IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2286 OF 2006

IN THE MATTER OF:

Aligarh Muslim University … APPELLANT

VERSUS

Dr. Naresh Agarwal & Others … RESPONDENTS

VOLUME I-F

SUBMISSIONS IN REJOINDER

ON BEHALF OF ALIGARH MUSLIM UNIVERSITY

By
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I. SCOPE OF REFERENCE

1.1. Various questions have been raised on the nature and scope of this reference, including whether the reference is limited to the unanswered question [No. 3(a)] in *TMA Pai* (2002)] or the entire appeal.

1.2. This reference is not on a singular issue. The reference order of 1981 (*Anjuman*) and reference order of 2019 (i.e., order dated 12.09.2019 in this appeal) creates several points of reference, which include the correctness of *Azeez Basha*, impact of *Yashpal* (2005), and those relating to NCMEI Act, 2004.

1.3. The correctness of *Azeez Basha* is central to the present reference. The following issues have been delineated based on the two reference orders of 1981 and 2019:

(i) Was *Azeez Basha* correctly decided, and whether it suffers from internal contradiction and reasoning on facts and on law?

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

(iii) What is the effect of *Azeez Basha* on the future decision of the Hon'ble Allahabad High Court which applies *Azeez Basha* completely and strikes down the statutory amendments to the 1920 Act through the 1981 Amendment Act as a usurpation of judicial power?

(iv) What is the effect of National Commission for Minority Educational Institutions Act, 2004 ('NCMEI Act') read with the University Grants Commission Act, 1956 ('UGC Act')? Should *Azeez Basha* be reconsidered in the light of the NCMEI Act (as amended in 2010) and read with UGC Act as considered in *Prof. Yashpal v State of Chhattisgarh*, (2005) 5 SCC 420?

(v) Was *Azeez Basha* correct in accepting the antecedent historical data on AMU's Muslim character, but denying its constitutional significance while deciding the issue of its minority status, which is at the variance with *St. Stephen's College vs University of Delhi*, (1992) 1 SCC 558 [5-Judge Bench], *Rev. Father W Proost vs State of Bihar*,

(1969) 2 SCR 73 [5-Judge Bench], and *Right Rev. Bishop SK Patro vs State of Bihar*, (1969) 1 SCC 863 [5-Judge Bench]?

(vi) Is *Azeez Basha* contrary to the Constitutional dispensation on rights of minorities under Articles 29 and 30 discerned before the Constituent Assembly Debates and approved in *TMA Pai* (*Pr. 94, 147, 203 to 221*)?

1.4. Both parties agree that the words 'establish' and 'administer' in Article 30(1) must be read conjunctively, and not disjunctively. This is a non-issue on which much emphasis has been made by the Respondents.

1.5. It is also not in issue that the right to administer the educational institution flows from the proof of establishment, although they may exist in different points in time.

1.6. The Union of India, their appeal (bearing C.A. No. 2318 of 2006) has also questioned the correctness of *Azeez Basha.*

A. It is not open for the Union of India to make out a new case, contrary to their pleadings and questions of law urged before this Hon'ble Court.

- *See* Questions of Law @ XLVI, XLVII, XLIX, LIII, and LV. [Vol. 3-B @ Pg. 365 - 367]

B. Union of India is duty bound to defend the statutes enacted by the Parliament. The arguments advanced by the Ld. Solicitor General to the extent they dispute or reject the minority character of AMU is contrary to the will expressed by the Parliament under the 1981 Amending Act.

1.7. The submission that rights under Article 30(1) apply only to institutions established after the adoption of the Constitution is not an issue in this reference, and as such unsustainable.

A. This proposition has been rejected in *Kerala Education Bill* (1958) [Vol. V-A @ Pg. 60], that was decided before *Azeez Basha.*

> … We do not think that the protection I958 and privilege of Art. 30 (1) extend only to the educational institutions established after the date our Constitution came into operation or which may hereafter 1957 be established. On this hypothesis the educational institutions established by one or more members of any of these communities prior to the commencement of the Constitution would not be entitled to the benefits of Art. 30 (1). The fallacy of this argument becomes discernible as soon as we direct our attention to Art. 19(l)(g) which, clearly enough, applies alike to a business, occupation or profession already started and carried on as to those that may be started and carried on after the commencement of the Constitution. There is no reason why the benefit of Art. 30(1) should be limited only to educational institutions established after the commencement of the Constitution. The language employed in Art. 30(1) is wide enough to cover both pre-Constitution and post-Constitution institutions.

B. *Azeez Basha* proceeds on the assumption that a university could have been established by minorities, and that too prior to the adoption of Constitution.

C. This proposition has stood the test of time and including the reference before the Eleven Judge Bench in *TMA Pai* (2002). Therefore, all institutions established either before or after the adoption of Constitution are entitled to claim minority status.

1.8. Respondents' contention that *Azeez Basha* should not be overruled as it held the field for several decades in without any force.

A. Correctness of *Azeez Basha* has been questioned for a large part of its existence: from the 1981 reference in *Anjuman*, the Amending Act of 1981, and the issues framed in *TMA Pai* (2002). Thereafter, it has again been referred to a larger bench by the 2019 reference order in the present appeal.

B. When it has found earlier decisions to be wholly erroneous, this Hon'ble Court has overruled long standing decisions. For instance,

(i) In 2016, this Hon'ble Court in *Jindal Stainless Ltd v State of Haryana* over-ruled long-standing decisions, including *Automobile Transport (Rajasthan) Ltd v State of Rajasthan* (1962) and *Atiabari Tea Co Pvt Ltd v State of Assam*, (1961).

(ii) In *RC Cooper v Union of India*, (1970) 3 SCR 530, this Hon'ble Court over-ruled its earlier long-standing decision in *AK Gopalan v State of Madras*, (1950) SCR 88.

C. It is settled law that the rule of stare decisis is not an inflexible rule, and cannot come in the way of reviewing earlier precedents if it perpetuates an error or is detrimental to general public.

- *Bengal Immunity Co Ltd v State of Bihar*, (1955) 2 SCR 603 (@ 631):

  "… In any case, the doctrine of stare decisis is not an inflexible rule of law and cannot be permitted to perpetuate our errors to the detriment to the general welfare of the public or a considerable section thereof. …"

1.9. Respondents' contention that AMU is a *sui generis* institution is not a valid ground to avoid the reconsideration of *Azeez Basha*. Every minority education is a standalone institution to serve unique needs of their community, which includes catering to the educational needs of their community, conserving their unique script or culture, and achieving standards of excellence.

II. MINORITY RIGHTS BEFORE & AFTER THE ADOPTION OF INDIAN CONSTITUTION

PROPOSITION **Minorities have a special position before and after the adoption of Indian Constitution. They have dual protections, a positive and a negative side. In addition, statutes of the Parliament have accepted the special position of minorities, especially in matters of education.**

2.1. Religious minorities were recognized as a distinct class even before the adoption of Constitution.

A. Indian Councils Act, 1909

(i) 08 out of 27 elected seats in the Imperial Council were reserved for the Muslim separate electorates.

(ii) In Provincial legislatures too, provision of separate electorates made. For instance, in Bombay Council, out of 21 elected, 4 to Muslim out of 7 class electorates.

B. Government of India Act, 1919

(i) In the Council of State (Upper House) – out of 34 elected members in 60 member House, 10 were to be elected by Muslim separate electorates (01 member to be elected by Sikh separate electorate)

(ii) Legislative Assembly (Lower House) – out of 104 elected in 145 member House, 30 were from Muslim constituencies, and 2 by Sikh.

C. Government of India Act, 1935

(i) Upper House: Out of 156 in the House of 260 members (104 to the rulers of Indian states), 140 seats were given to provinces of which 75 were general electorates, 49 for Muslims, 6 for SC, 4 for Sikh, 6 for women, 2 for Indian Christians.

(ii) Federal Assembly (Lower House): 250 seats out of 375 allotted to provinces (125 given to Indian States), Muslim got 82 seats, i.e. 24 % of population at that time obtained nearly 33% of seats.

2.2. Religious minorities have a special position in the Constitution.

A. On the positive side,

(i) Articles 25 to 28 guarantees, *inter alia*, freedom of conscience, right to freely practice and profess a religion, right to establish charitable institutions, non-interference in religious affairs, or in imparting religious instructions.

(ii) Article 29 and 30 guarantees the right to establish and administer educational institutions "of their choice," including the right to conserve distinct language, script, or culture and to provide secular education for the betterment of their community.

The rights of minorities under Articles 25 to 28 and Articles 29 and 30 are 'group rights'.

B. On the negative side,

(i) Articles 15(1) and 16(2) prohibit *inter alia* discrimination based on religion, which includes religious minorities.

> 15.(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
>
> 16.(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(ii) Articles 15(5) and 15(6) exempt minority educational institutions from reservations for other disadvantaged groups (SCs, STs, OBCs, and EWS).

> "15. (5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, <u>other than the minority educational institutions referred to in clause (1) of article 30</u>." (emphasis added)
>
> "15. (6) Nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making,—
> …

> (b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent. Of the total seats in each category.

2.3. Parliament has accepted that minorities have the right to establish and administer a university by virtue of the National Commission for Minorities Act, 2004 (as amended in 2010):

A. Definition of 'Minority Educational Institution' under Section 2(g) is inclusive. The definition in the original 2004 enactment excluded universities. It was amended in 2010 to give an inclusive definition of MEI.

B. Section 10 of the 2004 Act recognises the right of minorities to establish an educational institution, which includes a university.

C. Section 10A of the 2004 Act further provides that:

> "(1) 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."

2.4. Parliament has also excluded minority educational institutions from the requirement of providing reservations made for other disadvantaged groups:

A. Right of Children to Free and Compulsory Education Act, 2009 ('RTE Act') [SEE *Pramati*, (2014) 8 SCC 1, at pr. 56: "We, however, hold that the 2009 Act insofar as it applies to minority schools, aided or unaided, covered under clause (1) of Article 30 of the Constitution is ultra vires the Constitution."]

B. Central Educational Institutions (Reservation in Admission) Act, 2006 [See Section 4(c)] which provides for reservations in higher educational institution.

C. Central Educational Institutions (Reservation in Teachers Cadre) Act, 2019 [See Section 4(b)] which provides for reservations amongst teaching and academic staff in educational institutions.

2.5. The concept of minority education goes to the root of minority protections under the Indian Constitution, which has been recognized as a basic feature of the Constitution and its secular framework.

A. The right to establish and administer educational institutions under Article 30(1) cannot be abrogated, even by an amendment to the Constitution.

B. The Constitution Bench in *Pramati* (quoting Justice Sikri's opinion in *Kesavananda Bharati*), held:

> "54. Under Article 30(1) of the Constitution, all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice. … Moreover, in Kesavananda Bharati v. State of Kerala Sikri, C.J., has even gone to the extent of saying that Parliament cannot in exercise of its amending power abrogate the rights of minorities. To quote the observations of Sikri, C.J. in Kesavananda Bharati v. State of Kerala: (SCC p. 339, para 178)
>
> > "178. The above brief summary of the work of the Advisory Committee and the Minorities Sub-Committee shows that no one ever contemplated that fundamental rights appertaining to the minorities would be liable to be abrogated by an amendment of the Constitution. The same is true about the proceedings in the Constituent Assembly. There is no hint anywhere that abrogation of minorities' rights was ever in the contemplation of the important members of the Constituent Assembly. It seems to me that in the context of the British plan, the setting up of Minorities Sub-Committee, the Advisory Committee and the proceedings of these Committees, as well as the proceedings in the Constituent Assembly mentioned above, *it is impossible to read the expression 'Amendment of the Constitution' as empowering Parliament to abrogate the rights of minorities*." (emphasis supplied)
>
> Thus, the power under 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."

2.6. The concept of minority education goes to the root of minority protections under the Indian Constitution, which has been recognized as a basic feature of the Constitution and its secular framework.

2.7. The character of minority institutions is consistent with the doctrine of equality.

A. In *TMA Pai,* KIRPAL CJ (*majority*) held:

> "138. As we look at it, Article 30(1) is a sort of guarantee or assurance to the linguistic and religious minority institutions of their right to establish and administer educational institutions of their choice. Secularism and equality being two of the basic features of the Constitution, Article 30(1) ensures protection to the linguistic and religious minorities, thereby preserving the secularism of the country." [Vol. V-A @ 649]

B. In *St Xavier's*, Khanna J (*concurring*) held (quoted with approval in *TMA Pai*, at pr. 120):

> "77. The idea of giving some special rights to the minorities is not to have a kind of a privileged or pampered section of the population but to give to the minorities a sense of security and a feeling of confidence. The great leaders of India since time immemorial had preached the doctrine of tolerance and catholicity of outlook. Those noble ideas were enshrined in the Constitution. Special rights for minorities were designed not to create inequality. Their real effect was to bring about equality by ensuring the preservation of the minority institutions and by guaranteeing to the minorities autonomy in the matter of the administration of those institutions. The differential treatment for the 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 result in true, genuine equality, an equality not merely in theory but also in fact." [Vol. V-A @ 228]

2.8. Respondents suggested that an affirmative declaration of AMU's minority status would be contrary to public interest as it would exempt them from reserving seats for other disadvantaged groups. This is fallacious and negates the Constitutional scheme wherein the special rights of minorities are shielded under Articles 15(5) and 15(6).

2.9. Thus, the recognition of minority character of an educational institution must be in accord with dispensation under Article 30(1), which

(i) recognizes the rights under Article 30(1) as a basic feature of the Constitution, and cannot be abridged even by law under Article 368, and much less under a law under the pre-Constitutional regime;

(ii) is intended to bring equilibrium (and equality) between the majority and the minority by enabling the latter to setup institutions "of their choice;" and

(iii) is necessary to preserve the secular character of Indian Constitution by safeguarding "them from the vicissitudes of political controversy." [*St Xavier's*, Khanna J (*concurring*), at pr. 75]

III. SURRENDERING VERSUS CONTINUITY OF MINORITY CHARACTER

PROPOSITION **Muslims did not surrender minority character by seeking statutory incorporation. On the contrary, the 1920 Act shows continuity of minority character (both *de jure* and *de facto)*.**

3.1. It is undisputed that MAO College and their affiliate bodies are the 'nucleus' of AMU.

3.2. A holistic reading of the 1920 Act clearly shows continuity, rather than surrender.

A. Statement of Objects and Reasons and the Preamble shows that Muslims intended to convert and incorporate the MAO College and its affiliate societies into Aligarh Muslim University.

(i) The Statement of Object and Reasons:

> "The Muslim University Association having requested the foundation of a University and certain funds and property being available to this end. It is proposed to dissolve that Association and Muhammadan Anglo Oriental College and to transfer the property of those societies to a new body called Aligarh Muslim University. …"
> [Vol. IV-A @ 87]

(ii) The Preamble:

> "… a teaching and residential Muslim University, and to dissolve … the Muhammadan Anglo-Oriental College, Aligarh and the Muslim University Association, and to transfer to and vest in the said University all properties and rights of the said Societies and of the Muslim University Foundation Committee:";
> [Vol. III-G @ 5]

B. All assets, liabilities, funds, and references to MAO College and its affiliate bodies became the nucleus of AMU.

(i) **Sections 4(i) & 4(ii)**: Assets of MAO College and its affiliate bodies *in their entirety* were transferred and vested in the name of AMU [Vol. III-G @ 6]

(ii) **Section 4(iii):** References to MAO College or its affiliate bodies in any enactment prior to 1920 will now be construed as AMU [Vol. III-G @ 6]

(iii) **Section 4(iv):** References to MAO College or its affiliate bodies in any will, deed or other document will now be construed as AMU [Vol. III-G @ 6]

(iv) **Section 7:** Donations received including 30 Lakhs (collected by the Muslim Community) to be kept as reserve fund. [Vol. III-G @ 7]

C. **All employees of MAO College because employees of the AMU.** [Section 4(v), Vol. III-G @ 6

D. **The objects of MAO College, promotion of Islamic learning, and special provisions for Muslim students have been incorporated in the 1920 Act**

(i) **Section 5(2):** Promotion of Oriental and Islamic studies; Instruction in Muslim theology and religion; [Vol. III-G @ 6

(ii) **Section 5(12):** Furtherance of arts, science, and other branches of learning, including professional studies, technology, Islamic learning and Muslim theology [Vol. III-G @ 7]

(iii) **Proviso to Section 8:** Power to exempt women from attending public lectures and tutorial classes (to observe purdah); [Vol. III-G @ 8]

(iv) **Section 9:** Compulsory instruction in Muslim religion for Muslim students; [Vol. III-G @ 8]

(v) **Section 12:** Establish intermediate college and schools within the vicinity of MAO College and provide "instruction in the Muslim religion and theology." [Vol. III-G @ 8]

(vi) **Section 27(j)**: Can make statutes for "instruction of Muslim students in the Muslim religion and theology" [Vol. III-G @ 12]

E. **The 1920 Act ensures complete non-interference in matters affecting religion or religious instruction.** For instance, the Proviso to Section 28 provided that instruction of Muslim students in the Muslim religion and theology did not require submission and approval that was ordinarily applicable under Section 28 [Vol. III-G @ 12]

F. **Students of the MAO College at the time of incorporation of AMU and *alumni* became the responsibility of AMU**

(i) **Section 32(5):** Existing students at MAO College became the responsibility of AMU, including provision of instruction as per the prospectus of Allahabad University [Vol. III-G @ 14]

(ii) **Statute 21:** the Register of registered graduates was to contain the names of graduates of other Universities who had been educated for at least two years at MAO College [Vol. III-G @ 23]

3.3. ***Azeez Basha*** **squarely accepts that:**

(i) "… Further, it seems that the existing **M.A.O. College was made the basis of the University** and was made over to 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 had been contributed by Muslims** though some contributions were made by other communities as well." [Vol. III-A @ 9(A)]

(ii) "**It is true, as is clear from the 1920-Act, that the nucleus of the Aligarh University was the M.A.O College,** which was till then a teaching institution under the Allahabad University. **The conversion of that college (if we may use that 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…" [Vol. III-A @ 19(H)]

(iii) "The fact that **it was based on MAO College,** would make no difference to the question as to who established Aligarh University." [Vol. III-A @ 20(B)]

(iv) "By Section 23(2), **the Court was to be the supreme governing body** of the University and would exercise all the powers of the University, not otherwise provided for by the 1920-Act, the Statutes, the Ordinances and the Regulations …" [Vol. III-A @ 12(C)]

(v) "… The annexure to the 1920-Act gave the names of the **Foundation Members of the Court numbering 124 who were all Muslims** (all being trustees of MAO College) and who were to hold office for five years from the commencement of the Court." [Vol. III-A @ 14(C)]

(vi) "…It is true that proviso to s. 23(1) of the 1920-Act said that "no person other than a Muslim shall be a member of the Court", which was declared to be the supreme governing body of the "Aligarh University and was to exercise all the powers of the University, not otherwise provided for by the Act. …" [Vol. III-A @ 22(F-G)]

3.4. **There is a limit to which imperial legislative history, such as the Macaulay's Minutes (1835), Wood's Despatch (1854), and Hunter Commission Report (1882), have significance in determining the minority character. It is not necessary to go into Macaulay's understanding that the idea was to reproduce the Englishmen, nor is it necessary to refer to the Hunter Commission on recognizing degrees.**

3.5. Prior to AMU's establishment, there were two templates of a university available before the Governor General. The Indian Universities Act, 1904 contained the template for a secular university, such as the Calcutta University or Allahabad University. The Banaras Hindu University Act, 1915 contained the template for a denominational university. The AMU was incorporated as a denominational university.

3.6. Respondents' argument that the Muslims surrendered the denominational character of AMU in 1920, because the protection under Article 30(1) did not exist at that point, is a red herring.

A. Nothing in Article 30(1) indicates that the rights of minorities are prospective, in the sense that they apply to institutions established after the adoption of Constitution. In fact, this proposition is contrary to *Kerala Education Bill* and *TMA Pai* (2002).

B. Rights of minorities under Article 30(1) cannot be bartered away. In *St Xavier's*, Mathews J. (*concurring*) held

> "162. It is doubtful whether the fundamental right under Article 30 (1) can be bartered away or surrendered by any voluntary act or that it can be waived. The reason is that the fundamental right is vested in a plurality of persons as a unit or if we may say so, in a community of persons necessarily fluctuating. **Can the present members of a minority community barter away or surrender the right under the article so as to bind its future members as a unit? The fundamental right is for the living generation. By a voluntary act of affiliation of an educational institution established and administered by a religious minority the past members of the community cannot surrender the right of the future members of that community**. The future members of the community do not derive the right under Article 30 (1) by succession or inheritance."
> [Vol. V-A @ 263]

C. Fundamental rights cannot be waived, and much less can they be surrendered under a statute. In *KS Puttaswamy (Privacy-9 J.) v Union of India*, (2017) 10 SCC 1, in the majority opinion, Chandrachud, J (as he then was) noted that:

> 126. In Behram Khurshid Pesikaka v. State of Bombay (1955) 1 SCR 613, Mahajan, C.J. speaking for the Constitution Bench, noted the link between the constitutional vision contained in the Preamble and the position of the fundamental rights as a means to facilitate its fulfilment. Though Part III embodies fundamental rights, this was construed to be a part of the wider notion of securing the vision of justice of the Founding Fathers and, as a matter of doctrine, the rights guaranteed were held not to be capable of being waived. Mahajan, C.J., observed: (SCR pp. 653-54 : AIR p. 146, para 52)

> "52 . ... We think that the rights described as fundamental rights are a necessary consequence of the declaration in the Preamble that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity.
>
> These fundamental rights have not been put in the Constitution merely for individual benefit, though ultimately they come into operation in considering individual rights. They have been put there as a matter of public policy and the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy."" [Vol. V-B @ 413]

This principle was reiterated in the context of Article 30 by a 3-Judge Bench of this Hon'ble Court in *Chandana Das v State of West Bengal*, (2020) 13 SCC 1 (para 31).

3.7. Throgh 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 Statement of Objects and Reasons [Vol. IV-A @ 87] and Preamble [Vol. III-G @ 5] clearly reflect the denominational nature of AMU. The Legislative Debates also unequivocally support this view:

i. While introducing the AMU Bill, 1919, the Education Member narrated the entire history of how AMU came into being, from the foundation of MAO College to negotiations with the Muslim community for its conversion into a Muslim University [Vol. IV-C @ 40].

ii. The Education Member repeatedly used the phrase 'Muslim University' and stated that it "**will be of immense benefit to the Indian Musalmans**" [Vol. IV-C @ 45].

iii. Khan Bahadur Mis Asad Ali Khan noted that, "Though we were first in the field in launching out a scheme for **a teaching and residential University on denominational lines**, our sister community which started much later the Benaras scheme achieved their object sooner than we ourselves." [Vol. IV-C @ 45]

iv. The Raja of Mahmudabad stated that, "Sir, **this will be the second denominational University** in this Country." [Vol. IV-C @ 51]

v. At the time of passing of the Bill, the Education Member stated that, "My Lord, to-day **Your Excellency's Government is committing to the custody of the Muslim community a priceless trust, the incalculable benefits of which will be enjoyed not only by themselves but also by their children and children's children."** [Vol. IV-C @ 67] Further, the Governor-General stated that, "Before putting the question, **I should like to add my congratulations to the Muslim community on the passage of this Bill**." [Vol. IV-C @ 70]

IV. INDICIA FOR DETERMINING MINORITY STATUS

PROPOSITION **Any indicia must consider the text of Article 30(1) and the interpretation placed on Article 30(1) by various of this Court. The assessment of factors must be considered from the point of view of the institutions and minorities themselves, as long as it is supported with clear and convincing evidence.**

4.1. The question of indicia of minority educational institutions is an issue which squarely arises from the issue [No. 3(a)] left open in *TMA Pai* (2002) and quoted in reference order of 2019.

4.2. The indicia can be divided into two parts:

A. Factors which are relevant to be considered (which are indicative of minority character); and

B. Factors which are not determinative of minority character of an educational institution.

4.3. Determinative Factors:

I. Founders should belong to either religious or linguist community, and the community must be "numerically less than 50 per cent" of the total population in any state in India; [*Kerala Education Bill,* pg. 1047; & *TMA Pai,* at pr. 75 & 76]

II. Historical antecedents of the institution which show the active involvement, intention, and contributions of minority founders or the community; [*S.K. Patro*, at pr. 9; *St. Stephen's*, at pr.30-34]

III. Intent of the founders to establish the institution if it is for the benefit of the minority community; [*Mother Provincial*, at pr. 8]

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

Such other communities bring in income and they do not have to be turned away to enjoy the protection."

IV. Founders' intent should be *bona fide*, and not devious or dubious; [*St. Stephen's,* at pr. 28; *A.P. Christian,* at pr. 8; *P.A. Inamdar,* at pr. 97]

V. Constitutional documents (such as statute, rules, or regulations) *read as a whole* should show predominance of minority character; [*St. Stephen's,* at pr. 35 to 40]

VI. Administration of the institution if it is vested in the founders or persons in whom the founders have faith and confidence; [*Mother Provincial,* pr. 9; *St. Xavier's*, pr. 19 & 41; *St. Stephen's*, pr. 41]

VII. Imparting of religious education, or providing for religious instruction and worship; [*St. Xavier's*, pr. 8 (Ray CJ); pr. 256 (Dwivedi J); *TMA Pai,* pr. 88] and

VIII. Symbols such as the name, architecture, motto, and such other cultural symbols of the minority. [*St. Stephen's*, pr. 31 to 34]

4.4. Factors that may not be determinative:

I. Incorporation or establishment by or under a statute; [*St. Stephen's*, at pr. 41]

II. Recognition of degrees;

III. Receipt of Grant-in-aid; [*Rev. Sidhajbhai Sabhai,* Vol. V-A @ pg. 111; *TMA Pai*, pr. 30]

IV. Funding from members outside the minority community; [*Mother Provincial*, pr. 8 (quoted with approval in *TMA Pai*, at pr. 109); *S.K. Patro*, at pr. 15 & 18]

V. Role of government or its regulators to prevent maladministration; [*St. Xavier's*, at pr. 30 & 41; *TMA Pai*, at pr. 122]

VI. Regulation for promoting excellence; [*St. Xavier's*, at pr. 30 & 41; *TMA Pai*, at pr. 122]

VII. Provision of secular education and admission of non-minorities; [*Kerala Education Bill*; *TMA Pai*, at pr. 149; *PA Inamdar*, at pr. 102]

VIII. Recognition as institution of national importance;

IX. Presence of non-minorities in administration and day-to-day management; . [*Gandhi Faiz-e-Aam*, pr. 17]and

X. Absence of statutory declaration of minority status is not determinative. See *A.P. Christians*]

4.5. In the context of the 1920 Act, which was continued by virtue of Article 372 of the Constitution, AMU is a minority institution taking into account the indicia described above:

(i) Sir Syed Ahmad, the members of the MAO College Fund Committee, the Trustees of the MAO College and the members of the Muslim University Association were all Muslim. The reserve fund of Rs. 30 Lakhs was substantially donated by members of Muslim community.

(ii) The historical antecedents clearly show the predominant role of the Muslim community in founding AMU.

(iii) The intention of the founders to establish AMU for the benefit of the Muslims community is also unequivocally reflected in historical documents, including the Legislative Debates on the 1920 Act

(iv) The 1920 Act read as a whole clearly reflects the minority character.

(v) Three (3) of the four (4) Officers of the University, i.e., the Chancellor, Pro-Chancellor and Vice-Chancellor, were required to be Muslim. The Court, being the supreme governing body were required to be Muslims by law. The other two authorities, i.e., Executive Council and Academic Council, were predominantly Muslims because a majority of them had a seat in the Court (which is entirely Muslims.

(vi) The 1920 Act contains provisions for compulsory religious instruction for Muslim students (Section 9), establishing intermediate colleges and schools providing instruction in the Muslim religion and theology (Section 12), and study of Islamic subjects [Sections 5(2), 5(12) and 27(j), and Statute 19(1)].

(vii) The cultural symbolism in the name, architecture (such as existence of a University Mosque), motto, etc. all reflect Muslim character.

4.6. If we read the 1920 Act as a whole, it reflects the minority character even without the 1981 Act. This is self-evident from the various provisions in the Act and Statutes which represent the minority character.

4.7. While AMU is almost 100% funded by funds from the Central Government, it is settled law that the receipt of grant-in-aid cannot be conditioned upon surrendering the rights under Article 30(1).

(i) Grant of aid results in two things, namely – regulations to ensure proper utilization and sharing reservations with the Government. It does not lead to loss of minority character.

Rev. Sidhajbhai Sabhai (Vol. V-A @ pg. 111), relying on *Kerala Education Bill* held that:

> "The constitutional right to administer an educational institution of their choice, it was observed, does not necessarily militate against the claim of the State to insist that in order to grant aid the State may prescribe reasonable regulations to ensure the excellence of institutions to be aided, but the State could not grant aid in such a manner as to take away fundamental right of the minority community under Art. 30(1). …" (emphasis added)

In *TMA Pai*, it was held that:

> "130. It was further held that the state could lay down reasonable conditions for obtaining grant-in-aid and for its proper utilization, but that the state had no power to compel minority institutions to give up their rights under Article 30(1).
>
> 144. It cannot be argued that no conditions can be imposed while giving aid to a minority institution. Whether it is an institution run by the majority or the minority, all conditions that have relevance to the proper utilization of the grant-in-aid by an educational institution can be imposed.
>
> Q.4 - … …
> A minority institution does not cease to be so, the moment grant-in-aid is received by the institution. An aided minority educational institution, therefore, would be entitled to have the right of admission of students belonging to the minority group and at the same time, would be required to admit a reasonable extent of non-minority students, so that the rights under Article 30(1) are not substantially impaired and further the citizens rights under Article 29(2) are not infringed." (emphasis added)

(ii) In addition, there are universities such as Aliah University (Kolkata) and colleges such as St. Stephen's College fully aided by the government. Therefore, the Government recognizes that even if an institution is fully funded by the Government, it does not lose its minority status. If the contention of the Respondents is accepted, all these institutions would lose their protection under Article 30.

V. NATIONAL CHARACTER & EXCELLENCE

PROPOSITION **Recognition of minority status and the tag of national importance under Entry 63 can be simultaneously valid.**

5.1. Both parties are *ad idem* on the fact that any university, including a minority educational institution, are expected to be centres of excellence.

A. Minority institutions must satisfy the 'dual test' laid down in *Sidhajbhai* (1963)

> "Such regulation must satisfy a dual test - the test of reasonableness, and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it." [*Per* SHAH J, SCR, Pg. 857; Vol. V-A, p. 4 @ 114]

B. This Hon'ble Court in *TMA Pai* (2002) held that:

> "54. The right to establish an educational institution can be regulated; but such regulatory measures must, in general, be to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including qualified staff) and the prevention of maladministration by those in charge of management. …
>
> 57. We, however, wish to emphasize one point, and that is that inasmuch as the occupation of education is, in a sense, regarded as charitable, the Government can provide regulations that will ensure excellence in education, while forbidding the charging of capitation fee and profiteering by the institution. …" (emphasis added)
>
> [Vol. V-A, p. 552 @ 615-616]

5.2. It cannot be that centres of excellence, or those declared as institutions of national importance, shed their minority character.

A. It should be noted that entries in the Seventh Schedule (i.e. List 1 Entry 63) relates to the competence of the legislature, and but it does not constitute a limitation on the minority character or abrogate the rights recognised under Article 30(1).

B. In *Ujagar Prints (II) v. Union of India*, (1989) 3 SCC 488, this Court held:

> "48. Entries to the legislative lists, it must be recalled, are not sources of the legislative power but are merely topics or fields of legislation and must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. The expression "with respect to" in Article 246 brings in the doctrine of "Pith and Substance" in the understanding of the exertion of the legislative power and wherever the question of legislative competence is raised the test is whether the legislation, looked at as a whole, is substantially "with respect to" the particular topic of legislation. If the legislation has a substantial and not merely a remote connection with the entry, the matter may well be taken to be legislation on the topic." (emphasis added)

[See also, *Harakchand Ratanchand Banthia v. Union of India*, (1969) 2 SCC 166, at pr. 9[1]]

5.3. The Constitution does not put limits on the Parliament in declaring any monument, institution, record, or remains as a matter of 'national importance.'

A. The wide breadth of institutions that may be covered under Entry 63 is evident from the following observations of Dr. B. R. Ambedkar's in the Constituent Assembly:

> "… 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 his amendment."
>
> [Vol. IV-B @ Pg. 118]

B. The Constituent Assembly was conscious that Entry 63 of List I (draft Entry 40) was wide enough for the Parliament to grant the status of national importance to even a privately-run institution.[2]

5.4. It is open for the Parliament to declare an institution because of its academic excellence, strategic and security interests, geographic location, cultural or religious prominence, or even granting aid. Thus, the reasons for granting the tag of 'national importance' may be varied and unrestricted.

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[1] "9. … It is well-settled that the entries in the three lists are only legislative heads or fields of legislation and they demarcate the area over which the appropriate legislature can operate. …"

[2] During the debates, Shri K. V. Kamat noted:

> "The House will see that in the previous Entry No. 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 Union to legislate in regard to institutions, whether financed wholly or in part or not at all by Government. 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 Government interference. The amendment just now moved by Dr. Ambedkar shows that the grabbing instinct of the Drafting Committee is growing by leaps and bounds; and if this passes muster, if this is accepted by the House I am sure the day is not far distant when the acquisitive instinct of the Union Government will run riot and the Union will try to step in where perhaps angels fear to tread. This is a possibility, not merely possibility but probability which, I do not desire, should eventuate in our country." (emphasis added)
>
> [Vol. IV-B @ Pg. 115]

NOTE: Kamat supported the inclusion of AMU in draft Entry 40, although for reason that it is necessary for "Government to show their impartial non-communal nature."

VI. THE EFFECT OF SUBSEQUENT AMENDMENTS ON AMU'S MINORITY CHARACTER

6.1. The subsequent amendments to the 1920 AMU Act in 1951, 1965 and 1972 are not inimical to the minority character of AMU.

A. The proof of establishment ought to be tested with reference to the date when it was founded (i.e., date when the foundation for MAO College was laid; *or* when MAO College was converted and incorporated as AMU in 1920). To this extent, *Azeez Basha* has correctly limited its analysis on AMU's minority character based on the provisions of the 1920 Act as originally enacted, *de hors* the 1951 and 1965 Amending Acts (which were under challenge).

B. Neither the 1951 Amending Act nor the 1965 Amending Act were tested under Article 30(1) in *Azeez Basha*. [Vol. III-A @ 22-E]

> "… It is not our function in the present petitions to consider the policy underlying the amendments made by the 1965-Act; nor do we propose to go into the merits of the amendments made by the 1965-Act. We are in the present petitions concerned only with the constitutionality of the provisions of the 1965-Act. If the provisions are constitutional. they were within the legislative competence of Parliament. …"

6.2. It is to be noted that *Basha* simply holds that the 1951 Act was to bring the 1920 Act in conformity with the Constitution. To that extent, it was valid.

6.3. As far as the 1965 Amending Act is concerned, an examination of the legislative changes shows that it is a temporary measure. This amendment, though not tested against Article 30(1), was always a temporary measure, which is self-evident from the Statement of Objects and Reasons of the 1972 Amending Act:

> "As a result of the disturbance that took place in Aligarh Muslim University in April, 1965, the President promulgated the Aligarh Muslim University (Amendment) Ordinance, 1965 on the May 20, 1965, to amend the Aligarh Muslim University Act, 1920. The Ordinance was later replaced by the Aligarh Muslim University (Amendment) Act, 1965. Both the Ordinance and the amending Act were temporary measures to tide over the difficult situation which was prevalent in the University at that time and the intention was to bring before Parliament, in due course, a comprehensive long-term legislation for the University." (emphasis added) [Vol. IV-A @ 107]

6.4. The amendment made to Section 23 of the 1920 Act by the 1965 Amending Act was reversed by the 1981 Amending Act. The restoration of status of the Court as the 'supreme governing body' was never under challenge before the Allahabad High Court, and remains as such the supreme body to this date.

6.5. Even if we do not take into account the provisions of the 1981 Amending Act that were struck down by Allahabad High Court, namely, the Preamble, Long Title, Section 2(l) [definition of "University"] and Section 5(2)(c) [power to promote especially the educational and cultural advancement of the Muslims of India], if the statute is read as a whole, it will become clear that the minority character is embedded in the statute

6.6. A distinction needs to be made between the declaratory parts of the 1981 Amending Act (i.e., Preamble, Long Title, and Sections 2(l) and 5(2)(c)) and the administrative machinery in the 1920 Act as amended (Section 17, 18, 20-A, 23, etc.).

VII. ADMINISTRATION OF AMU HAS ALWAYS VESTED WITH THE MUSLIM MINORITY

7.1 Full administrative control is no longer possible. It does not have to be shown that a minority educational institution had full and total control over the administration. The institution can always exercise the control by appointing members to various authorities of the institution in whom the founders have faith and confidence.

7.2 Muslims had *de jure* administrative control over AMU under the 1920 Act. This is evident from the dominance of Muslims in the Authorities and Officers of the University

A. Under Section 23(2), the Court was the supreme governing body and has residuary powers, and, under Section 23(1) proviso, only Muslims could be members of the Court [Vol. III-G @ @ 11]. It is pertinent to note that the Court included the "Foundation Members" [Annexure, Vol. III-G @ 24], who were all trustees of MAO College.

B. The Court was vested with powers to elect Officers of the University, i.e.,

(i) The Chancellor (Section 17),
(ii) The Pro-Chancellor (Section 18),
(iii) The Vice-Chancellor (Section 19) from among its members; and
(iv) Pro-Vice-Chancellor (Section 20).

C. Three of the four (4) officers of the University, i.e., the Chancellor, Pro-Chancellor and Vice-Chancellor, were *ex officio* members of the Court, and therefore, required to be Muslim (Section 23 and Statute 8) [Vol. III-G @ 10, 18]

D. The Academic Council is predominantly Muslim. Per Statute 8 [Vol. III-G @ 19], 15 members of the Academic Council are elected to the Court, and therefore, required to be Muslims. The Vice-Chancellor is a Muslim (as he is elected from the Court), the Pro-Vice-Chancellor is elected by the Court, and 2 persons are elected to the Academic Council by the Court.

E. The Executive Council that consists of 30 members has a prominent Muslim character.

(i) 20 members were elected by the Court (a fully Muslim body)
(ii) Vice-Chancellor is a member;

(iii) 6 members elected by the Academic Council (which is predominantly Muslim);

(iv) 20 members elected by the Court (a fully Muslim body); and

(v) Its functions are "subject to the control of the Court."

7.3 Muslims have had *de facto* administrative control over AMU since its founding, 104 years ago.

(i) All the Members of the first Court were Muslim [Doc. No. 64, p. 539, Vol. III-C].

(ii) All the Members of the first Executive Council were Muslim [Doc. No. 64, p. 547, Vol. III-C]

(iii) 8 of 12 Members of the first Academic Council were Muslim [Doc. No. 64, p. 548, Vol. III-C]

(iv) Every Chancellor to this date has been Muslim [Doc. No. 63, p. 536, Vol. III-C]

(v) 34 out of 37 Vice-Chancellors have been Muslim (with the 3 non-Muslims being acting Vice-Chancellors) [Doc. No. 64, p. 537, Vol. III-C]

(vi) The vast majority of the Members of the Court, Executive Council and Academic Council throughout the years have been Muslim [data from 1983 to 2023 @ Doc. No. 65, p. 551, Vol. III-C; Doc. No. 66, p. 558, Vol. III-C; Doc. No. 67, p. 565, Vol. III-C respectively].

7.4 Notwithstanding the *de facto* and *de jure* control, if any provision of the AMU Act is found to be invasive of its minority character, they are susceptible for a challenge under Article 30(1).

7.5 Article 19(1)(g) contemplates regulatory control, but even such regulatory control under Article 19(1)(g) must yield to minority character. As held in *PA Inamdar*:

> "92. As an occupation, right to impart education is a fundamental right under Article 19(l)(g) and, therefore, subject to control by clause (6) of Article 19. This right is available to all citizens without drawing a distinction between minority and non-minority. Such a right is, generally speaking, subject to the laws imposing reasonable restrictions in the interest of the general public. In particular, laws may be enacted on the following subjects: (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business; (ii) the carrying on by the State, or by a corporation owned or controlled by the State of any trade, business, industry or service whether to the exclusion, complete or partial of citizens or otherwise. Care is taken of minorities, religious or linguistic, by protecting their right to establish and administer educational institutions of their choice under Article 30. To some extent, what may be permissible by way of restriction under Article 19(6) may fall foul of Article 30. This is the additional protection which Article 30(1) grants to the minorities." [Vol. V-A @ 880]

7.6 There lies a distinction between external supervisory control and internal day-to-day control. There are requirements after 1950 in conformity with a more egalitarian constitutional set-up. This does not denude the institution of its minority character.

7.7 It is necessary to point out that, but for the years from 1967 to 1981, AMU has always been a minority institution in fact and law.