

**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)**

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TRANSCRIPT OF HEARING

30-Jan-2024  
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10:35 AM IST

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2 **TUSHAR MEHTA:** [NO AUDIO - Without any repetition I have allowed my map. Ready  
3 how to upload address Your Lordships on the last day when Munadai ended my respectful  
4 submission was that the moment a statutory enactment comes into existence whatever was  
5 prior there too is extinguished and the act takes over. - END OF NO AUDIO] In case of AMU  
6 also....

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8 **CHIEF JUSTICE DY CHANDRACHUD:** It depends on the nature of the statute.

9

10 **TUSHAR MEHTA:** Correct.

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12 **CHIEF JUSTICE DY CHANDRACHUD:** There are different statutes. There may be a  
13 statute which is a curing statute. There may be a statute which is intended to alter the situation  
14 on the ground. There may be a statute which recognizes a preexisting situation. So, we can't  
15 have a general rule that the moment the statute comes... Yes, you are right to this extent that  
16 if it's a statute, which is a complete code in itself, then you don't look beyond the statute.

17

18 **TUSHAR MEHTA:** I bow down to, My Lord. It was not my submission that as a general  
19 proposition; once an enactment comes rest the past is evaporated or is extinguished. My  
20 respectful submission is that in case wherever an educational institution, or for that matter,  
21 anybody corporate is established, the statute takes over.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** It is warm. *Bahut garmi hai. Thoda...*

24

25 **TUSHAR MEHTA:** Literally and figuratively.

26

27 **RAJEEV DHAVAN:** It will become warmer.

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29 **CHIEF JUSTICE DY CHANDRACHUD:** Warmer now.

30

31 **TUSHAR MEHTA:** That possibly My Lords may not be aware. Something before Your  
32 Lordships assembled... the past, My Lord. My respectful submission is, this is a pre-  
33 Constitution statute, and whatever is extinguished cannot be tested on the ground of  
34 fundamental rights, which came after the Constitution. And for which My Lord I have two  
35 illustrations to give.

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**CHIEF JUSTICE DY CHANDRACHUD:** Yes.

**TUSHAR MEHTA:** Even during the British era, pre-Constitution era, where the British Legislature used to legislate for the purpose of universities. Whenever the Legislator felt, Legislation felt that we must recognize and incorporate the founding events, they have so done. That illustration I wish to give. Unless, because My Lord the argument of the petitioner was that while reading the statute you have to go behind it to know kind of genesis, the word which was used or that finding moment, the founding moment. No, that is not so. Unless Legislation recognizes the statute's takeover from that date, and it is that complete code which governs the future course of action for that university.

**CHIEF JUSTICE DY CHANDRACHUD:** Yes.

**TUSHAR MEHTA:** My submission is restricted to incorporation of universities. Those statutes, not statutes in general. Please, allow me to place before Your Lordships Volume 4(i), page 535. How the past is statutorily recognized by the British Parliament. 4(i).

**CHIEF JUSTICE DY CHANDRACHUD:** Page?

**TUSHAR MEHTA:** 535. It starts at 538. It is Annamalai University Act. The purpose is to point out to Your Lordships and assist that whenever the Legislature intended that we must recognize the founding event they do so by way of a legislative enactment. The parties cannot request the Court to go behind it, because behind it there can be two views. I say it was not founded by XYZ. Somebody may say it was found by ABC. Somebody would say it was found by DYF. Therefore the legislative device in case of incorporation of university pre and post Constitution both, is this. Kindly have a look at page 538, Annamalai University, Your Lordships have?

**CHIEF JUSTICE DY CHANDRACHUD:** Yes, we have the Act.

**TUSHAR MEHTA:** My Lord, this is Annamalai University Act 1929. So it is a pre-Constitution Act.

**CHIEF JUSTICE DY CHANDRACHUD:** Yes.

1 **TUSHAR MEHTA:** Please see - ' An Act to establish and incorporate a teaching at residential  
2 university at Annamalai Nagar. Whereas it is desirable to establish a teaching and residential  
3 university for the encouragement of higher education and research in Tamil Nadu. Districts  
4 so and so.' Now please mark this My Lord. 'And whereas the honourable Diwan Bahadur Sir  
5 S. R. M. Annamalai Chettiar has established and is maintaining colleges at and near  
6 Chidambaram in which higher instruction is imparted in English, Tamil and Sanskrit studies.  
7 And whereas Sir Annamalai Chettiar has agreed with the local Government to hand over the  
8 said institutions together with all properties attached thereto and further to give a sum of 20  
9 lakhs of rupees for the purpose of establishing and maintaining at Annamalai, a teaching and  
10 residential university, wherein he and his heir shall be entitled to certain powers and  
11 privileges.' My Lord, please see 2(c). The term 'founder' is defined. It is at page 539.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

14

15 **TUSHAR MEHTA:** Founder, 2(c). 'Founder means, the Honourable Diwan Bahadur Sir S.  
16 R. M. Annamalai Chettiar and after him his son, Mr. M.A. Muthiah Chettiar and for all time  
17 after the lives of the said two persons, in respect of every vacancy, any adult male member  
18 chosen by the Chancellor from amongst the members of the said Sir Annamalai Chettiar's  
19 family, consisting of his other sons and his descendants, tracing their descent through males  
20 and if no such member exists, or if one such exists, and he does not consent to act as Founder,  
21 or if no such member is competent, in the opinion of the Chancellor, to act as a Founder, then,  
22 and until such a competent member comes into existence is willing to act, or one who was not  
23 competent becomes competent, etc. etc.' I'm not reading it, but this is how the Founder is  
24 statutorily recognized. That's the only legislative way the British Parliament used to act. Now  
25 please come to Section 8, My Lord. 'The following shall be the officers of the university,  
26 namely, the Chancellor, the Founder.' Rest are not relevant. And please, My Lord come to  
27 Section 11 at page 544.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** So, Sir Annamalai Chettiar would be the Founder  
30 for life. He would hold the office of Founder for life.

31

32 **TUSHAR MEHTA:** As recognized by the statute itself. The court in future will never be  
33 required to undertake the exercise of going into the genesis of founding moment, et cetera.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Interestingly, what happened post-  
36 Independence to these statutory provisions? It's not relevant to your argument, but just as a  
37 matter of curiosity.

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**TUSHAR MEHTA:** It was deleted post 2017.

**CHIEF JUSTICE DY CHANDRACHUD:** So until 2017...

**TUSHAR MEHTA:** '17 It continued. It's 2013 Act, that's the amending Act, page 1458. The same...

**CHIEF JUSTICE DY CHANDRACHUD:** 145...?

**TUSHAR MEHTA:** 1458.

**CHIEF JUSTICE DY CHANDRACHUD:** Nothing else in this Act that you want the show us, right? Other than...

**TUSHAR MEHTA:** Section 11.

**CHIEF JUSTICE DY CHANDRACHUD:** Section 11, we saw.

**TUSHAR MEHTA:** Yes. 544.

**CHIEF JUSTICE DY CHANDRACHUD:** That we saw.

**TUSHAR MEHTA:** Your Lordships have seen. 1458. Just to answer My Lord's query, we have placed that on record.

**CHIEF JUSTICE DY CHANDRACHUD:** That's a 2013 Act.

**TUSHAR MEHTA:** Yes.

**CHIEF JUSTICE DY CHANDRACHUD:** Let's just see it.

**TUSHAR MEHTA:** The entire Act is now... A new Act has come into force.

**CHIEF JUSTICE DY CHANDRACHUD:** Oh, I see.

**TUSHAR MEHTA:** And there is no Founder.

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**CHIEF JUSTICE DY CHANDRACHUD:** But they brought in a new Act in 2013. So right until 2013, that...

**TUSHAR MEHTA:** The member of the Chettiar family.

**CHIEF JUSTICE DY CHANDRACHUD:** [UNCLEAR] Founder continued in Annamalai University.

**TUSHAR MEHTA:** And that founding fact and name of the Founder was recognized, whatever he must have bargained with the Government that was also recognized. He would be a member, he would be a part of the term 'Officers'. And my learned senior wants me to see.. showed page 12 also. I'm sorry. Section 12. Please come to page...

**JUSTICE DIPANKAR DATTA:** 12 of the [UNCLEAR] Act?

**TUSHAR MEHTA:** The original, 1929 Act.

**CHIEF JUSTICE DY CHANDRACHUD:** We'll rise for 2 minutes today at 10:59, because it's Martyrs' Day. I heard the siren go off... anyway, whether the siren goes or not, we all rise at 10:59.

**TUSHAR MEHTA:** Whenever Your Lordship rises we will rise. Section 12, the Vice-Chancellor. The Vice-Chancellor shall be appointed by the Chancellor from a panel of three persons recommended by the Founder. This is Administrative control also, apart from the fact of establishment. 'He is not only a member of the term, 'Officers'...'

**CHIEF JUSTICE DY CHANDRACHUD:** In pre Independence India, there were statutes which did recognize the role of the Founder in establishing the institution, even post the enactment of the Legislation by the imperial Legislature. That's the point which you're trying to...

**TUSHAR MEHTA:** And if he wanted a role in the Administration...

**CHIEF JUSTICE DY CHANDRACHUD:** Which is, according to you, absent in the case of the Aligarh Muslim University.

1 **TUSHAR MEHTA:** The similar thing happened, My Lord, with Visva -Bharati Act. My Lord,  
2 I stand corrected, My Lord, my instructions are, there was no degrees being given by Visva  
3 Bharati - Shantiniketan, My Lord. But when the Act came into force post Constitution in 1951,  
4 My Lord, I could get it, during the... My Lord, I have shared it...

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** They'll upload it on the visualizer. *Woh upload*  
7 *kar dijiyega.*

8

9 **TUSHAR MEHTA:** Only one para is to be seen, My Lord, that there is a statutory device  
10 where Founding Fact, Founder member and what the other side says, Genesis, is recognized  
11 by way of a statutory enactment itself.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** What do we find in the Visva Bharati Act?

14

15 **TUSHAR MEHTA:** Yes. It was founded by Rabindranath Tagore (Thakur). That's  
16 mentioned in Section 2 itself. Section 2 is on the screen. 'Declaration of Visva Bharati as an  
17 Institution of National imp...' The first is... 'This Act may be called Visva Bharati Act. It shall  
18 come into force...' I skip. 'Declaration of Visva Bharati as an institution of national importance  
19 - Whereas the Late Rabindranath Tagore (Thakur) founded an institution known as Visva  
20 Bharati at Shantiniketan in the district of Birbhum in West Bengal; the objects of which are  
21 such as to make the institution one of the national importance. It is hereby declared that  
22 institution known as 'Visva Bharati' aforesaid, is an institution of national importance and is  
23 as such, hereby constituted as a University.'

24 So two things happened: The founding person is statutorily recognized and University is  
25 established by an Act of Parliament. Your Lordships would find it was made University in '61.  
26 Otherwise it was an institution of national importance. The footnote, makes it clear. I just now  
27 got, My Lord, the original Constitution. My Lord, that is my respectful submission. I have got  
28 the Constitution of original Visva Bharati, but I got it in the morning only. I will go through it  
29 and place it on record. If there is something to be highlighted, My Lord, I'll request one of my  
30 learned, senior colleagues, to highlight it because my turn would be over. I don't wish, My  
31 Lord, to come again. Now, My Lord, may kindly see... So my respectful submission is that in  
32 absence of this Founding event, or what they call Genesis, etc. if...

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Take your submissions that absent is statutory  
35 recognition of the Founding moment, the statute therefore obliterates the entire past...and  
36 begins on a clear slate.

37

1 **TUSHAR MEHTA:** And takes over as a complete code. And that is the Statutory device,  
2 adopted by the Legislature, both pre and post Constitution.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Solicitor, in the absence of an express  
5 obliteration of the past by the statute, can the Court not look into the pre-existing history?  
6 Unless we find that there are certain express provisions in the statute. I mean, I'm just putting  
7 you the flip side of it. So that not to elicit a response. Absent and express obliteration of the  
8 past by the statute, is there something in law or Constitutional law to prevent the Courts from  
9 looking at the circumstances which led to the creation of that university or the creation of that  
10 institution by a statutory provision?

11

12 **TUSHAR MEHTA:** My respectful answer, would be - No. The simple reason is that history  
13 always has several shades. My Lord, absent... Annamalai part in the Act which I have shown.  
14 Suppose that would not have been taken care of, recognized by the statute. There may be five  
15 versions of history that not missed. Sir Annamalai, it was Sir Chettiar also who was running.  
16 It was not Sir Annamalai, it was somebody else also who contributed money. It was not Sir  
17 Annamalai, the entire...

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** I got your point. In other words, could it be like  
20 this, could it be your submission, therefore, that unless the statute expressly recognizes the  
21 minority character of an institution you cannot claim the right. Could that be? Can we stretch  
22 it to that point?

23

24 **TUSHAR MEHTA:** I would not say minority character. I would say for any university, the  
25 founding event, founding members and founding sets, whoever is saying whatever... unless  
26 recognized by the statute, if it becomes a statute. The statute is the final word. It would not be  
27 possible for any party to request the Court to go behind it and try and find out the history.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** That's why you have sort of distinguished the  
30 case of Annamalai and...

31

32 **TUSHAR MEHTA:** And that would be so about even majority institutions. I do not know,  
33 Annamalai may even be a majority institute.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Annamalai is not property. It is not an Article 13.

36



1 **TUSHAR MEHTA:** Maybe a linguistic minority I'm not aware of. Maybe a linguistic, may  
2 not be a linguistic. But whenever any university incorporated under an Act, unless that's...  
3 therefore I have shown. And I'll show other universities, similar examples.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** You made the point. Now you can go to the next.

6

7 **TUSHAR MEHTA:** Kindly My Lord, come to Volume 4(c), page 1346. This is debates of the  
8 year 1972. Volume 4... Even if history is to be gone into, there are two sets of histories before  
9 Your Lordships. I have given a different dates... list of dates and events. The question would  
10 be, how would Your Lordships examine? I'm posing a question to myself, which part of the  
11 history is true? Therefore, even from the prudence test, the submission which I am making  
12 that whenever statute recognizes or wants to recognize by a legislative enactment the founding  
13 events, it would be final and the statute takes over, it becomes a complete code. Now, Your  
14 Lordships, kindly allow me to place Volume 4(c), page 1343. My Lord, this is the speech before  
15 the House by Professor S. Nurul Hasan, who was the Minister of Education and Social Welfare  
16 in 1972 when Amendment was introduced.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Page 1343?

19

20 **TUSHAR MEHTA:** Yes, My Lord. 1343. My Lord, Your Lordships would recall there is an  
21 amend...there was an amendment in 1972 in AMU Act. And I'm just showing, My Lord, who is  
22 speaking. The concerned Minister. This is the stand of the Government. The Minister of  
23 Education, Social Welfare and Culture, Professor S. Nurul Hasan. Please, My Lord, see second  
24 unnumbered page on the right side column - what change was made. Earlier, Your Lordships  
25 are aware... 1343, Volume 4(c), My Lord. I will not take Your Lordship's time. I'll just orally  
26 say.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** You can just show it to us. We are already on it.

29

30 **TUSHAR MEHTA:** Yes. 'Formerly, the Chancellor was elected by the Court.' Your Lordship  
31 knows the Court then, in 2020, was consisting of Muslims. We are now proposing that  
32 Chancellor shall be appointed by the Visitor in such a manner as it's provided in the statute.  
33 And in the statute it is suggested that out of panel of three names, the Visitor may appoint the  
34 Chancellor. The Chancellor should be able to exercise his moral authority in the best interest  
35 of the University and should not in any way be associated with any group or faction. Therefore,  
36 he would be above all decisions...Above all decisions, because he will not be a party to any of  
37 the decision.' So he's not dependent upon the votes of the Court. Now, one more important

1 part is at page 1346 and in my respectful submission, after this, no debate from the petitioners  
2 can survive in the present matter. This is the stand of the Government, through the  
3 Honourable Education Minister, while amending the Act itself. Your Lordships have page  
4 1346? My Lord, right hand side column, last two paragraphs; it starts with 'I would not like.'  
5 Does Your Lordships get, My Lord? This is what the Government says in Parliament, because  
6 there were demands that you declare this to be a Minority University and the Minister  
7 answers. 'I would not like to take very much more of the time of the House, except to refer to  
8 two or three points which have been raised. First of all, a demand was raised that this  
9 University should now be declared to be a minority institution in terms of Article 30, Sub-  
10 Article 1 of the Constitution. Sir, this is a demand which is neither in the national interest nor  
11 in the interest of the University itself, nor if I may venture to suggest, of any section of our  
12 population, including the Muslim community. The responsibility for the educational  
13 development of every section of the population has been taken by the State. Maybe it is the  
14 some part of it with the Union Government and the other part is with the State Government.  
15 If the educational development of the entire country and all sections of the population is to be  
16 ensured, it would be necessary to see that the State plays its due part. Any single institution  
17 cannot be maintained by the Central Government for the benefit exclusively of one Community  
18 or to be run by a single Community.' Till '72, there was a demand that you declare it to be a  
19 minority institution and for very valid reason, with a foresight, looking at the future, My Lord,  
20 a very eminent Educational Minister made this statement that it is not in the interest of the  
21 Nation, nor in the interest of the Community. So after this, in my submission, the issue is  
22 closed. That's my respectful submission. My Lord similar, kindly come to debates of 1981.  
23 Same Volume, page 1680.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Same Volume?

26

27 **TUSHAR MEHTA:** Yes. 1680, My Lord, this is the bill which Your Lordships may recall  
28 introduced... the word 'established' was deleted and 'definition' was added as a post facto  
29 approval of one-sided history. My Lord I'm not going into the merits or demerits of '81, but I  
30 wish to read of what transpired in the Parliament. Kindly come to 51680 these are the debates  
31 when '81 amendment was introduced. Shri G. M. Banatwala... Your Lordships have? 'Mr.  
32 Deputy Speaker Sir, the Honourable Minister has been kind enough to tell the House that it  
33 was one of the pledges of the ruling party to restore the minority character of Aligarh Muslim  
34 University and this bill seeks to fulfil this pledge. I, on my part, respect the sentiments of the  
35 Government. But I wish that the provisions incorporated in the bill had really led to fulfilment  
36 of the pledge. Mr. Deputy Speaker Sir, the Government, as we understand now, wants to  
37 restore the minority character of Aligarh Muslim University.' My Lord, kindly pause here as a

1 factual thing. The Government never wanted to restore, it has said in '72 that it cannot be  
2 given. Something can be restored if it existed at any point of time. Be that as it may.' Then why  
3 does it fight shy of saying so in the bill itself? Why should there be reservation? There are  
4 certain basic things which need to be understood. We are not playing with words. Those who  
5 are not capable of understanding the words, are totally incapable of understanding the  
6 ideology and the facts behind this. There are show boys who have brought great woes and  
7 pains to this Country. I have only to tell the Government not to practice self-deception. The  
8 main issue is the restoration of the minority character to the Aligarh Muslim University in  
9 such a manner that the University gets protection of Article 30, Sub-Article 1 of the  
10 Constitution. The University has to be recognized as an educational institution as envisaged  
11 under Article 30, Sub-Article 1 of the Constitution.'- I'll skip My Lords, the quotation. - 'The  
12 judgment in *Azeez Basha's* case is a standing injustice both to the provisions of our  
13 Constitution as well as the minority and the secular concept that we have in our Country. In  
14 this case, the Supreme Court has erroneously made an observation that the University has  
15 neither been established by Muslims nor has the administration of the University been ever  
16 exclusively vested in the minority, in Muslims. Therefore, there are two aspects of the  
17 question.' Please mark this, My Lord.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

20

21 **TUSHAR MEHTA:** He's demanding now that - All right, you have established by  
22 incorporating the word... by deleting the word 'established.' You have taken care of... according  
23 to his understanding, subject to that Act being challenged. Now give us the administration  
24 also. Therefore, I am reading it. And the Minister says - No, administration cannot be given.  
25 So even as per this debate in Parliament nothing survives. I'm on page 1680, the bottom side.  
26 Top. 'Therefore, there are two aspects to the question. One aspect is the aspect of  
27 establishment of the University. This bill clearly says that it has been established by Muslims.'  
28 Your Lordships would recall the definition of University is changed. That's what My Lord, he  
29 is referring to. 'We are thankful to the Government. I congratulate the Government that the  
30 Government has come forward with a recognition of this historical fact. But then the other  
31 aspect remains, and that aspect is that since allegedly the administration of the University  
32 never exclusively vested amongst the Muslims. Therefore, it is not an educational institution  
33 envisaged under Article 30, Sub-Article 1 of the Constitution.' He admits that - Unless I have  
34 the administration, I can't rely upon 30 Sub-Article 1. 'The position should therefore be  
35 clarified. The definition as given of the term University in the present bill, which is now before  
36 the house, does not fully meet the requirements of Article 30, Sub-Article 1 of the Constitution  
37 and does not fully set at not the observations of the Supreme Court in *Azeez Basha* case.

1 Therefore, it is that we have come before the house to clarify explicitly that Aligarh Muslim  
2 University is a minority institution within the meaning of the minority institution under  
3 Article 30.' Now directly come to the reply of the honourable Minister at page 1682, on this  
4 question. The request, the demand that administration should also be given to us. It admits  
5 there is no administration with us and the honourable Minister, 1682, right hand side, Your  
6 Lordships gets? Smt. Sheila Kaul. I'm sorry. I may just before that, page before that. 1681. Just  
7 right hand side, there was a suggestion to add an explanation.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Right, I saw that actually.

10

11 **TUSHAR MEHTA:** 'Notwithstanding any judgment, decree, etc.'... which was not accepted  
12 by the Parliament. Now, please come to 1682. Smt. Sheila Kaul, she was the Education  
13 Minister. My Lord, Smt. Sheila Kaul as an Education Minister, answers on the question of  
14 administration. 'As the University will be administered in accordance with the provisions of  
15 the act, statutes and ordinances, it is not possible to agree to the amendment moved by Shri  
16 Banatwala and the amendments are not therefore acceptable.' The amendment which was  
17 moved is, please see, 'lobbies have been cleared, the question is, to be administered by the  
18 Muslims of India. The Lok Sabha divided'. This amendment...

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Solicitor, can you just show us that little.. When  
21 Mrs. Kaul moved the bill, what was the purpose? Because when she introduced the bill, she  
22 may have clarified why she was moving the bills. Can we just see that part? So that... otherwise  
23 you know to go... go to it later may be..

24

25 **TUSHAR MEHTA:** In a second. Can Your Lordships come to 1590? This was thereafter  
26 referred to the tending committee.

27

28 **JUSTICE SANJIV KHANNA:** Just come to 1155.

29

30 **TUSHAR MEHTA:** 1155. My Lord, shall I?

31

32 **JUSTICE SANJIV KHANNA:** It is a pledge that we seek...

33

34 **TUSHAR MEHTA:** 'It is the pledge that we are seeking to redeem today. It was a pledge that  
35 we gave to our Muslim brothers. The Establishment of Aligarh Muslim University Act was an  
36 important landmark in the development of modern education of Muslim of India. However, it  
37 was not the point at which the history of the Aligarh Muslim University started. As far back as

1 1870, Sir Syed Ahmed Khan realized that modern education was the only means for removal  
 2 of backwardness of the Muslim community in India. At his initiative, a committee to devise  
 3 ways and means for the educational regeneration of Muslims was set up. Two years later, Sir,  
 4 a society called the Muhammadan Anglo-Oriental College Fund started. ' My Lords, in the  
 5 history.. may I read history again? One side history is given. The second side history that you  
 6 started negotiating with the Government and started giving up one thing after the other, is not  
 7 recorded and countered by Shri Somnath Chatterjee. If Your Lordship wishes me to read, I  
 8 can read My Lord.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Just a little bit. We'll just see what you are saying.

11

12 **TUSHAR MEHTA:** I will just, My Lord. 'One of the steps taken by the Society was to open a  
 13 school in 1873. Three years later, Sir, it became a high school, and in 1877 the Foundation  
 14 stone for the establishment of a college was laid. Sir Syed Ahmed Khan died in 1880.' My Lord,  
 15 It should be 1877 and 1873. '1880. But the idea of establishing a university gathered strength  
 16 even after his death. The Muslim University Foundation Committee had started collecting  
 17 funds for setting up the University. The MAO College, Aligarh had, by that time, grown into a  
 18 leading centre for the education of Muslims. After prolonged discussions extending over 6  
 19 years between the Government of India and the representative of Muslim University  
 20 Foundation Committee, the Aligarh Muslim University Act with Muhammadan Anglo-  
 21 Oriental College, as its nucleus, was passed.' There, the history is not given, that there were  
 22 continuous correspondence that this is the condition, take it or leave it. This is the condition,  
 23 take it or leave it. That is not given. 'Sir, 1920 enactment was the realisation of the long-  
 24 cherished ideals of the Muslims of India and it was their dream that found expression in the  
 25 establishment of this University and the substantial part of the properties and funds which  
 26 went into making, was also contributed by them. Sir, these are the facts of history which we  
 27 must recognize and acknowledge. For quite some time, the Muslims of India have been  
 28 expressing concern that the Law of governing the Aligarh Muslim University does not  
 29 recognize or acknowledge these historical facts. Therefore, there has been a unanimous  
 30 demand, voiced by the Muslims of India, that the Aligarh Muslim University as it stands today,  
 31 should make provision for the acknowledgment of this fact. This demand has the support of  
 32 all sections of the country, including all political parties. Sir, the Aligarh Muslim University  
 33 today is one of our largest residential universities. It is a composite institution offering  
 34 education from the nursery stage to the highest level of research. The courses offered by the  
 35 University cover all major disciplines: Engineering, Technology, Medicine, Science, Social  
 36 Science and Humanities.' Something I am respectfully basing my submission on this as well,  
 37 My Lord.

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**CHIEF JUSTICE DY CHANDRACHUD:** It is clear that the object of the Government of the day, in introducing this 1981 Bill was to recognize, as the Union Minister said, the historical fact that it was established by the Muslims of India...that we can't. That seems to have been...

**TUSHAR MEHTA:** I also don't wish away but before that, she says that this was a part of our election manifesto, and, Your Lordships, I leave it that, Your Lordships may realize the danger if the Parliament were to be permitted to recognize hundred years history...Hundreds of years of history...I leave it at that, My Lord.

**CHIEF JUSTICE DY CHANDRACHUD:** That is Parliament's exclusive domain. We can't...

**TUSHAR MEHTA:** I'm happy. I'm very happy.

**CHIEF JUSTICE DY CHANDRACHUD:** The policy underlying domain and all...

**TUSHAR MEHTA:** I am very happy. I am arguing only university matters, but Parliament deals with many historical facts. I'm very happy.

**CHIEF JUSTICE DY CHANDRACHUD:** Subject to Constitutional validity, of course.

**TUSHAR MEHTA:** Of course. My Lord, that's what. I didn't want to elaborate much on that.

**JUSTICE DIPANKAR DATTA:** So, what stands out is; one of the honourable members, Mr. Banatwala, wanted a clarification to be inserted in the Act that this is a minority institution. But there, the Honourable Minister said - No. Administration would be according to the statutes and the ordinances. Therefore, Administration part cannot be left with a particular Community.

**TUSHAR MEHTA:** Yes, My Lord. Coupled with the fact that Mr. Banatwala says that unless you give us Administration, we cannot fall under 30.

**JUSTICE SURYA KANT:** Only establishment part was sought to be recognised but administration part was refused.

**TUSHAR MEHTA:** Was categorically refused.

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**JUSTICE DIPANKAR DATTA:** But then, when was for the first time, the institution was recognized by the Government as the minority institution?

**TUSHAR MEHTA:** This...they never recognized.

**JUSTICE SANJIV KHANNA:** One thing is very clear. The intent behind the '81 Amendment was to recognize and give it as a minority institution and to do away with whatever the reasoning was given. The intent was to modify the reasoning given. Or make the statute, modify the statute so that the reasoning given in *Basha's* case is not applicable...Yes? [UNCLEAR] is concerned, yes, Mr Banatwala did say that please make it...make an amendment saying its administration is with the Muslims. That the Government did not agree. But what they said, the administration is already provided in the statute.

**TUSHAR MEHTA:** Statute. Yes. Yes.

**JUSTICE SANJIV KHANNA:** All statutes will provide for administration. Even today, even after the 2004 Education Act, each statute will provide for administration. That's what the administration award, mainly because the statute provides for administration that cannot lead to a finding, whether it's a minority or a majority.

**TUSHAR MEHTA:** No, My Lord, I would raise...

**JUSTICE SANJIV KHANNA:** That if we accept that argument, that if administration is provided by the statute, and this itself is going to be a ground to decide whether it's institution is a minority or majority or non-minority institution, will lead to difficulty.

**TUSHAR MEHTA:** I just want to respectfully, My Lord...

**JUSTICE SANJIV KHANNA:** How can that be? Maybe because administration is provided by the statute that may not be the criteria. You have to find out who are the people actually administering it...

**TUSHAR MEHTA:** Correct.

**JUSTICE SANJIV KHANNA:** Or in terms of a statute, who are the people entitled...

1 **TUSHAR MEHTA:** I bow down. Your Lordships will have to examine the statute as it stood  
2 in 1981 and in that context, examine the request of Mr. Banatwala that right now it is not our  
3 administration and therefore we are unable to fall within the second part of Article 30, Sub-  
4 Article 1, that establishment yes, but not administered by us. You clarify that we are  
5 administering also. He says - No, Act will govern. And the amendment...

6

7 **JUSTICE SANJIV KHANNA:** Whether the Government was right or not that's a separate  
8 issue, but the fact of the matter is the Government also, when they were saying it's a minority  
9 institution. They very well knew of the requirements of Article 30(1). They felt that the  
10 administration is also with the minority.

11

12 **TUSHAR MEHTA:** No, My Lord.

13

14 **JUSTICE SANJIV KHANNA:** Because otherwise they will not say it's a minority institution.

15

16 **TUSHAR MEHTA:** No, they didn't. I'm sorry.

17

18 **JUSTICE SANJIV KHANNA:** Mr. Solicitor, they were very well aware that two  
19 requirements for minority institution, establish and administer.

20

21 **TUSHAR MEHTA:** Correct, My Lord.

22

23 **JUSTICE SANJIV KHANNA:** To say that when they move the amendment and made an  
24 open statement in the House of the Parliament saying it's a minority institution, they were not  
25 aware that administer is also one of the requirements will be little difficult to accept. They may  
26 be right or wrong, it's a separate question.

27

28 **TUSHAR MEHTA:** Yes, maybe they are. They are consciously... - Alright we satisfy you. We  
29 recognize the historical fact. What they have done is recognizing the historical fact according  
30 to their history without or rather omitting the history which I have shown. That one after the  
31 other, one after the other, they started giving up their rights. If there was... there was no  
32 concept of a right. But their demands, their insistence that this we will not accept. Alright, we  
33 give up. This we will not accept. All right, we give up. That's not taken care of. But they say that  
34 we recognize a fact in history that this is what happened as My Lord. I'll not reread it. But  
35 everyone was clear, including the Government, but especially Mr. Banatwala, that unless you  
36 give... and what was the amendment suggested. Amendment was 'administration to be given  
37 to Muslims'. That was within inverted commas and the Minister says - No, it will be as per the



1 Act. If, as per the Act, Your Lordships finds that it was Muslim administration that's a separate  
2 thing. But if that is so...

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Solicitor, to really conceptualize your argument,  
5 because I think we've heard you on this. Your argument is that Article 30 incorporates twin  
6 tests, 'establishment' and 'administration.' **Basha** came to the conclusion that, one, Aligarh  
7 Muslim University was not established by Muslims, though it does recognize the history of  
8 Anglo Oriental College, et cetera, because it says it was established by statute. That's the first  
9 limb of **Basha** and in as much as that it was established by statute. It has not been established  
10 by a Muslim minority. That's the first limb of **Basha**. Second, **Basha** says on the review of  
11 the Act that it is not administered by the Muslim minority. The 1981 amendment, according  
12 to you, was intended to recognize a historical fact of the establishment of Aligarh Muslim  
13 University and brought about that change, both in terms of the Preamble and in terms of the  
14 definition of the Muslim University. But the second limb of **Basha**, which was that it has to  
15 be administered by the minority, was there was no alteration to the existing statutory  
16 provisions in relation to administration and which was in fact noticed by Mr. Banatwala that  
17 you cannot... In that sense, though he didn't put it in that word, in those words, that you cannot  
18 override **Basha** unless you deal with both the establishment and the administration tests.  
19 And you had not left, you had left the administration intact, and therefore it would not in that  
20 sense still fall within the ambit of 30.

21

22 **TUSHAR MEHTA:** If **Basha** still stands... would stand. That's what he...

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** That's your contention. Therefore, your  
25 contention is that the 1981 Act did not take away the basis of **Basha** because you could have  
26 taken away the basis of **Basha** by not merely recognising, but administration as well. We have  
27 to hear the other side's response. I think now we've understood it conceptually. [UNCLEAR].  
28 I think that was really the submission.

29

30 **TUSHAR MEHTA:** **Basha** also recognize the fact that your rights, if at all there were any  
31 post pre Constitution were extinguished because, you started giving up those demands one  
32 after the other, and therefore... My Lord, there was no concept of a minority or minority rights  
33 in 1920. It was just a bargain between me and the Government. Some of them said that - We  
34 will not accept your bargain. We will say that, no, we want to have this framework. But those  
35 who were in charge, My Lord, Mr. Safi and led by... They said - All right, we give up this, we  
36 give up this. Government says - No, it would be full control of the Government. All right, let it

1 be Government control, etc. I have given. **Basha** recognizes that. The parliamentary debate  
2 does not recognize.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Anything else?

5

6 **TUSHAR MEHTA:** Next, please come to page Volume 2(a). I'll take only ten minutes. 2(b).  
7 I'm sorry. 2(b), at page 50 to 54. I'm not going to read. But I just want to give the illustrations.  
8 50 to 54. How this factum of founding or factum of establishing is a, always recognized the  
9 Legislature wants to recognize, by the Legislature itself and how it is recognized. Even  
10 administration is recognized by statute. Therefore, I say 1920, the curtain falls, the statute  
11 takes over. Please see, Sam Higginbottom University of Agriculture. It is University for Anglo  
12 Indians. Please see the title at page 51. Volume 2(b), at page 51. I'll just... small font. This is the  
13 Preamble of the Act. 'An Act to establish and incorporate a teaching, research and extension  
14 university with a view to upgrade and reconstitute the existing Sam Higginbottom Institute of  
15 Agriculture, Technology and Sciences, deemed to be university Allahabad, established and  
16 administered by the ecumenical minority Christian society, namely so and so.' This is how  
17 establishment, the historical fact of establishment and administration is statutorily  
18 recognized. Please see same at the foot of the page, same university, the jurisdiction. 'Save as  
19 otherwise provided.' I'm sorry. Because the argument of other side was on a wrong reading of  
20 **Basha**, that all these universities will go as minority institutions. No, it will not go. Legislation  
21 has conferred upon it the minority character. Please see the jurisdiction. 'Jurisdiction of the  
22 University - Save as otherwise provided by or under these Act, The limits of the area within  
23 which the university shall exercise its powers, shall be whole of Uttar Pradesh with its  
24 headquarters at Allahabad, with powers to associate any Christian minority institution within  
25 its jurisdiction.' The predominant purpose of minority character of the institution is statutorily  
26 recognized. Kindly come to page 52. ERA University, Lucknow. Page 52. Next page. ERA  
27 University, Lucknow. The other side would say that these were the institutions incorporated  
28 after the National Minority Commission Act. That is true but wherever the Legislature has  
29 thought fit to record the historical fact and give it a statutory colour, they have provided. So  
30 that's my purpose. And this is in response to their submission that if **Basha** is right, that once  
31 you are incorporated you can never be a minority institution. That reading of **Basha** is wrong.  
32 **Basha** does not say so. **Basha** is only a *sui generis*, fact specific judgment examining the  
33 Aligarh Muslim University. Please come to (b) the ERA University, Lucknow. 'An Act to  
34 establish and incorporate a teaching university sponsored by Era Educational Trust, duly  
35 established and administered by the members of Muslim minority community.' Then My Lord  
36 trust is also accordingly defined. I'll not take Your Lordship's time. Please come to next page.  
37 In all these not only statutory historical fact of founding is recorded, accepted statutory,

1 administration is given. Please see My Lords, Teerthanker Mahaveer University.' An Act to  
2 establish... An Act to establish and incorporate.' I'm sorry.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

5

6 **TUSHAR MEHTA:** 'An Act to establish and incorporate a Jain minority teaching university  
7 sponsored by Teerthanker Mahaveer Institute of Management and Technology Society,  
8 Moradabad, Uttar Pradesh.' My Lord, 9 also. Kindly sees only the highlighted, underlined part.  
9 'Nothing in this Section shall be deemed to prevent the University from making appropriate  
10 provisions for reservation of persons belonging to minority community in the post and  
11 recruitment of the employees and reservation of seats for admission in any course of study in  
12 the University which cannot exceed more than 50%.' I'm not duplicating, but the same  
13 provision in North East Adventist University. This is My Lord, a Christian minority  
14 institution... university established by an Act. Then please come My Lord... Only last example,  
15 My Lord, I would like to give. 4(i). Volume 4(i). I'm on Aliah University, page 1375.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Same volume, 1375?

18

19 **TUSHAR MEHTA:** 4(i). Same Volume 1345.

20

21 **JUSTICE SURYA KANT:** 1375?

22

23 **TUSHAR MEHTA:** 1375, 4(i). This is Aliah University.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Volume 4(i)?

26

27 **TUSHAR MEHTA:** 4(i), page 1375. This is West Bengal Legislature. Your Lordships would  
28 have the title West Bengal Act of 2007. Please see My Lord the Preamble. The second part.  
29 Whereas... does Your Lordships get? 'Whereas it is expedient to upgrade Kolkata Madrasa  
30 College erstwhile Madrasa Aliah, one of the oldest institutions of higher learning and culture  
31 in India, and to that end, to establish and incorporate a teaching university at Kolkata, to  
32 dissolve Kolkata Madrasa College, a Government Madrasa College and to transfer to and vest  
33 in the state university all properties and rights of the said College.' Now please see My Lord,  
34 3(3), 1378. Section 3, Sub-Section 3, 1378. Your Lordship gets My Lord? Please see, this is  
35 important, very important. Whenever the Legislature wants. Legislature does this. 3, Sub-  
36 Section 3. 'The character of the university shall be same as that of Kolkata Madrasa College  
37 erstwhile Madrasa Aliah declared as such with a Minorities Development and Welfare of

1 Madrasa Education Department, Government of West Bengal notification and dated so and  
2 so.' Statutorily provided, historical fact recorded and the same status and character statutorily  
3 recognized. Now, My Lord, I come to my last argument. Please come to what is this university,  
4 Volume 2(a). I'm sorry, 2(b), page 12.

5

6 **JUSTICE SANJIV KHANNA:** Page?

7

8 **TUSHAR MEHTA:** 12 and My Lord, I would. This is my last submission, but very important  
9 submission. I take only 10 to 15 minutes and then I'm done. What would be the.... There are  
10 two things I want to highlight. a) Why this issue arose and we are before Your Lordships and  
11 two, see the consequences if Your Lordships were to interfere and Your Lordships are not in  
12 appeal against **Basha**. What would be the consequence of an institution which the  
13 Constituent Assembly declared to be an institution of national importance. Please come to  
14 page 12. Just broadly, what this university is about. This is one of the finest university of the  
15 Country, My Lords. It has total... My Lord, I have given the chart, total number of entities,  
16 then number of faculties. Please see faculties, Agricultural Science, Management studies, Arts,  
17 Engineering and Technology, Theology, Medicine, Social Science, Life science, Unani  
18 Medicine, Law, Science, International studies, et cetera, et cetera, et cetera. Large number of  
19 subjects are being taught. Please come to... I'll not read everyone, everything. Please come to  
20 page 15. Number of colleges. There are eight colleges affiliated and the next is 'Number of  
21 centres'. They have centres all over the countries. My Lord, I am not right now addressing Your  
22 Lordships on that, because that's not the question, but **T.M.A. Pai** says for the purpose of  
23 deciding minority the unit is State. Muslims are not minority in Kashmir. What would happen  
24 if they have a learning centre in Kashmir? That's not the right now the question, and therefore  
25 I'm reserving that argument. Please see number of centres. They have 23 centres all across the  
26 Country. Then number of academies. They have three academies. Number of institutes,  
27 number of schools and the number of students. Please come to para 16. Page 16, bottom. How  
28 many students are studying, 27,619. It does not include polytechnics students because they  
29 are getting diplomas. These are all degree holders. Now why this problem arose? Please take  
30 the Constitution of India for a while. Article 15. I need not highlight that equality is heart, soul  
31 and of the Constitution of India. After, we became free from the British regime. Article 15, Sub-  
32 Article 1. 'The state shall not discriminate against any citizen on the grounds only of religion,  
33 race, caste, sex, place of birth or any of them.' Nobody can be discriminated against Hindus,  
34 Muslim, Sikhs, everyone are at par. Now, earlier, an argument used to be raised that there is  
35 an exception to this, under Sub- Article 5, which is not accepted. Your Lordships have said that  
36 Sub-Article 5 is not an exception, but another facet of equality, because the Government, the  
37 Nation, the Country wanted Scheduled Caste, Scheduled Tribes, Socially and Educationally

1 Backward Classes also to be at par and therefore, Sub- Article 5 was introduced. 'Nothing in  
2 this Article or in Sub-Clause G of Clause 1 of Article 19 shall prevent the state from making any  
3 special provision by Law for the advancement of any Socially and Educationally Backward  
4 Classes of citizens or for the Scheduled Caste or Scheduled Tribes, insofar as such special  
5 provision relate to their admission to educational institutions, including private educational  
6 institutions, where aided or... whether aided or unaided by the State.' - Please underline this-  
7 'other than the minority educational institutions referred to, in Clause 1, Article 30.' Meaning  
8 thereby, Your Lordships have the mandate of equality under Article 15, Sub-Article 1. Another  
9 facet of equality for Scheduled Caste, Scheduled Tribes and Socially and Educationally  
10 Backward Classes. And the last part of Sub-Article 5 is an exception to that equality clause and  
11 therefore, Your Lordship's test to decide whether a particular institute or university is a  
12 minority, will have to be a very strict test. This amendment is after **T.M.A. Pai** and **P.A.**  
13 **Inamdar**. They do not take note of this fact, where Your Lordships have said that 15(5) is an  
14 extension of the Doctrine of Equality, because Scheduled Caste, Scheduled Tribes, SEBCs, they  
15 are not equals. They are required to be brought at par with rest of the citizens, irrespective of  
16 the religion, but exception is minority is accepted, meaning thereby, and this is My Lord,  
17 crucial.

18

19 **JUSTICE SANJIV KHANNA:** Doesn't this then amendment also accept the reasoning given  
20 in **T.M.A Pai**, that the minorities are entitled to have reservation in their institutions?

21

22 **TUSHAR MEHTA:** Aided institutions. Yes, it does say.

23

24 **JUSTICE SANJIV KHANNA:** Doesn't it then give that recognition?

25

26 **TUSHAR MEHTA:** Yes. But the question is now, if Aligarh Muslim University having these  
27 many faculties, Law, Commerce, Medicine, Engineering, this, that and others. And one of the  
28 finest universities recognized as an institution of national importance by the Constitution at  
29 the original framing of the Constitution, would not have reservation for SC, ST and Socially  
30 Economically Backward Classes, and they would have at least 50% reservation for Muslim  
31 candidates. So a deserving candidate of a Scheduled Caste or a Scheduled Tribe or a Socially  
32 and Educationally Backward Class person would not have the reservation, a person having all  
33 the economic everything at his command, based on religion would have reservation and that  
34 led to filing of petitions before the Allahabad High Court. That is what I wanted to show. Please  
35 come to Volume 3(e), page 19. Volume 3(e). Your Lordships would also examine from the point  
36 of view of social justice and equality. One interpreter...

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** That choice is made by the Constitution, right?  
2 When they brought in the 93rd amendment,

3

4 **TUSHAR MEHTA:** I'm saying, test would be very rigorous, that's all I'm saying.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** They introduced it. This was a Constitutional  
7 Policy now which is given for us. And if you are an Article 30 institution, you are excepted from  
8 the provisions of.. all these provisions.

9

10 **TUSHAR MEHTA:** I'm not saying that Your Lordships may decide *dehors* that exception. I  
11 am saying that 15(1) is Equality Clause. 15(5) is Extended Equality Clause and the last part of  
12 15(5) is an exception. Therefore, Your Lordship's test. The test which My Lord would adopt  
13 would be very, very strict test because it would be SC, ST, SEBCs or Muslims or any linguistic  
14 minority or any other minority. So social justice would be a very, very determining factor in  
15 Your Lordship's decision making. That's my respectful submission.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Alright. Anything else, Mr. Solicitor?

18

19 **TUSHAR MEHTA:** Only five minutes. Why this came? Why the petitions came? They  
20 introduced in PG Medical College this reservation. Page 34, directly.

21

22 **JUSTICE SANJIV KHANNA:** Which volume are you referring?

23

24 **TUSHAR MEHTA:** Page 34, Volume 3(e). 3(e). This is...

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Yes. Ms. Solicitor.

27

28 **TUSHAR MEHTA:** My Lord, please come to page 34 of Volume 3(e). This reservation came  
29 in 2005. That led to filing of petitions. And Your Lordships would bear in mind. It's almost an  
30 admitted position between the parties that even without a reservation, approximately 70% to  
31 80% students are Muslims. I'm not on religion. It's a very, very serious phenomena. An  
32 institution of national importance declared by the Constitution must reflect, the national  
33 structure. Without reservation this is the position.

34

35 **JUSTICE SANJIV KHANNA:** And across the board in all universities.

36

1 **TUSHAR MEHTA:** Correct? It is happening. All universities have students from every walk  
2 of life. Please see now 34.

3

4 **JUSTICE SANJIV KHANNA:** Do we have the data with regard to that?

5

6 **TUSHAR MEHTA:** All national institutions. IIT is one. I can place it on record. IITs, IIMs,  
7 all institutions of national...

8

9 **JUSTICE SANJIV KHANNA:** Place that on record.

10

11 **TUSHAR MEHTA:** I undertake to do that. Because they do not provide for any reservation.

12

13 **JUSTICE SANJIV KHANNA:** No, no. There is no question of reservation because it's  
14 barred [UNCLEAR] under Article 15. We... that's...

15

16 **TUSHAR MEHTA:** Maybe the atmosphere they have given to the institution. IIM, for  
17 example, anybody would go. I do not know.

18

19 **JUSTICE SANJIV KHANNA:** Just get it.

20

21 **TUSHAR MEHTA:** We would get it. I'll need two or three days, but ...

22

23 **JUSTICE SANJIV KHANNA:** You may not be able to get it for a lot of institutes, but maybe  
24 institutes of...

25

26 **TUSHAR MEHTA:** Prime institutes... definitely we will give. Page 115. I have given of 2(b).  
27 Please come. Just institutions of national importance. Your Lordships may perhaps not  
28 require the figures. 2(b). But I undertake to give it. 2(b), Page 115.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Volume 2(b)?

31

32 **TUSHAR MEHTA:** Volume 2(b).

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Page 115.

35

36 **TUSHAR MEHTA:** They all have students from all spectrums of life. Please see Aligarh,  
37 Banaras we leave. University of Delhi. Then Atal Bihari Bajpai Indian Institute of Information

1 Technology and Management, Indian Institute of Information Technology. Then please come  
2 to the next page. All IITs.

3

4 **JUSTICE SANJIV KHANNA:** How many institutes have you listed under this?

5

6 **TUSHAR MEHTA:** In this list the total number is 7... No. I'll just... 165.

7

8 **JUSTICE SANJIV KHANNA:** Okay. For these institutes can you give us the breakup?

9

10 **TUSHAR MEHTA:** I will. Regarding which... it consists of the..

11

12 **JUSTICE SANJIV KHANNA:** May not be available. In fact, it may not be available also.  
13 But if it's available, please give it.

14

15 **TUSHAR MEHTA:** Religion wise may perhaps not be available but... AIIMS.

16

17 **JUSTICE SANJIV KHANNA:** But, if it's available just give it.

18

19 **TUSHAR MEHTA:** AIIMS, IIM's, IIT's. Your Lordships can take judicial note. It is for all  
20 spectrums. Now please see, what triggered this petition? 3(e). Volume 3(e), page 34. This was  
21 under challenge before the High Court.

22

23 **JUSTICE DIPANKAR DATTA:** Mr. Solicitor, could you come to 33?

24

25 **TUSHAR MEHTA:** 33... at same 3(e).

26

27 **JUSTICE DIPANKAR DATTA:** Same Volume. 33. It refers to a letter received from the  
28 Assistant Director dated 3rd December 2004.

29

30 **TUSHAR MEHTA:** They have read. Yes. That is based on '81. He writes that now you are a  
31 minority institution which they have read. That is My Lord at page...

32

33 **JUSTICE DIPANKAR DATTA:** What is the page number of this [UNCLEAR]?

34

35 **TUSHAR MEHTA:** I'll just give the page number. Your Lordship may give me a minute.  
36 Page of this Volume. 17 of this Volume.

37



1 **CHIEF JUSTICE DY CHANDRACHUD:** Page 17?

2

3 **TUSHAR MEHTA:** 3(e). I'm sorry.

4

5 **KAPIL SIBAL:** Page 39 may also be read in 3(e). Very important.

6

7 **TUSHAR MEHTA:** You read it. I will again read it. There is no difficulty.

8

9 **KAPIL SIBAL:** I did not read.

10

11 **TUSHAR MEHTA:** It was. Mr. Dhavan read it. Anyway I'll read it again. Please come to 34  
12 first, because my learned friend may not said that ultimately, after doing all this, what we need,  
13 what we are asking for some reservation. That was the argument. I am just showing. What is  
14 that, some reservation? In an institute where, without reservation, there is 70% to 80% from  
15 one particular community. Please see page 34. Your Lordship gets My Lord? Can I read?

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

18

19 **TUSHAR MEHTA:** 34 at the foot of the page. 'After detailed deliberation' - My Lord gets it?  
20 Justice Khanna? Justice Pardiwala? - 'After detailed deliberation, the Council approved the  
21 recommendation of the Academic Council made at its special meeting held on 15th January  
22 2005 regarding reservation of seats for admissions to MD, MS, PG diploma courses in the  
23 faculty of Medicine with minor modifications, as mentioned below. 25% students may be  
24 admitted from amongst the inter-candidate, internal candidates on the basis of All India Test.'  
25 Meaning thereby BSc to MSc, MBBS to MD, etc. '50% of seats may be reserved for Muslims of  
26 India to be selected on the basis of All India Entrance test.' So 75% roughly not for Muslims  
27 because 70% to 80% as on day who are studying are Muslims. That's an admitted position, Mr.  
28 Farasat gave those figures. And I can also give those figures that without reservation also 70%  
29 to 80% are Muslims, so they would go from Bachelors to Masters and 50% straight flat  
30 reservation for Muslims and open only for 25%. And this is ranking My Lord, one of the finest  
31 universities in the Country. I have no dispute about it. Apart from My Lord being an institution  
32 of national importance, I'm not taking Your Lordships through that, but please note here only  
33 for my satisfaction, My Lord, I have pointed out the debate of the Constituent Assembly when  
34 this was declared to be an institution of national importance. I am not reading it, but there are  
35 good reasons they have given and page 9, para 16 to para 21.

36

1 **JUSTICE SANJIV KHANNA:** Page 9, paragraph 16 to 22? That's in your written  
2 submission?

3

4 **TUSHAR MEHTA:** Yes, that's in my written submissions. I have quoted.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Volume?

7

8 **TUSHAR MEHTA:** 2(b).

9

10 **JUSTICE SANJIV KHANNA:** Mr Solicitor, just get the data. Because data may be available  
11 online but may not be authentic and accurate. If the Government has any...

12

13 **TUSHAR MEHTA:** I will. My Lord possibly, this is my impression. I'm not making a  
14 statement. Possibly now, when I fill up the form for admission, the religion is not...

15

16 **JUSTICE SANJIV KHANNA:** In minority institutions, probably it will be there.

17

18 **TUSHAR MEHTA:** Minority, yes. It has to be.

19

20 **JUSTICE SANJIV KHANNA:** But, in the other institutes, probably it's not required and  
21 may not be, in fact, mandated. Should not be, in fact...

22

23 **TUSHAR MEHTA:** Should not be, like IIT, IIM, others..

24

25 **JUSTICE SANJIV KHANNA:** Otherwise, the Government must be having some data, some  
26 figures. Figures are available online...

27

28 **TUSHAR MEHTA:** If it is, we will place on record.

29

30 **JUSTICE SANJIV KHANNA:** Figures are available on the internet but they may not be...

31

32 **TUSHAR MEHTA:** Accurate, correct... Last line. I'm not reading it, but this Article 15, Sub-  
33 Article 5, when was inserted, was put to challenge and the challenge is negative. That is the  
34 judgment in *Pramati* (2014), Volume 8, SCC, page 1. Relevant para is 31 to 34.

35

36 **JUSTICE SANJIV KHANNA:** Just repeat the citation.

37

1 **TUSHAR MEHTA:** 2014, Volume 8, SCC, page 1, relevant para 31 to 34.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** That rejected the Constitutional challenge.

4

5 **TUSHAR MEHTA:** Constitutional challenge to Sub-Article 5 of both Article 15 and Article  
6 16. My submissions are over. I'm immensely grateful for a very patient hearing. Obligated.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you, Mr. Solicitor.

9

10 **YATINDRA SINGH:** Before Mr. Dwivedi begins, may I have Your Lordships' permission to  
11 make a mention about this matter?

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Sorry?

14

15 **YATINDRA SINGH:** May I have Your Lordships' permission to make a mention, My Lord?

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Who are you appearing for Mr. Yatindra Singh?

18

19 **YATINDRA SINGH:** My Briefing Counsel in this particular matter, has become a Judge of  
20 a High Court. And then this last month, due to my health reason I was not coming. Last week  
21 when I came here, the case is here... I want Your Lordship's kind permission to submit my  
22 written submissions and ten minutes of Your Lordships' valuable time at whatever time  
23 velocity thinks proper. Give me just ten minutes. Or maybe seven or eight minutes.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** All right, let's complete the hearings and we will  
26 see how much time we have left.

27

28 **YATINDRA SINGH:** Should I upload my written submissions?

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Just wait. We'll see. Have you filed an  
31 intervention? Have you filed...

32

33 **YATINDRA SINGH:** My Briefing Counsel with whom I was appearing, they had  
34 [UNCLEAR] parties in the case. He is elevated. I do not have any connection with the AOR,  
35 and probably this is the reason it has happened.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** Let's wait for a little while, and then we can see  
2 what ground is covered and then if there's something else, we'll give you five minutes at the  
3 end to make your point.

4  
5 **YATINDRA SINGH:** I'll finish it in five minutes. Obligated, My Lords.

6  
7 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Singh, what you can do is that you can  
8 circulate your written submissions to the other side so they also know what your point is and  
9 then circulate it to the Court master in the electronic form. So we'll add it to our submission.  
10 You can circulate it to the Nodal Counsel. The Nodal Counsel will then put it together. That's  
11 better. Yes, Mr. Dwivedi.

12  
13 **RAKESH DWIVEDI:** The first submission which I wish to address is that to be a Muslim is  
14 one thing and to be a minority is another thing.

15  
16 **CHIEF JUSTICE DY CHANDRACHUD:** To be a Muslim is one thing, but to be a...?

17  
18 **RAKESH DWIVEDI:** Minority.

19  
20 **CHIEF JUSTICE DY CHANDRACHUD:** What do you mean?

21  
22 **RAKESH DWIVEDI:** For example, if we are in Jammu and Kashmir. Majorities of Muslims.  
23 Muslims are not a minority. It's in that sense. The question, therefore, would be either we  
24 proceed on the basis of the assumption which was made in *Azeez Basha* that the Muslims  
25 in 1920 were a minority and decide whether they're entitled to the benefit of Article 30 or we  
26 consider the question actually on facts whether they were a minority in 1920, which requires  
27 first of all determination of the most vital question which somehow has avoided the attention  
28 of this Court in most matters. Whether they were Christian colleges or whether they were  
29 Muslim colleges established before Independence . This Court has proceeded on an  
30 assumption that they were a minority. So how do we understand this concept 'Minority'. Do  
31 we decide this today in a bench of seven judges, when Your Lordships are sitting? Or we again  
32 like *T.M.A. Pai* said that these questions are left over to be decided later. This question was  
33 squarely there My Lord, in Question 1 and Question 3(a). But all that *T.M.A. Pai* decided was  
34 that minority will be decided state wise. But what is this minority? Is it a numerical question?  
35 Does it have a qualitative content? Does it require that the people who are now claiming to be  
36 a minority understood themselves to be a minority at that time? Only then this can be

1 proceeded. So either we avoid it, we say that today in India the Muslims are a minority and  
2 therefore we, from that, we jump to the conclusion that in 1920 also, they were a minority.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** But nobody has questioned that, Mr. Dwivedi.

5

6 **RAKESH DWIVEDI:** No, I'm raising this question. That is referred. That is referred. The  
7 two referring orders. If Your Lordships will look. This is the question which has not been  
8 addressed. Volume 3(a).

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** A question which has really been addressed  
11 before us is whether they are established and administered by a...

12

13 **RAKESH DWIVEDI:** Minority.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Right.

16

17 **RAKESH DWIVEDI:** Therefore My Lord, were you a minority?

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** The fact that they're a minority today in UP and  
20 that the fact that they were a minority at that relevant point of time. Because whether they  
21 were a minority or not has to be decided on today's standards. There were different standards  
22 in 1920 as compared to...

23

24 **RAKESH DWIVEDI:** That's the precisely the point.

25

26 **JUSTICE SANJIV KHANNA:** Just cutting it. Just a question. Just the thought. Before the  
27 Constitution, adoption of the Constitution, they didn't have any concept of minority and  
28 majority. Certain rights have been given under the Constitution on which there is no issue in  
29 terms of the different Articles from 25 to 30. Therefore, the determination whether you are  
30 minority or not has to be done on the basis of a set time period, not in the past. When we refer  
31 to establishment prior to the constitution, we'll have to go back in the point of time when the  
32 issue was established.

33

34 **RAKESH DWIVEDI:** Yes.

35

36 **JUSTICE SANJIV KHANNA:** But not with reference to whether that community was a  
37 majority or a minority community at that time. But with reference to who had established.

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**RAKESH DWIVEDI:** No. With great respect...

**JUSTICE SANJIV KHANNA:** Who is the minority or majority will be decided on the date when the Constitution was adopted. Possibly what argument you are raising in case there's a demographic change, what would be the effect is a separate issue.

**RAKESH DWIVEDI:** No, My Lords. Your Lordships have categorically held in number of cases that fundamental rights are not retrospective. So therefore, only question is whether are you entitled to avail the benefit of Article 30 today? In order to do that...

**JUSTICE SANJIV KHANNA:** Sorry. Will it be retrospective or retroactive, then?

**RAKESH DWIVEDI:** Whether it is a retrospective or retroactive only means My Lord, that retroact... The Law today takes notice of the facts earlier, that is retroactivity. When the Law is retroactive, it does not mean it operates from that day, but it takes note of the facts as they existed earlier. So we are on the question of fact, an assessment of whether this community was a minority when it established. If it was not a minority and if it did not consider itself to be a minority then, for example, let's take the Christians. The Christians were the rulers of the time. The British Government which was ruling this Country was a Christian Government and the Missionaries were brought in this Country with a particular purpose, as an arm of imperial rule and being that Lord, under the Charters of 1813, 1833, the English Education Act 1945, the Wood's Despatch of 1954(1854) and the Hunter Commission and all these commissions were really meant to provide an opportunity to the Missionaries to establish the college, to create people who were not fair like them, but they thought and whose face were like them. That was the objective. That is the great Minute of Macaulay. Now institutions which are established by missionaries to evangelize, to convert, to make Indians like British, and they were given grant of land which was occupied by them. Now, are we going My Lord, is this constitutional intent that Article 30 is to be given a benefit to these kind of institutions which were meant for a colonization purpose, for imperial rule purpose?

**CHIEF JUSTICE DY CHANDRACHUD:** But that's not the character of AMU. Why should we decide that question?

**RAKESH DWIVEDI:** Now, AMU... Question, therefore we need to decide the question whether... I'm coming to the Muslim minority.

1 **CHIEF JUSTICE DY CHANDRACHUD:** A- What was the political unit within which AMU  
2 was then established? There was no State of Uttar Pradesh at that time?

3

4 **RAKESH DWIVEDI:** Whether you take it as a State unit or National unit. For my  
5 submission may not be very pertinent, but we have to take British India because Indian States  
6 were outside. Or we take the North-West Province, or subsequently the United Province, as it  
7 was called. What was the status and position of the Muslims then? Could it be said in 1920,  
8 that they were a minority? The rule was of the Christian British rule who were less than the  
9 Muslims. Neither the Hindus nor the Muslims, we were both subjects. We were not even  
10 citizens of Britain. There was no concept of citizenship, even that this Court has said in  
11 **Patro's** case. So therefore here are... My Lord there is minority rule in India. That's the  
12 unfortunate part. Not only in India. But in so many other parts of the globe. Where the British  
13 imperialism was ruling, the position was that a handful of people were ruling over India for  
14 the last several hundred years. So are we to say a lot that the Mughals were in minority? The  
15 British imperialists were in minority? This will be something very, very strange My Lord, that  
16 after being a Republic, we are trying to bestow a characteristic, a status of minority on those  
17 who were not a minority. The Muslims were more than the rulers. The Christians who were  
18 ruling through the Governor General and the HMG, His Majesty's Government, they were  
19 smaller in numbers than the Muslims. Therefore, I request Your Lordships to first of all,  
20 instead of again, avoiding to go into this question, please decide this question. It's too long,  
21 My Lord, for 75 years and more we have been evading this question and we just assume and  
22 we stamp them as a minority institution and confer the benefit of Article 30 to them. According  
23 to me, there are three aspects of this minority. And this is a question which has been referred  
24 to Your Lordships. The first referring order says -'Decide the essential conditions or  
25 ingredients of the minority institution which may be decided once for all' that is Volume 3-A,  
26 page 209. In my additional written note, which is 2(j), Volume 2(j) in first paragraph, I have  
27 extracted this portion. Volume 2(j). It is all right for the petitioners to proceed on the  
28 assumption, as in **Azeez Basha**, but what is the referred to Your Lordship is - 'Decide  
29 essential conditions or ingredients of the minority institution which may be decided once for  
30 all.' And the second referring order refers to **T.M.A. Pai**, and that's one of the reasons for  
31 referring the entire matter to Your Lordships. That is Question 3(a), which is framed in that  
32 case, **T.M.A. Pai**. 'What are the *indicia* for treating an educational institution as minority  
33 educational institution? Would an institution be regarded as minority educational institution  
34 because it was established by persons belonging to a religious or linguistic minority or it's  
35 being administered by a person belonging to religious or linguistic minority? 'So first of all, we  
36 have to decide this question. And I am placing three characteristics which are absolutely  
37 essential. Why was the Article 30 needed as a safeguard or protection? Because of the fear of

1 domination by majority. So it's a protective, it's a safeguard. Number two, Article 30, My Lord  
2 will walk hand in hand with Article 29(1). It can walk separately also. It is up to the religious  
3 minority concern to decide how far they wish to go. These are not simple provisions of  
4 reservation. The object is to enable them to maintain their character as a religious minority,  
5 and in that respect, Shadan was right. To reduce it to reservation is to completely kill this  
6 Article 30 and equate it with 16 and 14 and 15. So, being a protective safeguard, what follows  
7 is, there is an idea of domination in built in this. The fear of the minority that its character,  
8 that its culture, that its language, that its script may be overridden and demolished by the  
9 majority. Therefore, a minority is that which is less in number than the ruling majority.

10

11 **JUSTICE SANJIV KHANNA:** How will you apply this test?

12

13 **RAKESH DWIVEDI:** This test will apply who was ruling at that point of time? Were you less  
14 than them or more than them?

15

16 **JUSTICE SANJIV KHANNA:** That means ascertaining?

17

18 **RAKESH DWIVEDI:** Ascertaining... The numerical test. I call this a numerical test. If the  
19 Christians are ruling, you accumulate, you aggregate all the Christians, aggregate all the  
20 Muslims of various sects and decides about whether they are less in number or not. That's a  
21 numerical test in my humble submission. The second test is a test of non-dominance. So, if  
22 that particular community, though being less in numerical, in numbers, if it is a ruling power  
23 then it cannot be a minority. Less in number and non-dominant. Because that's the correct  
24 idea underlying Article 30. If you are ruling then you don't need a safeguard. You don't need  
25 to protect yourself. That's the qualitative test. And the third is that the community which is  
26 claiming that status, should be considering itself to be a minority. The group which is founding  
27 the institution, should be considering itself to be a minority.

28

29 **JUSTICE SURYA KANT:** Which is the third test Mr. Dwivedi?

30

31 **RAKESH DWIVEDI:** The third test is that the community which is claiming to have  
32 established the institution, should be considering itself to be a minority.

33

34 **JUSTICE SANJIV KHANNA:** The founders should consider themselves to be a minority.

35



1 **RAKESH DWIVEDI:** Minority, yes. If they reject that claim, and seek some other status...  
2 Without these three factors being considered as on 1920, we will be looking at history in a  
3 blinkered way, in a partial way.

4  
5 **JUSTICE SANJIV KHANNA:** On that aspect, the third aspect. Leaving the third aspect  
6 aside, when we refer to a statue being retroactive we'll have to and also take into account what  
7 is the object and purpose of the Article 30, which you have yourself articulated. We go back in  
8 point of time to find out who are the person who has established that institution. But the  
9 question whether they were in minority or not at that time may not be relevant. What will be  
10 relevant is, whether on the date when the issue is being examined, whether they are minority  
11 or not.

12  
13 **RAKESH DWIVEDI:** My Lord, the issue is they have a right to establish. Today no dispute...

14  
15 **JUSTICE SANJIV KHANNA:** What you are saying is we'll have to go back in point of time  
16 and examine whether, when it was established, it could be treated as a minority institution  
17 because there was no concept of...

18  
19 **RAKESH DWIVEDI:** We are going back. We are considering who's founded in 1872, the  
20 primary school? Who founded it, the secondary school, who founded MAO?

21  
22 **JUSTICE SANJIV KHANNA:** What is the parameter..?

23  
24 **RAKESH DWIVEDI:** Who contributed? We are going back.

25  
26 **JUSTICE SANJIV KHANNA:** We are going back.

27  
28 **RAKESH DWIVEDI:** But we want to stop, and we don't want to consider the character of  
29 this group at that point of time, the character which this group was claiming for itself.

30  
31 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Dwivedi, apply your three tests. Your first  
32 test is minority has to be less in number than the ruling majority.

33  
34 **RAKESH DWIVEDI:** Yes.

35

1 **CHIEF JUSTICE DY CHANDRACHUD:** Now, going by that test the ruling majority, as  
2 you rightly said was Imperial Government. Therefore, those people who found it were certainly  
3 less.

4

5 **RAKESH DWIVEDI:** Those who were ruling were a ruling minority.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Right.

8

9 **RAKESH DWIVEDI:** And Muslims were more than the Christians at that time.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** That can never be the test. Mr...

12

13 **RAKESH DWIVEDI:** That's the whole point. We want to consider everything in history, but  
14 not that part of the history My Lord, which is absolutely relevant.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** We were ruled by colonial power, which was  
17 hopelessly, of course, it was a minority, but that's the whole point. That is the whole genesis of  
18 the freedom movement. But to therefore say that any claim for minority status has to be  
19 rejected because those who were ruling were, in any case a miniscule minority.

20

21 **RAKESH DWIVEDI:** The reason is this...

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Can we now deny minority status because of the  
24 fact that, well, the rulers were, in any case in a minority?

25

26 **RAKESH DWIVEDI:** The whole problem is arising because the Constitution has given a  
27 right to the present minorities, the Muslims, the Christians and whoever else is to establish  
28 and administer. This is a right which is given by the Constitution and operates *ex-post facto*.  
29 But by judgment, we have tried to accommodate and extend it to a scenario which existed prior  
30 to the Constitution .

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** So, therefore, to see whether you are entitled to  
33 a Constitutional right. You look at the status or position as on the birth of the Constitution.

34

35 **JUSTICE SANJIV KHANNA:** And even afterwards.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** Right. And thereafter. Now according to you, you  
2 have to go all the way back at the point of the birth of the institution.

3

4 **RAKESH DWIVEDI:** Either we go or we don't go. If we don't have to do.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** No, but. If you do, the test cannot be the  
7 numerical majority in relation to the rulers at that time.

8

9 **RAKESH DWIVEDI:** Has to be My Lords. Otherwise, if you are minority. Otherwise, what  
10 are we doing? What are we doing? We are taking note of... We don't want to take note of the  
11 Act. Then don't look into the history at all. Look at the Act. Act says, it has been established by  
12 the Governor General in Council, the end of the matter.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Then according to you, there'll be no minority at  
15 all.

16

17 **RAKESH DWIVEDI:** There was no minority. There was no minority institution at that time.  
18 We were all subjects. The Hindus and Muslims were at par. I was as subject as they were.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Is this equitable that any institution established  
21 prior to Independence would not be a minority institution?

22

23 **RAKESH DWIVEDI:** Yes, that's my humble submission and this Court has committed  
24 error, in my humble submission with deference, by not examining this aspect. By simply  
25 assuming in every case that... So what is the result?

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** When the Constitution says in Article 30, all  
28 minorities, either linguistic or religious.

29

30 **RAKESH DWIVEDI:** So establish. Today nobody says...

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** When it says all minorities, it certainly looks like  
33 in the position, the sociological position and the historical position prior to the birth of the  
34 Constitution.

35

36 **RAKESH DWIVEDI:** It cannot be My Lords. All minorities cannot...

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Minorities are not created for the first time post  
2 1950.

3

4 **RAKESH DWIVEDI:** The question which I'm posing for Your Lordship's kind consideration  
5 is the constitution attempting to imagine... force us to imagine that India was actually a  
6 Republic in 1920. What are we trying to do by taking it backwards. We are caught in a... what  
7 maybe is the consequence of this assumption is My Lord, we are actually trying to take the  
8 Constitution and applying it retrospectively. We may call it retroactive or we are applying the  
9 principles of it backwards. No, we are actually giving...

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** It's not like that. We also have to understand the  
12 historical perspective of the Constitution. Why did the Constitution introduce certain  
13 safeguards? It was a safeguard intended to hold out an assurance to communities which were  
14 otherwise joining the mainstream of the Constitution, that you will be protected. One Article  
15 of that protection was your right to establish and administer educational institution of your  
16 choice.

17

18 **RAKESH DWIVEDI:** No problem. After 1950, nobody is contesting. I am also not contesting  
19 that all these people who are now actually a minority. They are entitled to establish, and they  
20 are establishing. Nobody is preventing them from doing so. The problem is arising only when  
21 we are taking this principles back My Lord and backwards. And not for a few years, but several  
22 decades. And then saying, because most of the colleges established by Christian missionaries  
23 are between 1850 and 1900. So we take it back 100 years and say that even though you  
24 established this institution as a ruler as governing...

25

26 **JUSTICE SANJIV KHANNA:** Mr. Dwivedi, there can be number of arguments, counter-  
27 arguments, et cetera. Why can't we have more Institutions being established of equal status  
28 and character or equal excellence? There can be a number of arguments on either way, that  
29 will not... real issue is what did the Constitution in Article 30 say? The Constitution was  
30 certainly aware that they are minorities in India, there is some safeguard to be in spite of the  
31 partition of India being on religious line. They said - We will adopt and give certain safeguard  
32 to the minorities. That's the commitment of the Constitution. And on interpreting that do we...  
33 if we accept... your argument is all institutions which had come up prior to 1950 will no  
34 longer... there's no need to examine whether they are minority institutions or not.

35

36 **RAKESH DWIVEDI:** That is correct. What I'm submitting with... And this is something  
37 which Your Lordships have not debated and considered and decided.

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**KAPIL SIBAL:** My Lords, *In Re: Kerala Education Bill*. I'll just read. 'There is no reason why the benefit of Article 30 Sub-Article 1 should be limited only to educational institutions established after the commencement of the Constitution. Language employed in Article 30, Sub-Article 1 is wide enough to cover both pre-Constitution and post-Constitution institutions.' Seven judges of this Court. I have to revert it to 9.

**RAKESH DWIVEDI:** No. Does it matter? 7, 9 and 11, that's for Your Lordships to decide. But the question is, what is *In Re: Kerala* saying? *Kerala* is not saying that they were considering a Presidential reference. So supposing My Lords, before the Constitution, the Parsis have established. They are numerically small, they were a minority. They were less than the Christian ruling power. They will be entitled . So it's not saying don't examine whether you are a minority then or not. And that is the problem that there are not only *Re: Kerala*, other cases also assumed. In *Patro*, it's assumed that they are in minority. It would be a very amazing conclusion that Christians who were ruling at that point of time. Today yes, they are minority, but at that point of time, you ruled over us. You were evangelizing. Your mission was that and we are ready to stamp, give a stamp of minority and the benefit of Article 30 to them. So those missionary, who came here and to do evangelization, to act as an arm of colonial rule. With great respect, to confer upon them the status of minority, will be completely... and that's not the... no provision in the Constitution gives any.. has any intent of being retroactive in this sense. They were the arrowheads of western cultural imperialism in India and we are saying that you are minority, you get the benefit of Article 30. So we forget, we take note only of the fact that Mr. Syed Ahmed Khan was inspired, he wanted to attract Muslim youth to western education, so he set up a primary school and he set up the primary school in 1872, even while being in the employment of the East India Company and thereafter brought under the British Government. He retired from the British Government service since 1878. So as an employee of the British Government, he establishes a primary school, then secondary school, and then MAO, gets a grant from the British Government and then he becomes an Imperial Council member for eight years and then he becomes a member of the Council of the North-West Province. So what, he is acting as an arm of the Government. British Government had certain specific intent with regard to Muslims and Hindus. So again, My Lord, we have to forget all those things. He was an arm, whilst being a Government servant. He is establishing this with the aid of Government grant, with the aid of Government money, with the aid of money which is coming from the Nawabs who are of the Indian State, which is also a Government. Where is the private community sprinkling My Lords, maybe here and there, in small amount of collection. Everything was because of that. Viceroy Lytton will not come all over to inaugurate MAO merely because he was an employee of the Government , a sub judge at that time and

1 therefore he comes there with their own objectives, imperialist objectives. These schools and  
2 colleges, the group headed by Mr. Syed Ahmed Khan by itself, neither had the right to establish  
3 institution, nor they had the power to establish the institution, nor they had the capacity to  
4 establish it. Everything flowed in from the Governor General's Government and from the  
5 Provincial Government. The 30 lakhs money came from Nizam, he is a ruler of the Indian  
6 State. But we can start looking at his face and his belief and then say he's a Muslim, but he's a  
7 ruler, Monarch. Maharaja Patiala, he was a monarch. Maharaja Vizianagaram, he was a  
8 monarch. They are all made patrons in the AMU Act. So where from the fund is coming? Not  
9 from the community, but from those who are governing the British Government itself and the  
10 Royal Princes . Now we can say we will not look at the Royal Princes , but the Chamber of  
11 Princes, which was constituted in 1923. We can also overlook that the princes were not the  
12 breakers of storm, which comes in India. The freedom struggle, every force which was against  
13 the freedom struggle. To all of them, My Lord, we are very grateful and we confer the status of  
14 minority. So it's not established by them. They don't have the capacity. They could not run it.  
15 Yes, they wanted a university to request and to negotiate non-essential terms and to be  
16 members of court, if that is sufficient to establish. I submit it is neither founding nor  
17 establishing. Now what was the status, which Syed Ahmed Khan was seeking? I have annexed  
18 his own letter. Kindly see my written submission notes at Volume 2(h), page 18. They  
19 considered themselves to be a separate Nation, not a minority and he is the founding father of  
20 this. Kindly come to page 18, the footnote where the letters My Lords, which is the speeches  
21 which he gave in '87, '88. Your Lordships have it? 'We ought to consider carefully our own  
22 circumstances and the circumstances of Government. If the Government entertains  
23 unfavourable sentiments towards our community. Then I say with utmost force that these  
24 sentiments are entirely wrong. At the same time, if we are just, we must admit that such  
25 sentiments would be by no means unnatural. I repeat it. If Government entertains these bad  
26 intentions, it is a sign of incompetence and folly. But I say this we ought to consider whether  
27 Government can entertain such thoughts or not? Has she any excuse for such suspicions or  
28 not? I reply that she certainly has. Think for a moment who you are. What is this Nation of  
29 ours? We are those who ruled India for 6 or 700 years. From our hands in the country was  
30 taken by Government into its own. Is it not natural then for the Government to entertain such  
31 thoughts? Is Government so foolish as to suppose that in 70 years we have forgotten all our  
32 grandeur and our empire? Although should Government entertain such notions, she is  
33 certainly wrong. Yet we must remember she has ample excuse. We do live on fish, nor we are  
34 afraid of using a knife and forth less we should cut our fingers. Our Nation is of the blood of  
35 those who made not only Arabia, but Asia and Europe to tremble. It is our Nation which  
36 conquered with its sword the whole of India, although its people were all of one religion. I say  
37 again that if Government entertained suspicions of us, it is wrong, but do her the justice and

1 admit that there is reasonable ground for such suspicion. Can a wise ruler forget what the state  
2 of things was so shortest time ago? He can never forget it. If then Mohammedans also joined  
3 the monstrous and unreasonable schemes which are impossible of fulfilment and which are  
4 disastrous for the country and for our Nation . What will be the result? If the Government be  
5 wise and Lord Dufferin be a capable viceroy, then he will realize that a Mohammedans  
6 agitation is not the same as the Bengali agitation, and he will be bound to apply an adequate  
7 remedy. If I were viceroy, and my Nation took part in this affair, I would, first of all drop down  
8 on them. In time of Lord Ripon, I happened to be a member of the Counsel. Lord Ripon had a  
9 very good heart and kind disposition and a very qualification for a Governor. But unfortunately  
10 his hand was weak, his ideas were radical. At that time, the local board and municipality bills  
11 were brought forward and the intention of them was that everybody should be appointed by  
12 election. Gentlemen, I am not a conservative. I'm a liberal, but to forget the prosperity of one's  
13 Nation is not a sign of wisdom. The only person who was opposed to the system of election  
14 was myself. If I'm not bragging too much, I may, I think, say that it was on account of my  
15 speech that Lord Ripon changed his opinion and made one-third of the members appointed  
16 and two-thirds elected. Now, just consider the result of election. In no town are Hindus and  
17 Mohammedans equal. Can the Mohammadans suppress the Hindus and become the masters  
18 of our self-Government? In Kolkata an old bearded Mohammedan of noble family met me and  
19 said that a terrible one of whom calamity has befallen them. In his town, there were 18 elected  
20 members, not one of whom was a Mohammedan. All were Hindus. Now he wanted  
21 Government to appoint some Mohammedan and he hoped Government would appoint  
22 himself. This is the state of things in all cities. In Aligarh also there are not special rule. It  
23 would be impossible for any Mohammedan except my friend so and so to be elected and at last  
24 he too would have to rely on being appointed by Government. Then how can we walk along a  
25 road for which neither we nor the country is prepared?' Kindly turn over leaf My Lord, at the  
26 bottom. This is second speech extract. The letters are annexed. 'After this long preface, I wish  
27 to explain what method, my Nation rather the whole country of this country ought to pursue  
28 in political matters, I will treat in regular sequence of the political questions of India so that  
29 you may have full opportunity of giving your attention to them. The first of all is this. In whose  
30 hands shall the administration and the Empire of India rest? Now suppose that all English and  
31 the whole English army were to leave India taking with them all their canon and their splendid  
32 weapons and everything, then who would be rulers of India? It is possible that under these  
33 circumstances, two nations, the Mohammedans and the Hindus, could sit on the same throne  
34 and remain equal in power. Most certainly not. It is necessary that one of them should conquer  
35 the other and thrust it down. To hope that both could remain equalist to desire the impossible  
36 and the inconceivable. At the same time, you must remember that although the number of  
37 Mohammadan is less than that of Hindus. And although they contain far fewer people who

1 have received a high English education yet they must not be thought insignificant or weak.  
2 Probably they would be by themselves enough to maintain their own position. But suppose  
3 they were not, then our Mussalman brothers, the Pathans would come out as a swarm of  
4 locusts from the mountain valleys and make rivers of blood to flow from their frontier in the  
5 north to the extreme end of Bengal. This thing, who, after the departure of English would be  
6 conquerors, would rest on the will of God. But until one Nation had conquered the other and  
7 be obedient, peace could not reign in the land. This conclusion is based on proof so absolute  
8 that no one can deny it.'

9  
10 So, therefore, My Lord, this is what they thought of themselves, the group. I'm limiting myself  
11 to the group, which is said to be pioneering, My Lord, the establishment of institution. I'm not  
12 talking about the entirety of the Muslim. They were nationalists also. There were people who  
13 did not believe in the two Nation theory also. But here is the moving spirit, who never thought  
14 that he is a minority. His spirit was that we are Nation. His spirit was that we have to be loyal  
15 to the British. And even the British thought like that, they also said India is a multinational.  
16 So, this concept of minority was not there. Should we then My Lord, ignore all these important  
17 aspects of history. At no point of time before his death in 1898, he changed his views and it is  
18 this inspiration which led to this grant of separate electorates in 1906 and the division of  
19 Bengal in 1905 which led to the freedom struggle, My Lord. And why did this movement for  
20 University of BHU and this start My Lord in 1915 and 1920? Both cases, the request was made  
21 in 1911. That's the record on this, Mr. Shafi's speech itself. The request was made in 1911 when  
22 the Prince of Wales was visiting India. When India capital was being shifted to Delhi and  
23 Bengal was reunited. That's why in the speech, My Lord, all this is coming. The rise of and the  
24 renaissance of Bengal was behind this. So in 1911, it started, they made a request. There were  
25 negotiations begun and at that time, BHU accepted the terms and conditions, the format, the  
26 scheme of administration and therefore BHU Act was made in 1915. They were resisting, not  
27 accepting. Ultimately, they fell in line. All that has been shown to Your Lordships. So, the  
28 Governor General says - You accept the BHU pattern. That's the command. There was no  
29 choice to them. My Lords, kindly bear in mind one thing that Governor General was the  
30 supreme power. He could do whatever it wanted. It is one thing to say that the university is  
31 established by the Muslims. It is another thing to say that the university was established by  
32 the Governor General in Council for the Muslims. There is a distinction between by and for.  
33 Even today the Parliament can pass an act saying that for tribals, we are establishing a  
34 university. The tribals will be member of the court, so the fact that it is meant for tribals will  
35 not mean that it has been established by tribals. The tribals may go from Jharkhand and  
36 Chhattisgarh, the North-East, and they may request the Government of India to give them a  
37 university. They are not getting enough educated students from their midst and acceding to



1 their request, the parliament passes an act saying that this will be a tribal university. So it's  
2 not established by tribals. Nothing prevents the Governor General in Council to form a  
3 university, to establish a university, to form the university for a particular denomination,  
4 community, tribals, schedule castes whomsoever they wanted. They have absolute power. But  
5 what they do in this case, from MAO College to the university is a change of status and level of  
6 education. I have in my written submission, because of time, I will not be reading to all them,  
7 paragraphs. I have brought out from the basis of Woods Despatch of 1854(1854) and the  
8 Hunter Commission, because the Hunter Commission was not concerned with university. It  
9 is the Wood's Despatch, which is the foundation. Wood's Despatch, 1854(1854), which is on  
10 record, placed by the Government which is the starting point of universities in India. First in  
11 1857, three universities, Calcutta, Bombay, Madras, all three established by Act, initially as an  
12 examining university, then in 1860, to award degrees and teaching also. In 1882 comes the  
13 Lahore University in Punjab, and in 1887, the Allahabad University. In 1904, after a  
14 commission's report in 1902, in 1904, the Indian Universities Act was enacted, and all its  
15 provisions were read into the act of the five universities which were existing. It says so in  
16 Section 2 that all the provisions of this should be read into that. It provided a particular  
17 structure of administration. And the format was based on the London University. Now, what  
18 is the importance of this? The importance is that while the British Government allowed private  
19 persons to establish schools and colleges, it kept the power to establish a university to itself.  
20 There is no British policy shown to Your Lordships. And based on these policies, which we  
21 have placed on record, there is no British policy which enabled private persons to establish  
22 university. That is the reason why the Hindus and Muslims had to make a request to the  
23 Governor General in Council, for they alone had the power. In fact, My Lords, in the Lahore  
24 University, I have mentioned there was one gentleman. He was a Christian and he led a  
25 movement and he made a request to the Governor General in Council to establish the Lahore  
26 University. So the fact that somebody is behind the move, behind the request or contributing  
27 some little thing, some existing property that is not founding. That is not establishment. In my  
28 submission founding and establishment are synonymous. It can't be founding that I have gone  
29 to the Governor General in Council. So you say you have not established, but you have found.  
30 Mr. Seervai is not right. With great respect to the eminent jurist, and many at times Your  
31 Lordships have accepted his criticism and many a times Your Lordship have not. In the  
32 context of Article 30, founding and establishment, bringing into existence is one and the same  
33 thing. Founding is not making requests. Founding is not going up to the Governor General and  
34 meeting some officials, and negotiating something non-essential. Supposing I go to the  
35 Governor General saying My Lord, I have some limit little property of 5 acres. I can't establish  
36 university. You please bring in more land, et cetera, you have enough funds so you can  
37 establish it. Give me some role in this. Is that founding? Is that establishment? So therefore,

1 let us not equivalent semantics. Contextually, it can mean nothing else. Founding is nothing  
2 short of bringing the infrastructure, bringing the funds, bringing the faculties and constituting  
3 the framework, the most important. Constituting the scheme and framework of the university  
4 is functioning. Today, minority institutions are being established. It is the societies and the  
5 companies which are formed, which present their own scheme of administration. They appoint  
6 the Chancellor, the Visitors. So the scheme is formed by them.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Dwivedi, just because we are concluding, we  
9 may reflect on it. Your position, therefore, is that variance with what the Solicitor General  
10 argued. Because the Solicitor argued that there was no prohibition on any private individual  
11 establishing a university in British times. If you wanted to do it you would not have recognition  
12 for your degrees. Your position is that - Look, there was no question of any private person  
13 establishing a university. It had to be done by or under an..

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15 **RAKESH DWIVEDI:** Yes, just a little qualification...

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17 **CHIEF JUSTICE DY CHANDRACHUD:** Under the charter of the imperial power.

18

19 **RAKESH DWIVEDI:** Yes. Just a little qualification that this is in the context of universities  
20 whose qualifications and degrees are recognized. Private universities you can go and establish,  
21 your degrees will not be recognized. I am limiting my submission to universities whose degrees  
22 are recognized. Who are imparting western education, western science, liberal arts. If you are  
23 having a Sanskrit university of your own, private, that's a different thing. That we had from  
24 long back Nalanda universities and all that. The university is not a concept, which is emerging  
25 for the first time, but what they want is, Solicitor also said the same thing. He was referring to  
26 Viswa-Bharati and other Kashi Vidyapith and Jamia and so on. So, there you don't require a  
27 Governor General. And there was no law which said that you can't use the word university like  
28 today. But if you wanted to have a university whose degrees are recognized, then only  
29 Governor General could do it. There was no policy. University as a subject, was expressly  
30 excluded from the Hunter Commission. Kindly advert to the recommendations of the Hunter  
31 Commission, it was excluded. So they went to the Governor General because they had no  
32 adequate land. They didn't have adequate funds, no capacity, and they knew that it can't be  
33 established unless Governor General creates it.

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35 **CHIEF JUSTICE DY CHANDRACHUD:** We'll come back after lunch.

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37 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, Mr. Dwivedi.

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**RAKESH DWIVEDI:** Yes. But before I proceed My Lord, I will request Your Lordships to have Volume 2(j), page 4. And kindly note these My Lord, definitions of minority, which is from the United Nations General Assembly. Para 10, 11, 12, 13. The first definition is designed by Francisco Capotorti, Italian lawyer My Lord who was representative of the Italy in the United Nations General Assembly, which was slightly modified then by the Canadian judge.

**JUSTICE SANJIV KHANNA:** You are in which page?

**RAKESH DWIVEDI:** Volume 2(j). That's the additional detailed submission. Volume 2(j), page 4. And in paragraph 12 those definitions find My Lord resonance in United Nations Commission for Religious and Linguistic Minorities. I'm sorry, it's the Indian National Commission for Religious and Linguistic Minorities. And then from Britannica My Lord. And this My Lord, I had already submitted that is actually flowing from the objective of Article 30, the idea of dominance. Otherwise, Article 30 is not required. And also note at page 9, para 24.

**JUSTICE SANJIV KHANNA:** If we go by the question of dominance.

**RAKESH DWIVEDI:** Yes.

**JUSTICE SANJIV KHANNA:** They have some repercussions, even they have lot of repercussions otherwise. Not otherwise.

**RAKESH DWIVEDI:** It matters, not My Lord what repercussions it has. The question is to define. This Court has been avoiding definition. So let's define it appropriately My Lord. Then everything My Lord, in every case it can be applied. Otherwise .....

**CHIEF JUSTICE DY CHANDRACHUD:** Your approach, Mr. Dwivedi would be that the conferment or denial of minority status would depend upon the position of the Founder in relation to the dominant ruling group, not the position of that minority in relation to the ruling group, but that the Founder. For instance, in this case, it may be well conceivable that the Muslims were, in fact, in a minority, I mean, in the constitutional sense. I'm just using it as a tag. But you are saying that because Sayed Ahmed Khan. He became a Sub Judge. He was employed in the British East India Company. Therefore, his relationship with the Government was not...he didn't consider himself to be a minority.

**RAKESH DWIVEDI:** That's a separate argument. That's the third limb,

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**CHIEF JUSTICE DY CHANDRACHUD:** So it has to be the position of that group, it's a group right. It can't be in relation to the position of the individual *qua* the rest or...

**RAKESH DWIVEDI:** I'm sorry. I said there are three aspects of minority. One was numerical test. The second was the dominance test. The third is, did you consider yourself to it? That part of the submission pertains to the third limb.

**CHIEF JUSTICE DY CHANDRACHUD:** The dominance also, dominance would pertain even if applying your standard to the entirety of the community. It can't be the dominance in relation to the Founder, that because the Founder was kow-towing to the then, powers that be, either pre or post-Independence India, therefore, that...

**RAKESH DWIVEDI:** Minority is a political concept. It relates to somebody, some group, which is in majority. It's a political relationship which is now enshrined in the Constitution in the form of Article 30 for the futuristic purposes.

**CHIEF JUSTICE DY CHANDRACHUD:** For instance, say, a political party in a State may regard a particular minority, A, I'm not taking any particular name of any minority group. A political party in power in a State may regard that minority as a very valid constituent, a very important constituent of its roadblock. Does that mean that therefore, though numerically it is in a minority or it performs or fulfils all the *indicia* of a minority because it is regarded as a very important ingredient of the ruling block. Therefore, it will be denied minority status in Article 30. This will become subjective, then.

**RAKESH DWIVEDI:** No, no, I'm not saying in the context of the Government, which of the day. I'm talking in terms of the community, which is ruling. We are talking of 1920, when a particular community was ruling through the Governor General. Take the community as a whole. Neither the Muslims nor the Hindus were part of that Government. We were subjects alike and we were equal in the sufferings.

**CHIEF JUSTICE DY CHANDRACHUD:** So therefore, both the Hindus and the Muslims would fulfil the *indicia* of minority status.

**RAKESH DWIVEDI:** No. There's no question of minority. The relationship was of the imperial ruler and the subjects. We are all subjects. We are all treated alike. All subjected in the same manner. So, there's no question. As the Solicitor General also said that there's no

1 concept of minority then. We are trying to foist something backwards on an statute made by  
2 an imperial power which was not there. Now, this is just a fiction which we are creating. How  
3 do we do it? What principle? How do we extract the principles which this Court has laid down  
4 over the course of years up to *T.M.A. Pai* and then says that we will apply to 1920 and then  
5 discern whether this particular community was...

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7 **CHIEF JUSTICE DY CHANDRACHUD:** There is the claims of those who are established  
8 pre Independence are also subsumed within Article 30. It's not that because you have been  
9 established before Independence that you do not entitle 30.

10

11 **RAKESH DWIVEDI:** That's the question which I'm raising for Your Lordship's  
12 consideration. Lordships may not accept it, but then that has to be decided, because Your  
13 Lordships, have at least five cases I have cited in...

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** That is your contention, because prior to 1947,  
16 there was no concept of minority as we Constitutionally recognize it today. Therefore, it means  
17 that any institution which has been recognized is... which has been established before 1947 or  
18 really before the advent of the Constitution on 26th of January 1950, no such as institution  
19 would be entitled to claim minority status. It would boil down to that.

20

21 **RAKESH DWIVEDI:** It will boil down to that, My Lord. And the only exception which can  
22 be drawn My Lord, is a principle where some community was actually a minority, not in power,  
23 not in dominant position. Like Parsis I have given.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** But there again, you say that the whole concept  
26 of minority was non-existent before...

27

28 **RAKESH DWIVEDI:** Not in existence, but they were in numerically test and the  
29 dependence... non dominance test if applied can probably... if we stretch Article 30. It was  
30 never meant to apply by any principle backwards My Lords. Just see, there are five cases in  
31 Para 24, page 9 of the same [UNCLEAR].

32

33 **JUSTICE SANJIV KHANNA:** There may be some difficulty also, because these definitions  
34 which we are reading of western philosophers, etc., or UN etc., are made in slightly different  
35 context whereas when we are referring to Article 29 and 30, we are referring to certain things  
36 which are provided in the Constitution. What was in the Constitution itself because let's take  
37 the example, say now South Africa, the majority community, in fact, was not dominant.

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**RAKESH DWIVEDI:** There are numerous examples in...

**JUSTICE SANJIV KHANNA:** Now, it's also possible, therefore if that is, if we go into all that, there can be also they will be difficult. So when they're dealing with that, because here in India, we have given protection to various groups also. The ones which are marginalized, socially marginalized they have been protected. There are certain benefits also. Positive reformation is also there.

**RAKESH DWIVEDI:** That's all right. It doesn't impact that.

**JUSTICE SANJIV KHANNA:** When we are referring to 30. Should we apply these definitions over here?

**RAKESH DWIVEDI:** No. This definition is applicable... independently I had made a submission that the object of Article 30 is safeguard. Protection.

**JUSTICE SANJIV KHANNA:** That's a separate argument.

**RAKESH DWIVEDI:** From that flows dominance. So this definition is apt. It is in sync with what I have submitted respectfully, that you are numerically less and non-dominant. The problem which Your Lordships are posing...

**JUSTICE SANJIV KHANNA:** Then also, dominance can keep on varying from time to time.

**RAKESH DWIVEDI:** No. We are based on a constituent.

**JUSTICE SANJIV KHANNA:** If you talk about political dominance, it can vary from time to time.

**RAKESH DWIVEDI:** No, now we have a Constitution, a Republican Constitution. Now, Article 30 is in the Constitution, so we have to proceed with the Constitution as from 26th January 1950 onwards. How do you...

**CHIEF JUSTICE DY CHANDRACHUD:** And dominance is also a function of socioeconomic advancement. What if there's a community which does not have the benefit of

1 education as the Muslims were at that time? Community which was not highly advanced  
2 socially, economically, educationally. These types of minority status...

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4 **RAKESH DWIVEDI:** From the angle of western education, everybody was in minority. If  
5 this test is applied, nobody had. This all started in 1957. Universities there were hardly five, so  
6 we were all in the same position. It's not that the Hindus, had western education and the  
7 Muslims did not have.

8

9 **JUSTICE SANJIV KHANNA:** That they indicate that the Constitution as framed did not  
10 mean to apply this test of dominance. Because otherwise even Hindus were minority in that  
11 sense.

12

13 **RAKESH DWIVEDI:** Constitution has to... Constitution you may not apply or apply. The  
14 point is, how do you apply any principle of Article 30 backwards 30 years ago and even  
15 hundred years ago? What are we doing? 1950... all missionary colleges, which is called college  
16 period for the missionaries, 1850 to 1900. So what are we doing, My Lord? How far we are  
17 going back at taking these principles and judging their status and giving them the *imprimatur*  
18 of 30. Now, if the college is doing good, why will Parliament or any Legislature do something  
19 which takes away anything from that college. We have to trust the Parliament in that respect.  
20 Why extent 30 is my...

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** I will ask you another question. What change  
23 took place on 26th January 1950 that the Muslims, which, according to you, would not have  
24 minority status before 1950, suddenly acquired that minority status post 1950? What is the big  
25 change which took place?

26

27 **RAKESH DWIVEDI:** The big change happened was, that after My Lord, whatever I had  
28 mentioned earlier, the separate electorates, weighted reservations and this theory of separate  
29 Nation. 1930, Allama Iqbal repeats in the Agra session of Muslim League and from '35 to '47  
30 entire Aligarh Muslim University barring some exceptional individuals was the pioneering the  
31 Pakistan movement. Mr. Sibal perhaps or Mr...

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33 **CHIEF JUSTICE DY CHANDRACHUD:** What happened on 26th of January 1950, which  
34 then eliminated...

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36 **RAKESH DWIVEDI:** By that time India stood divided and therefore who ever...

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** In relation to your threefold test. What is the  
2 change which takes place on 26 January 1950?

3

4 **RAKESH DWIVEDI:** Change happened that those who were left behind, who had been  
5 beguiled into that theory of Pakistan, they were dependent upon now... upon rule of the  
6 majority under the Constitution of India, which is likely to be most often of elements from  
7 Hindu community.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** But presumably even....

10

11 **RAKESH DWIVEDI:** So, therefore My Lord they needed....

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** But presumably even post-Independence the  
14 Constitution assured an equal citizenship to everyone whether you are a Hindu, Muslim, Jew,  
15 Christian, Zoroastrian.

16

17 **RAKESH DWIVEDI:** Those who were resident....

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** We at a Constitutional level we assured an equal  
20 citizenship to everyone.

21

22 **RAKESH DWIVEDI:** That's right.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Right? In which case how can anyone then claim  
25 that I have a minority status, because of what the constitution assures me?

26

27 **RAKESH DWIVEDI:** Because of 30. But for 30, nobody could.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** But that begs the question. Because what does  
30 30 recognize in terms of a minority?

31

32 **RAKESH DWIVEDI:** 30 recognizes only this My Lord that you are a group of people who  
33 have got subscribed to different religion, you have a different culture, you subscribe to a  
34 different script and language, Urdu, and therefore that needs protection.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** Correct. So these are sociological features. These  
37 are sociological features. And those sociological features existed even prior to 1950.



1  
2 **RAKESH DWIVEDI:** But it makes no difference whether it existed or did not exist. Before  
3 the British came My Lord, they were the rulers. It was a question of alliance and loyalty  
4 between two rulers of the past. So even My Lord, if you go back, how many years will we go  
5 back and say My Lord even if 200 years back, some school was set up so minority My Lord.  
6 The rulers are establishing for dominance over this country, for imperial rules, for exploiting  
7 this country, for destroying this country and whatever constructions were done by them was  
8 for their advantage. Incidentally, it flowed to the others. They thought, we will produce brown  
9 sahibs My Lord, but our intellect was such that we produced a renaissance in Bengal and it  
10 flowed all over the country. So that was our potential. But their objective was that. However  
11 My Lord, this is my respectful submission which Your Lordship will examine kindly, because  
12 we are, in no case we are defining what is a minority. If you don't accept that definition, or the  
13 definition which I am placing for consideration, there has to be some definition. If you apply  
14 the.. merely see another angle My Lord. If you simply apply the numerical test, what happens?  
15 Let's take Kerala My Lords. Now nobody is in majority. Let's assume that there are Hindus,  
16 Muslims and Christians and each of them are 33% or 35%, 30%. How do you apply, decide  
17 who is minority? So please define. These cases will come and the reference requires decision.  
18 Now nobody is in majority in there. It has to be some combination, Christians -Muslims,  
19 Hindu-Muslims or Hindu-Christians or somewhere. I mean, it's electoral politics will play out  
20 in its own way. But how will you decide? If you have simply a numerical test, then how do you  
21 decide Kerala? Nobody is above 50%, nobody is a majority. So we need a definition and now  
22 it's a high time, 2024, if we still don't decide the definition of minority, the frameworks did not  
23 decide it. So we need a definition. And we had, the best test is objective test. Why was 30  
24 needed? It's a safeguard and a protection. And the next question will be, from whom? From  
25 the ruling majority. The fear, what was that fear? The whole argument for creating Pakistan  
26 was the fear of Hindu domination. We want a separate homeland. So the fear of Hindu  
27 domination which was there and it lingered. Kindly see what Syed Ahmad Khan says, we have  
28 not forgotten and we will not forget. They did not forget in '47 also. Gandhiji pleaded with  
29 Jinnah - Tell me maximum safeguard. Whatever safeguard you want, I'm ready to give. Agree  
30 to that. He says - We don't want safeguards because safeguards gave us a tag of minority.  
31 Whereas if you agree that we are a separate Nation , then that idea of minority transmutes  
32 itself and we become co sharers. That's why, My Lord, in the cabinet mission they were giving  
33 parity at the top, central level. They did not enter the Constituent Assembly, which started on  
34 9th December 1946 because we had declared it will be a Republic, Democratic Republic, votes  
35 will be there. He said -Vote doesn't help me. I have got one vote, brother Gandhi has three  
36 votes. So we will never be protected. No safeguard works. So, when Pakistan was finally  
37 created, then this question was that, all right, this is the safeguard, Article 30. So, here fear of

1 dominance of Hindus, this is meant to protect that. So, that's the objective, My Lord. I would  
2 request we can't look at history. We must look at history wholesomely. It's not a deprecation.  
3 I'm not against Muslims and all the Muslims in India today have hardly anything to do with  
4 what happened before 1947. So, we are all bound by fraternity, otherwise also. So, no ill feeling  
5 at all. But we must look at the history and the problem. Greater problem arises when we don't  
6 look at the history squarely on the face. We want to avoid looking at it, and we ultimately create  
7 something which creates more problems. After all, Justice Wanchoo and all the learned judges  
8 in *Azeez Basha* are witnesses to what was happening through... the two World Wars. Justice  
9 Wanchoo became an ISCS [ICS] officer in 1926. So, he's a witness of all that, Simon  
10 Commission and everything My Lord, he knows what was. That's why is he assuming? He  
11 doesn't want to go into that question and decides on established. Because if you decide go into  
12 this whether Muslims are minority or not, at that time, there are complications. So, why go  
13 into it? Decide on this basis and this judgment has operated for a long time. The whole thing  
14 is scenario has changed to which I'll come adverted to later on. For the time being, kindly just  
15 note, My Lord, these judgments which I have mentioned in paragraph 24 of page 9 of the same,  
16 which say that Fundamental Rights cannot be applied retrospectively. If they cannot be  
17 applied retrospectively, then the principles are underlying those Fundamental Rights cannot  
18 be applied retrospectively. We can't judge...

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Which page were you saying?

21

22 **RAKESH DWIVEDI:** Para 24, page 9. This Volume 2(j).

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

25

26 **RAKESH DWIVEDI:** The Learned Solicitor has also, My Lords, in his adverted to this, have  
27 given in the page and paragraphs. Some of the cases he has elaborated in his written  
28 submissions. I'm not reading these cases. It's well settled. But what follows from these  
29 judgments which say that Fundamental Rights cannot be applied? So we say now, yes,  
30 Fundamental Rights will not apply retrospectively, but the spirit, the fundamental, the  
31 principles, et cetera. we will project it backwards and judge them from that angle today. But  
32 no Constitutional principle permits that.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Dwivedi, merely because the circumstances  
35 relating to the transaction are partly drawn from the past does not necessarily render the  
36 Fundamental Rights retrospective.

37

1 **RAKESH DWIVEDI:** I don't understand the distinction between.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** For instance, suppose we are in 1951, somebody  
4 has acquired a property in 1930. Property has come to a zamindar in 1930, Constitution is  
5 born; property is expropriated. Can that person not assert a Right under Article 19(1)(f).

6

7 **RAKESH DWIVEDI:** Yes. Why? The reason I'll tell Your Lordship, because that property...

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Because those certain antecedent elements are  
10 drawn from the past, the right, the Fundamental Right arise on the birth of the Constitution.  
11 Likewise, Article 30 is basically a group right. That group rights comes to be recognized in the  
12 birth of the Constitution.

13

14 **RAKESH DWIVEDI:** Provided you had....

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** What is the group right require us to decide, who  
17 establishes and who administers? Now, one way of looking at it is who is establishing it now  
18 in 1950? But that could not be a correct reading. Who established this institution on the birth  
19 or the founding moment, as they were saying? Now, the founding moment, you therefore look  
20 at, not for extrapolating the fundamental rights back to 1920. Not at all. But to look at the  
21 circumstances in which that institution was created in the first place.

22

23 **RAKESH DWIVEDI:** But we are doing more.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** It comes to the conclusion that created by  
26 minority. It was created by an operation of law, by a statute. That's a separate issue. But we  
27 have to necessarily look. Otherwise we'll be artificially restricting the operation of Article 30  
28 only to those institutions which were created post the Constitution. When there is nothing  
29 intrinsically in the Constitution to deny that assertion of status to those who were in existence  
30 prior to it. I say, why stop at 30 then? Same thing will apply to 19(1)(f). Same thing will happen  
31 to...apply to a variety of rights. Somebody sets up an industry in 1925. Industry continues.  
32 Does that person not have a right under 19(1)(g) on the birth of the Constitution? You have a  
33 right.

34

35 **RAKESH DWIVEDI:** Let's examine this My Lord. Supposing somebody sets up an industry  
36 before the Constitution, he had a right to do it. He had set up an institution. He had a property  
37 right. That property right by virtue of Article 395, read with 372, etc. continues and therefore,

1 the Fundamental Right he gets from the date. When we come to Article 30, the persons whom  
2 we are talking about did not have a right. There should be some right which is being protected  
3 and carried on in a different shape, in a higher pedestal. But if there was no right and it was  
4 entirely on the mercy of the Governor General to do or not to give, then where is the question  
5 of sticking this label on them. There was no concept of minority. There was no right of  
6 minorities. There was no duties of minorities, no provision. And they did not claim that they  
7 are minority. Yet we are trying to project 30. My Lord. So the two examples with greatest  
8 respect, rather they downed in favour of my submission. Where you had a right certainly it will  
9 continue and it can be elevated also. But if you had no right and there was no concept of  
10 minority and you never considered yourself to be minority. Rather, you rejected it when it was  
11 told to you that you are minority, said - No. Kindly just have My Lord... from the document  
12 from the transfer of power. Very interesting.

13

14 **JUSTICE SANJIV KHANNA:** Page?

15

16 **RAKESH DWIVEDI:** Same Volume page 31, written submission. Para 8 at the bottom. I'm  
17 sorry it's not underlined My Lords.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Where will you get it, Mr. Dwivedi?

20

21 **RAKESH DWIVEDI:** This is Volume 2.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Page?

24

25 **RAKESH DWIVEDI:** This is from the transfer of power.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

28

29 **RAKESH DWIVEDI:** Page 31, para 8. 'I was therefore led to ask myself, what is this element  
30 in Muslim thought which finds expression in Pakistan? It derives, it seem to me, from a revolt  
31 against the allied concepts of minority and safeguards. Experience under the Congress  
32 Governments may have been the immediate stimulus, but the real motive goes deeper. Nor  
33 does it lie in the recognition that safeguards depend for their efficacy upon the presence of a  
34 third power to enforce them. A power which will disappear from the Indian scene with the  
35 coming of the dominion status.' This is something happening relates to 1942. 'It lies more  
36 profoundly, though perhaps less consciously, in the knowledge that safeguards are designed  
37 to improve but cannot radically alter the position of a minority which remains a minority. A

1 Cinderella with trade union rights and radio in the kitchen but still below stairs. It is against  
2 this whole combination of ideas that Muslim mind rebels. The two Nation theory which  
3 transmutes the ideology of minorities is thus more fundamental to their present thought than  
4 the Pakistan theory, which transmutes the ideology of safe guards. From this new outlook of  
5 Muslims, there will obviously be no retreat. My conversations have therefore indicated that it  
6 is misleading to approach the general Muslim problem in terms of the same phraseology as we  
7 use about the interest of minorities like the Europeans depressed classes and so on. Some new  
8 terminology is needed to keep our consideration of this problem on the right lines.  
9 Terminology which recognizes the problem is one of sharing of power rather than qualifying  
10 the terms on which power is exercised by a majority.' And also My Lord, at page 38. So both  
11 the Muslims and the ruling power of the time considered them to be a Nation . They rejected  
12 minority and we are trying to give that imprint. Kindly have the last page at page 38, the third  
13 line. That was the time when Chiang Kai-shek was visiting India, when the INA forces had  
14 marched and reached Imphal. The third line - 'India is not one national state, it's two major  
15 nations being Hindus and Mussalmans and one third of India is under the princes.'  
16 So unlike the case of industry and property, et cetera My Lord, where the rights were in  
17 existence and our Constitution transmutes it into a higher level, protected it by Fundamental  
18 Rights under 19. But here something with which they are rejecting, don't agree with it, we have  
19 then by 30 My Lord... And this is all part of history. I can multiply number of documents My  
20 Lord, but this is just to give an idea about what they were thinking. And the person who said  
21 to be the Founder his ideas of separate nations continued to grip AMU. That is why what was  
22 told to Your Lordship that when the President at that time Vice Chancellor Zakir Hussain who  
23 had visited, he said that the future will depend upon how Aligarh looks to India. That was what  
24 was told to Your Lordships from the appellant side. Why was this said? Because Aligarh was  
25 with Pakistan movement. And a large number of students and teachers all migrated to  
26 Pakistan also. Now, these are facts My Lord. I don't think that it should be inconvenient to any  
27 person that this is being stated, but because we must face the truth and then see whether 30  
28 can still be applied.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, Mr Dwivedi.

31

32 **RAKESH DWIVEDI:** Now kindly have the other, the main volume of my submission 2(h).

33

34 **RAKESH DWIVEDI:** Page 8. For the Lordships' convenience I will not read all of this My  
35 Lord, but this is from the Wood's despatch, which we have enclosed as R-1. I have extracted  
36 the relevant portion.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Page?

2

3 **RAKESH DWIVEDI:** Page 8, paragraph 11(b). 11(a) is Macaulay's extract. That Minutes of  
4 Macaulay's is also enclosed as R-6. Page 9 is the relevant portion, that is para 35. My Lords,  
5 11(b) at page 8 and kindly come to...these are.... full documents are in Volume 5(h).

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Where will you get that.. Volume?

8

9 **RAKESH DWIVEDI:** 5(h), because the Hunter Commission, et cetera, is pretty thick  
10 Volume, so we separately... All these documents in this written submission are separately  
11 compiled in 5(h). Now please turn to page 9, para 35 from that document. 'What's Despatch?  
12 We shall be ready to sanction the creation of an university at Madras or in any other part of  
13 India where a sufficient number of institutions exist from which properly qualified candidates  
14 for degrees could be supplied. It is being, in our opinion, advisable that the great centres of  
15 European Government and civilization in India should possess university similar in character  
16 to those which will now be founded, as soon as the extension of a liberal education shows that  
17 their establishment would be of advantage to the native communities.' Now, both the words,  
18 'founded' and 'establishments' are simultaneously being used and the objectives are similar.  
19 Now, please turn to page 11(d), sub-para (d). 'Between 1857 and 1882, no other university had  
20 been established. The Hunter Commission was appointed by Resolution of Government of  
21 India dated 3rd February 1882 to review the progress of English education made in India.  
22 Specific instructions were given to the Commission with respect to primary education,  
23 secondary education and colleges to examine further involvement of private efforts under the  
24 grant in aid system.' That is Hunter Commission Report, para 10, page 626. 'It is noted in the  
25 report of the Commission that after the disappearance of British East India Company, the  
26 Principles of Despatch of 1854 had been confirmed by the Secretary of State in the Despatch  
27 of 1859. In para 46 of the report related to the Indian universities, the same is quoted below.'  
28 Now see at page 12, the last bold lines of this sub-para (d).

29

30 This is regarding Lahore, Dr. Leitner -' was a very prominent place. It is mainly an examining  
31 body, but exercises variety of functions for the promotion of literature and education. Its  
32 distinguishing features are that it owns its origin to other than State efforts and that is  
33 designed to give special encouragement to our intel studies.' So somebody or the other,  
34 obviously, will goes and request that now we need in the North-West Frontier Province, we  
35 need a university. There is no university. So merely because somebody is requesting,  
36 contributing some little things. So therefore, at that time there was no policy. That's what I  
37 had submitted. And these documents show that up to the level of college, private efforts, grant

1 in aid. Otherwise there was no policy. My Lord, may I now move on to some two-three aspects  
2 of the Act only because almost everything has been covered, so I don't want to retrace all those  
3 things. If Your Lordship has Volume 4(c).

4

5 **JUSTICE SANJIV KHANNA:** Volume 4(c), Mr Dwivedi?

6

7 **RAKESH DWIVEDI:** 4(c). Page 40.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** In this case, who are the two Nodal Counsels,  
10 actually? If you can just overnight, maybe give us a master index like we had in Article 370,  
11 which act to be found in this, the documents you can give us a master index, then the  
12 judgments. So *Basha*, other judgments, which are the volumes, so it becomes easier when  
13 you are dictating in the end, or even to read it before the... as we go along. Just put it in a  
14 plastic or I just on any paper. Give it to the Court Master, so he'll circulate to all five of us. Yes?

15

16 **RAKESH DWIVEDI:** Page 40 My Lords, at the bottom Mr. Shafi, who is introducing the  
17 bill, he is a member of the Council, Executive Council. 'Sir I beg to introduce the bill to establish  
18 and incorporate a teaching and residential Muslim university at Aligarh and to move that bill  
19 be referred to a select committee consisting of the Honourable George Lowndes, Honourable  
20 so and so, Raja of Mahmudabad.' There were five British persons in this select committee and  
21 five other gentlemen. Raja Mahmudabad, Asad Ali, Khan Saheb, Shah Nawaz Bhutto. I hope  
22 My Lord this name rings some bell My Lord. He is the father of the Prime Minister of Pakistan.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Of Mr. Zulfikar Ali Bhutto.

25

26 **RAKESH DWIVEDI:** Zulfikar Ali Bhutto. And there's something more very significant. All  
27 these five gentlemen ultimately were Pakistan supporters and Shah Nawaz Bhutto is the  
28 person who in January 1947 came from Karachi and became the Diwan of Junagadh, Nawab  
29 of Junagadh. The Nawab himself was holidaying in London. Mountbatten never summoned  
30 him for accession, like he was doing with all others on three Subjects. Nawab comes back on  
31 11th of August and signs accession in favour of Pakistan and along with his numerous dogs, he  
32 vanishes to Karachi. Shah Nawaz Bhutto continued there to rule...

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** in Junagadh?

35

36 **RAKESH DWIVEDI:** From Junagadh. When this accession happened to Pakistan then  
37 there were two other principalities i.e., Mangrol and Babariawad which had been attached

1 during World War with Junagadh. So, they declared Independence and acceded to India.  
2 Then Shah Nawaz Bhutto sent his forces to occupy Babariawad in Junagadh. Then, cutting the  
3 other part of the story short, what happens is that Indian forces are sent which take back and  
4 surround Junagadh. It is then that Shah Nawaz Bhutto through the sea route vanishes to  
5 Karachi and the Junagadh was regained. So these are all forces... All these five gentlemen went  
6 there. In the negotiating team M.A. Jinnah was also involved which was negotiating the Bill.  
7 And he was one of the persons who said that - Now, since nationally, it's all India importance  
8 University, therefore, instead of Lieutenant Governor of North-West Province, it will be  
9 befitting to have the Governor General as Lord Rector. So, this is one aspect which I wanted  
10 to point out to Your Lordships, that the British, in the scenario of Raulat Act of 1919 and  
11 Khilafat Movement, the discovery of oil in the Middle East and obtaining of the Mandate in  
12 his Palestine by the Britain... Imperialist... British Imperialist, all the circumstances, certain  
13 things were being done by the HMG and the Governor General, which is known to everybody...  
14 drive a wedge. Your Lordships will find at the next page 41 bottom that this process began in  
15 1911. The request... And it was granted only when they agreed to BHU in 1890. Sorry, 1919. It  
16 took them eight years to have that Act. This is one aspect. The second aspect is what is the  
17 significance of this office of Lord Rector? None of the universities which were created  
18 established by the Governor General in Council, had this office of Law Director. We were told  
19 by the Appellant's side that all universities have got Visitors. So what is so great about it? There  
20 are Visitors. There are Chancellors, Vice Chancellors, there's some supervision, some  
21 regulation. Now, I'm trying to make an effort to apply these principles of 30 backwards and  
22 see what's the consequence. Can we say that it was established by the minority? This special  
23 office of Lord Rector and Governor General as Lord Rector was only in these two universities.  
24 BHU and Aligarh Muslim University. The second feature is that, unlike the Visitors, even in  
25 the Acts passed subsequent to the Independence under the Constitution of India, the visitors  
26 have a very limited power of supervising, causing an inspection to happen and giving a show  
27 cause, giving some advice and directions, nothing else. No visitor in no university, public or  
28 private, has got a power to make, approve, amend, modify statutes, ordinances. So, in contrast  
29 to the visitors, the Lord Rector has very wide powers. One, the first statute and the first  
30 ordinances are all made by the Governor General in Council. And no amendment can be  
31 enforced merely at the will of the court or the Visitor's body, visiting board. It must get the  
32 approval. So ultimately, amendment can happen only at the will of the Governor General and  
33 nobody else. The Lord Rector. The statutes, the third, My Lord. The statutes and the  
34 ordinances are the life and soul of a university. All universities function in accordance with  
35 that. The Aligarh Muslim University Act provides specifically that admissions will happen in  
36 accordance with the ordinance. So all policies in accordance with statute and ordinances. The  
37 court meets once in a year. So where is the control in the court merely because the name has



1 Muslims and the court has Muslims and *de facto*, there have been Muslims. It's all fine. No  
2 problem. Nobody has problem with that. Muslims are also Indian citizens like anybody else  
3 so, if the majority of students there have been Muslims, so Muslim Vice Chancellor can be  
4 appointed. But that doesn't mean that they have established therefore we take it again. Back  
5 this *de facto* is also rolled back to 1920 to find out the establishment. As I submitted the main  
6 part of the establishment under Article 30 is the framing of the scheme of administration.  
7 Please mark the words, 'right to establish and administer'. The right to administer has to be in  
8 accordance with the scheme of administration which happens with establishment.

9  
10 **JUSTICE SANJIV KHANNA:** Then aren't you drawing distinction between administration  
11 and Legislation part in your own argument itself?

12  
13 **RAKESH DWIVEDI:** No, there's no contradiction. With great respect My Lords,  
14 established... when you establish a university...Supposing let's take a hypothetical case. Today  
15 we establish an University, the Law comes 'X' University is established, there's no framework.  
16 This is what happened in *Yashpal*. The appellants rely upon *Yashpal*. In *Yashpal* My Lord,  
17 by notifications under act, universities were established. There was the shop. 'X' university  
18 established in this shop. 'Y' in that shop and third in this house. No infrastructure, nothing.  
19 The court says - No, if private people are establishing, then there must be infrastructure, there  
20 must be faculty, there must be all minimum rooms, etc., for where students will study and  
21 until that is done, it cannot be incorporated. So what happened there was just incorporation  
22 of shops and houses and also on piece of open land university established. Government, they  
23 said may do that because Government has obligations, constitutional obligations. It will  
24 establish. It has funds and everything but one must know there are no university shops.  
25 Therefore, when you establish a university the scheme of administration has to be part of it.  
26 Who is going to be Chancellor? Who's going to be Vice Chancellor? How Principal will be  
27 appointed? How employees will be appointed? How students will be admitted? How discipline  
28 will be maintained?

29  
30 So, there has to be a framework. And that is what Justice Wanchoo's judgement in *Azeez*  
31 *Basha* does. It looks into all the provisions and finds that the entire scheme of administration  
32 has been provided by the Act. Their role in the framing of the scheme of administration is very  
33 minimal in non-essential parts. Otherwise BHU framework was there, you have to follow that.  
34 Some little changes were done because university became a central subject. So this Rector My  
35 Lord, is a concept borrowed from the London universities, especially the 1858 Act where  
36 Scotland University was formed, from there they took this. And Rector My Lord is considered  
37 to be a leader of the university. So, this is not a mere change of nomenclature that instead of

1 Visitor, we are having Rector. And who has made Lord Rector. That's added upon it, the  
2 Governor General the supreme power on the soil of India. Nothing prevented the Governor  
3 General in Council from saying that this MAO College, is MAO University as it is and asking  
4 them to make some changes about visitors, et cetera. And just as today, the private universities  
5 are being formed. They could do anything. There was nobody to question, no judicial review.  
6 But they don't do it. They keep the power and entitlement to establish university to themselves.  
7 And this is the Lord Rector which is provided. Entire scheme is generated from having the  
8 source in the Lord Rector, the Governor General in Council with the sanction of HMG. Before  
9 this was established, sanction was taken from the Secretary of State in London. One last thing  
10 about this My Lord is, look at the court also My Lord. Volume 2(b) is the Solicitor's submission.  
11 Your Lordship will not find 124 members are the founder members in the statute. The Act says  
12 members will be as per the statute. The statute has ordinary members and founder members.

13

14 **JUSTICE SANJIV KHANNA:** Which page are you reading?

15

16 **RAKESH DWIVEDI:** I'm just giving that My Lord. Statute number. members *wala kaun sa*  
17 *hai?* Yes. Kindly have a statute number 8 which is at page 160. 'Class 1 is *ex-officio* members.  
18 Class 2 is foundation member. Class 3 is life members. And Class 4 is ordinary members.' Now  
19 kindly come to the Annexure My Lord, which is containing the names of the... page 167. There's  
20 hardly any connect with the MAO college, its past students, its past teachers or those who  
21 were... from all over India, from even Indian states. The Nawabs are members. Retired  
22 Director of Public Instruction. Almost half of them are in the service of British Government in  
23 different parts of the country, from North-West to Bengal and from Kerala to here. Not one  
24 person. Some of them are even judges. 46. Judges High Court, District Judges, Magistrates.  
25 79 is Nawab Justice Sir Syed Shamsul Huda, High Court, Kolkata. So all over the place. Item  
26 81, Muhammad Ali Jinnah. So, people from Karachi, Punjab and all. 124 members in all. These  
27 founder members are supposed to, under the statute, retire like in Rajya Sabha. My Lord, one  
28 fifth retires every year. And so for at least after 5 years, 6th year, 7th year, 8th year, 9th year  
29 like that, they will retire. So, for 10 years this is the founders members' court. So, they are  
30 Muslims, all right. But nothing to do with MAO.

31

32 **RAJEEV DHAWAN:** But they were all trustees of the MAO College.

33

34 **RAKESH DWIVEDI:** All of them?

35

36 **RAJEEV DHAWAN:** Yes. all of them.

37

1 **KAPIL SIBBAL:** Most of the facts you have placed are wrong...

2

3 **RAKESH DWIVEDI:** You place the correct facts. Now with this the last submission, which  
4 I would like to place, is about *stare decisis*.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** What do you have to say about *stare decisis*?

7

8 **RAKESH DWIVEDI:** My Lord, before this, just a reference to one of the queries of My Lord,  
9 there was allusion to legally positive approach in this. The submission is that legal positivism  
10 does not involve any retrospectivity. It only is concerned with infusing whether moral  
11 principles can be utilized to interpret statutes. Various authors in any case, the gods of legal  
12 positivism are not at one. They are varied and in conflict, so very difficult to choose. However,  
13 My Lords, the best approach could be of Hart or Austin. But that also, it's limited to infusing  
14 moral principles. Our Court, I have given three judgments at page 9 of my additional  
15 submissions, where Your Lordships have rejected the inclusion of moral principles. However  
16 today, we are talking about Constitutional morality, et cetera. So, at the highest, My Lord, even  
17 if we have to infuse and inject the Principles of Constitutional morality and drawn from the  
18 provisions of the Constitution, it would be to interpret the Act, but we are faced with an entirely  
19 different question. Therefore, that approach, in my respectful submission with utmost  
20 difference, may not be appropriate. With this, I come to *stare decisis*, my submission is, as  
21 Solicitor General has already indicated, this is a standalone university. The Act, standalone  
22 Act creating a university of the kind it is. The judgment in *Azeez Basha* is statute specific.

23

24 It analyses the particular act and comes to a certain conclusion. The third My Lord, then the  
25 Act was first amended in 1951 and then in 1965. Some individuals had come to the Court. The  
26 Aligarh Muslim University never intervened and it had no problem with *Azeez Basha* at least  
27 on the judicial side. They may be trying to get changes through Parliament which obviously  
28 has to proceed on the footing that the judgment is good and we have to alter the basis, etc.,  
29 and whether they have succeeded or not is a different question. But the Parliament also will  
30 proceed on the footing that the judgment is good and how to change the basis. Now this  
31 judgment being statute specific and concerning one university has been implemented by the  
32 Government for a long period of time. On the basis that it is not a minority institution.

33

34 **JUSTICE SANJIV KHANNA:** On factual aspect, was there any reservation or preference  
35 given to the Muslims right from 1950 till 1981?

36

1 **RAKESH DWIVEDI:** It's after '81 that this order was passed which was challenged in the  
2 High Court.

3

4 **JUSTICE SANJIV KHANNA:** No. I'm talking about from 1950 till....

5

6 **RAKESH DWIVEDI:** No, not to my knowledge My Lords subject to correction by the other  
7 side. Actually, it wasn't required because 80% already they were admitting.

8

9 **JUSTICE SANJIV KHANNA:** No, was there any preference being given or by... even if there  
10 was no preference being given,

11

12 **RAKESH DWIVEDI:** No policy of reservation.

13

14 **JUSTICE SANJIV KHANNA:** There was no policy of reservation?

15

16 **RAKESH DWIVEDI:** That's subject to correction from the other side.

17

18 **JUSTICE SANJIV KHANNA:** After '81?

19

20 **RAKESH DWIVEDI:** After '81, this order came in '85, reserving 50%. which was questioned.  
21 2005, I'm sorry.

22

23 **JUSTICE SANJIV KHANNA:** Because what was said by, I think it was stated by them.  
24 Preference was being given to the schools which were affiliated to the AMU and they were  
25 giving preference in admissions in the college itself.

26

27 **RAKESH DWIVEDI:** So not perhaps in a formal way, but, yeah, they were controlling. They  
28 were Principals and all those. So they were admitting that way. That's what *de facto*  
29 submission is that the Vice Chancellors were there, the Principal was there, and so on so. So,  
30 now this judgment has been implemented. Now, please see My Lords when MAO asked the  
31 Governor General to establish the university, what was their contribution in the MAO College.  
32 Look at the establishment today which was shown to Your Lordships. It's not the same thing.  
33 74 acres of land and now, it is having 1150 acres of land. The Government of India is in today's  
34 budget is 1000 crores. There are today 17 halls, all subject to corrections. My learned friend  
35 will say it's all incorrect facts. Seven storey building. So there's a complete metamorphosis. It's  
36 no more that MAO College. What are we looking at? What are we wanting to change? This

1 judgment in **Azeez Basha** has no impact on any other university which were created before.  
2 This is a one standalone university.

3  
4 So, what are we wanting to do today My Lord? I can understand that this judgment is creating  
5 havoc with respect to minorities or something. There's no great public interest involved.  
6 Rather all this money which has been invested by the Governments in this institute on the  
7 understanding of **Azeez Basha's** position, that can't be taken away now. So we take back all  
8 those buildings, et cetera, you go and establish. Nobody has the right to a grant. That may well  
9 be consequences which are adverse. There's no public mischief happening and I have My Lord  
10 mentioned certain judgments.

11

12 **JUSTICE SANJIV KHANNA:** Page?

13

14 **RAKESH DWIVEDI:** At page 56 of Volume 2(h), para 53 to 59. Kindly at para 58 My Lords.

15

16 **JUSTICE SANJIV KHANNA:** Which page?

17

18 **RAKESH DWIVEDI:** Page 57. Para 58. It's a quotation from Waman Rao. 'The principle of  
19 *stare decisis* is also firmly rooted in American jurisprudence. It is recorded as a rule of policy  
20 which promotes predictability, certainty, uniformity and stability. The legal system, it is said,  
21 should furnish a clear guide for conduct so that people may plan their affairs with assurance  
22 against the price. It is important to further fair and expeditious adjudication by eliminating  
23 the need to relitigate every proposition in every case. When the weight of the volume of the  
24 decision on the point of general public importance is heavy enough, courts are inclined to  
25 abide by the rule of *stare decisis*, leaving it to the Legislature to change long standing  
26 precedents, if it's so thinks fit, expedient or necessary. In **Bernard so and so** Justice  
27 Brandeis stated that *stare decisis* is usually the wise policy because in most matters it is more  
28 important that the applicable rule of law be settled than it be settled right.' 38 -'While dealing  
29 with the subject of *stare decisis* Shri H. M. Seervai in his book on Constitutional Law has  
30 pointed out how important it is for judges to conform to a certain measure of discipline, so  
31 that decisions of old standing are not overruled for the reason merely that another view of the  
32 matter could also be taken. The learned author has cited an Australian case in which it was  
33 said that though the Court has the power to reconsider its own decision that should not be  
34 done upon a mere suggestion that some or all of the members of the latter Court may arrive at  
35 a different conclusion if the matter were *res integra*. The [UNCLEAR] case. The learned author  
36 then refers to two cases of our Supreme Court, in which the importance of adherence to  
37 precedents was stressed. Justice Jagannadha Das said in the Bengal Immunity case that the

1 finality of the decisions of Supreme Court, which is the court of last resort, will be greatly  
2 weakened and much mischief open to reconsideration.

3  
4 Much mischief done if we treat our own judgments, even though recent as opened to  
5 reconsideration. Justice Sinha said in the same case that if the Supreme Court were to review  
6 its own previous decisions simply on the ground that another view was possible, that litigant  
7 public may be encouraged to think. Always worthwhile taking a chance with the highest court  
8 of the land. Justice Hegde said in his dissenting judgment that the Supreme Court should not  
9 overrule its decisions except under compelling circumstances. It is only when the Court is fully  
10 convinced that public interest of the substantial character would be jeopardized by a previous  
11 decision that the Court should overrule that decision. Reconsideration of the earlier decisions,  
12 according to the learned judge should be confined to questions of great public importance.  
13 Legal problems should not be treated as mere subjects for mental exercise. An earlier decision  
14 may therefore be overruled only if the Court comes to the conclusion it's manifestly wrong not  
15 upon a mere suggestion that if the matter were res integra, members are so and so.' Some other  
16 judgments are there, My Lord, which I will not read on the same vein. Now, therefore My Lord,  
17 in this case, I submit that there is greater public mischief to happen if **Azeez Basha** is even  
18 reconsidered and possibly overruled, rather than if this is sustained, it has no impact on any  
19 other. There is no other past Act made by the Governor General in Council. So, it has no other  
20 impact... trickledown effect. Why we should not... but what are we looking for in this? No other  
21 benefit. And it's a judgment which has, we are now, what, 1968, 32 and 24, 56 years down the  
22 line. And for a standalone case which ultimately would result in all this creation at the cost of  
23 public expense to be handed over to. And lastly as I said, there is a distinction between  
24 established by, established for. In the worst case scenario, we look at the title Muslim  
25 University and the Court, Muslim Institute at the highest be a case, where the Governor  
26 General is establishing the university for the Muslims. I have given in my written submission  
27 cases on, by or under. 'By' means directly by the provision of the Act and 'under' will be  
28 something like this Deemed university, Section 3, UGC Act where we apply, My Lord, with all  
29 by infrastructure everything degree college is functioning, education level is high and then  
30 UGC recommends and Government then sanctions and you are a Deemed to be university.  
31 And finally My Lord, this Statute of Recognition and Statute of Establishment. Aligarh Muslim  
32 University Act is a Statute of Establishment of university, not a case where the statute is merely  
33 recognizing some college, which is already of the standard of an university. While establishing  
34 a university, the power that be can always infuse something from those people who are  
35 contributing. Sometimes they may be made the trustees, sometimes they may be made some  
36 Rector or something which is decorative positions, patrons and so on. And even if we have to  
37 deal with the judgments **Patro**, etc they are all judgments, **St. Xavier**, et cetera, which their

1 judgments, which are of colleges and schools. So, there's no question... none of those cases  
2 were considering... they have all noted. I have pointed out that **Azeez Basha** has been noted  
3 in at least half a dozen cases. And even **St. Stephen's** accepts the definition which has been  
4 accepted by Justice Wanchoo. I have quoted that portion, My Lord. Thank you

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, Mr. Kaul. Yes.

7

8 **NEERAJ KISHAN KAUL:** My Lords, I'll concentrate on three aspects. One is the scope of  
9 reference and why it's important for Your Lordships to see that neither is **Basha** under review  
10 or an appeal and I'll show the reference order in three crucial orders by never ever in 56 years,  
11 even remotely, the correctness of **Basha** on the issue of AMU being established and  
12 administered, has ever been questioned. The only question in the reference order which said  
13 remains undetermined or is yet to be determined is only with regard to the conjunctive or  
14 disjunctive readings of established and administered under Article 30, Sub-Clause 1. That's  
15 the first limb of my argument. In the second limb of my argument, My Lords, I will refer to the  
16 judgments because a question which was never framed is sought to be framed by the appellants  
17 in their written submissions to say. There are internal contradictory findings in **Basha** that's  
18 their question they frame and then go on to say that this is contrary to various judgments of  
19 the Supreme Court to show that, that is an attempt to unravel **Basha** completely when there  
20 is no contradiction with the 6 judgments that they cite. That will be the second limb of my  
21 argument. And the third will of course, be three or four principal submissions established  
22 through by, was the act really seeking to overrule **Basha**? Was it a validating act? Just three  
23 or four crucial submissions I'll deal with in the end. Now, first of all, My Lords **Azeez Basha**  
24 was the result of five writ petitions challenging the constitutionality of the 1951 Amendment  
25 Act and the 1965 Amendment Act. The challenge was principally based on Article 30, Sub-  
26 Clause 1 of the Constitution and the petitioner's case in that matter was that AMU was  
27 established by Muslim minority and therefore the Muslims had the right to administer it. It  
28 was their case, and they contended that the 1951 and '65 Acts took away or abridged the  
29 administrative rights of the Muslims and thus the actual *ultra vires* Article 30, Sub-Clause 1.  
30 Now, the Supreme Court, My Lords, distinctly on three different issues held as far as  
31 'administer and establish' is concerned, it was held and as also held in **St. Stephens** later,  
32 that they have to be read conjunctively and not disjunctively. The second finding was that AMU  
33 was not established by a Muslim minority, but by the Central Government of the day. And  
34 thirdly, AMU was not administered by Muslim minority. The latter two as I show the next few  
35 cases or four cases never, ever have been the subject matter of any discussion or being referred  
36 to a larger bench at all. It's all been about disjunctive versus conjunctive. Then came My Lords  
37 the two judge bench decision in **Anjuman E Rahmania versus the District Inspector.**

1 Now, what had happened was the people who had set up the society, some were Muslims and  
2 some were non-Muslims in that case. So the issue which arose in **Anjuman E Rahmania**  
3 was whether protection under Article 30, Sub-Clause 1 will be granted to an institution which  
4 has not solely been established by a minority. That was the one issue they were grappling with  
5 in that. And the other issue was regarding whether registration of a society under the Society  
6 Registration Act changes the status of the society from a minority institution to a non-minority  
7 institution. These were the two issues being dealt with in that judgment. It was in that context  
8 they never disagreed with **Basha**. They never doubted **Basha** in any form. They referred it to  
9 seven judges saying that we need to decide on the issue of essential conditions and ingredients  
10 of a minority institution should be decided once and for all. That was the basis of **Rahmania**.  
11 Now, as I respectfully submitted, My Lord, nowhere was the findings in **Azeez Basha**  
12 regarding either establishment of AMU or administering of AMU ever questioned in this  
13 judgment. And they pertain to minority societies, not universities. That judgment. Then came  
14 **T.M.A. Pai Foundation**, which dealt with the scope of minorities to deal with and  
15 administer an institution and if aid is given, what are the nature of regulations which can be  
16 imposed? Regulatory in nature conditions that could be imposed. Therein My Lords, a  
17 question came to be framed *qua* **Rahmania** and that question is the Question 3, Sub-Clause  
18 (a) which the reference order also refers to and says that this was the question *qua* **Rahmania**  
19 which was framed in **T.M.A. Pai** and that question specifically, My Lord, said... Would Your  
20 Lordships want to see that or should I just read that out?

21

22 **JUSTICE SANJIV KHANNA:** Yes.

23

24 **NEERAJ KISHAN KAUL:** 'What are the *indicia* for treating an educational institution as a  
25 minority educational institution? Would an institution be regarded as a minority educational  
26 institution because it was established by a person, persons belonging to a religious or linguistic  
27 minority, or it's being administered by persons belonging to a religious or linguistic minority?  
28 And then they went on to say, this question need not be answered by this bench. It will be dealt  
29 with by a regular bench. So the question was *indicia*. And thereafter, conjunctive or  
30 disjunctive. Whether AMU was administered by a Muslim minority, established by a Muslim  
31 minority. Never ever questioned. **T.M.A. Pai** again, never questioned. In fact, discussed and  
32 then I come to **T.M.A. Pai**, not for a second, doubts what **Basha** said. Thereafter, My Lords,  
33 while disposing off **Anjuman E Rahmania**, all that the judgment did, the two judges did  
34 was that now **T.M.A. Pai** is the law, all regulations, all orders enactments, schemes,  
35 regulations will abide by **T.M.A. Pai** and if any question arises in future, it will be decided in  
36 the context of **T.M.A. Pai** and **Rahmania** came to be disposed off. Then came My Lords,  
37 the second reference order of 12th of February 2019 and that I'll request Your Lordships to



1 please have once more the reference order. Volume 3(a) page 216. Yes. Volume 3(a) page 216.  
2 'This Court in **S. Azeez Basha and another versus Union of India**, *inter alia* has  
3 observed as follows : it is, to our mind, quite clear that Article 30, Sub-Clause 1 postulates that  
4 the religious community will have the right to establish and administer educational  
5 institutions of their choice, meaning thereby that where a religious minority establishes an  
6 educational institution, it will have the right to administer that. An argument has been raised  
7 to the effect that even though the religious minority may not have established the educational  
8 institution, it will have the right to administer it, if by some process it had been administering  
9 the same before the constitution came into force. We are not prepared to accept this argument.  
10 The Article, in our opinion, clearly shows that the minority will have the right to administer  
11 educational institutions of their choice, provided they have established them, but not  
12 otherwise. The Article cannot be read to mean that even if the educational institution has been  
13 established by somebody else, any religious minority would have the right to administer it.  
14 And because for some reason or other, it might have been administering it before the  
15 Constitution came into force. The words 'establish and administer' in the Article must be read  
16 conjunctively and so read it gives the right to the minority to administer an educational  
17 institution, provided it has been established by it. We are of the opinion that nothing in that  
18 case justifies the contention raised on behalf of the petitioners that the minorities would have  
19 the right to administer an educational institution, even though the institution may not have  
20 been established by them. The two words in Article 30, Sub-Clause 1 must be read together  
21 and so read the Articles. Article gives the right to the minority to establish, to administer  
22 institutions established by it. If the educational institution has not been established by a  
23 minority, it cannot claim the right to administer it under Article 30, Sub-Clause 1. The  
24 judgment of the Allahabad High Court, which is under challenge in the present appeals rejects  
25 the prayers made on account of the decision of this court in **S. Azeez Basha supra**. The issue  
26 arising in **S. Azeez Basha, supra** was referred to a seven judges bench by an order of this  
27 Court dated 26th November 1981, passed in writ petition so and so, **Anjuman E Rahmania**  
28 **versus District Inspector**. The aforesaid writ petitions, that is writ petition number so and  
29 so were heard, along with other connected cases. **T.M.A Pai versus State of Karnataka**  
30 by a bench of eleven judges. The judgment in which cases is reported as so and so.

31

32 **NEERAJ KISHAN KAUL:** The Question 3(a), which was formulated for an answer in  
33 **T.M.A. Pai Foundation**, which coincidentally reflects the question referred by the order of  
34 this Court, dated 26th November 1981, passed a writ petition number so and so is as follows.  
35 3(a) - What are the *indicia* for the treating and educational institution as a minority  
36 educational institution? Would an institution be regarded as a minority educational  
37 institution because it was established by a person since belonging to a religious or linguistic

1 minority, or it's being administered by a person belonging to a religious or linguistic minority?  
2 However, the bench did not answer the question, stating that it will be dealt with by the regular  
3 bench. The Order of the regular bench passed on 11th March 2003, which, for reasons that we  
4 need not dilate, did not answer the force at Question 3(a) formulated in *T.M.A. Pai*  
5 *Foundation, supra*. The set facts would show that the correctness of the question arising  
6 from the decision of this Court and *Azeez Basha supra*, has remained undetermined. That  
7 apart, the decision of this Court and *Professor Yashpal and Another vs State of*  
8 *Chhattisgarh and Another* and the amendment of the National Commission for Minority  
9 Education Institution Act, 2004, made in the year 2010, would also require an authoritative  
10 pronouncement on the aforesaid questions formulated as set out above. Besides the  
11 correctness of the view expressed in the judgment of this Court in *Azeez Basha*, which has  
12 been extracted above. Ordinarily and in the normal...

13

14 **JUSTICE SANJIV KHANNA:** Just read this paragraph once again.... first argument of  
15 yours?

16

17 **NEERAJ KISHAN KAUL:** Lordship wants me to read 9?

18

19 **JUSTICE SANJIV KHANNA:** Yes.

20

21 **NEERAJ KISHAN KAUL:** 'That apart, the decision of this Court and *Professor Yashpal*  
22 *and Another...*

23

24 **JUSTICE SANJIV KHANNA:** What was professor....

25

26 **NEERAJ KISHAN KAUL:** Can I complete the para and I'll answer that question? Then I'll  
27 answer that.

28

29 **JUSTICE SANJIV KHANNA:** Okay. Fair enough.

30

31 **NEERAJ KISHAN KAUL:** *versus State of Chhattisgarh and Another* and the  
32 amendment of the National Commission for Minority Educational Institutions Act 2004,  
33 made in the year 2010, would also require an authoritative pronouncement on the aforesaid  
34 questions formulated as set out above. Besides the correctness of the view expressed in the  
35 judgment of this Court and *Azeez Basha* which has been extracted above.' Now, My Lord,  
36 the reason specific...

37

1 **JUSTICE SANJIV KHANNA:** This paragraph refers to three things. One is the effect of  
2 ***Professor Yashpal***. What did ***Yashpal*** deal with? And therefore the issue which arises.  
3 Second, it says amendment to the National Commission of Minority Education Act 2004 in  
4 2010, the second question. The third question is with regard to correctness of the view  
5 expressed in the judgment of ***Azeez Basha***.

6  
7 **NEERAJ KISHAN KAUL:** Absolutely right. Now, let me answer that. So what are the three  
8 things. Yes. So, the question is 'administered and established and administered ' or  
9 'established or administered' is one - is the ***Azeez Basha*** question. Why is ***Yashal*** put to a  
10 mention here. I put a question to myself. ***Yashpal*** is mentioned here because ***Yashpal*** had  
11 the provision under Section 2(f) of the UGC Act, which said 'established or incorporated' and  
12 they said, in this context, it will have to be seen whether it is 'established or incorporated' or  
13 'established and incorporated'. Because if Your Lordships will recollect in ***Yashpal***, as Mr.  
14 Dwivedi also rightly pointed out, if you were to set up these one room tenements all over these  
15 universities, all over the place and then say - I have incorporated a university. That's a  
16 university. They said - No, you must have infrastructure. You must have facilities. So first  
17 establish and simultaneously incorporate. And that is why the word 'establish or incorporate',  
18 like 'administer and/or incorporate' or 'administered and established' came to be. Most  
19 pertinent here is the amendment of the National Commission for Minority Educational  
20 Institutions Act 2004 because here the words used earlier were 'administered or established',  
21 which by the 2010 amendment were replaced by 'administered or established and  
22 administered'. So that is why, keeping in mind the question, which in ***Azeez Basha*** remained  
23 undetermined, was disjunctive or conjunctive. That is under Article 30, Sub-Clause 1, is it  
24 'established and administered' or 'established or administered'. Similarly in ***Yashpal***, the  
25 finding on 'established or incorporated' or should it be read as 'established and incorporated'  
26 as in ***Yashpal*** and more importantly, in the NSC, NCMEI Act, where the 2010 amendment  
27 changed the word from 'established or administered' to 'establish and administer' was the  
28 context that this had to be seen.

29  
30 My respectful submission in that light is that what Your Lordships are today being asked to  
31 decide on the basis of question that has been framed by the appellants, not by the reference  
32 Court. Because the question they choose to frame, or one of the questions they choose to frame  
33 is, that whether the decision in ***Azeez Basha*** is internally contradictory in its reasoning on  
34 facts and in law, contrary to the authoritative decisions of this court render negatory by  
35 subsequent statutory changes and contrary to the constitutional dispensation of Articles 29  
36 and 30. Now My Lords, would Your Lordships. I'm not for a minute saying that a Bench of  
37 seven judges cannot frame an additional question, or the contours cannot be decided. But

1 would Your Lordships ever in these matters, go into an appeal, go into a review of a judgment  
2 who has been settled for 56 years and never questioned at all in any decision, not once doubted  
3 on the two issues of AMU being administered and AMU being established. On both question  
4 their findings never doubted. And the only question which arose was, is it to be read as 'or' or  
5 'and' and that is what gets referred. And that is why the reference order in para 8 uses the word  
6 not in plural. It says 'the question in **Basha**,' it doesn't say 'the questions in **Basha**' because  
7 the only question which arose was the question of disjunctive or conjunctive. Not all the three  
8 issues, because **Basha** ultimately decided three issues. Administer, establish and establish  
9 and administer, or establish or administer. And **St. Stephens**, of course, followed that finding  
10 and said that it has to be conjunctively read, not disjunctively. So our respectful submission,  
11 My Lord, also linking this argument to the last argument of Mr. Dwivedi on *stare decisis* is  
12 that would Your Lordships today when neither does any court ever doubt the decision. And I'll  
13 go through those decisions that today or tomorrow when I again commence my argument,  
14 then none of those decisions, whether **Mother Provincial, St. Stephens, T.M.A. Pai**. A)  
15 their facts have no bearing on **Basha** at all at all. Secondly, not one of them even remotely has  
16 questioned the correctness of **Basha** at any stage in any form. On the issue of 'administer and  
17 establishment of AMU' as an institution, not by a minority as held in **Azeez Basha**.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Commence tomorrow.

20

21 **NEERAJ KISHAN KAUL:** We'll commence tomorrow.

22

23

24

25

***END OF DAY'S PROCEEDINGS***