted by Dr. Rajeev Dhawan, learned Senior Counsel, appearing for the Aligarh Muslim University, that the order dated 26.11.1981 passed by this Court in the case of ***Anjuman-e-Rahmaniya v. District Inspector of Schools, W.P.(C) No. No. 54-57 of 1981*** and the reference order dated 12.02.2019 in the present batch of petitions creates several points of reference for this bench to adjudicate upon, which include the correctness of judgment in ***Azeez Basha* [supra]**, impact of ***Prof. Yashpal v. State of Chhattisgarh*, (2005) 5 SCC 420**, and those relating to National Commission for Minority Educational Institutions Act, 2004 ('NCMEI Act'). However, no specific issues were spelt out in the order dated 12.02.2019.

34. In view of the above, Dr. Dhawan submitted that the issues are required to be framed and then decided by this Bench. According to him, following issues arise in the present matter:

a. Was ***Azeez Basha* [supra]** correctly decided, and whether it suffers from internal contradiction and reasoning on facts and on law?

b. Does ***Azeez Basha* [supra]** need to be reconsidered in light of earlier and subsequent decisions of this Court on Article 30(1)?

c. What is the effect of ***Azeez Basha*** **[supra]** on the future decisions of the Hon'ble Allahabad High Court which applies ***Azeez Basha*** **[supra]** in toto and strikes down the statutory amendments to the Aligarh Muslim University Act 1920 (hereinafter referred to as 1920 Act) through the 1981 Amendment Act as a usurpation of judicial power?

d. What is the effect of NCMEI Act read with the University Grants Commission Act, 1956 ('UGC Act')? Should ***Azeez Basha*** **[supra]** be reconsidered in the light of the NCMEI Act (as amended in 2010) and read with UGC Act as considered in ***Yashpal*** **supra**?

e. Was ***Azeez Basha*** **[supra]** correct in accepting the antecedent historical data on AMU's Muslim character, but denying its constitutional significance while deciding the issue of its minority status, which is at the variance with ***St. Stephen's College v. University of Delhi,*** **(1992) 1 SCC 558** [5-Judge Bench]; ***Rev. Father W Proost v. State of Bihar,*** **(1969) 2 SCR 73** [5-Judge Bench]; and ***Right Rev. Bishop SK Patro v. State of Bihar,*** **(1969) 1 SCC 863** [5-Judge Bench]?

f. Is ***Azeez Basha*** **[supra]** contrary to the constitutional dispensation on rights of minorities under Articles 29 and 30, discerned before the Constituent Assembly Debates and approved in TMA Pai?

35. Further, Dr. Dhawan raised a preliminary objection regarding change of stand of the Union of India insofar as the validity of the 1981 Amending Act is concerned. Having once filed an appeal against the impugned judgment of the Allahabad High Court, the decision to withdraw the same by Union of India and adopting a stand, which is contrary to the pleadings before the Hon'ble High Court is arbitrary, unreasonable and lacks bonafides. Dr. Dhawan submitted that the stance taken by Union of India presently is also contrary to its stance in the case of ***Azeez Basha*** **[supra],** which should not be permitted at this stage.

36. Dr. Dhawan interpreted Articles 26, 29 and 30 of the Constitution to argue that there are three questions, answers to which determine the character of a particular institution i.e., whether a particular institution is a minority institution or not: -

a. What is the origin of the institute?
b. Whether the minority community founded the institution or not?
c. Whether the community in question is minority, either linguistic or religious, in the State or not?

37. Dr. Dhawan assailed the correctness of ***Azeez Basha*** **[supra]**, by making the following submissions. Firstly, it has been held that as per the University Grants Commission Act, 1956, a university can be established only by a statute (enacted either by the Parliament or a State Legislature) and a university

can also be of a minority character. Also, that the university loses its minority character as soon as it is established by a statute. Therefore, there is inherent contradiction in the said judgment. Secondly, while ***Azeez Basha*** **[supra]** recognizes the history, background and antecedent role that the MAO College played in building this institution, the bench, however, ignores it at the end in view of the existence of 1920 Act. The said history and background ought to be appreciated as has been done in case of ***St. Stephen's*** **[supra].** Thirdly, in this respect, ***Azeez Basha*** **[supra]** completely ignores the purpose of the 1920 Act. The said judgment fails to correctly appreciate the salient features of the 1920 Act which demonstrate the minority character of Aligarh Muslim University. Furthermore, ***Azeez Basha*** **[supra]** adopts a very narrow construction of the word "establish" used in Article 30 of the Constitution and further, fails to give reasons to disregard other meanings of the said term. Lastly, ***Azeez Basha*** **[supra]** wrongly concludes that the educational institutions of the minorities converted into, and incorporated as, a university by a statute loses or seizes to retain its minority character. If a minority can establish a university under Article 30(1), and if universities are required to be incorporated under a statute for degrees to be recognised, then it must follow that the minority community is entitled to seek incorporation of its institution as a university.

38. Dr. Dhawan, relying upon the provisions of the 1920 Act, asserted that that it clearly demonstrates the Muslim character of the Aligarh Muslim University. It is further urged that the AMU is the alter ego of MAO College has been recognized by various provisions of the 1920 Act. Dr. Dhawan emphasized that the then Imperial Legislature had incorporated various provisions in the 1920 Act which are clearly intended for the benefit of the Muslim community. It is pointed out that the administration of AMU has been vested with the Muslim minority and that Muslim community had *de jure* and *de facto* control over the management of AMU.

39. Dr. Dhawan asserted that the law laid down in ***Azeez Basha*** **[supra]** ignored the earlier binding decisions of larger benches of this Hon'ble Court and therefore is, *per incuram.* These include the law laid down by a 7-judge bench in the case of ***In Re Kerala Education Bill*****, 1957, (1959) SCR 995** and also by a 6-judge bench in the case of ***Sidhajbhai Sabhai v. State of Bombay*****, (1963) 3 SCR 837.**

40. Furthermore, in view of the subsequent decisions of this Hon'ble Court also, the law laid down in ***Azeez Basha*** **[supra]** does not hold the field anymore. Additionally, it is urged that so far as UGC Act and NCMEI Act (as amended in the year 2010) are concerned, Sections 2(f), 22 and 23 of the former Act read with Sections 2(g) and 10 of the latter Act indicate that a

university can only be established by a statute and apart from them, only those institutions can confer degrees which have been declared as 'deemed to be University' under Section 3 of the UGC Act or which have been specifically empowered as such by an Act of Parliament. A university established by a statute cannot be kept out of the scope of Article 30 of the Constitution. If it is so kept out, then it would mean all tertiary education, except private institutions, will not get the protection of Article 30. As per Dr. Dhawan's reading of ***Azeez Basha*** **[supra],** every minority institution, once given a statutory recognition, will fall outside the ambit of Article 30.

41. Dr. Dhawan referred to the amendments made to the 1920 Act in the year 1981, which, as noted hereinabove, have already been struck down by the Allahabad High Court by the impugned judgment. It is submitted that the validity of the said amendment provisions need not be examined by this Bench and can be later dealt with by the regular bench. As per Dr. Dhawan, presently, the only issue which may be decided is whether ***Azeez Basha*** **[supra]** was correctly decided or not.

42. Dr. Dhawan, referring to the said provisions and the statutes annexed to the 1920 Act, submitted that *de jure* the control of management of the Aligarh Muslim University was and is with the Muslim Community. Further, adverting to certain other facts such as that all Chancellors till date have been

Muslims and 34 out of 37 Vice-Chancellors have been Muslims, it has been pleaded that *de facto* too, the administration of the Aligarh Muslim University has been in the hands of the Muslim community.

43. Mr. Kapil Sibal, learned senior counsel, appearing for the Old Boys' Association, submitted that the judgment in ***Azeez Basha*** **[supra]** failed to consider the history and genesis of the Aligarh Muslim University in the right perspective. While determining the factum of the establishment of the University, historical initiative, impetus, promotion, and purpose behind the institution has to be given due importance, which was not done in ***Azeez Basha*** **[supra]**.

44. It is asserted that ***Azeez Basha*** **[supra]** wrongly concludes that the University was established by the 1920 Act and therefore, it cannot be considered a minority institution. The 1920 Act is not the establishing factum of the University but only a recognition of such establishment, which has been done by the Muslim community at the relevant time. In order to highlight the history and purpose behind the institute, Mr. Sibal relied upon letters exchanged between Sir Syed Ahmed Khan and the relevant authorities of the Government and the debates which took place when the Aligarh Muslim University Bill was being discussed in the Imperial Legislature in the year 1920. In short, the genesis, according to him, includes the following:

a. Inspiration or purpose to set up the institution is by the minority.

b. The steps taken for persuasion are by the minority.

c. The essential paraphernalia or initial funding should be by the minority.

d. Persuading the authorities, by the minority, to accept that fact.

45. Mr. Sibal vehemently argued that the mere presence of "outsiders" in the administration of a minority institution would not deprive the institution from its minority status. He accepted that certain regulations can be imposed by the State on such institution to maintain the stands of excellence, however, those regulations would not affect the minority status of the institution. In contrast, the right of a linguistic or a religious minority under Article 30 to establish and administer an institution "of their choice", which cannot be subject to any regulation, is absolute.

46. Additionally, it is submitted that the only benefit to a particular institute of having a minority character is that the institute has the right to reserve a certain number of seats for students of the said minority community. The said right should not be taken away in the case of Aligarh Muslim University, where *de facto,* majority of students are already of Muslim community.

47. Apart from adopting submission of Dr. Dhawan and Mr. Sibal, Mr. Salman Khurshid, learned senior counsel, appearing for applicants in I.A Nos. 5 & 6 of 2016 in Civil Appeal No. 2286 of 2006 i.e., AMU Lawyers Forum and AMU Old Boys' Association, Delhi Unit, submitted that a moral reading of the Constitution needs to be adopted in the present case. If that is so done, it will follow that the rights under Part III of the Constitution of India are natural to or inherent in a human being. Mr. Khurshid argued that the natural rights are inalienable because they are inseparable from the human personality and have been just preserved by the Constitution. In this context, the rights under Article 30 that the minorities have, as individuals, existed even prior to 1950. As such, these rights cannot be taken away by way of an artificially restricted interpretation of a word like 'establish'.

48. Mr. Shadan Farasat, learned counsel, appearing for the appellant in CA 2316 of 2006 - Haji Muqeet Ali Qureshi vs Malay Shukla, submitted that there is a difference between establishment of an educational institution and the device to bring it into legal existence, which the judgment in ***Azeez Basha*** **[supra]** fails to take note of. The 1920 Act is a device to bring into legal existence the Aligarh Muslim University, which was established by the Muslim Community. Furthermore, the interpretation of Article 30 cannot depend on the existence of a

particular legal regime at any given point, which is the UGC Act in the present case. Mr. Farasat relied upon the data to show that *de facto*, the administration of the AMU has been with persons, majority of whom belong to Muslim community and further that, whether there is reservation of 50% for Muslim Community or not will not make any real difference since the majority of students also has been of Muslim Community.

49. Mr. M R Shamshad, learned counsel appearing for the applicants in I.A. No. 563 of 2024 in Civil Appeal No. 2316 of 2006 i.e., Anjuman-e-Rahmania, submitted that the applicant was the petitioner in ***WP Nos. 54-57 of 1981*** titled as ***Anjuman-e-Rahmania v. Distt. Inspector of School*** in which the order dated 26.11.1981 was passed by Fazal Ali J. questioning the correctness of the judgment in ***Azeez Basha*** **[supra].** In addition to what has already been argued, he submitted that minorities in the country have group rights in the form of rights under Articles 29 and 30 of the Constitution, which must be protected as is done in the case of other group rights available to Scheduled Castes, Scheduled Tribes, OBCs, etc.

C.2 Respondents defending the correctness of Azeez Basha [supra]

50. Controverting the same, on behalf of the parties defending the judgment of the High Court and the correctness of the judgment in ***Azeez Basha*** **[supra]**, Mr. R. Venkataramani, the

learned Attorney General, submitted that the power to establish a university is traceable to Article 30 of the Constitution and because the Aligarh Muslim University was a pre-constitutional university, the Muslim community did not legally have the power to establish it. Only the British Government could have established the University through an act of the Legislature. He has also sought to distinguish the existence of the University from its predecessor, the Mohammedan Anglo Oriental College, as the enabling power to create such a college came from the Societies Registration Act. Ld. Attorney General argues that the words "educational institutions of their choice" used in Article 30 do not by themselves confer a power of establishment independent of legal competence to do so. The Ld. Attorney General argued that ***Azeez Basha*** **[supra]** was correct insofar as it stated that the AMU was not "established" by the Muslim community but by an Act of Legislature.

51. Mr. Tushar Mehta, Solicitor General of India, raised a preliminary objection challenging the very reference itself, holding that a bench of two judges could not have directly referred the matter to seven judges in ***Anjuman*** **[supra]**. The Solicitor General disputed the interpretation of ***Azeez Basha*** **[supra]** put forward by the Appellants whereby it is argued that ***Azeez Basha*** **[supra]** holds that universities established by legislation can never be minority institutions. He accepted that

institutions incorporated by statute can also be minority institutions but submitted that in such a case, the Legislature would include provisions in the Act clarifying the minority character of the institution and AMU Act makes no such provision. He gave the example of the pre-constitution Annamalai University Act, to indicate how the British parliament recognised "founders" of universities, which were eventually taken over by the then Government.

52. The Solicitor General made extensive reference to the provisions of the 1920 Act to argue that the intent was in fact the opposite, that is to have government control over the institution by controlling, *inter alia,* the appointment of important office holders, the composition of administrative bodies, the rule making power of the university etc.

53. The Solicitor General argued that the AMU, despite its name is not really a Muslim University but rather a secular educational institution. Reference was made to the secular nature of the education provided therein, to the history of AMU as a national institution and the correspondences between British officials prior to the passage of the Act to show that their intent was to have significant control over the administration of the educational institution sought to be established. Reference was further made to the Parliamentary debates on the amending acts of 1965 and 1981.

54. It was asserted, through various examples, that in a pre-constitutional context, the British Government had the power to require a community to establish a university on the Government's own terms. It was sought to be argued that the AMU was a secular institution and not a denominational university as the proponents of AMU may have wished for. It was argued that since there was no Article 30 at the said time, there was no right to establish a university free of government control while still seeking governmental recognition of degrees.

55. The Solicitor General took the Court through the history of establishment of Universities in the country. It was argued that the history of universities under British rule to show that government control was a built-in feature so far as educational institutions were concerned. Reference was made to the history of the split between the AMU and the Jamia Milia Islamia to argue that the AMU chose to remain under government patronage while the Jamia was established as a "nationalist" college.

56. It was asserted that it was open to the AMU to remain a college and be free of government control or to establish a university without recognition of its degrees by the government but it chose not to exercise these options. The substance of the submission was that the right of administration was 'surrendered' when the proponents of the AMU accepted establishment by statute of the kind made by the 1920 Act.

57. The Solicitor General made an attempt to distinguish the concept of being established *by* an Act from the concept of being established *under* an Act. The decision in ***Dalco Engineering Pvt. Ltd. v. Satish Prabhakar Padhye*****, (2010) 4 SCC 378,** was cited to urge that the AMU owes the whole of its existence to a statute and thus it cannot be said that the statute was a mere recognition of an existing arrangement. It was argued that through the 1920 Act, the establishment of the AMU was the fresh establishment of an entirely new body.

58. It was argued that the rights of establishment and administration are distinct and separate. Reference in this regard was made to ***Re: Kerala Education Bill, 1957*****, [supra]**. The thrust of the argument was that the institution must be shown to have been established by the minority community. Only when this preliminary fact is proved, would "administration" come into the picture. According to him, the words "establish and administer" must be read conjunctively i.e. there can be no right of administration separate from establishment. The stand that these words are conjunctive is common to all the Respondents. He referred to the Constituent Assembly Debates and to amendments carried out in the NCMEI Act by which the words "establish or administer" were substituted with "establish and administer" in line with the constitutional scheme and ***Azeez Basha*** **[supra]**.

59. It is further argued that an overly-expansive reading of Article 30 would result in educational institutions using the 'cloak' of minority to escape government regulations and therefore, there must be a real positive index which connects the minority community to the institution. Extensive reference is made to ***A.P. Christians Medical Educational Society v. Government of Andhra Pradesh,*** (**1986) 2 SCC 667** and ***St. Stephens College*** **[supra]** to show what might be indicia of minority character of an institute.

60. The Solicitor General supported the interpretation of "establish" put forth in ***Azeez Basha*** **[supra]**, to assert that it was in line with the constitutional intent of Article 30. Since the provision is intended to give a right to specifically to minorities, it was argued that was necessary to show that the institution must have been "actually, tangibly and manifestly brought into being" by a minority.

61. It was asserted that "establishment" is a question of fact and as ***Azeez Basha*** **[supra]** decided this question of fact conclusively, it is not open for the Legislature to reverse a factual finding by bringing a legislation stating otherwise in the form of the 1981 amendment. The Solicitor General, in response to the submissions made on the stand of the Union of India, stated that the Union of India has been consistent in its stand. It was stated that as per the Union of India, the AMU was not a minority

institution even during the hearing of the case of ***Azeez Basha*** **[supra]**. It was further stated that a party can always withdraw the appeal at its discretion and the Union of India can always choose the assist the Court on a question of law.

62. Mr. K.M. Nataraj, learned Additional Solicitor General of India, has submitted a short note wherein it was argued that the Muslim minority surrendered their right to establish the college and opted for the governmental establishment in order to have recognition for its degrees. It was urged that the circumstances in which such surrender was made cannot be gone into by the Court in exercise of its power of judicial review while placing reliance on the judgment in the case of ***Dir. of Endowments Gov. of Hyderabad v. Syed Akram Ali,*** **AIR 1956 SC 60.** He distinguishes the observations regarding impossibility of surrender of such rights made in the case of *A**hmedabad St. Xavier's College Society v. State of Gujarat,*** **(1974) 1 SCC 717** by stating that the said observations applied only in a post-constitutional context. He referred *Black's Law Dictionary 6th Edition* to argue that in ***Azeez Basha*** **[supra],** the court correctly understood the meaning of 'establish'. He further relies on ***State of Kerala v. Very Rev. Mother Provincial,*** **(1970) 2 SCC 417** to argue that the words 'establish' and 'found' have the same meaning.

63. It was further submitted that in order to qualify as a minority educational institution, an institution must be established for the betterment of the minority community and the inclusion of any outsiders must be merely incidental. It was argued that the administrative control must lie with the minority and that on a cumulative understanding it should be clearly visible that the institution in question is actually a minority institution and to a masked phantom as warned of in ***A.P. Christians Medical Educational Society v. Government of Andhra Pradesh,*** **(1986) 2 SCC 667.** He finally submits that the AMU is an institution of national character and hence, it cannot be a minority institution.

64. Mr. Vikramjit Bannerjee, learned Additional Solicitor General of India, briefly traced the history and purpose of incorporating Articles 25-30 from the Constituent Assembly Debates. It was argued that the purpose of these provisions was to instil a sense of confidence in the minorities with a final view to erasing the difference between majority and minority altogether. In that view, allowing an institute of national importance to be classified as a minority institution would go against the principles behind Article 30. To support his stand, he relied on ***Bal Patil v. Union of India***, **(2005) 6 SCC 690**. It was argued that the words "institution of national importance" in Entry 63 of List I must be read keeping in mind the principle of

noscitur a sociis which would indicate that the AMU is intended to be a secular institution open to all.

65. Mr. Rakesh Dwivedi, learned Senior Counsel, submitted that in the pre-constitution era, the sole prerogative of establishing universities lay with the Governor-General-in-Council. He refers to the establishment of a number of Universities during the time of British time to show that all such Universities were established by an Act of the Legislature. It was argued that the intent of a minority in establishing a university was material factor because the ultimate fact of establishment could be only through the Government. It was argued that the Muslim community in the pre-constitution era did not identify as minorities at all. Therefore, it was stated that if the community itself did not accept a minority character, it was not open to confer such a character on them through operation of Article 30 insofar as the AMU is concerned. It was argued that the numerical inferiority is only one aspect of minority status. Other aspects would include whether or not the community was dominant either socially or politically and whether or not it considered itself a minority. He relied on certain reports of the United Nations to reinforce the idea that minority must be defined with respect to socio-political dominance.

66. Mr. Dwivedi referred to history of negotiations between the proponents of a Muslim University and the British

Government to argue that all major demands of the community were rejected and administrative control of the university by the government was a condition precedent for approval. He also referred to the Constituent Assembly Debates to argue that the understanding of the constitution makers was that the AMU was an institution of a national character. It is argued that there is a difference between a university established under an Act by private persons and a university established by an Act. He argued that the AMU is established by the Act and not under the Act by the Muslim community.

67. Mr Neeraj Kishan Kaul, Ld. Senior Counsel, took the stand that the correctness of ***Azeez Basha*** **[supra]** had been referred only to the limited extent of determining whether its holding of the words "establish" and "administer" being conjunctive in Article 30 was correct or not. He argued that the original reference order in ***Anjuman*** **[supra]** only referred the question of whether an institution could be called a minority institution even if certain non-minority individuals had been involved in its establishment. He also relied on the reference order dated 12.02.2019 to argue that the status of AMU had not been referred as a question at all.

68. In support of the conjunctive nature of the words establish and administer, Mr. Kaul relied on ***Hyderabad Asbestos Cement Products v. Union of India***, **(2000) 1 SCC 426** and ***St. Stephens***

[supra] and also on the 2010 amendments to the NCMEI Act referred to above. It was argued that applying a disjunctive test would lead to adverse consequences since it would enable institutions to claim minority status even if they were never administered by minorities. It is submitted that no adverse effect would be caused to the right of minorities to establish universities as a result of ***Azeez Basha*** **[supra]**. It was argued that any university which wanted a minority status was free to do so and in the absence of action by the concerned authorities could take advantage of the deeming provision under the NCMEI Act.

69. Mr. Kaul argued that the creation of the AMU was the creation of a new and distinct entity, not merely the incorporation of an existing institution as a university. The old MAO college had been completely dissolved and its assets and liabilities transferred to the University. It was further stated that the Act used the words "an act to establish" and it did not anywhere state that it was recognising an existing institution.

70. Mr. Kaul defended the correctness of ***Azeez Basha*** **[supra]** by submitting that it had correctly appreciated the antecedent history of the MAO College and the AMU. He next referred to ***TMA Pai*** **[supra]** and the five parameters of administrative control outlined therein i.e. admissions, fees, governing body composition, appointment of staff and disciplinary control over staff. On each of those criteria, it was argued that the real control

was with the government due to the predominant role of the Visiting Board and the Lord Rector. Mr. Kaul argued that the 1981 Act had been correctly struck down by the Allahabad High Court since it did not take away the basis of ***Azeez Basha*** **[supra]** and moreover because legal fictions could not supplant historical facts.

71. Mr. Guru Krishna Kumar, Ld. Senior Counsel, made extensive reference to the history of the AMU to argue that it was never established as a minority institution but as an institution for general and secular education. It was argued that the British Government was consistently opposed to both, the possibility of a denominational character of the university and the proposed power of the university to affiliate colleges. It was argued that the word "Muslim" in the university's name was accepted more out of deference to local sentiment than as an indication of minority character. He also drew the Court's attention to the array of powers exercised both by the Governor-General-in-Council as Lord Rector and the Visiting Board over the University.

72. Mr. Guru Krishna Kumar argued that the fact that the Muslim community approached the then Government for establishing a university is insignificant, as it was not necessary. It was argued that the minority community had the right to establish a college as happened thereafter with the creation of the Jamia Milia Islamia without government interference.

73. It was argued that the muslim community approached the Government since they wanted governmental recognition of their degrees which was possible only if university was established by the Government. He gave examples of certain colleges to show how such colleges were given legal recognition as Universities through Acts of Legislature. By contrast the MAO college was instead dissolved by the 1920 Act and a new entity created in its place.

74. Further, it was argued that the inclusion of the AMU as a specific entry in List I of the Constitution is a clear indication of its All-India character. Even if the university once had the trappings of a minority institution, such inclusion crystallises the secular nature of the university and erases all vestiges of control by one specific community. Reference in this regard is made to ***M. Siddiq (Ram Janambhumi Temple Reference-5J) v. Mahant Suresh Das,*** **(2020) 1 SCC 1.**

75. It was urged that the 1981 amendment indirectly attempted to set aside the judgement in ***Azeez Basha*** **[supra]** without removing the basis of the judgement, which is impermissible. He adds that there cannot be a legislative declaration of fact through an amending Act which operates to set aside a finding of fact by the Supreme Court and that the 1981 Amendment was bad on this count. He relied on ***Indra Sawhney v. Union of India & Anr.,***

(2000) 1 SCC 168 and ***Mullaperiyar Environmental Protection Forum v. Union Of India & Ors, (*2006) 3 SCC 643.**

76. Mr. Vinay Navare, Ld. Senior Counsel, submitted that the judgement in ***Azeez Basha*** **[supra]** is not under challenge, only the principle laid down therein. The findings arrived at in the said judgment cannot be affected by the decision of the present Constitution Bench and only the correctness of the legal principle is in question as a reference does not decide the merits of a dispute *inter se parties* but only the interpretation of a law.

77. It was argued that declaring the AMU to be a minority institution would divest the Parliament of a large part of the power it could otherwise have exercised under Entry 63 of List I. Since the AMU is established by a special statute, it would be "State" within the meaning of Article 12 and hence, cannot be a minority institution. He relies on the judgement in ***Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi***, **(1975) 1 SCC 421.**

78. It was argued that the 1981 amendment relying on the judgement in ***Hotel and Catering Industry Training Board v. Automobile Propriety Ltd,*** **(1968) 1 WLR 1526**. It was argued that the AMU was created by a statute and not under a statute. It was argued that to say that having been established by the Act, the AMU can be governed only in terms of the Act and hence the minority community can make no claim of having established the

AMU since such claim is precluded by the very provisions of the Act. It was argued that since the institution was created by an Act, the words "of their choice" in Article 30 would not be applicable.

79. Mr. Shridhar Potaraju, Ld. Senior Counsel, referred to the requirement of publishing the university's accounts in the official gazette and the submission of the accounts originally to the Lord Rector and after the 1981 amendment to the Parliament. On this basis he argues that the AMU is an open and public university. It was argued that the AMU itself never raised any questions about its character from 1950 until 2005, when for the first time it enacted reservations for Muslims. Until 2005, the AMU was governed by the non-discrimination requirement under Article 29(2) since AMU is under the financial and administrative control of the Government, it is 'State' within the meaning of Article 12 of the Constitution.

80. Ms. Archana Pathak Dave, Ld. Senior Counsel, submitted that the insertion of Section 2(l) by the 1981 amendment was an impermissible exercise of legislative overruling of a judgement. The question of establishment having been settled in ***Azeez Basha*** **[supra]** it cannot be reopened by an amendment act which seeks to take a contrary view on facts.

81. Mr. Yatindra Sharma, Ld. Senior Counsel, reiterated that the university was established and is being administered by the government and not the Muslim community. He goes on to state

that Muslims are in fact not a minority in terms of Article 30 as the said Article applies to electoral minorities i.e. those whose numbers are so few that they cannot influence electoral outcomes. It was argued that even assuming that the changes made in the 1981 amendment take away the basis of ***Azeez Basha*** **[supra],** they are unconstitutional for violating Articles 14, 15 and 29(2) of the Constitution

82. Mr. Anirudh Sharma, learned counsel, submitted that Article 29(2) would stand on higher footing as compared to Article 30(1) and therefore once any institution is covered by Article 29(2), the general right provided therein cannot be unsettled by the specific right under Article 30(1). He has also attempted to distinguish the case of the AMU from that of ***St. Stephens*** **[supra]** by arguing that there were clear indicia of minority character in St Stephens College which are not present in case of the AMU.

83. Mr. Vivek Sharma, learned counsel, briefly submitted and reiterated that the administration of the AMU never vested in the Muslim community and always lay with the government under the 1920 Act.

84. Mr. Nachiketa Joshi, learned counsel, submitted a note which reiterates that it was the choice of the proponents of the AMU to seek government recognition for the AMU's degrees. To that end, they accepted the establishment by the government

instead of establishing the university themselves. It was argued that therefore the benefit of Article 30 cannot be claimed since establishment by the minority was missing. Further, the 1981 amendment was correctly struck down by the Division Bench of the Allahabad High Court as it was an attempt at legislative overruling of a judgement.

85. Mr. Sanjay Kumar Dubey, learned counsel, made reference to the original 1920 legislative council debates to submit that Shri Mohammed Shafi who had tabled the AMU bill had himself stated that this was to be an All-India and national institution. In view of the intent of the original movers of the Bill, the AMU cannot be said to be a minority institution.

C.3 Submissions in Rejoinder

86. In rejoinder, Dr. Rajeev Dhawan, Ld. Senior Counsel, argued that both sides to the dispute agree that the words 'establish' and 'administer' in Article 30(1) must be read conjunctively, and not disjunctively. It was argued that it is also not in issue that the right to administer the educational institution flows from the proof of establishment, although they may exist in different points in time.

87. It was argued that the Respondents' contention that AMU is a *sui generis* institution is not a valid ground to avoid the reconsideration of ***Azeez Basha*** **[supra]**. It was argued that every minority educational institution is a standalone institution to

serve unique needs of their community, which includes catering to the educational needs of their community, conserving their unique script or culture, and achieving standards of excellence.

88. It is further urged that the minorities have been recognized in India even before the Constitution came into force and therefore, to say that Muslim community had no minority 'group' rights before 1950 is fallacious. It is argued that there exists a constitutional premium, as well as a statutory premium (for e.g., Central Educational Institutions (Reservation in Admission) Act, 2006) which is attached to minority exceptions and the minority dispensation. Therefore, it is not just Article 30 which recognizes the minority rights, but if the whole statutory dispensation analysed, it is clear that Parliament has excepted the minorities from Articles 15(5) and 15(6).

89. Additionally, certain other factors have been suggested by Dr. Dhawan, which may be determinative of minority character of a particular institute, which are as follows:

a. Founders should belong to either religious or linguist community;

b. Historical antecedents of the institution which show the active involvement, intention, and contributions of minority founders or the community;

c. Founders' intent to establish an institute should be bona fide, and not devious or dubious and for the benefit of the minority community;

d. Constitutional documents (such as statute, rules, or regulations) read as a whole should show predominance of minority character;

e. Administration of the institution if it is vested in the founders or persons in whom the founders have faith and confidence;

f. Imparting of religious education, or providing for religious instruction and worship

g. Symbols such as the name, architecture, motto, and such other cultural symbols of the minority.

90. It is further submitted that declaration as to a particular institute bearing national importance under Entry 63, List 1 and status as a minority institution operate in different spheres. It is open for the Parliament to declare an institution of national importance because of its academic excellence, strategic and security interests, geographic location, cultural or religious prominence, or even granting aid. Therefore, it is argued that the reasons for granting the tag of 'national importance' may be varied and unrestricted, which are different than the factors determinative of minority character of a particular institute. It

was argued that the declaration under Entry 63, List 1 shall always be subject to the rights under Article 30.

91. Mr. Kapil Sibal, Ld. Senior Counsel, submitted in rejoinder that the minority has a right under Article 30 to administer the institution which it has established, which it may exercise or may not exercise. It is not the duty of the said community to administer once it has established. Therefore, in the present case, even if it is assumed that the administration of AMU is not with the Muslim community, it would not mean that the AMU will cease to be a minority institution since it has been established as such by Muslim community.

92. It was argued that to that extent, the judgment is ***Azeez Basha*** **[supra]** has been decided wrongly. Further, it is urged that if right to administer is exercised and if the Government interferes in such right, the minority institute can challenge such interference on the ground of it being violative of Article 30. Moreover, the Muslim minority wanted to establish a university which could grant degrees of its own which would have to be recognised by the Government. It was argued that subscribing to a regulatory framework that would offer better opportunities to students who enrolled with the institution, is a choice that has no relation to the alleged surrender of minority status.

93. Mr. Shadan Farasat, learned counsel, compared the provisions of all the Acts establishing the Universities, existing

at the relevant time to show that the denominational nature is evident from the level of autonomy granted vis-a-vis, the non-denominational universities of the relevant time and sought to argue that the provisions of the AMU Act clearly depict the minority character of the institution even at the time of inception.

D. SCOPE OF PROCEEDINGS

D.1 Petitions before the Court

94. Before adverting to the legal issues and the contentions raised in the present proceedings, it would be appropriate to define the scope of the present proceedings. The present set of the petition can be divided in the following groups :

i. Batch of eight (8) civil appeals challenging the judgment of Hon'ble Allahabad High Court dated 05.01.2006 [hereinafter referred to as the "Impugned Order"] - Civil Appeal Nos. 2286, 2316, 2317, 2318, 2319, 2320, 2321 and 2861 of 2006;

ii. A transferred case involving a writ petition filed before the Hon'ble Allahabad High Court seeking implementation of reservations in terms of the Central Educational Institutions (Reservation in Admissions) Act, 2006 - Transferred Case (Civil) No. 46 of 2023.

iii. A civil appeal challenging the judgment of the Hon'ble Allahabad High Court dated 16.10.2015 that dismissed the prayer for quo warranto regarding the appointment of the

then Vice Chancellor of Appellant-University - SLP(C) No. 32490 of 2015;

iv. A writ petition under Article 32 seeking a writ or direction to the Appellant - University to follow the regulations laid by University Grants Commission ('UGC') in 2010 on minimum qualifications for appointment of teachers and academic staff - WP(C) No. 272 of 2016

D.2 The Anjuman reference

95. The Aligarh Muslim University Act, 1920 was amended in the year 1965 following some disturbances at the campus. The said amendment was challenged by way of writ petitions filed under Article 32 and disposed off by this Court by way of the judgment in ***Azeez Basha*** **[supra]** [5 Hon'ble Judges]. The judgment dated 20.10.1967 held that the University was not established by the minority community and therefore, it cannot be said to be an institution falling under the expanse of Article 30 of the Constitution.

96. In 1981, Writ Petition No.54-51 of 1981 came up before a bench of two Hon'ble Judges of this Court, which was titled ***Anjuman-e-Rehmania & Ors v. Distt. Inspector of School & Ors.*** In the said petition, this Court was confronted with a question, which is recorded in its order dated 26.11.1981. The relevant portion is reproduced hereunder: -

"The point that arises is as to whether Act. 30(1) of the Constitution envisages an institution which is established by minorities alone without the participation for the factum of establishment from any other community. On this point, there is no clear decision of this court. There are some observations in S. Azeez Basha & ors. Vs. Union of India 1968(1) SCR 333, but these observations can be explained away. Another point that arises is whether soon after the establishment of the institution if it is registered as a Society under the Society Registration Act, its status as a minority institution changes in view of the broad principles laid down in S. Azeez Basha's case. Even as it is several jurists including Mr. Seervai have expressed about the correctness of the decision of this court in S. Azeez Basha's case. Since the point has arisen in this case we think that this is a proper occasion when a larger bench can consider the entire aspect fully. We, therefore, direct that this case may be placed before Hon. The Chief Justice for being heard by a bench of at least 7 judges so that S. Azeez Basha's case may also be considered and the points that arise in this case directly as to the essential conditions or ingredients of the minority institution may also be decided once for all. A large number of jurists including Mr. Seervai, learned counsel for the petitioners Mr. Garg and learned counsel for respondents and interveners Mr. Dikshit and Kaskar have stated that this case requires reconsideration. In view of the urgency it is necessary that the matter should be decided as early as possible we give liberty to the counsel for parties to mention the matter before Chief Justice."

97. The question of law, as noticed above, was referred to bench of seven Hon'ble Judges by a bench of two judges. It may be noted that Hon'ble CJI at that time was not a part of this bench of two Hon'ble Judges. The said group of matters in ***Anjuman*** **[supra]** were placed before a bench of 11 Judges and was heard along with other writ petitions which culminated into the judgment of ***TMA Pai Foundation and Ors. v. State of Karnataka*****, (2002) 8 SCC 481**.

98. The 11 Judges bench, *inter alia*, framed a question vide its order dated 26.11.1981, which reads as under:

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

99. Finally, the larger Bench in ***TMA Pai*** **[supra]** opined that "this question need not be answered by this Bench, it will be dealt by a regular Bench." Thereafter, the group of matters in case of ***Anjuman*** **[supra]** came to be disposed of vide order dated 11.03.2003

D.3 The present reference

100. Separately, the present proceedings arise out of the decisions/resolutions of the Admission Committee dated

10.01.2005, the Resolution Passed by the Academic Council dated 15.01.2005 and the Resolution passed by the Executive Council dated 19.05.2005 which provided_reservation to the extent of 50 per cent of seats to be reserved for Muslims of India for admission to post graduate programmes.

101. The Petitioners before the High Court of Judicature at Allahabad [hereinafter referred to as the "Allahabad High Court" or "High Court"] filed writ petitions against the said decisions, while also challenging the amendment made to the AMU Act in 1981. The said writ petition came to be decided by Ld. Single judge of the High Court of Judicature at Allahabad vide Judgment and Order dated 04.10.2005. The said judgment was impugned before the Division Bench of the Hon'ble High Court by way of Special Appeal 1321 of 2005 and connected matters, which was finally decided by the judgment dated 05.01.2006, vide which the High Court dismissed the appeals filed by the appellants therein. The appeals/special leave petitions from the said order are under challenge before this Court.

102. On 12.02.2019, a three Judge Bench has referred the present batch of appeals and petitions to a bench of seven Hon'ble Judges. Considering the intense divergence of opinion on the reference order and the resultant scope of the present proceedings, the said order deserves to be quoted *in extenso* as under :

"3. The issue arising in S. Azeez Basha (supra) was referred to a Seven (07) Judges Bench by an order of this Court dated 26th November, 1981 passed in Writ Petition (Civil) Nos. 54-57 of 1981 [Anjuman-e-Rahmania & Ors. vs. Distt. Inspector of School & Ors.].

4. The aforesaid writ petitions i.e. Writ Petition (Civil) Nos. 54-57 of 1981 were heard along with other connected cases {lead being Writ Petition (Civil) No.317 of 1993 (T.M.A. Pai Foundation and others vs. State of Karnataka and others)] by a bench of Eleven (11) judges, the judgment in which cases is reported in (2002) 8 SCC 481.

5. The question 3(a) which was formulated for an answer in T.M.A. Pai Foundation (supra) which coincidentally reflects the questions referred by the order of this Court dated 26th November, 1981 passed in Writ Petition (Civil) Nos. 54-57 of 1981, is as follows:

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

6. However, the Bench did not answer the question stating that it will be dealt with by the Regular Bench.

7. The order of the Regular Bench passed on 11th March, 2003, which, for reasons that we need not dilate, did not answer the aforesaid question 3(a) formulated in T.M.A. Pai Foundation (supra).

8. The said facts would show that the correctness of the question arising from the decision of this Court in S. Azeez Basha (supra) has remained undetermined.

9. That apart, the decision of this Court in Prof. Yashpal and another vs. State of Chhattisgarh and others 2 and the amendment of the National Commission for Minority Educational Institutions Act, 2004 made in the year 2010 would also require an authoritative pronouncement on the aforesaid question formulated, as set out above, besides the correctness of the view expressed in the judgment of this Court in S. Azeez Basha (supra) which has been extracted above.

10. Ordinarily and in the normal course the judicial discipline would require the Bench to seek a reference of this matter by a Five Judges Bench. However, having regard to the background, as stated above, when the precise question was already referred to a Seven Judges Bench and was, however, not answered, we are of the view that the present question, set out above, should be referred to a Bench of Hon'ble Seven Judges.

11. Consequently and in the light of the above, ***place these matters before the Hon'ble the Chief Justice of India on the administrative side for appropriate orders.****"*

103. Considering the varying positions taken by various parties before this Hon'ble Court, we have divided the sides in two categories – the ones defending the judgment of the High Court and the ones aggrieved by the judgment of the Hon'ble Court.

D.4 The parameters on which reference can be made to a larger bench

104. The parties defending the judgment of the High Court were at pains to assert that it would not be permissible for the other side to re-agitate the factual findings and facts based legal controversies already decided by a five-Judge bench in ***Azeez Basha*** **[supra]**. The parties defending the judgment of the High Court assert that the *lis* between the parties, as far as the minority status of the AMU is concerned, stands settled by the judgment of ***Azeez Basha*** **[supra]** and cannot be re-opened. As per the said set of submissions, this Court is merely supposed to decide the question of law - Question 3(a), which was formulated for an answer in ***T.M.A. Pai*** **[supra]** without deciding status of the AMU. At the same time, the said parties urged the Hon'ble Court to decide upon the validity of the amendments made to the AMU Act in 1981 which were under challenge before the High Court. The said parties further highlighted the manner in which the matter was referred by the bench of two judges in ***Anjuman*** **[supra]** directly to seven judges was incorrect as the said bench was bound by a judgment of five judges in ***Azeez Basha*** **[supra]**.

105. On the other hand, the parties challenging the judgment of the High Court, pressed that correctness of the view expressed in the judgment of this Court in ***Azeez Basha*** **[supra]** has been specifically referred to a larger bench of seven judges and

therefore, the said issue is moot before this bench. The said parties requested this Court to lay down the law Question 3(a), which was formulated for an answer in ***T.M.A. Pai*** **[supra]** and decide thereupon whether the approach adopted in the judgment of ***Azeez Basha*** **[supra]** was correct or not. At the same time, the said parties urged the Hon'ble Court not to decide upon the validity of the amendments made to the AMU Act in 1981 which were under challenge before the High Court and other decisions of the AMU authorities made in 2005 and leave the same to be decided by a regular bench.

106. At first, it is important to clarify the issue raised by the parties with regard to the reference order in Writ Petition (Civil) Nos. 54-57 of 1981 in ***Anjuman-e-Rahmania & Ors. v. Distt. Inspector of School & Ors***. The said bench of two Hon'ble Judges [without comprising of the Hon'ble Chief Justice of India] referred the judgement of five Hon'ble Judges in ***Azeez Basha*** **[supra]**, directly to a bench of seven Hon'ble Judges. The reason that the Court in ***Anjuman-e-Rahmania & Ors*** **[supra]** provides is that as per the judgement in ***Azeez Basha*** **[supra]**, if after the establishment of an institution, the institution is registered as a society, its status as a minority institution changes. It has been pointed out that the AMU and the decision in ***Azeez Basha*** **[supra]**, had nothing to do with a society or Societies Registration Act as the AMU is governed by way of a standalone

legislation. The other reason the Court in ***Anjuman*** **[supra]** cites for making a reference is the criticism of the judgement by jurists like Mr. Seervai. It has been argued that while opinions of jurists hold persuasive value, the same cannot be a ground for making reference to a larger bench. The reference order in ***Anjuman*** **[supra]** does not point towards a future or previous judgement of equal or larger strength from ***Azeez Basha*** **[supra]**, being contrary to the judgement in ***Azeez Basha*** **[supra]**. In effect, a Bench of two hon'ble Judges has directly referred to the correctness of a decision rendered by five Hon'ble Judges to seven Hon'ble Judges, without the presence of a Chief Justice despite being prima facie bound by the opinion of the larger Bench.

107. A similar situation arose in relation to the judgment of this Court in ***Sardar Syedna Taher Saifuddin Saheb v. State of Bombay,*** **1962 Supp (2) SCR 496**. In the said case, which concerned the powers of excommunication of the head of Dawoodi Bohra community, a five-Judge Bench of this Court, ruled by a majority of 4:1, that the Bombay Prevention of Excommunication Act (Act 42 of 1949) was *ultra vires* the Constitution as it violated Article 26(*b*) of the Constitution and was not saved by Article 25(2).

108. Decades later, on 26-2-1986, a fresh petition was filed seeking reconsideration and overruling of the decision of this

Court in ***Sardar Syedna*** **[supra]** and for issuing a writ of mandamus directing the State of Maharashtra to give effect to the provisions of the Bombay Prevention of Excommunication Act, 1949.

109. The said matter came up for hearing before a two-Judge Bench of this Court which on 25-8-1986 directed "rule nisi" to be issued. On 18-3-1994 a two-Judge Bench directed the matter to be listed directly before a seven-Judge Bench for hearing. On 20-7-1994 the matter did come up before a seven-Judge Bench which adjourned the hearing awaiting the decision in WP No. 317 of 1993 [***T.M.A. Pai*** **(supra)**].

110. On 26-7-2004 IA No. 4 was filed on behalf of Respondent 2 seeking a direction that the matter be listed before a Division Bench of two Judges. Implicitly, the application sought a direction for non-listing before a Bench of seven Judges and rather the matter being listed for hearing before a Bench of two or three Judges as is the normal practice of this Court. In the contents of the application reliance was placed on the Constitution Bench decisions of this Court in ***Bharat Petroleum Corpn. Ltd. v. Mumbai Shramik Sangha,*** **(2001) 4 SCC 448** followed in four subsequent Constitution Bench decisions namely ***Pradip Chandra Parija v. Pramod Chandra Patnaik,*** **(2002) 1 SCC 1**; ***Chandra Prakash v. State of U.P.,*** **(2002) 4 SCC 234;** ***Vishweshwaraiah Iron & Steel Ltd. v. Abdul***

***Gani*, (2002) 10 SCC 437 and *Arya Samaj Education Trust v. Director of Education*, (2004) 8 SCC 30**.

111. The matter was ultimately placed before a bench of five Hon'ble Judges in order to decide that whether the course adopted by the two judge bench, doubting the correctness of a decision rendered by five Hon'ble Judges, was correct. While examining the issue, this Court highlighted the approaches available to the Court in a decision reported in ***Central Board of Dawoodi Bohra Community and Anr. v. State of Maharashtra and Anr*, (2005) 2 SCC 673**.

112. On the question of reference, the Court held that when a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength. A Bench of lesser quorum has only two options :

a. invite the attention of the Chief Justice and request for the matter being placed for hearing before an appropriate bench or;

b. place the matter before a Bench of coequal strength which pronounced the decision laying down the law the correctness of which is doubted.

The only exception to the above said rule is the discretion of the Chief Justice in whom vests the power of framing the roster.

113. In extremely rare cases, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum needs correction or reconsideration, then by way of an exception and for reasons given by it, it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of Chief Justice constituting the Bench and such listing. After discussing the said legal position, this Court in ***Central Board of Dawoodi Bohra Community*** **[supra]**, crystallised the law as under :

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

taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.

(3) The above rules are subject to two exceptions :

(i) The abovesaid rules do not bind the discretion of the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength; and

(ii) In spite of the rules laid down hereinabove, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way of exception (and not as a rule) and for reasons given by it, it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of Chief Justice constituting the Bench and such listing. Such was the situation in Raghubir Singh and Ors. and Hansoli Devi and Ors. (supra)"

In understanding the correctness of the reference in ***Anjuman*** **[supra]**, the said finding in ***Central Board of Dawoodi Bohra Community and Anr.*** **[supra]** is crucial.

114. Further, it has been held by this Court that reference to a larger bench cannot be merely made for the asking or even because another view appears to be a possible view. It in ***Govt. of A.P. v. B. Satyanarayana Rao,*** **(2000) 4 SCC 262**, it was held as under :

> *"**8.** Learned counsel for the respondent attempted to convince us that the decision in the case of State of A.P. v. V. Sadanandam [1989 Supp (1) SCC 574 : 1989 SCC (L&S) 511 : (1989) 11 ATC 391] has to be ignored on the principle of per incuriam as certain relevant provisions of the Rules were not considered in the said case, and in any case this case requires to be referred to a larger Bench of three Judges. The rule of per incuriam can be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue. This is not the case here. In State of A.P. v. V. Sadanandam [1989 Supp (1) SCC 574 : 1989 SCC (L&S) 511 : (1989) 11 ATC 391] the controversy was exactly the same as it is here and this Court after considering para 5 of the Presidential Order of 1975 held that the Government has power to fill a vacancy in a zone by transfer. We, therefore, find that the rule of per incuriam cannot be invoked in the present case. **Moreover, a case cannot be referred to a larger Bench on mere asking of a party. A decision by two Judges has a binding effect on another coordinate Bench of two Judges, unless it is demonstrated that the said decision by any subsequent change in law or decision ceases to laying down a correct law.** We, therefore, reject*

the arguments of learned counsel for the respondents."

115. In ***Shrimanth Balasaheb Patil v. Speaker, Karnataka Legislative Assembly*** **(2020) 2 SCC 595**, it was held as under :

> ***"157.*** *There is no doubt that the requirements under Article 145(3) of the Constitution have never been dealt with extensively and, more often than not, have received mere lip service****, wherein this Court has found existence of case laws which have already dealt with the proposition involved, and have rejected such references.*** *Normatively, this trend requires consideration in appropriate cases, to ensure* ***that unmeritorious references do not unnecessarily consume precious judicial time in the Supreme Court****.*
>
> ***158.*** *In any case, we feel that there is a requirement to provide a preliminary analysis with respect to the interpretation of this provision. In this context, we need to keep in mind two important phrases occurring in Article 145(3) of the Constitution, which are, "substantial question of law" and "interpretation of the Constitution". By reading the aforesaid provision, two conditions can be culled out before a reference is made:*
>
> *(i) The Court is satisfied that the case involves a substantial question of law as to the interpretation of this Constitution;*
>
> *(ii) The determination of which is necessary for the disposal of the case.*
>
> ***160. Any question of law of general importance arising incidentally, or any ancillary question of law having no significance to the final outcome, cannot be considered as a substantial question of***

law. ***The existence of substantial question of law does not weigh on the stakes involved in the case, rather, it depends on the impact the question of law will have on the final determination***. ***If the questions having a determining effect on the final outcome have already been decided by a conclusive authority, then such questions cannot be called as "substantial questions of law"***. *In any case, no substantial question of law exists in the present matter, which needs reference to a larger Bench.* ***The cardinal need is to achieve a judicial balance between the crucial obligation to render justice and the compelling necessity of avoiding prolongation of any lis."***

116. Similarly in ***Joint Commissioner of Income Tax, Surat v. Saheli Leasing & Industries Ltd.*****, (2010) 6 SCC 384**, it was held as under:

"(x) ***In order to enable the Court to refer any case to a larger Bench for reconsideration, it is necessary to point out that particular provision of law having a bearing over the issue involved was not taken note of or there is an error apparent on its face or that a particular earlier decision was not noticed, which has a direct bearing or has taken a contrary view. Such does not appear to be the case herein***. *Thus, it does not need to be referred to a larger Bench as in our considered opinion it is squarely covered by the judgment of this Court in Gold Coin [(2008) 9 SCC 622 : (2008) 304 ITR 308]"*

117. In view of the above, the approach adopted in the reference order in ***Anjuman*** **[supra]** was not wholly appropriate. However,

considering the fact that the present reference was made by a separate three judge bench [which consisted of the then Hon'ble Chief Justice], it would be apposite to not be whittled down by the error that may have crept in ***Anjuman*** **[supra]** reference. As far the scope of the present proceedings is concerned, the Court must adopt a sustainable and consistent approach. In this regard, it is clear that this Court needs to provide a clear understanding of the overlapping and intersecting reference orders mentioned above.

118. The expanse and the width of the proceedings before a larger cannot be whittled down by statute like reading of the reference order(s). Order VI Rule 2 of the Supreme Court Rules, 2013 reads as under:

> *"ORDER VI*
> *CONSTITUTION OF DIVISION COURTS AND POWERS OF A SINGLE JUDGE*
> *2. Where in the course of the hearing of any cause, appeal or other proceeding, the Bench considers that the matter should be dealt with by a larger Bench, it shall refer the matter to the Chief Justice, who shall thereupon constitute such a Bench for the hearing of it."*

119. The terms "any cause" and "other proceedings" are of a very wide import and the power of the Chief Justice of India, with regard to references to larger benches has also been judicially re-iterated by numerous constitution benches. A bench of nine

Hon'ble Judges in ***Kantaru Rajeevaru (Right to Religion, In re-9 J.) (2) v. Indian Young Lawyers Association*, (2020) 9 SCC 121**, has held as under :

> ***"27.*** *No matter is beyond the jurisdiction of a superior court of record unless it is expressly shown to be so, under the provisions of the Constitution.* ***In the absence of any express provision in the Constitution, this Court being a superior court of record has jurisdiction in every matter and if there is any doubt, the Court has power to determine its jurisdiction*** *[Delhi Judicial Service Association v. State of Gujarat, (1991) 4 SCC 406] . It is useful to reproduce from Halsbury's Laws of England, 4th Edn., Vol. 10, Para 713, relied upon in the aforementioned judgments, which states as follows:*
>
> > *"713. ... Prima facie, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular court."*
>
> *Undoubtedly there is no bar on the exercise of jurisdiction for referring questions of law in a pending review petition. Therefore, the reference cannot be said to be vitiated for lack of jurisdiction. This Court has acted well within its power in making the reference."*

D.5 A holistic approach

120. It is undoubtedly true that the correctness of the view expressed in the judgment of this Court in ***Azeez Basha*** **[supra]**

has been specifically referred to a larger bench of seven judges. Further it is correct that Court is supposed to decide the question of law - Question 3(a), which was formulated for an answer in ***T.M.A. Pai*** **[supra]**.

121. The status of AMU is in question due to the amendments made to the AMU Act in 1981 and the decisions of the AMU authorities in 2005. The said changes, especially the legislative changes, have taken place after the judgment in ***Azeez Basha*** **[supra]**, and therefore, it is imperative that this Court decides the questions arising therefrom. The validity of the amendments made to the AMU Act in 1981 and decisions of the AMU authorities made in 2005 may be left to be decided by a regular bench.

122. This Court shall therefore decide the Question 3(a), which was formulated for an answer in ***T.M.A. Pai*** **[supra]**. A decision on the said question would naturally have an impact on the correctness, or lack thereof, on the judgment of ***Azeez Basha*** **[supra]**.

123. Once the correctness of the judgment in ***Azeez Basha*** **[supra]**, is under scanner and the Question 3(a) has been decided, the regular bench may decide the status of the AMU especially with regard to the question whether it was "established" by the minority community or not, would have to be adjudicated. The decision on the said question, would lay down the parameters of

scope and extent to which the Parliament could have amended the AMU Act. Once the fate of the 1981 amendments to the AMU Act is decided, the Court would adjudicate upon the validity of actions of the AMU authorities in 2005.

124. In light of the above, despite the strong contest with regard to the correctness of ***Anjuman*** **[supra]**, this bench would be taking a holistic approach to the present reference in deciding the questions present before it.

E. ISSUES

125. In light of the above, the following issues would be decided by the present reference :

i. Whether the bench of two judges in Writ Petition No.54-51 of 1981 titled ***Anjuman-e-Rehmania & Ors v. Distt. Inspector of School & Ors.*** could have referred to the matter to a bench of seven Hon'ble Judges directly, without the Hon'ble Chief Justice of India, being a part of the bench? [*already decided above*]

ii. Whether the "establishment" of an institution by the minority is necessary for the said minority to claim right of administration? To put it different, is "establish" and "administer" used disjunctively or conjunctively in Article 30 of the Constitution?

iii. What is the meaning of the term "establish" in Article 30 of the Constitution and what are the *real positive indicia*

for determining the question of establishment of an institution?

iv. What is the true meaning and purport of the judgment in ***Azeez Basha*** **[supra]**?

v. What must be the approach of the court in balancing the conflicting narratives of history presented before it in such cases?

vi. What was the legislative scenario governing the Universities in India prior to the University Grants Commission Act, 1956 and how does the same impact the judicial enquiry in the present matter?

vii. Whether the Legislature using the terms "establish" and/or "incorporate" in the Preamble of a legislation would be determinative of the question of establishment?

viii. What is the impact of the Constitution coming into force and the subsequent legislative amendments made to the AMU Act on the present proceedings?

ix. Whether the presence of members of the minority community in the governance of the institution, without any necessary legal requirement for the same, would impact the question of the institution falling under Article 30?

x. Whether Article 30 exists to protect institutions from "majoritarianism by default" approach?

xi. Whether the UGC Act, 1956 and the judgement in ***Yashpal*** **[supra]** impacts on the correctness of the judgment in ***Azeez Basha*** **[supra]**?

xii. Whether the NCMEI Act, 2004 impacts on the correctness of the judgment in ***Azeez Basha*** **[supra]**?

126. The following issues and proceedings are however, left to be decided by a regular bench:

i. Whether the AMU was "established" and "administered" by the minority community and therefore entitled to claim protection under Article 30?

ii. Whether the 1981 amendment to the AMU Act, 1920, was an impermissible exercise of legislative power?

iii. Whether the Central Educational Institutions (Reservation in Admissions) Act, 2006, would be applicable to the AMU?

iv. The civil appeal challenging the judgment of the Hon'ble Allahabad High Court dated 16.10.2015 that dismissed the prayer for quo warranto regarding the appointment of the then Vice Chancellor of Appellant-University - SLP(C) No. 32490 of 2015;

v. The writ petition under Article 32 seeking a writ or direction to the Appellant - University to follow the regulations laid by University Grants Commission ('UGC') in 2010 on minimum qualifications for

appointment of teachers and academic staff - WP(C) No. 272 of 2016.

F. WHETHER ESTABLISHMENT IS NECESSARY

127. The first question that needs to be answered is whether an institution needs to be "established" by the minority community in order to claim protection/rights under Article 30? In other words, is it possible for an institution to "acquire" the status of a minority institution without being established as one? While there has not been much contest on the aforesaid question, considering the fact that it has arisen before this Court on numerous occasions and further was one of the factors for the reference in ***Anjuman*** **[supra]**, it would be appropriate that the same is settled for posterity.

128. The first judgment which may provide some assistance in this regard would be the landmark judgment in case of ***Re: Kerala Education Bill, 1957,*** **1959 SCR 995**, rendered by a bench of seven judges wherein this Court deliberated on the prerequisites for invoking Article 30 for the first time. The Court considered the argument presented by the State's counsel, which outlined three conditions necessary to avail the protections and privileges under Article 30(1):

i. The presence of a minority community;

ii. The initiation of the right to establish an educational institution by one or more members of that community '*after the commencement of the Constitution*';

iii. The establishment of the educational institution for the benefit of members of the minority community.

During its examination of these arguments, the Court dismissed the notion that the institution must be established only after the commencement of the Constitution, affirming that institutions established prior to this could still claim such rights. Additionally, the Court clarified that admitting non-minorities into the institution would not alter its minority character.

129. Moreover, while discussing the matter, the Court observed that Article 30(1) confers two distinct rights upon minorities: the right to establish and to administer. This clarification by the Court does not negate the remaining arguments presented by the State, which assert that the establishment of an institution by the minority is essential to assert rights under Article 30. The relevant paragraph of the said judgment, which has been read by both sides in the present case, to further their respective arguments, deserves to be quoted in toto as under:

> ***"22.*** *We now pass on to the main point canvassed before us, namely, what are the scope and ambit of the right conferred by Article 30(1). Before coming to grips with the main argument on this part of the case, we may deal with a minor point raised by*

learned counsel for the State of Kerala. He contends that there are three conditions which must be fulfilled before the protection and privileges of Article 30(1) may be claimed, namely, (1) there must be a minority community, (2) one or more of the members of that community should, after the commencement of the Constitution, seek to exercise the right to establish an educational institution of his or their choice, and (3) the educational institution must be established for the members of his or their own community. We have already determined, according to the test referred to above, that the Anglo-Indians, Christians and Muslims are minority communities in the State of Kerala. We do not think that the protection and privilege of Article 30(1) extend only to the educational institutions established after the date our Constitution came into operation or which may hereafter be established. On this hypothesis the educational institutions established by one or more members of any of these communities prior to the commencement of the Constitution would not be entitled to the benefits of Article 30(1). The fallacy of this argument becomes discernible as soon as we direct our attention to Article 19(1)(g) which, clearly enough, applies alike to a business, occupation or profession already started and carried on as to those that may be started and carried on after the commencement of the Constitution. ***There is no reason why the benefit of Article 30(1) should be limited only to educational institutions established after the commencement of the Constitution. The language employed in Article 30(1) is wide enough to cover both pre-Constitution and post-Constitution institutions. It must not be overlooked that Article 30(1) gives the***

minorities two rights, namely, (a) to establish, and (b) to administer, educational institutions of their choice. The second right clearly covers pre-Constitution schools just as Article 26 covers the right to maintain pre-Constitution religious institutions. *As to the third condition mentioned above, the argument carried to its logical conclusion comes to this that if a single member of any other community is admitted into a school established for the members of a particular minority community, then the educational institution ceases to be an educational institution established by the particular minority community. The argument is sought to be reinforced by a reference to Article 29(2). It is said that an educational institution established by a minority community which does not seek any aid from the funds of the State need not admit a single scholar belonging to a community other than that for whose benefit it was established but that as soon as such an educational institution seeks and gets aid from the State coffers Article 29(2) will preclude it from denying admission to members of the other communities on grounds only of religion, race, caste, language or any of them and consequently it will cease to be an educational institution of the choice of the minority community which established it. This argument does not appear to us to be warranted by the language of the article itself. There is no such limitation in Article 30(1) and to accept this limitation will necessarily involve the addition of the words "for their own community" in the article which is ordinarily not permissible according to well established rules of interpretation. Nor is it reasonable to assume that the purpose of Article 29(2) was to deprive minority educational institutions of the aid they receive from*

the State. To say that an institution which receives aid on account of its being a minority educational institution must not refuse to admit any member of any other community only on the grounds therein mentioned and then to say that as soon as such institution admits such an outsider it will cease to be a minority institution is tantamount to saying that minority institutions will not, as minority institutions, be entitled to any aid. ***The real import of Article 29(2) and Article 30(1) seems to us to be that they clearly contemplate a minority institution with a sprinkling of outsiders admitted into it. By admitting a non-member into it the minority institution does not shed its character and cease to be a minority institution. Indeed the object of conservation of the distinct language, script and culture of a minority may be better served by propagating the same amongst non-members of the particular minority community.*** *In our opinion, it is not possible to read this condition into Article 30(1) of the Constitution."*

130. Thus, the judgement in ***Kerala Education Bill*** **[supra]** does not in any way, detract from the position that the factum of establishment by the minority community was a necessary pre-condition to claim rights/protection under Article 30. There was specific emphasis laid by both sides on the phrase '*sprinkling of outsiders*' which shall be further discussed in a subsequent portion of the judgment.

131. The subsequent judicial decisions and the evolving jurisprudence stemming from the rulings of this Court further solidify the legal position articulated above. Another significant

judgment pertinent to the analysis of the rights conferred under Article 30, particularly addressing the issue at hand, is the verdict in ***State of Kerala v. Very Rev. Mother Provincial*, (1970) 2 SCC 417**. Rendered by a bench of six Hon'ble Judges, this judgment emphasizes how the twin rights of "establishment" and "administration" are sequential in nature under Article 30(1). It elucidates that these rights are temporally distinct, with the act of establishment preceding the entitlement to administration. This interpretation is pivotal in comprehending Article 30(1) and underscores that the right to "administer" an institution arises subsequent to its "establishment" by the minority community. The pertinent excerpts from this judgment are cited below for reference:

> *"**8.** Article 30(1) has been construed before by this Court. **Without referring to those cases it is sufficient to say that the clause contemplates two rights which are separated in point of time. The first right is the initial right to establish institutions of the minority's choice. Establishment here means the bringing into being of an institution and it must be by a minority community.** It matters not if a single philanthropic individual with his own means, founds the institution or the community at large contributes the funds. The position in law is the same and the intention in either case must be to found an institution for the benefit of a minority community by a member of that community. It is equally irrelevant that in addition to the minority community others from other minority communities or even from the majority community can take*

advantage of these institutions. Such other communities bring in income and they do not have to be turned away to enjoy the protection.

9. The next part of the right relates to the administration of such institutions. Administration means "management of the affairs" of the institution. This management must be free of control so that the founders or their nominees can mould the institution as they think fit, and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best served. No part of this management can be taken away and vested in another body without an encroachment upon the guaranteed right."

132. Therefore, the "administration" right is available to the minority community which establishes the institution [or 'their nominees'] implying that "establishing" of institution by the minority is necessary. There has been considerable emphasis on part of the Appellants with regard to the use of the term "found" in the aforesaid paragraphs which shall be discussed in the subsequent part of the judgment.

133. Thereafter, the judgement in ***S.P. Mittal v. Union of India*, (1983) 1 SCC 51** rendered by a bench of five Hon'ble Judges, albeit without much discussion on this specific issue, holds that the establishment of an institution by a linguistic or religious minority is necessary for claiming benefit under Article 30(1). The relevant paragraphs are quoted as under :

*"**137.** The impugned Act does not seek to curtail the rights of any section of citizens to conserve its own language, script or culture conferred by Article 29.* ***In order to claim the benefit of Article 30(1) the community must show : (a) that it is a religious or linguistic minority, (b) that the institution was established by it. Without satisfying these two conditions it cannot claim the guaranteed rights to administer it.***

138. *In Re Kerala Education Bill, 1957 [AIR 1958 SC 956 : 1959 SCR 995 : 1959 SCJ 321] Article 30(1) of the Constitution which deals with the right of minorities to establish and administer educational institutions, came for consideration. The Kerala Education Bill, 1957, which had been passed by the Kerala Legislative Assembly was reserved by the Governor for consideration by the President.*

xxx

142. *On an analysis of the two Articles, Article 29 and Article 30 and the three cases referred to above, it is evident that the impugned Act does not seek to curtail the right of any section of citizens to conserve its own language, script or culture conferred by Article 29.* ***The benefit of Article 30(1) can be claimed by the community only on proving that it is a religious or linguistic minority and that the institution was established by it.***

In the view that we have taken that Auroville or the Society is not a religious denomination, Articles 29 and 30 would not be attracted and, therefore, the impugned Act cannot be held to be violative of Articles 29 and 30 of the Constitution."

134. More recently, in the judgement in ***Dayanand Anglo Vedic (DAV) College Trust and Management Society v. State of Maharashtra,*** **(2013) 4 SCC 14,** a Society claimed to have minority status in the State of Maharashtra as it sought to encourage Hindi, which is a linguistic minority in the said State. While examining the question of law, the Court held that the establishment of an institution as a minority institution is necessary to claim rights under Article 30. The relevant portion of the said judgement is quoted as under:

> *"**29.** Similarly, in S.P. Mittal v. Union of India [(1983) 1 SCC 51 : AIR 1983 SC 1] , this Court held that in order to claim the benefit of Article 30, the community must firstly show and prove that it is a religious or linguistic minority; and secondly, that the institution has been established by such linguistic minority.*
>
> *xxx*
>
> ***34. After giving our anxious consideration to the matter and in the light of the law settled by this Court, we have no hesitation in holding that in order to claim minority/linguistic status for an institution in any State, the authorities must be satisfied firstly that the institution has been established by the persons who are minority in such State; and, secondly, the right of administration of the said minority linguistic institution is also vested in those persons who are minority in such State. The right conferred by Article 30 of the Constitution cannot be interpreted as if irrespective of the persons who established the institution in the State for the benefit of persons who are minority, any person, be it non-minority***

in other place, can administer and run such institution."

135. The aforementioned legal position illustrates that this Court has consistently embraced an approach which mandates the initial establishment of an institution as a minority institution by the minority community to assert minority status. This established legal principle has attained the status of *stare decisis*, which is a fundamental pillar of our legal framework.[4] The doctrine of precedent serves to promote certainty, stability, and continuity within our legal system, particularly in matters concerning societal dynamics, religion, minority rights, and fundamental freedoms.

136. The undoubted reaffirmation of this position is palpable in subsequent judicial decisions, notably in the landmark case of ***TMA Pai*** [**supra]**, wherein the Court refrained from providing a response to question 3(a) on the grounds that it did not warrant constitutional scrutiny by 11 Judges perhaps owing to the firmly established legal position. Apart from the fact that ***TMA Pai*** **[supra]** is binding upon us being a judgment delivered by a larger bench of this Court, neither of the parties have argued that a divergent view ought to be taken in the present case.

[4] *Sakshi v. Union of India*, (2004) 5 SCC 518; *Milkfood Ltd. v. GMC Ice Cream Private Ltd.*, (2004) 7 SCC 288 ; *Narinder Singh v. State of Punjab*, (2014) 6 SCC 466 ; *Shah Faesal v. Union of India*, (2020) 4 SCC 1

137. At this stage, another aspect of the matter may be noted. In the formalised education sector, the majority of educational institutions operating through private means are registered as societies under various Acts. This encompasses a significant number of secular/non-minority institutions established as such. Such institutions, whether aided or unaided, in contrast to minority institutions, whether aided or unaided, are subjected to a significantly higher degree of regulation by the State in various aspects, including curriculum, admissions, teacher appointments, and other factors. Consequently, it is evident that private entities administering minority institutions enjoy a notably higher degree of freedom from such regulation. Hence, there exists a pronounced inclination on the part of non-minority institutions to seek minority status.

138. In the backdrop of this clamour for minority status, if minority status is deemed attainable without necessitating the factum of establishment of an institution by the minority at its inception, it may result in a widespread proliferation of institutions claiming to be minority institutions despite not being established as minority institutions. This could be easily achieved by merely amending the rules or Articles of Association of the society to create a semblance of minority control. If the prerequisite of initial establishment by a minority community is deemed dispensable for invoking protection under Article 30, it

would result in a creation of minority institutions, in name only. On the said count as well, it is necessary to treat the criterion of establishment by the minority community, as essential to claim rights/protection under Article 30.

G. MEANING OF "ESTABLISHMENT" AND THE REAL POSITIVE INDICIA BEHIND

G.1 The existing jurisprudence of this Court

139. The two sides have diverged significantly on the aspect of the meaning of the word "establish" occurring in Article 30. The parties challenging the judgment of the High Court and the correctness of the judgment in ***Azeez Basha*** **[supra]** have argued that the term "establish" cannot have a strict meaning to signify 'to bring into existence'. They argue that the word has various other meanings such as 'to ratify', 'to found', 'to confirm', or 'to settle', as defined in numerous dictionaries or utilized in foreign legal contexts. They further argue that the narrow interpretation of 'establish' solely as '*to bring into existence*' lacks justification as it neglects to analyze Article 30(1) within its context, i.e., the safeguarding of minority rights and nullifies the effect of words '*of their choice*' in Article 30(1). It is further argued that the constrained interpretation of 'establish' is against the judgments in ***Very Rev. Mother Provincial*** **[supra]**, which was endorsed by ***TMA Pai*** **[supra]** and argued for a broader interpretation to the term 'establish', implicitly overturning the narrow perspective of

Azeez Basha **[supra]**. It was strenuously argued that the establishment of an educational institution can be ascertained from the 'intention' of the minority community "to found an institution" of their *choice* and "for the benefit of a minority community by a member of that community."

140. The parties defending the judgment asserted that the meaning of the word "establish" under Article 30 has indeed been understood by this Court consistently to mean to bring into existence. They submit that judgment in ***Azeez Basha*** **[supra]** correctly understands the word "establish" in the common sense it connotes. They argue that any minority community seeking to claim rights under Article 30, needs to necessarily prove that an institution in question was actually, tangibly and manifestly *brought into being* by the minority. It was asserted that the right under Article 30 and the factum of "establishment" is not a function of the "intent" of the minority at the said time or the "choice" of the minority at the said time and is a pure question of fact. It was argued that question of "establishment" cannot be satisfied by some limited effort or actions on part of the minority rather it has to be established that the predominant character of the institution and the predominant efforts in establishing the institution was of the minority only. It was argued that to claim protection under Article 30(1) an institution/university should be

predominantly established by the minority, for the minority and administered as a minority institution.

141. In understanding the meaning of the term "establish" occurring under Article 30, the judgment in the case of ***St. Stephens*** **[supra]** rendered by a bench of five Hon'ble Judges, is crucial. In the said case, the dispute arose due to the College, affiliated with the University of Delhi, had a practice of reserving a certain percentage of seats for Christian students in admissions. Furthermore, St Stephens had also formulated an admissions policy that was at variance with the admission policy of the University as a whole. The circulars issued by the University prescribing the admission schedule and procedure were not being followed in St Stephens on the ground that it was a minority educational institution which had the right to frame its own policy for admissions. Certain students challenged the admission policy of St. Stephens College for being divergent from the University policy. They also challenged the preference given by the college to Christian students. In response, the management of St Stephens retired that as a minority institution, it had the right to administer its own affairs, including the selection of students, to some extent. During the arguments, a question arose as to the status of the institution as a minority institution. The judgement points out towards what has been subsequently referred to as the '*real positive indicia*' for any institution to claim to be an

institution established by a minority. The relevant paragraphs of the said judgment are quoted as under:

> *"**28.** There is by now, fairly abundant case law on the questions as to "minority"; the minority's right to "establish", and their right to "administer" educational institutions. These questions have arisen in regard to a variety of institutions all over the country. They have arisen in regard to Christians, Muslims and in regard to certain sects of Hindus and linguistic groups. The courts in certain cases have accepted without much scrutiny the version of the claimant that the institution in question was founded by a minority community while in some cases the courts have examined very minutely the proof of the establishment of the institution.* ***It should be borne in mind that the words "establish" and "administer" used in Article 30(1) are to be read conjunctively. The right claimed by a minority community to administer the educational institution depends upon the proof of establishment of the institution. The proof of establishment of the institution, is thus a condition precedent for claiming the right to administer the institution.*** *Prior to the commencement of the Constitution of India, there was no settled concept of Indian citizenship. This Court, however, did reiterate that the minority competent to claim the protection of Article 30(1) of the Constitution, and on that account the privilege of establishing and maintaining educational institutions of its choice, must be a minority of persons residing in India. They must have formed a well defined religious or linguistic minority. It does not envisage the rights of the foreign missionary or institution, however, laudable their objects might be. After the*

Constitution, the minority under Article 30 must necessarily mean those who form a distinct and identifiable group of citizens of India. Whether it is "old stuff" or "new product", the object of the institute should be genuine, and not devious or dubious. There should be nexus between the means employed and the ends desired. As pointed out in A.P. Christians Educational Society case [(1986) 2 SCC 667 : (1986) 2 SCR 749] there must exist some positive index to enable the educational institution to be identified with religious or linguistic minorities. Article 30(1) is a protective measure only for the benefit of religious and linguistic minorities and it is essential, to make it absolutely clear that no ill-fit or camouflaged institution should get away with the constitutional protection.

xxx

Origin and Purpose of St. Stephen's College

30. *Surprisingly, the Delhi University in the pleading, has neither denied nor admitted the minority character of the College. But the counsel for the University have many things to contend which will be presently considered. Mr Gupta, counsel for the petitioner in T.C. No. 3 of 1980 has specifically urged that the College was established not by Indian residents, but by foreign Mission from Cambridge and therefore, it is not entitled to claim the benefit of Article 30(1). From the counter-affidavit filed by Dr J.H. Hala — the Principal of the College in W.P. Nos. 13213-14 of 1984 and from the publication of "The History of the College" the following facts and circumstances could be noted: The College was founded in 1881 as a Christian Missionary College by the Cambridge Mission in*

Delhi in collaboration with the Society for the Propagation of the Gospel [SPG] whose members were residents in India. The College was founded in order to impart Christian religious instruction and education based on Christian values to Christian students as well as others who may opt for the said education. The Cambridge Brotherhood with plans of establishing the Christian College in Delhi sent the Cambridge Mission whose members were: Rev. J.D. Murray, Rev. E. Bickarsteth, Rev. G.A. Lefroy, Rev. H.T. Blackett, Rev. H.C. Carlyon and Rev. S.S. Allnutt. Of the said members of the Cambridge Mission, Rev. Allnutt, Rev. Blackett and Rev. Lefroy teamed up with Rev. R.R. Winter of the SPG to establish the College. It will be seen that Cambridge Mission alone did not establish the College. ***The Cambridge Mission with the assistance of the members of the SPG who were residents in India established the College.*** *The contention to the contrary urged by Mr Gupta, counsel for the petitioner in T.C. No. 3 of 1980 is, therefore, incorrect.* ***The purpose of starting the College could be seen from the Report of 1878 to the Cambridge Brotherhood and it states "the students after leaving St. Stephen's Mission School joined non-Christian Colleges and lost touch with Christian teachings … the case would be otherwise if we were able to send them from our school to a College, where the teachings would be given by Christian professors and be permeated with Christian ideas."*** *(F.F. Monk in A History of St. Stephen's College, Delhi, Calcutta, 1935, p. 3). In October 1879 the Cambridge Committee expressed the desirability of imparting instruction also in secular subjects. "It was also felt that the influence of the missionaries would be greatly increased if*

they held classes in some secular subjects and did not conform their teachings to strict religious instruction". (ibid p. 5)

Building

31. *Originally, the College building was housed in hired premises paid for by the SPG. A new building was eventually constructed by the Society for the Propagation of the Gospel wherein the foundation stone bore the following inscription:*

To the Glory of God
And the Advancement of Sound
Learning
And Religious Education

The new building of the College was eventually opened on December 8, 1881, by Rev. Allnutt. On the said building on the front of the porch, at the top of the parapet, a 'cross' in bas-relief was placed and immediately under the bracket the words "Ad Dei Gloriam" had been inscribed which have since been adopted as the College motto.

32. *Today the new College building in the University campus has also a large 'cross' at the top of the main tower and in the front porch is inscribed the St. Stephen's motto "Ad Dei Gloriam" to perpetuate and remind the students the motive and objective of the College, namely, "The Glory of God".*

33. *There is also a chapel in the College campus where religious instruction in the Christian Gospel is imparted for religious assembly in the morning.*

34. *It would thus appear that since its foundation in 1881, St. Stephen's College has apparently maintained its Christian character and that would be evident from its very name, emblem, motto, the establishment of a chapel and its religious*

instruction in the Christian Gospel for religious assembly. These are beyond the pale of controversy.

Constitution of the College

35. It is said that during the early part of the College history, it was managed by the Mission Council — a totally Christian body. Late in 1913 it was registered as a society and a constitution was formulated on November 6, 1913 which was adopted by the SPG Standing Committee and by the Cambridge Committee. The Constitution as it stands today again maintains the essential character of the College as a Christian College without compromising the right to administer it as an educational institution of its choice. The Constitution of the College consists of Memorandum of the Society and Rules. Clause 2 of Memorandum states that "the object is to prepare students of the College for University degrees and examinations and to offer instruction in doctrines of christianity which instruction must be in accordance with the teachings of the Church of North India". Clause 4 sets out the original members of the Society who were mostly Christians. The composition of the Society also reflects its Christian character inasmuch as the Bishop of the Diocese of Delhi is the Chairman of the Society [Rule 1(a)]. Further, two persons appointed by the Bishop of the Diocese of Delhi, one of whom shall be a senior Presbyter of the Diocese, shall be members of the Society [Rule 1(b)]. One person to be appointed by the Church of North India Synodical Board of Higher Education shall also be a member of the Society [Rule 1(g)]. Similar is the position of a person to be appointed by the Diocesan Board of Education [Rule 1(h)]. Two persons to be appointed by the Executive Committee of the Diocese, one of whom shall be a

Presbyter, shall also be members of the Society [Rule 1(i)]. ***The composition of the Society, therefore, indicates the presence of a large number of Christian members of the Church of North India on it.***

Management

36. *The management of the College is being looked after by the Supreme Council and the Governing Body. The Supreme Council consists of some members of the Society, all of whom must be members of the Church of North India or some other church in communion therewith, or any other duly constituted Christian church. They are:*

> ***(a) The Bishop of the Diocese of Delhi, who shall be the Chairman.***
>
> ***(b) Two persons appointed by the Bishop of the Diocese [under Rule 1(b)].***
>
> ***(c) The person appointed by the Church of North India Synodical Board of Higher Education [under Rule 1(g)].***
>
> ***(d) The person appointed by the Diocese Board of Education [under Rule 1(h)].***
>
> ***(e) The Principal of the College (Member-Secretary).”***

37. *Rule 3 of the Society provides that the Supreme Council mostly looks after the religious and moral instruction to students and matters affecting the religious character of the College. The Principal of the College is the Member-Secretary of the Supreme Council. Rule 4 provides that the Principal shall be a member of the Church of North India or of a Church that is in communion with the Church of India. The Vice-Principal shall be appointed annually by the Principal. He shall also*

be a member of the Church of North India or of some other church in communion therewith.

38**. True, Rule 5 provides that the Supreme Council of the College has no jurisdiction over the administration of the College and it shall be looked after by the Governing Body.* ***But the Governing Body is not a secular body as argued by learned counsel for the University. Rule 6 provides that the Chairman of the Society (Bishop of Diocese of Delhi) shall be the Chairman of the Governing Body. *The members of the Society as set out in categories, (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l) and (m) of clause (1) shall be the members of the Governing Body. The Chairman and the Vice-Chairman of the Governing Body shall be the members of the Church of North India. Out of categories (a) and (m) in clause (1), only category (k) may be a member of the teaching staff who may not be a Christian. Two members referred under category (l) to be appointed by the Delhi University may not be Christian and likewise, under the category (n) may not be Christian. But the remaining members shall be Christians. Out of thirteen categories, only three categories might be non-Christians and therefore, it makes little difference in the Christian character of the Governing Body of the College. A comparison of Statute 30(c) of the Delhi University at pages 127-28 of Calendar Volume I will show the difference between the Governing Body of other colleges under the Statute as contrasted with St. Stephen's College.*

Principal

39. ***It is again significant to note the difference between the method of appointment of the Principal of St. Stephen's College and all other colleges. The Principal of St. Stephen's College is***

appointed by the Supreme Council and he must be a Christian belonging to Church of North India (Rule 4). *He will exercise control, and maintain discipline and regulation of the College. He will be in complete charge of the admissions in the College assisted by admission committee. But the Principals of other affiliated colleges under Ordinance XVIII clause 7(2) [page 335 Calendar Volume I] are to be appointed by the Governing Body of the College.*

40. The immovable property of the College shall be vested in the Indian Church trustees, who shall merely act as Trustees, and shall have no power of management whatsoever. All other property connected with the College shall be vested in the Society *(Rule 21)."*

142. During the examination of the particular college under consideration, the Court observes that the institution was established by missionaries with the primary purpose of providing Christian religious education - as per paragraph 30. It also observes that the assets and property of the college are legally owned by the church - as described in paragraph 40. The Court also notes that at the time of its inception, the college was under the exclusive management of a body composed entirely of Christians - as outlined in paragraph 35. The Court notices that the rules of the institution's society stipulate that all members must be appointed by Christian organizations - as mentioned in paragraph 35. The Court lays specific emphasis on the fact that the administration of the college is also entrusted to a body

comprised entirely of Christians - as indicated in paragraph 36. The Court notes that the Principal of the college holds an ex-officio position and is required to be a Christian - according to paragraph 39. As far as historical factors are concerned, the Court notes that the construction of the college building was commissioned by a minority community and funded by them - as detailed in paragraphs 31-34. In governance, the Court notes that both the Supreme Council and the Governing Body of the college are predominantly constituted of Christians, with 10 out of 13 members belonging to this religious group - as per paragraphs 37-38.

143. As for ***St. Stephens*** **[supra],** both sides have placed considerable reliance on the aforesaid paragraphs to further their respective cases and see the facts surrounding the establishment of AMU from a particular perspective. In any event, from the said analyses in ***St. Stephens*** **[supra]**, it is clear that the question of establishment is not dependent on a singular factor, rather is a culmination of various aspects surrounding the facts leading up to the establishment of the institution and the form of the institution itself. The factors that the Court found relevant in ***St. Stephens*** **[supra]** form jurisprudential basis of the factual enquiry that ought to be carried out by the Court in such matters. However, the said enquiry cannot be straight-jacketed in all cases and the Court ought to suitably modulate the approach suiting the

needs of the institution in question and the nature of the institution. In simple words, a school or a college or a University may require a significant difference in approach while adjudicating the question of "establishment" by the minority community.

144. The judgment in ***A.P. Christians Medical Educational Society v. Government of Andhra Pradesh, (*****1986) 2 SCC 667** is another specific case wherein the Court interrogated the essentials of an institution claiming to be a minority institution. The Court guarded against false schemes in order to claim protection under Article 30. The relevant paragraphs of the said judgement are quoted as under:

> ***"****A brazen and bizarre exploitation of the naive and foolish, eager and ready-to-be-duped, aspirants for admission to professional collegiate courses, behind the smoke-screen of the right of the minorities to establish and administer educational institutions of their choice — is what this case is about. A society styling itself as the 'Andhra Pradesh Christian Medical Educational Society' was registered on August 31, 1984. The first of the objectives mentioned in the memorandum of association of the society was,*
>
> > *"to establish, manage and maintain educational and other institutions and impart education and training at all stages, primary, secondary, collegiate, post-graduate and doctoral, as a Christian Minorities' Educational Institution".*

Another object was

> *"to promote, establish, manage and maintain Medical colleges, Engineering colleges. Pharmacy colleges. Commerce, Literature, Arts and Sciences and Management colleges and colleges in other subjects and to promote allied activities for diffusion of useful knowledge and training."*

Other objects were also mentioned in the memorandum of association. All that is necessary to mention here is that none of the objects, apart from the first extracted object, had anything to do with any minority*. Even the first mentioned object did not specify or elucidate what was meant by the statement that education and training at all stages was proposed to be imparted in the institutions of that society "as Christian Minorities' Educational Institution". Apparently the words "as a Christian Minorities' Educational Institutions" were added in order to enable the society to claim the rights guaranteed by Article 30(1) of the Constitution and for no other purpose. This will become clearer and clearer as we narrate further facts.*

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7. *Even while narrating the facts, we think, we have said enough to justify a refusal by us to exercise our discretionary jurisdiction under Article 136 of the Constitution.* ***We do not have any doubt that the claim of the petitioner to start a minority educational institution was no more than the merest pretence****. Except the words, "as the Christian Minorities' Educational Institutions" occurring in one of the objects of the society, as mentioned in the memorandum of association, there is nothing whatever to justify the claim of the society*

that the institutions proposed to be started by it were 'minority educational institutions'. Every letter written by the society whether to the Central Government, the State Government or the University contained false and misleading statements. As we had already mentioned the petitioner had the temerity to admit or pretend to admit students in the first year MBBS course without any permission being granted by the government for the starting of the medical college and without any affiliation being granted by the University. The society did this despite the strong protest voiced by the University and the several warnings issued by the University. The society acted in defiance of the University and the government, in disregard of the provisions of the Andhra Pradesh Education Act, the Osmania University Act and the regulations of the Osmania University and with total indifference to the interest and welfare of the students. The society has played havoc with the careers of several score students and jeopardised their future irretrievably. Obviously the so-called establishment of a medical college was in the nature of a financial adventure for the so-called society and its office bearers, but an educational misadventure for the students. Many, many conditions had to be fulfilled before affiliation could be granted by the University. Yet the society launched into the venture without fulfilling a single condition beyond appointing someone as Principal. No one could have imagined that a medical college could function without a teaching hospital, without the necessary scientific equipment, without the necessary staff, without the necessary buildings and without the necessary funds. Yet that is what the society did or pretended to do. ***We do not have any doubt that the society***

and the so-called institutions were started as business ventures with a view to make money from gullible individuals anxious to obtain admission to professional colleges. It was nothing but a daring imposture and sculduggery. By no stretch of imagination, can we confer on it the status and dignity of a minority institution.

8. *It was seriously contended before us that any minority, even a single individual belonging to a minority, could found a minority institution and had the right so to do under the Constitution and neither the government nor the University could deny the society's right to establish a minority institution, at the very threshold as it were, howsoever, they may impose regulatory measures in the interests of uniformity, efficiency and excellence of education.* ***The fallacy of the argument insofar as the instant case is concerned lies in thinking that neither the government nor the University has the right to go behind the claim that the institution is a minority institution and to investigate and satisfy itself whether the claim is well-founded or ill-founded. The government, the University and ultimately the court have the undoubted right to pierce the 'minority veil' — with due apologies to the corporate lawyers — and discover whether there is lurking behind it no minority at all and in any case, no minority institution. The object of Article 30(1) is not to allow bogies to be raised by pretenders but to give the minorities 'a sense of security and a feeling of confidence' not merely by guaranteeing the right to profess, practise and propagate religion to religious minorities and the right to conserve their language, script and culture to linguistic minorities, but also to enable all minorities, religious or linguistic, to establish and administer***

educational institutions of their choice. These institutions must be educational institutions of the minorities in truth and reality and not mere masked phantoms*. They may be institutions intended to give the children of the minorities the best general and professional education, to make them complete men and women of the country and to enable them to go out into the world fully prepared and equipped. They may be institutions where special provision is made to the advantage and for the advancement of the minority children. They may be institutions where the parents of the children of the minority community may expect that education in accordance with the basic tenets of their religion would be imparted by or under the guidance of teachers, learned and steeped in the faith. They may be institutions where the parents expect their children to grow in a pervasive atmosphere which is in harmony with their religion or conducive to the pursuit of it.* ***What is important and what is imperative is that there must exist some real positive index to enable the institution to be identified as an educational institution of the minorities. We have already said that in the present case apart from the half a dozen words 'as a Christian minorities' institution' occurring in one of the objects recited in the memorandum of association, there is nothing whatever, in the memorandum or the articles of association or in the actions of the society to indicate that the institution was intended to be a minority educational institution. As already found by us these half a dozen words were introduced merely to found a claim on Article 30(1). They were a smoke-screen****."*

145. The jurisprudence in ***St. Stephens*** **[supra]** and ***A.P. Christians Medical Educational Society*** **[supra]** requires a *real positive indicia* for an institution to claim to have been established by a minority community. Therefore, it is permissible to 'pierce the veil' in order ascertain the real character of the institution and claims of minority status cannot be bestowed on illusionary claims. This ruling serves as a cautionary reminder that granting the right to administer educational institutions without the prior establishment by minorities could result in unwanted constitutional outcomes. The concerns expressed by the Court could materialize, potentially resulting in a widespread "takeover" of institutions by groups claiming minority status through creative interpretations to seek protection under Article 29 and 30.

146. After delving in to the finer details of the vexed constitutional question and the meaning of the term "establish", it would serve a salutary purpose if one analyses the approach adopted by this Court as and when any institution approached it. In the case of ***Rev. Father Proost v. State of Bihar*****, (1969) 2 SCR 73**, with a bench consisting of five Judges, the Court acknowledges that the institution in question was established by the Catholic minority before extending the safeguards provided under Article 30. The relevant portion of the judgment is as under:

*"**2. St. Xavier's College was established by the Jesuits of Ranchi**. It was affiliated to Patna University in 1944. The management of the College vests in a Governing Body consisting of 11 members. They are:*

> *"(i) The Superior Regular of Ranchi Jesuit Mission — President exofficio.*
>
> *(ii-v) Four Counsellors to the Superior Regular to be nominated by the Jesuit Mission authorities.*
>
> *(vi) The Principal of the College — Vice-President and Secretary ex-officio.*
>
> *(vii) One representative of the teaching staff of the College elected by the members of the staff.*
>
> *(viii) One representative of the Patna University.*
>
> *(ix-xi) Three persons to represent Hindu, Muslim and Aboriginal interests."*

The terms of service of religious staff are determined by the Jesuit Mission Authorities, but those of the members of the lay staff including their appointment are determined by the Governing Body. All appointments to the teaching staff, both religious and lay are reported to the Syndicate of the Patna University. The object of founding the College inter alia is "to give Catholic youth a full course of moral and liberal education, by imparting a thorough religious instruction and by maintaining a Catholic atmosphere in the institution". The college is, however, open to all non-catholic students. All non-catholic students receive a course of moral science.

2. *The College was thus founded by a Christian minority and the petitioners claim they have a right*

to administer it a constitutional right guaranteed to minorities by Article 30.

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12. We are, therefore, quite clear that St. Xavier's College was founded by a Catholic Minority Community based on religion and that this educational institution has the protection of Article 30(1) the Constitution. For the same reason it is exempted under Section 48-B of the Act. The petition will therefore be allowed with this declaration but in the circumstances of the case we make no order about costs."

147. In ***Right Rev. Bishop S.K. Patro v. State of Bihar*, (1969) 1 SCC 863** [bench of five Judges], a challenge was laid to an order of the Deputy Director of Education which imposed an obligation on the school to constitute a managing committee to control, administer and manage its affairs. During the discussion, the Court assessed various factors and evidence to ascertain the institution's status as a minority establishment, highlighting the significance of the funding source during its inception. The relevant paragraphs are quoted as under :

*"**8.** It was the case of the State and the parties intervening in the writ petition before the High Court that the school was established by the Church Missionary Society, London, which they claimed was a Corporation with an alien domicile and "such a society was not a minority based on religion or language" within the meaning of Article 30 of the Constitution. On behalf of the appellants in the*

appeal and the petitioners in the two writ petitions filed in this Court, it is claimed that the School was started in 1854 by the local Christian residents of Bhagalpur. They concede that the Church Missionary Society of London did extend financial aid in the establishment of the School, but they contend that on that account, the School did not cease to be an educational institution established by a religious minority in India.

9. *There is on the record important evidence about establishment in 1854 of the Lower Primary School at Bhagalpur. It is unfortunate that sufficient attention was not directed to that part of the evidence in the High Court. The "Record Book" of the Church Missionary Association at Bhagalpur which is Annexure 'D' to Writ Petition No. 430 of 1968 furnishes evidence of vital importance having a bearing on the establishment of the School. It contains copies of letters written from Bhagalpur and minutes of meetings held and the resolutions passed by the Local Council of Bhagalpur. On June 1, 1948, Rev. Vaux informed the Calcutta Corresponding Committee of the Church Missionary Society by a letter that if the Calcutta Society were to establish a School at Champanagar, "local assistance shall not be wanting to the extent of 1000 or 1200 rupees a year, besides providing a school house and residence for the master", and that "At first, for breaking up the fallow ground and setting the school a going the presence of a Missionary of tact and experience may be necessary". On June 26, 1848, Rev. Vaux by another letter informed the Calcutta Corresponding Committee that a special service was held in the Church on June 22, 1848 and thereafter on Friday, June 23, 1848, a meeting was held and contributions*

were invited from persons present including Indian residents, that monthly subscriptions of Rs 202 for the "salary of masters" and other expenses were promised, and that an amount of Rs 1647 was donated for building the school and residence for the master; that the general impression made was so favourable to the cause that he felt justified in assuring the Calcutta Committee that the local Committee were in a position to guarantee certain requisites for making a commencement such as payment of the salary of the School Master and Mistress and the building of a house for their accommodation which may afterwards be enlarged so as to form a suitable residence for a Mission.

10. *By letter, dated July 10, 1848, the Secretary, Calcutta Corresponding Committee, informed Rev. Vaux that they were looking out for a prominent person to commence missionary operations by opening a School "which is indeed a common way of beginning a Mission." In a letter, dated December 22, 1848, written from Bhagalpur it was stated:*

> *"The Society will provide for the Missionary's salary and trust that local funds will provide a residence for him of a suitable kind. All other Mission requirements, such as school teachers etc. should be left to be provided on the spot."*

11. *Then there are minutes of the resolutions passed at a meeting held on October 24, 1849, by the Parent Committee and another resolution, dated October 25, 1851, of the Local Committee, to raise funds, and to determine upon disbursements with the advice of the Missionary to promote the objects of the Mission. In the minutes of the meeting, dated*

October 25, 1851, it is recorded that a statement of account of receipts and disbursements up to September 30, 1851, including expenses of a boys' school and salary of masters, "hire of school rooms and furniture" and expenses of a girls' school "including cost of working materials up to date" was submitted.

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15. It appears from this correspondence and the resolutions and the discussions at the meetings that a permanent home for the Boys' School was set up in 1854 on property acquired by local Christians and in buildings erected from funds collected by them. The institution along with the land on which it was built and the balance of money from the local fund were handed over to the Church Missionary Society in 1856. It is also true that substantial assistance was obtained from the Church Missionary Society, London. But on that account, it cannot be said that the School was not established by the local Christians with their own efforts and was not an educational institution established by a minority*."*

148. Thus, this Court affirmed that the protection afforded by Article 30 extends to institutions established before the Constitution following the dictum in ***Kerala Education Bill* [supra]**. The Court scrutinized why the institution in question merits recognition as a minority institution, with particular emphasis on examining whether the minority was predominantly involved in its establishment.

149. In ***D.A.V. College v. State of Punjab*, (1971) 2 SCC 269**, the Court expressly notes that the institution in question was established by a community which was minority within the confines of the State of Punjab. Similarly, in ***Ahmedabad St. Xavier's College Society v. State of Gujarat*, (1974) 1 SCC 717**, J. H.R. Khanna's opinion notes that the college in question was established, at the time of its inception, by the minority. Similarly, in ***Gandhi Faiz-e-am-College v. University of Agra*, (1975) 2 SCC 283**, the Court, while extending rights under Article 30, notes that the institution claiming protection was expressly established by the minority.

150. The said approach has been consistently adopted over the past five decades after the judgment in ***Azeez Basha* [supra]** [See ***Rt. Rev. Msgr. Mark Netto v. State of Kerala*, (1979) 1 SCC 23**; ***Lily Kurian v. Lewina*, (1979) 2 SCC 124**; ***Christian Medical College Hospital Employees' Union v. Christian Medical College Vellore Association*, (1987) 4 SCC 691**; ***Al-Karim Educational Trust v. State of Bihar*, (1996) 8 SCC 330; *Yunus Ali Sha v. Mohamed Abdul Kalam*, (1999) 3 SCC 676; *Society of St. Joseph's College v. Union of India*, (2002) 1 SCC 273**; ***Secy., Malankara Syrian Catholic College v. T. Jose*, (2007) 1 SCC 386; *Satimbla Sharma v. St Paul's Senior Secondary School*, (2011) 13 SCC 760**].

151. In ***P.A. Inamdar v. State of Maharashtra*, (2005) 6 SCC 537**, seven Hon'ble Judges, were called upon to interpret the judgment in ***TMA Pai*** **[supra]**. While the said inquiry primarily focused on the scope of regulations viz aided/unaided minority institutions, nevertheless, the bench reaffirmed the observations that the determination of whether an institution qualifies as a minority institution, and its character at the time of establishment, should be evaluated against the criterion that it must be envisaged primarily as a minority institution placing reliance on ***Kerala Education Bill*** **[supra]**.

152. Through a survey of the case law cited above, it can be seen that the Court has adopted a varied approach is determining the criteria for discerning the true character of an institution at the time of its establishment. In order to arrive at a finding that an institution was established by the minority for the purposes of Article 30, it has been held that such institution must principally embody a minority character and be instituted to safeguard the minority language, culture, or religion. In some situations, there has also been a specific emphasis on the source of funding being from the minority community or the fact that the management of lands should eventually vest with the minority. Further, the presence of some non-minorities in administration has not been held detrimental if the actual authority rests with the minority community.

G.2 The founding moment or the genesis argument

153. The Appellants have argued that the word "establish" is to be interpreted broadly and would include the parallels drawn with generic phrases such as "genesis of the institution" or the "founding moment of the institution". With regard to the claim that the word "establish" and "found" can be used interchangeably thereby according it with a wider and more generalised meaning, it can be noticed that the Court as a matter lexical variation may have used the terms interchangeably, however, the constitutional meaning of the term cannot be diluted on that count. This is because the word "establish" as used in the Constitution carries a specific meaning. The meaning of the terms occurring in the Constitution ought to have a specific meaning especially when the same occurs under Part III of the Constitution.

154. This Court has consistently held that when the words of a provision are clear and there exists no ambiguity, the same ought to be given their plain and simple meaning. The assertion on part of the Appellant that "establish" ought to be given a wider meaning owing to the context in which it occurs is also unmerited on the same count. It must be noted that the right under Article 30 is an important and exceptional right/protection extended by the Constitution to a specific class, for a specific purpose, in a particular circumstance. The extension of the same over and

beyond what the Constitution contemplates would dilute the constitutional guarantee itself and would be counter-productive to the interests of the minorities themselves.

155. As held by this Court, the objective of Article 30 is not to afford a false sense of security and confidence to pretenders posing as minorities. It was for this reason that this Court in ***A.P. Christian Medical Educational Society*** **[supra]** cautioned against what it referred to as *masked phantoms*. It is imperative to interpret the Constitution in a manner that ensures the sacred protection under Article 30 is extended only to institutions genuinely representing the minority community, in substance and not merely in appearance.

156. From the above it is amply clear that the meaning of the word "establish" under Article 30 has indeed been understood by this Court consistently to mean '*to bring into existence*'. The meaning of "establish" in **Black's Law Dictionary 6th Edn.** is as under:

> *"xxx*
>
> *(3) To found, to create, to regulate; as: "Congress shall have power to establish post-roads and post-offices."*
> *(4) To found, recognize, confirm, or admit; as: "Congress shall make no law respecting an establishment of religion."*
> *(5) To create, to ratify, or confirm; as: "We, the people," etc., "do ordain and establish this constitution."*

> *To settle or fix firmly; place on a permanent footing; found; create; put beyond doubt or dispute; prove; convince.*
> *To bring into being; to build; to constitute; to create; to erect; to form, to found; to found and regulate, to institute, to locate; to make; to model; to organize; to originate; to prepare; to set up."*

157. Similarly, the *Webster's Third New International Dictionary* defines "establish" as – "To bring into existence, create, make, start, originate, found or build as permanent or with permanence in view". The *P.Ramanatha Aiyer's Law Lexicon* defines it as – "*To found, recognize, confirm or admit, to make or form*". The *Black's Law Dictionary, 9th edition* defines it as – "*to settle, make or fix firmly, to enact permanently, to make, form or bring into existence*." The *Bouvier Law Dictionary* defines it as – "*Creation or authorization of an operation or institution. Establishment is the act of creating or recognizing in law or in fact any institution, office, place or person so that the person or thing established has an authority or certain privileges that are recognized by others*". The *Oxford Dictionary of English* defines it as – "*To set up on a firm or permanent basis, initiate or bring about.*" The *Collins English Dictionary and Thesaurus* defines it as – "*To create or set up*". The common thread amongst all the said definition is that "establish" refers to the creation or bringing in to being of a body/institution. It refers to the action or process which involves creation of a new entity. In light of these

considerations, a minority community seeking to assert rights under Article 30 must substantiate that the institution in question was indeed physically, demonstrably, and conclusively brought into existence by the minority.

158. The Appellants urged that the establishment is equivalent to a 'founding moment' in order to further their stance on the facts surrounding MAO College and AMU. This fundamentally ignores the understanding of "establishment" as establishment is not a *moment* rather establishment is a *process*. A process consists of various factors and forces at play, the culmination of which result in the creation of the institution. A moment connotes a singular act or just an idea which, in the opinion of this Court, would not suffice the enquiry under Article 30. A process is a complex sequences of events and actions/inactions on part of various stakeholders which were relevant in the history of the institution at the point of establishment.

159. Further, in cases wherein there are multitude of forces and multiple stakeholders involved during establishment of an institution, the judicial inquiry would have to be suitably calibrated. The Court, in such situations, ought to take a holistic view of the matter and decide the question on totality of factors. The Court needs to weigh the factors and contributory forces in the balance in order to ascertain whether the minority community

was the primary force behind the bringing in to being of the institution.

G.3 Relevance of "choice" and "intent" in the question of establishment

160. At this juncture, it is necessary to understand the meaning of the term "choice" occurring in Article 30 of the Constitution. The term choice, is representative of the decision of minority community as to the nature of the institution it seeks to establish. The choice therefore could be to establish a technical institution, an arts institution, an institution for religious teaching or even a minority institution with largely secular teaching. The "choice" is therefore operationalised by the decision of the minority as to the kind of institution that the minority seeks to establish.

161. In ***Ahmedabad St. Xavier's College Society and Ors. v. State of Gujarat and Ors.*, (1974) 1 SCC 717**, this Court refers to this aspect of "choice" as under :

> *"96. xxx*
> *Clause (1) of Article 30 also contains the words "of their choice". These words which qualify "educational institutions" show* ***the vast discretion and option which the minorities have in selecting the type of institutions which they want to establish.*** *In case an educational institution is established by a* ***minority to conserve its distinct language, script or culture, the right to establish and administer such institution would fall both under Article 29(1) as well as under Article 30(1)****. The minorities can, however, choose to establish an*

educational institution which is purely of a general secular character and is not designed to conserve their distinct language, script or culture. The right to establish and administer such an institution is guaranteed by Article 30(1) and the fact that such an institution does not conserve the distinct language, script or culture of a minority would not take it out of the ambit of Article 30(1)."

162. The "choice" therefore, is with regard to the type of the institution and cannot be conflated with the "administration" of an institution. The assertion that once the choice includes having secular education in the institution, it would be necessary that non-minority persons are appointed for the purposes of teaching and administration is only partially correct. Indeed, when a minority seeks to provide secular education it would have to appoint non-minority teachers and some administration from outside the community, however, the same cannot mean that even the major decision-making, managerial and superior administrative setup can be "outsourced" by the minority. The lower rungs of administration and the teaching staff may certainly be of a non-minority character however, the higher echelons of administration and policy decision making of the institution ought to be in the hands of the minority community to claim minority status. Further, the "intent" of the minority community unless expressed and actually exercised as the "choice", cannot govern the question of establishment.

163. The constitutionally sustainable approach qua the question of "establishment" therefore, cannot hinge only upon the "intent" or "choice" of the minority at the time. The intent and choice may be relevant only to a limited extent and cannot be the controlling factors in the judicial enquiry for determining the question of establishment. The question of establishment is to be adjudicated from a multitude of factors as noticed above and cannot be inferred from bald assertions regarding the "wishes" or "choices" or "efforts" of a minority community.

164. The question of establishment would constitute a factual inquiry to ascertain the predominant forces behind the *bringing in to being* of an institution. Admittedly, the admission or taking help of other members of other communities would not be fatal, but the prominence must be of the minority community in major aspects of the institution. The primary character of the institution and the predominant efforts in its establishment ought to originate from the minority community and must culminate [*come in to being*] through the said community. The "choice" and "wishes" during the *process* of establishment – if not accepted, would clearly indicate that the concerned minority community was not the predominant force behind the institution.

G.4 The nature of administration at the time of establishment

165. The Appellants urge that it is open for a minority community, while exercising *its* choice, to hire teacher and other

administrative staff from non-minority community while establishing a minority institution. There cannot be any doubt with regard to the said proposition however, while the teaching and administrative staff may be drawn from any community, the Court needs to be ultimately ascertain whether such a choice of having a secular staff was exercised by the minority community or was enforced by other stakeholders who were involved in the process of establishment. If the position is the latter, the same would have a significant bearing on the adjudication of the question at hand.

166. At this juncture, it is necessary to understand the meaning of the term "administration" in Article 30. Further, it is important for the Court to delineate the distinction between administrative and academic setup in the concerned institution. The administrative and academic authorities within an educational institution are functionally distinct. The judgment of this Court in ***Ahmedabad St. Xavier's College Society*** **[supra]**, provides some assistance in this regard. The relevant portion of the said judgement is quoted as under :

> *"19. The entire controversy centres round the extent of the right of the religious and linguistic minorities to administer their educational institutions. The right to administer is said to consist of four principal matters.* ***First is the right to choose its managing or governing body.*** *It is said that the founders of the minority institution have faith and confidence in their own committee or body*

consisting of persons elected by them. ***Second is the right to choose its teachers.*** *It is said that minority institutions want teachers to have compatibility with the ideals, aims and aspirations of the institution.* ***Third is the right not to be compelled to refuse admission to students****. In other words, the minority institutions want to have the right to admit students of their choice subject to reasonable regulations about academic qualifications.* ***Fourth is the right to use its properties and assets for the benefit of its own institution****.*

40. ..... The right to administer is the right to conduct and manage the affairs of the institution. This right is exercised through a body of persons in whom the founders of the institution have faith and confidence and who have full autonomy in that sphere. The right to administer is subject to permissible regulatory measures. Permissible regulatory measures are those which do not restrict the right of administration but facilitate it and ensure better and more effective exercise of the right for the benefit of the institution and through the instrumentality of the management of the educational institutions and without displacing the management. If the administration has to be improved it should be done through the agency or instrumentality of the existing management and not by displacing it. Restrictions on the right of administration imposed in the interest of the general public alone and not in the interests of and for the benefit of minority educational institutions concerned will affect the autonomy in administration.

> *41. Autonomy in administration means right to administer effectively and to manage and conduct the affairs of the institutions. The distinction is between a restriction on the right of administration and a regulation prescribing the manner of administration.* ***The right of administration is day to day administration. The choice in the personnel of management is a part of the administration****."*

167. Similarly, ***TMA Pai*** **[supra]** considered the essential elements of the 'right to administer' [although under the heading "Private unaided non-minority educational institutions"] as follows:

> *"50. The right to establish and administer broadly comprises the following rights:*
> *(a) to admit students;*
> *(b) to set up a reasonable fee structure;*
> *(c) to constitute a governing body;*
> *(d) to appoint staff (teaching and non-teaching); and*
> *(e) to take action if there is dereliction of duty on the part of any employees."*

168. Therefore, "administration" and its link with the question of establishment is to be ascertained by locating who exercised the "choice" with regard the crucial aspects of an institution and to what extent was the minority's decision making expressed in the tangible outcomes at the time of establishment. It is at this point that the "choice" of the minority marries itself with the "administration" by the minority community. As stated above, the choice can be said to have been exercised by the minority

community, if the minority community is present in some higher echelons of the administrative setup. Such positioning of the minority community would, in fact, enable the community to exercise its "choice" as the said choice is a function of the decision making of the minority community. If the minority community is not the decision maker in offices of prominence in the institution, the offices which hold the keys to giving character to the institution, the claim of administration or establishment by the minority community would fall flat.

G.5 Locating the real positive indicia

169. In light of the above, in discerning real positive indicia for adjudging the question of establishment, there cannot be a rigid formula; rather, it would rely on various factors depending on the era, type, and nature of the institution under consideration. The following broad parameters can be culled out from the judgments and may be considered by the Court while adjudicating the question of establishment :

i. Firstly, to claim "establishment", the minority community must actually and tangibly bring the *entirety* of the institution into existence. The role played by the minority community must be *predominant*, in fact almost complete to the point of exclusion of all other forces. The indicia which may be illustrative and exhaustive in this regard may be nature of the institution, the legal/statutory basis

required for establishing the institution, whether the establishment required any "negotiation" with outside forces, the role in acquiring lands, obtaining funds, constructing buildings, and other related matters must have been held completely minority community. Similarly, while teachers, curriculum, medium of instruction, etc. can be on secular lines, however, the decision-making authority regarding hiring teachers, curriculum decisions, medium of instruction, admission criteria, and similar matters must be the minority community. The choice of having secular education in the institution must be made expressly by the minority community, demonstrating the link between institution and the persons claiming to establish it.

ii. Secondly, the purpose of the institution must have been to predominantly serve the interests of the minority community or the sole betterment of the minority community, irrespective of the form of education provided and the mode of admission adopted. Therefore, as per the choice of the minority community, an institution may have secular education, but such secular education and the resultant institution, must be predominantly meant for the overall betterment of the minority community.

iii. Thirdly, the institution must be predominantly administered as a minority institution with the actual functional, executive and policy administration vested with the minority. The minority community should determine the selection, removal criteria, and procedures for hiring teaching, administrative staff, and other personnel. The authority to hire and fire staff must be from the minority community. Further, even if teaching or administrative staff may include non-minority persons, the final authority exercising functional, directional, and policy control over these authorities must be from the minority community. This ensures that the thoughts, beliefs, and ideas of the minority community regarding administration are implemented. This represents the real decision-making authority of the institution being the minority community.

170. In ascertaining the aforesaid, it would be open for the Court look at the true purpose behind each of the above factors. The apprehensions expressed in ***A.P. Christian Medical Educational Society*** **[supra]**, enable the Court to *pierce the veil* to determine answers to the factors mentioned above.

171. It is reiterated that the factors mentioned above are not a straight-jacket formula rather illustrative for the Court to develop on a case-to-case basis. Additionally, factors such as

incorporation under a statute as opposed to establishment under a statute would be relevant. The context may vary between pre-Constitution and post-Constitution institutions. The interpretative exercise must be agnostic to generic claims of a 'narrow' or 'broad' construction of constitutional terms. The interpretation must be such that it serves the interests of minorities by protecting genuine minority institutions.

H. THE AZEEZ BASHA JUDGMENT

H.1 The content of the judgment of Azeez Basha [supra]

172. The judgment of the constitution bench of this Court in ***Azeez Basha*** **[supra]** is the cynosure of all eyes in the present case. The parties attacking the judgment of the High Court assert that the approach adopted by the Court in ***Azeez Basha*** **[supra]** to arrive at the finding that the AMU was "neither established nor administered by the Muslim minority" was fraught with errors. Apart from other aspects discussed hereinabove, the judgment was questioned on the ground that it made the rights under Article 30 illusionary as far as Universities are concerned. It was argued that the judgment in ***Azeez Basha*** **[supra]**, despite accepting that a minority community has the right to establish a 'university' under Article 30(1), held that since a university is necessarily required to be established/incorporated by or under a statute, Article 30(1) would not apply. It was also argued that if a minority can establish a university under Article 30(1), and if

universities are required to be incorporated under a statute for degrees to be recognised, then it must follow that the minority community is entitled to seek incorporation of its institution as a university. It was argued that ***Azeez Basha*** **[supra]** holds that a university incorporated by a statute would lose its status as a minority institution and therefore, the reasoning is flawed.

173. The parties defending the judgment of the High Court, in this regard assert that the understanding of the Appellants of the judgment in ***Azeez Basha*** **[supra]** is incorrect as the judgment is not merely premised on the fact that the AMU was established by way of a statute rather the said judgment, in depth, studies the antecedent facts prior to the establishment of the university and the nature of the legislation establishing the university, to ascertain the character of the university at the time of its initial establishment, and thereafter arrives at a factual finding. It is argued that the findings of the judgment in ***Azeez Basha*** **[supra]** are findings of fact at the time of the establishment of the AMU in 1920 and do not lay down any straightjacket formulation of law.

174. Before adverting the countering versions, it is necessary to study the judgment in ***Azeez Basha*** **[supra]**. The judgement can be divided in ten parts. In the first part, the Court notes the broad parameters of challenge before it and the principal arguments by both sides. The Court notes that amendments made to the AMU

Act, 1920 in the years 1951 and specifically 1965, were impugned before it. The Court noted assertion of the Petitioners therein, to the effect that, the AMU was established by the Muslim minority. It was claimed that therefore, the Muslim minority possess the right to administer it, and any provisions within the Acts of 1951 and 1965 that diminish or curtail this right are beyond the scope of Article 30(1) and hence, invalid. The argument of the Union of India at the said time was that the AMU was established by the 1920 Act and therefore, the Parliament possessed the authority to amend that statute as deemed necessary for the advancement of education. It was argued that the minority did not establish the AMU and thus cannot assert the right to administer it. Furthermore, it was contended that the provision in the 1920 Act, stipulating that the Court of the AMU was to be composed entirely of Muslims, did not confer any administration rights upon the Muslim community and the administration remained under the jurisdiction of the secular authorities established by the 1920 Act.

175. The next part of the judgment notes in some detail the history prior to the AMU coming in to being. The said portion is relevant as it represents a specific, fact-based enquiry that the Court carried out. The Court noted that it was "*necessary to refer to the history*" prior to the establishment of the AMU in 1920 in order to "*understand the contentions raised on either side*". The

Court notes the establishment of the MAO College by efforts of Sir Syed Ahmad Khan. The Court notes that the at the end of the 19th century, the idea of establishing a Muslim University gathered strength and by 1911 some funds were collected and a Muslim University Association was established. The Court referred to the parleys that took place between the Association and the Government of India, the condition to collect funds by the Government, and the MAO College and its properties being vested in the proposed university. The Court notes a variety of factors which led to the establishment of the Aligarh University in 1920 by the 1920 Act.

176. In the next part, the Court refers to the provisions of the 1920 Act to ascertain the character of the AMU when it was established in 1920. The Court refers to a large number of sections, including Section 23, which provided for the 'Court' to be a minority body [along with the comment of the Select Committee on the same]. After a detailed analysis of the provisions, ***Azeez Basha*** **[supra]** concludes that the '*final power in almost every matter of importance*' was not with the minority community.

177. Thereafter, the Court discusses the amendments made to the 1920 Act in 1951 and 1965. It specifically notes the amendments made to Section 9 and Section 23 which deal with Islamic education and the all-Muslim member 'Court', wherein

the provisions were altered. It noted that the amendments were made in 1951 to specifically bring the 1920 Act in conformity with the provisions of the Constitution and for the benefit of the University so that it could continue to receive aid from the Government. For the 1965 amendments, it was noted that the 'Court' under Section 23, ceased to be the supreme governing body and the powers of the Executive Council were correspondingly increased. The constitution of the 'Court' was drastically changed making it largely a nominated body.

178. In the next portion, the Court discussed the legal challenge and the position of law under the Constitution. The Court squarely rejects the argument that even though the religious minority may not have established the educational institution, it will have the right to administer it, if by some process it had been administering the same before the Constitution came into force. It held that the '*minority will have the right to administer educational institutions of their choice provided they have established them, but not otherwise*' and that '*words "establish and administer" in the Article must be read conjunctively*'. The Court then referred to certain observations ***Durgah Committee, Ajmer v. Syed Hussain Ali*, (1962) 1 SCR 383**, wherein it was held that even if it be assumed that a certain religious institution was established by a minority community it may lose the right to administer it in certain circumstances.

179. In the next part of the judgment, the Court contextualised the position of educational institutions and specifically Universities in the pre-Constitution and pre-UGC era. The Court notes that a University and a college are different institutions and what distinguishes a university from any other educational institution is that a university grants degrees of its own while other educational institutions cannot. Most critically, the Court noted that at the said time, there was no prohibition against establishment of universities privately however, the degrees of such a "University" would not be recognised by the then British Indian Government. The non-recognition was non-justiciable as establishment of a Government recognised was only through a legislation and there existed no Article 30 or fundamental rights before 1950. The Court emphasized the importance of the recognition from the then Government as it made the value of degree being awarded by such an institution higher. The Court noted that it was only in the year 1956, that the University Grants Commission Act, 1956, prohibited establishment of a University without a statute.

180. In essence, in this critical part of the judgement, the Court noted the two important considerations as under :

i. There was no law prohibiting establishment of a private institution which grants degree without Government intervention or legislation prior to 1956;

ii. The educational institution established with Government intervention and legislation had a significant advantage of British Government's recognition to the degree granted by the institution.

It was this simple understanding of facts as prevalent in pre-Constitution India, that formed the fulcrum of the judgment in ***Azeez Basha*** **[supra]**.

181. On the basis of the said observations, the Court held that the minority community was not prevented in any manner in 1920 from establishing a university if it was not interested in having such University and its degrees recognised by the British Indian Government. The Court also noted that in such a situation, the minority community could not insist that degrees granted by such a university should be recognised by Government. Therefore, on the said basis the Court remarked that when the AMU was established, by virtue of Section 6 of the 1920 Act, its degrees were recognised by Government and in that manner, an institution was brought into existence which could not be brought into existence by any private individual or body.

182. In the next portion, the Court referred to the MAO College as the 'nucleus' of AMU – an expression which has caused considerable controversy in the present proceedings. The Court thereafter notes that the Central Legislature established the AMU through the 1920 Act as the minority could not establish a

university whose degrees were bound to be recognised by Government and that one circumstance was critical. The Court notes that the 1920 Act was passed as a result of the efforts of the Muslim minority but it would not mean that the AMU, as a University granting government recognised degrees in 1920, was established by the Muslim minority.

183. In the next part, the Court renders its opinion on the meaning of the word ‘establish’ to mean "to bring into existence". On the basis of the said meaning, the Court thereafter again ventured into the history surrounding the establishment of the AMU. The Court notes through a historical analysis that the minority community approached the Government to bring into existence a university whose degrees would be recognised by Government. It was thereafter that the British Government took the decision to establish the university, whose degrees it would recognise, in the only manner known to law for establishing such a university at the said time – by passing a legislation. The Court notes that the 1920 Act was then passed by the Central Legislature and the university of that type was established.

184. Thus, the Court held that the University was brought into existence by the 1920 Act for it could not have been brought into existence otherwise. Thus, the Court held that since AMU was not established by the minority, and therefore, the amendments

of 1951 and 1965 cannot be struck down as being unconstitutional under Art. 30(1).

185. Finally, the Court in ***Azeez Basha*** **[supra]**, analyses various provisions of the Act as it then existed and held that administration was also not vested in the Muslim minority rather it was vested in the statutory bodies created by the 1920 Act. It noted that only the 'Court' was minority only body in 1920 [amended in 1951], but the electors for some of the members included non-minorities. On the totality of the factors, the Court held that AMU was neither established nor administered by the minority. The remaining part of the judgment considers the attack on other fundamental rights like Article 26 and Article 19, which may not be germane to the present enquiry.

H.2 The rationale behind the findings

186. This Court has consistently held that the text, context and the totality of the factors, give actual meaning to a judgment. In ***P.S. Sathappan v. Andhra Bank Ltd. & Ors.*****, (2004) 11 SCC 672**, this Court has held as follows:

> *"144. While analyzing different decisions rendered by this Court, an attempt has been made to read the judgments as should be read under the rule of precedents. A decision, it is trite, should not be read as a statute. 145. A decision is an authority for the questions of law determined by it. While applying the ratio, the court may not pick out a word or a sentence from the judgment divorced from the*

context in which the said question arose for consideration. A judgment as is well-known, must be read in its entirety and the observations made therein should receive consideration in the light of the questions raised before it."

In ***Goan Real Estate & Construction Ltd. & Anr. v. Union of India, (2010) 5 SCC 388****, it has been held as under :*

"What is more important is to see the issues involved in a given case, and the context wherein the observations were made by the Court while deciding the case. Observation made in a judgment, it is trite, should not be read in isolation and out of context. It is the ratio of the judgment, and not every observation made in the context of the facts of a particular case under consideration of the court, which constitutes a binding precedent."

187. The Court needs to conduct a careful exercise in ascertaining the true purport and meaning of a judgement. Both sides in the present case have to an extent tried to read the judgment in ***Azeez Basha*** **[supra]** as per their own respective conveniences. As is the case in any adversarial exercise, to an extent, the Court needs to reconcile the varying approaches. The judgment in ***Azeez Basha*** **[supra]** ought to be understood in the correct historical perspective in order to ascertain if it lays down the proposition - that whenever a University is established by way of an enactment, it cannot be a minority institution.

188. From a proper reading presented above, it is incorrect to suggest that the Court in ***Azeez Basha*** **[supra]** adopts an approach which this Court has not adopted in future cases. It is also crucial to note that apart from ***Azeez Basha*** **[supra]** this Court has, in no other case, ever dealt with a situation where a University, which was established by the Legislative Council during the British period, has claimed minority status. In that sense, the judgment in ***Azeez Basha*** **[supra]** and present bench are faced with a unique situation. It is for this reason, the Court in ***Azeez Basha*** **[supra]** had to adopt a suitably modulated approach.

189. The notion that ***Azeez Basha*** **[supra]** categorically prohibits minorities from establishing universities due to statutory requirements is unfounded. The judgment in ***Azeez Basha*** **[supra]** underscores the importance of legislative intent and the specific provisions within statutes in determining the character of an institution at the time of its establishment. The AMU's founding legislation, according to ***Azeez Basha*** **[supra]**, did not designate it as a minority institution, either in character or administration.

190. Furthermore, the judgment in ***Azeez Basha*** **[supra]** correctly emphasizes the absence of UGC regulations at the time of the AMU's establishment and underscores the need to consider historical circumstances highlighting the supreme importance of

Government recognition of degrees at the said time. In essence, the judgement in ***Azeez Basha*** **[supra]** provides crucial insights into the contextual factors influencing the establishment of educational institutions, emphasizing the need for interpretative clarity while considering pre-Constitution and pre-UGC institutions status as minority institutions, especially Universities. It would be unfair to judge the approach of a judgement rendered almost six decades back for the alleged lack of verbosity.

191. The judgment in ***Azeez Basha*** **[supra]** does not preclude minorities from establishing universities but rather highlights the importance of legislative intent and statutory provisions in determining an institution's character. As a matter of law, it is within the purview of the Legislature to enact legislation for the establishment of a minority university, provided that such legislation fulfills the criteria of constituting a statute for a minority university. In such a scenario, the concerned legislation must incorporate provisions that clearly indicate the establishment of the institution by the minority community and confer administrative authority to the minority community.

I. BALANCING CONFLICTING NARRATIVES

192. There is an inherent problem in the study of history. Since the events in history that have already occurred can be highlighted or dimmed depending upon the proclivities of the

writer, the ‘correct’ version of history often remains elusive. Many modern history writers adopt an approach which is known as *Complex Adaptive System*, where the world is seen as an unruly unorganised place in which the sequence of events is complex and unpredictable. The events are characterised by interactions between a host of factors including grand socio-economic forces, geography, actions of persons in power, actions of a random commoner, culture, ideology, technology, fluke etc. The theory provides that history does not follow a predetermined path and can go down multiple ones at the hands of any of the factors mentioned above. While some outcomes remain to be more likely than others, the theory remains that the world is made up of unintended consequences, random shocks and cascading effects of significant and insignificant events both.

193. Both sides in the present case have highlighted their own version of history of the establishment of the AMU and sought highlight specific events which, in their understanding, were crucial in the eventual *establishment* of the AMU. The Appellants contended that the AMU's formation was fundamentally enabled by the proactive involvement, demand, and contributions of the Muslim community. They argued that the 1920 Act essentially transformed the status of 'MAO College' from being affiliated with Allahabad University to an independent entity named 'Aligarh Muslim University' primarily

aimed at imparting Muslim religious education and featuring a Department of Islamic Studies.

194. The Appellants delineated the historical trajectory of AMU into three distinct phases:

A. The period spanning from 1870 to 1877 witnessed the inception of the idea among the Muslim community to establish a university for the upliftment and progress of Muslims, leading to the establishment of MAO College.

B. From 1877 to 1910, the Muslim community fervently advocated for the conversion of MAO College into a university, eventually securing tentative agreement from the Government.

C. The period from 1910 to 1920 saw concerted efforts by the founders of the Muslim University to engage with the Government, culminating in the successful conversion and incorporation of MAO College into Aligarh Muslim University.

195. It was sought to be highlighted that Sir Syed Ahmad Khan envisioned establishing a university in India akin to Oxford and Cambridge to address the educational backwardness among Indian Muslims. In order to achieve this goal:

i. On October 2, 1870, Sir Syed formed the Committee for the Better Diffusion and Advancement of Learned among Mohammadans of India. This committee aimed to

understand why Muslims were not pursuing Western education, identifying reasons such as lack of religious education and non-involvement of Muslims in educational decisions. Consequently, the idea of an educational institution managed by and for Muslims with religious instruction gained traction.

ii. In 1871, Sir Syed established the Mohammadan Anglo-Oriental College Fund Committee to raise funds for the educational institution. The committee's objective was explicitly stated as collecting funds for establishing a college, particularly for the education of Muslims.

iii. The committee resolved to establish Madrasatul Uloom (an Arabic term for educational institution) in Aligarh, which was inaugurated on May 24, 1875. This marked the initial step toward realizing the vision of a university for the Muslim community.

iv. Subsequently, Madrasatul Uloom was established as the Mohammedan Anglo-Oriental College (MAO College) on January 8, 1877, as a registered society. During the laying of the foundation stone, the College Fund Committee addressed the Viceroy and Governor-General of India, expressing the hope that the college would eventually evolve into a university spreading the values of free inquiry, tolerance, and morality.

v. The Rules and Regulations of MAO College emphasized its primary objective as the education of Muslims, while also accommodating Hindus and other communities.

vi. Administration of MAO College was exclusively entrusted to the Muslim community, as evidenced by various resolutions and rules. The Select Committee for the Advancement of Muslim Education, the Fund Committee, and the Trusteeship regulations all mandated Muslim involvement in the institution's governance.

196. The Appellants sought to highlight that in the second phase, the MAO College expanded, and Sir Syed and the Muslim community continued to seek government support for its "conversion" into a university by placing reliance on the following :

i. Sir Syed pursued government support primarily because the Muslim community viewed a degree as essential for success and government employment. This viewpoint was documented in Mr. Altaf Husain Hali's biography of Sir Syed, "Hayat-i-Javed." Justice S Amir Ali also stressed the necessity for the proposed university to be empowered to grant government-recognized degrees.

ii. To further this goal, the College Fund Committee presented a written address to the Viceroy on 18.11.1884, expressing the hope that, with increased funds and

completed schemes, they would seek recognition as an independent university.

iii. After Sir Syed's demise on 27.03.1898, a memorial fund was established on 08.04.1901 to gather funds for elevating MAO College to university status. This endeavor met with success, with Rs. 1,27,000/- collected by 11.11.1901. Additionally, Mr. Syed Jafar Husain initiated the 'one rupee fund' scheme, urging each Muslim to contribute at least one rupee towards the proposed university, resulting in substantial funds being raised.

iv. Various representations were made to the government by the MAO College management and members of the Muslim community, including addresses to the Viceroy on 01.10.1906 and 22.04.1908, seeking assistance in establishing a Muslim university. The 22.04.1908 address emphasized the alignment of their goals with Sir Syed's vision, with significant support from figures like Mr. Justice Mahmood and Mr. Theodore Morison.

v. In 1910, the efforts of the Muslim community garnered in-principle acceptance from the Government of India for the conversion of MAO College into a Muslim University.

197. The Appellants pointed out that in the final phase, the Muslim community continued to collect funds and negotiate with

the government to establish the university, highlighting the following :

i. In 1911, the internal Foundation Committee was formed to establish a University, with the Raja Saheb of Mahmoodabad as its President.

ii. On 18.07.1911, the Secretary of State approved in principle the establishment of a university at Aligarh, subject to the provision of adequate funds and control, based on the recommendation of the Government of India dated 10.06.1911.

iii. The then Government of India, in its letter dated 31.07.1911 to the Foundation Committee, specified that the university could be established only through a bill in the Imperial Legislative Council, expressing willingness to draft the proposed bill in consultation with community representatives.

iv. A draft bill was prepared by the Constitution Committee in August 1911.

v. Negotiations in November 1911 led to a dispatch from the Government of India to the Secretary of State, highlighting the significance of sanctioning a university at Aligarh for the Muslim community.

vi. The negotiations continued, addressing issues such as university affiliation, nomenclature, and the Chancellor's

role. A letter dated 09.08.1912 from the Education Member of the Government acknowledged the community-led initiative and the draft constitution's intent.

vii. In 1915, the Muslim University Association, comprising entirely of Muslim members, was founded to facilitate the conversion of MAO College. The association's efforts were detailed in the MAO College Annual Report 1912-14, highlighting significant funds raised.

viii. The Muslim Community successfully raised Rs. 30 lakhs for the university, as required by the Government.

ix. After prolonged negotiations, the Muslim University Bill was prepared in 1919 and referred to a Select Committee. The committee's report, submitted on 02.09.1920, underscored the Muslim Community's pivotal role in the university's establishment and administration.

x. The Aligarh Muslim University Bill, 1920 was debated in the Indian Legislative Council and passed. The President congratulated the Muslim community on its passage.

xi. Consequently, the Aligarh Muslim University Act, 1920 was enacted, with the Statement of Objects and Reasons acknowledging the significant role of the Muslim community in its establishment.

198. Apart from the above, the Appellants sought to highlight other aspects to highlight minority character of the institution such as :

i. The historical background of the institution, as described above, showcases the evolution MAO College into a full-fledged university through the Aligarh Muslim University Act, 1920. This journey reflects the concerted efforts of the Muslim community, led by visionaries like Sir Syed Ahmad Khan, to address the educational needs and aspirations of Indian Muslims.

ii. The architecture of AMU's buildings, characterized by features such as deep green color, domes, and Qur'anic inscriptions, distinctly embodies its Islamic identity. Photographic evidence presented to the Division Bench of the High Court further underscores this Islamic architectural style.

iii. The emblem of AMU incorporates a Qur'anic verse, serving as both its motto and a symbol of its Islamic heritage.

iv. AMU boasts a University Mosque, a significant religious and cultural landmark within its premises. The Amending Act of 1972 permits the establishment of halls, hostels, specialized laboratories, and research units within a 25 km

radius of the University Mosque, highlighting its central importance.

v. The employment of Muezzins at AMU reflects its commitment to Islamic traditions and practices, contributing to the religious and spiritual ambiance on campus.

vi. Initially, AMU offered separate Departments of Studies for Sunni Theology, Shia Theology, Islamic Studies, Arabic language and literature, Persian, and Urdu. Over time, these departments have expanded to include various disciplines, such as Islamic systems of medicine, Philosophy (with a focus on Islamic Philosophy), and a Center for Quranic Studies, reflecting the university's continued emphasis on Islamic scholarship and education.

vii. AMU has historically accommodated female students to observe purdah (veiling) as per Islamic tradition. Photographs documenting these accommodations provide tangible evidence of the university's efforts to create an inclusive and supportive environment for its female students while respecting their religious beliefs and practices.

199. On the contrary, the parties defending the judgment in ***Azeez Basha*** **[supra]** and the judgment of the High Court, have sought to highlight their own version of events prior to the

establishment of the AMU in order make a case that while the minority community was involved in the process, the establishment of the University was at the primary will and decision of the British Indian Government. The following aspects were highlighted :

i. In 1873, Sir Syed Ahmad Khan proposed substituting the term "college" with "university" in the name of MAO College. However, the government responded by stating that if a "Mohammedan University" were to be established, no financial aid would be provided.

ii. It was brought to the fore that contributions from various sources, including government officials and dignitaries, as well as the donation of land by Lt. Governor Sir John Strachey, underscored the national character of MAO College.

iii. The college, initially dependent on government funds, struggled with significant debt around the time of Sir Syed's death in 1898.

iv. Efforts to establish a university at Aligarh continued, with suggestions from individuals like Prof. Dr. Zia-ud-din, Justice S. Amir Ali, Theodore Morison, Theodore Beck, and Maulvi Rafi-u'd-din, aiming to model it after European universities and offering a blend of Western and Oriental

learning. However, despite proposals for a predominantly minority university, the demands were not fully accepted.

v. The Imperial Government insisted on substantial secular control over the university's establishment, as indicated in correspondences between officials such as JP Hewitt, the Secretary of State, and Sir Harcourt Butler. Despite proposals for affiliating colleges outside Aligarh, such plans were rejected to prevent potential overgrowth and competition with future institutions.

vi. During meetings and conferences, the government's proposal for a university along the lines of the Benares Hindu University was met with disappointment and protest, highlighting the community's desire for autonomy. Eventually, the Muslim University Association voted to accept the government's proposal, aligning the university's setup with that of the Benares Hindu University.

vii. Discussions regarding government recognition of degrees and control over examinations emphasized the need for government oversight to maintain standards. Members of the Regulations Committee agreed to government veto power over the appointment of the University Vice Chancellor, citing the university's envisioned All India character and the desire to avoid local prejudice.

viii. On October 10, 1917, H. Sharp, the Secretary of the Department of Education in the Government of India, outlined several key principles to consider regarding the organization of the proposed university's constitution. Firstly, he suggested following the precedent set by the University of Benares, except for non-essential changes or improvements. Secondly, he emphasized not allowing adherence to the constitution of the Mahomedan Anglo-Oriental College as a basis for deviating from the Benares model. Additionally, he highlighted various political considerations, including the desire to establish Islamic colleges affiliated with Aligarh, potential political movements centered around Aligarh, and the desire for a network of recognized Islamic schools. Other concerns included the desire for autonomy from local government control, political representation within the university's governing bodies, the conferment of inexpensive degrees to increase Muslim graduates, and the potential elimination of European staff members. Sharp also addressed specific aspects of the draft bill, such as the powers of the Governor-General in Council, the role of the Visitor, and the composition and powers of the Court, Senate, and Syndicate.

ix. On January 19, 1918, a letter from Sir E.D. Maclagan, Secretary to the Government of India, highlighted the need for any legislation to establish a Muslim University at Aligarh to conform with the provisions of the legislation passed for the Hindu University at Benares. The letter raised concerns about certain provisions in the draft bill, including compulsory theology instruction for Muslim students and the absence of provisions regarding a Visitor's control over statutes and regulations.

x. On December 19, 1918, a demi-official letter from Mr. Keane mentioned the expectation of a liberal annual grant from the Government of India to the proposed university, similar to the grant given to the Benares Hindu University.

xi. On December 27, 1919, the Government of the United Provinces provided its views on the draft constitution for the proposed Muslim University at Aligarh. The Lieutenant-Governor expressed concerns about granting the Court the power to interpret statutes and suggested limiting the Court's powers to preserve the influence of the Governor-General.

xii. On March 12, 1920, Mr. H. Sharp's letter to Kunwar Maharaj Singh noted that the draft bill would allow the Governor-General in Council to give instructions and

compel the university to follow them regarding the standard of university examinations.

xiii. On May 8, 1920, a telegram compared the Muslim University draft bill with the Benares Hindu University Act, noting differences in the publication of accounts, the approval process for alterations to statutes and ordinances, and the transfer of certain powers from the Visitor to the Governor-General in Council. The telegram emphasized the importance of retaining control over these all-India universities under the Government of India.

xiv. On June 12-13, 1920, a meeting was held to discuss the establishment of Aligarh Muslim University. A large number of points were discussed at the meeting which ultimately ended with the observation that BHU and AMU should be on equal footing regarding their relations with the government.

xv. In a subsequent speech on September 9, 1920, Mr. Shafi presented the report of the Select Committee on the AMU Bill in the Indian Legislative Council. Amendments proposed during the session, such as altering the tenure of key university officials and modifying the ordinance-making process, were met with objections. Concerns were raised about potential anomalies and the balance of power between university bodies and government authorities.

Despite objections, the proposed amendments were put to a vote and rejected by the council.

200. Significantly, another aspect that was highlighted by the parties defending the judgment in ***Azeez Basha*** **[supra]** and the judgment of the High Court, was about the two groups that emerged during the 'negotiations' with the British Indian Government on the minority side and the creation of the Jamia Milia Islamia. It was pointed out as under :

i. Sir Syed's original vision for AMU was deeply rooted in loyalty to the British.

ii. The division within the Aligarh University movement stemmed from the government's refusal to grant the college authority to affiliate with institutions outside Aligarh. Even prior to this, the Ali brothers endeavored to remove pro-government influences from the college administration.

iii. The rift intensified over the denial of affiliating powers to MAO College, exacerbated by events like the annulment of the Bengal partition, perceived by Mahomed Ali as a betrayal of Muslims.

iv. The factions emerged, with Maulana Aftab Ahmed Khan leading those willing to accept the government's terms (the loyalists), including later Mohd. Shafi.

v. Conversely, the opposition, led by Ali Brothers and Hasrat Mohani, advocated for Muslim control of the university and affiliation powers.

vi. The Ali brothers and their followers sympathized with Turkey and opposed British actions during WWI. Mahomed Ali's influence over Aligarh students created challenges for MAO college's principal, Dr. Ziauddin.

vii. After the BHU Act, pressure mounted to accept the government's terms, leading to a split in the movement. Despite the University Foundation Committee's decision to accept government proposals without conditions in April 1917, Mahomed Ali remained opposed to the same.

viii. In 1920, negotiations between the Government and the Aligarh group led to the introduction of the University Bill. Simultaneously, Gandhiji's involvement in the Khilafat movement aimed to mobilize Muslims amidst anti-government sentiments during the Non-cooperation movement started with the co-operation from the Ali Brothers.

ix. The rapid introduction of the AMU bill was aimed to align Muslims with the government amid growing anti-government sentiment. Subsequently, the pro-Khilafat group urged the university to reject government aid, prompting Maulana Mahomed Ali to advocate for non-

cooperation. On October 12, 1920, the Ali brothers and Gandhiji urged the college to cease accepting government aid. Aligarh students actively joined the non-cooperation movement, threatening to nationalize the college.

x. Leaders supporting the non-cooperation movement assured Aligarh students of the college's transformation into a National University, encouraging enrollment. The Deoband Theological School issued a fatwa advising students to leave MAO College and enroll in the proposed National University.

xi. On October 27, the Aligarh Board of Trustees directed Maulana Mohammed Ali and his supporters to vacate college hostels, leading to the college's closure.

xii. Finally, on October 29, 1920, Maulana Mohammed Ali and his followers left the college to establish Jamia Milia Islamia, aimed at countering government influence at AMU. Consequently, the Ali Brothers established Jamia Milia Islamia as an independent institution not subject to government control, contrasting with AMU's dependence on government support.

201. On the basis of the above, it was argued that the judgment in ***Azeez Basha*** **[supra]** correctly recognises the historical context of AMU's establishment and the influence of British recognition on its character. It was argued that the judgement in

***Azeez Basha* [supra]** does not simplicitor conclude that statutory establishment precludes minority status but examines the circumstances preceding AMU's founding to determine its nature as a government-supported institution.

202. Keeping the above factors in mind, the Court must survey the important events and incidents that led to the formation of the AMU. In the conflict of narrative surrounding the century old history, the Court cannot be swayed by one side of the story or the other. In a complex historical context such as this, the Court must weigh carefully the role played by the minority as against that played by the government in establishment of the institution in order to determine who is responsible for the positive fact of such establishment.

203. From a minute study of the aspects highlighted above, it is clear that in some case, there may exist certain factors which point towards efforts made by the minority community to claim to have a denominational University. Further, clearly the real intention of the minority community may indeed have been to have a denominational University for its own use. However, as stated above, intention and efforts are not the complete answer to the question of establishment.

204. If in a given case, there may be other factual factors pointing towards the contrary, highlighting that whatever the intention or the will of the minority community might have been

at the said time, in exchange or during negotiations, if the resultant institution was effectively rendered an open governmental institution [with limited minority aspects], then Article 30 would be out of the picture. An institution with a limited minority aspects/elements cannot be a minority institution. The Court in such a situation, must balance the narratives on a weighing scale and test which forces were stronger during the process of establishment and the resultant institution.

J. PRE-INDEPENDENCE UNIVERSITIES AND OTHER INSTITUTIONS

205. At this juncture, it would be appropriate to refer to the position of educational institutions, specifically Universities, prior to the advent of the Constitution and the UGC Act, 1956. During the said time, the British Indian Government, through legislations passed through provincial legislatures, passed various enactments establishing Universities in various zones/cities. The University of Calcutta, the University of Bombay, the University of Madras, the Panjab University and the University of Allahabad were established through legislations in the 19th century.

206. At the same time, throughout this period, it is noteworthy that a significant number of colleges and similar educational institutions were established across the country, including those

established by minority communities. The said institutions did not aspire to attain “university” status and were content with operating as affiliated colleges to the Universities established by legislation by legislative bodies.

207. Parallelly, prior to the prohibition contained in the UGC Act, 1956, there existed a period wherein the legal landscape lacked statutory constraints preventing the establishment of universities without specific legislative enactments. During this time, it was within the prerogative of any collective body or individuals to establish educational institutions in the nature of universities without legislative intervention.

208. In fact, in the absence of a provision like Section 23 of the UGC Act, 1956, it was open to such institutions to even adopt the titles such as "university" or in some cases "vidyapeeth" or "jamia" asserting their capability to grant degrees. This era witnessed the emergence of numerous universities, predating independence, whose degrees did not carry recognition from the British Government for eligibility in employment within Crown services. Despite this absence of official recognition, many of these institutions rose to prominence, eventually becoming leading national educational establishments.

209. Therefore, the authorities behind the MAO College, had three options :

i. First, request the British Indian Government to establish a university, with the classical British Indian Government's control as in case of other Universities, through a legislation passed by the Imperial Legislative Council or Provincial Legislature. In the said eventuality, the advantage was that the institutions degrees could be recognised by the British Indian Government [and perhaps the world over] however, it would require foregoing of the character and the control over the institution.

ii. Second, continue as the MAO College, affiliated to the Universities already in existence, and persist as a college only [without granting its own degrees] while preserving its control and character as a denominational institution subject to regulatory controls that came along with the affiliation with a legislation-based University;

iii. Thirdly, the MAO College had the option to establish a university/Vidyapeeth/jamia under its own name or any other name without the need for government enactment, albeit without recognition from the British Indian Government. The institution could have chosen to maintain its character and avoid British governmental control.

210. The history of the events as mentioned above, is witness to the decisions taken and path chosen by the stakeholders and the

same would have a bearing on the issue whether the AMU was established as a minority institution or not.

K. THE QUESTION OF ADMINISTRATION AND THE 1920 ACT

211. As stated above, "administration" and its link with the question of establishment is to be ascertained by locating who exercised the "choice" with regard the crucial aspects of an institution and to what extent was the minority's decision making expressed in the tangible outcomes at the time of establishment. As stated above, it is at this point that the "choice" of the minority marries itself with the "administration" by the minority community. As stated above, the choice can be said to have been exercised by the minority community, if the minority community is present in some higher echelons of the administrative setup. Such positioning of the minority community would, in fact, enable the community to exercise its "choice" as the said choice is a function of the decision making of the minority community. If the minority community is not the decision maker in offices of prominence in the institution, the offices which hold the keys to giving character to the institution, the claim of administration or establishment by the minority community would fall flat. It is in this light that the AMU act, 1920 [and as it stood post the Constitution coming into force], would have to be examined.

212. The AMU act, 1920, as enacted, is an interesting piece of legislative drafting. The Act had 40 sections and created a unique

machinery, to administer the AMU. As discussed above, the establishment of the university and the question thereof is also a function of nature of the university established through the Act and the real controlling authorities – both at executive level and staff level. The parties doubting the judgment in ***Azeez Basha*** **[supra]**, sought to highlight some aspects of the 1920 Act in order to further their points.

213. It was pointed out that the Statement of Objects and Reasons and preamble of the Act explicitly articulates its purpose to establish and incorporate a teaching and residential Muslim University while dissolving the Muhammadan Anglo-Oriental College, Aligarh, and the Muslim University Association, transferring all their properties and rights to the new university. It was pointed out that all assets, rights, powers, and privileges of MAO College and its affiliate bodies were fully transferred and vested in AMU. It was pointed out that any references to MAO College or its affiliate bodies in previous enactments or documents are construed as references to AMU. It was pointed out that all employees and staff of MAO College were automatically deemed as employees of AMU with the same tenure, terms, rights, and privileges. It was pointed out that donations received from the Muslim community, totaling thirty lakh rupees, were allocated as the Reserve Fund to be managed by AMU.

214. It was pointed out that all students of MAO College became the responsibility of AMU upon commencement, including the provision of instruction as per the prospectus of Allahabad University. It was pointed out that the First Statutes mandated that the Register of registered graduates include those who had been educated for at least two years at MAO College. Additionally, the Central Legislature incorporated provisions in the AMU Act specifically benefiting the Muslim community, such as the promotion of Oriental and Islamic studies, instruction in Muslim theology and religion, and furtherance of arts, science, and other branches of learning.

215. It was pointed out that the Act allowed for the establishment of intermediate colleges and schools within the vicinity of MAO College to provide instruction in Muslim religion and theology. It was pointed out that regarding administration, the Muslim community had both de jure and de facto control over the management of AMU. It was pointed out that the limitation of the membership to the 'Court' [which is the *supreme governing body*] to Muslims is a significant aspect in that regard.

216. It was highlighted that the Chancellor, Pro-Chancellor, and Vice-Chancellor, being ex-officio members of the 'Court', had to be from the minority community. It was pointed out that the powers vested in the Court to appoint university officers and

frame statutes for the Executive and Academic Councils, and the predominance of Muslims in elected university positions. It was pointed out that additionally, the Act did not require the submission and approval of certain statutes dealing with Muslim education. It was pointed out that the presence of non-Muslims in governing bodies does not diminish the minority character of the university, citing legal precedents. It was pointed out that powers vested in the Lord Rector and the Visiting Board under the Act do not affect the university's minority character and are merely 'regulatory' or 'supervisory' in nature as would be in case of even present-day Universities and their 'Chancellors'.

217. The parties defending the judgment of the High Court pointed out that the 1920 Act provides for government control over the AMU by controlling, inter alia, the appointment of important office holders, the composition of administrative bodies, the rule making power of the university etc. It was pointed out that the Governor General-in-Counsel was appointing authority at the time of inception for the high positions of Chancellor, Pro-Chancellor, and Vice-Chancellor. It was pointed out that powers of the University had 12 sub-clauses, all of which were secular expect for one. It was pointed out that the admissions in the University at the time of inception were made on secular lines. It was pointed out that First Statutes of the University were framed not by the 'Court' but by the British

Indian Legislature and the First Ordinances of the University at the time of inception were also not framed by the minority rather were framed by the non-minority authority of the Governor General-in-Council. It was pointed out that Lord Rector had wide ranging powers and it was the British Indian authorities that had effective, de-facto, policy level control over the AMU and not the minority community at the time of establishment.

218. It is critical to note that the 1920 Act and the nature thereof, also bestows the AMU with its character at the time of inception. The said character at the time of inception would be useful in ascertaining if the institution was predominantly established for the minority community with a '*sprinkling of outsiders*' or not. It may be noted that merely having a faculty or a portion thereof dedicated to a religious discipline would not bestow a larger public entity like a University, with its character. The leading Universities of the world today have faculties for religious studies and enquiry[5]. The said faculties are genuine centres of intellectual and theological enquiry and would also interest persons from other religions in numerous cases. Therefore, having a specific portion carved out in a larger University set-up would not be the defining characteristic of the University. In fact, such a dedicated Faculty in a University would indicate the wide-

[5] Oxford Centre for Hindu Studies (OCHS), Oxford Centre for Islamic Studies, Delhi University's Centre for Hindu Studies

ranging nature of studies the institution. Therefore, the regular bench must examine if the AMU Act, 1920 [and how it stood after the advent of the Constitution], is an enacting establishing an institution which was predominantly minority in character.

L. 'INCORPORATED' OR 'ESTABLISHED' BY OR UNDER A STATUTE

219. At this stage, this Court has to adjudicate another issue that touches upon the question of establishment. It has been argued that the 1920 Act was a mere legislative "veneer" or a token recognition to an already existing entity. On the other hand, it was countered by the argument that there is a difference between a body which is created under a statute as opposed to a body which the statute claims to itself 'establish'. On the basis of the same, it is urged that since the AMU owed its very existence to a statute, it was *established by the statute* only.

220. In this regard, the Court needs to clarify that a legislation [more so a legislation in the pre-independence era] can never be considered to be an inconsequential veneer or a mere recognition/token. A legislation is the will of the sovereign reflected and enacted through a dedicated body. A legislation is always of some consequence and cannot be presumed to be of tertiary importance.

221. Separately, the parties defending the judgment of the ***Azeez Basha*** **[supra]**, place heavy reliance on the judgment in

***Dalco Engineering Pvt. Ltd. v. Satish Prabhakar Padhye*, (2010) 4 SCC 378**, and others[6] to assert that the use of the term 'established' in the phrase 'established by or under an Act' in any statutory enactment creates a deeming fiction which would entail the coming into existence of the entity so established a result of the statutory enactment alone.

222. While testing this argument, it is important to note that the judgment in ***Dalco* [supra]**, was dealing with entities and enactments such as the State Bank of India Act, 1955 or the Life Insurance Corporation Act, 1956 or the State Financial Corporations Act, 1951. The same principle cannot *ipso facto* be lifted and applied in the context of Article 30, especially when it concerns the fundamental rights of citizens.

223. Crucially, as pointed out during arguments, there are other statutes, enacted by the State Legislatures, which recognise the minority character of the institutions through various provisions. In the said statutes, the 'establishment' is done by and under the statute and at the same time, the establishment of the previous institution is recognised to be done by the minority community. For example, The Sam Higginbottom University of Agriculture,

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[6] *Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi*, (1975) 1 SCC 421 ; *Executive Committee of Vaish Degree College v. Lakshmi Narain*, (1976) 2 SCC 58; *S.S. Dhanoa v. MCD,* (1981) 3 SCC 431; *CIT v. Canara Bank*, (2018) 9 SCC 322

Technology and Sciences, Uttar Pradesh Act, 2016, in this preamble provides as under :

> *"An Act to **establish and incorporate** a Teaching, Research and Extension University with a view to upgrade and reconstitute the existing Sam Higginbottom Institute of Agriculture, Technology and Sciences (Deemed-to-be- University), Allahabad, established and administered by the Ecumenical Minority Christian Society namely the Sam Higginbottom Educational and Charitable Society, Higginbottom House, 4- Agricultural Institute, Allahabad-211007, Registered under the Society Registration Act, 1860 in the State of Uttar Pradesh, and to provide for natters connected therewith or incidental thereto,"*

224. Similarly, The Era University, Lucknow, Uttar Pradesh Act, 2016, and its Preamble provides as follows:

> *"Preamble*
> *An Act to **establish and incorporate** a teaching University sponsored by Era Educational Trust duly established and administered by the members of Muslim Minority community.."*

225. At the same, time, there were other enactments which claimed to have established and incorporated the Universities and still bestowed them with minority characteristics. For example, in the North East Adventist University Act, 2015, in the Preamble, provides as under:

> *"An Act to **establish and incorporate** an University in the State, with emphasis on providing high quality education, training and research in the*

fields of Physical Sciences, Applied Sciences, Life Sciences, Health Sciences, Social Sciences, Bio-Technology, Information Technology, Engineering, Management, Commerce, Communication, Law, Humanities, Languages, Performing Arts and other allied areas, sponsored by the Medical Educational Trust Association Surat of Seventh-day Adventists, and to provide for matters connected therewith or incidental thereto."

226. Similarly, the preamble of The Teerthanker Mahaveer University Act, 2008 reads as under:

"An Act to ***establish and incorporate*** *a Jain Minority Teaching University sponsored by Teerthanker Mahaveer Institute of Management & Technology, Society, Moradabad Uttar Pradesh and to provide for matters connected therewith or incidental thereto."*

227. Therefore, the use of the phrase 'establish and incorporate' by the Legislature may be relevant in the larger enquiry but cannot be said to be determinative of the factum of establishment or not by the minority community. The question of establishment is to be ascertained by a multitude of factors, and especially in case of Universities – the history of the establishment, the nature of the Act, the nature of the University, etc. and the phrase '*establish and incorporate*' would be of limited importance only.

228. Separately, it is noteworthy that there exist alternative paradigms of universities established by legislative bodies[7], which may claim to be minority institutions.

229. The legislative frameworks of statute-based minority Universities were highlighted before this Court, wherein the predominant character of the University is minority-oriented with only peripheral non-minority elements. Therefore, if the intention was to establish or incorporate or recognise a minority University, the Legislatures have incorporated suitable provisions to colour the University with a minority identity.

230. Furthermore, the abovementioned enactments and a perusal of the same underscores that a considerable degree of autonomy was retained by the sponsoring entity, with pivotal decision-making powers vested therein and further in some cases, specific provisions for providing religion-based reservations.

231. The Court may notice another aspect that the 1920 Act in its Preamble provided that it was "*An Act to* ***establish and incorporate*** *a teaching and residential Muslim University at*

[7] The Integral University Act, 2004 ; The Teerthanker Mahaveer University, Uttar Pradesh Act, 2008 ; The North East Adventist University Act, 2015 ; Sam Higginbottom University of Agriculture, Technology and Sciences, Uttar Pradesh Act, 2016 ; The Era University, Lucknow, Uttar Pradesh Act, 2016 ; The Mohammad Ali Jauhar University Act, 2005 ; The Aliah University Act, 2007 ; The Sri Guru Granth Sahib World University Act, 2008 ; The Spicer Adventist University Act, 2014 ; The Khaja Bandanawaz University Act, 2018 ; The Khangchendzonga Buddhist University, Sikkim Act, 2020 ; The Enteral University (Establishment And Regulation) Act, 2008

Aligarh". The said recognition is relevant but cannot be the sole basis of enquiry on either side. A Legislature speaks through the enactment and not merely the Preamble, therefore, the contents of the legislation would be primordial source of information for the enquiry. The amendment made to the 1920 Act in 1981, and the deletion of the words '*establish and*' from the Preamble, cannot therefore alter the pre-existing, pre-occurred factual situation. The regular bench, would therefore, have to analyse the factual situation and arrive at a finding.

M. EVOLUTION OF AMU AND THE ADVENT OF THE CONSTITUTION

M.1 The amendments made to the 1920 Act

232. The statute enacted in 1920 has gone through its own journey and evolution. As far as the evolution of the 1920 Act is concerned, both sides have illustrated the amendments made over the years. The 1951 Amendment Act introduced notable alterations, including the omission of Section 9 from the original 1920 Act, which had sanctioned compulsory instruction in Muslim religion for Muslim students. Further, an amendment to Section 8 allowed for religious instruction for consenting students, aligning with Article 28(3) of the Constitution, which prohibits such instruction in aided institutions. In Section 5(12), which was the residuary clause, the portion dealing with Islamic learning and Muslim theology, along with another portion, was

deleted. Importantly, the lynchpin of the case of the parties challenging the judgment of the High Court and ***Azeez Basha*** **[supra]**, the proviso to Section 23(1) of the 1920 Act [as it then was], which limited 'Court' membership to Muslims, was deleted by the 1951 Amendment Act. As per amendment to Section 15, Governor of the State of Uttar Pradesh became the Chief Rector of the University.

233. The amendment in 1965, more than its content and changes, becomes relevant because of the unusual sparring between two giants of their respective fields – Retd. J. M.C. Chagla [the well-known Retd. Chief Justice of the Bombay High Court and the Education Minister in 1965] and Mr. Frank Anthony [a well-known educationist and Senior Counsel before this Court]. The Bill was introduced in Lok Sabha on 16.08.1965. On 27.08.1965, Mr. J. Chagla presented the reasons behind the amendments. The amendments were thereafter described and were sought to be justified in the context of the occurrences at the University. It was stated that the amendment, to at least some portions, was a temporary measure. Critically, Mr. J. Chagla discussed the 'character of the University' during the said debate. He asserted that the AMU was a 'national institution' of 'national importance' along the lines of the four Central Universities as per Entry 63 of List I of Seventh Schedule. While emphasizing the importance of intellectual enquiry qua Muslim culture in India at

the institution, Mr. J. Chagla highlighted that it was in the context of national and secular India. He referred to the history of the AMU in 1920 and the amendments made in 1951.

234. In response, on the same day, Mr. Anthony raised the issue how the Government had on affidavit claimed that the Article 30 would not apply to the AMU in the proceedings before the Supreme Court [purportedly in a petition challenging the Ordinance preceding the 1965 amendment]. Mr. Anthony, on 01.09.1965, made a detailed speech claiming that the right under Article 30 has two elements – establish and administer – which can be used disjunctively. In his opinion, establishment was not a necessary pre-condition. Mr. Anthony thereafter refers to his own understanding of history of the AMU and refers to the MAO College as the 'nucleus' and asserted that the 1920 Act vested administration with the minority community.

235. Mr. J. Chagla responded to this on 02.09.1965 quippingly claiming that he was '*no longer a practicing lawyer and perhaps my law has become rather rusty. But still I know a little bit of law, particularly constitutional law. I entirely disagree with him* [Mr. Anthony]'. Mr. J. Chagla stated that the AMU was neither established nor administered by the Muslim community. He stated that the AMU was created by a statute, the 1951 amendments and the presence of the AMU in Entry 63, List I of Seventh Schedule makes the same crystal clear. He further gave

numerous examples of how the administration of the institution was not technically with the minority community. He again claimed that the AMU was a national institution and the sovereign legislature had the right to amend the clause. He also remarked that through history, the British ensured that the institution which was financed by Indian money, was open to all communities.

236. The sparring between the two continued on 03.09.1965 as well. Mr. Anthony clearly claimed that he equated establishment with foundation and with '*who founded it. If the minority community founded it, then giving legislative recognition will merely be as I said and I repeat, giving legislative sanction*'. Mr. J. Chagla stated that in law the Parliament cannot make a classification on the basis of religion and therefore, both the AMU and the BHU enactments were amended in 1951. Finally, on 06.09.1965, after short closing speech by Mr. J. Chagla, the amendment was passed. The 1965 Amending Act effected a notable amendment by demoting the Court from its status as the 'supreme governing body' of the University to a consultative body for the Visitor of the University, namely, the President of India.

237. The 1972 amendment made additions to the definition clause. Critically, it added a clause to Section 5 which provides the University with the power *to promote the study of religion,*

civilisation and culture of India. It amended Section 17 to provide that the *Chancellor shall be appointed by the Visitor in such manner as may be prescribed by the Statutes* and amended Section 19 made him the principal executive and academic officer of the University, and shall exercise general supervision and control over the affairs of the University and give effect to the decisions of all the authorities of the University. The powers of the 'Court' were revised but remained significantly curtailed.

238. The amendment in 1981 rescinded Section 23 to its position prior to 1965, which had resulted in the 'Court' being demoted to a consultative body. It amended Section 17 to provide that the Chancellor to be elected by the 'Court'. The 1981 amendment deleted the portion in Section 8 which restricted the University from adopting or imposing any test of religious belief or profession for admissions or appointments as teacher or other office. The 1981 amendment also made three specific changes which are a subject matter of the present petitions and deserve to be quoted in full :

PREVIOUS PROVISION	**AMENDED PROVISION**
(l) "University" means the Aligarh Muslim University	(l) "University" means the educational institution of their choice established by the Muslims of India, which originated as the

	Muhammadan Anglo-Oriental College, Aligarh, and which was subsequently incorporated as the Aligarh Muslim University.
An Act to establish and incorporate a teaching and residential Muslim University at Aligarh. WHEREAS it is expedient to establish and incorporate a teaching and residential Muslim University at Aligarh, and to dissolve the Societies registered under the Societies Registration Act, 1860 (21 of 1860), which are respectively known as the Muhammadan Anglo-Oriental College, Aligarh, and the Muslim University Association, and to transfer to and vest in the said University all properties and	An Act to incorporate a teaching and residential Muslim University at Aligarh. WHEREAS it is expedient to incorporate a teaching and residential Muslim University at Aligarh, and to dissolve the Societies registered under the Societies Registration Act, 1860 (21 of 1860), which are respectively known as the Muhammadan Anglo-Oriental College, Aligarh, and the Muslim University Association, and to transfer to and vest in the said University all properties and rights of the said Societies and of the

rights of the said Societies and of the Muslim University Foundation Committee;	Muslim University Foundation Committee;
5. Powers of the University—The University shall have the following power, namely:- xxx	5. Powers of the University—The University shall have the following power, namely:- xxx 2 (c) to promote especially the educational and cultural advancement of the Muslims of India;

239. From a perusal of the same, it is clear that through a legislative device, the question as to who established the AMU, was sought to be laid out. As stated above, the legislative declaration as to the fact of establishment or incorporation, while relevant, cannot be sole basis of the enquiry required under Article 30. Further, the said amendments may have been without any controversy had the fact as to who established the AMU in 1920 was not already finally decided by this Court in ***Azeez Basha*** **[supra]**. The limitations of the Legislatures, in rendering questions of fact decided by the Court nugatory through a legislative device, would be decided by the regular bench.

M.2 The Constitution and the question of surrender of rights

240. Once the amendments have been discussed, it is important to note the coming in to force of the Constitution and the effect it had on the rights claimed. The parties defending the judgment of the High Court asserted, on the basis of ***Durgah Committee*** **[supra]**, and the reliance placed in ***Azeez Basha*** **[supra]**, that the right to administer was relinquished in 1920 itself and it cannot be revived subsequent to the advent of the Constitution, as it was complete at a juncture when fundamental rights were not operative. Further it was argued that the fundamental rights surrendered prior to the Constitution, cannot be revived after the advent of the Constitution [See ***Sri Jagadguru Kari Basava Rajendraswami of Govimutt v. Commr. of Hindu Religious and Charitable Endowments*****, (1964) 8 SCR 252**; ***Rabindranath Bose v. Union of India*****, (1970) 1 SCC 84**; ***Guru Datta Sharma v. State of Bihar*****, (1962) 2 SCR 292**].

241. On the other hand, the parties challenging the judgment of the High Court, placed reliance on ***St Xavier's*** **[supra]** and ***KS Puttaswamy (Privacy-9 J.) v. Union of India*****, (2017) 10 SCC 1**, to assert that the fundamental rights cannot be surrendered. It was also argued that the events prior to 1920 and the establishment process which culminated in to the 1920 Act, could not have taken away the minority character in the name of legislative recognition as a University.

242. It is necessary to clarify at this juncture that it cannot be said that the fundamental rights can be surrendered by one generation for it to be extinguished from utilization by another generation. Fundamental rights are the bedrock of the Constitution and the Republic and must be perennial and continuing in nature.

243. Further, it is a well-established legal principle that fundamental rights do not possess retrospective effect, and actions that were concluded before the enactment of the Constitution cannot be revisited. In ***Keshavan Madhava Menon v. State of Bombay*, (1951) SCR 228**, it was noted as under:

> *"As already explained, Article 13(1) only has the effect of nullifying or rendering all inconsistent existing laws ineffectual or nugatory and devoid of any legal force or binding effect only with respect to the exercise of fundamental rights on and after the date of the commencement of the Constitution. It has no retrospective effect and if, therefore, an act was done before the commencement of the Constitution in contravention of any law which, after the Constitution, becomes void with respect to the exercise of any of the fundamental rights, the inconsistent law is not wiped out so far as the past act is concerned, for, to say that it is, will be to give the law retrospective effect.… So far as the past acts are concerned the law exists, notwithstanding that it does not exist with respect to the future exercise of fundamental rights."*

Similarly in ***Pannalal Binjraj v. Union of India, 1957 SCR 233*** *it was noted that :*

> *"It is settled that* ***Article 13 of the Constitution has no retrospective effect*** *and if, therefore, any action was taken before the commencement of the provisions of any law which was a valid law at the time when such action was taken, such action cannot be challenged and the law under which such action was taken cannot be questioned as unconstitutional and void on the score of its infringing the fundamental rights enshrined in Part III of the Constitution"*

244. In the absence of any application of Article 30 in 1920, there was no inherent fundamental right to establish a minority institution and neither was there a requirement on the State to provide any recognition to any institution. The argument of the parties defending the judgment of the High Court claiming that the right was "surrendered" by the minority community in 1920 is misplaced. It erroneously assumes that there existed any right in the decade of 1910-1920 when the events concerning establishment of the AMU took place. There is no question of surrendering any right as no such right, even in context of MAO College, ever existed as the British Indian Government was a supreme Imperial power in the country and no person living in India had any constitution-based rights nor was there any such concept. The entirety of the landscape was a function of the largesse of the Executive or the Legislative powers of the British

Indian Government and its bodies. Thus, the question of surrender is illusory and does not arise in the present case.

245. Indeed, fundamental rights could not have been surrendered after 26.01.1950 however, if some events have already happened prior to the same, it is not possible to re-interpret such factual events in a different or a purportedly constitutionally compliant manner. The facts of history cannot be changed by the advent of the Constitution.

246. It is important to clarify at this stage that the said proposition does not entail that pre-Constitution enactments, even enactments providing for taking over of institutions [religious or educational] by the then Legislatures, would be free from the vice of unconstitutionality. The said statutes would always be subject to the overarching constitutional rights and subject to the rigours of Article 13. The present case therefore, does not concern surrender of "rights" rather involves a holistic survey of events leading up to the 1920 Act.

N. THE DE-FACTO AND SAFE HAVEN ARGUMENT

247. It has also been argued by the parties challenging the judgment of the High Court that de-facto, the important authorities like the members of the 'Court' and the Vice-Chancellors of the University have been from the minority community. On the basis of the same, it is asserted that the while

after 1951, there may not have been a specific requirement for the 'Court' to be consisting of the minority community, in reality, the members from the minority community have been appointed in most cases. The same has been read to be a pointer towards the minority character of the institution. On the other hand, the parties defending the judgment of the High Court highlighted that once there exists no such requirement in law, it would be erroneous to base a conclusion on the basis of practice.

248. As a matter of law, a practice or a chance occurrence would not be a factor in deciding the nature of the institution and certainly not relevant to decide the question of establishment. If the institution is not held to have been established by a minority, if by some reason, persons of one community have manned the positions in the administration in an institution, the same would not ascribe character to the institution. For example, if a secular institution was established by a group of persons [which were not predominantly of the minority community], if for some reasons, the Principal/Director of the institution has been from one minority community, the said occurrence could not be said to be enough to declare the institution to be a minority institution. The de-facto position of the AMU, with regard to the electors in the 'Court', the 'Court' or the Vice-Chancellors, would therefore not be the deciding factor for the purpose of the Article 30 question.

249. Apart from the above, it was also asserted that the AMU has, over the years, provided the minorities a haven to gain knowledge in the country, and declaration as a non-minority institution, would be highly detrimental to the same. The said argument, apart from being constricted in approach, is evidently contradictory.

250. The AMU, from the time of its establishment, has never had any sort reservations on the basis of religion all the way up till 2005, which was the first time the said exercise was sought to be carried out. Further, the AMU, after the declaration in ***Azeez Basha*** **[supra]**, at least till 1981 and arguably even thereafter, was always considered to be a non-minority institution. The contention that the AMU serves the interests of the minority community and denial of the protection under Article 30 would jeopardise the same, ignores the fact that the AMU, without being recognized as a minority institution or implementing religion-based reservations for an entire century, has served such a purpose. Therefore, asserting minority status and advocating for religious reservations based on the university's historical contributions to the minority community, appears to be self-contradictory.

251. At this juncture it is also important to deal with another submission to the effect that 'neutral' institutions or non-minority institutions would in the natural course of things be-

'majoritarian'. It was asserted that since such neutral institutions tend to be driven by the assumptions, leanings, and priorities of the majoritarian groups/cultures, Article 30 contemplates constitutionally protecting certain educational spaces from such 'majoritarianism-by-default', guarding their minority character and priorities.

252. The said assertion completely misconstrues the purpose of Article 30 and the nature of non-minority or neutral institutions in the country. The purpose of Article 30 is not to create 'minority only' *ghettos* rather provide positive rights to the minorities to establish educational institutions of their choice and kind. Article 30, as a feature of the Constitution, provides important rights which function within the larger penumbra of fundamental rights. There is substantial interplay, intermixing and balancing of rights *inter se* within the fundamental rights.

253. The Constitution, specifically under the fundamental rights chapter, provides for other rights such as Article 14 [right against arbitrariness], Article 15 [right to equality], Article 16 [right to equality in matters of public employment], Article 19 [fundamental freedoms], Article 21 [right to life and liberty and dignity], Article 21A [right to education], Article 25 [freedom of religion], Article 26 [freedom of religious institutions], etc, all of which contain shades of protection, equality and freedoms, available to minorities as well. Article 30, and the rights

contained thereunder, are therefore, not absolute and certainly do not exist in a *silo*. The other fundamental rights under Chapter III of the Constitution colour the interpretation of Article 30 and vice versa. In this regard, certain paragraphs of the judgement in ***TMA Pai*** **[supra]** would be crucial and require reproduction as under :

> *"148. Both Articles 29 and 30 form a part of the fundamental rights chapter in Part III of the Constitution. Article 30 is confined to minorities, be it religious or linguistic, and unlike Article 29(1), the right available under the said article cannot be availed by any section of citizens. The main distinction between Article 29(1) and Article 30(1) is that in the former, the right is confined to conservation of language, script or culture. As was observed in Father W. Proost case the right given by Article 29(1) is fortified by Article 30(1), insofar as minorities are concerned. In St. Xavier's College case it was held that the right to establish an educational institution is not confined to conservation of language, script or culture. When constitutional provisions are interpreted, it has to be borne in mind that the interpretation should be such as to further the object of their incorporation.* ***They cannot be read in isolation and have to be read harmoniously to provide meaning and purpose. They cannot be interpreted in a manner that renders another provision redundant. If necessary, a purposive and harmonious interpretation should be given.***
>
> ***xxx***
>
> *137. It follows from the aforesaid decisions that even though the words of Article 30(1) are unqualified, this Court has held that at least certain other laws of the land pertaining to health, morality*

and standards of education apply. ***The right under Article 30(1) has, therefore, not been held to be absolute or above other provisions of the law, and we reiterate the same****. By the same analogy, there is no reason why regulations or conditions concerning, generally, the welfare of students and teachers should not be made applicable in order to provide a proper academic atmosphere, as such provisions do not in any way interfere with the right of administration or management under Article 30(1).*

138. As we look at it, Article 30(1) is a sort of guarantee or assurance to the linguistic and religious minority institutions of their right to establish and administer educational institutions of their choice. Secularism and equality being two of the basic features of the Constitution, Article 30(1) ensures protection to the linguistic and religious minorities, thereby preserving the secularism of the country. Furthermore, the principles of equality must necessarily apply to the enjoyment of such rights. No law can be framed that will discriminate against such minorities with regard to the establishment and administration of educational institutions vis-a-vis other educational institutions. Any law or rule or regulation that would put the educational institutions run by the minorities at a disadvantage when compared to the institutions run by the others will have to be struck down. ***At the same time there also cannot be any reverse discrimination.*** *It was observed in St. Xavier's College case at SCR p. 192 that: (SCC p. 743, para 9)*

> ***"The whole object of conferring the right on minorities under Article 30 is to ensure that there will be equality between the majority and the minority.*** *If the minorities do not have such special protection they will be denied equality."*
>
> *In other words, the essence of Article 30(1) is to ensure equal treatment between the majority and the minority institutions. No one type or category of institution should be disfavoured or, for that matter, receive more favourable treatment than another. Laws of the land, including rules and regulations, must apply equally to the majority institutions as well as to the minority institutions. The minority institutions must be allowed to do what the non-minority institutions are permitted to do."*

254. Article 30, therefore, is a reinstatement of constitutional values of Chapter III, specifically in the context of educational institutions. It is clear that the crux of Article 30(1) lies in its mandate to ensure parity between non-minority [or 'neutral'] institutions and minority institutions. Its fundamental aim is to prevent any form of discrimination or preferential treatment, thereby advocating for equal treatment under the law for one and all. This provision underscores that no specific category or type of institution should be disadvantaged or unduly favoured over another within the legal framework.

255. In this light, and under the mandate of ***TMA Pai*** **[supra]**, to assert that the neutral institutions are majoritarian by nature, would be ignore the mandate of other provisions of the

Constitution which specifically provide for equal treatment for all, protect secularism and diversity and protect individuals and communities against arbitrariness.

O. THE UGC ACT AND YASHPAL

256. In relation to the UGC Act, the parties challenging the judgment of the High Court relied upon Section 2(f), Section 3, Section 22, and Section 23, read with the judgment in ***Prof. Yashpal v. State of Chhattisgarh*, (2005) 5 SCC 420**, to assert that universities are necessarily created and chartered through legislative enactments. As per the said provisions, the institutions established in that manner only are legally authorized to utilize the term "University" in their names and confer degrees. Taking this further, it was argued that, if the judgement in ***Azeez Basha* [supra]**, which holds that if any institution is established by virtue of the statute, cannot be a minority institution, because a University has to be established by and under a statute, no University can ever be conferred the status of a minority institution.

257. As already concluded hereinabove, the judgment in ***Azeez Basha* [supra]** ought to be understood in its historical context and does not lay down a proposition that whenever a University is established by way of an enactment, it cannot be a minority institution. The assertion that the establishment and incorporation of a university through legislation inherently preclude it from

being classified as a minority institution is unfounded. Such a contention arises from a misinterpretation of the decision in ***Azeez Basha*** **[supra]**, which was specific to a particular statute and addressed a legislative framework predating the Constitution, enacted by a colonial authority.

258. It was noticed in ***Yashpal*** **[supra]** that a university lacking infrastructure or educational facilities would still have the authority to grant degrees, potentially resulting in significant disorder in coordinating and upholding standards in higher education, which could detrimentally affect the entire nation. Therefore, it was in the larger public interest that this Court, held that the establishment of a university by the State, exercising its sovereign power, ought to occur through a legislative enactment. It held that insofar as private universities are concerned, "established or incorporated" should be read conjunctively and further that "a private university can only be established by a separate Act or by one compendious Act where the legislature specifically provides for establishment of the said university".

259. It can be seen through various enactments[8] that universities are established by the 'sponsor' who designs the administrative framework, considering the minimum requirements outlined in

[8] See The Amity University Uttar Pradesh Act, 2005; The Galgotias University Uttar Pradesh Act, 2011; The Bennett University, Greater Noida, Uttar Pradesh Act, 2016; The Mohammad Ali Jauhar University Act, 2005; The Era University, Lucknow, Uttar Pradesh Act, 2016; Maulana Azad University , Jodhpur Act, 2013.

the regulations. The "sponsor", typically a society, also arranges the necessary properties, including land and buildings. Subsequently, the University may either be recognized as deemed to be a university under Section 3 of the UGC Act, or it may be formally established and incorporated on behalf of the sponsor through a statutory enactment.

260. As stated above, there exists substantial legislative frameworks of minority Universities established by statute. The said statutes highlight the predominantly minority orientation of these institutions with peripheral non-minority elements. As stated above, the said legislative enactments and their examination reveals that a significant level of autonomy was retained by the sponsoring entity, with pivotal decision-making authority vested therein. In some instances, specific provisions were made for religion-based reservations as well through the legislation itself. Therefore, the appropriate Legislature, in its wisdom, can certainly establish, incorporate, or recognize a minority University, and include appropriate provisions to imbue the University with a minority identity. Therefore, the UGC Act or the judgment in ***Yashpal*** **[supra]**, in no manner, come to the aid of the parties challenging the correctness of the judgment in ***Azeez Basha*** **[supra]**.

P. NCMEI ACT AND THE AMENDMENT

261. According to the parties challenging the judgement of the High Court, the error that since a University requires a statute for establishment and statutory establishment renders such University to be non-minority, was furthered under the National Commission for Minority Educational Institutions Act, 2004 (hereinafter referred to as the "NCMEI Act"). The said enactment and its definition clause, excluded universities from being certified as 'Minority Educational Institution'. From 2004-2010, the NCMEI Act defined the word "minority educational institution" as under-

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

262. Subsequently in 2010, the said definition was amended on two counts : one, the phrase other than a University was deleted and two, the words established and administered was put in the clause taking cue from Article 30. The statement of the Hon'ble Minister while moving the said amendment is illustrative in this regard. The relevant portion is quoted as under :

> *"24.02.2009*
> *THE MINISTER OF STATE IN THE MINISTRY OF HUMAN RESOURCE DEVELOPMENT (SHRI M.A.A. FATMI):…In Section 2 of the Bill, two amendments are proposed in clause (g). First is to do away with the exclusion of Universities in the*

definition of "Minority Educational Institutions". The second proposal is to substitute the words "or maintained by" with the words "and administered by". ***The existing exclusion of a University from the definition of a minority educational institution runs counter to the law laid down by the Supreme Court of India vide Azeez Basha V. Union of India (A.I.R. 1968) substitution of words "or maintained by" with the words "and administered by" Several complaints were received to the effect that non-minorities were advertising the institutes as established by the minorities.*** *Through this amendment this defect is sought to be removed by providing that the institutions should be both established and administered by a person or group of persons belonging to the same minorities. This will also conform to the language used in Article 30 of the Constitution."*

263. Therefore, the amendment in the NCMEI Act provides that Universities can be considered under the provisions of the NCMEI Act and further, there exists a twin requirement of "establishment" and "administration" for claiming minority status in line with ***Azeez Basha*** **[supra]**.

264. According to the parties challenging the judgement of the High Court, since the provisions of the NCMEI Act as amended in 2010 clearly recognize that a University can be a minority institution in terms of Article 30 and post ***Yashpal*** **[supra]**, since a university can only be established by a statute, the purported finding in ***Azeez Basha*** **[supra]** that a university established and

incorporated by a statute cannot be held to be "established" by a minority community for the purposes of Article 30, is erroneous.

265. As stated above, the said assertion is also a product of the erroneous understanding of the judgment in ***Azeez Basha*** **[supra]**. It is reiterated that the judgement in ***Azeez Basha*** **[supra]** does not lay down a proposition that established and incorporated by a statute cannot be held to be "established" by a minority community for the purposes of Article 30. The judgement in ***Azeez Basha*** **[supra]** ought to be understood in its historical context and does not lay down a proposition that if a University is established by way of a legislative enactment, it cannot be a minority institution. In light of the above, the amendment in the NCMEI Act does not come to the aid of the parties questioning the correctness of the decision in ***Azeez Basha*** **[supra].**

Q. CONCLUSIONS

266. In light of the above, the following conclusions can be recorded :

i. The bench of two judges in Writ Petition No.54-51 of 1981 titled ***Anjuman-e-Rehmania & Ors v. Distt. Inspector of School & Ors.*** could not have referred the matter to a bench of seven Hon'ble Judges directly, without the Hon'ble Chief Justice of India, being a part of the bench.

ii. The "establishment" of an institution by the minority is necessary for the said minority to claim right of administration under Article 30. The words "establish" and "administer" are used conjunctively in Article 30 of the Constitution.

iii. The term "establish" in Article 30 means "*to bring into existence or to create*" and cannot be conflated with generic phrases such as "genesis of the institution" or the "founding moment of the institution".

iv. The *real positive indicia* for determining the question of establishment of an institution would have to be developed on a case to case basis with the following broad parameters in mind :

    i. Firstly, to claim "establishment", the minority community must actually and tangibly bring the *entirety* of the institution into existence. The role played by the minority community must be *predominant*, in fact almost complete to the point of exclusion of all other forces. The indicia which may be illustrative and exhaustive in this regard may be the nature of the institution, the legal/statutory basis required for establishing the institution, whether the establishment required any "negotiation" with outside forces, the role in acquiring lands, obtaining

funds, constructing buildings, and other related matters must have been held completely by the minority community. Similarly, while teachers, curriculum, medium of instruction, etc. can be on secular lines, however, the decision-making authority regarding hiring teachers, curriculum decisions, medium of instruction, admission criteria, and similar matters must be the minority community. The choice of having secular education in the institution must be made expressly by the minority community, demonstrating the link between institution and the persons claiming to establish it.

ii. Secondly, the purpose of the institution must have been to predominantly serve the interests of the minority community or the sole betterment of the minority community, irrespective of the form of education provided and the mode of admission adopted. Therefore, as per the choice of the minority community, an institution may have secular education, but such secular education and the resultant institution, must be predominantly meant for the overall betterment of the minority community.

iii. Thirdly, the institution must be predominantly administered as a minority institution with the actual functional, executive and policy administration vested with the minority. The minority community should determine the selection, removal criteria, and procedures for hiring teaching, administrative staff, and other personnel. The authority to hire and fire staff must be from the minority community. Further, even if teaching or administrative staff may include non-minority persons, the final authority exercising functional, directional, and policy control over these authorities must be from the minority community. This ensures that the thoughts, beliefs, and ideas of the minority community regarding administration are implemented in reality. This represents the real decision-making authority of the institution being of the minority community.

In ascertaining the above, it would be open for the Court to look at the true purpose behind each of the above factors and to *pierce the veil*.

iv. The notion that ***Azeez Basha*** **[supra]** categorically prohibits minorities from establishing universities due to statutory requirements is unfounded. The bench in ***Azeez Basha*** **[supra]** and present bench are faced with a unique

situation and needs to adopt a suitably modulated approach. The judgment in ***Azeez Basha*** **[supra]** does not preclude minorities from establishing universities but rather highlights the importance of legislative intent and statutory provisions in determining an institution's character.

v. The minority community may conceptualize the idea of an institution and may advocate for the same, however, if during exchange or negotiation, the actual institution which was established had primacy of governmental efforts and control, then such institution cannot be held to be predominantly established by the efforts and actions of the minority community.

vi. In the pre-independence and pre-UGC era, in the absence of a provision like Section 23 of the UGC Act, 1956, it was open for any institutions to adopt the titles such as "university" or in some cases "vidyapeeth" or "jamia" asserting their capability to grant degrees. The absence of a legislative embargo from private establishment of Universities prior to 1956 would be critical for the scope of enquiry.

vii. The use of the phrase ‘establish and incorporate’ by the Legislature may be relevant in the larger enquiry but cannot be said to be conclusively determinative of the

factum of establishment or not by the minority community. If the intention of the Legislature is to establish or incorporate or recognise a minority University, the Legislatures have incorporated suitable provisions to colour the University with a minority identity.

viii. There were no rights, fundamental or otherwise, prior to the Constitution coming into force and therefore, there is no question of surrendering any right. The British Indian Government was a supreme Imperial power in the country, and the question of surrender is illusionary and does not arise in the present case. The coming into force of the Constitution and fundamental right after 1950, cannot alter the events that occurred during the decade of 1910-1920 which led to the establishment of the AMU.

ix. There is no legal requirement for the AMU 'Court' to be manned by the people from the minority community ever since 1951 and therefore, merely because *de facto* the persons from the minority community may have manned the posts in the institution, would not be relevant to adjudicate the question.

x. The assertion that 'neutral' institutions or non-minority institutions would in the natural course of things be 'majoritarian' or that Article 30 contemplates constitutionally protecting certain educational spaces from

such ‘majoritarianism-by-default’ tendencies, is wholly erroneous. The purpose of Article 30 is not to create ‘minority only’ ghettos rather provide positive rights to the minorities to establish educational institutions of their choice and kind.

xi. Article 30, as a feature of the Constitution, provides important rights which function within the larger penumbra of fundamental rights. There is substantial interplay, intermixing and balancing of rights inter se within the fundamental rights and Article 30 is not absolute and certainly do not exist in a *silo*.

xii. The crux of Article 30(1) lies in its mandate to ensure parity between non-minority [or ‘neutral’] institutions and minority institutions. Its fundamental aim is to prevent any form of discrimination or preferential treatment to non-minority communities, thereby advocating for equal treatment under the law for one and all. This provision underscores that no specific category or type of institution should be disadvantaged or unduly favoured over another within the legal framework.

xiii. To assume that the minorities of the country require some ‘safe haven’ for attaining education and knowledge is wholly incorrect. The minorities of the country have not just joined the mainstream but comprise an important facet

of the mainstream itself. The institutions of national character of the country always serve the interests of the minorities and are diverse centers of learning.

xiv. The UGC Act or the judgment in ***Yashpal*** **[supra]**, in no manner, comes to the aid of the parties challenging the correctness of the judgment in ***Azeez Basha*** **[supra]**.

xv. The amendment in the NCMEI Act does not come to the aid of the parties questioning the correctness of the decision in ***Azeez Basha*** **[supra].**

267. The reference is answered in the above terms. The matters may be placed before an appropriate bench as per the prevailing rules.

…….J.
[SATISH CHANDRA SHARMA]

NEW DELHI
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