REPORTABLE

IN THE SUPREME COURT OF INDIA
ORIGINAL AND CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2286 OF 2006

ALIGARH MUSLIM UNIVERSITY ... APPELLANT (S)

VERSUS

NARESH AGARWAL AND OTHERS ... RESPONDENT (S)

WITH

CIVIL APPEALS NO. 2316-2321 of 2006

CIVIL APPEAL NO. 2861 OF 2006

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

WP(C) NO. 272 OF 2016

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

JUDGEMENT

SURYA KANT, J.

Table of Contents

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

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

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

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

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

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

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

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

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

I. BACKGROUND

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

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

A.1. Global history of minority rights

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

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

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

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

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

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

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

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

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

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

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

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

A.2. Minority rights in India

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

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

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

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

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

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

A.2.1. The concept of linguistic minorities

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

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

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

A.2.2. The concept of religious minorities

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

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

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

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

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

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

A.2.3. Deliberations by the Constituent Assembly of India

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

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

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

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

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

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

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

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

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

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

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

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

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

[Emphasis supplied]

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

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

[Emphasis supplied]

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

B. ***The Constitutional scheme***

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

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

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

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

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

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

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

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

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

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

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

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

B.2. Statutory Scheme

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C.1. Features of the AMU Act, 1920

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C.2. Features of the 1951 Amendment Act

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C.3. Features of the 1965 Amendment Act

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

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

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

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

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

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

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

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

D.1. Contentions proffered by the parties therein

D.1.1. Contentions of the Petitioners

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

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

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

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

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

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

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

D.1.2. Contentions of the Respondents

62. Conversely, the Respondents submitted that:

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

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

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

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

D.2. Issues formulated

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[Emphasis supplied]

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

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

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

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

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

[Emphasis supplied]

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

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

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

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

[Emphasis supplied]

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

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

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

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

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

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

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

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

E. *History of discordance with Azeez Basha*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. CONTENTIONS OF THE PARTIES

Appellant's submissions:

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

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

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

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

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

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

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

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

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

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

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

Respondents' submissions:

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

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

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

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

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

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

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

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

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

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

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

III. ISSUES FOR DETERMINATION

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

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

Prefatory issues

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

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

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

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

Questions on constitutional interpretation

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

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

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

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

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

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

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

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

IV. ANALYSIS

Prefatory Issues

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[Emphasis supplied]

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

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

[60] (2005) 2 SCC 673.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

G.1. Locus of pre-Constitution institution

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[Emphasis supplied]

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

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

G.2. Locus of individuals from the minority community

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

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

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

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

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

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

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

[Emphasis supplied]

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

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

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

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

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

116. Having said that, it is important to emphasize that the technical issue of who can invoke Article 30 should not be used to oust the claim at the threshold. Procedure, ultimately, is the handmaiden of justice. This is especially true for contentions regarding *locus* and who can invoke a particular provision, especially when there is public interest at stake. Unless there is a risk of collusion between the parties or the Court believes that the interest of all the stakeholders might not be adequately represented and there might be some 'invisible victims', the Court typically refrains from scrutinizing who has invoked the constitutional provision and whether the claimant represents the entire community. Constitutional Courts are envisaged as liberal platforms where vital questions regarding the violation of Fundamental Rights can be analysed without being bogged down by procedural technicalities. In that sense, the substance of the claim usually takes precedence over its form, instead of the form foreclosing the substance at the very outset.

117. The locus *standi* of the Appellant is thus not undermined on this count as well.

G.3. What is a 'minority' community?

118. Since during the course of hearing, or otherwise, the Respondents have not provided any reliable figures or substantial evidence to counter the Appellant's position, it appears that it is not necessary to determine this issue at this stage, when only legal issues are being resolved.

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[70] *Right Rev. Bishop S.K. Patro, supra* note 66.

119. Having answered the prefatory issues of *locus* and maintainability, we now proceed to delve into the contours of Article 30 of the Constitution and make an endeavor to explain the true meaning of the expressions 'establish' and 'administer'.

Questions regarding constitutional interpretation

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

120. When posed with the question of whether the prongs of 'establishment' and 'administration' ought to be construed conjunctively or disjunctively in determining whether it is a minority institution, the Appellant sought to contend that minority administration of their institution is merely discretionary and that they are not bound to satisfy the twin test. They instead urged that the prong of administration, would not be a prerequisite for determining the minority status of an educational institution.

121. The Respondents, on the other hand, assailed that for an institution to claim the protection proffered under Article 30, the minority community would have to demonstrate the two prongs of 'establishment' and 'administration' of the institution conjunctively.

122. Having considered the rival submissions tendered by the parties as well the language of the provision itself, it is evident that 'establishment' and 'administration' are qualitatively distinct: while the former deals with the history of the institution, the latter deals with the control over the institution, at present. Accordingly, 'establishment' is temporally fixated, while 'administration' requires analysis over a continuous span of time, both during and post-establishment.

123. Of these two aspects, the necessity of the prong of establishment is not in dispute. Both parties agree that an institution must be established

by the minority community. This issue is also largely settled by various judicial precedents of this Court, which have held that establishment by minority is a necessary pre-requisite for claiming the right under Article 30.[71] The question, however, has been raised in regard to the administration prong. The Respondents have argued it to be a pre-requisite for invoking Article 30, while the Appellant has argued it to be the result of such an invocation.

124. We find that both the Appellant and Respondents are right, but only to the extent that administration is both a pre-requisite and the result. In this respect, it mirrors its counterpart, Article 29, under the section '*Cultural and Educational Rights*'. Article 29 makes the distinctiveness of culture a pre-requisite for invoking its provision, and once invoked, it bestows the right to conserve such distinctiveness. Similarly, Article 30 outlines administration by the minority community as a pre-requisite for invoking the provision, ultimately granting the right to continue such administration free from unreasonable government interference.

125. There are multifarious reasons behind upholding administration as a pre-requisite rather than merely a right or result. *First*, if Article 30 were contingent only on the establishment by the minority community, it would render the provision susceptible to significant misuse. In a bid to attain special protection under Article 30, majority communities could purchase or takeover institutions established by minorities and then administer such institutions with reduced State interference in perpetuity. This will potentially lead to all communities ultimately enjoying the special right guaranteed by Article 30, denuding the very purpose of this Article.

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[71] *Kerala Education Bill, 1957, supra* note 58*; State of Kerala vs. Very Rev. Mother Provincial,* (1970) 2 SCC 417, para 8*; S.P. Mittal vs. Union of India,* (1983) 1 SCC 51, para 137; *Dayanand Anglo Vedic* (*DAV) College Trust and Management Society v. State of Maharashtra,* (2013) 4 SCC 14.

126. *Second*, it is clear that Article 30 carves out an exception to the general power of the Government to regulate and intervene in educational institutions. It has also been defined broadly, extending to all religious and linguistic minorities, potentially encompassing a significant portion of India's population. If not interpreted narrowly, Article 30 would undermine governmental control over educational institutions and compromise the quality of higher education.

127. Therefore, if the institutions not administered by minorities were also brought under the purview of Article 30, it could face misuse by institutions camouflaging as minority institutions when, in reality, they are not. I find support to this view in ***A.P. Christian Medical Educational Society v. Govt. of A.P.***,[72] which held:

> *"8. […]* ***The government, the University and ultimately the court have the undoubted right to pierce the 'minority veil' — with due apologies to the corporate lawyers — and discover whether there is lurking behind it no minority at all and in any case, no minority institution. The object of Article 30(1) is not to allow bogies*** *to be raised by pretenders but to give the minorities 'a sense of security and a feeling of confidence' not merely by guaranteeing the right to profess, practise and propagate religion to religious minorities and the right to conserve their language, script and culture to linguistic minorities, but also to enable all minorities, religious or linguistic, to establish and administer educational institutions of their choice.* ***These institutions must be educational institutions of the minorities in truth and reality and not mere masked phantoms*** *[…] What is Important and what Is imperative is that there must exist some real positive index to enable the institution to be identified as an educational institution of the minorities […]."*
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> [Emphasis supplied]

128. Several other existing case laws support the notion that administration too, ought to be regarded as a pre-requisite. For instance, In ***St.***

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[72] *A.P. Christian Medical Educational Society v. Govt. of A.P & Anr.,* (1986) 2 SCC 667, para 8.

Stephen's College (supra), a five-judge bench of this Court analysed the facets regarding both establishment and administration of St. Stephen's College under the Delhi University Act, to conclude whether it could be characterised as a minority institution. In ***DAV College (supra)*** a two-judge bench reiterated the principle that administration has to be exercised by the minority community. This view was also reinforced by another two-judge bench in ***T. Varghese George v. Kora K. George***.[73] Similarly, in ***Manager, Rajershi Memorial Basic Training School v. State of Kerala***,[74] the Kerala High Court held that an institution merely being founded by a member of a minority community is insufficient, and it has to be administered by the minority community in question.

129. All of these cases support the legal principle that for an institution to claim protection under Article 30, it should have a 'real positive indicia' and must not be a mere sham. It is, therefore, permissible to 'pierce the veil' in order to ascertain the real character of the institution, as the minority status cannot be bestowed on illusionary claims.

130. Lastly, it is an established principle of statutory interpretation that a provision has to be read as a whole, and the accompanying text may be employed in interpreting the meaning of another clause.[75] This principle is particularly relevant in the present case, as Article 30(1A) specifically defines an institution "*referred to in Clause 1*" and mentions it to be an institution that is both established '*and*' administered by a minority:

> *"(1A) In making any law providing for the compulsory acquisition of any property of an* ***educational institution established and administered by a minority, referred to in clause (1)****, the State shall ensure that the amount fixed by or determined under such law for the acquisition*

[73] Dr. *T. Varghese George v. Kora K. George and Ors.,* (2012) 1 SCC 369.
[74] *Manager, Rajershi Memorial Basic Training School v. The State of Kerala and Anr.,* 1972 SCC OnLine Ker 111, para 4.
[75] Justice GP Singh, Principles of Statutory Interpretation, Lexis Nexis (2016), 14th edn.

of such property is such as would not restrict or abrogate the right guaranteed under that clause."

[Emphasis supplied]

131. Since the term '*and*' has been consciously employed instead of '*or*', it is clear that the text of the provision itself envisages the conditions to be read conjunctively. To hold to the contrary would require reading down an original provision of the Constitution, which the Court must refrain from doing.

132. Considering that institutions claiming any benefit under Article 30 must satisfy this two-pronged test, it is trite to say that the terms 'establishment' and 'administration' under Article 30 are conjunctive.

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

133. The Appellant has argued that the term 'establish' in Article 30 means who 'founded' the institution. It is their assertion that if the genesis of the institution can be traced back to the minority community, the institution would satisfy the test of being a minority institution.

134. *Per contra*, the Respondents ascribe a different meaning to the term 'establish' and argue that the Court must evaluate as to who created the institution. If the institution owes its existence to the Statute, then it would mean that the institution was established by the Legislature and not by the minority community.

135. In due consideration of these opposing views, the central issue for our determination, therefore would be to ascertain the meaning of the term 'establish' in Article 30 and determine what the relevant *indicia* should be, in order to determine on facts as to whether or not an institution is established by the minority community.

136. Previously, a six-judge bench of this Court had conducted a similar exercise in ***State of Kerala v. Very Rev. Mother Provincial***[76] and defined the term establish as the 'bringing into being of an institution':

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

137. Hence, as rightly held by this Court, the term 'establish' means bringing the institution into existence for the benefit of the minority community. However, we must ask ourselves as to when an institution can be said to have come into existence, and what it means to establish it for the benefit of the community. Each of these prongs have been analysed separately below.

I.1. Bringing into existence—meaning and factors

138. In this regard, the Appellant and Respondents both suggested that an institution comes into existence at a single point in time but disagreed on what that exact point should be. The Appellant suggested looking back into the genesis of the institution to determine when it was 'founded' or when the idea was conceived. In contrast, the Respondents argued against going back in time and instead urged that the

[76] *Mother Provincial*, *supra* note 71, para 8.

institution should be considered established the moment it was operationalized. According to them, if the institution was operationalized by virtue of a statute, then it was established at that specific point by the Legislature.

139. To clarify these divergent views, it might be helpful to consider analogous situations. For instance, if the question is about when a photograph taken with an analogue camera comes into existence, one perspective would argue that it is created when the photograph is clicked, while the other would assert that it only exists when the photo is finally printed on paper. Similarly, in the context of a melody, one side might argue that it comes into existence when it is composed, whereas the other side could contend that it only comes into being when it is finally performed. Or in the context of art, one perspective could be that a painting comes into existence when the idea is conceived, and the other side could be that it is only when it is fully completed.

140. We believe that both sides are partly right and partly wrong. They are right in considering both the genesis of the institution and the point of sanction by the statute for operationalizing the institution as relevant factors to determine establishment. However, they are incorrect in asserting that coming into existence is an event frozen at a single point in time. Instead, we believe that coming into existence operates in a continuum, which requires the analysis of the entire gamut of relevant factors that brought the institution into being. The essence of existence—be it that of an educational institution or a photograph, melody, or an art as instantiated above—is a multi-faceted and an ontological question that cannot be answered by artificially fixating it at a specific time with a bright-line test. Since there are several factors that contribute towards the existence of the educational institution, at no point can we say that the institute came into existence as soon as one specific factor was fulfilled. Such an exercise would highlight one

factor while discounting the importance of others, which would be arbitrary and irrational. Instead, the correct approach requires an appraisal of the entirety of facts—i.e., the origin, the point of finality, and the whole process in between—to reach an understanding about the establishment.

141. Hence, while the parties are right in pointing out the relevant factors of genesis and the statutory sanction, the analysis of who establishes the educational institution has to go beyond them to cover all aspects holistically. Since these factors would be a question of fact that would differ from case to case, giving a laundry list of all such aspects would be erroneous in law. However, to determine whether the minority community has established the institution or not, a few illustrative factors that the Courts have considered in the past include:

a. The genesis of the institution and who conceptualized the idea;

b. The gathering of resources and who provided the requisite finances for creating the institution;[77]

c. Who contributed towards the infrastructure of the institution to provide it with a physical existence;[78]

d. The framing of charter documents and who imparted the purpose to the institution;[79]

e. In case government approvals were required, who made the initial efforts in taking those permissions and fulfilling the necessary compliances; and

f. Post the approval of the government, who undertook the initial steps in forming the administrative bodies,[80] hiring teachers,

[77] *Right Rev. Bishop S.K. Patro*, *supra* note 66, para 15-16.
[78] *St. Stephen's College*, *supra* note 50, para 31.
[79] Ibid, para 35.

admitting students, passing the first statutes and ordinances, ensuring regular compliances, etc., for operationalizing the institution.

I.1.1. Caveat to these factors

142. In regard to these factors and any additional ones that may be relevant based on the specifics of each case, there are two important qualifications to note. *First*, as was previously stated, none of these factors individually would be determinative of the minority status; the analysis must be holistic, and the factum of existence must be seen in a continuum instead of fixating on one factor and point of time. In several instances, Courts have clarified that the absence of certain factors, such as the institution not being constructed by the minority community[81] or receiving external financial assistance,[82] does not negate the minority character of the institution. These decisions reiterate that the presence or absence of a single factor should not alter the Court's overall conclusion.

143. *Second*, the analysis concerning who fulfils each individual factor should not aim at creating absolutes, i.e., the Court must not mandate that the minority community must be single-handedly responsible for fulfilling the role prescribed by that factor. It could be the case that the community takes aid of external parties for setting up the institution, but still takes the lead role in such establishment. If we were to hold that such aid would take away the minority character of the institution, we would, in effect, be laying down a requirement that the community must work in silos and that no member belonging to any other community should provide any assistance in achieving its purpose. This would squarely contravene the very spirit of our Constitution,

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[80] Ibid, para 35-40.
[81] *Rt. Rev. Dr. Aldo Maria Patroni v. Assistant Educational Officer*, 1973 SCC OnLine Ker 60, para 7; *A. Raju and Ors. v. Manager, Nallor Narayana L.P. Basic School & Ors.,* 2019 SCC OnLine Ker 16483, para 6-7; *T.M.A. Pai, supra* note 3, para 11.
[82] *Right Rev. Bishop S.K. Patro, supra* note 69, para 16; *Dipendra Nath Sarkar v. State of Bihar & Ors.*, 1960 SCC OnLine Pat 205, para 14.

which permits—or rather encourages—other communities to work in tandem with minority communities for their upliftment. In a cohesive society like ours, cooperation for mutual development is a shared moral responsibility. Hence, the mere presence of external aid is a factor which would not obviate the minority character of the institution.

144. That being said, the converse must also hold true. If the leading role in establishing an institution is played by an external party, mere contributions from a member of the minority community would not be sufficient to attribute the establishment itself to the minority. To hold otherwise would expose the protection given under Article 30 to potential misuse, allowing institutions established by the majority community to claim minority status based on some insignificant contribution from the minority community. The test should therefore rather focus on who takes a leading and decisive role in fulfilling the relevant criteria for establishing an institution.

145. To determine whether the minority community established the institution, the Court should thus examine whether it was indeed that community which brought the institution into existence. This involves assessing who played the leading role from the institution's inception, through the process of making its creation a reality, and finally, in making it operational.

146. Having understood the meaning of 'bringing into existence', we shall now revisit the Respondent's argument that if an institution is being created by Statute, then it cannot be said to have been brought into existence by the minority community since in that, case it is the Legislature which establishes the university. This particular element requires some detailed analysis, not only because it was vehemently argued by both sides but also because, as confirmed by this Court in ***Prof Yashpal (supra)***, a University can only be created by or under a Statute.

147. Having said that, if we were to hold that statutory intervention means that the Parliament 'establishes' the university and not the minority community (as was held in ***Azeez Basha (supra)***), it would mean that the minority community would never be able to qualify the 'establishment' prong under Article 30. This would concomitantly lead to the conclusion that minorities can never establish a university under this provision. Such a conclusion would run contrary to the amendment to the NCMEI Act, which includes universities also under the ambit of minority educational institutions. Therefore, to render *quietus* to this issue, we shall discuss whether the Statute does, in fact, bring an institution into existence.

I.1.2. Statutory intervention and establishment of an institution

148. In this regard, it is important to note that statutory intervention exists as a sliding scale, which can differ based on the kind of institution. Broadly, there are three such categories of institutions: *first*, those which are 'registered in accordance' with the statute; *second*, which are 'recognized' by the statute; and *third*, which are 'created by' the statute. Each of these are analysed separately below.

I.1.2.1. Registered in accordance with the statute

149. To establish an institution as a juristic entity, it is possible that the minority community uses a form of organization provided under a statutory framework. For instance, to establish an institution as a company, the community might utilize the provisions of the Companies Act, 2013; for a society, it would perhaps be the Cooperative Societies Act, 1912, and so on. In case such a statutory framework is used by the community, the question arises who truly brings the institution into existence—the community or the statute that is used to create the institution?

150. This question is no longer *res integra* and has been effectively answered in ***Dalco Engg. (P) Ltd. v. Satish Prabhakar Padhye***,[83] wherein this Court held:

> "*20.* ***A "company" is not "established" under the Companies Act. An incorporated company does not "owe" its existence to the Companies Act****. An incorporated company is formed by the act of any seven or more persons (or two or more persons for a private company) associated for any lawful purpose subscribing their names to a memorandum of association and by complying with the requirements of the Companies Act in respect of registration.* ***Therefore, a "company" is incorporated and registered under the Companies Act and not established under the Companies Act****. Per contra, the Companies Act itself establishes the National Company Law Tribunal and the National Company Law Appellate Tribunal, and these two statutory authorities owe their existence to the Companies Act.*"
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> [Emphasis supplied]

151. Hence, as rightly held in the aforementioned case, using a statutory framework does not necessarily mean that the organization is established by the statute. If that were so, all companies under Companies Act, 2013 would become government companies, leading to an absurd consequence that does not hold water.

152. The Statutes that are used merely as a tool by the minority community to register their institution under the statutory framework do not thus take away the community's role in bringing the institution into existence.

I.1.2.2. Recognized under the Statute

153. The second kind of Statutes are those that provide recognition to already existing institutions. This is usually true for Statutes providing affiliation to colleges with universities. Once the college affiliates itself to a university, it will have to fulfil the statutory requirements prescribed under the relevant statute of the university. Would such a

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[83] *Dalco Engg. (P) Ltd. v. Satish Prabhakar Padhye and Ors.,* (2010) 4 SCC 378, para 20.

statutory intervention then mean that the institution has been brought into existence by that Statute?

154. This question has also been lucidly answered by this Court in ***Executive Committee of Vaish Degree College v. Lakshmi Narain,***[84] where a similar contention was raised that after being affiliated with the university, Vaish Degree College became a statutory body that was created by the statute. Rejecting this view, the Court held that:

> "***Here a distinction must be made between an institution which is not created by or under a statute but is governed by certain statutory provisions for the proper maintenance and administration of the institution****. There have been a number of institutions which though not created by or under any statute have adopted certain statutory provisions, but that by itself is not, in our opinion, sufficient to clothe the institution with a statutory character. […]*
>
> *It is, therefore, clear that there is a well-marked distinction between a body which is created by the statute and a body which after having come into existence is governed in accordance with the provisions of the statute.* ***In other words the position seems to be that the institution concerned must owe its very existence to a statute which would be the fountainhead of its powers. The question in such cases to be asked is, if there is no statute would the institution have any legal existence. If the answer is in the negative, then undoubtedly it is a statutory body, but if the institution has a separate existence of its own without any reference to the statute concerned but is merely governed by the statutory provisions it cannot be said to be a statutory body*** *[…].*"
>
> [Emphasis supplied]

155. Hence, if an institution possesses legal existence independent of the statute, then the Statute merely recognizes an existing institution and does not 'establish' it. This kind of Statute also does not take away the role of the minority community in bringing the institution into

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[84] *Executive Committee of Vaish Degree College and Anr. v. Lakshmi Narain and Ors.* (1976) 2 SCC 58, para 10.

existence. Accordingly, just because a college is affiliated with a university and follows its statutory requirements, it would not deprive the institution of its minority character. This was also stated in ***St. Stephens (supra)***, where this Court held:

> "*41.* ***It was contended that St. Stephen's College after being affiliated to the Delhi University has lost its minority character. The argument was based on some of the provisions in the Delhi University Act and the Ordinances made thereunder. It was said that the students are admitted to the University and not to the College as such. But we find no substance in the contention****. In the first place, it may be stated that the State or any instrumentality of the State cannot deprive the character of the institution, founded by a minority community by compulsory affiliation since Article 30(1) is a special right to minorities to establish educational institutions of their choice […]*"
>
> "*45. From these and other relevant provisions of the Act and Ordinances, we have not been able to find any indications either in the general scheme or in other specific provisions which would enable us to say that the College is legally precluded from maintaining its minority character. That in matters of admission of students to Degree courses including Honours courses, the candidates have to apply to the College of their choice and not to the University and it is for the Principal of the College or Dean of Faculties concerned to take decision and make final admission. It is, therefore, wrong to state that there is no admission to the College but only for the University. The procedure for admission to Post Graduate courses is of course, different but we are not concerned with that matter in these cases.*"
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> [Emphasis supplied]

156. It may also be relevant at this stage to examine instances of such universities, which, under law, are mandated to be operationalized by a Statute. We may, in this regard, usefully refer to the University Grants Commission Act, 1956 (**UGC Act**) which provides as follows:

> "*22. Right to confer degrees—*
>
> *(1)* ***The right of conferring or granting degrees shall be exercised only by a University established or incorporated by or under a Central Act, a Provincial Act or a State Act*** *or an institution deemed to be a University under Section 3 or an institution specially*

empowered by an Act of Parliament to confer or grant degrees.
(2) Save as provided in sub-section (1), no person or authority shall confer, or grant, or hold himself or itself out as entitled to confer or grant, any degree.
(3) For the purposes of this section, "degree" means any such degree as may, with the previous approval of the Central Government, be specified in this behalf by the Commission by notification in the Official Gazette.

23. Prohibition of the use of the word "University" in certain cases.—
No institution, whether a corporate body or not, other than a University established or incorporated by or under a Central Act, a Provincial Act or a State Act shall be entitled to have the word "University" associated with its name in any manner whatsoever*:*
Provided that nothing in this section shall, for a period of two years from the commencement of this Act, apply to an institution which, immediately before such commencement, had the word "University" associated with its name."
[Emphasis supplied]

157. Since the UGC Act mandates that degrees can be conferred only by those universities that are established 'by or under' a statute, it is a necessary corollary that the university must be operationalized by a statute itself in order to validly confer the degrees. Given that the legal existence in this context flows directly from the statute, the question thus arises: does this mean that the minority community does not bring such universities into existence, and that they are instead established by the legislature? Indeed, ***Azeez Basha (supra)*** says so. Contrarily, the NCMEI Act, as amended from time to time, enables a minority community to establish a university on its own. There being an apparent inconsistency between the two, the question that arises for further consideration is as to which perspective accurately reflects the correct position—***Azeez Basha (supra)*** or the NCMEI Act?

Azeez Basha (supra) v. the NCMEI Act: The curious case of bringing universities into existence

158. In this regard, one needs to note the nuance between legal recognition and other facets of existence. As was discussed before, existence covers other aspects apart from legal sanction. Especially for universities, this Court, in the case of ***Prof. Yashpal (supra)***, held that the Statute shall not give legal sanction unless it is satisfied that there exist enough infrastructural facilities within the institution:

> "*44. […]* ***When the Constitution has conferred power on the State to legislate on incorporation of university, any Act providing for establishment of the university must make such provisions that only an institution in the sense of university as it is generally understood with all the infrastructural facilities, where teaching and research on a wide range of subjects and of a particular level are actually done, acquires the status of a university****. […]"*
>
> *45. The State Legislature can make an enactment providing for incorporation of universities under Entry 32 of List II and also generally for universities under Entry 25 of List III.* ***The subject "university" as a legislative head must be interpreted in the same manner as it is generally or commonly understood, namely, with proper facilities for teaching of higher level and continuing research activity. An enactment which simply clothes a proposal submitted by a sponsoring body or the sponsoring body itself with the juristic personality of a university so as to take advantage of Section 22 of the UGC Act and thereby acquires the right of conferring or granting academic degrees but without having any infrastructure or teaching facility for higher studies or facility for research is not contemplated by either of these entries****. Sections 5 and 6 of the impugned enactment are, therefore, wholly ultra vires, being a fraud on the Constitution."*
>
> *46. […] In the absence of any campus and other infrastructural facilities, UGC cannot take any measures whatsoever to ensure a proper syllabus, level of teaching, standard of examination and evaluation of academic achievement of the students or even to ensure that the*

students have undergone the course of study for the prescribed period before the degree is awarded to them."

[Emphasis supplied]

159. Similarly, while Regulation 3.1 of the University Grants Commission (Establishment of and Maintenance of Standards in Private Universities) Regulations, 2003 also states that universities have to be established by a statute, the very definition of the term 'private university' in Regulation No. 2.1 clarifies that the university is established albeit 'through' the legislation, but 'by' a private body:

"*3.1. Each private university* ***shall be established by a separate State Act*** *and shall conform to the relevant provisions of the UGC Act, 1956, as amended from time to time.*"

"*2.1.* ***"Private university" means a university duly established <u>through</u> a State / Central Act <u>by a sponsoring body</u>*** *viz. a Society registered under the Societies Registration Act 1860, or any other corresponding law for the time being in force in a State or a Public Trust or a Company registered under Section 25 of the Companies Act, 1956.*"

[Emphasis supplied]

160. In addition to these provisions, it is also imperative to take into consideration that the role of sponsoring bodies is explicated in further detail in various state legislations. For instance, the Uttar Pradesh Private Universities Act, 2019, sets out in detail the steps that the sponsoring body must take to receive sanction for establishing a university. The body is required to create an endowment fund, possess certain specified areas of land, construct buildings, install equipment, appoint professors, plan curriculum and other activities, make rules for the functioning of the university, and comply with other norms.[85] Subsequently, such a body is then required to apply for the sanction by

[85] Uttar Pradesh Private Universities Act, 2019, Section 3.

furnishing the requisite details.[86] Only once the government is satisfied with the necessary compliances by the sponsoring body, does it grant the sanction and incorporates it under the statute.[87] Therefore, even though the final legal existence is sanctioned through the statute, it is the private body which initiates and fulfils other essential roles.

161. A similar situation existed in India prior to independence. During this pre-independence era, the very nature of universities was in a state of flux. Up until the 1920s, universities primarily functioned as administrative units rather than teaching institutions. Accordingly, they were established by the State as government bodies to exercise control over all the colleges in the respective provinces. This factum is acknowledged by the Saddler Commission of 1917-19, which noted:

> "*These territorial limits have been deemed necessary in the past, mainly for the following reasons. In the first place, the functions of the older universities in India have demanded them.* ***So long as each of these universities is engaged, subject to Government control, in administrative rather than teaching functions, it necessarily follows that its boundaries should be as far as possible co-terminous with those of a province*** *[…]* ***The self-contained provincial university affords some administrative conveniences. Because it exercises direct control over Government colleges, gives grants-in-aid to others, and is deeply interested in the secondary school system, Government is necessarily hampered in carrying out these duties if the affiliation and inspection of colleges within its area and the recognition of schools situated within its territorial jurisdiction are in any respect under the authority or in the hands of another Government and university****."*[88]
>
> [Emphasis supplied]

162. However, in order to expand the scope of education and to accommodate growing demand, there was a legitimate need to change the role of the university from mere administrative bodies to

[86] Ibid, Section 4.
[87] Ibid, Section 7.
[88] M.E. SADLER, *Calcutta University Commission 1917-1919*, Chapter XXIX.

institutions of learning. Hence, while there was hitherto monopoly exercised by government universities,[89] it permitted private players to approach the government and seek the setting up of a university. As recognized by the Saddler Commission, BHU was the first of its kind.

163. In due parlance, the University Commission Report of 1929 also acknowledged this change, and it was noted that various learning universities had come into being.[90] In order to establish a university whose degree would be recognized by the government, they were required to be established through a statute.[91] Universities that were established in native states were also created through the sanction of the ruler.[92] Even though some native groups did establish universities without the statute, their degrees were not recognized, consequently leading to them being less attractive centres of learning.[93]

164. That means that while universities were still required to seek a government's sanction for recognition of degrees, the statutes were limited to their legal existence. There are other essential components as well, to determine the status of a university. As was also briefly explicated in ***Prof. Yashpal (supra)***,[94] a university in essence, is also an organized body that serves as a centre of higher education by linking students and teachers. For it to exist in that form, it is necessary for someone to ideate, plan, gather the resources, take approvals, and

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[89] Henry Sharp, "The *Development of Indian Universities*" JOURNAL OF THE ROYAL SOCIETY OF ARTS, (1925), Vol. 73, No. 3778 pp. 523.

[90] INDIAN STATUTORY COMMISSION, Interim Report- Review of Growth of Education in British India, Calcutta, Government of India, central Publication Branch (1929) pp. 123, available at https://archive.org/details/dli.csl.1000/page/n157/mode/2up?view=theater

[91] Dr. Vishwanath Pandey (editor), FOUNDER OF BANARAS HINDU UNIVERSITY: PANDIT MADAN MOHAN MALVIYA, Publication Cell, Banaras Hindu University (2006), pp. 19, available at https://web.archive.org/web/20120412191310/http://www.bhu.ac.in/MMMMM.pdf .

[92] *The Handbook of Indian Universities*, published by Inter University Board India (1928), pp. 255, available at https://archive.org/details/handbookofindian029307mbp/page/n269/mode/2up?view=theater; Syed Akbar, "Controversy over Osmania University Centenary as Firman says it was founded in 1918, THE INDIAN EXPRESS (23 November, 2017) available at https://timesofindia.indiatimes.com/city/hyderabad/controversy-over-osmania-university-centenary-as-firman-says-it-was-founded-in-1918/articleshow/61762699.cms.

[93] INDIAN STATUTORY COMMISSION, *supra* note 90, pp. 121.

[94] *Prof. Yashpal*, *supra* note 4, para 20-22.

functionalize the institution once the sanction is received.[95] This materiality was also briefly alluded to by the University Commission of 1948, when it said that:

> "*The Annamalai University* ***owes its inception*** *to the generosity of the late Annamalai Chettiar of Chettinad. The Banaras and the Aligarh Universities have had large endowments given by princes and commoners. The Calcutta University has had endowments given by such eminent persons as P.C. Ray, Rash Behari Ghose and Tarakanath Palit; while Bombay has had large endowments from the Singhania and Tata Trusts besides endowments from several other philanthropic citizens; the University of Nagpur has had a large endowment under the Laxminarayan Trust, Fund and the Madras University has for the first time been given a generous endowment by Dr. Alagappa Chettiar.* ***The new university at Saugor owes its existence to a donation of Rs. 2,000,000 from Sir Hari Singh Gaur which is regarded as a first instalment.***"
>
> [Emphasis supplied]

165. Hence, even when the legal existence—i.e., the authority to grant degrees—comes from an external body or legislature, it is an important but not the sole facet that constitutes a University. Further, the legislative object and intent of such a Statute would be a determinative factor in ascertaining the nature of the University. If it were solely responsible for the creation of the university, the statute might assume a size larger than the University. Instead, since the concept of a university encompasses numerous other factors beyond legal sanction, these factors also contribute to its existence, and the statute is one of them. Consequently, the presence of this external factor does not render the entire existence attributable to the Legislature.

166. It seems to us that when the UGC Act or colonial laws mandated universities to be created by statutes, those who intended a university, including the minority community, were not absolved from complying with other relevant factors so as to bring the university into being. We

[95] *Dr. Vishwanath Pandey, supra* note 91.

therefore do not find any conflict between the amended provisions of the NCMEI Act, UGC Act, and the holding in ***Prof. Yashpal (supra).*** Each holds its own independent and distinct field and operates validly within that sphere. The minority community thus can establish a university under Article 30,[96] provided it fulfils the norms of the UGC—i.e., gets legal sanction to create the university through a statute. To the extent that ***Azeez Basha (supra)*** holds to the contrary, it deserves to be modified and clarified.

167. Having held so, we will now analyse the third category of institutes, which are 'created by' the legislature itself.

I.1.2.3. Created by the statute

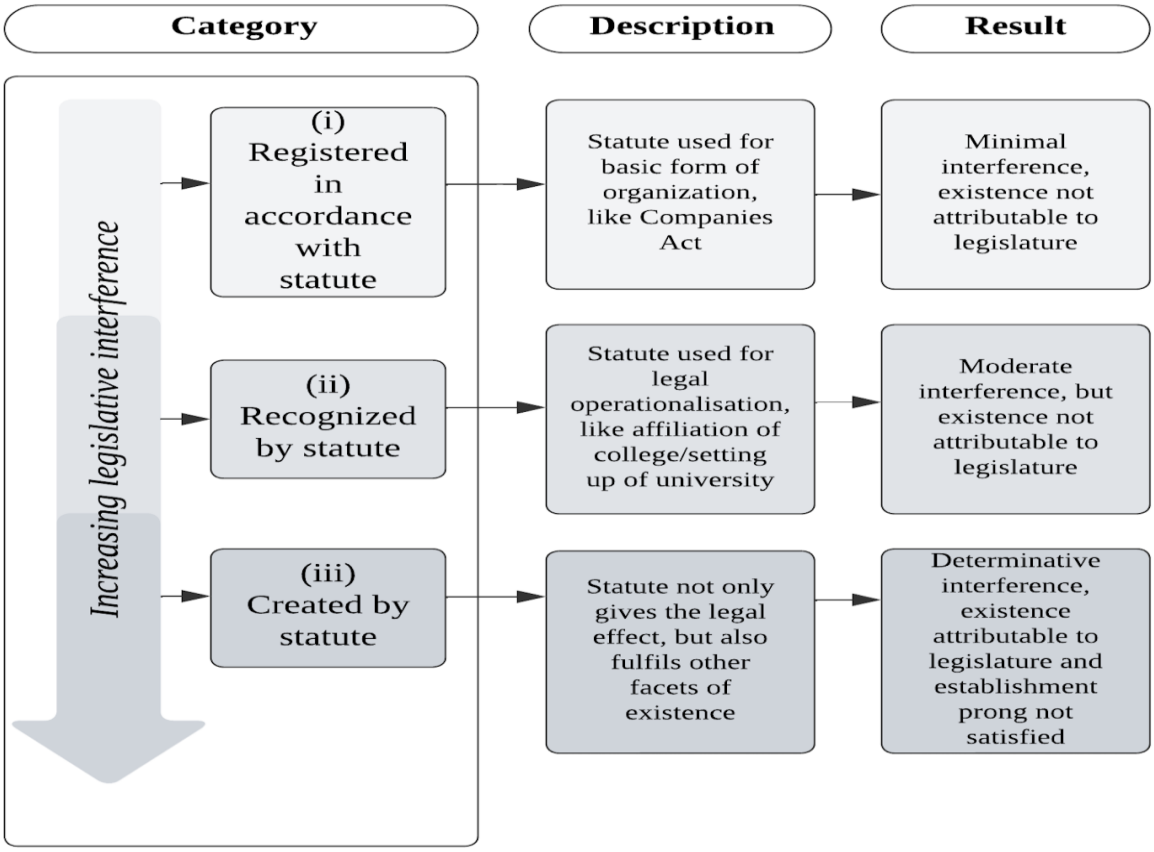
168. The previous section showed that an institution would not owe its existence to the legislature itself, provided that other facets apart from legal operationalization are fulfilled by another body. However, it may also happen that the Government itself may fulfil the other aspects by perhaps ideating the institution, providing funds and infrastructure for its set-up, making its charter documents, and finally operationalizing it through different bodies. In case the leading role in the different factors instantiated in paragraph 141 of this judgement is played by the Legislature itself or through the Executive Government, then it will be said to have brought the institution into existence and not any private individual or community.

169. The distinction between the second and third categories of institutions (i.e., those recognized by statute versus those created by statute) is thus one of degree and a matter of fact. While both types of institutions may appear on paper to be established under a statute, only a thorough analysis of their backgrounds can illuminate whether they belong to the second category—i.e., where the statute merely operationalizes the institution or to the third category—where their very

[96] Uttar Pradesh Private Universities Act, 2019, Section 2(p).

existence is attributable to legislative action. Depending on such analysis, the Court can conclude whether the institution meets the establishment prong under Article 30 or not.

170. To sum up the entire discussion on the spectrum of legislative interference pictorially:



I.2 Establishment shall be for the benefit of the community

171. There can hardly be any quarrel that, for fulfilling the establishment prong, it is not sufficient that the institution was brought into existence by the community, but it must be further proved that it was for the benefit of that community. For this purpose, it is essential to analyse the overall functioning of the institution and the primary objective for which it has been established. For instance, where the institution admits members of other communities; also teaches secular courses;[97]

[97] *In Re: The Kerala Education Bill, supra* note 58; para 23; *Rev. Father W. Proost and Ors. v. State of Bihar and Ors.*, (1969) 2 SCR 73, para 8; *Ahmedabad St. Xaviers College Society and Anr.* v. *State of Gujarat and Anr.*, AIR 1974 SC 1389, para 10.

or if it is working merely as a commercial entity that does not admit students of its own community; or working primarily towards the development of its community, it would be antithetical to the very purpose of Article 30 to grant such an institution minority status.

172. This has been clarified by various judgements of this Court, which held that the purpose of Article 30 is to ensure the upliftment of the minority community by providing them with a congenial atmosphere for education.[98] If the institution is not aligned with this purpose, it would not be covered under the purview of Article 30 and would not enjoy extra administrative autonomy, even if its existence is owed to a minority community.

173. To conclude the discussion on the meaning of 'establish', for an institution to fulfil the establishment prong under Article 30, it is necessary for it to have been brought into existence by the minority community and must be working towards the benefit of that community.

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

174. The parties are not unanimous on the meaning of the term 'administer' as contained in Article 30 of the Constitution. The Appellant sought to assail that the term 'administer' essentially refers to who has overall control over the university. The parties argued that the mere fact that the State regulates the institution does not take away the 'administration' from the community. The Respondents, on the other hand, proffered that the 'administer' prong requires the minority community to control essential factors of the institution, such as admission to the institution, fee structure, appointment of teachers, etc.

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[98] *In Re: The Kerala Education Bill, supra* note 58; Para 32; *P.A. Inamdar, supra* note 48, para 97.

175. Before venturing onto understanding what is included in administration, it is necessary to first understand what it does not include. Various judicial precedents, including the decision in ***TMA Pai (supra)***, have held that the term 'administration' does not include maladministration. In other words, while the minority community has the right to administer the institution, the regulatory measures imposed by the State that merely regulate the educational standards are not included within the right of 'administration'.[99]

176. To this end, the State has the power to prescribe, *inter alia*: compliance requirements of the government for granting recognition to the university, if they largely and substantially leave unimpaired the right of administration in regard to internal affairs of the institution;[100] general laws of the land applicable to all persons, such as laws relating to taxation, sanitation, social welfare, economic regulation, public order and morality, or general regulations regarding welfare of students and teachers;[101] regulations requiring transparency and merit in admission procedure;[102] regulations restricting charging of capital fee;[103] regulations which mandate that there is a govt. nominee in admission process, that fix merit criteria for minority students, or which mandate that the vacant seats shall go to non-minority students;[104] etc.

177. Similarly, this Court has held that in a minority institution, there can be a sprinkling of outsiders in administration, and the mere presence of

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[99] *Very Rev. Mother Provincial*, *supra* note 71, para 9-10; *Gandhi Faiz-e-am-College v. University of Agra and Anr.*, (1975) 2 SCC 283, para 40; *Kolawana Gram Vikas Kendra v. State of Gujarat and Anr.*, (2010) 1 SCC 133.

[100] *All Saints High School v. Govt. of A.P. and Ors., (1980) 2 SCC 478, para 5.*

[101] *TMA Pai Foundation*, *supra* note 3, para 136 and 161; *P.A. Inamdar, supra* note 48. Para 94; *Secy., Malankara Syrian Catholic College, supra* note 51.

[102] *TMA Pai Foundation*, *supra* note 3, para 161; *Christian Medical College Vellore Assn. v. Union of India*, (2020) 8 SCC 705.

[103] *P.A. Inamdar, supra* note 48, Para 140; *Modern School v. Union of India and Ors.*, (2004) 5 SCC 583; *Father Thomas Shingare and Ors. v. State of Maharashtra and Ors.*, (2002) 1 SCC 758.

[104] *Andhra Kesari College of Education v. State of A.P.*, (2019) 9 SCC 457, para 6.9.

members of the non-minority community does not take away the minority character of the institution.[105]

178. However, at the same time, there is a core part of 'administration' that should remain in control of the minority community. As has been discussed before during the discussion on the conjunctive and disjunctive nature of the test incorporated within the text of Article 30 (*Issue III*), this is necessary to prevent the potential misuse of this provision. The question that now arises is when would 'administration' be said to have been taken away from the minority community?

179. To this end, the very concept of 'administration' is inherently fluid, and a specific definition is likely to be underinclusive. Determining whether a minority community exercises control over an institution is a factual question that varies from case to case. Although there is no definitive test to ascertain whether administration lies with the minority community, various judicial precedents provide indicators that may be considered relevant.

180. Similar to the test to determine 'establishment', these indicators alone may not conclusively establish whether the administration rests with the minority community. Instead, a cumulative and holistic analysis of these factors can assist the court in making its determination.

181. To instantiate, illustrative factors which are likely to take away administration of minority community from the institution include, *inter alia*:

i. Management staff is not answerable to the founders, or an external person has *veto* over their selection.[106] The lack of control over such selection would have significant weight since it is a post of prime importance around which administration revolves, i.e.,

[105] *In Re: Kerala Education Bill*, *supra* note 58; *Society for Unaided Private Schools of Rajasthan v. Union of India*, (2012) 6 SCC 1, para 57.
[106] *Very Rev. Mother Provincial*, *supra* note 71, para 19.

he/she is the hub on which all spokes of the institution's wheels are set around.[107]

ii. There are outside authorities in the governing body of the managing committee[108] with wide powers over the other members; [109]

iii. Minority community does not have any right over determining the overall fee structure of the institution;[110]

iv. Minority community does not have the final say over administration, such that over the management committee comprising of members of the minority community, there is an appeal to an outside member; [111]

v. Minority community does not have any say over the medium of instruction;[112]

vi. Regulation prescribes reservation for unaided minority institutions;[113]

vii. Minority community does not have the right to choose the governing body and to choose teachers or admit students;[114]

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[107] *Secy., Malankara Syrian Catholic College*, *supra* note 51, para 22-28; *Board of Secondary Education and Teachers Training v. Jt. Director of Public Instructions*, (1998) 8 SCC 555, para 3; *Ivy C.Da. Conceicao v. State of Goa and Ors.*, (2017) 3 SCC 619, para 16; *The Manager, Corporate Educational Agency v. James Mathew and Ors.*, (2017) 15 SCC 595; *R. Sulochana Devi v. D.M. Sujatha & Ors.*, (2005) 9 SCC 335, para 26.
[108] Dr. *T. Varghese George, supra* note 73, para 37.
[109] *All Saints High School, supra* note 100.
[110] *Icon Education Society v. State of M.P. and Ors.*, 2023 SCC OnLine SC 289; *Islamic Academy of Education v. State of Karnataka and Ors.*, 2003 6 SCC 697; *Cochin University of Science & Technology and Anr. v. Thomas P. John and Ors.*, (2008) 8 SCC 82, para 16.
[111] *Lilly Kurian* v. *Sr. Lewina and Ors.,* AIR 1979 SC 52.
[112] *State of Karnataka and Anr. v. Associated Management of English Medium Primary & Secondary Schools and Ors.*, (2014) 9 SCC 485.
[113] *Society for Unaided Private Schools of Rajasthan v. Union of India and Anr.*, (2012) 6 SCC 1, para 62; *Pramati Educational & Cultural Trust and Ors. v. Union of India and Ors.*, (2014) 8 SCC 1, para 55.

viii. Removal of an employee requires the approval of an outside member who has the discretion to withhold such consent;[115]

ix. The minority community does not have a say in appointment of administrative authorities of the university such as the Vice Chancellor, Pro-Vice Chancellor, Registrar etc.;

x. The minority institution entirely depends on government aid; and

xi. The minority community does not have the right to deploy properties and assets for the benefit of the institution.[116]

182. It thus emerges that the minority community must largely be free from external control and must have broad autonomy to mould the institution's functioning and administration per their idea of what would be best for the community.[117] If the long-term administrative factors and the day-to-day sundry decisions do not lie with the community, it would mean that the institution is being administered by an outside authority and not by the minority community. As already elucidated, while the minority community can be subjected to general regulations regarding the betterment of such management, and while there can be a sprinkling of outsiders, administration itself cannot be taken away from the minority community. This is perhaps best explained in ***Gandhi Faiz-e-am-College v. University of Agra***,[118] where this Court held:

> "***16.*** *The discussion throws us back to a closer study of Statute 14A to see if it cuts into the flesh of the management's right or merely tones up its health and habits. The two requirements the University asks for are that the managing body (whatever its name) must take in (a) the*

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[114] Dr. *T. Varghese George, supra* note 73, para 19.
[115] *G. Vallikumari v. Andhra Education Society*, (2010) 2 SCC 497, para 17; *Frank Anthony Public School Employees' Assn. v. Union of India and Ors.*, (1986) 4 SCC 707, para 18.
[116] *Ahmedabad St. Xavier's College Society, supra* note 97, para 19.
[117] *St. Stephen's College, supra* note 50, para 46.
[118] *Gandhi Faiz-e-am-College, supra* note 99, para 16.

> *Principal of the College; (b) its seniormost teacher.* ***Is this desideratum dismissible as biting into the autonomy of management or tenable as ensuring the excellence of the institution without injuring the essence of the right?*** *On a careful reflection and conscious of the constitutional dilemma, we are inclined to the view that this case falls on the valid side of the delicate line.* ***Regulation which restricts is bad; but regulation which facilitates is good. Where does this fine distinction lie? No rigid formula is possible but a flexible test is feasible. Where the object and effect is to improve the tone and temper of the administration without forcing on it a stranger, however superb his virtues be, where the directive is not to restructure the governing body but to better its performance by a marginal catalytic induction, where no external authority's fiat or approval or outside nominee is made compulsory to validate the Management Board but inclusion of an internal key functionary appointed by the autonomous management alone is asked for, the provision is salutary and saved, being not a diktat eroding the freedom of the freedom****."*
> [Emphasis Supplied]

183. Notably, for such administration to lie with the community, it is not enough if the decisions are taken by a member of such a community. If these decisions lie with the community but there is an outside authority with the power to change these decisions, it would imply that the minority community does not have pervasive control over the administrator, and its status is merely that of a paper tiger.[119] Conversely, if there are outside authorities and the minority community does not have the power to oversee or reverse the decisions of such authorities, it would again imply that control lies externally. In other words, the administration shall cover both the active and the reactive aspects, such that the minority community can take active steps to effect changes in the institution without outside restriction and can also *veto* decisions taken or changes made from the outside.

184. Consequently, in order to satisfy the requirements of Article 30, a minority community must retain both *de jure* and *de facto* control over

[119] *Lilly Kurian, supra* note 111.

the institution. It is insufficient for the community to simply have a minority member appointed by the majority for administrative roles; this does not confer genuine control. If the minority member's position can be revoked at any time by the majority, the real power of administration does not lie with the minority community. Allowing Article 30 protection under such circumstances would create legal unpredictability, as non-minority institutions could temporarily appoint minority members to exploit the benefits. To meet the administration test, the minority community must therefore first have visible *de jure* control over the institution.

185. Similarly, mere *de jure* control over the institution may not be sufficient on its own. It is possible that, to secure protection under Article 30, a minority community might be nominally granted administrative power while actual control is exercised behind the scenes by individuals outside the community. Such a scenario would amount to a façade of minority administration, failing to satisfy the test of genuine physical control over the management. Thus, the need arises for both aspects of control over the educational institution.

186. To summarize, the test for administration under Article 30 involves identifying who holds effective and overall control within the institution. While external authorities may assist in its administration, the decisive influence and control must rest with members of the minority community. To meet this test, the minority community must exercise both active and reactive control, ensuring that administrative powers are genuinely held in both *de jure* and *de facto* terms.

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

187. Before parting, we would like to fairly acknowledge that both sides to the present dispute, aggressively argued on the issue as to whether the UOI could be allowed to change its stance and challenge its own

statute. While the Appellant urged that the UOI and the Learned Attorney General for India are obliged to defend the 1981 Amendment Act, the Respondent maintained that such support would run antithetical to constitutional values.

188. We have pondered over the submissions and are of the view that the controversy has been rendered academic. In our considered opinion, all the legal issues, including those relating to constitutional interpretation have already been answered effectively. In all fairness, the parties also rendered their full assistance in the context of the factual issues as well, especially in terms of whether or not AMU is entitled to the protection of Article 30 of the Constitution. This second limb of the controversy however, will be resolved by the Regular Bench, and to this extent we are respectfully in tandem with the opinion rendered by Hon'ble the Chief Justice of India.

V. AREAS OF DIVERGENCE

189. In light of the above discussion, we find ourselves at variance with Hon'ble the Chief Justice of India on the following issues:

189.1. Whether the opinion of the seven-judge bench in ***Kerala Education Bill (supra)*** *which according to Hon'ble the Chief Justice, was followed by a six-judge Constitution bench in* ***Rev. Sidhajbhai Sabhai v. State of Bombay****,*[120] *has been overlooked in* ***Azeez Basha (supra)****?*

a. In ***Kerela Education Bill (supra)***, this Court, in no uncertain terms opined that: (***i***) "*there is no reason why the benefit of Article 30(1) should be limited only to educational institutions established after the commencement of the Constitution. The language employed in Article 30(1) is wide enough to cover both pre-Constitution and post-Constitution institutions*."; and (***ii***) "*Article 30(1) gives two*

[120] *Rev. Sidhajbhai Sabhai v. State of Bombay,* 1963 (3) SCR 837.

rights to the minorities, (1) to establish and (2) to administer educational institutions of their choice. The right to administer obviously cannot include the right to maladminister. The minority cannot surely ask for aid or recognition for an educational institution run by them in unhealthy surroundings, without any competent teachers, possessing any semblance of qualification, and which does not maintain even a fair standard of teaching or which teaches matters subversive of the welfare of the scholars…"

b. In ***Sidhajbhai Sabhai (supra)***, the challenge was laid to a government order directing that "*80% of the total number of seats in non-Government Training Colleges should be reserved for School Board teachers deputed by the Government…*" In this regard, the six-judge Constitution Bench held that "*unlike Article 19, the fundamental freedom under Clause (1) of Article 30, is absolute in terms; it is not made subject to any reasonable restrictions of the nature the fundamental freedoms enunciated in Article 19 may be subjected to. All minorities—linguistic or religious—have, by virtue of Article 30(1), an absolute right to establish and administer educational institutions of their choice; and any law or executive direction which seeks to infringe the substance of that right under Article 30(1) would to that extent be void. This, however, is not to say that it is not open to the State to impose regulations upon the exercise of this right...*"

c. What comes to light in ***Sidhajbhai Sabhai (supra)*** is that the bench therein did not rely upon the opinion delivered by the seven-judge bench in ***Kerala Education (Bill)*** and rather distinguished it, as the latter was relied on by the State. The Constitution bench in ***Sidhajbhai Sabhai (supra)*** thus took pains to explain that the opinion in ***Kerala Education Bill (supra)*** was distinguishable and that it "*is not an authority for the proposition submitted by the Additional Solicitor General that all regulative measures which are*

not destructive or annihilative of the character of the institution established by the minority, provided the regulations are in the national or public interest, are valid…"

d. We now turn to examine whether the five-judge bench in ***Azeez Basha (supra)*** failed to follow the principles opined in ***Kerala Education Bill (supra)*** or those laid down by the six-judge bench in ***Sidhajbhai Sabhai (supra)***. In so far as ***Kerala Education Bill (supra)*** is concerned, ***Azeez Basha (supra)*** categorically holds that the protection of Article 30(1) was not restricted only to educational institutions established after the Constitution came into force. Such a restrictive interpretation was held to be contrary to the opinion delivered in ***Kerala Education Bill (supra)*** and was bolstered with strong language that "*if that interpretation was given to Article 30(1) it would be robbed of much of its content'*." The bench further held that the expressions 'establish' and 'administer' must be read conjunctively, in response to a plea that even if an educational institution was not established by minorities, it could still be administered by them under the ambit of Article 30. This view, which has been consistently affirmed in the later decisions as well, in our considered opinion, is the correct interpretation of Article 30(1).

e. As regard to ***Sidhajbhai Sabhai (supra)*** it was neither cited nor was particularly relevant in the context of the controversy that arose for consideration in ***Azeez Basha (supra)***.

f. Most pertinently, the decision in ***Sidhajbhai Sabhai (supra)*** is no longer a good precedent, to the extent of disapproval of its view by the 11-judge bench in ***TMA Pai (supra)***, in this regard.

g. We therefore see no discordance between ***Kerala Education Bill (supra)*** and ***Sidhajbhai Sabhai (supra)*** on the one hand and ***Azeez Basha (supra)*** on the other.

*189.2. Is there any conflict between **Azeez Basha (supra)** and the principles enunciated in **TMA Pai (supra)**?*

a. A conjoint reading of paragraphs 106 to 108 of the draft judgement circulated by Hon'ble the Chief Justice, gives an impression that ***Azeez Basha (supra)*** has had some collision with the subsequent eleven-judge Constitution bench in ***TMA Pai (supra)***. In this regard, Hon'ble the Chief Justice has relied on paragraph 70 (the majority opinion by Chief Justice Kirpal, as his Lordship then was). We are, however, unable to find any such perceived conflict between the two decisions. ***TMA Pai (supra)*** considered the scope of regulating the right of administering government aided private minority institutions from paragraph 82 onwards. Pursuantly, in paragraph 93, the bench therein formulated the following questions:

> *"93. Can Article 30(1) be so read as to mean that it contains an absolute right of the minorities, whether based on religion or language, to establish and administer educational institutions in any manner they desire, and without being obliged to comply with the provisions of any law? Des Article 30(1) give the religious or linguistic minorities a right to establish an educational institution that propagates religious or racial bigotry or ill will amongst the people? Can the right under Article 30(1) be so exercised that it is opposed to public morality or health? In the exercise of its right, would the minority while establishing educational institutions not be bound by town planning rules and regulations? Can they construct and maintain buildings in any manner they desire without complying with the provisions of the building by-laws or health regulations?"*

b. After due discussion and a detailed reference to ***Kerala Education Bill (supra)*** and ***Sidhajbhai Sabhai (supra)***, the Constitution Bench in ***TMA Pai (supra)*** answered these questions in paragraph 107 which reads as follows:

> *"107. The aforesaid decision does indicate that the right under Article 30(1) is not so absolute as to prevent the government from making any regulation whatsoever. As already noted hereinabove, in Sidhajbhai Sabhai's case, it was laid down that regulations made in the true interests of efficiency of instruction, discipline, health, sanitation, morality and public order could be imposed. If this is so, it is difficult to appreciate how the government can be prevented from framing regulations that are in the national interest, as it seems to be indicated in the passage quoted hereinabove. Any regulation framed in the national interest must necessarily apply to all educational institutions, whether run by the majority or the minority. Such a limitation must necessarily be read into Article 30. The right under Article 30(1) cannot be such as to override the national interest or to prevent the government from framing regulations in that behalf.* ***It is, of course, true that government regulations cannot destroy the minority character of the institution or make the right to establish and administer a mere illusion; but the right under Article 30 is not so absolute as to be above the law. It will further be seen that in Sidhajbhai Sabhai's case, no reference was made to Article 29(2) of the Constitution. This decision, therefore, cannot be an authority for the proposition canvassed before us.***"
>
> [Emphasis supplied]

c. It may thus be seen that the decision in ***Sidhajbhai Sabhai (supra)***, which holds that the "*fundamental freedom under Clause (1) of Article 30, is absolute in terms; it if; not made subject to any reasonable restrictions*" has in fact been expressly disapproved by ***TMA Pai (supra)***. In essence, ***Sidhajbhai Sabhai (supra)*** has thus lost its binding nature, in that context.

*189.3. Whether a two-judge bench would be competent to make a reference to a larger bench of seven-judges? Whether the Constitution bench in **Dawoodi Bohra (supra)** has been correctly construed by Hon'ble the Chief Justice of India in his opinion?*

a. In order to avoid any repetition, we wish to mention here that an elaborate answer to the aforesaid question has been given under '*Issue I*' from paragraphs 83 to 99 of our judgement. In essence, the reference by the two-judge bench to a larger bench of seven-judges is totally impermissible; such a recourse is directly in the teeth of the dictum of the Constitution bench in ***Dawoodi Bohra (supra)***. Such an attempt by a two-judge bench is hit by: (***i***) the doctrine of predictability; (***ii***) the doctrine of finality; (***iii***) the principle of judicial propriety; and (***iv***) the doctrine of *stare decisis*.

b. Further, there is no substantial difference between 'doubting' a larger bench or 'disagreeing' with such a judgement. 'Doubt' and 'disagreement' both originate from a tentative opinion which is in conflict with the reasons already assigned by the larger bench. There cannot be disagreement without doubting the correctness and there cannot be a doubt unless you disagree with the reasons.

c. Most importantly, entertaining a reference by a two-judge bench doubting a larger bench would dilute the authority and position of the Chief Justice of India as enjoyed upon Article 145 read with Order VII Rule 2 of the Supreme Court Rules, 1966, as was then applicable.

189.4. What is the true import of Entry 63 of List I of the Constitution?

a. The Seventh Schedule derives its relevance from Article 246 of the Constitution. This provision is included in Chapter I of Part XI of

the Constitution, which deals with the relationship between the Union and the State and defines their legislative relations.

b. It may be seen that Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh schedule, known as the Union List. In this vein, Entry 63 of List I reads as follows:

> *"63.* ***The institutions known at the commencement of this Constitution as the Benares Hindu University, the Aligarh Muslim University*** *and the Delhi University; the University established in pursuance of article 371E; any other institution declared by Parliament by law to be an institution of national importance."*
>
> [Emphasis supplied]

c. Entry 63 has two significant components which we can broadly label as procedural and substantive. The former, i.e., the procedural feature, flows from Article 246 and reiterates that the Parliament is the sole Competent Authority for legislating to declare any other institution to be an institution of National Importance

d. The first component of Entry 63 is a substantive part, which is a constitutional declaration of BHU and AMU, to be institutions of National Importance. The opening part of Entry 63 manifestly indicates that the Constituent Assembly was determined to confer such an elevated status on both, BHU and AMU.

e. The second component of Entry 63 on the other hand, permits the Parliament to declare any other institution also to be an institution of national importance. It seems from the language of Entry 63 that the Parliament has no power to take away the status of an institute of national importance conferred upon BHU or AMU, save and except by following the route of an amendment to the

Constitution itself. Though the Parliament can declare any other institution as an institution of National Importance through the route of Article 246; such plenary legislative power cannot be invoked to take away the status of an institution of National Importance, accorded by the Constitution.

190. Having delineated the issues of disagreement with the opinion of Hon'ble the Chief Justice, we may hasten to add that one of the conclusions assigned in ***Azeez Basha (supra)***, is such that it deserves to be revisited. We say so for the reasons that:

a. In this regard, ***Azeez Basha (supra)*** rightly holds that the expression 'educational institutions' is of very wide import and would also include universities. It has correctly understood that a religious minority has the right to establish a university under Article 30(1). ***Azeez Basha (supra)*** is also right in observing that there was no law in India before the Constitution came into force, which prohibited any private individual or body from establishing a university. ***Azeez Basha (supra)*** further holds that no private individual or body could, prior to 1950, insist that the degrees of any university established by them must be recognised by government. This position continued even after the enactment of University Grants Commission Act, 1956.

b. ***Azeez Basha (supra)*** however, seems to be erroneous to the extent it holds that since Section 6 of the Aligarh Muslim University Act, 1920 (**AMU Act, 1920**) provided that the degrees conferred by the university would be recognised by government, consequently, "*an institution was brought into existence which could not be brought into existence by a private individual or body…*" ***Azeez Basha (supra)*** might therefore not be correct in its entirety and as a general principle of law, to hold that even if the AMU Act, 1920 was passed as a result of the efforts of the Muslim

minority it "*does not mean that the Aligarh University when it came into being under the 1920 Act was established by the Muslim minority*".

c. In this context, it is our considered opinion that the establishment of a university, whether as a minority institution or as a religion neutral institution of high standard, is a complex and mixed question of law and fact. The legislative intent behind the establishment of a university or an institution will have a significant role in determining the status of such an institution. For instance, if the Preamble or the Statement of Objects and Reasons of a Statute explicitly states that the University or the institution concerned is intended to be established and shall be administered by a minority community, we see no reason as to why such a University or institution would be denuded of its minority character merely because it was created through legislative means.

d. Conversely, if the Legislature by itself (particularly, post-Constitution) decides to establish an institution where besides preserving the culture, values, traditions, language and conventions of a religious or linguistic minority community, it promotes other streams of education without any barrier to children belonging to other religions, it will be highly debatable to discern whether such a university can take refuge under the protective umbrella of Article 30.

191. Having laid down the broad principles to be followed to determine as to whether AMU qualifies as a minority institution within the meaning of Article 30, we leave it for the regular bench to determine such status, in light of the parameters laid down in our opinion. We, therefore, do not deem it appropriate to express any final view as to whether or not AMU is a minority institution within the meaning of Article 30 of the

Constitution. Accordingly, we refrain ourselves from determining the factual issue enumerated as '*Issue No. VII*'.

VI. CONCLUSION

192. Thus, drawing upon the comprehensive analysis presented in the preceding sections, we thus hold that:

a. There is no conflict between the seven-judge bench opinion in ***Kerala Education Bill (supra)*** and the five-judge Constitution Bench in ***Azeez Basha (supra)*** on the other.

b. The six-judge Constitution Bench in ***Sidhajbhai Sabhai (supra)***, laying down that the right under Article 30 is absolute and unconditional, is not the correct principle of law; the judgement is no more binding in nature and stands effectively overruled in ***TMA Pai (supra)***, to that extent. Consequently, ***Azeez Basha (supra)*** does not suffer from any legal infirmity on the premise that it did not cite or follow ***Sidhajbhai Sabhai (supra)***.

c. There is no substantial difference between 'doubting' or 'disagreeing' with a judgement. That being so, the reference by a two-judge bench in ***Anjuman (supra)*** doubting the correctness of the five-judge bench in ***Azeez Basha (supra)*** and referring it to a seven-judge bench suffers from multiple illegalities, including judicial impropriety.

d. In view of the dictum of the Constitution Bench in ***Dawoodi Bohra (supra)***, a two-judge bench has no authority whatsoever to doubt or disagree with a judgement of the larger bench, and directly refer the matter to a bench having a numerically greater strength than the matter so doubted. The reference by the two-judge bench in ***Anjuman (supra)*** is nothing but a challenge to the authority of the Chief Justice of India being the master of the roster and in derogation of the special powers enjoyed upon under

Article 145 of the Constitution read with Order VII Rule 2 of the Supreme Court Rules, 1966 (as was applicable). Consequently, the said reference is not maintainable. However, the subsequent reference dated 12.02.2019, in which the then Hon'ble Chief Justice of India was the presiding judge, is maintainable.

e. The reference in ***Anjuman (supra)*** to a seven-judge bench for the reconsideration of the five-judge decision in ***Azeez Basha (supra)*** is bad in law and ought to be set aside.

f. The Constitution Bench in ***Azeez Basha (supra)***, when it holds that since Section 6 of the AMU Act, 1920 stipulates that degrees conferred by AMU would be recognised by the Government, it could not have been 'brought into existence by a private individual or body', is seemingly incorrect. Accordingly, and for the reasons assigned in paragraphs 190 (b) and (c), the said decision to that extent is hereby modified and clarified.

g. The minority institutions established in the pre-Constitution era are also entitled to the protection conferred by Article 30.

h. Educational institutions, with reference to Article 30 include universities as well.

i. In order to seek protection under Article 30 of our Constitution, the minority institution must satisfy the conjunctive test, namely that it was established by a minority community and has been/is being administered by such a community.

j. The true import and meaning of the expressions 'establish' and 'administer', which comprise the very core of Article 30, are to be construed and understood strictly in accordance with the indicia in paragraphs 141 and 181.

k. The question pertaining to whether AMU satisfies the above-mentioned test of 'establish' and 'administer' so as to seek protection of Article 30 of the Constitution, and which will concomitantly entail a mixed question of facts and law, will be determined by a Regular Bench.

193. The reference is answered in the above terms. Ordered accordingly.

..... J.
[SURYA KANT]

NEW DELHI
DATED: 08.11.2024