

CHIEF JUSTICE'S COURT
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE SURYA KANT
HON'BLE MR. JUSTICE J.B. PARDIWALA
HON'BLE MR. JUSTICE DIPANKAR DATTA
HON'BLE MR. JUSTICE MANOJ MISRA
HON'BLE MR. JUSTICE SATISH CHANDRA SHARMA

COURT NO.1
SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

Civil Appeal No. 2286/2006

**ALIGARH MUSLIM UNIVERSITY THROUGH ITS REGISTRAR FAIZAN
MUSTAFA**

Petitioner(s)

VERSUS

NARESH AGARWAL & ORS

Respondent(s)

TRANSCRIPT OF HEARING

23-Jan-2024

Document Control

Document Name & Date	Transcript of Civil Appeal No. 2286 of 2006 Hearing dated 23.01.2024
Status	Released
Version	1.0
Last Update	23.01.2024
Nature of Update	Original version
Release Date	23.01.2024
Document Owner	Supreme Court of India

10:45 AM IST

1 **KAPIL SIBAL:** Before my Learned Friend starts, we have now been given a new set of,
2 another Volume of the pleadings of the argument of the Learned Solicitor which was not with
3 us. With 2000...how many pages of documents? Over 2000 pages. That's all right, but unless
4 we have that, how do we do this?

5

6 **KANU AGARWAL:** These are just enactments that we have put on record. It's a separate
7 note, which is about 30-35 pages. It just has a list of all the old universities. The documents
8 may run into 2000 pages, but that may not necessarily be relevant. We put them on record
9 to...

10

11 **KAPIL SIBAL:** There's nothing to do with pleadings. Now it's a nationalist thing, that the
12 whole thing is being...nothing to do with the pleadings of the case.

13

14 **KANU AGARWAL:** There's absolutely no new argument in fact, in the additional note. All
15 the arguments.

16

17 **CJI DY CHANDRACHUD:** When the Solicitor General takes us through that, we'll see what
18 is to be appreciated. Most of it is just Acts and other things, may turn out that there's of no
19 consequence value.

20

21 **KAPIL SIBAL:** The arguments are not based on anything that's in the pleadings.

22

23 **CJI DY CHANDRACHUD:** We will bear that in mind.

24

25 **KAPIL SIBAL:** Yes, thank you.

26

27 **CJI DY CHANDRACHUD:** Now, we've really heard very substantive arguments from all the
28 Counsel who have preceded you. So, we don't want to deny you the opportunity to argue before
29 a seven-judge bench, but brief, so that we can then call upon the other side.

30

31 **RAJEEV DHAVAN:** We have stuck to the pleadings, My Lord, that's very important, because
32 both in the original submission and the latter one, it's all in the air now. It's something entirely
33 new.

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1 **CJI DY CHANDRACHUD:** That's important to stick to the pleadings because though it's a
2 constitution bench, I mean, we can't have something, then we might as well be reading a
3 website and deciding the case. We have to confine ourselves to what is on the record as
4 pleadings, and we will observe that.

5

6 **RAJEEV DHAVAN:** Arguments by Google, My Lord.

7

8 **M. R. SHAMSHAD:** Your Lordship pleases. Whatever time I have, I'll try touching four
9 points, My Lord, very briefly. One, how this *Anjuman Rahmania* had approached in 1981
10 and second, some submissions in supplement to what has been argued on educational
11 institution of their choice, My Lord. I'll just take few paragraphs.

12

13 **CJI DY CHANDRACHUD:** Can you just, to start with, formulate your four points? So that
14 then we can go to each one of them. So, you can just formulate the proposition, then we can
15 go to everything that you want to...

16

17 **M. R. SHAMSHAD:** After this *Anjuman Rahmania's* approaching this Honourable
18 Court, I'll come to the Educational Institution of their choice, has been, so this will, first point
19 will be: Educational Institution of choice includes University, and I will corroborate with the
20 judgements of this Honourable Court. Second, My Lord...

21

22 **CJI DY CHANDRACHUD:** Just one second. Yes.

23

24 **M. R. SHAMSHAD:** 1920 Act is in the nature of recognition of an institution, rather than...

25

26 **CJI DY CHANDRACHUD:** 19?

27

28 **M. R. SHAMSHAD:** 1920 Act. AMU Act, My Lord, is in the nature of recognition within the
29 system, My Lord, for the purpose of making the degree usable, so, there are views of this
30 Honourable Court on this, how recognition is important for an Institution. So, my submission
31 is that the Act is nothing but a tool of recognition. Third, My Lord, the entire chapter of
32 fundamental right, My Lord, part 3, apart from various other aspects, also talk about
33 adjustment of group rights for enforcing affirmative action, My Lord. And when...

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35 **CJI DY CHANDRACHUD:** [UNCLEAR] speaks of?

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37 **M. R. SHAMSHAD:** Group rights, My Lord.

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CJI DY CHANDRACHUD: Adjustment of group rights.

M. R. SHAMSHAD: For affirmative action. And I will touch little bit, to just say how the Union of India, even today, taking that this is a matter of National Unity, National integration. So, that I have pointed out few pages from judgements of this Honourable Court, how it was rejected earlier.

CJI DY CHANDRACHUD: Third proposition and then fourth?

M. R. SHAMSHAD: These are...

CJI DY CHANDRACHUD: Three propositions, basically. Fair enough. Now let's go rapid fire about what you want to cite about.

M. R. SHAMSHAD: *Anjuman Rahmania*, My Lord.

CJI DY CHANDRACHUD: So, we take the first. Educational institutions of their choice includes a university. That point, I think, Mr. Kapil Sibal has substantially argued. Is there something else that you want to supplement on that point? You feel free to tell us.

M. R. SHAMSHAD: Before I go there, my *Anjuman Rahmania* petition of 1981 before this Honourable Court was just closed without... despite *TMA Pai* saying that it will have to be decided by regular bench, was not decided. So, I just want to point it out to Your Lordship. Your Lordship may have this Volume 1(e).

RAJEEV DHAVAN: Chief Justice, I have graduated to the tablet.

CJI DY CHANDRACHUD: I noticed that.

RAJEEV DHAVAN: I thought I'd tell you that, since you told me in open court.

CJI DY CHANDRACHUD: That's excellent.

M. R. SHAMSHAD: If Your Lordship has Volume 5(a), page 552. Your Lordship may have it. This is *TMA Pai*.

1 **CJI DY CHANDRACHUD:** Volume?

2

3 **M. R. SHAMSHAD:** 5(a), 552. This is a case's description, writ petitions 300, just after
4 course title. Writ petition 5457. In the first line.

5

6 **CJI DY CHANDRACHUD:** Yes.

7

8 **M. R. SHAMSHAD:** This is that petition of '81, and this was before eleven judges,
9 Honourable eleven judges. And thereafter, if Your Lordship comes to page 779? The same
10 judgment.

11

12 **JUSTICE SANJIV KHANNA:** What was the issue raised by you in that?

13

14 **M. R. SHAMSHAD:** Basically, the similar issue which related to right to administer. This
15 was the issue in *Basha* also. And the same issue was here. And one thing I just want to place
16 before Your Lordship. When I came in 1981, there were at least nine judgments to say that you
17 can administer. Regulatory controls, all right. Nine out of nine judgments. One, nine judges,
18 which is *Xavier*. One, seven judges, *Kerala Education*. Two, six judges. Four, five judges.

19

20 **CJI DY CHANDRACHUD:** Just tell us... come again, how many?

21

22 **M. R. SHAMSHAD:** Total nine judgments, till 1975. From '57 to 1975. *Kerala Education*
23 first. Seven judges. *Sidhajibhai*, six judges. In between, this *Azeez Basha*, Honourable five
24 judges. *Father Proost*, five judges. *Rt. Patro*, five judges.

25

26 **CJI DY CHANDRACHUD:** *Rev. Patro*, right?

27

28 **M. R. SHAMSHAD:** My Lord. This is '69. 1969. *Mother Provincial*, Honourable six
29 judges. 1970. 1971, *DAV*, Honourable five judges. 1974, *Ahmedabad Xaviers*, Honourable
30 nine judges. And then comes, *Gandhi Faizeam*, three judges, 1975.

31 I had gone to the Allahabad High Court because I had problem in administering it.

32

33 **CJI DY CHANDRACHUD:** So, just to go back, *Father Proost* is which year?

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35 **M. R. SHAMSHAD:** Father Proost is 1968 My Lord, 13th of September.

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37 **CJI DY CHANDRACHUD:** Right, *Basha*?

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M. R. SHAMSHAD: *Basha* is October 1967.

CJI DY CHANDRACHUD: All right. *Sidhajibhai*?

M. R. SHAMSHAD: My Lord, *Sidhajibhai* is 30th of August 1962.

CJI DY CHANDRACHUD: And *Kerala Education*?

M. R. SHAMSHAD: *Kerala Education* My Lord, 25th of May 1958.

CJI DY CHANDRACHUD: Alright, we got them. Yes.

M. R. SHAMSHAD: So, this institution, My Lord, was formed in 1938. Admittedly, Muslims, members of Muslim community had given land, et cetera, and nucleus fund. 1940 it was registered as society. After registration, out of 40 members, 10 members were taken with permission of minority community from non-minority community. So, Mr. Sibal and Dr. Dhavan have both argued on this, that you can have other members also, so I'm not getting into that. That became the reason to stop me from administering my institution. I went to Allahabad High Court. Allahabad High Court granted a stay. Immediately it was revoked in 1980. And then I had to approach this Honourable Court and this question was framed by Justice Fazl Ali....

CJI DY CHANDRACHUD: Can you give us the factual sequence once again, just so that....

M. R. SHAMSHAD: My Lord, 1938, this society was formed informally. 1940, society was registered under Societies Registration Act. I was extended with aid in the pre-constitution time. 1950 Constitution of India came into effect.

CJI DY CHANDRACHUD: When was the aid granted?

M. R. SHAMSHAD: Between 1940 to '50. I don't have exact date.

CJI DY CHANDRACHUD: All right. Yes.

1 **M. R. SHAMSHAD:** And thereafter it was treated all along as minority institution till 1970.
2 1977 My Lord, the administration stated in one line that it is not possible to recognize you as
3 minority institution. One line.

4

5 **JUSTICE SURYA KANT:** 19?

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7 **M. R. SHAMSHAD:** 1977 My Lord, 13-01-1977. Again 03-05-1978, I was told that we will
8 not declare you minority, though it was being treated as minority.

9

10 **CJI DY CHANDRACHUD:** What was the date in '77 you said?

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12 **M. R. SHAMSHAD:** 13th of January 1977.

13

14 **CJI DY CHANDRACHUD:** Yeah, then repeated on?

15

16 **M. R. SHAMSHAD:** 3rd of May 1978.

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18 **CJI DY CHANDRACHUD:** Yes.

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20 **M. R. SHAMSHAD:** And 2nd of May 1980 finally, they said that your governing body is not
21 limited to the scholars of Muslim minority, that's why I will not treat you as minority. Out of
22 eleven members of governing body, I am told, one was from non-minority or two. And that
23 was the background My Lord, and till '70... till '80, when this last order was passed, I have
24 already placed before Your Lordship, nine judgments were there. What is the meaning of
25 administration? What is the meaning of minority and, what is the background of Article 30?
26 So, in a way, My Lord, 1940, society registration is like MAO of AMU, before 1920. MAO was
27 also a society. So that is the background in which, when this entire argument took place, this
28 was referred to, not like the submission that I see, that it was all unrelated issue and somebody
29 just wanted to refer it and... This is how the impression has been sought to be created in the
30 written submission of Union of India, My Lord. So, that is the background. Now I am coming
31 to, My Lord, Educational Institution. I have created a table, My Lord. I've created 1(e), My
32 Lord, if Your Lordship has? Just to run through fast, My Lord.

33

34 **CJI DY CHANDRACHUD:** Table at?

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36 **M. R. SHAMSHAD:** 1(e). Before I go to the table, My Lord, then, Your Lordship, I have
37 shown a *TMA Pai* and *TMA Pai* 779, My Lord, Volume 5(a).

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CJI DY CHANDRACHUD: You are showing us something at 779, I think.

M. R. SHAMSHAD: 779.

CJI DY CHANDRACHUD: What is that?

M. R. SHAMSHAD: It is the question which was left open to be decided by the regular Bench. 779, Question 3. Your Lordship has it? This question need to be answered by, need not to be answered by this Bench; it will be dealt with by regular Bench. 779, Volume 5(a). Dr. Dhavan has argued this in [UNCLEAR] of question in *TMA Pai*.

CJI DY CHANDRACHUD: Whether it was conjunctive or disjunctive or...

M. R. SHAMSHAD: So, now, my petition was finally disposed of, without going into this question 3(a), Volume 1(e), page 73. Volume 1(e), page 73.

CJI DY CHANDRACHUD: 1(a), right?

M. R. SHAMSHAD: 1(e). When it came before Honourable two judges, My Lord, at page 74, this is the same petition: 5457. Writ petition 5457, 1981. May I read, page 74? The petition above mentioned, along with other connected matters being called for hearing before this court on 11th March 2003. Upon pursuing the record of hearing Counsel appearing for the parties, this court passes following order: The matters are covered by decision of constitution bench in writ petition *TMA Pai* and connected batch decided on 3 October 2002. All statutory enactments, orders, schemes, regulation will have to be brought in confirmative with the decision of the constitution bench of this court, in *TMA Pai* case decided on 31-10-2002 and as and when the problem arises, the same can be dealt with, in an appropriate forum and in appropriate proceeding, and the matter is over, My Lord. So, this is how my matter got closed. It's another thing that there are many petitions. Even today, *Anjuman Rahmania* has *ad hoc* principle for last ten years, My Lord, and it is working, out of 53 sanctioned teachers' strength, they are working on 23 and 1800 students. So, that's another issue. So, these statutory modifications have not taken place till now. Rather, there are different statutory provisions which have come, taking away the right.

JUSTICE SANJIV KHANNA: What is the effect of this order then?

1 **M. R. SHAMSHAD:** The effect of the order, My Lord, in my view, would be that whatever
2 **TMA Pai's** ratio is, as per that ratio, all the regulations, all the rules relating to appointment,
3 administration will have to be brought in conformity with the ratio. That's what I can
4 understand. But what is happening on the ground is altogether different. There are regulations
5 saying that you will not appoint. Private agencies will appoint. This is what has happened in
6 **Anjuman Rahmania's** case. The entire right has been given to private agency that they will
7 prepare a merit list, and from that merit list, you will have right to choose. So, these things are
8 going on. This, with my respectful submission, this is not in conformity with this order. And
9 that is the ground for me approaching this Honourable Court. Coming to the second point,
10 because this was an issue which was raised by the other side, that's why, I thought appropriate
11 to address on this. I'll just conclude it quickly. Educational institution of their choice, it is a
12 very wide term which relates to setting up of an institution. That's what **Sidhajibhai** has said.
13 Setting up is important. Page 113, Volume 5(a). Setting up, with my respectful submission, can
14 be related to the historical facts which has already been argued by Dr. Dhavan. How it was set
15 it up, in **TMA Pai**. So, once you set up an institution, you exercise your choice. That could be
16 a primary school and that could be a university. Now, after 1950, it becomes a fundamental
17 right. Once it becomes fundamental right, then the entire system is obliged to give effect to
18 that right to choice. Maybe, I may be interested in establishing medical college. Medical college
19 is not a university. I'll go get myself registered under Societies Registration Act. Myself
20 registering into Societies Registration Act will not be termed as, 'establishing an institution'.
21 It will be only a compliance of a statute which is existing to promote excellence, which has
22 been argued. So, this word, 'setting up to establishment', the word used in 1950, I think, My
23 Lord, that needs little bit explanation on this. Chart 4, page 4, Volume 1(e). I'll just quickly run
24 through. It's only one page.

25

26 **CJI DY CHANDRACHUD:** The table?

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28 **M. R. SHAMSHAD:** The table, My Lord.

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30 **CJI DY CHANDRACHUD:** Where is that?

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32 **M. R. SHAMSHAD:** 1(e), page 4. This is all taken from **Azeez Basha**. On the left-hand side,
33 **Azeez Basha** says, educational institutions are of very wide import and would include
34 university also.

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36 **CJI DY CHANDRACHUD:** 1(e) is not opening.

37

1 **M. R. SHAMSHAD:** My Lord, 1(e).

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3 **CJI DY CHANDRACHUD:** 1(e), both for brother Surya Kant and me is not opening. We've
4 got it displayed now. *Aa gaya*, thank you. We've got it on the screen. You can just tell us. Yeah.
5 Educational...

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7 **M. R. SHAMSHAD:** Page 4, this is both side is ***Azeez Basha***. I have given pagination, I'll
8 not go there, just to save time. 'Educational institutions are of very wide import and would
9 include a university also'. That's what ***Azeez Basha*** says. Now, right hand side My Lord.
10 Before Constitution came into force, most universities were established by legislation. So, it's
11 all right. Not disputed....I am on the left hand side. Not disputed by the Union of India and
12 hence, it may be accepted that a religious minority had right to establish a university under
13 Article 30(1). So, in ***Basha*** also, the stand is that yes, you can do that. Then third, My Lord, it
14 is true, that the nucleus of Aligarh Muslim University was the MAO College. And on the other
15 side. , if Your Lordship sees, conversion of that college into university was not, however, by
16 Muslim minority. So, what was this conversion? Conversion was legislation, it took place by
17 virtue of Central Legislation. Now I'll come, left side My Lord once again. It may be that 1920
18 Act was passed as a result of efforts by Muslim minority. Right hand side, but that does not
19 mean that the Aligarh Muslim University, when it came into being under 1920 Act was
20 established by university... by Muslim minority. Fifth, My Lord, there was nothing in law then
21 to prevent them, MAO or University foundation from doing, establishing university if they so
22 desired, without asking Government to help them in the matter. But if, they had brought into
23 existence a university on their own, the degrees of that universities were not bound to be
24 recognized by the Government. That is the genesis My Lord. The entire thing falls back to
25 recognition. In 1920 in 1950, Article 30, terminology is used, "established", so that recognition
26 becomes established, that's the interplay. How this was argued My Lord, this is also
27 interesting. In ***Azeez Basha***, when the matter came before Your Lordship it was only in
28 relation to administer. It is the Union of India that took a stand that sorry, this university is
29 not established. So, the entire debate went in the line of established. Your Lordship may have
30 this for a moment, My Lord 3(a) I just want to show that My Lord. 3(a), page 7 My Lord. 3(a),
31 page 7.

32 This was not an issue of whether established or not established when ***Azeez Basha*** came
33 here. 3(a) page 7 My Lord, may I read the last para? The petitions have been opposed on behalf
34 of Union of India and the main contention is that Aligarh Muslim University was established
35 in 1920. So, this is what they said. And establishment was not by Muslim minority, but the
36 Government of India, by virtue of a statute, namely 1920 Act and therefore, the Muslim
37 minority could not claim fundamental right to administer Aligarh Muslim University under

1 Article 30. So, this came during the argument from Union of India. Now this will become more
2 clear My Lord, if Your Lordship comes to page 16. Placitum E-16, in the middle, My Lord this
3 is a small para of five lines, page 16. The contention of the petitioner is that by these drastic
4 amendment of 1965, Muslim minority was deprived of the right to administer Aligarh Muslim
5 University and this deprivation was violation of Article 30. So, the issue was this, Placitum E.
6 But Union of India says that so, that's why it becomes...entire debate becomes established. So,
7 I'm coming back to that Volume 1(e) table. VI My Lord, page 4 of that Volume 1(e) that Table
8 VI on the left hand side. There was nothing in 1920 to prevent Muslim minority, if it so chose
9 to establish a university, it did so, if it did so, the degree of such a university was not bound to
10 be recognized by the Government. It could not insist that the degree granted by the university
11 should be recognized by the Government. Now, on the right-hand side, My Lord, by Act of
12 1920, degrees were recognized by the Government, hence, an institution was brought into
13 existence, which could not be brought into existence by private Individual. Then, My Lord,
14 1920 Act is circumstance to show that the university came to be established in 1920 and not
15 by Muslim community. Such recognition dependent upon the will of the Government,
16 generally expressed through a statute. This narration is for pre-independence time. Now,
17 Article 30 is altogether in different shape. It is part of Part 3. It is in Part 3, where right to
18 establish and administer is held to be absolute. Later on, explained that regulatory things will
19 apply. Regulatory mechanism will apply. So, that is the position post-independence. There are
20 three judgements, at least to say, that pre-independence, post-independence doesn't matter.
21 You will interpret fundamental right to give effect to and for the beneficial interest of the
22 citizens. So, I'm not going into that, My Lord. Now, coming to the third point, My Lord,
23 recognition issue, because **Basha** says, such recognition dependent upon the will of the
24 Government, generally expressed through a statute. So, the entire issue is recognition...about
25 recognition. Your lordship may have 5(a) 76. Page 76. Page 76, My Lord. In between, My Lord,
26 in the middle of the page, from bottom it's about 15-20 lines...without recognition, therefore,
27 the educational institutions established or to be established by minority communities cannot
28 fulfil the real object of their choice and the right under Article 30 cannot be effectively
29 exercised. The right to establish educational institution of their choice, therefore, mean the
30 right to establish real institutions, which will effectively serve the need of their community and
31 the scholars who resort to their educational institutions. There is no doubt, no such thing as
32 fundamental right to recognition by the State except upon terms that tantamount to surrender
33 to the cost. Yes. Now, Your Lordship, this **Kerala Education**, My Lord, has been Your
34 Lordship may have 103, just to complete this, 103 in Volume 5(a) itself. This is **Sidhajibhai**.

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36 **CJI DY CHANDRACHUD:** Mr. Shamshad, can a minority institution say, I have a choice to
37 establish a primary school, a secondary school, high secondary school, an Intermediate

1 college, a professional degree college, it's my choice, no difficulty. Can say that, that choice,
2 according to you and the submissions on this side is recognized by Article 30. Educational
3 institutions of their choice - so it's across the spectrum. My question is this, can an Institution
4 say that when I establish, say a university, you must necessarily recognize my right to confer
5 degrees through that university without the provisions of an enabling statute?
6

7 **M. R. SHAMSHAD:** No.
8

9 **CJI DY CHANDRACHUD:** I think we'll all be on the same page.
10

11 **M. R. SHAMSHAD:** There are regulatory provisions.
12

13 **CJI DY CHANDRACHUD:** There are regulatory provisions. I will set up an engineering
14 college but my engineering college should be recognized for conferment of degrees,
15 independent of the AICTE Act, no? Or that I'll establish a medical college. So, if I have to
16 establish a medical college...
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18 **M. R. SHAMSHAD:** I will fulfil the requirements. I will have this big building. I will have
19 these many teachers. These are the curriculums which I will accept and if I have done all these,
20 then I am entitled to be recognized within the system and carry on with the medical education.
21

22 **CJI DY CHANDRACHUD:** Now, when is the university set up for the first time? When is
23 the university established for the first time?
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25 **M. R. SHAMSHAD:** University is established for the first time... because we are discussing
26 AMU at 1920. So, pre-independence position could be different. Post...
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28 **CJI DY CHANDRACHUD:** Would it be correct to say that the university owes its existence
29 only to the AMU Act of 1920? *Dehors* 1920 Act, there is no university at all.
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31 **M. R. SHAMSHAD:** No, My Lord. There is university. The university is a... **Basha** accepts
32 this, that I had right to establish university and it was there. But your degree will not be
33 recognized within the system. So, for...
34

35 **CJI DY CHANDRACHUD:** No, we are not on what your right was. Was there any university
36 at all in existence *dehors* 1920 Act? Or is it that the entire character of a university comes into
37 being only under the 1920 Act?

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M. R. SHAMSHAD: The requirement of recognition of that institution as university existed before 1920. I will say like this. And that is the requirement even today, for even if you want to establish medical college, you should have all these things. And once you assert this with the concerned institution, they have only this much interference that they will check it. They create a team and they go there, inspect. Whether it is there or not. If it is there, then you can't say you become general institution. It's minority institution. I have established it. Because I want to give some benefit to the community. It is not 100%. 50%, I'll give it to the community because they are lagging behind. So, that way, My Lord's question, a recognized university in the system could be one thing. An institution which has everything which entitles it to become a university, could be another thing. My choice. I can carry on with this without being recognized within the system. But I want to be recognized. So, I approach the institutions. I approach UGC today. I approach the Legislature.

CJI DY CHANDRACHUD: There's another issue, that today you cannot set up an institution for the conferment of degrees which are not recognized. You can't say that look...

M. R. SHAMSHAD: Yes, yes.

CJI DY CHANDRACHUD: Nobody can say that I will set up a university, you don't recognize my degrees. That the law doesn't permit. If you have to set up a university today, It has to be recognized within the fold or covenant. Otherwise, what will happen is... there's a reason for it. That students will take admission to a university; they'll pay valuable fees. They'll spend three years or four years of their life. At the end of it, get a degree which has no value.

M. R. SHAMSHAD: That aspect Dr. Dhavan has argued from the *Yashpal's* case.

CJI DY CHANDRACHUD: Nobody can even say that I will establish a university today and I'll take the consequence of non-recognition. I'm good enough. My students will still come to me. Nobody can say that today also.

M. R. SHAMSHAD: Yes, that's why I said, that I may have everything which entitles me to claim a recognized university. I may be running that institution. But the moment I have to have my relevance within the system with the degree, then I will go to the authority. The authority could be any statutory...

1 **CJI DY CHANDRACHUD:** We have got your point. I think the basic, the drift of the
2 submission is that the conversion of the status of MAO College into a university under the
3 AMU Act was for the purpose of ensuring that the degrees would be recognized under law and
4 therefore, the Muslim minority itself was a proponent of this move to convert this into... for
5 the passing of the legislation because you wanted the benefit of the degrees being recognized.
6 Therefore, the Act is only for the purpose of recognition. And therefore, you must look at the
7 antecedent historical circumstances.

8

9 **M. R. SHAMSHAD:** And in that background, the statute may have used the word,
10 'established' in the objectives, et cetera. That time nobody knew what is going to be Article 30
11 in 1950.

12

13 **CJI DY CHANDRACHUD:** Fair enough. Mr. Shamshad, should we close it at that? I think
14 It is about 45...

15

16 **M. R. SHAMSHAD:** One point My Lord. And *Xavier's* My Lord, just note down the pages
17 Volume 5(a) 217, 243, 255.

18

19 **CJI DY CHANDRACHUD:** Can you just say Volume 5(a), page?

20

21 **M. R. SHAMSHAD:** 217, Justice Reddy's opinion.

22

23 **CJI DY CHANDRACHUD:** Yes.

24

25 **M. R. SHAMSHAD:** 243, Justice Khanna. 255, Justice Matthew. And again 259 and 287
26 Justice Baig. They all have emphasized how recognition is important. That's why this is, My
27 Lord, nine judges, My Lord. So that's how I conclude this point. As far as the group rights are
28 concerned, there are various beneficial rights given to Scheduled Castes, Scheduled Tribes,
29 OBCs. By a statute, we create rights for women, physically disabled persons, victims of crime.
30 They all get different benefits as group in different educational institutions as part of
31 affirmative action.

32

33 **CJI DY CHANDRACHUD:** Similarly, Minorities also have a group right, which is
34 recognized by Article 29, 30.

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36 **M. R. SHAMSHAD:** And for that My Lord, *Kesavananda Bharati* My Lord 1(e). My Lord
37 I have just made a chart.

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CJI DY CHANDRACHUD: Just give us the page and we'll be done.

M. R. SHAMSHAD: That chart, Volume 1(e), page 5.

CJI DY CHANDRACHUD: We'll have a look at it. Don't worry.

M. R. SHAMSHAD: I have given instance of about...

CJI DY CHANDRACHUD: A basic proposition. I don't think you need to [UNCLEAR] on that.

M. R. SHAMSHAD: ...five universities, which are tribal universities created in tribal areas, for tribals. There is a university for OBCs and SCs. There is a university in Delhi, by Delhi Government for women and all are state funded. Yes, I can understand. In tribal universities, the other side may object, saying, that the reservation is defined nationally, so that will apply. But in that 2006 Act, there is a provision that reservation can be increased. So that is very flexible. So, once we can have these group universities...

CJI DY CHANDRACHUD: Why not for the Minorities?

M. R. SHAMSHAD: Why not to the minorities My Lord? And on this line, *Kesavananda Bharati* 1(e), page 78

CJI DY CHANDRACHUD: Page?

M. R. SHAMSHAD: 78. Page 78 1(e), this para 535(a). This has given entire background how this minority's right was discussed, debated, committees was formed and how it became so important. I will not read My Lord, it's a longish para and it has said that is in the nature of basic feature. So, I just conclude by saying that, this minority's choice, please don't make it exclusionary. *Sidhajibhai* said that you will not interpret with a cutting down effect. My Lord *Basha* is a cutting down effect, which takes away, para 8 of *Sidhajibhai* says that you will not interpret with cutting down effect. And My Lord this 5(a) page 87 *Kerala Education* also says that you will take into effect what is the impact of a particular interpretation. The impact is that, admittedly an institution which was established by minorities is being taken away. And what, 50% only seats that one aspires to give it to their own community, that's the effect. Otherwise, what rule we are not following? Mr. Sibal has already addressed Your

1 Lordship on this, that we follow everything. The effect is, that certain seat can go there, that's
2 the effect. And for that, Your Lordship, with greatest respect, Your Lordship will not give it
3 cutting down effect. Your Lordship My Lord Justice Sharma on that day asked Mr. Farasat,
4 aid issue. Aid has become irrelevant after two, three judgments. I feel, from the other side's
5 argument also today, that something is, there is some under current that aid is there so I will
6 take this...

7

8 **CJI DY CHANDRACHUD:** That's well settled. You don't have to give up your minority
9 status when you seek aid. Because today, there is a recognition that without aid, no institution:
10 minority - non-minority can exist. That merely by seeking aid or being granting aid, you don't
11 lose your right to claim your minority status. That's now very well settled.

12

13 **M. R. SHAMSHAD:** *Kerala* and *TMA Pai*, My Lord. Eleven judge bench.

14

15 **CJI DY CHANDRACHUD:** Thank you.

16

17 **M. R. SHAMSHAD:** I am deeply obliged, My Lord.

18

19 **CJI DY CHANDRACHUD:** Now we have got, I think, Mr. Mrinal Chakravarty, Mr. Pulkit
20 Aggarwal and Syed Mehdi Imam. So, we will call upon the other side now, I think. Thank you.
21 So, Mr. Attorney, you'll start?

22

23 **R. VENKATARAMANI:** My apologies Sir, for not sharing my very brief note earlier. I am
24 going to address the Court on a very narrow aspect of the matter, picking up from the last
25 threads about the competently established university. I would like to look at...

26

27 **CJI DY CHANDRACHUD:** Where is your note? Where to get it Mr. Attorney? All right, we
28 have just got the note, so they will [UNCLEAR]

29

30 **R. VENKATARAMANI:** In my understanding, this is not a case which has emanated from
31 deprivation of an Article 30 right. Somebody keen to establish an institution of their choice,
32 and that came to be declined, and therefore we need to reopen *Azeez Basha* for the purpose
33 of understanding "establish and administer". If that is not so, we are only looking at *Azeez*
34 *Basha* whether it is rereading of *Azeez Basha* would have any future implication. We could
35 have a future implication only if there is a deprivation in a current context. If that is not so,
36 *Azeez Basha* is a standalone case. It doesn't have any future implications at all.

37

1 **CJI DY CHANDRACHUD:** Should we read the note, so that you'll have your...

2

3 **R. VENKATARAMANI:** Let me just quickly read my note, and then pick up [UNCLEAR] of
4 the notes. The jurisprudence of Article 30, besides the minority feature, has looked at two
5 other aspects of the provision, namely, educational institution and choice regarding such
6 educational institution. Having regard to the constitutional protection and guarantee
7 underlying Article 30, Supreme Court has not read any limitations on the scope of the choice
8 of educational institution. Thus, we find that educational institutions perpetuating to impart
9 secular education in all subjects, have been read into the choice aspect of Article 30. It can be
10 further stated that it cannot be the concern or authority of the State to enquire into as to how
11 the choice of educational institutions facilitate or serve the interest or needs of a minority
12 community. Protection, promotion or preservation of identity of minority section is the
13 philosophy underlying Article 30. However, Article 30 is an enabling provision as well. The
14 further key to understanding Article 30, lies in exploring the right to establish and administer
15 parts of the provision. In order that educational institution of a particular character or class, I
16 mark that aspect of it, of a particular character or class could be established by any person,
17 minority or otherwise - the first prerequisite would be the legal competence or authority to
18 establish that class of institution. In the absence of a legal competence to establish a given
19 class of institution, the question of availing all attendant rights and claims in relation to Article
20 30 cannot arise. Under the constitutional...

21

22 **CJI DY CHANDRACHUD:** Can you repeat that? Could you just go back to Item 3?

23

24 **R. VENKATARAMANI:** Item?

25

26 **JUSTICE SANJIV KHANNA:** Last part of 2 and 3.

27

28 **CJI DY CHANDRACHUD:** Can we reread 2? Just a little slowly, because I am also...

29

30 **R. VENKATARAMANI:** However, Article 30 is an enabling provision as well. The further
31 key...

32

33 **JUSTICE SANJIV KHANNA:** What do you mean by enabling provision? What do you
34 mean by enabling provision?

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36 **CJI DY CHANDRACHUD:** When you say enabling, are you referring to the choice of the
37 minority then...

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JUSTICE SANJIV KHANNA: Then you have already dealt with it in Article 1, paragraph 1.

CJI DY CHANDRACHUD: You see, it's not an enabling provision in the sense in which we conventionally, is called enabling.

R. VENKATARAMANI: The choice. The choice part of it is enabling.

CJI DY CHANDRACHUD: Because enabling provision is like Article 15, where you have the choice to make a provision. 30 is not enabling in so far as the State is concerned. It's an obligation on the State to recognize that [UNCLEAR].

R. VENKATARAMANI: Enables the minority. I am putting it as enables the minority... the choice part of it...[UNCLEAR] higher dimensions.

CJI DY CHANDRACHUD: ...provision in relation to conferring a choice on minorities, it's a...

R. VENKATARAMANI: That's right. That's what it will do.

CJI DY CHANDRACHUD: It can't be that I, as a State, can either decide to grant or deny you that status.

R. VENKATARAMANI: I am not talking about the State. I am talking about minority.

JUSTICE SANJIV KHANNA: Therefore, the words, "as well" is little, may not be appropriate. If I can be permitted to use that word.

R. VENKATARAMANI: I have used it deliberately, in the sense that the choice part is available to every citizen, but the higher status is given to a minority. Therefore, I say, it enables them to reach a level beyond the other common consideration. That's how I put it. So, paragraph 3: In the absence of a legal competency establish a given class of institution...

CJI DY CHANDRACHUD: Just read this... can you go back to your second sentence of para 2?

1 **R. VENKATARAMANI:** Yes. In order that an educational institution of a particular
2 character or a class could be established by any person, minority or otherwise, the first
3 prerequisite would be the legal competence or authority establish that class of institution. As
4 we go further I will give further explanations about it. So, then I go to para 4. 'Under the
5 constitutional scheme, the power of competence, right to establish educational institution can
6 be located only under an authority granted by a competent legislation'. For instance, Entry 25
7 talks about education. Then Entry 14, List 2 talks about agriculture education. Similarly, the
8 Entry 64 talks about institutions of scientific, technical education and are treated as
9 institutions of national importance.

10

11 **CJI DY CHANDRACHUD:** That is List 1?

12

13 **R. VENKATARAMANI:** That's right. Then, 'prior to the Constitution, schools, colleges,
14 other teaching institutions were established, while societies or trusts by reason of enabling
15 authority granted under the Societies Registration Act 1860 or the Trust Law to act towards
16 the promotion of literature, science, fine arts, and for the diffusion of useful knowledge.
17 Educational institutions such as schools and colleges are tools and instrumentalities in the
18 pursuit and promotion of such activities. In other words, the competence to establish
19 educational institutions of the above class towards imparting knowledge on the above-
20 mentioned field of study was made available under the said legislation'. I'm talking about the
21 competence. Now, paragraph 5. 'Prior to the Constitution, there was no other legislation that
22 conferred competence on any set of persons to establish a university as such. There was no
23 legislation that conferred competence to establish universities. In the absence of a law
24 conferring or granting competence to establish a defined class of institutions, namely a
25 university, the question of establishing university did not arise. The Aligarh Muslim University
26 is a product of a standalone legislation enacted by the then existing provincial Legislature. The
27 antecedent events, namely the establishment of Muhammadan Anglo Oriental College sought
28 to be connected with the coming into being with Aligarh Muslim University cannot be said to
29 be any part of that competence to establish the university as such. The Muhammadan Anglo
30 Oriental College was set up by the Muslim community, deriving it's competence granted under
31 the enabling provisions of the Societies Registration Act. That legal competence to set up
32 educational institutions such as a school or a college cannot be extended to legal competence
33 to set up a university. In other words, the power to establish a given class of educational
34 institution must be granted under a statute. Prior to the constitution, there was no power or
35 competence available under any legislation either to establish a university or to convert a
36 school or a college into a university. Consequently, the community of persons who had set up
37 the Muhammadan Anglo Oriental College did not have the competency to establish a

1 university and Aligarh Muslim University was not established by them in the above legal sense
2 and understanding. Establishment of a college is different from establishing a university and
3 the one does not and did not merge into the other. **Azeez Basha**, rightly understands this
4 position and rightly did it hold that when the university was not established by the Muslim
5 minority, it did not have the right to administer it'. Then, in order therefore, when after they
6 are coming into the fold of the Constitution, a minority community can claim the protection
7 under Article 30, it must first have the legal competence to establish a particular class of
8 institution. The Societies Registration Act, like the law relating to trust, continued to be part
9 of an enabling legal framework, by reason of which, schools and colleges can be established.
10 There must therefore, exist a similar enabling legislation that either enables or facilitates or
11 grants competence to establish a university. The scheme of the University Grants Commission
12 Act to the extent it regulates all matters relating to universities, including deemed universities,
13 is comparable to such an enabling law. In the absence of a competence or authority granted a
14 conferred under a law to establish a university, no person whether belonging to a minority
15 community or otherwise can establish a university. The words, "educational institutions of
16 their choice" cannot be construed by itself conferring an authority to establish any class of
17 institution, regardless of a legal competence to do so. The authority to establish a given class
18 of institution must first precede and be traceable to and be located under an enabling statute.

19
20 The choice aspect of educational institution will then follow. Within the scope of enabling legal
21 framework which may confer the authority to establish institution the choice aspect will be
22 unfettered and free, and this is the essence of Article 30. So, neither prior to the Constitution,
23 nor under the Constitution the minority community was clothed with the authority to establish
24 a university. In this legal sense, no infirmity can be attributed to **Azeez Basha**. The unfettered
25 freedom, the established educational institutions of their choice does not extend to the grant
26 of exemption from the obligation to abide by other constitutional demands and requirements.
27 For example, the obligation to provide a provision, relating to reservations or matters relating
28 to regulation where appointments of teaching and non-teaching staff, etc. and including
29 general regulations relating to standards and quality of education. The choice aspect of
30 institution does not exempt the minority from constitutionally sanctioned regulations or
31 constitutional prescription, which are themselves as important as a choice. As long as the State
32 does not impinge on the choice and which the state cannot, Article 30 is intact. The claim
33 raised in **Azeez Basha**, has wrongly interpreted the words 'establish and administer' is
34 misconceived. The question is not only of disjunctive or conjunctive reading, the fundamental
35 question is one of the competence of the authority to set up a university. That being so there
36 is no warrant or need for reconsidering **Azeez Basha**, as it has no application to any post-
37 constitutional institutions, including a university. Therefore, follows that for the purpose of

1 Article 30, educational institutions need not necessarily include a university and such an
2 educational institution subject to relevant regulatory restriction. Therefore, the argument I'll
3 just conclude by a few more... if you go back to the history of granting degrees in England,
4 from 13th century onwards, Oxford, all those other universities.

5
6 **JUSTICE SANJIV KHANNA:** If one accepts your, if one goes by the tenor of your
7 arguments, therefore, if a legislation is today made that school can be only established by this
8 method, by registration under this Act, then the right under Article 30 will also not be there.
9 Suppose tomorrow, like the UGC Act, we have another legislation which says that the schools
10 will be only established if you register under this particular Act then that right will be also
11 under Article 30, fundamental right under Article 30 will be also diluted to that extent, the
12 choice will be then diluted.

13
14 **R. VENKATARAMANI:** Refer the whole question of a choice, will have to be seen within an
15 overarching legal framework or a constitutional framework. Constitution provides for an
16 overarching framework. So, statutes come in and say that this is what you will do, these are
17 the kind of educational institutions are to be setup. That's why talking about a character, a
18 class of an institution. So, we did not.... All the judgments prior to, for instance, even *St.*
19 *Stephens*, the court did not go into the question where is the legal competence to set up an
20 institution? Does it flow from Article 30 by itself? Perhaps the answer would be no. Article 30
21 comes in at a point of time when the competence part of it is answered. If it is answered well,
22 within that broader legal framework a constitutional framework, my choice is unfettered.

23
24 **CJI DY CHANDRACHUD:** But in the absence of an enabling legal framework, there is no
25 choice within the meaning of Article 30.

26
27 **R. VENKATARAMANI:** No, Article 30's premise is on the availability of the legal
28 framework. Otherwise, it will be a vacuum. Article 30 envisages it because it's a history about
29 setting up institutions, including universities.

30
31 **JUSTICE SANJIV KHANNA:** Will it not make it then subservient to a statutory legislation?

32
33 **R. VENKATARAMANI:** No. That's why we are caught into a circular argument. We are
34 trying, therefore try to come out of that. The argument therefore is, my choice, which itself
35 confers an authority to determine what will be the nature of a class of an institution. But in the
36 absence of a defining framework, a legal framework, the choice will remain very abstract. It
37 will have no social relevance and importance. Therefore, you must have...you can work

1 wherever you are, you must work within the broader enabling, legal or a constitutional
2 framework. And within that, what I want to do, whether I want to have institution A, B, C or
3 D, and that is my choice. And how that choice will enable me to exist as a minority is not the
4 concern of State at all.

5

6 **CJI DY CHANDRACHUD:** Pre-constitution, AMU was set up under the 1920 Act. Post-
7 constitution, are there any universities which today have recognition as minority institutions
8 post-constitution?

9

10 **R. VENKATARAMANI:** No.

11

12 **CJI DY CHANDRACHUD:** Something which is...

13

14 **JUSTICE SANJIV KHANNA:** Sorry to interrupt. Probably after the Minorities Education
15 Act 2005 and 2010, it's possible. But there is...

16

17 **R. VENKATARAMANI:** Let us look into the law. Let us look into the law, just briefly and
18 then probably that will answer some of the... that would probably also support what I'm trying
19 to point out. I'm not saying...

20

21 **JUSTICE SANJIV KHANNA:** But your argument you've accepted will mean any university
22 set up by...

23

24 **R. VENKATARAMANI:** I will just pick up two provisions of the Act.... it is PDF, I'm sorry.

25

26 **JUSTICE SANJIV KHANNA:** 2005 and then subsequent amendment in 2010, with regard
27 to minority education, then possible, it is possible to set up because once you get the status
28 from that under the said Act, then obviously you can get it. But that was pointed out by Mr.
29 Sibal during the course of arguing.

30

31 **R. VENKATARAMANI:** I heard.

32

33 **JUSTICE SANJIV KHANNA:** But prior to that, prior to 2005, therefore, it was, according
34 to you as far as a university is concerned, they cannot be any minority university.

35

36 **R. VENKATARAMANI:** No. Let me close my eyes to a statute like that. Let's suppose
37 Parliament enacted a different law conferring an authority to set up universities and any

1 citizen whatsoever, and then brought about limitations on that power to set up a university.
2 The story would have been different. So, therefore, to say that Article 30 by itself is a reservoir
3 of a competence or a power to set up a university, we are not talking about **Azeez Basha**, we
4 are not talking about a future implication of a deprivation in educational institution.
5 Therefore, if we stay beyond that, then there are some problems.

6

7 **CJI DY CHANDRACHUD:** Your argument, if it is stretched, will apply to every educational
8 institution.

9

10 **R. VENKATARAMANI:** That's true.

11

12 **CJI DY CHANDRACHUD:** But according to your argument it wouldn't then only apply to
13 university. But unless there is an enabling legal framework, you cannot set up any educational
14 institution in India, if your argument is right.

15

16 **R. VENKATARAMANI:** Yes.

17

18 **CJI DY CHANDRACHUD:** You can't set up even a primary school. Your argument will
19 apply to a school as well.

20

21 **R. VENKATARAMANI:** That's true. That's what I'm saying, before, we have today, a
22 plethora of legislation...

23

24 **CJI DY CHANDRACHUD:** So, according to the Article 30 right is contingent on an enabling
25 provision of legislation recognizing that right in statutory term.

26

27 **R. VENKATARAMANI:** Let me say the enabling legislation may have two components. One,
28 to enable, to set up, number one, to regulate what you do when it's very..

29

30 **CJI DY CHANDRACHUD:** Regulation, there is no difficulty. Enabling regulation which
31 says that, look, you have to have so many teachers. You must have so much of reservation, you
32 must pay your salary, teachers' salaries, to... at a rate which is prescribed by the Union
33 Government; that you will get paid only if you fulfil these conditions of infrastructure. There's
34 no difficulty about that. The problem about your argument is because once you say that, your
35 right under Article 30 is contingent on an enabling legal framework that will apply to every
36 right, every matter of choice under Article 30.

37

1 **R. VENKATARAMANI:** That's right. But then to say because it will apply to every citizen
2 then how do we locate Article 30, the importance of Article 30, then we need to depart from
3 that regular framework and say, have something special for Article 30. My answer would be
4 no. Therefore, the competence to set up a particular class of institution is what we were trying
5 to talk about. We're not talking about university in abstract. Any class of an institution, you
6 will have a legal competence, because every attendant consequences will follow with a
7 competent.

8

9 **CJI DY CHANDRACHUD:** And does it make a difference whether the institutions set up by
10 or under a statute.

11

12 **R. VENKATARAMANI:** I know it has created some...

13

14 **CJI DY CHANDRACHUD:** Because by a statute, you can possibly see in the case of AMU.

15

16 **R. VENKATARAMANI:** In *Vaish Degree College*...

17

18 **CJI DY CHANDRACHUD:** That's right. That it is being set up by this statute. What about
19 university of an institution. We forget the university issue. You set up an institution under a
20 statute.

21

22 **R. VENKATARAMANI:** I'll just give you a few examples. There are some states which have
23 called Universities Legislation. Karnataka, Kerala, they have this University Legislation.
24 Under that Act, you can set up a university or they're a private universities. I want to set up a
25 university, but I can't do by my own volition. There are any number of private universities. The
26 State Legislature intervenes. So, in the absence of an intervention by a Legislature, even
27 private universities cannot come up. Therefore, the competence part of it, either a Legislature
28 intervenes or a law intervenes; that provides you and gives you that competence. It is very
29 important. Therefore, prior to 1920 Act is where the Legislature intervenes, I am setting up a
30 university.

31

32 **CJI DY CHANDRACHUD:** But does the fact that the Legislature... you rightly gave the
33 example or, say, legislation in the states which has the standalone legislation, providing for a
34 particular establishment of a particular university in a state. Private universities have been
35 established in Tamil Nadu, for instance.

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37 **R. VENKATARAMANI:** Any number of private universities.

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CJI DY CHANDRACHUD: Any number of states. Haryana. So many universities have been established under deeming legislation of the State Governments. Now, does the fact that the university has been established by legislation of the state by itself amount to a denial of the right to claim minority status?

R. VENKATARAMANI: Now, in a given case...

CJI DY CHANDRACHUD: Does the fact that the university has been... institution has been set up under a law amount to a denial of its right to claim minority status?

R. VENKATARAMANI: Right.

CJI DY CHANDRACHUD: If the answer is in the negative, then, when do you say that, well, your minority status cannot exist?

R. VENKATARAMANI: May I put it... the question...

CJI DY CHANDRACHUD: Suppose, there is a society. Suppose, there's a society which is established by a minority A, whether it's Zoroastrian, whether it's linguistic or religious minority. That minority, then seeks to set up a university. A law is enacted by the State Legislature providing for recognition as a university, that the university is set up. Now, the institution itself, the foundation is by a minority. The society is a minority society. The state legislation confers upon it the character of a university. Does that by in itself amount to a denial of the minority status? Two, suppose, there is state legislation which allows for the setting up of universities. Right? And a particular minority seeks to set up an institution within that, within the purview of that legislation. Would that by itself...

R. VENKATARAMANI: My answer to that...

CJI DY CHANDRACHUD: Would that by itself lead to the denial of minority status?

R. VENKATARAMANI: My answer to that, now that there is a law occupying this field, Minority Educational Institutions Act. So, that will address all these questions. And even that... let's only look at two provisions of the Act. Section 10.

CJI DY CHANDRACHUD: Let's see the Act. Where is it?

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R. VENKATARAMANI: It is Volume 4(a). PDF... The Act begins at PDF page 221. At page 223, present Solicitor's note on this Act is highly exhaustive. He will deal with it. But just want to point out, say that 10 and 10(a). 10 begins with this, 'subject to the provisions...'

JUSTICE SANJIV KHANNA: Mr. Attorney, is there any university established, minority university established after 1950 till 2010?

R. VENKATARAMANI: No.

JUSTICE SANJIV KHANNA: There's none?

R. VENKATARAMANI: They are all schools, colleges, deemed universities under the UGC Act.

JUSTICE SANJIV KHANNA: After 2010, obviously, with the amendment made in the Act?

R. VENKATARAMANI: There are. Therefore, Section 10 talks about, 'subject to the provisions contained in any other law for the time being enforced.' So, this could be a law relating to regulation. This could be a law providing for certain requirements relating to establishment. It could be any law.

...Some about this English position. It's a....

CJI DY CHANDRACHUD: The right under Article 30 in certain areas as our law has evolved, may well be conditional or contingent upon provisions of a regulatory statute. For instance, the right under Article 30 to establish and administer institutions of your choice. When you seek recognition, that recognition is contingent on provisions of regulatory statutes. When you seek the award of degrees, that right would be contingent on your complying with provisions of regulatory statutes, which are intended to define what the course of study should be. What should be the length of duration of the courses. When you seek to get aid from the state, there would be regulatory statutes which would define what is the nature of staff that you are going to engage. Will you engage people who have basic minimum qualifications? If you are a law school that your staff must have passed the NET, SET examination. Right? If you have to appoint a professor, that Professor must have completed a doctoral degree. Years of experience for movement from, say, an Assistant to an Associate Professor, Associate Professor to Professor, so on and so forth. Therefore, there can be no manner of doubt that the right under Article 30, the exercise of the right is contingent on compliance with regulatory

1 provisions. Those regulatory provisions ensure that the true character of an institution as an
2 institution of excellence as our court has said repeatedly, is maintained. Second, that even
3 minority institutions do not fall below a national standard in terms of the quality of the
4 students which you admit. They must all pass the CLAT exam for admission to Law, or they
5 must all pass the medical, the NEET examination for admission to Medicine, that they may
6 pass the JEE for admission to Engineering degree courses. So, regulatory statutes can define
7 the minimum qualifications for the body of students. The staff and the quality of the
8 infrastructure which the institution must maintain in order to gain recognition. No difficulty.
9 Now, the law has made that very, very clear. Minimum salaries for instance, **Frank Anthony**
10 **Public School** says that. But can the right to establish an institution itself be contingent on
11 recognition by an enabling statute, that your argument seems to be over broad.

12

13 **R. VENKATARAMANI:** I'm not saying recognition by...

14

15 **CJI DY CHANDRACHUD:** Because what you have said in para 9, 'the choice aspects of
16 institutions does not exempt the minority from constitutionally sanctioned regulations or
17 constitutional prescriptions which are themselves as important as a choice.' No difficulty.
18 Regulatory provision, the State is entitled to make. I don't think any minority today can say
19 that I am exempt from regulatory provision. But can you say that look, your right to establish
20 yourself as a minority institution itself is contingent on enabling provisions in a law. Then
21 you'll be making a constitutional right subservient to a statute. The Constitution can do it. The
22 Constitution can do it. We're not saying that the Constitution, if it has done it in a given case
23 that provision is bad, but 30 doesn't do it.

24

25 **R. VENKATARAMANI:** I'm not trying to convey this proposition that recognition of setting
26 up an institution is part of a regulatory [UNCLEAR]. Therefore, it is subsumed within I don't
27 propose say that. What I'm saying is, before anybody can set up an institution, you must have
28 some authority of law or a competence or a power available to you under some law. You can't
29 say, I desire therefore I set up.

30

31 **CJI DY CHANDRACHUD:** Undoubtedly. For a moment we concede that point.

32

33 **R. VENKATARAMANI:** Right.

34

35 **CJI DY CHANDRACHUD:** But your argument that before you set up an institution, there
36 must be an authority of law. Even if you want to set up a primary school, there has to be an
37 authority of law. Some law in Uttar Pradesh, Maharashtra, Tamil Nadu, where you are allowed

1 to set up that. But does that by itself detract from your right to establish a minority institution
2 within the framework of the law? Or to put it differently...

3

4 **R. VENKATARAMANI:** Within the framework of the law, then the choice is entirely there.

5

6 **CJI DY CHANDRACHUD:** Or is it your argument that once there is a law, the moment you
7 establish the institution under the law, you lose your right to claim minority status.

8

9 **R. VENKATARAMANI:** That's not what, I will follow from what I'm saying.

10

11 **CJI DY CHANDRACHUD:** Or your right to claim minority status would be contingent on
12 the law recognizing your right to claim minority status. That I'm not sure will carry.

13

14 **R. VENKATARAMANI:** That I'll follow from my submission. I'm only trying to narrow
15 down a proposition that before you set up any institution, of a particular class of institution,
16 where will you derive your competence or authority? If that competent authority is lacking,
17 you can't say independent of that competence, I still have a right to establish. That's all what
18 I'm trying to point out. That's what *Azeez Basha* came, prior to the Constitution, we don't
19 have Article 30.

20

21 **CJI DY CHANDRACHUD:** But can the law say, that because you do not have a right to
22 establish an institution absent an enabling provision of law and now, I'll have an enabling
23 provision of law, my enabling provision of law is contingent on your not claiming Minority
24 status. Can you do that?

25

26 **R. VENKATARAMANI:** No.

27

28 **CJI DY CHANDRACHUD:** That'll be violative of Article 30.

29

30 **R. VENKATARAMANI:** That's not what I tried to put. No, I'm not saying. In the context, in
31 the narrow context of *Azeez Basha*, I think this is what probably one would look at, and I
32 was trying to point out, in England, although the universities came by a Charter...So, in a sense,
33 therefore, even today, the University Grants Commission Act, it could have probably a
34 different legislation. It could have been a legislation concurring authority on any citizen,
35 including minorities, to set up universities, but it did not do so. It is again enabling legislation,
36 and you want to set up a university or to become a deemed university, you follow within this
37 requirement in a regime. So this is older universities operate under a Royal Charter. Some of

1 the charters go back many centuries. The universities of Oxford and Cambridge received theirs
2 in 13th Century. In Scotland, so and so granted theirs in the 15th. A number of newer
3 universities are created following the two Acts of Parliament. In the 1992 Act is Higher
4 Education Act, is more or less corresponding to the UGC Act. And then further, Higher
5 Education Act authorized a Privy Council to specify providers of higher education as
6 competent to award and taught and research degrees'. Therefore, the question of degree. We
7 are talking about that. So, who can confer a degree? Why can't the person establishing a college
8 confer a degree? For that part again, there are certain competencies available to do something
9 in the field of education.

10

11 **CJI DY CHANDRACHUD:** Right. We have got the point. Thank you, Mr. Attorney-General.
12 Thank you.

13

14 **DINESH DWIVEDI:** May I add something? Para 22, page 92. Even if regulations are
15 invasive, they will fall violated of Article 30. For example, in *St. Xavier's...*

16

17 **CJI DY CHANDRACHUD:** Head of the institution. I'll give you a classical example. Our
18 Court is held that you have an unfettered right to appoint the Head of the institution. Right?
19 No law can say that the head will be chosen by a panel consisting of, say, the Vice Chancellor...a
20 professor nominated by the Vice Chancellor. That is clearly violative of Article 30.

21

22 **DINESH DWIVEDI:** Even regulations cannot be invasive. *Lilly Kurian* says, you dismiss
23 somebody, you can't say you require the permission of the Vice Chancellor.

24

25 **CJI DY CHANDRACHUD:** So, for institutes, I'll give you an example. See Section 5. There's
26 an Act in Maharashtra called the Maharashtra Educational Institutions Conditions of Service
27 Regulation Act. Section 5 says that the right to appoint a Head and any two other Professors,
28 any other two teachers is exclusively given to minority institutions. Because our Court says,
29 Head you cannot say, that I'll impose the Head on you. There's an unfettered right to appoint
30 a Head. The Vice Chancellor can't say, that I will... Vice Chancellor of a university which is, to
31 which that institution is affiliated, Vice Chancellor cannot say that, well, I will constitute a
32 committee to appoint your Head. Our judgements have consistently held, Head you have to
33 appoint. Because Head of the institution decides that determines the character of the
34 institution.

35

36 **DINESH DWIVEDI:** That's the point I was making.

37

1 **CJI DY CHANDRACHUD:** Yes.

2

3 **R. VENKATARAMANI:** *Vaish Degree college* reference. Just make a note of it about,
4 'by or under'. It has an exhaustive...

5

6 **CJI DY CHANDRACHUD:** Which one?

7

8 **R. VENKATARAMANI:** *Vaish Degree college*. The 1976...

9

10 **CJI DY CHANDRACHUD:** Justice Bhagwati's judgment, *na*?

11 Yes, Mr. Solicitor General.

12

13 **TUSHAR MEHTA:** Fully agree with Mr. Dhavan that if regulation is invasive which denies
14 right under Article 30, the regulation would be bad. There is no quarrel on that. But I am taking
15 Your Lordships to a different point of view.

16

17 **CJI DY CHANDRACHUD:** Yes.

18

19 **TUSHAR MEHTA:** Your Lordships are examining the law laid down in *Azeez Basha*,
20 where *Azeez Basha* examines the law which is enacted by the Imperial Parliament, 103 years
21 from today. We are traveling back to hundred and... it's 2020. We are in 2024. My Lord, *Azeez*
22 *Basha* will have to be understood in the context of the historical background in which Act of
23 '20 was passed and historical background in which *Azeez Basha* was decided. Because my
24 respectful submission is, *Azeez Basha*, does not lay down a law of any universal application
25 nor does it lay down any ratio which the petitioners have understood. The petitioners' main
26 argument was that *Azeez Basha* lays down that once you are established by an Act of
27 competent legislature, you can never become a minority institution. And the logic behind their
28 submission is, and rightly so, if that is the ratio but it is not, that now UGC Act requires that a
29 university can be incorporated only by an act of Parliament or competent Legislature, and
30 therefore, there can be no minority institution... a minority university. That is not the ratio of
31 *Azeez Basha*.

32

33 **CJI DY CHANDRACHUD:** Yes.

34

35 **TUSHAR MEHTA:** There was a particular regime in place during which My Lord, this
36 movement started, of establishing universities, that is somewhere in or before 1920. There
37 were educational institutions, either recognized through an Act of the Imperial Legislature or

1 otherwise. There were several universities, several institutions which were, which had no
2 blessings of the Imperial Legislature. There were simultaneous two streams which were going
3 on. One was, and we may not forget My Lord, 20s were the years, where the freedom struggle
4 was at its peak. One stream was that, no, we will have our own university and we will not
5 depend upon the British Government 's legislative competence or legislative power. The
6 Nationalists, they are historically called 'The Nationalists'. Without meaning any disrespect to
7 the other group. That's how they are described. Second was that, no, we must have an Act of
8 the Imperial Legislature, so that the degrees are recognized, where, in the employment of
9 Crown. Degrees of non-registered universities were also recognized, but not in the services of
10 the British Government. And not, of course, outside the country.

11

12 **CJI DY CHANDRACHUD:** Yes.

13

14 **TUSHAR MEHTA:** So, having more than one options and several. In fact, the majority, like
15 Vishwa Bharati University, Shanti Niketan. Shanti Niketan was an institution. It had no
16 blessings of the British Government. It became university after UGC and it was granting
17 degrees, and their degrees were valuable, IIT Roorkee was an institution without any imperial
18 legislation. You had that option.

19

20 **CJI DY CHANDRACHUD:** When was IIT Roorkee, set up actually?

21

22 **TUSHAR MEHTA:** 1857. The name was different, Thompson College of Engineering. But
23 1857 thereafter, in somewhere in 30s, it became IIT Roorkee but remained unaffiliated.
24 Ultimately, I'll just say the end first and then take Your Lordships to the historical background.
25 There were two simultaneous streams going on. Those who were in favour of, so far as this
26 university is concerned, those who were in favour of accepting the conditions imposed by the
27 British for the purpose of passing an Act and making you a university, and the second that, no,
28 we will continue with our minority Muslim status. We will not succumb to the British. We
29 don't wish because Britishers were saying that, if you want a university status, you will have to
30 give up some of your minority status. It would be a kind of neutral or kind of a secular network,
31 which we will provide."

32

33 **CJI DY CHANDRACHUD:** Not just minority status, but your cultural status as well.... a
34 non-minority cultural status which you are claiming.

35

36 **TUSHAR MEHTA:** My Lord, that I will show. Those who were in favour of having a
37 university called Aligarh Muslim University under an Act of Imperial Legislation provided for

1 that, and an Act was passed where they surrendered many of their rights, and those who were
2 confirmed, were very sure that, "No, we will not." It would be an Islamic institution, they, in
3 1920, from the premises of Aligarh Muslim University declared Jamia Milia Islamia. Jamia
4 means *university* in Urdu, Milia means *national* and Islamia means *Islam*. They continued
5 their status as minority institution, the way they wanted without surrendering anything, and
6 they were registered after the UGC Act came in to force. They were recognized. I'll take Your
7 Lordship through that. Therefore, the ratio in **Basha** is that at a time where there were no
8 Fundamental Rights, there was no Article 30, you had a choice of either not surrendering your
9 rights or surrendering your rights and get an Act of Parliament, Imperial Parliament; you
10 chose to surrender and therefore it was established when it was passed by Imperial Legislation.
11 In 1920, there was no Article 30. So, it was a voluntary surrender. Today, I cannot be asked to
12 surrender my fundamental rights but Britishers did, and they could. And everything is
13 documented. And documents are on record from the beginning. What I have done, I was told
14 by learned senior, Mr. Sibal's objection that I have placed some new documents on record.
15 They are Acts of constituting or incorporating several universities. I'm not going to read them,
16 but I don't wish to be accused of suppressing something. The way they did. They placed on
17 record 3rd September 1965 debates without placing 2nd September. I have placed everything.
18 I'm not going to read them. Now please see my note, II(f). And kindly examine **Azeez Basha**,
19 in this context. Note 2 (f), My Lord, page 1. I'm sorry. Volume 22(f), page 1. This was the regime
20 in place where 1920 Act was passed.

21

22 **JUSTICE SANJIV KHANNA:** Just one moment...

23

24 **TUSHAR MEHTA:** This is Roman II. II(f). I'm sorry. I'm correcting it. I should have Roman
25 form. With Your Lordship's permission, we'll change it to 2(b)(1). I think it was 2(b). It should
26 have been 2(b)(1). Done by someone. Anyway, I'm not. Does Your Lordships...?

27

28 **JUSTICE DIPANKAR DATTA:** Vishwa Bharati came before UGC?

29

30 **TUSHAR MEHTA:** Much before. Vishwa Bharati University, Santiniketan obviously, much
31 before.

32

33 **JUSTICE DIPANKAR DATTA:** Santiniketan was there, but Vishwa Bharati University
34 came sometime in 1951.

35

36 **TUSHAR MEHTA:** It was by an Act of Indian Parliament.

37

1 **JUSTICE DIPANKAR DATTA:** Indian Parliament.

2

3 **TUSHAR MEHTA:** Yes, Your Lordships are right. I stand corrected.

4

5 **JUSTICE DIPANKAR DATTA:** You said after UGC Act.

6

7 **TUSHAR MEHTA:** No, it was before that. I stand corrected. I have that year also. And the
8 Act also. Santiniketan, of course, was started by father of Rabindranath Tagore but expanded
9 and it reached its glory during the period of Rabindranath Tagore.

10

11 **CJI DY CHANDRACHUD:** And I also sort of trace, I mean, those universities are not in
12 question before us, so therefore, we are not at all going to be commenting on them. But
13 institutions which did get minority status, what was the course which they followed? What was
14 the path which they followed? And you may want to make a distinction with AMU, if you want
15 to make... that's your line of argument.

16

17 **TUSHAR MEHTA:** The question of minority status came only after the Constitution came
18 into effect.

19

20 **CJI DY CHANDRACHUD:** Right.

21

22 **TUSHAR MEHTA:** I have weaved that also in.

23

24 **CJI DY CHANDRACHUD:** All right. We'll see how that...

25

26 **TUSHAR MEHTA:** We would be doing injustice to *Azeez Basha*, unless we read it in the,
27 *dehors* the context and the regime, it was available. Because, this cannot be an argument, I'm
28 aware. But My Lord, just out of curiosity, I just examined. *Azeez Basha* is '65 judgment. 1968
29 judgement. 1968 judgement. The Honourable judges... this is not an argument, and please
30 don't take this as an argument... must be around 20 when 1920 Act was passed. Their age.
31 They must be aware of this history, especially the author of the judgment. He was from Uttar
32 Pradesh. This is the background. This was not a very hotly debated issue in the country. This
33 was a part of Khilafat Movement. Ali brothers who separated and made Jamia Milia Islamia.

34

35 **CJI DY CHANDRACHUD:** Wanchoo [UNCLEAR] was one of the few remaining ICS
36 officers. He was...

37

1 **TUSHAR MEHTA:** Possibly the only Chief Justice without any legal background.

2

3 **CJI DY CHANDRACHUD:** He was an ICS officer.

4

5 **TUSHAR MEHTA:** He was an ICS officer.

6

7 **CJI DY CHANDRACHUD:** Dr. Dhavan, right?

8

9 **RAJEEV DHAVAN:** Golaknath, advocate who had the majority and the ICS officers who
10 were in a minority. Very interesting about Golaknath. All of them were in the minority.

11

12 **TUSHAR MEHTA:** This is interesting. I did not know that. But possibly Justice Wanchoo
13 was the only Chief Justice who was ICS, who was not having a kind of formal legal background.
14 Please come to II(f), page number 1. There is a chart we have prepared. 1813. I'll just quickly
15 go through what is relevant for the purpose of completeness, but we will have to keep this in
16 mind while reading *Azeez Basha*, My Lord. It does not say what the other side apprehends.
17 The Charter of 1813 of British Crown allocated funds for education in British India leading to
18 the establishment of institutions like Hindu College in Calcutta in 1817. Charter of 1813 read
19 as under. My Lord, I may skip that. Only C, the highlighted part. Rest My Lord, I have put it
20 for completeness. Provision for schools, public lectures or other literary institutions for the
21 benefit of natives. We were natives, we were subjects, to be regulated by the Governor- General
22 in Council, subject to control of the Board, but appointment of two offices therein made by the
23 local government. Then next date, 1817 and 1818, Hindu College established in Calcutta in
24 1817, and the Serampore College is established in 1818 by William Carey, Joshua Marshman
25 and William Ward. Then 1854, an education policy of British for British India came in the form
26 of the Wood's Dispatch of 1854 officially known as 'Dispatch of Indian Education'. It was
27 seminal educational policy document issued in 1854 by Sir Charles Wood, the President of the
28 Board of Control for India. It marked a significant step in the development of Modern
29 Education System in India. The dispatch advocated for the establishment of universities in
30 major cities and improvements in schools. It specifically provided as under. My Lord, this
31 dispatch is discussed during communications between those who were requesting for Aligarh
32 to be declared a university through an act of imperial legislature and My Lord, the British
33 Crown through officer of the British Crown. We now proceed to sketch out the general scheme
34 of the measures which we propose to adopt. We have endeavoured to avail ourselves of the
35 knowledge which has been gained from the various experiments, which have been made in
36 different parts of India for the encouragement of education and we hope, by the more general
37 adoption of those plans which have been carried into successful execution in particular

1 districts, as well as by the introduction of other measures which appear to be wanting to
2 establish such a system as will prove generally applicable throughout India, and thus to impart
3 to the educational efforts of our different presidencies, a greater degree of uniformity and
4 method than at present exist. My Lord, para 24, only underlined parts may be read. I'm sorry.
5 I'll just read. The rapid spread of a liberal education amongst the natives of India. Since that
6 time, the high attainment shown by the native candidates for government scholarships and by
7 native students in private institutions, the success of medical colleges and the requirements of
8 an increasing European and Anglo Indian population have led us to the conclusion that the
9 time has now arrived for the establishment of universities in India, which may encourage a
10 regular and liberal course of education by conferring academical degrees as evidence of
11 attainment in the different branches of art and science, and by adding marks of honour for
12 those who may desire to compete for honorary distinction. The function of the universities will
13 be, to confer degrees upon such persons as having been entered as candidates according to the
14 rules which may be fixed in this respect and having produced from any of the affiliated
15 institutions. My Lord, please mark this. This MAO remained an affiliated institution to the
16 then Allahabad University, which was created by an act of Imperial Legislature. I'll come to
17 that. And today also, it continues My Lord. In this respect and having produced, I'm sorry,
18 which will be enumerated on the foundation of the universities or be from time to time added
19 to them by government certificates of conduct, of having perused a regular course of study for
20 a given time shall have also passed at the universities such examination as may be required of
21 them. Your Lordships, can consider skipping the rest.

22

23 Then 28. The examinations for degree will not include any subjects connected with religious
24 beliefs and affiliated institutions will be under the management of the persons of every variety
25 of religious persuasion. This was the policy document which mandated this. Either you accept
26 it if you want the Act or you don't accept it, as it would come later. As in England, various
27 institutions in immediate connection with the Church of England, the Presbyterian College of
28 so and so, is empowered to receive certificates of degrees. So, in India, institutions conducted
29 by all denominations of Christians, Hindus, Mohammedans, Parsis, Sikhs, Buddhists, Jains
30 or any other religious persuasions may be affiliated to the universities, if they are found to
31 afford the requisite course of study and can be depended upon for the certificates of conduct
32 which will be required. **St. Stephen's** continued as an institution with minority status with
33 predominant Christian attributes affiliated with Delhi University. I'll come to that. Other
34 branches of useful learning may suggest themselves to you, in which it might be advisable that
35 lectures should be read and special degrees given, and it would greatly encourage the
36 cultivation of vernacular languages of India, that Professorship should be bounded for those
37 languages, and perhaps also for Sanskrit, Arabic and Persian. A knowledge of Sanskrit

1 language, the root of the vernaculars of the greater part of India is more especially necessary
 2 to those who are engaged in the work of composition in those languages. While Arabic, through
 3 Persian, is one of the component parts of Urdu language which extends over so large a part of
 4 Hindustan and is, we are informed, capable of considerable development. The grammar of
 5 these languages and their application to the improvement of the spoken languages of the
 6 country are the points, to which, the attention of the Professors should be mainly directed and
 7 there will be an ample field for their labours, unconnected with any instruction in the tenets
 8 of Hindu or Mohammedan religions. We should refuse to sanction any such teaching as
 9 directly opposed to the principle of religious neutrality to which we have always adhered.
 10 Because Sanskrit, Persian, Urdu, they were linked to religion during those times. To an extent,
 11 My Lords, even today. The candidates for university degree will, as we have already explained,
 12 be supplied by colleges affiliated to the universities. These will comprise all such institutions
 13 as are capable of supplying a sufficiently high order of instruction in the different branches of
 14 Art and Science in which university degrees will be accorded. The Hindu, Hugli, Dhaka,
 15 Kishuga [UNCLEAR] and Berhampore Government Anglo Vernacular colleges and the
 16 Sanskrit college, the Mohammedan Madrasas, and the medical college in Bengal, the
 17 Elphinstone Institution, the Poona College, the Grant Medical College in Bombay, the Delhi,
 18 Agra, Banaras, Bareilly and Thompson colleges in Northwestern part of provinces, seminaries
 19 such as the Oriental Seminary in Calcutta, which have been established by highly educated
 20 natives, a class of places of instruction which we are glad to learn, is daily increasing in number
 21 and efficiency. Those which, like the parental academy, are conducted by East Indians,
 22 Bishops College, the German Assembly's Institution, Dr. Duff's College, the Baptist College at
 23 Serampore and other institutions under the superintendents of different religious bodies and
 24 missionary societies will at once supply a considerable number of educational institutions
 25 worthy of being affiliated to the universities. So, you had a choice of continuing as a
 26 denominational institution affiliated with some university which would be under an Act of the
 27 Imperial Legislature. Then 1856-57, towards the end of 1856, the British Government in India
 28 passed draft bills for the establishment of the first three universities in India, namely
 29 University of Calcutta, Bombay and Madras. These Acts were passed in the early 1857 by the
 30 Imperial Legislative Council, a representative body empowered by the British Parliament to
 31 make laws for British India, which continued till 1947. My Lords, why I say British India, some
 32 of the part of present day India was not in British India. For example, Hyderabad was not. It
 33 was a Charter of the Nizam under which a college was established. Then 1860, Act number so
 34 and so of 1860, passed by the Imperial Legislative Council, expanded the powers of the above
 35 referred three universities to grant degrees. But I may not read that part. It merely says that
 36 now you are entitled to confer degrees. Every university, whether recognized by the Imperial
 37 Parliament or not, were conferring degrees. Degrees had values, but they were not entitled to

1 have employment in the British Crown Services. Now 1882, Punjab University was established
2 by Punjab University Act 1882, again Imperial Legislature, then Allahabad University was
3 established by the Allahabad University Act 1887.

4
5 Then 1902. The report of the Indian Universities Commission was published. The said report,
6 with regard to MAO specifically noted as under, because this MAO was an institution, a
7 Muslim institution functioning and affiliated with Allahabad University. 'In connection with
8 MAO College at Aligarh, proposals have been put forward from time to time for the creation
9 of a Mohammedan university. It does not appear that these proposals have received the
10 support which would be necessary to give the scheme a particular, a practical character. And
11 even if its resources adequate to the formation of a complete university were forthcoming, it
12 is for the Government to decide as to the expediency of creating a denominational university'.
13 There was no Article 30, there was no fundamental right. The Government can decide whether
14 there should be a denominational university or not. 'In the present circumstances of India we
15 hold that while no obstacle should be placed in the way of denominational colleges, it is
16 important to maintain un-denominational character of the universities'. Taking clue from the
17 Wood's dispatch, the British policy continued and that was the policy in 1902. Then 1904, the
18 Indian Universities Act was passed. This was an umbrella Act which repealed other Acts and
19 brought within its purview above referred five universities, Calcutta, Bombay, Madras, Punjab
20 and Allahabad. It also reconstituted the governing bodies of the universities and gave statutory
21 recognition to the Syndicates. Now, comes the moment where... this would be relevant for the
22 historical perspective, which I'll narrate. In 1915, 1st October 1915, Banaras Hindu University
23 Act is passed by Imperial Legislative Council leading to the establishment of the BHU. Now,
24 please see para 4. 'The above history clearly depicts that British parliamentary policy was to
25 confer the status of university only when the nature of the university is non-denominational',
26 what we call secular, broadly in the present context. 'And second, provides for prominent
27 governmental control'. But please note, it's not governmental regulation. Governmental
28 control. 'This was an era in which establishment of any university which had advantages in the
29 form of funds, value of degrees...'. I say value, not recognition. 'value of degrees, possibility of
30 employment with Imperial Government by its alumni, et cetera, needed a legislative
31 enactment by the British Legislature, fulfilling the above referred two criteria. In all cases
32 where universities were established by way of an Act of Imperial Legislature, it ensured both
33 the above referred two criteria are met. The presence of both above criteria obviously changed
34 and resulted in alteration of character of any institution, even if such institution was before
35 the enactment of Imperial Legislature, making it a university of a denominational or religious
36 character. Such universities, which were established by an Act of Imperial Legislature were
37 national, open and secular centres of learning. The following is the list of universities

1 established by Imperial Legislature before the Constitution came into force'. My Lord, I have
2 already mentioned Calcutta, Bombay, Madras, Punjab University in Lahore, then University
3 of Mysore, Banaras Hindu University, Patna University, Aligarh Muslim University,
4 University of Lucknow, University of Dhaka, Delhi University, Nagpur University, Andhra
5 University, Agra University, now known as Dr. Bhimrao Ambedkar University. Annamalai
6 University. Annamalai University, please note here, something would turn on that. There,
7 there was a question that one who found, founding movement also has its value. No. There are
8 two types of legislations. One, legislation which incorporates the university and second, the
9 legislature which, while incorporating the university, recognizing the founding fact also. In
10 Annamalai, the founding fact is also recognized. I'll show that. It's a separate point. Then
11 University of Sengu, Rajputana, Guwahati University, University of Kashmir, Karnataka
12 University, Maharaja Sayajirao University of Baroda, et cetera. I'm sorry, I stand corrected.
13 My Lord, page, item number 20. My Lord, there is a mistake. It was established in '50 that is...
14 in 46. But My Lord, second amendment was passed in 50. Nothing turns on that. Just a factual
15 correction. Then Savitribai Phule University, formerly known as University of Pune and
16 Gujarat University, 1950. The universities is established by Indian efforts without succumbing
17 to British conditions and retaining its independence. Now, I have said that there were people
18 who were ready to accept this non-denominational character and governmental, British
19 Governmental control. But that was an era of nationalism, that was an era of freedom struggle
20 at its peak. So, there were people that, no, we will have institutions from our own resources,
21 we'll not have governmental control, we will not depend upon the British Government's
22 Imperial legislation. My Lord, that I'll see. It is submitted that prior to the UGC, in absence of
23 any prohibitive framework estopping someone from establishing universities without a
24 legislative act. It was only permissible for any group of persons to establish an institution and
25 label it a University or a Vidyapeeth or Jamia and claim to be the university. Now My Lord,
26 this is prohibited. UGC Act prohibits use of word university, and you cannot be a university
27 unless you are recognized under Section II(F) or Section D. At this juncture, it is necessary to
28 demarcate the distinction between a pre-constitution university established and recognized by
29 the Legislature, as opposed to a pre-constitution university not recognized, and not recognized
30 by the British Government. It is submitted that at the relevant time
31 it was only permissible for the MAO college to establish a university. There was nothing which
32 prevented MAO from establishing a complete Muslim university. By the same name or any
33 other name, if it so wish, without any enactment, with the only drawback that such university
34 would not have been recognized by the British Government. It is relevant to note that there
35 was no Article 30 and no concept of minority also. My Lord, pre-constitution, there was no
36 concept of minority. There was a concept of Hindus, Muslims, Parsis et cetera. There was no
37 majority or minority during British regime. There is nothing that stopped the same institution

1 from doing so, which would have maintained its independence and perhaps its minority
2 character. A large number of pre-independence universities existed whose degrees were not
3 recognized by the British Government for appointment in services under the Crown but
4 nonetheless went on to become leading national institutions. They were getting jobs My Lord,
5 in big industries in India. British Crown was not recognizing those degrees. A list of such pre-
6 independence universities, please see. Osmania University, Nawab of Hyderabad, I'm sorry,
7 Nizam of Hyderabad established, Gujarat Vidyapeeth. My Lord, this was Vidyapeeth means
8 university the way Jamia means university. Vidyapeeth means university. This was established
9 by Mahatma Gandhi in 1920 as a part of non-cooperation Movement that we will not go to the
10 British Parliament. Which My Lord, under now, after coming into force of UGC Government
11 of... Government of India My Lord, in 63 gave them the status of deemed to be university under
12 Section 3 of the UGC Act. Then Bihar Vidyapeeth, again My Lord, Mahatma Gandhi
13 established this University. **Basha** said you had the option of doing this, but you surrendered
14 everything. Now, you cannot raise 30, Article 30 issue. Then Kashi Vidyapeeth, now known as
15 Mahatma Gandhi Kashi Vidyapeeth, again a product of non-cooperation moment. And Your
16 Lordships, would see at the right side, Uttar Pradesh State University Act was enacted, which
17 recognized it as a University, defined under the UGCA. Then Jamia Milia Islamia in case of
18 MAO College, there were two groups completely hostile to each other, on the question of
19 further course of action. One group led by Mr. Shafi. Can we remember this name in the
20 Parliamentary debates of the British Parliament. He would open the debate on behalf of the
21 British. Mr. Shafi wanted an Act of British Legislature, surrendering the rights of functioning
22 as denominational institution. And the second group, led by Ali brothers, who supported
23 Khilafat movement when Ottoman Khalif was deposed by the British as an Anti-Islam Act of
24 British. The second group, Khilafat movement, they played a major role because the Khalif
25 was attacked by the British. It was more a pro-Khalif movement than freedom struggle
26 movement. The second group strongly objected for any British enactment and insisted by any
27 indigenous university retaining insisted for, it should be, retaining denominational character.
28 Upon passing of Aligarh Muslim University Act, 1920 on 14 September 1920, there was a
29 uproar amongst the opposite group led by Ali brothers who wanted to retain the minority
30 character of MAO. This group therefore, declared establishment of Jamia Milia Islamia from
31 the campus of Aligarh Muslim University itself on 29th of October 2020, just few days
32 thereafter. This is 14 September 1920 and after that Jamia is declared...Jamia means
33 university.

34

35 **CJI DY CHANDRACHUD:** Mr. Solicitor, only one thing. This is not really like a
36 contemporary date to something that we can take notice of. Can you give us the source from
37 where this has been prepared actually? If you have footnote or something or if you have got

1 some report or historical documents from which this is taken because while writing the
2 judgement, we'll have to study all those reports, et cetera.

3

4 **TUSHAR MEHTA:** It was there already on record when we filed the similar documents first
5 and we will give the reference a little later. Now kindly see My Lord. Your Lordships are right.
6 This is a court of record.

7

8 **CJI DY CHANDRACHUD:** ...To look at basically, what was the status? I mean, we want to
9 read through with you on your submission, but later on when you are developing your
10 submissions...

11

12 **TUSHAR MEHTA:** Yes.

13

14 **CJI DY CHANDRACHUD:** What was the status of AMU under the 1920 legislation? And
15 we can look at what was the status as on the eve of the adoption of the Constitution. So, what
16 happened between 1920 and 25th of January, 1950? Because after 26th of January, 1950, there
17 cannot be a change in status. Because, if it is a minority institution, as on 25th January, 1950,
18 then the right becomes absolute on the birth of the Constitution.

19

20 **TUSHAR MEHTA:** Correct.

21

22 **CJI DY CHANDRACHUD:** So, we will have to then see. And as Brother Surya Kant was just
23 saying a moment ago, '50 to '56 is a further window because UGC Act comes in in 1956. But
24 the first step is for us to see what happened in 1920? What was happening between 1920 and
25 1950?

26

27 **TUSHAR MEHTA:** Yes, right. My immediate answer is and I'll develop that. Between 1920
28 and the Constitution coming into force, there is no change in the Act. 1920 remains as it is.
29 The First Amendment comes in 1951.

30

31 **CJI DY CHANDRACHUD:** And second, is the 1920 legislation also consistent with
32 recognizing the preexisting history of AMU, namely the MAO college, that it was
33 predominantly founded by minority or does the Act itself, the 1920 Act result in the abrogation
34 of any claim to minority status? You will not claim, call it minority status because minority
35 status has a certain connotation under the Constitution. Does the 1920, I will change my
36 language, does the 1920 Act have the consequence of abrogating its status as a denominational
37 institution?

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TUSHAR MEHTA: Exactly, My Lord.

CJI DY CHANDRACHUD: By a religious minority?

TUSHAR MEHTA: Absolutely. And Your Lordships are right, absolutely right, that I will have to...

CJI DY CHANDRACHUD: You could not do that post Constitution because you can't ask for a surrender of constitutional rights or fundamental rights. Prior to Constitution, the regime was entirely different.

TUSHAR MEHTA: Yes, that's why I am giving this history. The purpose of giving this history is this. My respectful reading of *Azeez Basha* is that *Azeez Basha's* ratio is that you had three options. a) remain a denominational institute, the way a part of you, Jamia Milia Islamia remained or other institution remained. Denominational or other unrecognized institution. Unrecognized in the sense that without any...

CJI DY CHANDRACHUD: This should be a matter of just curiosity. What was the path which then Jamia followed?

TUSHAR MEHTA: Jamia remained an institution, remained a university and thereafter, after this National Commission Act came in 2004, they applied for being declared a minority institution. And it was so declared.

JUSTICE SANJIV KHANNA: That matter is still pending.

TUSHAR MEHTA: Still pending. Therefore, I'm not going beyond a...

JUSTICE SANJIV KHANNA: What you are arguing, may have impact there also. May have impact.

TUSHAR MEHTA: I'm consciously arguing only those parts which may not affect me either. Your Lordships, are right. My Lords are absolutely right.

1 **JUSTICE SANJIV KHANNA:** I was a member of the bench which admitted the petition.
2 Let me tell you, the Government over there had also changed their stand on Jamia Millia
3 Islamia whether it is a minority institution or not.

4

5 **TUSHAR MEHTA:** Possible. I'm not, I didn't appear. But Your Lordships, are right. Possible.

6

7 **CJI DY CHANDRACHUD:** The distinction with Jamia for the purpose of this case, may
8 ultimately affect you in the Jamia case.

9

10 **TUSHAR MEHTA:** No, no I'll be conscious My Lord. Your Lordships, can write or whatever...

11

12 **CJI DY CHANDRACHUD:** Right. I'll not trench into an area which is a subject matter of...

13

14 **TUSHAR MEHTA:** Of another litigation because Jamia is not here My Lord, otherwise also.
15 But the point I'm making is Jamia is just an illustration. There were several institutions of,
16 institutions.

17

18 **CJI DY CHANDRACHUD:** So, according to you Jamia was born out of the desire to preserve
19 the denominational status of a university.

20

21 **TUSHAR MEHTA:** Which was surrendered...

22

23 **CJI DY CHANDRACHUD:** In the case of AMU.

24

25 **TUSHAR MEHTA:** In the case of Aligarh. That I will show with pagination. But My Lord,
26 I'm really tempted to show to Your Lordships, the pre-constitution, I'm sorry. My Lord, Ali
27 Brothers writes a letter to Raja of Mahmudabad, who was on the other side My Lord, in favour
28 of Aligarh University being established, that these people are sent in the service of God, not
29 service of British Crown and therefore, what you have done is disastrous, et cetera, but leave
30 it at that. My Lord, there were institutions during that pre-independence, independence
31 struggle time like ultimately became Vishwa Bharati which had reputation, which used to
32 grant degrees, degrees were recognized, except in British Crown services. My Lord, please see
33 that list. I am not reading the entire list at page 11. Delhi College. No law of British Parliament,
34 My Lord, it was affiliated with University of Delhi. I'll just give My Lords, some example
35 without going into... Scottish Church College, Kolkata, para, item number 6, presently a
36 minority college affiliated to the University of Calcutta. It continued as an institution,
37 continued as a minority. My Lord, St Stephen's. St Stephen's is a pre-constitution institution,

1 it continued affiliated with, continued to be affiliated with Delhi University. My Lord, please
2 come to page 30, Roorkee College of Engineering, page 30. 1847. Government of Northwestern
3 Province established College of Engineering at Roorkee in 1847. In 1853, college was renamed
4 as Thompson College of Civil Engineering, which got affiliated to Calcutta University in the
5 year 1864 and later to Allahabad University in 1894. The college was incorporated into
6 Roorkee University with a Roorkee University Act 1948 passed by provincial legislature. In the
7 year 2002, the university was incorporated as Indian Institute of Technology Roorkee and was
8 declared as institution of national importance. but during pre-constitution, it chose to
9 continue as an institution without any Imperial Legislation backing it. Then St. Stephen's
10 College item number 16. Founded in 1881 by Cambridge Mission in Delhi in conjunction with
11 Society of Propagation for Gospel. The college became one of the three original constituent
12 college universities, colleges of University of Delhi when it was established in 1922. Delhi
13 University was established thereafter. The college existed. Thereafter My Lord, please see 25,
14 page 16, very eminent college, but now university. Gurukul Kangri, I think somewhere in
15 Haryana. Gurukul Kangri now is a deemed university, was founded on March 4, 1902 by
16 Swami Shradhanandji became the deemed university after enactment of UGC Act in the year
17 1962.

18
19 Then My Lords, may kindly skip then come to 30. Dakshin Bhartiya Hindi Prachar Samiti.
20 This is a linguistic minority institution in South India. In Karnataka, this is a leading institute.
21 Dakshin Bhartiya Hindi Prachar Sabha was established by Mahatma Gandhi, with the sole aim
22 of propagating Hindi in southern states. The institute got the status of being an institute of
23 national importance in 1964 by Dakshin Bharat Hindi Prachar Sabha Act 1964. The Act came
24 into force thereafter, when Indian Parliament took it over. 33, Vishwa Bharati. Rabindranath
25 ...We say Tagore, it's also called Thakur, established an institution known as Vishwa Bharati
26 at Shanti Niketan, later established as a university and recognized as an institute of national
27 importance with a Vishwa Bharati Act, 1951. I'll take Your Lordship through that. Entry 63,
28 that the Central Government has the power of declaring some of the institutions...

29
30 **CJI DY CHANDRACHUD:** As institutes of national importance.

31
32 **TUSHAR MEHTA:** All IIMs, IITs, et cetera. Vishwa Bharati is one of those. There were, I've
33 given the illustrations. I am not reading all the illustrations.

34
35 **CJI DY CHANDRACHUD:** Where have you drawn this from?

36
37 **TUSHAR MEHTA:** This is from the public domain.

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CJI DY CHANDRACHUD: From the individual college's website? Some reports from which you have got this?

TUSHAR MEHTA: From the websites. Individual colleges websites. But rest of them, I have given the Act pagination where would Your Lordships find in the document compilation, et cetera from here onwards. Kindly. now come to page 22, para 11. And here Your Lordships would find the pagination and reference, everything. The birth of Jamia and AMU. The backdrop of Aligarh...

CJI DY CHANDRACHUD: [UNCLEAR] Kalakshetra at number 44.

TUSHAR MEHTA: I'm sorry?

CJI DY CHANDRACHUD: No. 44, Kalakshetra, a very famous institution. [UNCLEAR] in 1938.

TUSHAR MEHTA: Rukmani Devi and Arun Dave established this. I didn't want to, each, 43, Indian Statistical Institute. It's now an institution of national importance. There are several which eventually went on to become institution of... Banaras Engineering College... 31.

CJI DY CHANDRACHUD: Now 22 you want us to go to, right?

TUSHAR MEHTA: Yes, My Lord, page 20. There are several which chose and the choice which was available with MAO. That is what *Basha* says. *Basha* doesn't say that because you have become a university now, you cannot have a minority status. No.

CJI DY CHANDRACHUD: What are the *indicia*... later on we'll have to again look at it. What are the *indicia* to indicate that when it was conferred with a university status that it surrendered its minority status. The mere fact that it is converted, that is given university status, does not amount to a surrender of its minority's status.

TUSHAR MEHTA: No, no.

CJI DY CHANDRACHUD: Denominational status prior to Independence. We will have to independently see whether by the 1920 Act, the denominational character of AMU was lost. You have given us that little thing about the Khilafat Movement.

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TUSHAR MEHTA: I have given three, in three compartments. a), I have given the correspondence, which is already on record, to show that there was a correspondence between Britain and MAO College that you will have to do this if you want an Act to be passed. Second the debates in the Imperial Parliament where Mr. Shafi introduces the Bill and keeps on surrendering the denominational character. And third is the Act itself. The Act as it stood in 1920.

JUSTICE SANJIV KHANNA: So, your argument is, it's not the enactment itself, but prior to the enactment...

TUSHAR MEHTA: Exactly, and Your Lordship says that it is the fact that you have surrendered and Act came into effect, now you cannot claim minority status. And I'll show that finding. *Basha* was very cursorily read, some patches here, some patches there. I want Your Lordships to read *Basha*, the way I would wish Your Lordships to examine...

CJI DY CHANDRACHUD: We will return after lunch.

TUSHAR MEHTA: Yes.

CJI DY CHANDRACHUD: Yes, Mr. Solicitor.

TUSHAR MEHTA: My Lords, kindly come to page 23 of (ii)(f). The submissions, which I was reading and here, My Lord, I have given the references of the documents. '22 is the birth of Jamia and AMU, the backdrop of Aligarh split. I have orally submitted, but page 23, small abcd.

CJI DY CHANDRACHUD: Yes.

TUSHAR MEHTA: It must be noted that original vision of AMU as envisaged by Sir Syed was based strongly on loyalism to the British. My Lord, I have given footnotes, et cetera. The split in the Aligarh Movement began after the Government refused to grant it the power to affiliate colleges outside Aligarh. Even prior to this, the Ali Brothers had made attempts to rid the college administration of pro-government influences. The divide had become worse when two camps formed over the Government's refusal to allow affiliating powers to the MAO College. This rejection, along with events such as annulment of partition of Bengal was seen by Mohammad Ali as betrayal of Muslims. Those willing to accept the Government's proposal

1 were headed by Maulana Aftab Ahmad Khan, the loyalist, My Lords, every historian described
2 them as the loyalist and later Muhammad Shafi, as a follower of...

3

4 **CJI DY CHANDRACHUD:** Mr. Solicitor, when MAO though it was called MAO College, was
5 it basically a college or was it in the nature of college plus, like, a university or purely a college.

6

7 **TUSHAR MEHTA:** It was a college affiliated to Allahabad University, the way St. Stephen's
8 is today a college affiliated to Delhi University.

9

10 **CJI DY CHANDRACHUD:** MAO was by all accounts, only a college?

11

12 **TUSHAR MEHTA:** It was a college.

13

14 **CJI DY CHANDRACHUD:** Only in the sense it was exclusively a college.

15

16 **RAJEEV DHAVAN:** Tertiary education was given by the college, hence the degrees, because
17 we are concerned with tertiary education now. Not secondary. Because sometimes one
18 associates college with secondary information... the education, but MAO had degrees, and
19 therefore it was involved in tertiary education as well.

20

21 **TUSHAR MEHTA:** It could have continued that way. Let us put it that way.

22

23 **CJI DY CHANDRACHUD:** Post high school institution.

24

25 **RAJEEV DHAVAN:** That's right.

26

27 **TUSHAR MEHTA:** Yes, otherwise they needed no affiliation with the University. So, it is not
28 correct to say that MAO was giving degrees. MAO was affiliated with Allahabad University and
29 Allahabad University used to give degrees. So, degrees of MAO was recognized by Allahabad
30 University.

31

32 **CJI DY CHANDRACHUD:** Right. No, not degrees of MAO. The degree was from Allahabad
33 University.

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35 **TUSHAR MEHTA:** I'm sorry. Courses of MAO were recognized by Allahabad University.

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37 **CJI DY CHANDRACHUD:** It was an affiliating college of Allahabad University.

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TUSHAR MEHTA: Yes.

CJI DY CHANDRACHUD: Yes.

TUSHAR MEHTA: There is no dispute on that.

JUSTICE SANJIV KHANNA: We may not be very sure whether courses were recognized or not, but the fact of the matter is, degrees were given by Allahabad University.

TUSHAR MEHTA: Correct. As a follower of what he called the Anglo Muhammadan School of Politics. Mr. Shafi regarded his community's interest to be identical with those of the Government and refused to take part in anything calculated in the slightest degree to injure British interest and to weaken the stability and permanence of British rule in India. He is the one, who introduced Aligarh... this 1920 Act. I'll show that from the debates. Those opposed were led by Ali Brothers and Hasrat Mohani, who wanted both Muslim control of the university and the power of affiliation. Hasrat Mohani was a member of the Constituent Assembly, representing the Muslim League. One of the My Lord, finest Urdu lyricist. The Ali Brothers and their followers were also sympathetic to the Turkey and opposed the British actions against Turkey during the First World War. Furthermore, Muhammad Ali's influence over Aligarh's student body was noted to cause great difficulties for MAO College principal Dr. so and so. After the BHU Act was passed, those in favour... My Lord, that was in 2015, I'm sorry, 1915. After the BHU Act was passed, those in favour of accepting the Government proposal began to mount pressure, stating that this made clear that any Muslim university would have to be on the same lines as BHU.

At a vote held on the question of Muslim university associated on the question of accepting the Government's terms, the loyalist one, that is pro-British one, that is Volume 4D, I'm not reading, but this is the reference. This caused a formal split in the movement. In April 1917, the University Foundation Committee decided to accept the Government's proposals without conditions, though Mohammad Ali remained opposed to the same. That is, My Lord, Mohammad Ali is one of the Ali Brothers, My Lord. In 1920, it was agreed between the Government and the Aligarh group to bring the University Bill in the legislature. At around the same time Gandhi *ji*... My Lord, I'm sorry it's a typo. It should be Gandhi *ji*. Gandhi *ji* instead of Gandhi. Kindly pardon me and allow me to correct. ...came into contact with Maulana Mohammad Ali and Hasrat Mohani and began promoting the *Khilafat* Movement. Because for Gandhi *ji*, it was anti-British freedom struggle. So, wherever My Lord, he could

1 get support of anti-British sentiments, Mahatma Gandhi *ji*, used to take that. The rapid
2 introduction of the AMU Bill was seen to be an attempt to bring the Muslims to the
3 Government side, in the face of anti-government sentiment among them during the Non-
4 Cooperation Movement. Subsequently, pro-*Khilafat* group brought a letter to the university
5 authorities, asking them to stop receiving Government aid. My Lord, there is a letter, which is
6 on record. From the beginning, I have placed that letter on record. Maulana Mohammad Ali
7 called on the Aligarh Trustees to participate, in the Non-Cooperation Movement. On October
8 12th, 1920, Ali Brothers and Mahatma Gandhi visited the College and asked it to stop accepting
9 Government aid. That was, again, a Non-Cooperation Movement, My Lord. At this meeting
10 even certain members of the Aligarh Trustees resolved, that if the College did not break ties
11 with the...

12

13 **RAJEEV DHAVAN:** These are all new facts, because now we are not looking at documents...

14

15 **TUSHAR MEHTA:** My Lords, 4D...

16

17 **RAJEEV DHAVAN:** We're looking at a very contentious part of our history, loyalists, non-
18 loyalists, et cetera. This is an imposition from a book, My Lord. Let them stick to the pleadings.

19

20 **TUSHAR MEHTA:** My learned friend may not be aware, these documents 4D are placed by
21 them, I am relying upon it.

22

23 **RAJEEV DHAVAN:** No, no, no, definitely not.

24

25 **TUSHAR MEHTA:** And it is on record, My Lord, since Your Lordships directed that, this
26 PDF file be kept ready. This is not something new I am placing on record.

27

28 **CJI DY CHANDRACHUD:** At the same time you know, this is also what, broadly the
29 parameters I drew up, when I was doing the Jammu & Kashmir Judgment. That something,
30 which is in a book, which is written by someone, however eminent the author, is after all
31 secondary material.

32

33 **TUSHAR MEHTA:** Correct.

34

35 **CJI DY CHANDRACHUD:** Official documents, official statutes...

36

37 **TUSHAR MEHTA:** Some of them are letters. They may not have read it.

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CJI DY CHANDRACHUD: Something which is in a book, one sort of doesn't treat that as primary...

TUSHAR MEHTA: I will rely on the letters. The letters would reflect these positions.

CJI DY CHANDRACHUD: So, what is the impact of the Act which is the second part, which you are going to argue. Certainly, absolutely, that's beyond doubt, because you have an Act of the Legislature and we have to interpret the Act, what the Act does. But, you know we have to be a little careful, when we are dealing with underlying materials such as books, because books you will also find on both sides, depending on which side of the spectrum you are.

TUSHAR MEHTA: My Lord, I leave it at it, but I must say, this has been on record placed by them, now they're objecting because they have not read it, it is unfair.

CJI DY CHANDRACHUD: We'll look at it. The evidentiary standard of course to a book which is...[UNCLEAR]

TUSHAR MEHTA: Your Lordship may not take that into consideration, but the 4D is filed on 10th of January, 2024. The last day, My Lord, of filing of documents, much before they started arguing.

CJI DY CHANDRACHUD: All right.

TUSHAR MEHTA: My Lord, with profound respect, I don't want to... it's a petty thing to argue before a seven judge Bench. They relied upon some portion from 4D.

RAJEEV DHAVAN: 4D was filed by them, My Lord.

TUSHAR MEHTA: They've relied upon them, but leave it at that. I don't want to reduce the level of this debate.

CJI DY CHANDRACHUD: We are just entering a small caveat, on so far as books are concerned, because you know books could be, it's after all a historical account we have also...

TUSHAR MEHTA: Yes, yes, yes. My Lord please come to 'J', My Lord.

1 **CJI DY CHANDRACHUD:** Yes.

2

3 **TUSHAR MEHTA:** During the said time... this is My Lord, a resolution, which is on record.
4 During the said time, the Aligarh students also begin to participate actively in Non-
5 Cooperation Movement and passed the resolution on October 13, asking the university
6 authorities to disaffiliate the College, failing with the students would employ all means to turn
7 the College into a national organization, under the control of the Central *Khilafat* Committee.
8 The British and the Aligarh authorities asked the alumni associations to persuade students to
9 give up their demand and the MAO Old Boys Association passed the resolution condemning
10 the same. The party represented by Mr. Sibal, the Old Boys Association. The leaders
11 supporting the Non-Cooperation Movement assured Aligarh students that MAO College
12 would be turned into a national university and asked them to enrol in the new university. The
13 Deoband Theological School issued a *fatwa* asking students to leave the MAO College and
14 enrol in the proposed new national university. On October 27, the Aligarh Board of Trustees
15 voted to direct Maulana Mohammad Ali and his supporters to vacate the hostel of MAO
16 College and close the College for a month. My Lord, the other group... that order is on record.
17 Finally, Maulana Mohammad Ali and his followers vacated the College on October 29th, 1920
18 and announced setting up of Jamia Millia Islamia. The intent of the new college was declared
19 to be the purification of MAO College, and it was intended to counter the governmental
20 influence. Government influenced the university at Aligarh. Therefore, when the endeavour of
21 Ali Brothers did not succeed, they broke away to establish the Jamia Millia Islamia as a
22 national Muslim university. The Jamia Millia Islamia was created expressly to be an
23 independent institution which was not dependent on Government grants or otherwise subject
24 to Government control, as opposed to the full Government control, support enjoyed by AMU.
25 My Lord, this is a letter written by Ali Brothers to Raja of Mehmoodabad. That letter is on
26 record. I'm not reading, but I've paraphrased it. In fact...

27

28 **CJI DY CHANDRACHUD:** Mr. Solicitor, there may be a problem in this line of argument.
29 We assume for a moment that there were two factions, right? You had the loyalists' faction,
30 which was the view that you must [UNCLEAR] your efforts in line with the British, the then
31 Imperial Government's efforts. There was then, the other faction, which was probably
32 encouraged by Gandhi *ji* as well, namely, those who are supporting the *Khilafat* Movement
33 and Non-Cooperation. According to you, they broke away and they formed Jamia. Assuming
34 that is so, the fact that the loyalists' faction was more in line with the British Government then,
35 does not deprive it of its minority character. The fact that they were in alignment with the
36 views of the then imperial power, does not make it any less an institution founded by minority.
37 Founded by minority does not mean that you have to be in opposition to the then Government.

1 Today, you may have a minority institution which is perfectly on the side of the Government
2 on many important issues. That does not change its minority character.

3

4 **TUSHAR MEHTA:** I'm not on that. My Lord, kindly allow me to say...

5

6 **CJI DY CHANDRACHUD:** Therefore, this... really to say that there were two factions and
7 one was pro loyalist, one was loyalist, one was with the British Government, the other one was
8 with the Nationalist Movement, this will not have a bearing on whether it was a minority
9 institution... it ceased to be a minority institution.

10

11 **TUSHAR MEHTA:** Your Lordships, may, My Lords, I would earnestly request to, defer that
12 conclusion for the time being. There is a reason why I'm showing...

13

14 **CJI DY CHANDRACHUD:** No, no. We're not drawing a conclusion. We are just saying that,
15 this hypothesis is equally consistent with the fact that, a minority institution may politically
16 be aligned or may not be aligned with the Government.

17

18 **TUSHAR MEHTA:** I'm not on that. I'm not on... because they were politically aligned to
19 British, they were not minority. That's not my case. My Lord, I am building up a case based
20 upon the finding recorded... finding a fact recorded, in *Azeez Basha*, that because of this you
21 have surrendered, your right. This is, My Lord... They may find these facts inconvenient, but
22 they are on record. Your Lordships, may at the end of my respectful submissions, may choose
23 to rely upon it, partly rely upon it or completely ignore it.

24

25 **CJI DY CHANDRACHUD:** Your argument is that, there was, therefore surrender of the
26 minority status.

27

28 **TUSHAR MEHTA:** That's the finding. The finding is not that because you are a university,
29 you can never be a minority institution the way they apprehend. That's not the finding. I am
30 just trying to show, how historically you surrendered, what others did not. Others also had this
31 option of surrendering their rights as a denominational institution and go before the
32 Government of the then Crown and let their Act be passed. But they continued their existence
33 *dehors* the Government. No Article 30, My Lord, was in existence. You could have
34 surrendered. You could have stuck to your ground. Vishwa Bharati stuck to its ground.

35

36 **CJI DY CHANDRACHUD:** So, they continue to award degrees which were not recognized
37 by the then Government.

1

2 **TUSHAR MEHTA:** Yes, and subsequently, when the India became free, when UGC Act
3 came, all these institutions which continued their denominational character or their
4 independent character, they were recognized as either Universities or Deemed to be
5 Universities. I'll show the scheme of the Act. My Lord, Section 3 says that, if you have an
6 institution, then in consultation with UGC, Central Government declares you to be, Deemed
7 to be University. So, they are now declared to be Deemed to be University, but that option, this
8 particular institution did not exercise and therefore, *Azeez Basha* says you have
9 surrendered. That is the ratio of *Azeez Basha*. Therefore, I'm respectfully...

10

11 **CJI DY CHANDRACHUD:** We got your point.

12

13 **TUSHAR MEHTA:** It won't take more time, My Lord. My intention is not that because they
14 sided with British, don't trust them, that's not the idea. They had every right, My Lord to take
15 their own political stand. And they took the political stand. Maybe that was a beneficial stand
16 for the community, for the student, for the College. I do not know. I don't sit in judgment over
17 there. Please see, My Lord 13. 13, Your Lordships can skip. Now, kindly come to page 26,
18 bottom. Now, My Lord, post AMU developments...

19

20 **CJI DY CHANDRACHUD:** Actually 13... just read 13. Gandhi *ji*'s statement that supports
21 your submission. Just read that statement by Gandhi *ji*.

22

23 **TUSHAR MEHTA:** In fact, new institutions such as Jamia and Kashi Vidyapeeth were
24 established specifically to provide education on nationalist lines. In contrast to AMU's loyalist
25 approach. In a speech, Gandhi *ji*... My Lord, I'm extremely sorry, my apologies. Himself noted
26 the Government controlled character, of the university as follows. I have myself appealed to
27 thousands of parents, at which hardly a parent has objected to the proposition of leaving
28 Government controlled schools. I therefore, take leave to think the parents of Aligarh boys are
29 not less convinced than the others of the necessity of withdrawing their children from the
30 schools and controlled by the Government that has participated in betraying the Muslims in
31 India and has wantonly humiliated the Nation through its barbarous treatment of Punjab.
32 Shall we not free...

33

34 **JUSTICE SANJIV KHANNA:** Jallianwala Bagh.

35

36 **TUSHAR MEHTA:** Jallianwala. This is near, My Lord, historically... Jallianwala Bagh
37 episode is being referred to by *Mahatma Gandhi ji*. That is, 1919, My Lord, Jallianwala Bagh.

1 Shall we not, free them boys from the curse of slavery, which has made us crawl on our bellies.
2 Surely, they would not need Government University degrees. Our existing religious and
3 charitable Hindu and Muslim funds can support our education without even a week of self-
4 denial.

5

6 **RAJEEV DHAVAN:** After Gandhi *ji's* quotation, there is a reference to contemporary
7 material and this is what we are objecting to. Just see after that, it says, therefore, even
8 contemporary material clearly suggests. My Lord, this is very wayward, My Lord.

9

10 **TUSHAR MEHTA:** When I would read *Basha*, I will read the text.

11

12 **RAJEEV DHAVAN:** Not when we read *Basha*, we read *Basha...*

13

14 **TUSHAR MEHTA:** It's not Bhasha its *Basha*.

15

16 **RAJEEV DHAVAN:** What it says is, only in respect of property, nothing else. The word
17 surrender, if used, My Lord, is only in respect of property, nothing else.

18

19 **TUSHAR MEHTA:** My Lord, if I would have done this, he would have abused me like a
20 pedestrian, My Lord, but I will not do it.

21

22 **CJI DY CHANDRACHUD:** Come along now, let's...

23

24 **RAJEEV DHAVAN:** No, no, no, I am sorry. It is a legitimate concern, My Lord, that we
25 placed...

26

27 **TUSHAR MEHTA:** You interrupted me at a very right time, that I must give you. At a very
28 right time.

29

30 **DINESH DWIVEDI:** The point is, they rely upon Shri Khan, My Lord, Syed Ahmad Khan,
31 whose the person who started this College, from primary school to MAO. His book, the Loyal
32 Musalman was written and the whole purpose of this MAO, based on that, was to create a body
33 of educated Muslims, who are loyal subjects, that is his own book. So, other books may be
34 discarded, but the founder, on whom they rely, has written, the Loyal Musalman. And he also,
35 wrote a book about 1857 rebellion, absolving... Musalmans were not primarily responsible,
36 only few people who were divergent, they were participants. So, I don't know why you object...

37

1 **RAJEEV DHAVAN:** No, My Lord this is all secondary...

2

3 **TUSHAR MEHTA:** Basically My Lord, the way in which *Basha* was read, the way in which
4 the Act was read...

5

6 **RAJEEV DHAVAN:** This is all secondary material... And when it comes to the term,
7 national.... the meaning, My Lord...

8

9 **CJI DY CHANDRACHUD:** Alright, alright. Now, can we all just... we are in the midst of an
10 argument... That's all right. We will hear you in the Rejoinder... Now, Mr. Solicitor, continue
11 that part...

12

13 **TUSHAR MEHTA:** *Basha*... while reading *Basha*, look at this, what he says, the Learned
14 Judges do not become he after retirement. My Lord they were ridiculed. My Lord, I want to
15 show that they were aware of this history, which is recorded in *Basha*. You can't pick up some
16 paragraphs here and there and start, My Lord, ridiculing the judgment, I'm leaving at that.
17 Ridiculing the judgment.

18

19 **CJI DY CHANDRACHUD:** Well, let's have a look at what you have said.

20

21 **TUSHAR MEHTA:** My Lord, if he has any objection, I'll welcome that objection. Please see,
22 is there anything objectionable to it?

23

24 **CJI DY CHANDRACHUD:** Para 14 let's see at least.

25

26 **TUSHAR MEHTA:** Para 17, My Lord. Your Lordships may skip 14 and 15. Please come to 17.
27 After the establish... It is submitted that post establishment of the AMU, the education system
28 in the country developed in the following manner. My Lord, I have given how the statutory
29 regime changed. How someone can object to this being shown to the Court? '20 Aligarh
30 Muslim University Act is passed, conference of Vice Chancellors of existing universities to
31 establish an inter-university board, was held in Shimla. Then '25 inter-university board was
32 established with the following objectives. Then My Lord, 1935 Government of India Act,
33 included provisions related to regulation of higher education, it divided legislative powers
34 between Central Government and Provincial Governments. In matters related to higher
35 education, both the Central and Provincial Legislature had the authority to make laws, et
36 cetera, et cetera. Ultimately, My Lord, I have said at the end, 1952, Government of India set
37 up an interim with University Grant Commission and Act is passed in 1956. What is

1 objectionable in this? This is a history known to each one of us. This is the way in which the
2 regime, post-independence progressed.

3

4 **CJI DY CHANDRACHUD:** Para 18. Let's see how you formulate that?

5

6 **TUSHAR MEHTA:** Before that, My Lord. Now please see, as Your Lordships, put a very
7 pertinent query. Kindly come to, Volume 2B, page 62. How, Your Lordships very pertinently
8 put that, how can you show, that there was a conscious decision to surrender?

9

10 **CJI DY CHANDRACHUD:** 2B, 62?

11

12 **TUSHAR MEHTA:** 2B, page 62. My Lord, this is also filed long back, including this table
13 with relevant paginations from the material. I am just taking care of a possible interruption.

14

15 **CJI DY CHANDRACHUD:** Actually Volume 2B, page 62 is your Written Submission or
16 what is it?

17

18 **TUSHAR MEHTA:** Yes, it's my Written Submission, My Lord. The title is, *Basha* and the
19 character of Aligarh Muslim University. First, 16-12-1870. A private committee was set up by
20 the name of 'Committee for Better Diffusion and Advancement of Learning Amongst the
21 Muhammadans of India'. Then, 15th April, 1872, this I have taken from a letter of Private
22 Secretary to the Viceroy. Please see the source, which is on record since beginning. 'The
23 Committee submitted its Report. The Report suggested and outlined the structure of a
24 Muhammadan Oriental College. The idea behind the same was to bring the Muslims on par
25 with current developments in the world. It emerges that one of the principal aims of the
26 Committee was the promotion of western arts and sciences and not just religious study'. Then
27 1873, Your Lordships, can skip that, but I'll read for completeness. 'A scheme was proposed
28 for the Muhammadan Oriental College, Sir Syed Ahmad Khan proposed, that the word 'college'
29 in the name of MAO College be substituted with 'university'. When the proposal is sent to the
30 Government, it replied that, if a Muhammadan University is sought to be established, then no
31 grants in aid would be receivable from the Government. We could not... we cannot after
32 Constitution, British Government could, and they did. Now, 24th of May '87. Opening
33 ceremony of MAO College is held in Aligarh. It may be noted that, as per some records... Your
34 Lordships can skip the first part. 'Further, land of 74 acres on which the entire MAO College
35 was set up, was given by Lieutenant Governor, Sir John Strachey in the Cantonment area of
36 Aligarh. Relevant portion of the said book is as under. My Lord, this fact is not in dispute, that
37 74 acres land is given by the British. This shows that national character of MAO College itself

1 and also shows how persons from all walks of life contributed to the proposed institution. This
2 further shows, that MAO College itself was wholly established on Government land and not
3 land acquired by minority community. This is not the only argument, My Lord, this is one of
4 the fact I have stated. Then, a letter from the Secretary of MAO College notes, that MAO
5 College is an institution dependent on Government funds. Then, 08-01-1877, the foundation
6 of MAO College was laid by Sir Syed on the land of the British Government in Aligarh
7 Cantonment. Then, Your Lordships can come to 26-11-1897. I'll skip, what is not relevant. I
8 have understood what is being conveyed. 26-11-1897, addressed by Sir Mahmood on Lord
9 Elgin, Viceroy and Governor General of India. In his address, Sir Syed spoke of his
10 achievements that the MAO College had made in the field of education, but lamented that the
11 ultimate goal before it, the attainment of university for the Muhammadans of India, similar to
12 the great English university of Oxford and Cambridge. This clearly shows that the actual aim
13 was an open, secular, scientific institution for public good and not merely a minority
14 institution. The minority element was a small portion of larger idea of Sir Syed. Several
15 prominent individuals associated with MAO College propounded various different ideas for
16 the university. I'm not reading because they were not accepted.

17

18 **CJI DY CHANDRACHUD:** But you know, Mr. Solicitor, there again your note, which you
19 have put there. That really is fundamentally inconsistent with our principles, underlying
20 Article 30. A minority institution, may set up a purely secular form of educational institution.
21 You can set up a.... A minority can set up an Architects' College. It can set up a Medical College.

22

23 **TUSHAR MEHTA:** I bow down to that. There is no quarrel. I'm My Lord...

24

25 **CJI DY CHANDRACHUD:** When you say that, the minority element was a small portion of
26 the larger idea of Sir Syed. This may not be a correct constitutional test to apply. We take it
27 that Sir Syed's idea was to set up entirely a secular education institute...

28

29 **TUSHAR MEHTA:** And still be a minority. I'm not on that.

30

31 **CJI DY CHANDRACHUD:** And still be a minority institution.

32

33 **TUSHAR MEHTA:** My Lord, I am not on that. The difficulty is, we are testing something,
34 which happened in 1920 based on Article 30, which was not there, at that point of time.

35

36 **JUSTICE SANJIV KHANNA:** Just one more thing. Just read the statement. 'Ultimate goal
37 was attainment of University for Muhammadans of India'.

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TUSHAR MEHTA: Correct, My Lord, for Muhammadans of India. Therefore I have said...

JUSTICE SANJIV KHANNA: To that extent...

TUSHAR MEHTA: But that also does not mean... As My Lord, the Chief Justice says, absent this also doesn't make any difference, presence this also does not make any difference. This is a part of narration of history I'm giving. I am not saying, that because it was teaching other subjects or it was intending to teach other subjects, it was not a minority. That's not my argument. And please, My Lord do not evaluate 1920 Act in light of Article 30, which came subsequently. Under Article 13 if there is anything...

CJI DY CHANDRACHUD: No, but the facts, that they transpired 1920 and before that, would have a bearing on whether they are entitled to the protection of Article 30.

TUSHAR MEHTA: That's exactly what I'm trying to show...

CJI DY CHANDRACHUD: We are not pitchforking Article 30 in 1920. No. In 1920, they didn't have the benefit of minority status.

TUSHAR MEHTA: No. Even...

CJI DY CHANDRACHUD: Because there was no Constitution. But the facts, as they unveiled in 1920, have a bearing on what is the nature of the institution ...

TUSHAR MEHTA: Correct. I bow down. Your Lordships are absolutely right. I respectfully bow down. Your Lordships would decide whether AMU had minority status, as on 1920 based upon two things, what transpired when the Act was passed...

CJI DY CHANDRACHUD: Not whether it had minority status as on 1920. As to whether it acquired a minority status as on 26 January 1950, based on the facts pertaining to its establishment, because establishment can happen post-Constitution, establishment can happen pre-Constitution. So, we have to look at the facts antecedent to the establishment and surrounding the establishment...

TUSHAR MEHTA: Please, My Lord, look at it from that angle...

1 **CJI DY CHANDRACHUD:** To deduce the integral character of the institution.

2

3 **TUSHAR MEHTA:** Please look at it from that angle. I must give the true facts. I don't have
4 the luxury of reading some paragraphs from here, some paragraph from there, leaving relevant
5 paragraphs. I am giving the true facts, historical facts. I am conscious of the fact that if it would
6 not have been the word Muhammadan University, there would not have been any change.

7

8 **CJI DY CHANDRACHUD:** No difference.

9

10 **TUSHAR MEHTA:** Presence of that word does not make any change. This is what happened.
11 Now, Your Lordships may come to 3611 at page 65. J. P. Hewett, Your Lordship. J. P. Hewett,
12 Lt. Governor of the United Provinces writes to Harcourt, it's Lord Harcourt Butler, he is
13 member of the Governor General's Council... a step before that, May, 1891, if Your Lordship
14 don't mind. My Lord, just to know who the Harcourt Butler is because he is the one who has
15 entered into correspondence with everyone. Some representatives seeking the University met
16 Harcourt Butler, Member of the Governor General's Council for setting up of a Muslim
17 University. J. P. Hewett, Lieutenant Governor of the United Provinces writes to Harcourt,
18 stating that the University at Aligarh is not to be denominational and kindly, mark this. It is
19 not to be denominational and the control of Government over the University should be evident
20 and effective, not regulation, this was the condition. It would not be denominational, meaning
21 thereby it would not be a minority institution and we will have our control, which control
22 which is evident and effective.

23

24 Note, this shows that from the very inception, the Imperial Government was clear on its stance,
25 that the demand for establishing a university by way of an enactment, would only be accepted
26 if, the control substantially vests with the secular non-minority authorities. Then next, the
27 Secretary of State writes to the Viceroy, on the need for governmental control over the AMU.
28 He states, 'your telegram of the 10th June, I approve in principle of the establishment of a
29 university at Aligarh, subject to reservation of adequate control and provision of adequate
30 funds, and provided that my freedom of action is reserved, I sanction negotiations.' Then My
31 Lord, Secretary of State writes to the Viceroy, on the need for governmental control of the
32 AMU. He states, your telegram of the 10th... It's a reputation, my apologies. Then next, the
33 Secretary of State communicated the readiness to sanction the creation of a university, subject
34 to the condition that its constitution was acceptable to the Government of India. Well, that is
35 the British Government, this again, emphatically suggests that the government was never
36 accepting an institution formed by a particular religion, then later by Sir Harcourt Butler to
37 the Raja, Sir Mahamood Khan, conveying the decision of the Secretary of the State regarding

1 the Muslim University at Aligarh. In the letters, Sir Harcourt Butler points out, the Secretary
2 of State has decided, after mature consideration that the proposed university shall not have
3 powers of affiliation, outside the locality in which it may be established. He also conveyed that
4 the Chancellor could be elected and that the powers which it was proposed to vest in the
5 Chancellor should be exercised by the Governor General in Council, with one exception,
6 namely the professor should not be appointed without previous approval of Governor General
7 in Council. The Raja of Mahmudabad writes to Sir Harcourt Butler and states as follows, 'there
8 is undoubtedly very strong opinion, that objection towards Muslim, is being taken by many as
9 part of the policy of Christian nations, to crush Islam. We suggest, Aligarh Muslim University,
10 and should Hindu University materialize, we suggest for the Banaras Hindu University. These
11 names naturally grow out of existing names of Muhammadan Anglo-Oriental College and
12 Central Hindu College. And unless there are objection of overwhelming weight, we think it a
13 concession that might well be made to the local sentiments, that let both of them retain their
14 respective Hindu and Muslim names, so far as name of the university is concerned. Then next,
15 26th Muhammadan Educational Conference at Lucknow. My Lord, this resolution is on
16 record. President Major Syed Hussain Bilgrami, in his address to the conference, observed
17 that the decision of the Secretary of State, in transferring powers from the Chancellor to the
18 Government of India resulted in practically making the university a government institution,
19 instead of a communal one. My Lords, these are all factors Your Lordships would bear in mind,
20 whether I succeed or not, that's not the issue. These are the factors which must be brought to
21 My Lord's notice. Please see the resolution. This meeting views the decision of His Majesty's
22 Secretary of State as contained, in the letter of the Hon'ble Sir Harcourt Butler, dated Shimla
23 9th August, with profound disappointment and regret, having regard to the views expressed
24 by the Constitution Committee and... this Constitution Committee of Constitution of MAO,
25 not our Constitution. In the course of discussion, amongst others, 1) that the name of
26 university should be the Muslim University. 2) With regard to the control the powers proposed
27 to be vested in the Chancellor, should not be vested in the Governor Generally in Council. This
28 precisely happened thereafter. Then, 3) the powers mentioned in Clause 5, Chapter 3, of the
29 statute should be the same as conferred, on the patron, on the... it should be pattern under
30 Section 41 of the rules and regulations of trustees of Aligarh College. 4) This was also not
31 followed. With regard to affiliation, the statute should remain as proposed. And 5) the
32 provisions of the Constitution relating to the powers of the Court, the Council and the Senate
33 should not be modified. This was modified. I'll show that when the Act, is brought to Your
34 Lordship's notice. And further having regard to the momentous issues involved therein, this
35 meeting appoints a committee of the following gentlemen with full powers and authority to
36 act and finally settle all matters relating to Muslim University in such manner as may seem
37 proper to them in the best interest of the community and to wait in deputation of His

1 Excellency, the Viceroy, to make all necessary representation in this behalf. Then the next date,
2 6th August 1930. The Muslim Gazette which recorded the meeting of the Foundation
3 Committee at Aligarh, indicated that a group within the committee was willing to accept
4 unhesitatingly whatever form of university that the government was willing to offer. Then '50,
5 demi official letter from Mr. H. Sharp to Sir Harcourt Butler, indicated that while the proposed
6 university would be called the Aligarh Muslim University, it's set-up as regards control, would
7 be along the lines of Banaras Hindu University. Banaras Hindu University had full control of
8 the British government. H. Sharp if Your Lordships can just note down, he is Secretary,
9 Education, to the Crown... to the Viceroy. I stand corrected. My apologies, my learned friend
10 Mr. Dwivedi is right, Secretary to the Viceroy. Then 24th September 1950, demi official letter
11 by Sir Harcourt Butler to Raja Sir Mohammad Ali Mohammad Khan Bahadur. In this letter,
12 Sir Butler indicates that the acceptance of government's proposal as regards the question of
13 principle, such as control, etc., over which there has been prolonged discussion in connection
14 with Hindu University, is an absolute condition precedent for further action. There would be
15 a government control, take it or leave it. Then, October 15, at a meeting of the Muslim
16 University Association, the organization votes to accept the proposal of the government for a
17 university on the same lines as Banaras Hindu University. Then resolution of the Muslim
18 University Committee, the following has been observed having regard to the refusal of the
19 government to grant to Mohammadans, a university on any principle other than those granted
20 to Hindus. This meeting of Muslim University Foundation Committee has no other alternative
21 at present, but to accept the principles of Hindu University Act. Kindly note the Banaras Hindu
22 University Act came into force on 1st of October 1950. Immediately thereafter, they also say
23 that 'All right, we withdraw all our demands and we are happy, if it is given in line with Banaras
24 Hindu University'. Then next, 27th August 1917, in a meeting between Aligarh Muslim
25 University regulations committee and Education Member Mr. Sankaran Nair. It was stated by
26 Mr. Nair, that if the government was to recognize the degrees of the college, it would also want
27 control over standard setting in examinations. This was accepted by the regulation committee
28 without objection. Members of the regulation committee themselves agreed to the
29 appointment of the university Vice chancellor being subject to veto of the Government of
30 India. They stated, that the reason for which for this was that the university was meant to be
31 All India in character. It was stated as under, the reason assigned for this preference, both here
32 and in other places, was that the Government of India would be free from local prejudice and
33 that the university will be an All India institution. Sir Sankaran Nair said that, Governor
34 General in Council would act only on the advice of local government, that it would actually be
35 to the advantage of the university to place these powers in the hands of the Lieutenant
36 Governor, to whom they could have access and whom they would more easily be able to
37 persuade, as indeed the Banaras University had just persuaded the Lieutenant Governor to

1 reverse the course of action decided upon by himself and the Government of India. He also
2 said that things were tending towards local autonomy. The members of the committee said
3 they would prefer to wait until the time arrives. Then My Lord, notes of H. Sharp, Secretary,
4 Department of Education, Government of India, while discussing the Draft Constitution of the
5 proposed university. Please allow me to read this, this would have bearing. General principles
6 which should regulate the organization of the university. I suggest two, which should be kept
7 in mind during further negotiations.

8

9 1. The Banaras precedent should be followed save where the promoters desire a change which
10 is unessential or an actual improvement, such changes are the omission of the syndicate and
11 uni-collegiate character of the University. Adherence to the Constitution of the Muhammadan
12 Anglo-Oriental College should not be permitted as an argument in support of mischievous
13 departure from Banaras model or relaxation of essential conditions. The argument was
14 actually used by members, that is, in the matter of dismissing staff. But such an argument
15 entirely overlooks the fact that a college is not a university and that a certain amount of
16 wholesome control has hitherto been exercised over Muhammadan Anglo-Oriental College by
17 the University of Allahabad. Similarly, as a minor consideration, the argument put forward
18 that Allahabad is a Government University should not be permitted to weigh in. The statement
19 is incorrect and the implication is misleading. Then main political considerations, the
20 promoters undoubtedly have political as well as educational aims. They would like to spread a
21 network of Islamic Colleges over India affiliated to Aligarh. But they know this will not be
22 allowed and have wisely chosen a uni-collegiate form of University. They will possibly attempt
23 to make Aligarh a centre of Muslim political movement perhaps a pan-Islamic movement. This
24 can be guarded against by insisting in a reasonable composition in the governing bodies,
25 proper conditions for admission and a wide framing of Clause 6, in view of possible political
26 activities. They have all along desired network of Islamic schools recognized by the University.
27 They have now wisely abandoned the claim to recognition. Preceding paragraph 11 and 33.
28 They want to be free of all control by Lieutenant Governor partly as a matter of *izzat*, that is
29 respect partly because they anticipate greater leniency from the Government of India. See
30 proceeding number so and so. It would seem from paragraph 7 that they were willing to give
31 way on this point. Afterwards, they took counsel together and stiffened. But I think they will
32 give way if pressed, the plea of an All India Institution can be countered by the Banaras
33 analogy. Then, Your Lordships can consider skipping unless except at page 70 the underlying
34 portion, the Bill. The education aspects of the case can best be dealt with during the
35 consideration of the documents. The notes and proceedings touch all the important points. I
36 comment below on the following, on the proceedings. Power of Governor General in Council,
37 proceedings paragraph 17, the proposed Clause 6, is insufficient, Clause 19 of Banaras Bill

1 should be reproduced. Power of the Visitor. I do not see how the wishes of the promoters, not
2 to have a Visitor can be met. There would immediately be outcry from the Hindus. The
3 Lieutenant Governor should be Visitor and should have the powers given in Section 6 of the
4 Banaras Act. The visitor should also have the power of sanctioning statutes and regulations as
5 in Section 17(5), and 18(5), of the Banaras Act, see proceedings so and so. I'll show them from
6 the provision which were not shown to Your Lordship. The Court is not the final body for all
7 statutes. I'll show that when I come to that. Then powers of the Court. The following powers
8 of the Courts are excessive and should be disallowed. The power of interpretation, the
9 sanctioning of regulation, etc. Senate and Syndicate. There will be no Syndicate, this is not
10 necessary provided a sub-committee can be appointed proceeding para so and so. If the power
11 of the Court are properly curtailed those of the Senate appear sufficient, but should perhaps
12 be made subject to the Act, etc, etc. Then Your Lordships can skip and please come to page 72,
13 1901... 1918. Letter by Sir... Your Lordship gets it? Letter by Sir Edwin Montagu, Secretary to
14 the Government of India to the Chief Secretary to the Government of United Provinces. My
15 Lord this is a part of the record Volume 4D PDF page. 1089. The letter is placed on record.

16

17 As His Honor, the Lieutenant Governor is aware, the Government of India wrote a
18 [UNCLEAR] during the year 1911-12 in correspondence with the Secretary of State, regarding
19 proposal to establish a Muslim University at Aligarh and the Secretary of State communicated
20 his approval of the institution of the proposed university subject to certain remarks and
21 criticisms put forward, by then under discussion. The principles then indicated by the
22 Secretary of State, have formed the basis of Banaras Hindu University Act 1915, and it is a
23 university. It is now presumed that any legislation for the establishment, of a Muslim
24 University at Aligarh, must conform in all matters of substance with the provisions of the
25 legislation already passed by the Hindu University at Banaras. At a meeting of Muslim
26 University Foundation Committee held at Aligarh, on 8 April 1917, it was resolved that
27 committee was prepared to accept the best university on the lines of Hindu University and
28 authority was given to the regulation committee of the proposed Muslim University, to take
29 the necessary steps for the introduction of a Muslim University Bill in the Imperial Legislative
30 Council. Now, Your Lordships may directly come to page 75. This is in the same lines, that
31 government control, no denominational character and... page, My Lord 75. No denominational
32 character (b), absolute government control and (c), at par with and on line of BHU. Page 75,
33 08-05-1920, telegram from the Secretary to the Government of United Provinces and Judicial
34 Department to Secretary to the Government of India, Department of Education. The telegram
35 compares the BHU Act and Draft Bill for AMU. On a comparison, it notes the following, My
36 Lord, please see 2, A-2, a comparison of Muslim University Draft Bill with Banaras Hindu
37 University Act shows that,

1 2. Alterations, additions, amendments, or repeal of statutes and (b) ordinances in the case of
2 Muslim University Bill, that is subject to the veto of Governor General in Council, while in case
3 of Banaras Hindu University, they require the previous approval of the Visitor. AMU had
4 omitted that. 3. objects to that. It is also noted that certain powers vested under the Banaras
5 Hindu University Act in the Visitor have, according to the draft Muslim University Bill, been
6 transferred to the Governor General in Council. In other words, while official control in this
7 respect is in no way affected, only the agency exercises that control is changed, from local to
8 Imperial Government. Now, bearing in mind the fact that Aligarh and Banaras Universities
9 are All India and not merely provincial institutions and that in future, as a result of the scheme
10 of constitutional reforms, introduced under the Government of India Act 1919, these two
11 universities will not... will be not provincial but central subjects. It is necessarily follows, that
12 the proposed modifications are not only in no way opposed to principle, but in the highest
13 degree desirable. These were the seeds sown for Entry 63. Then it follows, therefore, that
14 unless the modifications proposed in the draft Muslim University Bill are retained, the
15 Government of India control over these two universities will really be nominal. And as a result,
16 the very object for which the Aligarh and Banaras universities are constituted as a central
17 subject will be defeated. What in fact, the proposed draft does bring about, is that while leaving
18 sufficient measure of control in the hands of the local government, insofar as it is at all
19 necessary, it tightens the control of Governor General in Council, over these All India
20 universities. The account of the university will include expenditures of the imperial recurring
21 grant, these must therefore be submitted to the Government of India. New statutes and
22 ordinances will be framed by virtue of power given by the Imperial Act, to a university
23 constituting a central subject which will, under the reform scheme, be under the control of the
24 Government of India and not under the provincial government. These must therefore be
25 subject to the veto of Governor General in Council and not of the local government. To enact
26 otherwise would result not only in the abdication by the Imperial Government of its own power
27 as well as responsibilities, but may also lead to undesirable results. Now, Your Lordships may
28 kindly come to page 77 at the foot. Now, the bill is introduced, which I say the second limb
29 would be after the history, what happened in the imperial Parliament when the bill was passed.
30 Ultimately, Mr. Shafi who was one of the liberals, introduced the bill. He seems to be a member
31 of this Imperial Parliament also, Imperial Council also, I'm sorry. Your Lordships have bottom
32 of page 77?

33

34 **CJI DY CHANDRACHUD:** 77?

35

36 **TUSHAR MEHTA:** Discussion on the AMU Bill, 1920. That is Imperial Council. That is
37 delegate of the Parliament, British Parliament. Mr. Shafi introduced the bill for the

1 establishment of a university and moved to refer the bill to a Select Committee. The relevant
2 extracts of his speech are as follows. This was the reason why I said, that Mr. Shafi led one
3 group and Ali Brothers led other group. That was the only relevance. The Secretary of State,
4 on 18th July approved the principle of establishment of such a university, subject to
5 reservation of adequate control and provision of adequate funds. And while reserving his own
6 freedom of action, sanctioned the proposed negotiations with the association. Meanwhile, the
7 Hindu leaders who too had, in their turn, approached the Government of India, with a scheme,
8 the establishment of a Hindu University at Banaras, guided by the practical spirit (which is
9 one of their characteristics)... I don't know, it's a compliment, I take it as a compliment.
10 Practical spirit, which is one of their characteristics accepted the conditions laid down by the
11 Secretary of State with the result that a bill for the establishment of Banaras University was
12 prepared and after having passed through the Imperial Legislative Council, received the assent
13 of the Governor General on the 1st October 1915, an undertaking was at that time given by the
14 government to the Hindu leaders that the university to be granted to the Muslim community
15 would also be on the same lines of Hindu University. This position, as clearly explained to the
16 Muslim leaders and the Government of India have all along been ready and willing to act up
17 to that undertaking and the government. They say on the floor of the Parliament that we will
18 be at par with Hindu University. There cannot be anything more to suggest that they surrender
19 their right to continue as a minority institution. Then further, Honourable members are aware
20 that education, including university education, has in the past been a provincial subject.
21 Legislation regarding the Banaras University was framed in consonance with the state of
22 things and all official control in consequence, reserved to the Provincial Government
23 recognizing the All India character of Banaras and Aligarh Universities. The rules framed
24 under the new Government of India Act have now proposed that these two universities should
25 be central subject and the responsibility in connection therewith, will henceforward rest on
26 the shoulders of the Government of India. Now, Your Lordships may kindly come to next page,
27 Syed Mohammad Ali, he is not one of those Ali brothers, he is a different Mohammad Ali. This
28 is at page 79. Does Your Lordship get? I'm skipping something, which might at times become
29 boring, without rendering any assistance. Syed Mohammad Ali, a university, they pointed out,
30 must be a national organization calculated to subserve the various and varying needs of the
31 different communities, their cultural genius and their industries and their trades, which are to
32 be served by it. About the former, the Muslim community has felt compelled to accept the
33 latter academic opinion, there is no room in future for an affiliating type of a university and
34 that the best interest of educating will be served by a local university. Regarding the latter, the
35 community has reluctantly accepted the limitation of the control imposed by the government.
36 I should like to draw attention to another important point. The Muhammadans have always
37 felt the need of secular education, being supplemented by religious instruction. They have

1 always felt that nothing can be more deplorable, more subservient of discipline, more
2 detrimental to the development of manhood and character than, to train and educate the youth
3 of the country in godless education. It is therefore a matter of satisfaction, that promoters of
4 the scheme have made religious and moral instruction, the bedrock of education. The bill
5 provides that students of all classes and creeds would be admitted to the university and it is
6 hoped that the university will be a means of better understanding between various
7 communities of the country. He also expresses the need, etc. Then My Lords, it is referred to
8 the Select Committee and now we are in the Select Committee's report. At page 80, the
9 Committee inserted a provision in Clause 30 which provides that the first ordinances shall be
10 framed in accordance with the directions of the Governor General in Council. Please pause
11 here for a moment, My Lord. These are the documents of Governance. Statutes and ordinances
12 are the documents of governance which are framed by the Governor General in Council under
13 the Act. In Clause 30, we have inserted a provision as to the first ordinances which shall be
14 framed in accordance with the directions given by the Governor General in Council, the full
15 control. Thereafter, My Lord, we have also substituted the Lord Rector as the authority who
16 shall nominate a High Court Judge on the Board to settle disputes between the Executive and
17 Academic Council as to the power of making ordinances. This we have done so, so as to have
18 wider field of selection then would have been possible if the authority has been one having no
19 power of selection outside the United Provinces. In Clause 35, we have substituted the visiting
20 Board for the Court as the authority to appoint the Auditor, etc, etc. I may not further detain
21 Your Lordships any further. Now, Mr. Shafi comes back before the... now the report comes
22 before the Imperial Council again for discussion, that is 9 September 2020, at the foot of page
23 80. Mr. Shafi moved the report of the Select Committee on the bill to establish AMU. Khan
24 Bahadur Ibrahim Harun Zafar proposed an amendment that the first Chancellor, Vice-
25 Chancellor and Pro-Chancellor shall hold office for such period as the Court may determine.
26 Court, My Lord, means the Court as an authority under the Act. Mr. S. Mohammed Ali
27 responded as follows. My Lord, the amendment, if carried, would result in creating an
28 anomalous position both as regards the highest offices of the university and as regards the
29 Governor General in Council. It would be ridiculous if the Court immediately after the
30 appointment by the Governor General in Council of the first Chancellor, the Pro-Chancellor
31 and the Vice-Chancellor sets aside this appointment and makes fresh appointment is hardly
32 conceivable that any person would consent to accept any of these honorary offices under the
33 university, under those conditions. You can't have that Governor General in Council, appoint
34 three highly placed persons, and next day the Court removes them. So he says that is not
35 acceptable. Now, Mr. Shafi repeats that in different words, I am not reading them. Then Your
36 Lordship, kindly come to the bottom of page 81. It was opposed by Mr. Shafi as follows, My
37 Lord a careful examination of Clause 30 as it stands in the bill will show the Honourable

1 Members that the acceptance of my Honourable Friend's amendment will result firstly in
2 deletion of sub-clause 2. Your Lordships can skip. Come to next page highlighted part. In the
3 third place my Honourable Friend would like the word veto being substituted for what in effect
4 is precious approval of the Governor General in Council. Here against the Government of India
5 are unable to accept the change proposed by my Honourable Friend. It will be noticed that
6 previous sanction in the expression used in the Banaras Act and we have in fulfilment of the
7 pledge given to Hindu leaders at that time, in this respect, adhered to the phraseology adopted
8 in the case of Banaras Act. The Government of India are not prepared to depart from the
9 decision then arrived at. Government of India means, My Lord, the then British Government.
10 Now Your Lordships may kindly come to the scheme of the Act, page 85. My Lords, allow me
11 to read the scheme, the way I see the scheme, because unfortunately, many provisions were
12 not pointed out to Your Lordship or pointed out only in part. AMU Act as it stood in 1920.

13

14 **CJI DY CHANDRACHUD:** Yes. Page 85, right?

15

16 **TUSHAR MEHTA:** Yes. My Lord 119. Allow me to read this, My Lord. I have paraphrased
17 my arguments also, with quoting the relevant provision.

18

19 **CJI DY CHANDRACHUD:** Page 85?

20

21 **TUSHAR MEHTA:** Page 85, My Lord. The title is the AMU...

22

23 **CJI DY CHANDRACHUD:** The AMU Act as it stood in 1920.

24

25 **TUSHAR MEHTA:** As it stood, because Your Lordships would examine, as it stood then,
26 whether any status was conferred. The survey of provision of the Aligarh Muslim University at
27 the time of inception of the university in 1920, clearly points towards a predominantly national
28 and non-minority character of the university. In fact, the minority element, was only present
29 as an exception or a carve out, as opposed to the omnipresent non-minority character. A copy
30 of the Aligarh Act is annexed at the time of its inception, Section 3, provided that the first
31 Chancellor, Pro-Chancellor and Vice Chancellor, were to be appointed by the Governor
32 General in Council by way of a notification in the Gazette. The Governor General in Council
33 being the appointing authority, at the time of inception of the high positions of Chancellor,
34 Vice Chancellor, to be reflected through a notification of India, is asymptomatic of a national
35 character. Section 30 is quoted above. My Lord, I'll not read that. Then 121, Section 5, which
36 provided for the powers of the university, had 12 Sub-clauses, out of which 10 were clearly
37 non-minority. Mr. Sibal, read, only one of the objects out of ten. My Lords, allow me to read

1 the whole. Dr. Dhavan, My Lords, I'm sorry. Section 5, My Lord, at page 86. The university
2 shall have the following power, namely, to provide for instruction in such branches of learning,
3 as the university may think fit and to make provision for research and for advancement and
4 dissemination of knowledge. To promote Oriental and Islamic studies and give instruction in
5 Muslim theology and religion and to impart, moral and physical training, to hold
6 examinations, etc, etc. The only part which is religious... which is denominational part,
7 because the Britishers were saying that we'll not accept denominational characters, is My Lord,
8 at the end of 12, which was read before, Your Lordships. I'm not reading others. They are non-
9 religious or non-denominational. 12, to do all such other acts and things, whether incidental
10 to the powers aforesaid or not, as maybe requisite in order to further the objects of the
11 university as a teaching and examining body, and to cultivate and promote art, science, and
12 other branches of learning, including professional studies, technology, Islamic learning and
13 Muslim Theology. So the...

14

15 [NO AUDIO]

16

17 My purpose again at the outset is, please take a holistic view. The history, the historical
18 background, the historical background in which the Act comes into force and the Act also
19 holistically, one provision or two provision may or may not make it a minority institution. My
20 Lord, I am respectfully urging that the Britishers were very clear, that it would be non-
21 denominational and it would have our full control. If these are the two things then, it is not a
22 minority institution.

23

24 **CJI DY CHANDRACHUD:** Yes.

25

26 **TUSHAR MEHTA:** My Lords, 8. Your Lordships have seen this. the university shall subject
27 to provision of this Act and the ordinances be open to all persons of either sex and of whatever
28 race, creed or class. I straightway consider as a proposition of law. A minority institution can
29 be open to everyone. That would not rob it of its minority character, if otherwise, other
30 attributes are satisfied. But please see 30. Ordinances. The executive council or in academic
31 ordinances matters the academic council may make ordinances. The first ordinances shall be
32 framed as directed by the Governor General in Council and shall receive such previous
33 approval as he may direct. Correct, My Lords? Not by the committee, not by the court, not by
34 anyone else. He says non-denominational government controlled ordinance will be the first
35 ordinances, and I'll show how it can be amended. It can't be amended without his approval.
36 No new ordinance or amendment or repeal of an existing ordinance shall have any validity
37 until it has been submitted through the court and the visiting board, which may record its

1 opinion thereon to the Governor General in Council and has obtained the approval of the
2 latter, who may sanction, disallow or remit it for further consideration. See My Lord, the
3 absolute power. Same provision is for statutes also. Unlike what was submitted before Your
4 Lordship, that 'I make statutes, I am the court and court is 100% Muslim', which is, of course,
5 deleted now in view of the new constitutional setup. Incidentally it may be, *de facto* it may be,
6 but *de jure*, it is not necessary that courts should be consisting of only Muslims. If any question
7 arises between the executive and the academic council as to which has the power to make an
8 ordinance, either council may represent the matter to the visiting board, who shall refer the
9 same to a Tribunal consisting of three members, one of whom shall be nominated by the
10 executive council, one by the academic council and one shall be a judge of a high court
11 nominated by the Lord Rector. Complete governmental control, outside control. Kerala Bill,
12 Your Lordships would remember, say, sprinkling of outsiders. Complete control on
13 administration by the minority community with sprinkling of outsiders. Now further, 32,
14 admission to the university. This is the heart of any university administration. How to admit
15 students? How to judge their suitability to be the student of this particular university?
16 Admission of students to the university shall be made by an admission committee consisting
17 of the Pro Vice Chancellor, the Principal of an intermediate college who shall be selected by
18 the vice chancellor and such other persons as may be appointed by the academic council.
19 Students shall not be eligible for admission to a course of study for a degree, unless they have
20 passed the intermediate examination of an Indian university incorporated by any law for the
21 time being enforced or an examination recognized in accordance with the provisions of this
22 section as equivalent to the intermediate examination and possess such further qualifications
23 as may be prescribed by the ordinances. Again My Lord framed above. The conditions under
24 which students may be admitted to the diploma courses of the university shall be prescribed
25 by the ordinances. Court can do nothing to the ordinance except suggesting some amendment
26 which can be discarded, which can be disallowed or remitted back. The conditions, the
27 University shall not save with the previous sanction of the Governor General in Council
28 recognize for the purpose of admission to a course of study for a degree as equivalent to its
29 own degrees, any degree conferred by any other University or as equivalent to the intermediate
30 examination of an Indian University, any examination conducted by any other authority.
31 Notwithstanding anything contained in this Act or the ordinances, any student of the
32 Muhammadan Anglo-Oriental College Aligarh, who immediately before the commencement
33 of this Act, was studying for the examination of Allahabad. That's the transitory provision.
34 Nothing turns on them. Then 124.

35

36 **DINESH DWIVEDI:** 123 may be read.

37

1 **TUSHAR MEHTA:** 123. Section 9, on which considerable reliance has been placed also
2 merely creates an island of minority education by giving the power to the Court to make
3 statutes making institution in Muslim religion compulsory only for Muslim students and not
4 otherwise. This provision does not define the predominant character of the institution at the
5 time of its inception. I'm thankful to My Learned Friend. After the Constitution to make it
6 Article 29 compliant, this is deleted in 1951, 70 plus years back. This is deleted by the
7 Parliament, by Indian Parliament, to bring this in conformity with Article 29 of the
8 Constitution.

9

10 **JUSTICE SANJIV KHANNA:** Article 29?

11

12 **TUSHAR MEHTA:** 28.

13

14 **JUSTICE SANJIV KHANNA:** 28, not 29.

15

16 **TUSHAR MEHTA:** 28, my apologies.

17

18 **JUSTICE SANJIV KHANNA:** But that will in fact show probably it was a minority
19 institution.

20

21 **TUSHAR MEHTA:** Show of.

22

23 **JUSTICE SANJIV KHANNA:** That it was probably a minority institution because
24 otherwise state funded institutions, religious education is not permitted.

25

26 **TUSHAR MEHTA:** Correct My Lords. The provision concerning teaching of the University
27 at the time of its inception also overwhelmingly includes only secular education, which is
28 evident from the fact that it is include lecturing, laboratory work, tutorials, et cetera, et cetera.
29 Now, My Lords, please see the actual governance documents, para 125. As per section 27
30 statutes could provide for conferment of Honorary degrees, appointment of Rectors,
31 institution of fellowship scholarship, the conditions of appointment of officers of the
32 University, et cetera. But the first statues of the University were framed not by the Court, but
33 by the Legislature as set out in the schedule to the original Act in terms of Section 28.
34 Therefore, the first statute at the time of inception, which could have provided for wide array
35 of powers and functions and administration. Section 30, Sub-article 1, sorry... Article 30, Sub-
36 article 1, Administration. When it is established, what is the position. Within the University
37 were not framed by the minority, but by the Federal Legislature itself. Further, as per Section

1 28, the said first statutes framed by the Federal Legislature could be amended, please note
2 this, repealed or added by the Court only after it had been approved by the Governor General
3 in Council. Now the Governor. Now, there is an amendment because there is no Governor
4 General in Council. Now Governor of the State. Governor of Uttar Pradesh. Amended, repealed
5 or added by the Court only after it had been approved by the Governor General in Council,
6 who also had the power to disallow proposals for amendment of such statutes. It's not binding.
7 It's not like the resolution passed by the Cabinet that the Governor is bound. He can only refer
8 it once. No. He can straightway say that. I don't agree. I reject it. I'll show that provision also.
9 The only carve out from this power of the Governor General in Council was that statute dealing
10 with instruction of Muslim students in Muslim Theology were not required to be submitted
11 for approval. Rest everything goes for approval to the Governor, having full power to reject.
12 Therefore, while the statutes and the power to control the statute predominantly vested in a
13 non-minority authority, only a small portion as a sprinkling minority were provided. My Lord,
14 now, please see Section 23. Before that please see Section 28, statutes. The first statutes were
15 also provided by the legislature. It was not left to anybody, academic council or executive
16 council or even the court. So at the time of establishment of AMU, no decision making was
17 done by anyone other than the Legislative Council. First ordinances, first statute, and both the
18 documents of Governance, it's a part of the Act itself. Now, please see, My Lord, this is Section
19 28. Now I take Your Lordship to some of the other provisions of the Act, please see page 148
20 and 149 of this very document. I skipped some provisions before, thereafter I'll come to My
21 Lord... kindly come back to page 89. I'm sorry. My apologies to Your Lordships.

22

23 **JUSTICE SANJIV KHANNA:** Mr. Mehta, the term used in the Constitution is
24 administration.

25

26 **TUSHAR MEHTA:** Yes, My Lord. Administer.

27

28 **JUSTICE SANJIV KHANNA:** Administer. Now, the issue would be whether, day to day
29 administer, task for the administration or administrating institution is vested with the
30 community that would be the test, or it will be the test to see as pointed out by some of the
31 councils on the other side, *de facto* who had the control, who are in charge and taking
32 decisions. You may be right, as far as the first ordinances, et cetera, as pointed out by you these
33 are all made by the... government had a big role to play with. We don't know what really was
34 the nature and structure of those ordinances.

35

36 **TUSHAR MEHTA:** I'll show that. I'm going to show that and even those...

37

1 **JUSTICE SANJIV KHANNA:** And just keep in mind also Article 28, and the bar created or
2 restrictions created by that. Because Article 28, Clause 1, says no religious education, etc., in
3 the government aided, fully government aided institutions.

4

5 **TUSHAR MEHTA:** Yes, that's going to be... That's why there is an amendment.

6

7 **JUSTICE SANJIV KHANNA:** And that's why I flagged when you referred to the deletion
8 made by 1951 amendment, in terms of, that is really in terms of Clause 3 of Article 28.

9

10 **TUSHAR MEHTA:** Yes, it says so.

11

12 **JUSTICE SANJIV KHANNA:** Because it gives an option to...

13

14 **TUSHAR MEHTA:** Voluntarily, you can. Can 't be compelled.

15

16 **JUSTICE SANJIV KHANNA:** Compulsorily you can't.

17

18 **TUSHAR MEHTA:** You can't be compelled, you can voluntarily have it. Then ordinances,
19 My Lord, page 90 at the foot. As I said, first ordinances are framed by the, framed as directed
20 by Governor General in Council, etc. I have read My Lord. Please My Lord come to page 91,
21 Section 12. Your Lordship gets that? I'm sorry, My Lord.

22

23 **CJI DY CHANDRACHUD:** Page 91?

24

25 **TUSHAR MEHTA:** Page 91, Section 12. The university shall, subject to the statutes, have
26 power to establish and maintain intermediate colleges and schools within such limits in the
27 Aligarh district, as may be laid down in the ordinances for the purpose of preparing students
28 for admission to the university, and may provide for instruction in Muslim religion and
29 theology in any of such colleges and schools with the approval of the academic council and the
30 sanction of the governor General in council, on recommendation of the visiting board. The
31 subject to such conditions as may be prescribed by the statute and the ordinances the
32 university may admit intermediate colleges, etc. The purpose is, that decision making is not in
33 the hands of a body having Muslim majority. Administration is not... a peon is also a part of
34 the administration, a clerk is also a part of the administration. But when we are talking of an
35 institution, like university, administration is the body which administers the university. The
36 rest of the people would do their part assigned to them as decided by the administering body.
37 Otherwise...

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JUSTICE SANJIV KHANNA: The reason why I asked that question was, prior to 1947, the British government or the... could have established the institution and also formulated the role of the people. But given the administration to the Muslims or the Hindus?

TUSHAR MEHTA: Because of a request, which I read, that I don't insist, you don't want to make it. But please, you have respected local sentiments in Hindus... respect local sentiments of Muslims, not with an intention to make it a minority institution. Therefore, I read that, that inclusion of Muslims, which is also deleted subsequently, I'll show that. But right now I am on 20 Act as it stood on 20. That was also with a review to respect the sentiments, not with an intention of conferring any status. Banaras Hindu University had the court having Hindus. So it was more out of a gesture of goodwill rather than conferring any enforceable right on the institution. Then Section 13. The Governor General shall be the Lord Rector of the university. 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, et cetera, et cetera. Everything is conferred upon the Lord Rector. But please see subsection 5, where the court does not within reasonable time, take action to the satisfaction of Lord Rector. Now My Lord, it is, Governor. 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. Complete predominant, supervening powers conferred upon the Governor because it has always been the desire and stated wish of the Britishers that we will have effective government control. You accept it or you do not accept it. And this is where the government control is accepted.... is reflected. Then My Lord, annual accounts will also be placed before the visiting board and Lord Rector, non-Muslim bodies, and to be published in Gazette of India. Then last is Section 40, power to remove difficulties. If any difficulty arises with respect to the establishment of the university or any authority of the university, or in connection with the first meeting of any authority of the university, the Governor General in Council may, by order make any appointment or do anything which appears to him necessary or expedient for the proper establishment of the university or any authority thereof, or for the first meeting of any authority or university. Any such order may modify the provisions of this Act and the statute so far as so and so and so and so. Now Your Lordships may kindly come to page 139. The Act and some provisions which are not quoted here.

JUSTICE SANJIV KHANNA: 139?

1 **TUSHAR MEHTA:** 139 My Lord. Again it's an Act. Printed Act. They do not say that we
2 merge or we recognize your existence and convert you into the University. There are two types
3 of legislations. Please My Lord, bear one fact in mind, and this is going to the root of the
4 question when Your Lordship ultimately decides the issue. Some legislations can be
5 legislations which recognizes an existing factor. I'll show there are some Universities where
6 such things have happened and some legislations which in law establishes or incorporates
7 something new, a new entity comes into being, a new entity is born. This is a legislation where
8 it's not recognizing anything. It establishes and incorporates a new entity. And this judgment
9 in **Basha** is only 1920 Act specific. It does not lay down a law of universal application that
10 once you are incorporated, you are not a minority institution. I'll also show... I'm sorry My
11 Lords. Other side reads **Basha** to mean that if you are incorporated as a University, from date
12 of incorporation, your minority status goes. That's not what **Basha** holds. **Basha** merely
13 examines 1920 Act and says that you are not the University which is minority University. I
14 will show examples post Constitution also minority Universities can be incorporated. How?
15 That I'll show. Please see My Lord, the Preamble. Whereas it is expedient to establish and
16 incorporate a teaching and residential Muslim University at Aligarh. So, the purpose is to
17 establish and incorporate. By whom? By the legislation, legislature. Not only a new body is
18 born, the earlier body goes by operation of law. It merges, it dies. It is dissolved. The correct
19 word is not merger. It's dissolved into this new entity. It dies. So new body takes birth by
20 operation of law. It is established by operation of law, incorporated by operation of law, and
21 this is what it says 'whereas it is expedient to establish and incorporate a teaching and
22 residential Muslim University at Aligarh and to dissolve the society registered under the
23 Societies Registration Act.' Because there cannot be two statutory bodies simultaneously.
24 Therefore, one is born, another gets dissolved, it dies. Then Your Lordships kindly come to
25 Section 4. I'm sorry My Lord. Page 140, Section 4. Your Lordships are on Section 4?

26

27 **CJI DY CHANDRACHUD:** Yes.

28

29 **TUSHAR MEHTA:** I am grateful My Lord. The society is known as Muhammadan Anglo-
30 Oriental College, Aligarh and the Muslim University Association shall be dissolved and all
31 properties movable and immovable, and all rights, powers, and privileges of the said societies
32 and all property movable and immovable and all rights, powers and privileges of the Muslim
33 University Foundation Committee, shall be transferred to and vest in the university.... And
34 please, mark this My Lord, this is relevant, and shall be applied to the objects and purposes
35 for which the university is incorporated, not for the objects and purposes of either MAO or
36 other institutes, which gets dissolved, which dies, and the new body takes birth. Now, Your
37 Lordships may kindly come to page 140.

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JUSTICE SANJIV KHANNA: Just stopping here for a minute. MAO College and Muslim University Association, as per your argument, even they may be a minority institution in terms of Article 30, but after they got dissolved into it, they cease to be... that character will not be relevant.

TUSHAR MEHTA: I would put it slightly differently. They had a denominational character. There was no Article 30.

JUSTICE SANJIV KHANNA: No, I know. But if we apply Article 30, to them. If we applied...?

TUSHAR MEHTA: They may have denominational character. But in view of the peculiar historical fact which *Basha* notes, once you agree to the terms and conditions of the government and Parliament by an act of legislature, dissolves your existence and gives birth to a new body, the earlier one goes.

JUSTICE SANJIV KHANNA: First, this is your first, in fact, the first one was earlier. They agreed to give up certain rights and therefore, and the second was, the incorporation or the establishment.

TUSHAR MEHTA: Surrender the rights that's the ratio of *Basha*.

JUSTICE SANJIV KHANNA: But as far as, but as far as MAO is concerned and Muslim University Association is concerned, they were distinctly minority, in case we applied Article 30.

TUSHAR MEHTA: May have been, may have been, but they could have My Lord, I'm answering it straight. They could have continued even if they were minority institutions, as minority institutions, the way St. Stephen continued, the way Jamia continued, the way many other My Lord, linguistic establishments continued. There were many linguistic, not establishment, institutions which were continuing and their degrees were more valuable. This Roorkee may not have been My Lord, a minority institution, but they were minority institutions. St. Stephen is the best example. Closest My Lord, the Delhi University was incorporated simultaneously with Allahabad University, merged, five universities were merged into one and this continued its independent minority existence at that time, even St. Stephen had an option of going before the British Crown and requested pass an Act for me and

1 British Crown would have said that, these are my conditions. You will not be denominational
2 Christian Institute. You will have a full control of the government, if you agree, we will consider
3 your plan. That's what My Lord, the Harcourt Butler says, that we will consider. Permission is
4 given to consider your negotiations. All objects go, everything goes because it says that now
5 the money would be spent for the objects of this newly born statutory body.

6

7 **JUSTICE SURYA KANT:** Do you have any material on record, to show that what were the
8 recurring expenditure of the university, from 1920 to 1950, and who funded those?

9

10 **TUSHAR MEHTA:** As of now, My Lord, the government funded. The figure, I can take it but
11 figure, but as of now, it's 1500 crores per annum.

12

13 **JUSTICE SURYA KANT:** To 1950.

14

15 **TUSHAR MEHTA:** 1950, My Lord, I'll try and find out. There may be something on record.

16

17 **RAJEEV DHAVAN:** [UNCLEAR] Aligarh My Lord that it was about 25%. This is, I mean,
18 my [UNCLEAR].

19

20 **TUSHAR MEHTA:** We will check up My Lord. We will say as per....[INAUDIBLE]. My
21 learned friend is arguing some other matter between the two of us. St. Stephen is decided to
22 be minority institution by a five judge bench of this Honourable Court. So I cannot make any
23 other submission. And if I have other submissions, I'll make in appropriate proceedings at an
24 appropriate time. My learned friend cannot apply the estoppel rule against me.

25

26 My Lord, please see page 143. Why everything was surrendered? Apart from their political
27 affiliation. I'm not going into it. They were loyalists to the British. They may be, they were
28 entitled to be. Anyone can be loyalist to either a, b, c and I'm not on any value judgment. But
29 they wanted recognition of their degrees, that is Section 6 of this Act. The degrees, diplomas
30 and other academic distinctions granted or conferred to, or on persons by the university shall
31 be recognized by the government. I'm sorry. Eminent universities and eminent institutions
32 were conferring degrees, only thing was not recognized by the British government. Now, please
33 see 6... I'm sorry. I'll read it again. The degrees, diplomas and other academic distinctions
34 granted or conferred to or on persons by the university shall be recognized by the government
35 as are the corresponding degrees, diplomas and other academic distinctions granted by any
36 other university incorporated under any enactment. Please, underline this portion. The degree
37 granted by AMU would be at par with degree of any incorporated university. Not Gujarat

1 Vidyapeeth, not Vishwa Bharati, not any other institute, but by the bodies, which are... by the
2 universities, which are incorporated by the British sovereign, that is the Parliament. Now Your
3 Lordships, kindly see 146. Visiting Board, Section 14. Please see Visiting board. The Visiting
4 Board of the University if and when the united provinces of Agra and Oudh, become a
5 Governor's province... Awadh... Why should we say Oudh? Britishers were unable to
6 pronounce, therefore, they used to say, Oudh. It's Awadh as per our.... Agra and Awadh
7 become a governor's province within the meaning of the Government of India Act shall consist
8 of Governor thereof, the members of the Executive Council, the ministers, one member
9 nominated by the Governor and one member nominated by the minister in charge of
10 education. No Muslims.

11

12 **CJI DY CHANDRACHUD:** See Section 7, by the way, apropos what fell from my Learned
13 Brother Justice Surya Kant.

14

15 **TUSHAR MEHTA:** Yes My Lord.

16

17 **CJI DY CHANDRACHUD:** Very interesting provision. I was trying to track whether this act
18 had any provision for finance. There's no provision for finance. It has a provision for audit and
19 accounts, but no provision for finance. See Section 7. The University.....

20

21 **TUSHAR MEHTA:** I'll read. Your Lordship need not. The university shall invest and keep
22 invested in securities in which trust funds may be invested in accordance with law for the time
23 being enforced relating to trusts in British India, a sum of 30 lakhs of rupees as a permanent
24 endowment to meet the recurring charges of the university other than charges in respect of
25 fellowships, scholarships, prizes and awards, provided that any government securities as
26 defined in the Indian Securities Act 1920, which may be held by the university shall for the
27 purpose of this section be reckoned at their face value. The aforesaid sum of 30 lakhs shall be
28 reduced by such sums as at the commencement of this Act, the Governor General in Council
29 shall, by order in writing, declare to be the total capitalized value for the purpose of this
30 section. All permanent recurring grants of money which have been made either to the
31 Muhammadan Anglo-Oriental College, Aligarh Muslim University Association or Muslim
32 University Foundation by any ruler of a State of India and of the total income accruing from
33 immovable property not being land or buildings in the occupation, and use of State college,
34 which by operation of this Act, has been transferred to the University.

35

1 **CJI DY CHANDRACHUD:** But does Section 7 means that the entire 30 lakhs, which was
2 the initial corpus was really what was transferred from the erstwhile MAO and the Muslim
3 University Association?
4

5 **TUSHAR MEHTA:** 4 also says that. Please see My Lord, 4. Once again, My Lord 4 also says
6 that. Therefore, My Lord I say that while dissolving one body something, the Act will have to
7 do something about the property of that body.
8

9 **CJI DY CHANDRACHUD:** But the entire corpus of the University, therefore came from the
10 MAO and the Muslim University Foundation?
11

12 **TUSHAR MEHTA:** I'm sorry, factually. It's not correct. But what My Lord would be
13 necessary would be establishment and administration.
14

15 **CJI DY CHANDRACHUD:** Establishment. The finance would have some bearing on
16 establishment. Right? The person who has established if they have contributed to the finance,
17 that's a very important indicator...
18

19 **TUSHAR MEHTA:** 30 lakhs came from several people, including Hindu Rajas, Hindu
20 Kings.
21

22 **JUSTICE SURYA KANT:** What has been transferred includes the recurring grants also,
23 which were being given...
24

25 **TUSHAR MEHTA:** I'll give that bifurcation of 30 lakh. From the record I'll show that. The
26 government land is 75 acres. Please give the value of that.
27

28 **KAPIL SIBAL:** I didn't want to interpret my learned friend.
29

30 **TUSHAR MEHTA:** I'll show from the record.
31

32 **RAJEEV DHAVAN:** Once the land is transferred it becomes the land of the college or
33 university, so there's no point saying it came. It came as a grant, but it became the exclusive
34 property of MAO and then the University.
35

36 **TUSHAR MEHTA:** Just visualize. If I would have done it, what they are doing it.
37

1 **RAJEEV DHAVAN:** No, no. There there was a barrage. Here we are merely pointing out few
2 things.

3

4 **CJI DY CHANDRACHUD:** We will continue tomorrow. Roughly Mr. Solicitor, how long
5 will you take tomorrow?

6

7 **TUSHAR MEHTA:** I'll take about 3 hours. I can assure Your Lordships not to repeat
8 anything, and I'll attempt not to be boring also.

9

10 **KAPIL SIBAL:** That's just an attempt.

11

12 **CJI DY CHANDRACHUD:** We will also ensure that. But would it be possible for you to
13 finish by tomorrow lunch?

14

15 **TUSHAR MEHTA:** May not be possible.

16

17 **CJI DY CHANDRACHUD:** Because 3 hours would take us to about, say, 2:30. So we are
18 just saying if you can wrap up by lunch it will be nice.

19

20 **TUSHAR MEHTA:** There are other points. Other than this, for which...And there are times
21 to...

22

23 **CJI DY CHANDRACHUD:** Mr. Kaul will take, Mr. Dwivedi will argue or Mr. Kaul? Who
24 will argue?

25

26 **NEERAJ KISHAN KAUL:** I'll take about an hour and a half.

27

28 **CJI DY CHANDRACHUD:** An hour and half after this?

29

30 **NEERAJ KISHAN KAUL:** Yes. There is something I need to show about the judgements.

31

32 **CJI DY CHANDRACHUD:** Alright Mr. Dwivedi is also..

33

34 **TUSHAR MEHTA:** Mr. Dwivedi, Mr. Guru Krishna Kumar..

35

36 **GURU KRISHNA KUMAR:** I won't repeat My Lords. I was looking at one and a half, but I
37 think I'll reduce myself after all this is done. I'll reduce myself.

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CJI DY CHANDRACHUD: We were looking at whether we can wrap up arguments on this side by tomorrow evening?

GURU KRISHNA KUMAR: That may be difficult...little difficult.

TUSHAR MEHTA: That is.. that may not be realistic even if we say, yes.

CJI DY CHANDRACHUD: It's a little spill over to day after tomorrow, but day after tomorrow is Thursday.

TUSHAR MEHTA: It would go to another....

END OF DAY'S PROCEEDINGS