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

COURT NO.1
SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

Civil Appeal No. 2286/2006

ALIGARH MUSLIM UNIVERSITY THROUGH ITS REGISTRAR FAIZAN MUSTAFA
Petitioner(s)

VERSUS

NARESH AGARWAL & ORS
Respondent(s)

TRANSCRIPT OF HEARING
31-Jan-2024

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CHIEF JUSTICE D.Y. CHANDRACHUD: No mentioning before the seven judges, send an email. You got my order. Thank you. In this matter? Oh yeah, of course. But don't give it to us, give it to the Nodal Counsel. He'll then put it together. No difficulty. What we'll do is, Mr. Kaul, we'll just sort of... so that we give them enough time for the rejoinder. We'll give you about 40 minutes. 40 minutes to complete. 10 minutes for Guru and 10 minutes for Mr. Yatindra Singh. So that by 11.45 we will hand it over to them.

NEERAJ KISHAN KAUL: I'll just take 15 minutes more than the deadline given. About an hour.

CHIEF JUSTICE D.Y. CHANDRACHUD: Mr. Kaul, you know how precise you are. You can do it in 40 minutes. 1 hour for everybody together. 11.45 we are...

GURU KRISHNAKUMAR: Just about 10-15 minutes more, My Lord.

CHIEF JUSTICE D.Y. CHANDRACHUD: 11.45. I think we have heard the matter very substantially now we have to hear the other side because..

TUSHAR MEHTA: Mr. Nataraj and Vikramjit Banerjee would assist for some time.

CHIEF JUSTICE D.Y. CHANDRACHUD: All in 1 hour, yes.

GURU KRISHNAKUMAR: We'll endeavour, My Lords, we'll endeavour.

KAPIL SIBAL: Your generosity in these matters, My Lords.

CHIEF JUSTICE D.Y. CHANDRACHUD: At some point of time, you know, what happens is the judges also face a level of intellectual fatigue. Then you want to hear something...

NEERAJ KISHAN KAUL: My Lord, I hope that fatigue wasn't the result of my 20 minutes...

NEERAJ KISHAN KAUL: Yesterday, My Lords, I was on para 8 and 9 of *Basha* to say that the appellants cannot alter or expand the scope of reference and taking off from where Mr. Dwivedi left on the principle of *Stare decisis*. Now, whether...

CHIEF JUSTICE D.Y. CHANDRACHUD: That’s very technical, you know. In a combination of seven, we are not strictly ever bound by...

NEERAJ KISHAN KAUL: I said so that I’m not saying for a minute...

CHIEF JUSTICE D.Y. CHANDRACHUD: I think, we would more want an answer on the heart of the matter.

NEERAJ KISHAN KAUL: But My Lord, nonetheless, I’m entitled to say that if for 57 years, *Basha*, in no judgement discussed has ever been doubted, on whether established or administered factually, should Your Lordship at all get into it?

CHIEF JUSTICE D.Y. CHANDRACHUD: That point you have made.

NEERAJ KISHAN KAUL: That is all that I am saying, My Lord.

CHIEF JUSTICE D.Y. CHANDRACHUD: That point is well taken. We have made the point.

NEERAJ KISHAN KAUL: I’m not so much on the *Stare decisis* but on the issue that if that’s not part of the reference order, can you completely order, alter and rewrite the reference question, because the question they have rewritten...

CHIEF JUSTICE D.Y. CHANDRACHUD: Mr. Kaul, I’ll just tell you what my notes say:

1. Scope of reference - *Basha* is not under review or appeal. In 56 years, it has not been in question. Only question reference was whether it is conjunctive or disjunctive.

NEERAJ KISHAN KAUL: Yes, yes.

CHIEF JUSTICE D.Y. CHANDRACHUD: We have formulated your point.

NEERAJ KISHAN KAUL: And My Lords, also keep in mind that when para 8 and 9 was being read out, to Your Lordships yesterday, of the reference order, one consciously the word,
'question' was used there, in 8. And in 9, what is it that was referred to *Yashpal* for the purposes of 2(f) where establish...

**CHIEF JUSTICE D.Y. CHANDRACHUD:** Now, let's get on. We will now go fast.

**NEERAJ KISHAN KAUL:** My Lord, one thing, I missed out. In paragraph 9, the last line and the last word was the para *Basha* extracted above. So they were categorically on the question of what was extracted above, which was conjunctive or disjunctive. I'll go on to my next point.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** Yes.

**NEERAJ KISHAN KAUL:** Next point. My Lord. I must say, this was a mistake on my part. I've also got it uploaded now, My Lords, but I dictated to save time, a short note on the five-six judgements relied on them by what they say, their contention and our answer. Otherwise, I could give a hard copy to Your Lordships, because I...

**CHIEF JUSTICE D.Y. CHANDRACHUD:** It's already uploaded.

**NEERAJ KISHAN KAUL:** It is?

**CHIEF JUSTICE D.Y. CHANDRACHUD:** Yes.

**NEERAJ KISHAN KAUL:** Because these are the judgments they have relied on to say, because our whole submission is that there is nothing in law later on, which contradict or to which *Basha* is contradictory. Now, please have the first judgement, My Lords, which is in re *Kerala Education Bill*. My Lords, have that?

**CHIEF JUSTICE D.Y. CHANDRACHUD:** Yes.

**NEERAJ KISHAN KAUL:** What I've done, My Lords is, on the left hand side are the findings and their contention, based on the judgement. And on the right hand side, is our response to it. If, Your Lordships, My Lords, the Chief Justice has that. Judgement cited and contention in re *Kerala Education Bill* findings: A bench of seven judges of this Hon’ble Court in re *Kerala Education Bill*, while examining a reference on certain aspects relating to *Kerala Education Bill* opine that the provisions such as minimum salaries and qualifications for appointment of teachers, sought to be imposed on minority-run schools as a

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condition to receive aid, were regulatory in nature and that it would not offend the right of minorities to administer under Article 30 (1). The Hon’ble Court held that the benefit protection of Article 30 (1), would be available not only to educational institutions established after the commencement of the Constitution, but also to educational institutions established prior to the commencement of the Constitution. The Hon’ble Court also held that...

**CHIEF JUSTICE D.Y. CHANDRACHUD:** Mr. Kaul, instead of reading what *Kerala* holds, you can read out your second column, your response. So let’s see what your response is, because *Kerala*...

**NEERAJ KISHAN KAUL:** Would Your Lordships want me to also? Yes, as Your Lordships should say. On the left hand side, I’ve also given their contention based on *Kerala* and now the right hand side. Firstly, the propositions laid down by the Hon’ble Court in *Kerala Education* are not being challenged by us. The judgement in *Azeez Basha* also does not deny that minority institutions could have been set up prior to the coming into force of the Constitution and would still receive protection under Article 30(1). The Hon’ble Court in *Azeez Basha* firstly analyses the antecedent history of AMU and the subsequent enactment of the AMU Act, 1920 to conclude that the very establishment of AMU was not by a minority institution in the first place. Further the administration of the University as mandated in the 1920 Act, lies with the Central Government, with final decision making retained by the Lord Rector. Such control was not merely regulatory to prevent maladministration, but substantive in nature. The above finding is also made by the Hon’ble Court in *Azeez Basha* after an analysis of various provisions of the 1920 Act. In the facts of the case, in fact, a perusal of the provisions of AMU Act demonstrate that the five key administrative functions, admissions, levy of fees, governing council, appointment of staff and disciplinary powers as identified by this Hon’ble Court in *T.M.A. Pai*, to determine the locus of administrative control are executed primarily by the Executive Academic Council in conjunction with the Visitor, earlier Lord Rector.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** Can you just hold for a minute over there? I'll just make a note of these. Admissions.

**TUSHAR MEHTA:** Making of statutes also, if Your Lordships can add.

**NEERAJ KISHAN KAUL:** Under the Act.

**TUSHAR MEHTA:** Statutes and ordinances.

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NEERAJ KISHAN KAUL: And Ordinance.

CHIEF JUSTICE D.Y. CHANDRACHUD: Yes.

NEERAJ KISHAN KAUL: Therefore, the administration of University by the State cannot be simply viewed as reasonable regulations imposed in exchange for state aid. The administration of University by non-minority substantive in nature because AMU is a Central University and not a minority University receiving state aid. Then second is the judgment in Sidhajbhai Sabhai vs State of Bombay when the dual test was laid down. And here again on the left, on the right side. Firstly the present case regarding status of AMU is not a case involving mere regulations being imposed by the centre for state aid being given to AMU. AMU stands on a different footing, because the same was established by the then imperial legislature through an act of the then British Government. Therefore, the administrative and regulatory provisions therein reflect the fact that the establishment of the University was by the Central Government and not by a Muslim minority. Finally, as submitted supra, the provisions of 1920 Act are not merely regulatory, but confer substantive control over the administration and management of AMU upon the non-minority bodies, including the Visitor, the Executive Council and the Academic Council. Then is State of Kerala vs Very Rev. Mother Provincial. Firstly. The Hon'ble Court in Mother Provincial does not state that they are rejecting the view taken by Azeez Basha. Secondly, the interpretation of the two rights to establish and to administer is consistent with how Azeez Basha interprets Article 30(1). In State of Kerala vs Very Rev. Mother Provincial this Hon'ble Court merely held that non minorities can also contribute to the establishment of a minority institution. However, Azeez Basha also does not deny such interpretation, but merely holds that in the facts of AMU the establishment of the University was by a statute and not by any minority community. Thus, the Hon'ble Court in Azeez Basha, after highlighting the role that is required of the minority in the process of establishment of an institution concludes that in the facts of the AMU case, the criteria is not met, with respect to the establishment in State of Kerala vs Very Rev. Mother Provincial this Hon'ble Court held, the administrative powers of management of the affairs of a minority institution cannot be taken away. Even with respect to the administration, the Hon'ble Court in Azeez Basha undertakes a detailed and analysis of the 1920 Act and after assessing the same, concludes that the management of the affairs of the institution did not lie with the minority institution, and was with the Central Government. Therefore, in Azeez Basha, this Hon'ble Court not only laid down the broad principles of Article 30(1), but also undertook a factual analysis of the 1920 Act to hold that the administration of AMU was never envisaged to be in the hands of minority community. No

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subsequent decision has held that the factual analysis undertaken by *Azeez Basha* requires reconsideration. Then, St. Stephen's College. The Hon’ble Court, in St. Stephen’s case discusses the ratio of *Azeez Basha* and then proceeds to rely upon the decision in a different case, *S.K. Patro vs State of Bihar* because *S.K. Patro* was found to be in close parallel with the case on hand. Therefore, the Hon’ble Court in *St. Stephen’s* was conscious of the *Azeez Basha* judgment, but did not make any finding that the finding or decision in *Azeez Basha* required any reconsideration. Further, with respect to the importance of historical antecedents, the importance and relevance of MAO College was already considered by this Court in *Azeez Basha*, and only thereafter the Hon’ble Court made a finding that the establishment of AMU by the then legislature, was the founding of a new University and the absolute dissolution of the MAO College. In fact, the Hon’ble Court notes the nucleus of the Aligarh Muslim University was MAO College. Thus, the Hon’ble Court concludes that the conversion of MAO College from a college institution into a University was, however, not by the Muslim minority, it took place by virtue of the 1920 Act, which was passed by the central legislature. At the same time it is also important to note that, in fact, the Hon’ble Court in *St. Stephen’s* approved the conjunctive test laid down by *Azeez Bhasha* and holds that a minority institution must be established and also be administered by a minority community. Now, please have *T.M.A. Pai* in the next page. It is submitted that the issue in *Azeez Basha* was not regarding whether admission of non-minority students would not affect the minority character of an educational institution. This Hon’ble Court in *Azeez Basha* does not hold that minorities do not have a right to establish and subsequently administer religious institutions. It merely holds, that in the specific case of AMU neither establishment nor administration lay with the minority community. In fact in *T.M.A. Pai*, this Hon’ble Court laid down the *indicia* of administrative control, which was then relied upon by the Hon’ble High Court of Allahabad, to analyse and hold that none of the *indicia* of the administrative control in the case of AMU lay with the minority community. Accordingly, the Hon’ble Allahabad High Court thereafter found that the 1920 Act never envisaged administration of AMU by a minority. Now, My Lords, coming to some of the specific points raised. The next point is, My Lords, the 1981 Amendment does not remove the basis of *Basha*. My Lord, the establishment of....

**CHIEF JUSTICE D.Y. CHANDRACHUD:** In analysing this aspect, we’d like you to dwell separately on the establishment aspect of *Basha* and the administration aspect of *Basha* separately.

**NEERAJ KISHAN KAUL:** Right.

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CHIEF JUSTICE D.Y. CHANDRACHUD: So, to what extent did the 1981, because *Basha* held both, but it was not established by a minority. And second, it held it was not administered by a minority. Now, when the ‘81 Amendment comes, does it take away the basis of *Basha*, both in relation to establishment and..

NEERAJ KISHAN KAUL: Yes.

CHIEF JUSTICE D.Y. CHANDRACHUD: We’ll have to deal with it separately.

NEERAJ KISHAN KAUL: Yes

CHIEF JUSTICE D.Y. CHANDRACHUD: So it’s not a question. It’s just a suggestion.

NEERAJ KISHAN KAUL: Yes. I’m very grateful. The establishment of AMU by the then colonial British government is a finding based on historical fact that the MAO college was dissolved that a new University by the name of AMU was established and this was a University established by the then Central Government and not by Muslims. These are historical facts.

CHIEF JUSTICE D.Y. CHANDRACHUD: So just repeat it. Dissolution of the AMU by the historical fact...And you identified the...

NEERAJ KISHAN KAUL: And MAO College was dissolved?

CHIEF JUSTICE D.Y. CHANDRACHUD: Yes. Then?

NEERAJ KISHAN KAUL: MAO College was dissolved. That a new University by the name of AMU was established and this was a University established by the Government and not by Muslims after detailed negotiations and giving up of many rights as an institution that they may have possessed before coming forward to the Central Government, negotiating and an Act coming into place. Now by introduction of the word...

CHIEF JUSTICE D.Y. CHANDRACHUD: By deletion of the word, 'established'...

NEERAJ KISHAN KAUL: By deletion of the word, 'established' and amending the definition of 'University', you cannot remove the basis of *Basha* which recognize the historical fact and that was not laid down as law by *Basha*, but held to be a fact. *Basha* recognizes a historical fact. The change in legislative history is not possible in the manner thw 1981 Act is

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seeking to do. That cannot happen. You can't change legislative history. And a historical fact
cannot be revised or altered either by a legal fiction or by a Parliamentary fiat. Either of the
two cases. If it's a historical fact, it remains a historical fact. A legal provision can be changed.
But how do you remove a historical fact and as Your Lordships in Indra Sawhney, held that
a fact cannot cease to exist only because they are denied. If a fact is there, it's there. You can't
by a subsequent legislation, say, I deny this fact. You can't order legislative history. The fact is,
an Act came into being. The fact is that MAO was dissolved. The fact is that a new University
came into existence after negotiations. This is about historical facts. And that is why the Late
Somnath Chatterjee, one of our most erudite Parliamentarians, and that is in the Solicitor
General's written submissions on page 113, categorically said that changing the definition of
University was, as it was done, which was established by a statute. And once an institution was
established in a particular manner., such manner of establishment could not be changed
through retrospective legislation, as legislation cannot change history. That is what the late
Somnath Chatterjee said. You are today seeking to argue that by the change in definition of
University and by removal of the word, 'establishment', we may change a historical fact.

CHIEF JUSTICE D.Y. CHANDRACHUD: Reference of Mr. Somnath Chatterjee?

NEERAJ KISHAN KAUL: The Solicitor General's written submissions are on page 113...

CHIEF JUSTICE D.Y. CHANDRACHUD: Mr. Kaul, you can continue. Ask one of your
juniors to just give us in a minute the specific, not from the submission, but the actual
document, what page is it. Anybody can give it in two minutes so that we can complete your
submissions.

NEERAJ KISHAN KAUL: Yes, My Lord. As far as administration is concerned, My Lords,
my respectful submission is, and those are my instructions, subject to correction, that the '81
Act does not deal with administration at all. It only deals with this definition of University.
That's what it deals with, and establishment being removed. the Minister rejects it and says,
we will not go into administration. Now, My Lords, the second point for Your Lordships'...

CHIEF JUSTICE D.Y. CHANDRACHUD: I think you are on firmer ground on the second
aspect as compared to the first aspect. Frankly, I have some doubts about whether you are
right in the first aspect because when Parliament deleted the word, 'established' by the 1981
Amendment, in that sense, if you are going to delete the word, 'establishment', then the entire
incorporation of the University would have to come to an end, but possibly it was open to
Parliament to take a particular view that what the 1920 Act did was to give it a form of a
statutory University, but it does not dilute from the fact that this was still established by Muslim...

NEERAJ KISHAN KAUL: But the creation of University by a statute.

CHIEF JUSTICE D.Y. CHANDRACHUD: Fair enough. But on the latter part, that the 1981 does not take away the basis of Basha. You may be on firmer ground because the 1981 Act makes no change to the administrative provisions of the 1922 Act at all. It leaves them intact..

NEERAJ KISHAN KAUL: I'll only endeavour to persuade Your Lordship.

CHIEF JUSTICE D.Y. CHANDRACHUD: On the first point also.

NEERAJ KISHAN KAUL: I'm equally, on an equally firm ground. That's my endeavour just to persuade the Hon'ble...

JUSTICE SANJIV KHANNA: First of all your best argument on that is once the University is established pursuant to a particular enactment....

CHIEF JUSTICE D.Y. CHANDRACHUD: You can't just say it's not established because then you'll be going back to what? There would be a void.

NEERAJ KISHAN KAUL: My Lord, that's exactly what I'm saying. That is the sum and substance of my first argument. That's what I respectfully submitted.

JUSTICE SANJIV KHANNA: Because something once it's established you can't change it.

NEERAJ KISHAN KAUL: You can't then say it's not there.

JUSTICE SANJIV KHANNA: But then virtually what you are arguing and that too on the part of the response where Government is also doing, Government is also on that side, is taking virtually now saying that this power does not vest the Parliament.

NEERAJ KISHAN KAUL: My Lords I'm going to the extent of saying that even by a legislative....

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JUSTICE SANJIV KHANNA: Be careful. You're accepting then this power...

NEERAJ KISHAN KAUL: I am saying so. This is my submission that by a legislative fiat or legal fiction, you can't take away a historical legislative fact. You can't alter legislative history. That's my submission. Whether the Government can make it or not is another issue. I can surely make it.

CHIEF JUSTICE D.Y. CHANDRACHUD: I think it will be a little problem conceptually because it will always open to the legislature. The legislature is not bound to take notice of facts as they emerge as you and I would think that they emerge. But the legislature is always entitled to take a view of that.

NEERAJ KISHAN KAUL: As Your Lordship just said.

CHIEF JUSTICE D.Y. CHANDRACHUD: Powers of the legislature. That's what they do all the time with the Income Tax law.

NEERAJ KISHAN KAUL: As Your Lordship just said.....

JUSTICE SANJIV KHANNA: I was paraphrasing your argument, not accepting or rejecting that argument because it's also well settled that the legislature can make laws with retrospective effect.

NEERAJ KISHAN KAUL: No difficulty.

JUSTICE SANJIV KHANNA: Suppose they were of the view, that they by mistaken notion used the word established there, they could have always removed it because the Court acted upon that basis.

NEERAJ KISHAN KAUL: So, I'll just go back to what Your Lordships just summarized well, that can it be said that something was established by a legislature, and still we say we're not recognizing it.

CHIEF JUSTICE D.Y. CHANDRACHUD: Mr. Kaul, you are also appearing on the side of the Government. In the eagerness to uphold the striking down of the ‘81 Amendment, let us not do something which substantially cripples the powers of Parliament, and we should be very averse to taking that kind of an interpretation.
NEERAJ KISHAN KAUL: But My Lord, my submission is slightly, my submission is slightly different. I'm on the point, what Your Lordship also just summarized.

CHIEF JUSTICE D.Y. CHANDRACHUD: In the effort to sustain the decision of the Allahabad High Court and get over the '81 Amendment shouldn't be doing something, which, I mean, we means you, which really, in that sense will substantially also mute the powers of Parliament for the future. We have to be very careful because what we are laying down is law for the future.

NEERAJ KISHAN KAUL: Fair enough. But what Your Lordship....

CHIEF JUSTICE D.Y. CHANDRACHUD: On the powers of a Constitutional body.

NEERAJ KISHAN KAUL: But what Your Lordships also said that at the same time ultimately My Lord, there are actions of Parliament as well which are struck down. There are actions of Parliament, which are also held to be ultra vires.

CHIEF JUSTICE D.Y. CHANDRACHUD: And I'll tell you why. This may not be entirely correct. Parliament is entitled to say, Parliament is entitled to say, that we take a particular view of the expression established as opposed a factual view, as opposed to a legal view. Now, we got your point that even on the facts there's a historical fact with Basha basically.

NEERAJ KISHAN KAUL: That's all that I am saying. My Lords that is my limited submission on that. My Lord that is what Justice Khanna summarized, is my limited submission on the point.

CHIEF JUSTICE D.Y. CHANDRACHUD: Parliament can make that distinction between incorporation and setting up.

NEERAJ KISHAN KAUL: Yes.

CHIEF JUSTICE D.Y. CHANDRACHUD: And to say that, well, what is meant by the word established or what we mean by the word established is the factual setting up, not the legal form which is given to it by the incorporation of a University. So let's not sort of go into a wider context and sort of dilute the powers of Parliament and by laying such a broad proposition,
that it’s not open to Parliament while legislating to take a view of historical facts to the contrary. Even if it is embodied in a judgment of the Court.

NEERAJ KISHAN KAUL: This meaning of established also in a way....

CHIEF JUSTICE D.Y. CHANDRACHUD: That's why I said your second point, you probably are on a surer footing. You've never changed the administrative basis of the 1920 Act.

NEERAJ KISHAN KAUL: Let me just complete it.

CHIEF JUSTICE D.Y. CHANDRACHUD: But now you've made your point.

NEERAJ KISHAN KAUL: On established also read it in conjunction with Entry 63, List 1, where it's been brought in as a University of national importance.

CHIEF JUSTICE D.Y. CHANDRACHUD: That point has already been made here.

NEERAJ KISHAN KAUL: That's why I said, My Lord, don't read 'establish' alone. Read it in conjunction with what did Parliament intended or what did the Constituent Assembly when the Constitution was being drafted intend. Then Entry 63, List 1, came in. A University like Banaras Hindu University of national importance without any communal tag at all.

CHIEF JUSTICE D.Y. CHANDRACHUD: In this Entry 63, uses the expression "established", in relation to universities which are established under Article 371E. I just wanted to check whether they use the word "establish" in relation to AMU and BHU. Doesn't matter, but that's just factual.

NEERAJ KISHAN KAUL: No My Lord, just for the completeness of the narrative...

CHIEF JUSTICE D.Y. CHANDRACHUD: The University is referred to as AMU and BHU at the commencement of this Constitution.

NEERAJ KISHAN KAUL: Right. May I proceed with the...

CHIEF JUSTICE D.Y. CHANDRACHUD: There is one aspect, of course, which still is a point which may weigh in your favour, which is that Entry 63, of List 1, contains a Constitutional understanding in regard to the status of AMU and BHU. So, it freezes that
Constitutional understanding as at the date of the commencement to the Constitution. Now, if the Constitution adopts a particular understanding of these two universities, these two institutions which says, "institutions known at the commencement of the Constitution as AMU and BHU can a subsequent legislature alter that Constitutional understanding", which is the foundation of Entry 63.


CHIEF JUSTICE D.Y. CHANDRACHUD: Now, one thing is that Entry 63 tells us, is that as an institution of national importance, these two institutions are those which were known as such, at the commencement to the Constitution, and then can you by legislative fiat, alter that Constitutional understanding which forms the basis of entity.

NEERAJ KISHAN KAUL: In fact...

TUSHAR MEHTA: Amounts to amending the Constitution.

JUSTICE SANJIV KHANNA: That will be true even for 1951.

TUSHAR MEHTA: No, there's no change My Lord.

JUSTICE SANJIV KHANNA: And 65.

TUSHAR MEHTA: There is none.

NEERAJ KISHAN KAUL: No, the character of the is not...

JUSTICE SANJIV KHANNA: Those are amendments to the...

TUSHAR MEHTA: Conformity with part three.

JUSTICE SANJIV KHANNA: They are also amendments...

NEERAJ KISHAN KAUL: In fact, frankly, they bring it in conformity. Now, My Lord, the second point, since time is a... The next point for Your Lordship's kind consideration is that
the administrative functions of the AMU are primarily carried out by four bodies. The Visitor, the Executive Counsel, the Academic Counsel and the AMU Court.

JUSTICE SANJIV KHANNA: The Visitor, Executive Counsel?

NEERAJ KISHAN KAUL: Visitor, Executive Counsel, Academic Council, and the AMU Court. Now, if the five key administrative functions as per T.M.A. Pai, which disclose where does the locus of administrative control lie, are looked at, which are admissions, levy of fees...

CHIEF JUSTICE D.Y. CHANDRACHUD: Actually, six now.

NEERAJ KISHAN KAUL: Yes. Governing Councils, appointment of staff, disciplinary powers and ordinances and statutes.

CHIEF JUSTICE D.Y. CHANDRACHUD: Statutes and all.

NEERAJ KISHAN KAUL: Statutes and ordinances are looked at. The locus of administrative control as executed, primarily lies with the Executive and the Academic Council in conjunction with the Visitor, and the AMU Court is not the supreme body. Now, what is the argument sought to be made that 32 Muslims are always meant to be there approximately out of 180 members of the AMU Court. Now, admittedly they are not in a majority as the legislation does not require them to be a majority. What you are seeking to say is that de facto, by fortunate circumstances, because they happen to be in a majority treat this as a minority character. It can’t be. The legislature if it wanted could have done so, but the legislature consciously does not provide for it and puts it only at 32 out of 180 or above approximately that number. Now, in fact, because they turn out to be more, can’t alter the legislative fact. That they are not meant to be in a majority and not expected to be a majority. The legislature does not mandate that to happen. And the highest that can be said, My Lord, is that AMU Court is one amongst many administrative bodies with essential powers vested in the Executive Council, Academic Council, which are not minority-led.

CHIEF JUSTICE D.Y. CHANDRACHUD: Okay, next.

NEERAJ KISHAN KAUL: Yes. My Lord, next an argument was sought to be made that there is a difference between established by and established through. And it was said that it may have been established through a statute, but it was established by a minority. Now My Lord, with great respect, these semantic distinctions are not borne out from the 1920 Act at
all, which uses the term, 'An Act to establish' and does not anywhere, refer to the fact that the
Government is merely recognizing an existing Institution to be a University. There is a huge
difference, My Lord, when a college like St. Stephen's College is looked at. A minority
institution, whose character as a minority institution is analysed is affiliated to a secular
University. That's very different. There, the questions come in as what are the nature of
regulations can you put. Can you, as a condition for affiliation, say, that they cannot have a
separate interview, their cut-off date can be the same or not? Can, while granting them aid,
can you put regulations which are so onerous that it takes away the minority character of the
institution? That's a very different category of cases. They did not come to the Central
Government and say, create a statute and negotiated and a statute was passed to create St.
Stephen's as a college or a University. We are dealing with a case where, for historical reasons,
you came, negotiated, and ultimately in the facts as they existed in 1920, by virtue of a statute,
an Act to establish, as it said, the University came into being. So you can't give those examples,
and then you use semantics like by, to... It's irrelevant because the statute doesn't provide for
that.

JUSTICE SANJIV KHANNA: Mr. Kaul, isn't St. Stephen's also governed by substantial
extent by the statute and ordinances of the University of Delhi?

NEERAJ KISHAN KAUL: My Lords, maybe, but that is still an affiliated to the Delhi
University. If an issue arises there because it's a minority college, they went into issue, My
Lords, if you recollect in the judgement, where is the Chapel, the Principal comes from the
North India Church. Many such examples were given to establish it as a minority institution
there, and still affiliation was being looked at. We are talking about the very creation. Here,
the Preamble in Section 4 said, MAO college stands dissolved. All institutions connected with
it, bodies connected with them stand dissolved.

CHIEF JUSTICE D.Y. CHANDRACHUD: Ceases to exist.

NEERAJ KISHAN KAUL: Ceases to exist. Where is the parity between the two. How can
you even rely on an example of St. Stephen's College to cite AMU? And AMU is then posted in
Entry 63, List 1.

JUSTICE SANJIV KHANNA: When St. Stephen's College decided to become affiliate of the
Delhi University, did it not give up some of its rights? St. Stephen's could have also continued
the way it is, given degrees which had no value or may not have legal permitting to get
Government jobs, etc.
NEERAJ KISHAN KAUL: That is why My Lords, why I was wanting to read those judgements, Your Lordships told me to read the right and the left. All those judgements were cases of regulatory provisions like quality of teachers, academic qualifications of teachers, the way admissions are made, etc. Those are regulatory in nature so that academic standards are maintained.

JUSTICE SANJIV KHANNA: So, you have then drawing distinction. Now here you are now drawing distinction between regulation?

NEERAJ KISHAN KAUL: Yes. With substantive manner of control.

JUSTICE SANJIV KHANNA: Will that equally apply as far as when we refer to AMU is also concerned? Did they agree to get regulated in a way when they got the Government permission or did they give up their minority?

NEERAJ KISHAN KAUL: That is what our whole case is. And as is both recognized in the impugned order of the Allahabad High Court judgement and in Azeez Basha, that when you came and negotiated, you agreed to get the degrees recognized. All our bodies, all our MAO college ceased to exist, they stand dissolved and we will now be guided by the detailed provisions of the Act on administration and establishment.

JUSTICE SANJIV KHANNA: Understood. That we have understood.

NEERAJ KISHAN KAUL: And Governmental control is accepted. My Lords as MAO was affiliated to Allahabad, St. Stephen’s was affiliated to Delhi University. In this matter, MAO in its original avatar. Now, St. Stephen’s continued in the same skin even after affiliation. My Lord, that is why I said, My Lords, St. Stephen’s as I respectfully submitted continued in its same skin, even after affiliation to a University like the Delhi University. And what were the grounds taken there? The grounds taken there were, where was the management? Management was at the minority. Illustratively, it was shown that the college looked after religious and moral instructions to students. The Principal of the College was to be a member of the Church of North India or of a church that is in communion with the Church of India. All those factors came in. So it was held to be a minority institution.

CHIEF JUSTICE D.Y. CHANDRACHUD: Why did the 1920 Act contain a Schedule which refers to those founding members?
NEERAJ KISHAN KAUL: Yes.

CHIEF JUSTICE D.Y. CHANDRACHUD: Why does the imperial legislature recognize what it calls the founding members?

NEERAJ KISHAN KAUL: Again, I would respectfully say that if a historical fact is incorporated to say these are the founding members. Does that take away and does that have to be read so exclusively and selectively without reading the entire Act together? If the entire Act is read together, merely because founding members are mentioned therein, what about the way it is established? What about the way it's administered? Will everything be overlayed? So we can't pick and choose bits and pieces to come to a conclusion that it is a minority institution. We can't pick up and say, look here, they said founders there. There was another reference to the historical antecedent, but what about the core, the heart of the matter. The flesh and blood of the matter is...

CHIEF JUSTICE D.Y. CHANDRACHUD: Mr. Kaul, what else now remains?

NEERAJ KISHAN KAUL: My Lord just one or two submissions.

CHIEF JUSTICE D.Y. CHANDRACHUD: All right. Let's just formulate them so that we'll move on.

NEERAJ KISHAN KAUL: My Lords my respectful submission for Your Lordship's kind consideration at the end is this, that the entire argument has been that historical facts have been ignored and antecedents have been ignored. They have not been ignored. And then the argument is sought to be made that if that logic is accepted then no minority can ever be set up as a University. Now, firstly, there is the NCMEI Act in itself, one which have its own provisions. (b) There is no doubt now, historically, as recognized in repeated Supreme Court judgments, that a University can only be set up under the UGC Act. But the deeming provision provides for any institution to come and seek a deeming status. So this whole argument that minorities and their rights are in danger is a completely misplaced argument of prejudice and nothing else. And lastly, My Lords, the appellant says, as a continuation of this argument, lastly, said that after all, what are we asking? We are just asking for a bit of reservation, and you're snatching it away. That was an emotive appeal made. My Lords, my respectful submission is that when did you have reservation? The judgment in Bashas has been in place for 57 years. You never had reservation till the 2004-05, with that then change of government,
when the provision was made for reservation and it was ultimately struck down in the
Allahabad High Court judgment. So which reservation has been taken away? Which right of
minorities has been taken away? What is being done, that the fabric of a secular country is
being in any way, pierced or destroyed. What is being done? You're almost making it look as if
something is now being done, which completely destroys the minority character and snatches
away all the rights of a minority institution. It does not do so. You're as protected as you are
entitled to be, under the Constitution of India as equal citizen and whatever are the rights of
the minorities under the Constitution. I'm very, very grateful. Your Lords have been extremely
patient. I'm very grateful.

CHIEF JUSTICE D.Y. CHANDRACHUD: Thank you, Mr. Kaul. Yes, Mr. Guru.

NEERAJ KISHAN KAUL: Will My Lordships read my notes?

CHIEF JUSTICE D.Y. CHANDRACHUD: Yes, Mr. Kaul.

GURU KRISHNAKUMAR: If I sprint through some of my submissions My Lords, my
apologies, given the time frame. Broadly, four things that I wanted to highlight to My Lords.

CHIEF JUSTICE D.Y. CHANDRACHUD: What is the first?

GURU KRISHNAKUMAR: 1st, the importance of Entry 63 and inclusion of AMU in the
Constitution itself in Entry 63. That's one My Lord. That in my respectful submission is really
a crystallization and cementing of the position of AMU as a non-minority national institution.
That's the first point I want to highlight. Second point My Lord, the claim of AMU to minority
status on the footing that a pre-Constitution institution also is entitled to Article 30 protection.

CHIEF JUSTICE D.Y. CHANDRACHUD: What is the second point?

GURU KRISHNAKUMAR: Second point is the claim of AMU to protection of 30 on the
footing that, notwithstanding that, that is the pre-Constitution institution. It can still avail
Article 30 protection. It has to be seen from two time zones or time frames in my respectful
submission. Pre-Constitution and at the commencement and thereafter, that's the second
point, My Lord. What were you prior to the Constitution? What was your position and what
did you become or what is it that continued at the stage, at the time when the Constitution was
adopted. That's the second point. Third connected to that is with regard to, the fallacies which
are... the infirmities in Azeez Basha as argued. There, my respectful submission is, the

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formulation of the contours of 30 at the instance of the appellant, My Lords, is unsustainable.

Their formulation of what constitutes 30 is incorrect. I’ll specifically refer to Dr. Dhavan’s
submission on this point. Two and three are really, to that extent, they overlap. Fourth point
is My Lords on the effect of the 1981 Amendment. I think if there is any need to look at any
case law, straight away there’ll be two which directly in my submission answer the point. One
is Indra Sawhney, the second My Lords is Mulla Periyar, Constitution Bench decision
of this Hon’ble Court. Both judgments talk of how legislatively declared facts, cannot override
factual decisions of a Court, validating power notwithstanding its plenary nature to the extent
of even being retrospective, cannot undo factual conclusions which are final and binding on
parties.

GURU KRISHNAKUMAR: Direct are My Lords, Indra Sawhney and Mulla Periyar.

I’ve given those in my submissions, My Lords, I’ll show that. Now, coming to the first point.
My Lords will see that Entry 63 is part of the string of entries in List 1, being 62, 63 and 64. 62
deals with historically important institutions; Imperial War Museum, another museum,
National Museum, et cetera, et cetera. That is 62. 63 with which, we are immediately
concerned, deals with two named institutions, namely BHU and AMU. Thereafter, Delhi
University established under 371 (e) and any other institution declared by law to be an
institution of national importance.

CHIEF JUSTICE D.Y. CHANDRACHUD: Three entries used the expression -
‘Institutions declared by Parliament, by law, to be of national importance’.

GURU KRISHNAKUMAR: Yes.

CHIEF JUSTICE D.Y. CHANDRACHUD: 63, 64 and 60. Sorry, 62, 63 and 64.

GURU KRISHNAKUMAR: That’s right, My Lord.

CHIEF JUSTICE D.Y. CHANDRACHUD: In 62, it refers to three specific institutions -
National Library, Indian Museum, Imperial War Museum, Victoria Memorial and Indian War
Memorial.

GURU KRISHNAKUMAR: That’s right, My Lords.

CHIEF JUSTICE D.Y. CHANDRACHUD: And so it’s these five.
GURU KRISHNAKUMAR: Yes.

CHIEF JUSTICE D.Y. CHANDRACHUD: And then it says, 'any other like institution...'

GURU KRISHNAKUMAR: Yes.

CHIEF JUSTICE D.Y. CHANDRACHUD: 'financed by Government...'

GURU KRISHNAKUMAR: Yes.

CHIEF JUSTICE D.Y. CHANDRACHUD: 'wholly or in part, and declared by Parliament to be an institution of national importance'.

GURU KRISHNAKUMAR: Yes.

CHIEF JUSTICE D.Y. CHANDRACHUD: So 62, that residuary power of... the residuary clause refers to any other institutes or institution of a like nature.

GURU KRISHNAKUMAR: 'Like nature'. Correct.

CHIEF JUSTICE D.Y. CHANDRACHUD: So, it has to be like some... an archive.

GURU KRISHNAKUMAR: That's right.

CHIEF JUSTICE D.Y. CHANDRACHUD: It's an archive or a museum.

GURU KRISHNAKUMAR: Something of historical importance.

CHIEF JUSTICE D.Y. CHANDRACHUD: Right. On 62, the power relates to declaration of an archive.

GURU KRISHNAKUMAR: I bow down, My Lords.

CHIEF JUSTICE D.Y. CHANDRACHUD: Or a library or a museum.

GURU KRISHNAKUMAR: That's correct.
CHIEF JUSTICE D.Y. CHANDRACHUD: When you come to 63...

GURU KRISHNAKUMAR: Yes.

CHIEF JUSTICE D.Y. CHANDRACHUD: It refers to two institutions...

GURU KRISHNAKUMAR: By name.

CHIEF JUSTICE D.Y. CHANDRACHUD: BHU and AMU.

GURU KRISHNAKUMAR: Correct.

CHIEF JUSTICE D.Y. CHANDRACHUD: And it doesn’t say, 'of a like nature'. It says 'any other institution declared by Parliament'...

GURU KRISHNAKUMAR: I am obliged to, My Lord, for that, for one reason, My Lords...

CHIEF JUSTICE D.Y. CHANDRACHUD: In 64... If you go to 64, it refers to 'institutions of scientific or technical education, financed and declared by law to be institution'. So, 64 governs a specific class...

GURU KRISHNAKUMAR: Class of institutions...

CHIEF JUSTICE D.Y. CHANDRACHUD: ...Namely, institutions of technical or financial education. 63, gives a general power to Parliament, apart from these two. And 63... And 62 refers to those archives, libraries, or museums.

GURU KRISHNAKUMAR: Institutions of historical importance.

CHIEF JUSTICE D.Y. CHANDRACHUD: But all three entries, is the word 'declared by Parliament to be of national importance'.

GURU KRISHNAKUMAR: I bow down to My Lords, for the observation of 63 and tell My Lords, why...
CHIEF JUSTICE D.Y. CHANDRACHUD: But Guru, there is one aspect, there is nothing fundamentally inconsistent with a minority institution being an institution of national importance. That also, we have to understand.

JUSTICE SANJIV KHANNA: That's the whole issue, sir.

GURU KRISHNAKUMAR: No, I have a submission to make on that.

CHIEF JUSTICE D.Y. CHANDRACHUD: You can have a minority institution, which also Parliament made by law to be of national importance.

GURU KRISHNAKUMAR: No, I understand. I bow down. The point is well taken. I'm on something slightly different. Now, what fell from, My Lords on 63, is important. Unlike 62, which talks of a 'like institution', 63 doesn't have. During the Constituent Assembly debates, an amendment was suggested saying, for 63 also, it has to say similar institution. That was rejected and in the process of discussion, they talk about the national character which is non communal of BHU and AMU. That is what is important My Lords, for My Lord's purposes. That is what I wanted to show. My Lords, the Chief Justice's point is well taken, that 'like institution' is not found in 63. A similar amendment was suggested when Draft 63, equivalent to 40 and 40(a) of the Draft Constitution was moved. One member, Naziruddin... he said, should it not be similar institution like BHU and AMU. Dr. Ambedkar says no, we want width of power to take over any kind of institution, because these are institutions which are of national importance, which go beyond sectarian and communal character.

CHIEF JUSTICE D.Y. CHANDRACHUD: Is there... Just show us, just that relevant part of the Constituent Assembly debate, where they discussed 'national' on this Entry.

GURU KRISHNAKUMAR: Yes, in my Submission, also. In my Submission. Sorry...

TUSHRAM MEHTA: My Written Submissions, Page 12. We have....

CHIEF JUSTICE D.Y. CHANDRACHUD: Just show us that. Can we go... Do you have the CAD directly, instead of going through the Submissions?

TUSHRAM MEHTA: Volume 2(b), Page 12.

GURU KRISHNAKUMAR: That is in the Submission.
CHIEF JUSTICE D.Y. CHANDRACHUD: In the Submission. Do you have the Constituent Assembly debate?

GURU KRISHNAKUMAR: Debates itself we have.

CHIEF JUSTICE D.Y. CHANDRACHUD: Just show us that. Let's go directly to that page.

GURU KRISHNAKUMAR: 4(b) My Lord. 4(b), 115.

CHIEF JUSTICE D.Y. CHANDRACHUD: 4(b)?

GURU KRISHNAKUMAR: Yes. In my submissions we have given extracts, My Lords.

CHIEF JUSTICE D.Y. CHANDRACHUD: Because, we'd like to read around it also. Sometimes it's good to see the original text, so we understand the...

GURU KRISHNAKUMAR: I understand.


GURU KRISHNAKUMAR: 114, My Lord, we will start with My Lord. That relevant portion of Mr. Kamath’s and then Dr. Ambedkar also, I'll show. My Lords, got that My Lords? 114. Can I read that, My Lords? 114 at 115. "Taking the first amendment, first. I feel that the acceptance of the amendment moved by Dr. Ambedkar referring to an institution which may be declared by Parliament, by law, to be one of national importance. I am not referring to Delhi University at all. But the second part of the amendment is fraught with dangerous consequences. I hope the House will pause to consider whether such a sweeping provision for bringing within the purview of the Central Government any institution which of course, Parliament may declare by law to be of national importance, if at all necessary. House will see that in the previous Entry 39, which we have passed, we have given power to the Union to legislate about any institution financed by the Government of India, wholly or in part and declared by Parliament, by law, to be an institution of national importance. This Entry goes further and gives power to the Union to legislate in regard to institutions, whether financed wholly or in part or not at all, by the Government of India. I have in mind certain institutions in this country which are doing very good work, wholly privately run, but run on efficient lines without any governmental interference. Amendment just now moved by Dr. Ambedkar shows that this grabbing instinct...
of the Committee is growing by leaps and bounds and if this passes, mustered and if this is accepted, I’m sure the day is not far distant with the acquisitive instinct of the Union will run riot and the Union will try to step into' so and so. Then the next paragraph. 'As regards the two universities mentioned in this Entry, the Banaras Hindu University and the Aligarh Muslim University, of course either it may be true that they are of national importance or because they have the communal tag attached to them, government to show their impartial, non-communal nature might legislate in regard to these universities'. This is very important, My Lords. 'As regards Delhi too. Because the status of Delhi is not yet defined, it is perhaps desirable that it should be within the purview of the Union. But to specify here very vaguely that any other institution may also be take over by the Union legislated upon by the Union, though, of course, saving provision is here, is there that Parliament should declare by law those institutions to be of national importance. But in modern times', he goes into all of that. Now, this is one part where they specifically, please come back to that... 'As regards the two universities mentioned in this Entry, the Banaras Hindu University and the Aligarh Muslim University, of course, either it may be true that they are of national importance or because they have the communal tag attached to them', meaning to suggest My Lords, the name. The name. The government to show their impartial, non-communal nature might legislate in regard to those universities'. So, even this person who opposed, My Lords, the sweeping language of 63, where it says by Parliament can take over, says for BHU and AMU you are justified. Because you want to show that they are of national importance, they should not be carrying any communal colour because of the communal tag attached to their names. And in fact, Naziruddin then the other member, My Lord, he also talks about the amendment which he wants to do. Please come to 112.

CHIEF JUSTICE D.Y. CHANDRACHUD: How does Dr. Ambedkar respond to all this?

GURU KRISHNAKUMAR: Now Dr. Ambedkar... Just one minute, My Lords. Just give me a minute on that. Can I show Naziruddin for a minute, My Lords.

CHIEF JUSTICE D.Y. CHANDRACHUD: Sure.

GURU KRISHNAKUMAR: That is at 112. I've slightly altered my amendment to suit the change introduced by Dr. Ambedkar in his own amendment. I submit that Dr. Ambedkar's amendment to unduly enlarge the jurisdiction of the Centre and many things we should be otherwise cognizable by the Provinces would now, by virtue of the words which I seek to delete, be included within the jurisdiction of the Centre. The Banaras Hindu University and the Aligarh Muslim University have been regarded from the very inception as institutions of a

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national character and importance, and therefore they have been rightly regarded so far as
national institutions, and they have been rightly placed under the jurisdiction of the Union'.

Then it goes into the question of any other institution, where he says, you must have it for
similar institutions. That is the burden of the song in Naziruddin Ahmad's submission and
statement in the debate. Now, please come to page 118. Now please see, 'I find my Hon'ble
friends, Mr. Naziruddin, Dr. Deshmukh running at cross purposes. One wants to enlarge the
scope of the Article by adding the word academy other wants to limit to the scope of the Article
by adding the word Delhi University and any other institution declared by Parliament, by law,
to be an institution of national importance. So far as, Dr. Deshmukh's amendment is
concerned, it seems to be quite unnecessary to introduce the word academy because the word
institution is large enough to include both University and academy. Therefore, that is quite
unnecessary. With regard to the amendment of my Hon'ble friend Mr. Naziruddin Ahmad,
Delhi University is, as was pointed out by him already under the Central Legislature, by virtue
of the fact that the universities in a Commissioner's Province which is subject to legislation of
the Centre. Therefore, in introducing the words, Delhi University, we are really not departing
from the existing state of affairs. With regard to the subsequent part of the Entry relating to
any other institution declared by law by Parliament, it seems to me that it is desirable to retain
those words because there might be institutions which are of such importance from a cultural
or from a national point of view, and whose financial position may not be as sound as the
position of any other institution and may require the help and assistance of the Centre. In view
of that, I think the last part of the Entry is necessary, and I am not prepared to accept this
amendment. Now, with regard to my Hon'ble friend, Mr. Kamath he wanted to introduce the
words research institution he has forgotten, or probably his attention has not been drawn to
my amendment dealing with Entry 57(a). That's with regard to another Entry'. Dr. Ambedkar,
therefore substantially My Lord, stands by the amendment and says the purpose of 63 is that
you are looking at institutions which are of such national importance which go beyond
communal character. And therefore we will have the right vested in the Parliament to declare
by law any other institution of such nature. That's important. And one more aspect...

CHIEF JUSTICE D.Y. CHANDRACHUD: Yes.

GURU KRISHNAKUMAR: And one more thing, my Lords, perhaps that may also be useful
in My Lord's consideration. Please look at 112 also. Again by Dr. Ambedkar, when he's
introducing the amended Entry. Entry 40 of list on the following entry may be substituted.
'Institutions known on the date of commencement of this Constitution as the Banaras Hindu
University, the Aligarh Muslim University and the Delhi University And any other institution
declared by Parliament, by law, to be an institution of national importance, I submit the word

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University is a mistake, and it ought to be institution. And I hope you shall permit me to
substitute it'. Because they wanted it to make it a broad based one. Not just University, but an
institution. 'There is no fundamental change in this except that the latter part permits also
Parliament to take over any institution which it thinks is of national importance'. We have the
IIMs, we have the IITs. In fact, IIMs, IITs, My Lord should have seen they come under 64.
Now, the matter doesn't really stop there, My Lords. The reason why I'm highlighting.....

CHIEF JUSTICE D.Y. CHANDRACHUD: Is there any discussion on the importance on
the use of the word 'national' in Entry 65. I didn't find it here.

GURU KRISHNAKUMAR: There is one history to this...

CHIEF JUSTICE D.Y. CHANDRACHUD: I'm sure we'll find something in the...

GURU KRISHNAKUMAR: In the Drafting Committee.

CHIEF JUSTICE D.Y. CHANDRACHUD: Yes. Why was the word national used in Entry
65?

GURU KRISHNAKUMAR: I'll tell one thing, My Lords, there's a history to this...

CHIEF JUSTICE D.Y. CHANDRACHUD: There's some reason. I mean, we have to...
because if we have something in the Drafting Committee that would be very useful....

GURU KRISHNAKUMAR: In fact, we discussed this, My Lords... between us. We
discussed. My colleagues and all of us spread out. We couldn't really get anything specific on
the expression 'national importance'. But one thing is important, My Lords, 1935 Act contains
'institutional national importance'. The history for that is something slightly different. The
history there is education was part of Provincial legislative powers. Then, they wanted certain
institutions to be subject to Imperial legislative powers. So, they added Banaras. Thereafter,
they added AMU also. In fact, in my submissions, I referred to that. In my first submission.
Just have a look at that. Volume 4(c). Just have a look at that, My Lords.

CHIEF JUSTICE D.Y. CHANDRACHUD: Volume?

GURU KRISHNAKUMAR: Volume 4(C).
CHIEF JUSTICE D.Y. CHANDRACHUD: Page?

GURU KRISHNAKUMAR: Page 43. Now, please see... 'A glance...' No, in fact, the previous one. I'm sorry, My Lords.

JUSTICE SANJIV KHANNA: This is something else.

CHIEF JUSTICE D.Y. CHANDRACHUD: It's the Aligarh Muslim University.... This seems to be the Bill in 1920.

GURU KRISHNAKUMAR: 1920. Now, please see, the 2nd... 3rd paragraph there. 'Hon’ble members are aware that, education including University education, has in the past been a Provincial subject. Legislation regarding the Banaras University was framed in consonance with that state of things and all official control and consequence reserved to the Provincial government. Recognizing the all India character of the Banaras and Aligarh Universities, the rules framed under the new Government of India Act have now proposed that these two universities should be a Central subject and the responsibility in connection therewith will hence forward rest on the shoulders of the Government of India'. This is the basis. 'At the same time the Calcutta University Commission have commended the foundation of universities of the unitary teaching and residential type and have proposed that universities generally should possess greater autonomy in the administration of their internal affairs'... page 43... 43 in 4(C).
I'm reading the third paragraph. "That has been the case hitherto as a necessary consequence of this Constitutional development and of change of policy various modified provisions have been introduced in this Bill, which I venture to think constitute what will be recognized by Hon’ble members as distinct improvements. In forming their own judgment regarding this claim, I would ask the Hon’ble members to bear three fundamental and in my humble judgment, indisputable principles in mind. In the first place, no government be it purely British, exclusively Indian, or a combination of both can reasonably be expected to deprive itself absolutely all control over education. The real test of the liberal character of a measure like this lies in the nature of the agency and the extent of control proposed to be exercised. In the second place, in the new conditions upon which India is now entering, official control, no longer means what it did in the year 1915. With the introduction of a popular Indian element in the provincial as well as the imperial government official. Government official control will in the future have an entirely different meaning. In the third place, the substitution of control by a Constitutional authority consisting of a number of persons for individual authority is, on the face of it, a step in the right direction'. This is again indicator of the manner in which and the reason behind My Lords, putting in place all those provisions in the '20 Act. We have

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encapsulated the history of this, in my Submissions 2A, My Lord, may make a note of it. I won't read it, just to save the time.

**JUSTICE SANJIV KHANNA:** Could you read the next paragraph also?

**GURU KRISHNAKUMAR:** All right, I'll do that My Lord.

**JUSTICE SANJIV KHANNA:** 43, last para.

**GURU KRISHNAKUMAR:** 'A glance...' May I read it My Lords? 'A glance at Section 6(2) 17(5), 18(5), and statutes 80(1), 10(1) and 19(1) is Banaras Hindu University Act, will make it clear to the Hon’ble members of the Visitor, that is the Lt. Governor of the United Provinces is the main agency of control in the case of Banaras University. In the present Bill in consensus with the central nature of the subject. Much of the, much of that control is transferred to the Governor General and Council, an authority which under the Government of India Act, will hence forward, include three Indian members. Under the Banaras Hindu University Act. All new statutes are additions to statutes or amendments or repeals to statutes, other than those providing for the instruction of Hindu students in Hindu religion, required the previous approval of the Lt. Governor, who may sanction disallow or remit for the further consideration except statutes affecting the Constitution of the University authorities, which require the previous sanction of the Governor General and Council in this bill, that power is proposed to be vested in the Governor General Council. Moreover, the Governor General in Council will, when exercising the power so vested in him, have before him the opinion of the Visiting Board, which will include the ministers, one of whom will himself be in charge of education, so that the Government of India will be in possession of the views of this popular authority when exercising their own powers in this connection. Similar arrangements are also proposed with reference to ordinances. And though it has been considered advisable to reproduce in the present Bill the provisions contained in the Banaras Act, giving certain powers of supervision to the provincial authority in order to secure that the proceedings of the University shall be in conformity with law, the agency, even for the excess of this power has changed from the Lt. Governor to the Visiting Body. Election of successors to the first Vice Chancellor is subject to approval by the Lt. Governor under the Banaras Act, while in the present Bill such election is made subject to the approval of the Governor General in Council. In the Banaras Act, the Senate consists of 50 members, of whom five members are nominated by the Lt. Governor. In the case of Aligarh University, the corresponding body, to be called the Academic Council, will consist of 30 members, of whom two only shall be nominated not by the Lt. Governor, but by the visiting board constituted in the manner I've just described. Hon’ble members will thus
see that this brief comparison between the two agencies of control in the case of the two universities constitute sufficient indication of the liberal character of the present Bill'.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** It's that, when they set up AMU, they had a precedent namely of BHU.

**GURU KRISHNAKUMAR:** Correct.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** BHU had been set up earlier. It's indicated that an undertaking was given to the Hindu leaders at that time, that when AMU was set up, it will be set up on the same pattern.

**GURU KRISHNAKUMAR:** Pattern on the same lines. Yes.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** And therefore AMU itself was set up on the same pattern as BHU. That I think we also find at page, internal page 42. Middle of page 42. 'Meanwhile, the Hindu leaders, who too had, in their turn approached the Government of India with a scheme for establishment of a Hindu University at Banaras, guided by that practical spirit, which is one of their characteristics, accepted the condition laid by the Secretary of State, et cetera. 'An undertaking was at that time given by the government to the Hindu leaders that the University to be granted to the Muslim community would also be on the lines of the Hindu University'.

**GURU KRISHNAKUMAR:** 'On the lines of Hindu University'. Therefore My Lords, two things really come out. One, consciously it was decided that even at the inception, it was to be taken to be an institution of national character. Pre-Constitution on the lines of BHU.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** But equally, this was an institution which was granted to the Muslim community. We can't also ignore that.

**GURU KRISHNAKUMAR:** That's right. But one thing My Lords, as what Mr. Dwivedi was pointing out, maybe for the benefit of the community, My Lords, in terms of students, et cetera. But please see Section 8. It said that it is open to all. That's very important, My Lords. Teaching of Theology was for those who wanted to study it. And post-Constitution also, in terms of 28(3), any teaching was subject to consent. That's very important, My Lords. In fact, on that point, I wanted to, just for a minute, My Lords, get out of this and get into the meaning of the expression for institutions of their choice found in Article 30. In at least three decisions My
Lords have said, what the meaning of this expression of their choice is. It's not just choice of
the manner in which you do the administration, as what is sought to be projected. No. Which
means an institution for the development and benefit of that minority, be it linguistic or
religious, for which the institution is formed by the founders. That's how you understand the
expression 'of their choice'. I mentioned that in the Supplementary Submissions, what the
meaning of the expression is 'of their choice'. Just note that, My Lords. Volume 2(P), My Lords.
Lords, St. Xavier's... Given that specific extract from Xavier's, My Lords. The second point, My
Lord arising... coming back to the point which I was submitting,

JUSTICE SANJIV KHANNA: No, but if you read the second part of 96 'in the case of
educational institution is established by a minority to conserve the distinct language, script
and culture'. This was an issue which was meant to conserve the distant language, script and
culture of the Muslims. To that extent, it's quite clear in the enactment itself.

GURU KRISHNAKUMAR: Not exclusively for that.

JUSTICE SANJIV KHANNA: No. It allowed others to come and...

GURU KRISHNAKUMAR: Correct.

JUSTICE SANJIV KHANNA: But the object and purpose was to conserve the distinct
language, script and culture of the Muslims. That's clear from the...

GURU KRISHNAKUMAR: No, there I have a caveat, My Lords. A rider to add.

JUSTICE SANJIV KHANNA: There are a number of places where they've used the word
Muslim.

GURU KRISHNAKUMAR: No, they do. They do. My submission in response to what is
falling from My Lords, is this. The primary object was not that the primary object of the
institution, even according to the app appellant was to give liberal education.

JUSTICE SANJIV KHANNA: To whom?

GURU KRISHNAKUMAR: That's what they said to their community. But then it was an
institution which was designed and made established by Imperial legislature to be one open

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to all with liberal education. Section 8 is a clear answer to that. Section 8. That's what in my respectful submission ought to be the consideration My Lord, by looking at this. Therefore, the second point which comes out of this is this My Lord. One, institution of national character pre-constitution even prior to the Constitution at that commencement of the Constitution while putting it bodily into the Constitution, the understanding was this is an institution of national importance going beyond the communal tag. That's the second important takeaway from this point, I want to say, and one more aspect. Ultimately, the proof of the pudding lies in its eating. Now, what does all this mean? What does all this translate into by Parliament, declaring by law that an institution is of national importance? What happens? Straight away My Lords, four or five features.

JUSTICE SANJIV KHANNA: What safeguarded was, it prevented State legislatures from interfering.


JUSTICE SANJIV KHANNA: It was a clear indication that the State legislature will not interfere on these three issues.

GURU KRISHNAKUMAR: It'll be the Imperial legislation.

JUSTICE SANJIV KHANNA: It will be only the Imperial legislation.

GURU KRISHNAKUMAR: Correct.

JUSTICE SANJIV KHANNA: And after the election of the Constitution, only the Central Parliament.


JUSTICE SANJIV KHANNA: And the executive interference.

GURU KRISHNAKUMAR: That's correct.

JUSTICE SANJIV KHANNA: So they wanted to save them or give them an umbrella, ensuring that it's only the Central government and which interference or will regulate their affair.

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GURU KRISHNAKUMAR: For the reason that's important. Absolutely. Right. For the reason that they are institutions of a national character and of national importance. That's the point. That's the reason why...

JUSTICE SANJIV KHANNA: That's the way they distinguished them. Yes, certainly that's used. But the question, which was posed by the Chief Justice also was, when branding the institution or characterizing them as an institute of national importance, do away with their character as minority.

GURU KRISHNAKUMAR: It's at two levels that I want to respond to that. It's at two levels. Number one, while as a proposition, it is right...

JUSTICE SANJIV KHANNA: We can't read it as a negative stipulation.

GURU KRISHNAKUMAR: No, I'm saying something else. First level, yes, but at level two...

JUSTICE SANJIV KHANNA: It's a positive stipulation, not a negative stipulation.

GURU KRISHNAKUMAR: No, the indication clearly being this, by declaring an institution to be an institution of national importance, the Parliament has decided that it shall acquire a character which goes...

JUSTICE SANJIV KHANNA: This is not a individual negative statement, it is only a positive statement.

GURU KRISHNAKUMAR: No, I'm saying, the meaning, therefore, constitutionally, is that, this now acquires a certain character, where it goes beyond the position of all regular institutions, gets to the next level. And that's why I was saying, how by being declared by law, so many other consequences follow. One of the main things, My Lords, substantial government funding.

CHIEF JUSTICE D.Y. CHANDRACHUD: Guru do we have the report of the Standing Committee which presented its report to the Imperial legislature in this compilation?

GURU KRISHNAKUMAR: Yes.
CHIEF JUSTICE D.Y. CHANDRACHUD: Just give us the page.

GURU KRISHNAKUMAR: Yes. Yes.

CHIEF JUSTICE D.Y. CHANDRACHUD: Give us the page.

GURU KRISHNAKUMAR: I'll just take it out and give it. In a minute I'll give it. Can I just complete the submission on this. The consequence, of declaring it as an institution of national importance is the substantial funding, by which they become centers of excellence. Dr. Dhavan was wanting to make out that by declaration as an institution of national importance is all that is ensured is it becomes a center of academic excellence. No, not just that. Now in that position, it goes beyond the stage of aid to a minority institution, or a non minority institution as the case may be. Substantial funding takes place. In fact, in my additional submission I have pointed out from the statement of the Minister of Education on the floor of the Lok Sabha, how much money has been spent on AMU in the last four years. Please have a look at that for a minute. Yes, 2 (P), 2(P) My Lords. Page 27. Page 27, para 31.

CHIEF JUSTICE D.Y. CHANDRACHUD: Standing Committee report?

GURU KRISHNAKUMAR: Volume...

CHIEF JUSTICE D.Y. CHANDRACHUD: Volume?

GURU KRISHNAKUMAR: 4(A), 72, My Lords. Just look at page 73 My Lord. The Select Committee's report, I presume this is what My Lords, are looking at. Yes, mentioned in Basha My Lord. Page 73, it starts. My Lord, want me to refer to any specific portion.

CHIEF JUSTICE D.Y. CHANDRACHUD: We're just trying to see if there's something to...which...70, Volume 4(A), page 70...

GURU KRISHNAKUMAR: 73, My Lord.

JUSTICE SANJIV KHANNA: The Select Committee report is of...1920?

GURU KRISHNAKUMAR: Yes, 1920 My Lord.

CHIEF JUSTICE D.Y. CHANDRACHUD: Given you enough time.

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GURU KRISHNAKUMAR: Two more points. Little important, My Lords.

CHIEF JUSTICE D.Y. CHANDRACHUD: Yes.

GURU KRISHNAKUMAR: My Lords, will take it from me, that I'm referring to points which are not covered by anybody else. We are taking care to ensure that between us My Lord, there's no repetition. Just two more things. Yes, I wanted to refer to 2(P) page 31 of my additional submissions, para... page 27. I have given the actual expenditure of the government in the last three years. The last, My Lords, being 1 thousand, five...

CHIEF JUSTICE D.Y. CHANDRACHUD: Volume?

GURU KRISHNAKUMAR: Volume 2(P), page 27, para 31. The corresponding report, Lok Sabha report, it is page 89 of the same Volume, My Lords. It's in a tabular form. '22-'23 year, My Lord, is 1552 crores. Just one more word my Lord on the institution of national importance.

CHIEF JUSTICE D.Y. CHANDRACHUD: The Lok Sabha report is at page 81?

GURU KRISHNAKUMAR: The report itself is at page...

CHIEF JUSTICE D.Y. CHANDRACHUD: 81 you said, I think.

GURU KRISHNAKUMAR: 89, My Lords.


GURU KRISHNAKUMAR: 89. And the relevant portion, My Lord, is at 90.

CHIEF JUSTICE D.Y. CHANDRACHUD: It's not on the screen.

JUSTICE SANJIV KHANNA: This is not uploaded. 2(P) is not uploaded.

GURU KRISHNAKUMAR: Yesterday evening we had sent it.

JUSTICE SANJIV KHANNA: No, no, I'm just... It's a question of facts.

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GURU KRISHNAKUMAR: I'm so sorry, My Lord. I understand the Nodal Council has put it up, My Lords. Probably it's not been... I understand it's there on the screen My Lords. Yes, this is the one. That's the page, My Lord. Please see 90. My Lords have it on the screen. My Lords have that.

JUSTICE SANJIV KHANNA: It's more than the University of Delhi.

GURU KRISHNAKUMAR: That's true. And AMU My Lords, My Lords recall, has so many centres. Number of centres. One more thing on this point, institution of national importance My Lord and then I'm done with this point. Please make a note of it, I will not read just to save time. Please make a note of the discussion when the Viswa-Bharati Act was moved for declaring it by law to be an institution of national importance. There again, the national character, where it goes beyond regions and particular sections, is discussed. Same volume. Please note page 43, My Lords.

CHIEF JUSTICE D.Y. CHANDRACHUD: The same is which Volume?

GURU KRISHNAKUMAR: The Volume which I'm just referring to, 2(P).

CHIEF JUSTICE D.Y. CHANDRACHUD: Page?

GURU KRISHNAKUMAR: 43 at 53. Now, the next point My Lord. Please, please My Lords, look at my original submissions and the additional submissions where I've elaborated on all these points. On the effect of declaration as an institution of national importance. Just to save time, I'm not going into each one of these points, My Lords. Both the original submissions and further added in the written submission, additional submissions I've pointed out all of that My Lord. I've given the crux of what I wanted to submit My Lords, on this point. The second point, the effect of the 1981 amendment. If at all My Lords, there is anything to be looked at, please look at two portions of *Indra Sawhney* 2 and *Mulla Periyar* My Lords. *Indra Sawhney* 2, please come to my compilation of judgments 5(D).

CHIEF JUSTICE D.Y. CHANDRACHUD: Page?

GURU KRISHNAKUMAR: 1240, Para 28 and 29. There I'll just briefly give the background My Lords. *Indra Sawhney*, nine judges. The first one, said creamy layer shall be removed from the persons who are entitled to the benefit of reservation. Creamy layer is not entitled to
the benefit of reservation. Court also directed, please form Backward Classes Commissions, identify creamy layer, remove them. State of Kerala purports to say there is no creamy layer in the State of Kerala. The validity of that action My Lords, is considered in this judgment. That’s the long and short of this. Please come to paragraph 28, 5(D). 1240. That’s the relevant part. 1218 is the beginning of the judgment. I am at 1240, My Lord. May I read that My Lord, para 28? The question of validation arises in the context of Section 6 of the act. It is true that whenever legislative or executive action is declared as being violated to the provisions of part three, it will be permissible to the, for the executive or the legislature to remove the defect which is the cause for discrimination prospectively and which defect has been pointed out by the Court. The defect can be removed retrospectively too, but by legislative action and the previous actions can also be validated. But where there is a mere validation with retrospective effect, without the defect being legislatively removed with retrospective effect the legislative action will amount to overruling the judgment.

CHIEF JUSTICE D.Y. CHANDRACHUD: So you said, you have to take away the basis of a decision by clearing the defect, which was pointed out in the original.

GURU KRISHNAKUMAR: I bow down. There’s one important point, one important qualification there. Where the Court, let’s say a lot, strikes down a taxing statute, saying the definition clause does not cover an X category, then a validating statute can be made saying I’m now going to cover this category also, and retrospectively there, you’re removing the basis or curing the defect. A factual finding of this nature can never be part of validation, that’s a very important thing, My Lords. An institution, whether it has been established by a community or not is a factual finding, which is where My Lord, para 29 is important.

JUSTICE SANJIV KHANNA: But this argument also cuts.

GURU KRISHNAKUMAR: In the sense?

JUSTICE SANJIV KHANNA: In the sense that establishment by a statute may not be then relevant.

GURU KRISHNAKUMAR: No that’s slightly different. The point I’m making......

JUSTICE SANJIV KHANNA: You are right. When you argue this, that in order to see who had established the institution, you’ll have to go to the promoters or the persons behind... the founders, then you cannot argue also that the establishment is by the Act of the Parliament.
GURU KRISHNAKUMAR: No, there My Lords, it's one thing for the Parliament to amend in the absence of a judgment. It's something totally different. The moment there is a judgment interceding, which returns factual findings, and becomes final and binding on parties, thereafter My Lords, Parliament cannot step in. That's where the important qualification comes forth. One a factual finding, can it be subject matter of validation. Number two, once there is a factual finding, which is a subject matter of adjudication, by the judicial process, which is where My Lords the importance of separation of powers becomes extremely relevant. Separation of powers, yes the legislature has the power to undo, Acts which are held to be banned by removing the basis or curing the defect, but merely legislating to overcome cannot be done. Para 29 My Lords, looks at that. Now please come to Mulla Periyar Same volume. 1033... 1033 at 1123, please look at paragraph 157, Mulla Periyar again, very briefly. Judicial decision.

JUSTICE SANJIV KHANNA: Page 10 volume 5D.

GURU KRISHNAKUMAR: 1123 it starts My Lord. 1033 at 1123 it starts. That's right, at 1123, 5D My Lord, same volume.

JUSTICE SANJIV KHANNA: Para?

GURU KRISHNAKUMAR: 157. The question, may I read that My Lord. 'The question whether or not the legislature the question whether or not the legislation has the judicial power or enacted a law in breach of separation of power principle would depend on facts of each case after considering the real effect of the law on a judgment or a judicial proceeding. One of the tests for determining, whether judgment is nullified is to see whether the law and the judgment are inconsistent or irreconcilable, so that both cannot stand together, in what we have already discussed about, it's abundantly clear that on the one hand there is a finding of fact determined by the squad on hearing the parties on the basis of the evidence/materials placed on record in the judgment of this Court in Mullaperiyar Environment so and so and on the other, in the 2006 Amendment act the legislature has declared the dam being an endangered one and fixed the water level and the damage...' 

CHIEF JUSTICE D.Y. CHANDRACHUD: B on page 787, Placitum B. 'War is a classic case of nullification of a judgment, as in the judgment of this Court, the question of the safety of the dam was determined in the base of materials placed before it, and not on the interpretation
of any existing law, and there is no occasion for the legislature to amend the law by altering the basis on these judgments'.

GURU KRISHNAKUMAR: I bow down. This is precisely what I wanted to highlight.

JUSTICE SANJIV KHANNA: But in this case, this legislature, the Parliament amended the law.

GURU KRISHNAKUMAR: On a factual aspect found by the Court. That's why My Lords the distinction.

JUSTICE SANJIV KHANNA: They amended the law. Yes, you can argue, as far as the finding of fact, who are the people behind the founders of the University. If there is a finding recorded in Basha that could not have been changed by the Parliament.

GURU KRISHNAKUMAR: That's the whole point. On establishment, the clear conclusions in Basha threefold. I'm not on administration. Administration part has not been touched at all by the 81 amendment as what fell from the Chief Justice. Therefore that's something entirely in favour of our argument. On establishment, three important things finding is that it is by an act of legislature. One by looking at history. Number two, it specifically says there was an option available, to put up a University with the rider that if you did that, you were not assured of recognition of degrees by the then government. Therefore you chose the route of an University being established. And third, the societies which formed the basis or the beginning or the genesis, they were extinguished. In fact one point I like to say that, I want to say My Lord, as part of my submissions on the third point. There are at least 2, 3 legislations where expression used there used are that the antecedent bodies are conglomerated with the new body which is created by the statute. Page 31 of 2(P). My additional submissions I have given that example.

JUSTICE SANJIV KHANNA: Page?

GURU KRISHNAKUMAR: Page 31 of Volume 2(P), my Additional Submissions. The concerned Act My Lords, is, 'The Institute of Teaching and Research in Ayurveda Act' of 2020, Section 3, anteceding institutions. Two, is the declaration of the Parliament, that's an institution of national importance. That's at 33. Section 4, it says, all those are anteceding institutions they are named, and thereafter, it says, are hereby conglomerated and established as a body corporate under this Act. My Lords, got that?

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JUSTICE SANJIV KHANNA: Section 4, Page?

GURU KRISHNAKUMAR: Page 33 My Lords, 3 My Lords, is the definitions. 3(a) My Lord, will see the anteceding institutions. Then please come to four in the next page there, please see 41. "The anteceding institutions, namely so and so and so on, so are hereby conglomerated and established as a body corporate under this Act and on such incorporation we call the institute of teaching and research in Ayurveda'.

CHIEF JUSTICE D.Y. CHANDRACHUD: What is the effect thereof?

GURU KRISHNAKUMAR: The effect thereof is, those institutions are not extinguished or...

JUSTICE SANJIV KHANNA: Why they should continue to exist?

GURU KRISHNAKUMAR: No, on the contrary, My Lord, what happens is, those institutions become the...

JUSTICE SANJIV KHANNA: What happens on amalgamation?

GURU KRISHNAKUMAR: Amalgamation. There is a fusion of both entities in terms of company...

JUSTICE SANJIV KHANNA: Over here... 'these earlier institutions get submerged and become part of the main institute'.

GURU KRISHNAKUMAR: They are the responses, My Lord.

JUSTICE SANJIV KHANNA: Yes, the legislation has in this case, used a word dissolved. But the legislation could have realized we may use a word wrongly and let's change that word. Just like established also...

GURU KRISHNAKUMAR: No, In fact, in the case of AMU, the Draft Bill of 1911 used the expression amalgamation that was removed. That's the next point I wanted to highlight My Lord. Please see compare. I've given a table of the 1911 Draft and 2020 Act, has ultimately, 1920 Act has ultimately made. Please come to page five of the same Volume 2(P). Please, look

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at that My Lord. There's a tabular column we have given. My Lords, got that? That just see the
Preamble itself. My Lord, what the tone and tenor was and what it ultimately became. May I
read the My Lord, for a minute?

CHIEF JUSTICE D.Y. CHANDRACHUD: Yes.

GURU KRISHNAKUMAR: 'Where an institution, a page My Lord, five of my submissions.
The tabular statement is there on the screen now. Where an institution, whereas an institution
styled the Muhammadan Anglo-Oriental College was founded at Aligarh, in the year 1875, by
the Muslim community under the leadership of late so and so. With the special object of
promoting the diffusion of western science and literature and of training the character of the
students by a scheme adopted to meet the special educational requirements for the
community. And whereas, from the beginning, the object of the founder in the Muslim
community was to raise such a college to the status of a University. And whereas, during the
last 35 years of its existence, the college has very largely expanded and extended and expanded.
And whereas, the memorial has been presented to the government, by the trustees and other
representatives of the Muslim community, praying for election of a Muslim University at
Aligarh and inviting attention to the advantages which a University of their own would confer
on their community to the inadequate representation within their community, et cetera, et
cetera. So, the entirety of that is referred to and finally it says, whereas it has been determined
to establish a University at Aligarh. Now, please see the Preamble actually enacted, in the right
hand side column. Whereas it is expecting to establish and incorporate a teaching of
residential Muslim University at Aligarh and to dissolve the society's registered under the
Societies Act, which are respectively known as Muhammadan Anglo Oriented College, Aligarh,
at the Muhammadan Muslim University Association and to transfer and invest in the
University of all properties and rights of their societies, and of the Muslim University
Foundation Committee. Then please come to that part about amalgamation and
conglomeration page 9 My Lords. Section 29 in the Draft.

CHIEF JUSTICE D.Y. CHANDRACHUD: Page nine there?

GURU KRISHNAKUMAR: Nine, My Lord. Section 29 left hand side column.
Amalgamation of MAO College Aligarh...

CHIEF JUSTICE D.Y. CHANDRACHUD: Okay. Amalgamation of...

GURU KRISHNAKUMAR: My Lords, got that?

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CHIEF JUSTICE D.Y. CHANDRACHUD: Yes.

GURU KRISHNAKUMAR: 'On and after the date of establishment of the University, the MAO College, Aligarh shall cease to exist as a separate corporation and shall be incorporated to the University and all property movable and immovable of every description, et cetera, et cetera. And all rights and powers and privileges are immediately before the establishment belonging to or were vested in the college, shall, by virtue of this Act, without any conveyance assurance or other instrument be transferred to and become vested in the University for all estate and interest therein, respectively, of the college and shall be applied to the objects and purposes as distinguished from that'. So the amalgamation is, what is envisaged. Please see on the right hand side column.

CHIEF JUSTICE D.Y. CHANDRACHUD: It doesn’t say amalgamate, it says incorporate into.

GURU KRISHNAKUMAR: Yes. Now, Section 4 talks about dissolution as passed.

CHIEF JUSTICE D.Y. CHANDRACHUD: Right.

GURU KRISHNAKUMAR: Very significant in my respectful submission. The margin note. Two things, My Lords I'm left with now. Points three and four, they are connected to each other. Proceeding on the basis My Lords that a pre-Constitutional institution is also entitled to the benefit of reservation. Minority protection at 30. Please also bear in mind, My Lords, that this really stems out of a brief discussion in Kerala Education, whereas submission was made saying while dealing with the Kerala Act, which was sent up to this Court, for advisory opinion on its validity. One of the arguments was that an institution to claim the protection of 30 should have been established after the Constitution came into existence, amongst various other arguments. In that process, this Hon'ble Court says, no, there is nothing in 30 which prevents even an institution established and administered prior to the Constitution from claiming the benefit of 30. That's to be borne in mind, My Lords. Now, in my respectful submission, please look at it in two time frames. What was the status of the institution pre-Constitution, when it was established and being administered. Second is at the commencement of the Constitution, and thereafter. Now, I am not going into the larger question My Lords, and without in any manner seeking to dilute what has been submitted by Mr. Rakesh Dwivedi My Lords, on whether at all they can claim to be a minority institution. Large submissions and material has been placed while adopting that in the alternative and
submitting this. Two things will have to be established My Lords, that you were established
and administered. I am proceeding on the assumption that it's a minority. And that therefore
they can claim to come within the ambit of 30. That's why I'm saying it's in the alternative.
Please do not take it as diluting what has been argued on the question of minority status itself.

CHIEF JUSTICE D.Y. CHANDRACHUD: What is the submission then?

GURU KRISHNAKUMAR: The submission is, you ought to have been established and
administered prior to the Constitution. You can't say at the commencement of the Constitution
I will now say here I'm putting up my hand, I'm saying I'm a minority institution. Whatever
may have been my past I'm still entitled to the protection. That can't be.

CHIEF JUSTICE D.Y. CHANDRACHUD: Right. Thank you.

GURU KRISHNAKUMAR: That is one My Lords. One more thing. One more thing. Post
the Constitution. 1951, '65 all the amendments, they really My Lords, reinforce the character
that it's not a minority institution. In fact, one point My Lords, the approach adopted by My
Lords, in Ram janambhumi, where, that was of course, in the context of private property
rights. My Lord said you really look at it when old claims are being made saying prior to 1800,
prior to 1700, this claim was made, that claim was made, historical wrongs, et cetera. My
Lords, had two wholesome approaches. Whatever may have been recognized under the British
rule and which is expressly accepted is all that can be claimed. One. So that's why I said two
time frames. Look at it from the point of view of what they had before the Constitution was
adopted and whether it was accepted or not accepted. Alternatively, let me assume My Lords
for a minute, that they had the trappings or vestiges of a minority institution in 50. I am saying
My Lords, with the adoption of the Constitution, the Indian Parliament had decided that it will
not have even those vestiges of a minority character. By the 51 and 65 amendments and
thereafter, one important significant thing there My Lords never ever was a square claim made
for being a minority institution, except that skirmish, if I may put it that way, of '81 amendment
and thereafter the 2005 proposal for giving 50% reservation. Not earlier, not after. That's a
very, very important, respectful point in my respectful submission My Lords. They never made
a claim. Today My lords, are not looking at the validity of the 1920 Act, capability open to the
University of all people to collateral today argue saying no, no all this must be understood
or to be held to be contrary to what is laid down by Constitution benches in respect of 30. That
can't be My Lords. The first ever explicit claim is 2005 when they said 50% seats for that
community. Please look at it from that viewpoint. And post- Constitution also, My Lord have
said in Ram janambhumi, it is for the new sovereign to decide how to treat a particular right.

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I've given those page numbers My Lords in my submissions. Volume 5(D), 864, 865, paragraphs 989, 990.

**JUSTICE SURYA KANT:** How does that principle apply here?

**GURU KRISHNAKUMAR:** The principle applies here in this manner. Prior to the adoption of the Constitution, the Imperial government, never treated them as an institution which belongs to a particular community. One, it was on the contrary.

**JUSTICE SURYA KANT:** That's an argument from both sides, that status has to be determined first in 1920.

**GURU KRISHNAKUMAR:** Correct.

**JUSTICE SURYA KANT:** And then it will have its reflection, as on the date when Constitution came into effect on Article 30.

**GURU KRISHNAKUMAR:** That's right. And the second, therefore, 989, 990 and 997. My Lord's decision in Ram janambhumi, where alternatively, My Lord have also said it is open to the new sovereign to either accept or not accept, therefore, you look at it in any view of the matter. Look at it from the standpoint of what they had, prior to 50. What the legislature, Imperial legislature, gave them or did not give them, or assume for a minute they had some trappings at the commencement of the Constitution, Entry 63 list 1, 51, 65 and the actual practice in the institution, 2005 is perhaps the first tangible claim of status.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** That point you've made. Thank you.

**GURU KRISHNAKUMAR:** One last thing, and then I'm done. I'm obliged My Lord for a patient hearing. Their submission on 30. Please have a look at Dr. Dhavan's submission. Just have a minute.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** What's the point that you're making?

**GURU KRISHNAKUMAR:** The point I'm making is. The submission appears to proceed on the basis, that it is enough if it is shown that is the minority community which is involved. The establishment and administration, or the consequences of that status. Please have a look at that formulation in the respectable submission. It amounts to begging the question, please
look at it, My Lords. It's a little important because, one of the key ingredients of their attack, on Azeez Basha is on that. Please have a look at that page.... Give me the 2A, page 73. Page 73. 1A, I'm sorry. 1A. Now, please come to the conclusions. In fact the body of the submissions also refers to that, but I thought for ease of reference, I'll come directly to this. 73 the conclusions. Azeez Basha, is internally contradictory in its reasoning on facts and law. 9.2

'Azeez Basha failed to recognize that the word established an administer are not preconditions, to define a minority. I read that institution. It's not found there, otherwise it won't be complete. Preconditions to define a minority, but the consequential rights that flow from such recognition, the ingredients of the right that flow from 30 have been stated by T.M.A. Pai at para 50 and other decisions'. With respect, My Lords, the position is the other way around. If you want to claim the benefits of a minority, you must show that you have established on your......

CHIEF JUSTICE D.Y. CHANDRACHUD: No, there you are wrong. Absolutely right but article 30 says that all minorities, religious or linguistic, shall be entitled to establish and administer institution of a choice.

GURU KRISHNAKUMAR: That's right.

CHIEF JUSTICE D.Y. CHANDRACHUD: So, it postulates that you are a minority. And then gives you certain rights.

GURU KRISHNAKUMAR: No, that's right.

CHIEF JUSTICE D.Y. CHANDRACHUD: You have the right to establish and administer before the formulation that establishment and administration are concomitant rights once you are a minorities, correct. It is on the basis of plain language of that.

GURU KRISHNAKUMAR: No, I'm saying the submission appears to be that, if you show that you are a minority, then establishing an administration is really something which comes thereafter No, on the contrary, My Lords, even if you are a minority and you have been involved with an institution, you have to show that you have established it and that you have been administering it.

CHIEF JUSTICE D.Y. CHANDRACHUD: That's exactly the point. That, you obviously you cannot claim the benefit of Article 30 in respect of an institution, if you have not established it, and you are not administering it.

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GURU KRISHNAKUMAR: No. This is apart from My Lord...

CHIEF JUSTICE D.Y. CHANDRACHUD: But, it surely... it doesn't whether you have establish or administered an institution does not define as to whether you're a minority.

GURU KRISHNAKUMAR: No, not in that sense. I quite see that My Lord. I quite see that.

CHIEF JUSTICE D.Y. CHANDRACHUD: Therefore, this is clearly a clear construction of Article 30 as it's...

GURU KRISHNAKUMAR: Very well My Lord. On that point I have made some submissions. Please have a look at my Written Submissions on that. One last thing My Lord, I'm really done.

CHIEF JUSTICE D.Y. CHANDRACHUD: Last submission of Guru.

GURU KRISHNAKUMAR: Please see the 2006 Central Act providing reservations for SC, BCs and SCs and STs. That Act provides that all central institutions shall provide reservation in terms of 15 and 16, and by definition, institutions of national importance are covered by it. So, AMU will have to provide that reservation, but they have not been because there is some provision in the Act, which says that, if the Parliament declares a particular institution to be a minority institution and certain other conditions, then yes, it need not provide the reservation provided under 15 and 16. Now, AMU has not been declared as such, but still My Lord, it's not being provided. Therefore, we are looking at what belongs as what Mr. Sibal said, is it merely that 50% which they claim for a particular community or are we not looking at the larger umbrella of 15 and 16, across the spectrum. Foreign institution declared to be of national importance, with thousands of crores being pumped in, to keep it and make it an institution of excellence. And throughout has not made any specific overt claims of minority status, except that 2005 or the in between 1981 Amendment. Which in my respectful submission is subject to the vagaries of political changes.

CHIEF JUSTICE D.Y. CHANDRACHUD: All right. Thank you, Guru.

GURU KRISHNAKUMAR: I'm deeply obliged, My Lord. I overshot the time, but my apologies. I'm deeply obliged for a patient hearing.

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CHIEF JUSTICE D.Y. CHANDRACHUD: Navare. What is the point you wanted to...

VINAY NAVARE: My Lord, I will not repeat anything that I promise. My Lord, my written submissions are in Volume 2A, page 58, My Lord it starts, but actual submissions start at page 67.

JUSTICE SURYAKANT: Volume?


VINAY NAVARE: Page 58, but starts at 60... actual submissions start at 67. My Lord, the first submission that I'm making, is with respect to the scope of reference, and I will for that submissions are made, I will not My Lord, repeat that. On facts and the Law of 1920, interpretation of that Act to those facts. There is a decision rendered by a Five Judge's Bench, and that is something which is concluded. In reference, on principle everything can be re-looked at. But those principles, will be principles will be prospectively applicable not with respect to the decision which is made, in that judgment. My Lord, there is a judgment of three judges. I will just read. It is My Lord, that judgment is brought on record before Your Lordships, in Volume 5(i), it's a special only, that Judgment only. My Lord, the citation is 2014 Volume 5, page 800, and of that, the observations only in paragraph 12. I will read those five, six lines. 'Reference of a case to a larger bench, necessarily has to be for a reconsideration of the principle of law, on which the case has been decided, and not the merits of the decision. The decision rendered by any bench is final, inter partes subject to the power of review and the curative power. Any other view, would have the effect of conquering some kind of an appellate power, in a larger bench of this Court which cannot be countenanced'. So, My Lord, this is what I am relying upon for the first proposition. My Lord, the second submission that I want to make is, with respect to, in my written submissions I have used the term dangers, Your Lordship, may read it as the pitfalls. Dangers in accepting, the independent status of the AMU as a minority institution. 69 My Lord, page 69, that caption is there. Dangers in accepting the independent status of the AMU. Dangers in the sense not My Lord, political sense or social sense, purely legal sense, that's my submission. The first thing, for that My Lord, for appreciating this submission, Your Lordships will have to bear in mind that Entry 63 in list one, My Lord takes care of the AMU as an institution of national importance. If AMU My Lord is conferred or recognized to be a minority institution, My Lord the Parliament will be robbed of the powers My Lord, conferred under Entry 63. My Lord the wide nature of power that the Parliament possesses under Entry 63 will be curtailed if My Lord it is recognized as a minority institution.

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JUSTICE SURYA KANT: Other than two institutions.

VINAY NAVARE: I'm sorry My Lord.

JUSTICE SURYA KANT: Other than two institutions.

VINAY NAVARE: Yes. That will be underlining, undermining the authority of the Parliament. My Lord conferring or recognizing the status of a minority institution will virtually be taking away the powers of the Parliament under Entry 63 or My Lord diluting those powers. And while interpreting 1920 Act or any Act of the Parliament My Lord, the Court should avoid the interpretation which will result into undermining the authority of the Parliament under Entry 63 or any other entry. So My Lord this is first danger that My Lord needs to be seen in recognizing the minority status with respect to the AMU. Second My Lord since My Lord Parliament attempted to do that by way of 1972 amendment and 1981 amendment. My Lord that also cannot be allowed to be done by the Parliament because Parliament virtually will be abdicating its responsibility under Entry 63. Entry 63 gives a wide power and the moment the Parliament tries to My Lord, give that status to one of those institutions My Lord as a minority institution, Parliament virtually will be accepting certain restrictions on these legislative powers under Entry 63. That will amount to abdicating My Lord the responsibility which is conferenced upon the Parliament under Entry 63. And My Lord that's why My Lord Your Lordships put a question to the learned Solicitor, can you argue this? I don't know My Lord. I need not answer that, but My Lord Union of India cannot do something which will result into abdication of or undermining the authority of this. This is second submission. My Lord if AMU is a creature by a special statute it is My Lord, funded almost entirely by the government. It is a State under Article 12. My Lord but if it is a State under Article 12, then My Lord it can't do something which a minority institution will be entitled to do. My Lord, my learned friend, Guru Krishnakumar pointed out in the last submission that Scheduled Caste, Scheduled Tribes reservation, et cetera, will not be applicable to minority institution. That's My Lord what the act provides for. Virtually My Lord though it is a State and My Lord bound by My Lord mandate of Articles 15, 16, it will not be liable to do that only because it is recognized as, it's a conflict which will arise as a result of that. So My Lord this is my third submission with respect to the dangers of recognizing or conferring a status of a minority institution on AMU. My Lord there is one aspect which is covered. I will just put that in the caption and that caption, that My Lord there is a fundamental difference in created under the law and created by a special law. I have My Lord analysed that in my reason I will not repeat that. One word 'of their choice' was something that was My Lord argued on both sides. In fact Mr. Sibal tried to give it a new

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dimension, saying that even if the minority institution or minority community goes to the
government and requests them to create a law for it, for creation of that institution. That also
will be 'of their choice'. My Lord my submission on this 'of their choice' still adds for a new
dimension to it. Today, in what way My Lord, AMU is actually functioning? Parliament has
provided for everything, executive council, academic council, statutes, how to be framed, what
will be governed by the statute. Statutes governs My Lord and ordinances governs even the
control of examinations, even the awarding of degrees, appointment of professors, et cetera.
It is My Lord, the choice of the Parliament. It is not any community, some different entity
which is taking a decision, how do I administer it? But it is the wisdom, discretion and the
decision of the Parliament, which controls everything. So, 'of their choice' in this case, it's only
the choice. Therefore, I said discretion, wisdom and the decision of the Parliament, which
actually, is the manner in which the institution is run. So this is 'of their choice', therefore will
not be available in case of an institution like AMU, which is a creature under the statute. But
this aspect also is covered. I will just paraphrasing it and I will just not repeat that. That will
not be institution is, the earlier institutions, MAO, et cetera, are dissolved and new institution
is entities, I am putting it the Act of 1920 achieved win purposes and will I am putting it
paraphrasing it, once for all. Once for all in the sense that has happened there is something
inalterable thereafter. One is dissolution of the old institutions and establishment of the new
entity. That has happened once for all. And therefore 1981 Amendments cannot seek to alter
something which has already occurred, and those provisions are....

CHIEF JUSTICE D.Y. CHANDRACHUD: You can sit down now. Thank you. Mr. Navare.

VINAY NAVARE: There is only one thing. Last submission. Your Lordships have seen Entry
63. BHU and AMU are both will are on par in Entry 63. The moment this is again part of that
pitfalls the moment you recognize it as a minority institution, even-handedness of the
Parliament's power with respect to two institutions again will be affected. What Parliament
can do with respect to BHU will not be able to do with AMU. So My Lord, Entry 63 virtual will
be rewritten as a result of that, and therefore this will not the submission made on behalf of
the Respondents, the other side, may not be worth accepting. I’m obliged, My Lords.

CHIEF JUSTICE D.Y. CHANDRACHUD: Thank you.

VINAY NAVARE: This is last submission, but since my learned colleague reminds me. My
Lord the minority status of institution under Article 30, Your Lordships are held that it's state
specific. My Lord if AMU is established by the Parliament, treated as minority institution, what
do we do with respect to its campus on the Jammu and Kashmir. That's the question which may arise and therefore, that also is the conflict which may arise.

VIKRAMJEET BANERJEE: Two short issues.

CHIEF JUSTICE D.Y. CHANDRACHUD: Yes, Mr. Banerjee.

VIKRAMJEET BANERJEE: I don't want to repeat. I know.... I'm possibly right at the tail end... so... and am sure...

CHIEF JUSTICE D.Y. CHANDRACHUD: Yes Mr. Banerjee, what is it?

VIKRAMJEET BANERJEE: Just two short issues, My Lords. One, I've just submitted my note, which is Volume 2(K), that's what I am informed. At the last moment, just two short points. One is in relation to the three Entries. I'm not going into that, I've elaborated that in my note, but I'm just placing this. That it requires to be interpreted... There are institutions on national importance in all the three entries, so [UNCLEAR] sources has to be used to interpret all three and My Lords, in relation to the first half and My Lords what has not been cited is, I have quoted some of the extracts of Baba Saheb Ambedkar as well as Sardar Patel, saying that minority protection, what is the intention of 29 and 30 and My Lords, I have quoted Bal Patil which does not seem to have been cited.

CHIEF JUSTICE D.Y. CHANDRACHUD: Jain institutions...

VIKRAMJEET BANERJEE: Not only that... Jain institutions. But what Bal Patil actually does is addresses the question of minority... well, it's only at the end My Lords will recall if My Lords, have gone through Bal Patil. Bal Patil deals with the history of how minorities are formed, and it mentions in paragraph 33 specifically, that the intention of the protection of 29 and 30 is a temporary way to ensure that the minorities finally disappear into the majority. So it's not to have a construction which will perpetuate minorities. Now, what we are doing in the present case is if we say that the state can create certain minority institutions and so on and so forth. It would effectively go against the intention and objective of the interpretation of and Bal Patil My Lords, will recall is a three judge bench in... I can project it on para 33 is Lordships are willing to bear with me. And read the paragraph. Paragraph 33. It deals in great detail as to the history of if Lordship allows me to place that My Lords, I think Bal Patil would be relevant
CHIEF JUSTICE D.Y. CHANDRACHUD: Alright, we'll have a look at it.

VIKRAMJEET BANERJEE: My Lords, I only say this para 11 and para 33.

CHIEF JUSTICE D.Y. CHANDRACHUD: 11 and 33?

VIKRAMJEET BANERJEE: My Lords, that's part of my note, which I have included.

CHIEF JUSTICE D.Y. CHANDRACHUD: Thank you, Mr. Benerjee. Yes, Mr. Potaraju.

SRIDHAR POTARAJU: My submission is on first principles. The original provisions of the Constitution had Article 12, 14, 15, 28, 29(2), as well as Entry 63 as one scheme. There is a new sovereign, the people of India, who gave themselves this Constitution. They chose to elevate certain institutions, which were established by an enactment prior to the Constitution coming into force, and have conferred certain rights on the citizen of this country, to have access to education in institutions under 29(2). The institution in question, the Aligarh Muslim University was a 29(2) institution in which all the seats were available to the citizens of India until 2005. So, for the first time, the citizens of India have been deprived only on the basis of their religion, access to admission, consideration for admission on merits in the case of PG Medical seats in 2005. The judgment in 1967, has upheld the Constitutional status as a secular institution. Now Lordships, are sitting in a combination of seven judges deciding a question of seminal importance. The interpretation Lordships, will choose would have to be in sync with the Constitutional spirit, which is upholding the doctrine of secularism, which we have actually enshrined as a basic feature of our Constitution. Now, what is the interpretation which is sought to be given today? The interpretation which is sought to be given today is, the original scheme of the Constitution, which has converts certain fundamental rights on an institution which is classified... my submissions in Volume 2(M), I have stated My Lords, AMU qualifies as a state under Article 12 on the day the Constitution comes into force because it is maintained by the state. I've referred to section 35 in the 1920 Act and the substituted section, which came in the 1981 Amendment. Both of them mandate that the accounts and audit will have to be done and be published pre-independence, post-independence in the gazette of India. The pre-independence in addition to Gazette of India and the local gazette. Further 35(4), post 1981 mandates the audit by the Comptroller and Auditor General. The finances, which are going into the institution have been demonstrated My lord. The scheme of the Constitution has created certain rights, in favour of the citizen of this land. Now, those rights are now being diverted or being actually taken away by a Parliamentary legislation, which does not seek to even refer to the judgment of the Constitution Bench, much less refer to Entry 63 status. With
great respect, My Lords, Entry 63 is a status conference on an institution, not merely origin or
establishment of a new institution. The historical background has been set out My Lord, by
Mr. Rakesh Dwivedi, learned Senior Counsel. The background of 1916, 1920 is where we move
to a secular Constitution in 1950. This new sovereign was conscious of the pitfalls of the two
nations theory and have expressly rejected it. And by rejecting it, they elevated both
universities, though named as the Banaras Hindu University and the Aligarh Muslim
University as institutions of national importance. Once they elevated some purport has to be
given to that status being conferred under the original Constitution My Lords. The third point
that I would like to make is that an institution of this significance, once it is an Article 12 state,
it ceases to be an Article 31 minority institution, on the commencement of the Constitution,
because they cannot be a situation where it could have been an instrumentality of state or
otherwise. But, this is an institution which existed on the day when the Constitution has come
into force. So, therefore it becomes a state on the date when the Constitution comes and it
becomes Article 12 so, 31 is not available to this institution My Lords, and AMU as a creation
of the statute through its register, who's also a creation of the statute, cannot actually question
the Constitutional status of the University, which itself is a part of the original Constitution
the stream cannot question the sources. My respectful submission. I'm grateful.

CHIEF JUSTICE D.Y. CHANDRACHUD: Yes, Ms. Archana Dave.

ARCHANA DAVE: My Lords, taking the point further, I don't want to repeat myself because
already much has been said on this side. But My Lords, were particularly asking about the
legislative debates. And I could find one paragraph which I would just read that's in Volume
4(H) and page 14. I can just read it My Lord.

CHIEF JUSTICE D.Y. CHANDRACHUD: Just a second.

ARCHANA DAVE: Where...

CHIEF JUSTICE D.Y. CHANDRACHUD: Volume 4(H)?

ARCHANA DAVE: 4(H) page 14. They are talking about the national character.

CHIEF JUSTICE D.Y. CHANDRACHUD: Just one second. At page?

ARCHANA DAVE: 14, 1st column, down left.

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CHIEF JUSTICE D.Y. CHANDRACHUD: This is the 81 amendment?

ARCHANA DAVE: Yes. No, My Lord additional compilation of legislative dates, page 14. My Lords have that?

CHIEF JUSTICE D.Y. CHANDRACHUD: First column? Second column?


CHIEF JUSTICE D.Y. CHANDRACHUD: N. C. Chagla, right?

ARCHANA DAVE: Yes. The last paragraph, left column. Aligarh, My Lords have it?

CHIEF JUSTICE D.Y. CHANDRACHUD: Yes.

ARCHANA DAVE: 'Aligarh University is a national institution, an institution of national importance, established by the legislature and continued by this Parliament. Parliament has got every right to deal with the administration of the University either through an ordinance or by changing the law. It would be a most extraordinary proposition to suggest that this Parliament, this sovereign legislature, has no right to interfere with the administration of the Aligarh University, which is Mr. Anthony's argument. It was never accepted by the British Government, although there was no Constitution. And even in those days, if you look at the dispatches, I have gone through the history of this when the Governor General sent the dispatch to the Secretary of State, suggesting the starting of the Aligarh University. It was made incumbent that the doors of the University shall be open to persons of all castes and communities. Even that, British government would not permit a University to be set up to be financed by Indian money, which would be communal in its character. But as I said they did not make this concession about this Court, which we could not keep up because of our Constitution'. So My Lords, taking this further, this is with regard to the national importance, the national institution. Also My Lords, if I can say, the judgment in Azeez Basha is for a standalone institution. If I can say this is a judgment in personam. What it is deciding is the character of the University, AMU University as a standalone University. Both BHU and AMU are on a similar footing.

CHIEF JUSTICE D.Y. CHANDRACHUD: You may also want to read page 12, Archana.

ARCHANA DAVE: Yes, My Lords.

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CHIEF JUSTICE D.Y. CHANDRACHUD: Column two. That is again Mr. Chagla's speech.

ARCHANA DAVE: Yes.

CHIEF JUSTICE D.Y. CHANDRACHUD: Just read from, 'The right that is conferred...'

ARCHANA DAVE: 'The right that is conferred upon minorities, it is important to note is to establish and administer educational institutions of their choice. My submission to this house is that Aligarh University has neither been established nor is it being administered by the Muslim community. It is not a minority institution in the sense in which Mr. Anthony suggests. I will give him the reasons. You had first the Muslim college, which was founded by Sir Syed Ahmed. Sir Syed Ahmed asked the British Government of those days to establish a University, and the British Government in 1920 passed the Act of 1920. The legislature of those days passed that Act and established the University. Therefore, the establishment of the institution was by legislature and not by the community. Whatever might have been the origin of the Aligarh University, the Aligarh University itself was established by the legislature. Then came the Constitution. Then, in 1951, the amending act made certain alterations in our own Constitution, in the Union list, Entry 63, it is provided that central universities and other institutions of national importance can be legislated upon the Parliament. Now, I cannot understand how it can be said that the administration is in the hands of the minorities. The administration of the University depends upon the law. During British times it depended upon this act. After independence it depends upon the act as had been amended by Parliament. Does Mr. Anthony suggest that it is open to the Aligarh Muslim University or the Muslim community to change the administration of the University even to the slightest degree, and go contrary to what Parliament has laid down. If the minority had the right to administer the Aligarh University, then it can have any administration at life, it can change the administration and it can close down the University. It can change the Constitution of the Court or the Executive Council. Can it do so? Even the Constitution of the Court of the Executive Council and of the academic council is regulated not by the minority committee, but by the Parliament. There is another aspect of the matter which Mr. Anthony has completely forgotten. He has attached great importance to the fact that under, under the Act of 1920, the British government, as a concession, said that the Court shall consist wholly of Muslims. Now, everybody know that the University is administered by the Executive Council and not by the Court. The Court, of course, is the supreme authority, and it is like a showpiece. It meets once a year. Lots of people come there and make speeches and pass resolutions. But the day to day administration, selection, appointment and so on are carried on by the Executive Council, and
it is significant that even in the British days, it was not provided that the Executive Council
shall consist only of Muslims, that clearly shows that the British government did not concede
the argument. Although there was no Constitution then the argument is now advanced by Mr.
Anthony that the minority has a right to administer this particular institution. I say that this
institution was not established by the minority, nor it is being administered or was ever
administered by the minority community. That is the legal position as far as Article 30 is
concerned'.

add?

ARCHANA DAVE: So, my humble submission is Azeez Basha, who is holding the field till
today is a good law and it is only deciding the character of one particular University, which is
AMU in this case. Well, it's the Parliament, by the 1981 Amendment Act brazenly tried to
overrule Basha's judgment, which it could not have done, My Lord. I'm so deeply oblige for
your patient hearing.

ANIRUDH SHARMA: I am appearing for the National Commission for Schedule Caste. Mr.
Yogeshwan had filed the Written Submissions. However My Lord, there's a bereavement in
his family, so I just need two minutes, My Lords. The first submission is that the Appellants
have based their submissions on the extent and width of Article 30(1), on an interpretation of
Article 31, and interpretation of T.M.A. Pai, in Inamdar it has been held that it's only an
added protective measures and it is triangular. At the top the rights of the minorities minority
to establish institution is narrowed down and virtually zero. Hence, you cannot enter into the
protection of minority institution directly as a University. Even deemed University they first
become institution of eminence. Then there is a procedure to get themselves declared. That's
the first point. Second point, following this in T.M.A. Pai, and interpreting that in Inamdar
it has been held that Article 30(1) is now subject to article 29 (2). Once the field, on any seat
of any institution is occupied by 29 (2), and because it is a superior right, it cannot be relegated
back to Article 30(1)c. Just 60 seconds more. My Lords, the next point is that minority rights
establish an administrative institution cannot extend to a minority University at the start.
Fourth point is, the case of St. Stephen's, if we look at the factual ambit. St. Stephen's
clearly said that it was established to spread the gospel and the same charter of spreading the
gospel was also registered with Delhi University and a ritualistic religious head, that is, a
Bishop, occupies the position as the Chairman and nominates bodies.

CHIEF JUSTICE D.Y. CHANDRACHUD: Let us see Mr. Yatindra Singh's submission.

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YATINDRA SINGH: My Lords granted me 5 minutes. Probably, I cannot finish in five minutes.

CHIEF JUSTICE D.Y. CHANDRACHUD: Tell us what the point is. Of course, we'll hear.

YATINDRA SINGH: Please inform me, when the four minutes are over. 1 minute time, I want to tell Your Lordships, is something which probably even they don't know, about their own University. And there's one particular case.

CHIEF JUSTICE D.Y. CHANDRACHUD: Why don't we begin with that, then.

YATINDRA SINGH: My lords, I'm sorry. I have five submissions to make. And My Lord, I will argue the traditional way. I will feel more comfortable. This doesn't contain any of the Annexures, only my Written Submissions. There are seven submissions. Submission number one is number one is, plain language should be given natural meaning and should be read as 'and', not 'or'. Second submission is...

CHIEF JUSTICE D.Y. CHANDRACHUD: Where is that, Mr. Yatindra Singh?

YATINDRA SINGH: My Lordships, may have my... this submission, there's a...

CHIEF JUSTICE D.Y. CHANDRACHUD: Page? What page?

YATINDRA SINGH: Written Submissions.

CHIEF JUSTICE D.Y. CHANDRACHUD: What Page?

YATINDRA SINGH: Page two.

CHIEF JUSTICE D.Y. CHANDRACHUD: Page two, alright.

YATINDRA SINGH: My Lords, second is, University was, AMU was established by, was not established by Muslims. The third one is, that it was never being administered by minority Muslims. And the fourth one is, without changing the basis of Basha case, the legislature cannot reverse it. First and four, are settled point. Second and third are very well dealt by Solicitor General. I have mentioned them in Annexure A. Of course, I have given entirely a
different colour than what the Solicitor General has given. Your Lordships, pleasure is, if they
want to read it, Your Lordships may read it or omit it. Now, I come to the fifth point. What is
the meaning of the word 'minority'. Mr. Dwivedi has elaborated a lot. I must confess it is a very
novel way he put it. Your Lordships, will deal with it, the treatment that it deserves. But
actually, to my mind, minority in Article 30, does not mean numerical minority, which is the
general trend of this Court. It means electoral minority. A minority that cannot affect any
elections. Like take up the case of Zoroastrians.

CHIEF JUSTICE D.Y. CHANDRACHUD: But it will vary from constituency to
constituency. There may be some constituencies where you can certainly affect the elections...
the whole state-wide level...

YATINDRA SINGH: Your Lordships, if you just permit me to just complete this point and
ask, otherwise... I just wouldn't finish within five minutes.

CHIEF JUSTICE D.Y. CHANDRACHUD: Yes.

YATINDRA SINGH: I want to finish it.

CHIEF JUSTICE D.Y. CHANDRACHUD: Yes.

JUSTICE SURYA KANT: We will continue after lunch?

CHIEF JUSTICE D.Y. CHANDRACHUD: No.

YATINDRA SINGH: Democracy is a basic structure of the Constitution. Lord Acton, in his
'Essays on Freedom', says 'Most certain tests by which we judge whether the country is really
free, is amount of security enjoys by minorities.' That's Lord Acton in his 'Essays on Freedom'.
It's mentioned here in paragraph number two, My Lord. This is the reason why rights to
minorities were given under the Constitution. Now, if this is the case then any minority, which
affects the election results, is not a minority under Article 30, but, like, take up a case of
Zoroastrians, that is Parsis and Iranis. Those who came 800 years ago, Persia was there. They
are known as Parsis, Those who came 200 years ago, Iran was formed. They are known as
Iranis, now they are less than 1%. Bodhs are less than 1% , Sikhs are less than 1%. They can't
affect... Christians are 2.4. They can't affect any elections, Muslims in 2011, census were 14.2%,
but their population gross is the highest. My Muslim friends when I talk to them. How much
do you form the population? They say, now we have become 23%. So, Muslims as a minority

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affect the elections. And that is the Lord, if Bhindranwale was creation of Mrs. Gandhi then, 
Owaisi is the creation of BJP. They want to divide the Muslim vote. Wherever they combine 
together, they win.

CHIEF JUSTICE D.Y. CHANDRACHUD: We will not steer away from the area of 
Constitutional law.

YATINDRA SINGH: My Lordship, may reject it. I am again saying that. What I’m trying to 
say is...

CHIEF JUSTICE D.Y. CHANDRACHUD: Let’s not comment on political personality.

YATINDRA SINGH: All right. Your Lordships, may not comment it. Your Lordships, may 
hear the next sentence, which I am going to say. Because I just mention it as a reference. Your 
Lord, this Court is not competent to decide this question, whether they affect any elections or 
not. That is why My Lord, I mention that Your Lordships, may have some kind of Commission, 
may go into this question. That’s all.

CHIEF JUSTICE D.Y. CHANDRACHUD: According to you, Muslims are in a position to 
affect electoral outcomes and therefore they are not a minority according to you.

YATINDRA SINGH: Yes, that’s right and for that, Your Lordship, is... cannot go into this. 
No Court cannot go into this question. A Commission may be formed. I for that... I was laying 
down the basis, My Lord. I also know. I understand much better than Mr. Sibal, what are the 
limitations of the Court. As a judge also, as a lawyer also. This is all that I have to say on this 
point. My Lord, the Chief Justice has asked a particular question to Mr. Kaul. He gave a 
particular answer. I have given a different shape to it. If Your Lordships may have page 4, 
paragraph 4. I’ll just read it. The 6th and the 7th one I’ll read first the submission, and then I’ll 
read my answer. 6th is the principal Act. That’s the original act, as amended from time to time, 
was further amended in 1981. The 1981 Amendment. By this amendment, the four major 
changes were claimed. The most important change is section 2(l). Definition of the University. 
Then Your Lordships may come to the seven, 7(a), assuming they’re not admitting that basis 
of Basha case was changed, thus rendering it the Basha case has no longer a good law, then 
these amendments are illegal on the following ground. Number one, they are arbitrary and 
illegal; b), they go against the secularism and equality, basic feature of the Constitution. Point 
number six. and seven are dealt in page number four.
CHIEF JUSTICE D.Y. CHANDRACHUD: Thank you. Thank you so much. Yes certainly.
Tell us. We will hear you for a minute.

YATINDRA SINGH: Sure. I’d like to read this particular point.

CHIEF JUSTICE D.Y. CHANDRACHUD: Sure, you can read it. Which point?

Lordships can give me just five minutes more after...

CHIEF JUSTICE D.Y. CHANDRACHUD: Seeking five minutes, then we’ll take on reading
it.

YATINDRA SINGH: Yes. Six and seven.

CHIEF JUSTICE D.Y. CHANDRACHUD: Yes.

YATINDRA SINGH: In Basha case it was held that AMU was established by the principal
act. Kindly see the second submission on Annexure A. This finding cannot be reversed unless
the basis is changed. This can only happen if the status quo [UNCLEAR] or the way the things
were before the principal Act came into existence happened. In other words, the principal Act
is repealed and administration as well as properties are reverted back to AMU. Declaration in
Section 2(l), broadly providing the University to mean educational institution of their choice
established by Muslim is not inserted with retrospective effect and is pure fiction, as in
Haddock and Haddock. That’s a dissenting opinion of Justice Holmes, which later on
became the majority opinion. Fiction always is a poor ground for changing substantial ones.
It’s a dissenting opinion, but some words of wisdom. Then Your Lordships come to next page.
There is no change in the basis for decision in the Basha case. The legislature cannot reverse
it. Section 2(l) providing artificial definition to the word investee is arbitrary. An arbitrary
study provision violates Article 14 and 16. I mention number of [UNCLEAR], but Lok
Prahari case is the best case My Lord. Then secularism, secularism and equality are the basic
feature of the Constitution. I have cited Justice P.B. Gajendra Gadkar. Probably this book is
not there with Your Lordship’s library. I have the book, in case Your Lordship wants it. Though
I have an annexed the relevant pages there. Then there is Austin [UNCLEAR] quotation. I
don’t want [UNCLEAR]. There’s a good, very good book by Justice Chinnappa Reddy, where
he talks about secularism was not part of the Constitution. Sorry, was nowhere mentioned in
the original Constitution, but how it was part of the Constitution. That’s what he said. And the

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crux of all this is, Indian secularism respects all religions. It does not favour any particular
religion. Once you established a institution for a particular religion it violates the basic
principle of equality, secularism, Article 15. Now My Lord, this is one particular case was not
mentioned precedent. Let me explain this, and then My Lord I'll finish. It was yesterday my
young team suggested to me to put it there. Your Lordships must have read Spiderman comics
in your childhood. Spiderman has a kind of a toy, from here he can throw out this web. Now,
this was subject matter of patent dispute. It went up to Supreme Court. The Supreme Court
was... US Supreme Court was asked to reverse a decision which they have already taken. What
they ended up saving the advice of Uncle Ben Peter to Peter Parker. With great power comes
great responsibility. Will it be Your Lordships pleasure and they did not overrule it. That case
is 51 years old. Here it is 55 years old. Kindly read what the US.....


YATINDRA SINGH: Your Lordships, may read it here, I will read what is in my favour. Dr.
Rajeev Dhavan is very competent lawyer. He probably must, I personally rate him as
somebody who knows the law. There's no other person, who knows as much law as Dr. Rajeev
Dhavan. I have a great fascination. I grew up doing a hero worship for Rajeev Dhavan. He used
to live... very across the road.

RAJEEV DHavan: I am embarrassed.

YATINDER SINGH: No Rajeev, you are undoubtedly one of the greatest advocates, India
has seen.

CHIEF JUSTICE D.Y. CHANDRACHUD: Thank you.

YATINDER SINGH: My Lords... just...

CHIEF JUSTICE D.Y. CHANDRACHUD: We'll have a look at it. Thank you.

YATINDER SINGH: Your Lordships can I read that particular line?

CHIEF JUSTICE D.Y. CHANDRACHUD: We've seen that judgment, yes.

YATINDER SINGH: My Lords, and just one more incident, I will try to tell Your Lordship.
Bear in mind that not 30 seconds I'll take. Andre Weil was the greatest mathematician of last

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century. He was impressed by Gita. And during World War, when all the scientists were running away, he was a Jew, he came back to India. [UNCLEAR] was supposed to come to India. He got appointment at Allahabad University and, he got, unfortunately professorship in Aligarh Muslim University. Now he was impressed by Gita. India was a land of promise. He wanted it to be a.... He always used to quote Gita. Used to... There's a principle of [UNCLEAR]. He says, this is a new avatar like Vishnu had ten avataars. That's how he used to do. And unfortunately, he was trapped in AMU. Now AMU had an atmosphere which is say, let's say... put it... anti Hinduism kind of a thing, and they tried their level best... Your Lordship, hear me... hear me, there's some relevance. There's some relevance. Otherwise I wouldn't have insisted. He went back. He left AMU, embarrassed. Had he been here... the India would have been.... AMU would have been Princeton, AMU would have been Stanford, and India would be producing one of the finest mathematicians and we lost that. I'm obliged My Lords.

CHIEF JUSTICE D.Y. CHANDRACHUD: Now anything else that has not been said. We'll give you 30 seconds.

VIVEK SHARMA: 30 seconds. I will compete, Sir. Volume 2(c), page number 2. And I will highlight only two points of my Written Submission.

CHIEF JUSTICE D.Y. CHANDRACHUD: And what is the point? Just tell us alright.

VIVEK SHARMA: To consider the minority status of the Alligarh Muslim University under Article 30 of the prostitution, we have to examine, can an educational institution created by the Parliamentary institute enjoy minority in the article, 30 of.....

CHIEF JUSTICE D.Y. CHANDRACHUD: This has been argued, repeated.....

VIVEK SHARMA: I am forgetting the, please one minute Sir. If the answer is yes....

CHIEF JUSTICE D.Y. CHANDRACHUD: Pachaason bar yahi hua hai. Bahes issi point pe hai.

VIVEK SHARMA: That's why Sir that's why, please....

CHIEF JUSTICE D.Y. CHANDRACHUD: You are supporting that side?

VIVEK SHARMA: Being an intervener, and as a respondent, any respondent can support.....

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CHIEF JUSTICE D.Y. CHANDRACHUD: You are supporting the British?

VIVEK SHARMA: Yeah.

CHIEF JUSTICE D.Y. CHANDRACHUD: I don’t think they require support, right now.

VIVEK SHARMA: Now there can be two ways. If an educational institution had been established for minorities under the Act, it should be declared a parameter for granting it minority status under Article 30 of the Constitution. If the aspect of creating educational institution by the Parliamentary institute is for minority, it can also enjoy minority status under Article 30 of the Constitution now the Aligarh Muslim University is the well-established act is created by the AMU Act 1920 and passed by the imperial legislature. Let me say when they use the word Muslim in the AMU Act 1920. Secondly, Mr. Surendra Nath Banerjee was allowed to speak in that time in the debate as the representative of the Hindu community and he prayed and supported the bill. And also that time Governor General congratulated the Muslim committee. Clearly, the spirit of act was in the favour of...

SANJAY KUMAR DUBEY: My Lord, I am representing Respondent No. 10, who originally fought for the reservation. When the reservation was sought to. So, My Lord. I don’t want to repeat anything.. I want to highlight one very crucial aspect. Kindly see as discussed, how the genesis of the AMU, lies in the 1928. It started from the 1872, there were two groups moderate, called Wafadar Party and... So, My Lord, there were two prominent figures, who were the part of the moderate group. One was Mohammed Shafi, who tabled the Bill, page 43, Volume 4(C). It is specifically mentioned while tabled the Bill, the Mohammed Shafi said, the AMU like the BHU, having the all India characters. All India character means, Your Lordship, the national character. Second, prominent figure was, Dr. Maulana Azad, our great leader. He was present in the 1920, along with the Mohammed Shafi, that group. Another group, of course, did not agree and they started the Jamia, they passed the resolution on Jamia in the Aligarh itself. They started classes there, by buying some of the classroom and thereafter shifted to the Delhi, Your Lordship. Now the Maulana Azad, who was right in the 1920, also asked in the Constituent Assembly, was a part of the Constituent Assembly. In the...

CHIEF JUSTICE D.Y. CHANDRACHUD: That has been argued, that has been argued.

SANJAY KUMAR DUBEY: And, and, and, he was also...

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CHIEF JUSTICE D.Y. CHANDRACHUD: You're not here all this time. We've been here all the time.

SANJAY KUMAR DUBAY: And he was also in the 1951, as our first education My Lord...

CHIEF JUSTICE D.Y. CHANDRACHUD: Thank you. we will come back now.

SANJAY KUMAR DUBAY: Your Lordship, kindly allow me just five minutes, nothing more...

K. M. NATARAJ: Yes, I will not take any further time in this matter. If the Court permits, I'll give my written note.

CHIEF JUSTICE D.Y. CHANDRACHUD: Yes, Mr. Dhavan.

SANJAY KUMAR DUBAY: Your Lordship, kindly permit me to... My Lord...

CHIEF JUSTICE D.Y. CHANDRACHUD: Yes, Mr. Dhavan. Yes, Dr. Dhavan.

SANJAY KUMAR DUBAY: Seeking permission to upload my additional argument.

CHIEF JUSTICE D.Y. CHANDRACHUD: Sure, no problem. You can upload that.

SANJAY KUMAR DUBAY: One-two pointers...

CHIEF JUSTICE D.Y. CHANDRACHUD: But give it to the Nodal Counsel. Don’t upload it yourself.

SANJAY KUMAR DUBAY: Nodal Counsel will upload it. If time remains My Lord, I may be permitted to...

CHIEF JUSTICE D.Y. CHANDRACHUD: We’ll see at the end.

SANJAY KUMAR DUBAY: 5 minutes at the last.

CHIEF JUSTICE D.Y. CHANDRACHUD: Yes, Dr. Dhavan.

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**RAJEEV DHAVAN:** On the point of levy. I said on a point of levy, flattered though I am, but the only authoritative jurists in this country are Your Lordships. One has to be absolutely clear about that. I want to apologize to Your Lordships...

**CHIEF JUSTICE D.Y. CHANDRACHUD:** This was a little bit of good neighbourly behaviour coming in from Allahabad.

**RAJEEV DHAVAN:** I interned with Mr. Sibal and I told him, "tell me how 500 pages can be reduced to three, if you can teach me that, then I'm prepared, otherwise I'm not." So, he gave me lots of briefs to read and he is my guru. So, this side, I don't go beyond that to Allahabad. I'm sorry that I've interrupted My Lord, and I apologize. There have been two views given about me. One is that I come out blazing, with all guns blazing. The other I found the other day was "Dr. Rajeev Dhavan was the other senior Counsel who made his own detailed submissions with a mélange of legal acumen coupled with passion, thereby exacerbating the attack. I think this is good. Now, kindly 1(f). If Your Lordships will...

**CHIEF JUSTICE D.Y. CHANDRACHUD:** Yes.

**RAJEEV DHAVAN:** Is it uploaded, My Lords?

**CHIEF JUSTICE D.Y. CHANDRACHUD:** Yes.

**RAJEEV DHAVAN:** In my reply there are some questions that fell from Your Lordships. The question of indicia, for example, fell from Your Lordships. The questions of surrender versus continuity has been argued, and therefore I have to respond to that. National character versus an excellence. Therefore, My Lord, I'll briefly take Your Lordships through all that. If Your Lordships will just see the index first. This is a mixture of what they have argued that I have to respond to and some of the points raised by Your Lordships. Now, My Lord, much has been said about the scope of reference and it has been argued that Your Lordships are just to answer the unanswered question in *T.M.A. Pai*. My submission on page 2 is that, the reference in this case not having been delineated by the Court has to be abstracted from the '81 reference and more importantly, it has to be abstracted from the 2019 reference. Now on page 2 in 1.2 I say the reference is not on a single [UNCLEAR]. And then, My Lord in 1.3 I have indicated what can be gleaned from the reference in 2019. So, the first point is, was *Basha* correctly decided? Does it suffer from internal contradictions and reasoning on facts and law? *Azeez Basha* is squarely raised. I won't read the reference again. It's squarely raised as a point of reference. *Azeez Basha* needs to be reconsidered in the light of earlier and

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subsequent decisions that we have argued earlier, I won’t labour it. The effect of **Azeez Basha** on the future decisions of the Allahabad High Court, which applies **Azeez Basha** completely and strikes down the statutory character to the 1922 Act through the 1981, is it a usurpation of judicial power. I don’t think I need to labour too much on this My Lord, because it’s in my original written submission with the various case laws that support it. Then, My Lord, what is the effect of the National Commission for minority educational institutions. Now, the important point there is, it recognizes the rights of minority under Section 10, which I’ll elaborate later. And finally, was **Azeez Basha** correct in accepting the antecedent historical data on AMU’s Muslim character but denying it Constitutional significance while deciding the issue of minority status. And this is at variance with various decisions, and therefore it has been argued that in actual fact the question of antecedent data from their side has been argued on the negotiations. We have said that on the other hand, negotiations plus My Lord, the movement that started. In my respectful submission reference to Macaulay in 1837, or even the Wood’s letter is irrelevant. What is relevant My Lord is the 1904, that is what is relevant. That was a template that was indicated and Banaras Hindu University and AMU are the exceptions to that template and that has to be recognized. Then My Lord I move on, that it’s a question of appeal on whether **Azeez Basha**... We’ve raised these questions relating to **Azeez Basha** and therefore to say that **Azeez Basha** is not an issue, My Lord would be entirely incorrect. I won’t go more than that on this. The cross reference of the appeal is CA 2286, Questions 10, 13 and 14. This is squarely raised before Your Lordships, and there is no point taking a narrow interpretation that all that has been decided by Your Lordships is the unanswered 3(a). This is, broadly speaking on the reference, My Lord, the reference is not singular, but the reference is multiple and a mere reading of the 2019 reference will illustrate the various points I’ve indicated there. Now, My Lords, I then want to go into the question, and the way I have formulated it, is minority rights before and after the adoption of the Indian Constitution. The reason why I say before, My Lord, the 1909 Act recognizes the minority character of Muslims. In an electoral context, no doubt, but definitely the question of what constitutes a minority before the Constitution is squarely raised, My Lord, in the 1909 Act, in the 1919 Act, and in the Government of India Act. Later on one other minority is added, that is Sikhs. Therefore, minority status, My Lord, is something that was known before the Constitution. It isn’t a question that arises only after the Constitution. Certainly, My Lord, the Courts were aware and the relevant provisions, My Lord, of the particular statutes I’ll indicate later. After the Independence Act, there are two points that have been mentioned by Your Lordships. The first is the dispensation of Article 30. That’s important and the second is the dispensation of the UGC Act. Now, what prevailed My Lord after the UGC Act in essence is also prevailed before the Constitution as well had this minority character not being recognized, My Lord, there would have been no Partition of India. So, coming up from 1909, all the way to

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the Constituent Assembly debates, we see that the minority character is fundamental to our
understanding of what was there before the Constitution. Now, My Lord, let me take My Lords
through that portion of my submission on page 6, PDF 6. I've indicated My Lord in para. 2.1
that the Indian Council's Act, 8 out of 27 elected members were reserved for Muslims. This is
definitely an indication of the concept of minority before the Constitution. Then My Lord, the
Government of India Act, I've indicated that in the Upper House, out of 34 members in a 60
member house, 10 were to be elected by Muslim Separate Electorates and 1 member for the
Sikhs. Then My Lord, in the Lower House out of 104 who were elected in a 145 member house,
30 were Muslim constituencies and 2 were Sikhs. And then the Government of India Act, the
Upper House out of 156 in a house of 260, that's 104 to the rulers of the Indian states, 104
were given to the General Electorates. 49 for Muslims, 6 for SCs and 4 for Sikhs, 6 for women
and 2 for Christians. Then finally My Lord, in the Federal Assembly, out of 250 seats, out of
375 Muslims got 82 seats, 24 My Lord at that time, percent at that time and obtained nearly
33% of the seats. The point I'm indicating to Your Lordships, My Lord, when Nehru was asked
in July 1946, "Will you yield the question of political representation?" And he said, "We'll do
nothing of the sort." And that is the turn that takes place which leads to Partition. So, the issue
was fairly and squarely there. After the Constitution, Your Lordships will just have a look at
2.2 on page PDF 7. On the positive side, My Lord, 25 to 28 Guarantees, including freedom of
conscience, right to freely practice, profess a religion, right to establish charitable institutions
and non-interference in religious affairs or in imparting religious instructions. Your Lordships
had mentioned 29(2). "The reconciliation between 29(2) and 30(1) is you can't discriminate to
the other people", that's 29(2). But you can discriminate under 30 for your own people. Then
My Lord, on the negative side, I want to mention the importance of two aspects. The non-
discrimination aspect is one aspect and the positive part is Article 30 or 25 till 28, so I've
indicated that Articles 15(1) and 16(2) are the negative part dealing with discrimination. You
cannot discriminate on grounds of religion. But article 15(5) and 15(6) is important. I'll just
read that portion out. 15(5) ends with the underlying portion, 'other than the minority
educational institutions referred to in Clause 1 of Article 30.' So, this exception is an important
exception. Therefore, not only do you get Constitutional recognition, you also get statutory
recognition and likewise My Lord, 15(6) on PDF 8. It says, 'other than minority educational
institutions referred to in Clause 1 of Article 30.' So, My Lord, statutory recognition is given as
far as Article 30 is concerned, as far as 15 (5) and 15 (6) are concerned and Constitutional
recognition, of course, is there in Article 30 and 26. Parliament has accepted that minorities
have a right to establish and administer a University by virtue of the National Commission of
Minorities Act. The definition in the National Commission of Minorities Act is inclusive. And
then after the amendment that was made, it includes universities. 10(a) My Lord says a
minority educational institution may seek affiliation to any University of its choice, subject to
such affiliation being permissible within the Act under which the said University is established. When we come to the other statutory recognition Pramati at 2.4(a). We, however, hold that 2009 Act, insofar as it applies to minority schools aided or unaided is covered by Clause 1 of Article 30. Pramati arose in this way, whether certain aspects apply to the minority or not. And Pramati was absolutely clear, it does apply to the minority as well. Then My Lord, the Central Educational Institutions Reservation in Admission Act 2002, which also provides for reservations in higher educational institution. And an exception is carved out once again for minorities. So I’m looking at present in the Constitutional dispensation and also in the statutory dispensation, that is the voice of Parliament clearly saying that minorities are accepted in 15(5), 15(6) and the very statutes. Now the concept of minority goes to the root of minority protection under the Indian Constitution which has been recognized as a basic feature of the Constitution and its secular framework. Now, secularism has been understood by Your Lordship’s judgments. One of the important components of secularism is in fact, minority characters and their protection. Now, My Lord in Pramati a very interesting point was made by quoting the former Chief Justice Sikri. And what he says, My Lord, here, after quoting from Justice Sikri’s judgment in Kesavananda. I won’t read out that particular paragraph. Thus, the power and Article 21(a) of the Constitution vesting in the State cannot extend to making any law which will abrogate the right of the minorities to establish and administer schools of their choice. Now, the suggestion made by Chief Justice Sikri was in fact that you can’t even amend the Constitution as far as Article 30 is concerned. Then the concept of minority education goes to the root of minority protection, which has been recognized, My Lord, I’ve already said that. Over the page, My Lord we’ve already read these portions out to Your Lordships that minority institutions is consistent with the Doctrine of Equality. Once again, My Lord Justice Kirpal has been cited and My Lord Justice Khanna. Respondents suggested that an affirmative action of AMU’s minority status would be contrary to the public interest as it would be... I’m sorry, My Lord, my learned friend wants me to read the bit in T.M.A. Pai. Article 30(1) ensures protections to the linguistic and religious minorities, thus preserving the secularism of the country. So, there is a connection between secularism and an attempt was made to treat secularism and give it a narrow meaning. Minority protection goes through the heart of what secularism is about and consistent with the Doctrine of Equality. And in St. Xavier’s the portion which we have underlined special rights for minorities were designed not to create inequality, their real effect was to bring about equality by ensuring the preservation of minority institutions and by guaranteeing to the minorities, autonomy in the matter of the administration of those institutions. The differential treatment of minorities by giving them special rights is intended to bring about an equilibrium, so that the ideal of equality may not be reduced to a mere abstract idea, but should become a living reality and the result is through genuine equality and an equality not merely in theory,
but also in fact. Therefore, My Lord the point I’m making My Lord in this segment of my submission is, there is a Constitutional premium, as well as a statutory premium, which is attached to minority exceptions and the minority dispensation. It is not just Article 30, but if we go through the statutory dispensation, then it will become quite clear that Parliament has also come in to say we accept the minorities from 15(5) and 15(6). Now, My Lord, I come to page 11. The argument really on their side has been surrender and on our side has been continuity. It is ultimately left to Your Lordships to finally decide whether there was continuity or whether there was surrendering. And in our respective submission at 3.1, it is undisputed that MAO College and their affiliate bodies are the nucleus of AMU. Now, much has been said about the determination of fact which cannot be removed. In actual fact, there is only one and one only aspect of fact, that the MAO college and their affiliate bodies are the nucleus of AMU. That is the fact that was decided by Azeez Basha. And even if we accept their argument that facts cannot be changed in a reference which I believe is incorrect. There is facts and law. There is facts and there is law. All of them, My Lord, come under the dispensation of Bengal Immunity. So, when you look at all this in Bengal Immunity, [UNCLEAR]. When you look at them, certainly the foundational aspects of Azeez Basha can be re-examined and therefore this subtle distinction about facts not being the subject matter of appeal or reversal is not correct. Now, My Lord, here the statement of objects and reasons in the Preamble shows that the Muslims intended to convert and incorporate MAO College and its affiliate societies into Aligarh Muslim University. That, My Lord, you will just see the statement of objects and reasons. The Muslim University Association having requested the foundations of the University and certain funds and property being available to this end, it is proposed to dissolve that association of and Muslim MAO and to transfer the properties to these new bodies. Now, My Lord, in the Preamble it also says a teaching and residential University and to dissolve the Muhammadan Anglo Oriental College, Aligarh and the Muslim University Association and to transfer and vest all their properties. It is for Your Lordships to decide whether the surrender argument is an accurate argument or is it that it was a continuity? And as far as continuity is concerned, we have mentioned in 3.2(b). 4(1) and Section 4(2), assets of the MAO and its affiliate bodies in their entirety were transferred and vested in AMU. That is an argument of continuity. It’s not an argument of surrender. Then My Lord, Section 4(3). Reference to the MAO College or its affiliate bodies in any enactment prior to 1920 will now be construed as AMU. That is an argument also My Lord in my respectful submission of continuity. There is no surrender involved. Obviously, one phase finished and a new one started, but the continuity is very much a part of this process. Then, My Lord 3, 4. Section 4 references to MAO college or its affiliates body with any will need or other occupancy will now be construed as AMU. This is an argument of continuity. Then My Lord, Section 7, donations received, including 30 lakhs collected by the Muslim community is to be kept as a reserve fund. That too, is an example of

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continuity. There is no surrender involved. The Act is absolutely clear that these are provisions of continuity. See on the top of Page 12, all employees become employees of AMU. Now, Your Lordship, we are in service law. When this transfer takes place, it is not an argument of surrender; it's an argument of continuity. And most important, the objects of MAO College, promotions of Islamic Learning and special provisions for Muslim students have been incorporated in the 1920 Act. Section 5(2), we have read all these before to Your Lordships, so I'll just quickly run through them. 5(2) on the promotion of Oriental and Islamic studies and instructions in Muslim Theology and Religion. 5(12) furtherance of art, science, and other branches of learning, including professional studies in technology, Islamic Learning, and Muslim Theology. The proviso to Section 8 says, 'the power to exempt women', which is very much My Lord, an aspect of continuity. Section 9, compulsory instruction in Muslim religion for Muslim students and then, of course, was later on deleted. Establish intermediate colleges and schools within the vicinity of MAO College and provide instruction in the Muslim Religion and Theology. This is precisely what was taking place before the 1920 Act. Then, My Lord, 27(j) can make statutes for the instruction of Muslim students in Muslim religion and theology. This too My Lord, is a continuation from the spirit of MAO. Then My Lord, the 1920 Act ensures complete non-interference in matters affecting religion or religious instruction. For instance, the proviso to Section 28 provides that the instruction of Muslim students in the Muslim Religion and Theology did not require submission and approval that was ordinarily applicable under Section 28. Then students, and this is the most important example of continuity. That existing students in the MAO college would become the responsibility of AMU, including provisions of instructions as per the prospectus of Allahabad University. So, now this can only be an argument of continuity. It cannot be an argument of surrender. It says, those students who were there will come now in the dispensation of the AMU Act. And then Statute 21, the registered graduates was to contain graduates from other universities who had been educated for at least two years in MAO College. This is an example once again, of continuity. Now, the next is Azeez Basha squarely accepts that the existing MAO College, this is a quotation, was made the basis of the University and was made over the authorities established by the 1920 Act for the administration of the University along with the properties and funds attached to the College. The major part of which has been contributed by Muslims. Then it is true that the... clear from the 1920 Act that the nucleus of the Aligarh University was the MAO college, which was till then a teaching institution under the Allahabad University. The conversion of that college, if we may use the expression, into a University was, however, not by the Muslim minority. It took place by virtue of the 1920 Act, which was passed by the central Legislature. The fact that it was based... this is another finding, a fact that it was based on MAO College would make no difference to the question as to who established Aligarh University. Then ‘22... [INAUDIBLE] in establishment, which we already argued, so I’m not
taking Your Lordships to it. But the mechanism My Lord, was the 1920 Act. ’22 Act didn’t call
for any surrender. It was just a mechanism by which you converted MAO and then the
Annexure to 1920 gives the name of foundation members. I am instructed, My Lord, and I’ve
seen that particular list of Trustees. All 124 were Trustees in MAO. Mr. Dwivedi thought this
was not possible but there were 124 Trustees. Then My Lord, Annexure- Foundation Member,
I will not go... And then, of course, in the 1920 Act, no person other than a Muslim shall be a
member of the Court, which of course, was changed in 1951. Then My Lord, as I indicated to
Your Lordships there is a limit to which imperial history such as Macaulay’s Minute, 1837,
Woods Despatch and Hunter Commission report have significance in determining the
minority character. It is not necessary to go into Macaulay’s understanding that the idea was
to reproduce Englishmen, nor was it necessary to refer to the Hunter Commission on
recognising degrees. Now My Lords, there’s a very interesting book on Napoleon. And Peter
Gale, who edits that book, says we can go into history as an argument without end. And this is
what has really happened. One side, citing what they believe is surrender and we citing what
was the mood at that particular point in time as explained in the various provisions and the
background. What is relevant My Lord, when we look at Parliamentary history is not these
background factors. What is relevant may be the speech of the Minister, the Select Committee
and Parliamentary debates. All the rest of it, My Lord are not relevant except as an exercise
and movement. And there has been so much of a difference between what we argue, that an
entire movement took place and their argument of surrender. Because what we’ve argued is,
there was a movement from the original college and then schools, and then it culminated in
the 1920 Act. So My Lord, the question of surrender did not arise at any point in time. It is a
play on words, nothing more than that. Surrender always sounds like a stronger word than a
movement but there was no surrender at any point in time. And this argument, My Lord, is
entirely and totally a play on words and nothing more than that. Then My Lord, through a
selective reading of the material on AMU’s historical antecedents, the Respondents have
argued that the Muslim community surrendered the denominational character of AMU. The
1920 Act read as a whole, along with the statements of objects and reasons in the Preamble,
clearly reflect on the denominational nature of AMU. The legislative debates are unequivocal
to support this view. So the Education Minister... I’ve given the references, but I don’t want to
read all of them out. The Education Minister when introducing the AMU Bill narrated the
entire history of how AMU came into being from the foundation of MAO College to
negotiations with the Muslim University for its conversion into a Muslim University. The
education member also repeated, used the phrase Muslim University and stated that it will be
of immense benefit to the Indian Muslims. Then I have referred to Khan Bahadur’s means
Asad Ali Khan, though we are first in the field of launching out a scheme for a teaching and
residential University on denominational lines our sister community, which started much later

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than the Banaras scheme, achieved their objects sooner than us. The Raja Mahmudabad this
will be the second denominational University in this country. I'm making this point because it
is really, really very important, because that was the major argument My Lord canvased almost
right throughout the day. That these are arguments of surrender. You look at it from another
point of view, eventually, of course, Your Lordships will have to decide it. On page 16... the
Raja Mahmudabad... Then My Lord, PDF 16. At the time of passing the bill, the Education
Minister stated “My Lords, today Your Excellency's government is committed to the custody
of the Muslim community, a priceless trust, the incalculable benefits of which will be enjoyed
not only by themselves, but also their children and their children’s children.” And the
Governor General says before putting the question, “I’d like to add my congratulations to the
Muslim community on the passage of the Bill.” Now, this being an important point, My Lord.
Eventually, Your Lordships will decide and look at the debates and the so called items of
surrender. I think they're irrelevant until we've reached the 1919 bill. They're completely
irrelevant because ultimately it is that bill, which was converted into an Act read as a whole,
that will determine whether it is a surrender or whether it is a continuation. I've already made
that argument. Now important question, My Lord, which is consistent with their argument on
what is the *indicia* of a minority and My Lord, the Chief Justice said, please delineate those
particular... So I'll read it. The question of indicia of the minority is an issue which squarely
arises from the issue number 3(a) left open in *T.M.A. Pai* and quoted in the reference order
of 2019. We have divided the *indicia* to two parts. The first is factors which are relevant to be
considered, which are indicative of the minority character and factors which are not
determinative of minority character of an educational institution. The determining factors are
founders should belong to either the religious or linguistic minority, the community must be
numerically less than 50% of the total population in any State. This is *T.M.A. Pai*. This is the
numerical test. Historical antecedents of the institution, which show the active involvement,
intention and contributions of minority founders of the community. So, that My Lord is taken
straight from *St. Stephen's*. Their argument that if *Stephen's* were invoked to determine
the minority character then the historical antecedents will clearly show that the contributions
was active involvement, intention and contribution of the minority. Now My Lord, paragraph
8, it was argued that there's nothing in the statute, specifically mentioned the fact that *Azeez
Basha* was being overruled, but para 8 and I must bring it to Your Lordships attention, para
8 clearly goes against *Azeez Basha*. I'll just read that again. Article 30(1) has been construed
by this Court without referring to those cases, it is sufficient to say that the clause
contemplates two rights which are separated in point of time. The first right is the initial right
to establish institutions of minority choice. Establishment here means the bringing into being
of an institution, and it must be by the minority community. The next sentence is important.
It matters not if a single philanthropic individual with his own means founds the institution

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or the community at large contributes to the funds. Now, it is our submission earlier to which
there is no reply that even if one single philanthropic person were to contribute and other
contributions were made. Funding, My Lord, would not be an issue whether it's 100% or less
than 100%. It is of no consequence whatsoever. The position in law is the same and the
intention in either case must to found an institution for the benefit of a minority community
by a member of that community. It is equally irrelevant that in addition to the minority
community, other than from other minority communities or even from the majority
community can take advantage of these institutions. This gets us into the question that there
were several interpretations in Azeez Basha, whether it means, established or not, and this
now effectively indicates that the issue is one of founding and it can be by one individual.
Contributions can come from other individuals, and it would make no difference to the
minority character. Then over the page, I'll skip 4. Constitutional documents such as State
statutes, rules or regulations read as a whole should show the predominance of the minority
community that's St. Stephen's. Administration of the institution, if it's vested in the
founders or persons in whom the founders have faith and confidence. Now, this is an
important point because you needn't have found it. The idea here being that it must be of
people you have confidence in and this is important because I may put people in the operative
institutions but as long as I have faith in the founders, and the founders and others in this
stream of events, it is their faith and confidence that is important, not 100% this way or that
way. Then imparting of religious education, or providing a religious institution and worship.
This is, My Lord, also a point that goes into indicia. And then symbols such as the name,
arquitectura, motto and other cultural symbols of the minority. Now, in Allahabad, there was
about two, three volumes of the architecture, of the invocation to God and invocation to Allah.
This is repeated in St. Stephen's because they say these are also indications and part of the
indicia of minorities. Now, factors which may not be determinative. In corporation or
establishment by or under a statute. This may not be determinative. Recognition of degrees
may not be determinative. Receive or granting aid, funding from members outside the
minority community quoted with approval at T.M.A. Pai, para 109 and Patro, role of
Government or its regulators to prevent maladministration. This goes to the heart of the role
of the oversight of the Rector or the Visitor, as the case may be. I made a distinction earlier
between what are the oversight provisions and what are the administrative provisions in this
statute. So, even if we say these three declaratory provisions were, in fact ruled out the rest of
the statute will certainly show the minority character. Then regulation for promoting
excellence. Your Lordships will see that because it's an important point in only this sense that...
and I'll come to the national character My Lord, later... how can it be that when you promote
excellence to the highest point, which is of national character, how can it possibly, in my
respectful submission, how can it possibly take away the minority character? I will make some

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submissions a little later on. As far as the Item 63 in the List 1 is concerned. Provision of secular
education and admission of non-minorities is not as a factor which will be determinative.
Provision of secular education and admission of non-minorities My Lord, is not... I'm not
going to read out the portions of the judgments indicated them. My Lords, I'm not going to
take away from the minority character. In fact the entire set of arguments was we want to be
an institution of excellence. So, if I reach right over the top and say it's, national character, you
say this will take away, and that couldn't be right because we accept that institutions of
excellence will certainly be a factor that you will take into account. Then, recognition as
institution of national importance is not a definitive character. Presence of non-minorities in
administration and day to day management doesn't detract in any way from the minority
class. Now, I want to address the question of this national character. Let us be clear of the
four points which are not here, which I want to... My Lord, Entry 63 relates to competence.
Then, My Lord, 63, Entry 63 is subject to Article 30. Then I'll leave that for the moment. Those
are the arguments that arise out of Entry 63. It relates to competence. These are fields of
legislation and nowhere can we argue... I'm sorry. They say I'm going too fast. So, much of it
has been argued before, it's not My Lord....

**CHIEF JUSTICE D.Y. CHANDRACHUD:** What is meant by national character? I mean,
what was there in the Constitution? Why did the introduce these words national character?
Because they seem to suggest that national character is in...

**KAPIL SIBAL:** National importance not character.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** National importance.

**KAPIL SIBAL:** Those are two different things.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** Right. They are suggesting national
importance to be in contrast to denominational. That's their whole argument.

**RAJEEV DHAVAN:** My Lord, my learned friend will elaborate on that. My Lord, in any case
the opposite of national character, as it were importance... national importance. The converse
side of this particular argument is that these are then institutions of super excellence.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** Yes.
RAJEEV DHAVAN: May I just read that portion, My Lord? Now just see the institutions known at the commencement of this Constitution. Since Your Lordships were hurrying up the rest, I thought I was under that aspect as well, hence the speed. I apologise. Now let's have a look at 6. The institutions known at the commencement of this Constitution as the Benares Hindu University, Aligarh Muslim University and Delhi University. The University shall be established in pursuance of Article 371E and any other institution declared by Parliament and by law to be an institution of national importance. So My Lord, its national importance. Then have an look at 64. That is on the technical side and once again, the emphasis in Entry 64 is once again institutions of national importance. Then a variant of this is in Article 65, that is, professional education, promotion...

CHIEF JUSTICE D.Y. CHANDRACHUD: Actually, Dr. Dhavan, if you see, prior to the 42nd Amendment to the Constitution, Entry 11 of the State List dealt with education, including universities subject to the provisions of Entry 63, 64, 65, and 66 of List 1 and Entry 25 of List 3. So, education was a state subject to Entry 63 to 66.

RAJEEV DHAVAN: Then it became a concurrent subject.

CHIEF JUSTICE D.Y. CHANDRACHUD: And Entry 25 of List 3 prior to the 42nd Amendment read, vocational and technical training of labour. Therefore, what Entry 60, say in this case, Entry 63 of the Union List did was, once the subject was in the Entry 63 of the Union List, namely institutions of national importance, these two, and any others Parliament may declare. It was taken out of the fold of the State List. So the exclusive jurisdiction to legislate was conferred upon Parliament. Therefore, it was really something which related legislative competence. What the 42nd Amendment did was, it deleted Entry 11 of the State List, it substituted Entry 11 of the Concurrent List because that read vocational and technical training of labour and now post the 42nd Amendment, you see Entry 25 of List 3, which says education, including technical education, medical education in universities subject to Entries 63, 64, 65, 66. Therefore, ordinarily, but for Entry 63 of List 1, the entirety of the field of education would have been in the State List prior to the 42nd Amendment and after the 42nd Amendment in the Concurrent List. In respect of these two institutions, Aligarh and Banaras Hindu University and such other institutions as may be declared to be of institutions of national importance, the legislative competence is exclusively vested in Parliament. So the idea of this was, it appears that in respect of institutions of national importance, there must be some degree of uniformity of the legislative structure. Therefore exclusive jurisdiction is conferred upon Parliament under Article 245.
RAJEEV DHAVAN: And not in the States.

CHIEF JUSTICE D.Y. CHANDRACHUD: And not in the States. That seems to have been the scheme of the Constitution, pre the 42nd Amendment and post the... Now, we want to ask you, and that's something which we have been reflecting on their argument. They say that once an institution is declared as an institution of national character then calling it a denominational institution would somehow seem to detract from the institution’s status of national importance. Is there any substance there? Obviously your argument is on the contrary, but why do you say that there's no antagonism between an institution being of a national importance and yet having a minority character.

RAJEEV DHAVAN: After T.M.A. Pai indicated that the States will be the unit on which you determine the numerical character.

CHIEF JUSTICE D.Y. CHANDRACHUD: Right.

RAJEEV DHAVAN: There is of course, My Lord, a different argument by Justice Ruma Pal, where she said, it depends on the statute. But once you have accepted that these are the state subjects, which is linked to the idea of numerical importance, then the states will legislate. If it has reached a level of excellence and national importance is an indication of excellence that is over and above. It applies to Delhi University, it applies to Banaras, it applies to Aligarh and a huge number of other institutions. So, at the end of the day, this was left in the preserve of the List 1. So that's the important point here that they didn't want to...

CHIEF JUSTICE D.Y. CHANDRACHUD: So, the distribution of the subject whether it's in List 1, List 2, or List 3 would have no bearing on its minority or non-minority character, because these are really subjects of legislation and define the distribution of competence between Parliament and the State Legislatures on the one hand.

RAJEEV DHAVAN: Yes, that's right and these Lists are actually on the question of competence.

CHIEF JUSTICE D.Y. CHANDRACHUD: Absolutely.

RAJEEV DHAVAN: Nothing else and therefore if competence vests in the national character or national aspects then quite clearly, what they are trying to say here is that will be declared. It doesn’t go further than saying that it is of national character across states.

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CHIEF JUSTICE D.Y. CHANDRACHUD: I'll just show you one or two other entries to buttress this interpretation. Once an institution has been declared by Parliament to be of national importance, what would otherwise have fallen for regulation as a List 3 item, is taken out of List 3 and then vested under Entry 63 of List 1. Take, for instance, Entry 52 of List 1. Industries, the control of which, by the Union is declared by Parliament, by law, to be expedient in the public interest. So, once there is a declaration by Parliament within the meaning of Entry 52 of List 1, it goes out of industries which fall within the control of the State Government. See, for instance Entry 24 of the State List. Industries, subject to the provisions of Entries 7 and 52 of List 1. Entry 52 of List 1 says, 'those which are declared by Parliament'. So, once there's a declaration... absent a declaration, it still continues to be a State subject. Once there's a declaration, it ceases to be a State subject and it becomes a Central subject. Likewise, in the case of Entry 66, these national institutions of national importance, if there is no declaration by Parliament, we are not dealing with for a moment, AMU and BHU. If there is no declaration by Parliament within the meaning of Entry 63, it's still governed by the State's power to legislate by Entry 25.

RAJEEV DHAVAN: Significant point would be does this trump Article 30(1) or not. And in all, whether it's the legislation of the State or whether it's legislation of national...

CHIEF JUSTICE D.Y. CHANDRACHUD: Conceptually, it should not because all law making in pursuance of the jurisdiction under Article 245 and 246, subject to the Entries, is subject to the Fundamental Rights.

RAJEEV DHAVAN: It must be, My Lord.

CHIEF JUSTICE D.Y. CHANDRACHUD: So, the fact that something is of a national importance may not at the Constitutional level be antagonistic to the concept of... it's still yielding to minority rights. Whether there are minority rights here is a separate issue, but at a conceptual Constitutional level you can't accept that merely because it is of a national importance therefore, there cannot be minority control over the institution. That wouldn't be the scheme of the Constitution.

RAJEEV DHAVAN: That's right. Because what happens, national importance is there, as I indicated as a sign of super excellence, so that is there. But there's nothing within the competence that says it will trump Article 30(1). Nothing. Their argument My Lord, is that once you enter into the arena of national importance, then instantly it cannot be a minority

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institution. That's their argument. There's nothing to suggest that it can't be. Fundamental
Rights will trump the issue of competency. And the subject to the provisions in the State List
is writ larger over many other Entries.

CHIEF JUSTICE D.Y. CHANDRACHUD: See, for instance Entry 54 of the Union List.
Regulation of mines and mineral development to the extent to which such regulation and
development under the control of the Union is declared by Parliament, by law, to be expedient
in the public interest. And then Entry 23 of the State List, regulation of mines and mineral
development subject to the provisions of List 1 with respect to regulation and development
under the control of the Union. So, once Parliament makes a declaration under a List 1 subject
then that is to that extent denuded from the power of the State under List 2...

RAJEEV DHAVAN: Noting the scheme of 245 and 256, that is all on the question of
competency. But their argument goes one step further that is if this is of national importance,
it can't have a minority character. That's the essence of the argument that they have made on
public importance, national importance. Article 30 cannot be read out of existence on an issue
of competency. And nothing in these schedules, My Lord, of whatever nature, whether its
public interest or whether its national importance... will all, every single statute in any of the
Lists, will be subject to 30, and as indeed Article 19, 21, 26.

KAPIL SIBAL: My Lords I just wanted to mention Dr. Ambedkar in the context of institution
of national importance, said the following, 'with regard to subsequent part of the Entry relating
to any other institutions declared by law, by Parliament, it seems to me that it is desirable to
retain those words because there might be institutions which are of such importance from a
cultural or a national point of view, and whose financial position may not be as sound as the
position of any other institution and may require help and assistance of...

CHIEF JUSTICE D.Y. CHANDRACHUD: Where do we get this? In the...

KAPIL SIBAL: This is Dr. Ambedkar, My Lord, where the draft Constitution.

RAJEEV DHAVAN: This is extracted in my submission also.

CHIEF JUSTICE D.Y. CHANDRACHUD: Volume 4(b), 118.

KAPIL SIBAL: National importance because it symbolizes the ethos of the Constitution,
where...

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JUSTICE SANJIV KHANNA: Therefore, the Parliament has been given the power.

KAPIL SIBAL: That’s correct. It can’t be, My Lords, that merely because it’s a minority, it will not be of national importance to give it the status of an institution of national importance. It can’t possibly be. I just... I’m sorry, My Lord, I interrupted.

RAJEEV DHAVAN: The importance of this is when can the minority character under Article 30, when does it become defeasible? Never, My Lord. In fact Chief Justice Sikri goes to the extent that even the amendment power must preserve the nature of a minority.

CHIEF JUSTICE D.Y. CHANDRACHUD: Alright. Let’s go to a page 19.

RAJEEV DHAVAN: That is the real point here. What is it? It’s competence, exclusion of competence and then subject to Article 30, Sub-Clause 1. It can never My Lord, Fundamental Rights can neither be made nor are they defeasible and that premium on Fundamental Rights cannot be taken away by the issue of competency. That’s basically the argument. How they distribute the power between the Centre and the State is different. Because even in 62 the institutions known as National Library, Indian Museum, etc, declared by Parliament...

CHIEF JUSTICE D.Y. CHANDRACHUD: Dr. Dhavan, perhaps what Basha said was...

Basha’s logic was that you could not have set up a University whose degrees were recognized. And because you could not have set up a University whose degrees would be recognized, you followed this route and because you followed this route necessarily, there is a surrender of your... They don’t say surrender. Therefore, this is not established by a minority. That’s the logic.

RAJEEV DHAVAN: This was used in Azeez Basha in only one context - property. The word surrender is used in only one place.

JUSTICE SANJIV KHANNA: The other side has gone beyond Basha, reasoning of Basha.

CHIEF JUSTICE D.Y. CHANDRACHUD: They say there was a complete surrender.

JUSTICE SANJIV KHANNA: They have referred to the antecedent facts that repeatedly there was... different point of views and by choice they accepted certain conditions which
indicate that they gave up the status as a minority institution even if we apply the dictum and
doctrine as exists post the Constitution.

RAJEEV DHAVAN: That's right. But they've elevated national importance to be a denial of
30.

CHIEF JUSTICE D.Y. CHANDRACHUD: That's a separate issue altogether.

RAJEEV DHAVAN: Fine. Now, if you look at 62, 63 and 64. Once again, it requires a
declaration of national importance. And when it comes to State List. There are many
provisions in the State List that make it subject to Union List. This is a question of division of
power, nothing more. Now, may I come back to my...

CHIEF JUSTICE D.Y. CHANDRACHUD: Yes. Page 19?

RAJEEV DHAVAN: My Lord, I hope I made myself clear on factors that go to the root and
the factors that are not determinative. Aid is not determinative. Admissions are not
determinative. In fact, St. David's case that is cited there, they had the right to grant degrees,
but they said because there is no statement that it is a University. We won't treat it as a
University. So, the converse proposition arises from St. David's in Azeez Basha. Now, I
also wanted to emphasize that the absence of a statutory declaration of minority status is not
determined. Your Lordships will come to PDF 19. 4.5.

CHIEF JUSTICE D.Y. CHANDRACHUD: Yes.

RAJEEV DHAVAN: Sir Syed Ahmad... this is the movement of the community, not just the
negotiations. Sir Syed Ahmad, members of the MAO College Committee, Trustees of MAO
College, and members of the Muslim University Association were all Muslims. The reserve
fund of 30 lakhs was substantially donated by members of the Muslim community. The
historical antecedents clearly show the predominant role of the Muslim community in
founding AMU. The intention of the founders to establish AMU for the benefit of the Muslim
community is also unequivocally reflected in historical documents, including debates to the
1920 Act. The 1920 Act must be read as a whole and we find that even if the minority character,
we take away the declaratory provisions, it will still be established from the Act as the whole,
whether it is of minority character. Because of the various provisions which are provisions of
continuity and provisions which repose a certain amount of faith in the Muslim community.
Then, come (v) of 4.5. 3 out of 4 officers of the University, this is, in the 1920 Act, Chancellor,
Pro-Chancellor and Vice-Chancellor were required to be Muslim. If we are looking at the 1920 Act. The Court, being the supreme governing body, were required to be Muslims by law. That is again, we are looking at the 1920 Act. The two other authorities Executive Council, Academic Council were predominantly Muslim, because the majority of them had a seat at the top. Then My Lord, the others that I've already referred to.

CHIEF JUSTICE D.Y. CHANDRACHUD: Mr... Dr. Dhavan...

RAJEEV DHAVAN: My Lord, I prefer Mr., Dr. was 50 years ago.

CHIEF JUSTICE D.Y. CHANDRACHUD: That we have a continuing dialogue since that time when you were arguing Ayodhya before us. But we have to rise today at 3:30. In the highest traditions of the Bench, two of my colleagues are going out of town for a wedding this evening and coming back at 01:00 at night so that the CB hearings are not disturbed. So I thought, I'll just give them a little more time to reach the airport. But they said that they will not allow CB hearings tomorrow... Justice Surya Kant and brother Justice Sharma said that we'll come back in the night so that we are here on duty tomorrow morning. So, we will rise right now. Tomorrow morning we'll continue. Dr. Dhavan, just one last thing, if you could maybe dwell on the administration aspect because they have dealt quite substantially that administration was never vested in Muslims because...

RAJEEV DHAVAN: It’s in the next part of the note and Mr. Sibal will deal with it more elaborately.

CHIEF JUSTICE D.Y. CHANDRACHUD: Fair enough.

END OF DAY'S PROCEEDINGS