IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2286 OF 2006

ALONG WITH

CIVIL APPEAL NOS. 2316, 2861, 2320, 2321, 2319, 2317 & 2318 OF 2006

IN THE MATTER OF:

Aligarh Muslim University … APPELLANT

VERSUS

Dr. Naresh Agarwal & Others … RESPONDENTS

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WRITTEN SUBMISSIONS ON BEHALF OF THE IMPLEADERS – AMU LAWYERS FORUM AND AMU OLD BOYS' ASSOCIATION, DELHI UNIT

I.A 5/2016 AND I.A 6/2016

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WRITTEN SUBMISSIONS ON BEHALF OF THE IMPLEADERS – AMU LAWYERS FORUM AND AMU OLD BOYS' ASSOCIATION, DELHI UNIT.- I.A 5/2016 AND I.A 6/2016

BY: SALMAN KHURSHID

(Senior Advocate)

The impleaders herein, in addition to the submissions of the appellants would emphasize about the concept of natural and inalienable rights of the citizens in a constitutional democracy. The same is to be dealt by moral reading of the constitution and emphasizing on the moral values that goes in the making of the constitution. In the case of present institution, morality and constitution are linked with the history of the institution and the same view needs to be adopted in deciding the future of the institution of national importance as said by *Dr Zakir Husain*, Vice Chancellor of the Aligarh Muslim University (AMU) on theoccasion of President Rajendra Prasad's visit to the university

"***The way Aligarh participates in the various walks of national life will determine the place of Muslims in India's national life. The way India conducts itself towards Aligarh will determine largely, yes, that will determine largely the form which our national life will acquire in the future,***"

1. In interpreting constitutional provisions specially those that deal with rights of the citizen, it is important to consider the pre constitutional rights of humans. This has been explicitly done in ***K.S Puttaswamyand Anr. V. Union of India and Others. (2017)10 SCC 1*** and has been explained as under:

> *"Privacy is a concomitant of the right of the individual to exercise control over his or her personality. It finds an origin in the notion that there are certain rights which are natural to or inherent in a human being. Natural rights are*

inalienable because they are inseparable from the human personality. The human element in life is impossible to conceive without the existence of natural rights. In 1690, John Locke had in his Second Treatise of Government observed that the lives, liberties, and estates of individuals are as a matter of fundamental natural law, a private preserve. The idea of a private preserve was to create barriers from outside interference. In 1765, William Blackstone in his Commentaries on the Laws of England spoke of a "natural liberty". There were, in his view, absolute rights which were vested in the individual by the immutable laws of nature. These absolute rights were divided into rights of personal security, personal liberty and property. The right of personal security involved a legal and uninterrupted enjoyment of life, limbs, body, health, and reputation by an individual. He notion that certain rights are inalienable was embodied in the American Declaration of Independence (1776) in the following terms:
"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit'of happiness."The term "inalienable rights" was incorporated in the Declaration of the Rights of Man and of the Citizen (1789) adopted by the French National Assembly in the following terms:concede or establish them- and their conservation is the reason for all political communities; within these rights figures resistance to oppression.In 1921, Roscoe Pound, in his work titled The Spirit of the Common Law, explained the meaning of natural rights:
"Natural rights mean simply interests which we think ought to be secured; demands which human beings may make which we think ought to be satisfied. It is perfectly true that neither law nor State creates them. But it is fatal to all sound thinking to treat them as legal conceptions. For legal rights, the devices which law employs to secure such of these interests as it is expedient to recognize, are the work of the law and in that sense the work of the State."

2. **Ronald Dworkin** calls this the moral reading of the constitution;in essence the moral reading requires the constitutional judges to go beyond original interest (although in the present case that too might be sufficient

to grant relief to the petitioners) and look at the constitution as a whole in light of the institutional history of society.

3. The morality employed is not that of the judge but distinct from the provisions of the constitution as in the case of constitutional values or constitutional moralityamplified in judgements as also held in the landmark case of ***Navtej Singh Johar v. Union of India*** AIR 2018 SC 4321and***Govt. of N.C.T Of Delhi v. Union of India***(2018) 8 SCC 501.

4. It is already established law that the constitutional protection is available to institutionsestablished before the constitution came into force as dealt in State of Kerala v. Very Rev. **Mother Provincial (1970) 2 SCC 417.**

5. The due process provision and **Article 21** as drafted in the Constitution did not have any distinctions recognized by judicial reasoning in cases over the decades. In essence this is the moral reading of those provisions.

6. The right to privacy recognized in ***Puttaswamy*** is based on human personality and the right to preserve and protect is for fullsome and wholesome existence. Cultural and educational dimensions are intrinsic to what are now seen attributes of Article 21.**Article 21** has been interpreted to include a spectrum of entitlements such as a right to a clean environment, theright to public health, the right to know, the right to means of communication and the right to education. The rights which have been held to flow out of article 21 includes:

    i) **The right to go abroad-***Satwant Singh Sawhney v. Ramarathnam*AIR 1967 SC 1836

    ii) **The right against solitary confinement** — *Sunil Batra v. UT ofDelhi (1978) 4 SCC 494*

iii) **The right of prisoners against bar fetters** — *Charles Sobraj v. Supt., Central Jail (1978)4 SCC 104.*

iv) **The right to legal aid** –*M.H. Hoskot v. State of Maharashtra.(1978)4 SCC 544.*

v) **The right to speedy trial** –*Hussainara Khatoon v. State of Bihar.(1980)1 SCC81*

vi) **The right against handcuffing**–*Prem Shankar Shukla v. UT of Delhi (1980) 3SCC 526*

vii) **The right against custodial violence**–*Sheela Barse v. State of Maharashtra.(1983) 2SCC 96*

viii) **The right against public hanging** —*Attorney General of India v.Lachma Devi(1989) Supp(1)SCC264*

(ix) **Right to doctor's assistance at government hospitals**- *Paramanand Katara v. Union of India(1989) 4SCC286*

(x) **Right to shelter.Right to shelter**–*Shantistar Builders v. Narayan KhimalalTotame (1990) 1SCC 520*

(xi) **Right to a healthy environment**–*Virender Gaur v. State ofHaryana (1995) 2SCC 577*

(xii) **Right to compensation for unlawful arrest**– *Rudal Sah v. State of Bihar (1983) 4SCC141*

(xiii) **Right to freedom from torture —** *Sunil Batra v. UT of Delhi(1978) 4 SCC494*

(xiv) **Right to reputation –**
Umesh Kumar v. State of A.P.225 (2013) 10 SCC591

(xv) **Right to earn a livelihood –**
Olga Tellis v. BMCIS.(1985) 3 SCC 545

Neither is this an exercise in constitutional amendment brought about by judicial decision nor does it result in the creation of a new set of fundamental rights. The exercise has been one of interpreting existing rights guaranteed by the Constitution and while understanding the core of those rights, to define the ambit of what the right comprehends.

Para 262.Technology, as we experience it today is far different from what it d was in the lives of the generation which drafted the Constitution. Information technology together with the internet and the social media and all their attendant applications have rapidly altered the course of life in the last decade. Today's technology renders models of application of a few years ago obsolescent.Hence, it would be an injustice both to the draftsmen of the Constitution as well as to the document which they sanctified to constrict its interpretation to an e originalist interpretation. Today's problems have to be adjudged by a vibrant application of constitutional doctrine and cannot be frozen by a vision suited to a radically different society. We describe the Constitution… as a living instrument simply for the reason that while it is a document which enunciates eternal values

for Indian society, it possesses the resilience necessary to ensure itscontinued relevance. Its continued relevance lies precisely in its ability to allow succeeding generations to apply the principles on which it has been founded to find innovative solutions to intractable problems of their times. In doing so, we must equally understand that our solutions must continuously undergo a process of re-engineering."

7. The combination of Article 26 and 30 is critical for our understanding of the rights of minority and definition of minority institutions. If human personality includes the ability to make choice of educational attributes in the pre constitutional area, the same cannot be artificially restricted by strict reading of the phrase 'to establish'.

8. Even the establishment of the college or other institution by way of a registered society or a trust cannot be done without a formal registration under a statute. Yet such institutions are not restrictions in their statutes as minority institutions.

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The Moral Reading of the Constitution

Ronald Dworkin

March 21, 1996 issue

1.

Anthony Kennedy; drawing by David Levine

There is a particular way of reading and enforcing a political constitution, which I call the *moral* reading. Most contemporary constitutions declare individual rights against the government in very broad and abstract language, like the First Amendment of the United States Constitution, which provides that Congress shall make no law abridging "the freedom of speech." The moral reading proposes that we all—judges, lawyers, citizens—interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice. The First Amendment, for example, recognizes a moral principle—that it is wrong for government to censor or control what individual citizens say or publish—and incorporates it into American law. So when some novel or controversial constitutional issue arises—about whether, for instance, the First Amendment permits laws against pornography—people who form an opinion must decide how an abstract moral principle is best understood. They must decide whether the true ground of the moral principle that condemns censorship, in the form in which this principle has been incorporated into American law, extends to the case of pornography.

The moral reading therefore brings political morality into the heart of constitutional law.[1] But political morality is inherently uncertain and controversial, so any system of government that makes such principles part of its law must decide whose interpretation and understanding will be authoritative. In the American system judges—ultimately the justices of the Supreme Court—now have that authority, and the moral reading of the Constitution is therefore said by its critics to give judges absolute power to impose their own moral convictions on the public. I shall shortly try to explain why that crude charge is mistaken. I should make plain first, however, that there is nothing revolutionary about the moral reading in practice. So far as American lawyers and judges follow any coherent strategy of interpreting the Constitution at all, they already use the moral reading.

That explains why both scholars and journalists find it reasonably easy to classify judges as "liberal" or "conservative": the best explanation of the differing patterns of their decisions lies in their different understandings of central moral values embedded in the Constitution's text. Judges whose political convictions are conservative will naturally interpret abstract constitutional principles in a conservative way, as they did in the early years of this century, when they wrongly supposed that certain rights over property and contract are fundamental to freedom. Judges whose convictions are more liberal will naturally interpret those principles in a liberal way, as they did in the halcyon days of the Warren Court. The moral reading is not, in itself, either a liberal or a conservative charter or strategy. It is true that in recent decades liberal judges have ruled more statutes or executive orders unconstitutional than conservative judges have. But that is because conservative political principles for the most part either favored or did not strongly condemn measures that could reasonably be challenged on constitutional grounds in those decades.

There have been exceptions to that generalization. Conservatives strongly disapprove, on moral grounds, the affirmative action programs that give certain advantages to minority applicants to universities or jobs, and conservative justices have not hesitated to follow their understanding of what the moral reading required in such cases.[2] The moral reading helps us to identify and explain not only these large-scale patterns, moreover, but also more fine-grained differences in constitutional interpretation that cut across the conventional liberal-conservative divide. Conservative judges who particularly value freedom of speech, or think it particularly important to democracy, are more likely than other conservatives to extend the First Amendment's protection to acts of political protest, even for causes that they despise, as the Supreme Court's decision protecting flag-burners shows.[3]

So, to repeat, the moral reading is not revolutionary in practice. Lawyers and judges, in their day-to-day work, instinctively treat the Constitution as expressing abstract moral requirements that can only be applied to concrete cases through fresh moral judgments. As I shall argue later, they have no other real option except to do so. But it would indeed be revolutionary for a judge openly to recognize the moral reading, or to admit that it is his or her strategy of constitutional interpretation, and even scholars and judges who come close to recognizing it shrink back, and try to find other, usually metaphorical, descriptions of their own practice.

There is therefore a striking mismatch between the role the moral reading actually plays in American constitutional life and its reputation. It has inspired all the greatest constitutional decisions of the Supreme Court, and also some of the worst. But it is almost never acknowledged as influential even by constitutional experts, and it is almost never openly endorsed even by judges whose arguments are

incomprehensible on any other understanding of their responsibilities. On the contrary, the moral reading is often dismissed as an "extreme" view that no really sensible constitutional scholar would entertain. It is patent that judges' own views about political morality influence their constitutional decisions, and though they might easily explain that influence by insisting that the Constitution demands a moral reading, they never do. Instead, against all evidence, they deny the influence and try to explain their decisions in other—embarrassingly unsatisfactory—ways. They say they are just giving effect to obscure historical "intentions," for example, or just expressing an overall but unexplained constitutional "structure" that is supposedly explicable in nonmoral terms.

This mismatch between role and reputation is easily explained. The moral reading is so thoroughly embedded in constitutional practice and is so much more attractive, on both legal and political grounds, than the only coherent alternatives, that it cannot readily be abandoned, particularly when important constitutional issues are in play. But the moral reading nevertheless seems intellectually and politically discreditable. It seems to erode the crucial distinction between law and morality by making law only a matter of which moral principles happen to appeal to the judges of a particular era. It seems grotesquely to constrict the moral sovereignty of the people themselves—to take out of their hands, and remit to a professional elite, exactly the great and defining issues of political morality that the people have the right and the responsibility to decide for themselves.

That is the source of the paradoxical contrast between mainstream constitutional practice in the United States, which relies heavily on the moral reading of the Constitution, and mainstream constitutional theory, which wholly rejects that reading. The confusion has had serious political costs. Conservative politicians try to convince the public that the great constitutional cases turn not on deep issues of political principle, which they do, but on the simpler question of whether judges should change the Constitution by fiat or leave it alone.[4] For a time this view of the constitutional argument was apparently accepted even by some liberals. They called the Constitution a "living" document and said that it must be "brought up to date" to match new circumstances and sensibilities. They said they took an "active" approach to the Constitution, which seemed to suggest reform, and they accepted John Ely's characterization of their position as a "noninterpretive" one, which seemed to suggest inventing a new document rather than interpreting the old one.[5] In fact, this account of the argument was never accurate. The theoretical debate was never about whether judges should interpret the Constitution or change it—almost no one really thought the latter—rather it was about how it should be interpreted. But conservative politicians exploited the simpler description, and they were not effectively answered.

The confusion engulfs the politicians as well. They promise to appoint and confirm judges who will respect the proper limits of their authority and leave the Constitution alone, but since this misrepresents the choices judges actually face, the politicians are often disappointed. When Dwight Eisenhower, who denounced what he called judicial activism, retired from office in 1961, he told a reporter that he had made only two big mistakes as President—and that they were both on the Supreme Court. He meant Chief Justice Earl Warren, who had been a Republican politician when Eisenhower appointed him to head the Supreme Court, but who then presided over one of the most "activist" periods in the Court's history, and Justice William Brennan, another politician who had been a state court judge when Eisenhower appointed him, and who became one of the most liberal and explicit practitioners of the moral reading of the Constitution in modern times.

Presidents Ronald Reagan and George Bush were both intense in their outrage at the Supreme Court's "usurpation" of the people's privileges. They said they were determined to appoint judges who would respect rather than defy the people's will. In particular, they (and the platform on which they ran for the presidency) denounced the Court's 1973 *Roe* v. *Wade* decision protecting abortion rights, and promised that their appointees would reverse it. But when the opportunity to do so came, three of the justice Reagan and Bush had appointed between them voted, surprisingly, not only to retain that decision in force, but to provide a legal basis for it that much more explicitly adopted and relied on a moral reading of the Constitution. The expectations of politicians who appoint judges are often defeated in that way, because the politicians fail to appreciate how thoroughly the moral reading, which they say they deplore, is actually embedded in constitutional practice. Its role remains hidden when a judge's own convictions support the legislation whose constitutionality is in doubt —when a justice thinks it morally permissible for the majority to criminalize abortion, for example. But the ubiquity of the moral reading becomes evident when some judge's convictions of principle—identified, tested, and perhaps altered by experience and argument—bend in an opposite direction, because then enforcing the Constitution must mean, for that judge, telling the majority that it cannot have what it wants.

Senate hearings considering Supreme Court nominations tend toward the same confusion. These events are now thoroughly researched and widely reported by the press, and they are often televised. They offer a superb opportunity for the public to participate in the constitutional process. But the mismatch between actual practice and conventional theory cheats the occasion of much of its potential value. (The hearings provoked by President Bush's nomination of Judge Clarence Thomas to the Supreme Court, are a clear example.) Nominees and legislators all pretend that hard constitutional cases can be decided in a morally neutral way, by just keeping faith with the "text" of the

document, so that it would be inappropriate to ask the nominee any questions about his or her own political morality. (It is ironic that Justice Thomas, in the years before his nomination, gave more explicit support to the moral reading than almost any other well-known constitutional lawyer has; he insisted that conservatives should embrace that interpretive strategy and harness it to a conservative morality.) Any endorsement of the moral reading—any sign of weakness for the view that constitutional clauses are moral principles that must be applied through the exercise of moral judgment—would be suicidal for the nominee and embarrassing for his questioners. In recent years, only the hearings that culminated in the defeat of Robert Bork seriously explored issues of constitutional principle, and they did so only because Judge Bork's opinions about constitutional law were so obviously the product of a radical political morality that his convictions could not be ignored. In the confirmation proceedings of the present Justices Anthony Kennedy, David Souter, Thomas, Ruth Bader Ginsburg, and Stephen Breyer, however, the old fiction was once again given shameful pride of place.

The most serious result of this confusion, however, lies in the American public's misunderstanding of the true character and importance of its constitutional system. As I have argued elsewhere, the American ideal of government not only under law but under principle as well is the most important contribution our history has given to political theory. Other nations and cultures realize this, and the American ideal has increasingly and self-consciously been adopted and imitated elsewhere. But we cannot acknowledge our own contribution, or take the pride in it, or care of it, that we should.

That judgment will appear extravagant, even perverse, to many lawyers and political scientists. They regard enthusiasm for the moral reading, within a political structure that gives final interpretive authority to judges, as elitist, antipopulist, antirepublican, and antidemocratic. That view rests on a popular but unexamined assumption about the connection between democracy and majority will, an assumption that American history has in fact consistently rejected. When we understand democracy better, we see that the moral reading of a political constitution is not antidemocratic but, on the contrary, is practically indispensable to democracy. I do not mean that there is no democracy unless judges have the power to set aside what a majority thinks is right and just. Many institutional arrangements are compatible with the moral reading, including some that do not give judges the power they have in the American structure. None of these varied arrangements, however, is in principle more democratic than others. Democracy does not insist on judges having the last word, but it does insist that they must not have it.

The Moral Reading

The clauses of the American Constitution that protect individuals and minorities from government are found mainly in the so-called Bill of Rights—the first ten amendments to the document—and the further amendments added after the Civil War. (I shall sometimes use the phrase "Bill of Rights," inaccurately, to refer to all the provisions of the Constitution that establish individual rights, including the Fourteenth Amendment's protection of citizens' privileges and immunities and its guarantee of due process and equal protection of the laws.) Many of these clauses are drafted in exceedingly abstract moral language. The First Amendment refers to the "right" of free speech, for example, the Fifth Amendment to the process that is "due" to citizens, and the Fourteenth to protection that is "equal." According to the moral reading, these clauses must be understood in the way their language most naturally suggests: they refer to abstract moral principles and incorporate these by reference, as limits on government's power.

There is of course room for disagreement about the right way to restate these abstract moral principles, so as to make their force clearer to us, and to help us to apply them to more concrete political controversies. I favor a particular way of stating the constitutional principles at the most general possible level. I believe that the principles set out in the Bill of Rights, taken together, commit the United States to the following political and legal ideas: government must treat all those subject to its dominion as having equal moral and political status; it must attempt, in good faith, to treat them all with concern; and it must respect whatever individual freedoms are indispensable to those ends, including but not limited to the freedoms more specifically designated in the document, such as the freedoms of speech and religion. Other lawyers and scholars who also endorse the moral reading might well formulate the constitutional principles, even at a very general level, differently and less expansively than I just have however, and though here I want to explain and defend the moral reading, not my own interpretations under it, I should say something about how the choice among competing formulations should be made.

Of course the moral reading is not appropriate to everything a constitution contains. The American Constitution includes a great many clauses that are neither particularly abstract nor drafted in the language of moral principle. Article II specifies, for example, that the President must be at least thirty-five years old, and the Third Amendment insists that government may not quarter soldiers in citizens' houses in peacetime. The latter may have been inspired by a moral principle: those who wrote and enacted it might have been anxious to give effect to some principle protecting citizens' rights to privacy, for example. But the Third Amendment is not itself a moral principle: its *content* is not a general principle of privacy. So the first challenge to my own interpretation of the abstract clauses might be put this way. What argument or evidence do I have that the equal protection clause of the Fourteenth Amendment (for example), which

declares that no state may deny any person equal protection of the laws, has a moral principle as *its* content though the Third Amendment does not?

This is a question of interpretation or, if you prefer, translation. We must try to find language of our own that best captures, in terms we find clear, the content of what the "framers" intended it to say. (Constitutional scholars use the word "framers" to describe, somewhat ambiguously, the various people who drafted and enacted a constitutional provision.) History is crucial to that project, because we must know something about the circumstances in which a person spoke to have any good idea of what he meant to say in speaking as he did. We find nothing in history, however, to cause us any doubt about what the framers of the Third Amendment meant to say. Given the words they used, we cannot sensibly interpret them as laying down any moral principle at all, even if we believe they were inspired by one. They said what the words they used would normally be used to say: not that privacy must be protected, but that soldiers must not be quartered in houses in peacetime.

The same process of reasoning—about what the framers presumably intended to say when they used the words they did—yields an opposite conclusion about the framers of the equal protection clause, however. Most of them no doubt had fairly clear expectations about what legal consequences the Fourteenth Amendment would have. They expected it to end certain of the most egregious Jim Crow practices of the Reconstruction period. They plainly did not expect it to outlaw official racial segregation in school—on the contrary, the Congress that adopted the equal protection clause itself maintained segregation in the District of Columbia school system. But they did not *say* anything about Jim Crow laws or school segregation or homosexuality or gender equality, one way or the other. They said that "equal protection of the laws" is required, which plainly describes a very general principle, not any concrete application of it.

The framers meant, then, to enact a general principle. But which general principle? That further question must be answered by constructing different elaborations of the phrase "equal protection of the laws," each of which we can recognize as a principle of political morality that might have won their respect, and then by asking which of these it makes most sense to attribute to them, given everything else we know. The qualification that each of these possibilities must be recognizable as a political *principle* is absolutely crucial. We cannot capture a statesman's efforts to lay down a general constitutional principle by attributing to him something neither he nor we could recognize as a candidate for that role. But the qualification will typically leave many possibilities open. It was once debated, for example, whether the framers intended to stipulate, in the equal protection clause, only the relatively weak political principle that laws

must be enforced in accordance with their terms, so that legal benefits conferred on everyone, including blacks, must not be denied, in practice, to anyone.

History seems decisive that the framers of the Fourteenth Amendment did not mean to lay down only so weak a principle as that one, however, which would have left states free to discriminate against blacks in any way they wished so long as they did so openly. Congressmen of the victorious nation, trying to capture the achievements and lessons of a terrible war, would be very unlikely to settle for anything so limited and insipid, and we should not take them to have done so unless the language leaves no other interpretation plausible. In any case, constitutional interpretation must take into account past legal and political practice as well as what the framers themselves intended to say, and it has now been settled by unchallengeable precedent that the political principle incorporated in the Fourteenth Amendment is not that very weak one, but something more robust. Once that is conceded, however, then the principle must be something *much* more robust, because the only alternative, as a translation of what the framers actually *said* in the equal protection clause, is that they declared a principle of quite breathtaking scope and power: the principle that government must treat everyone as of equal status and with equal concern.

Two important restraints sharply limit the latitude the moral reading gives to individual judges. First, under that reading constitutional interpretation must begin in what the framers said, and, just as our judgment about what friends and strangers say relies on specific information about them and the context in which they speak, so does our understanding of what the framers said. History is therefore plainly relevant. But only in a particular way. We turn to history to answer the question of what they intended to *say*, not the different question of what *other* intentions they had. We have no need to decide what they expected to happen, or hoped would happen, in consequence of their having said what they did, for example; their purpose, in that sense, is not part of our study. That is a crucial distinction. We are governed by what our lawmakers said—by the principles they laid down—not by any information we might have about how they themselves would have interpreted those principles or applied them in concrete cases.

Second, and equally important, constitutional interpretation is disciplined, under the moral reading, by the requirement of constitutional *integrity*.[6] Judges may not read their own convictions into the Constitution. They may not read the abstract moral clauses as expressing any particular moral judgment, no matter how much that judgment appeals to them, unless they find it consistent in principle with the structural design of the Constitution as a whole, and also with the dominant lines of past constitutional interpretation by other judges. They must regard themselves as partners with other officials,

past and future, who together elaborate a coherent constitutional morality, and they must take care to see that what they contribute fits with the rest. (I have elsewhere said that judges are like authors jointly creating a chain novel in which each writes a chapter that makes sense as part of the story as a whole.)[7] Even a judge who believes that abstract justice requires economic equality cannot interpret the equal protection clause as making equality of wealth, or collective ownership of productive resources, a constitutional requirement, because that interpretation simply does not fit American history or practice, or the rest of the Constitution.

Nor could he plausibly think that the constitutional structure commits any other than basic, structural political rights to his care. He might think that a society truly committed to equal concern would award people with handicaps special resources, or would secure convenient access to recreational parks for everyone, or would provide heroic and experimental medical treatment, no matter how expensive or speculative, for anyone whose life might possibly be saved. But it would violate constitutional integrity for him to treat these mandates as part of constitutional law. Judges must defer to general, settled understandings about the character of the power the Constitution assigns them. The moral reading asks them to find the best conception of constitutional moral principles—the best understanding of what equal moral status for men and women really requires, for example—that fits the broad story of America's historical record. It does not ask them to follow the whisperings of their own consciences or the traditions of their own class or sect if these cannot be seen as embedded in that record. Of course judges can abuse their power—they can pretend to observe the important restraint of integrity while really ignoring it. But generals and presidents and priests can abuse their powers, too. The moral reading is a strategy for lawyers and judges acting in good faith, which is all any interpretive strategy can be.

I emphasize these constraints of history and integrity, because they show how exaggerated is the common complaint that the moral reading gives judges absolute power to impose their own moral convictions on the rest of us. Macaulay was wrong when he said that the American Constitution is all sail and no anchor,[8] and so are the other critics who say that the moral reading turns judges into philosopher-kings. Our constitution is law, and like all law it is anchored in history, practice, and integrity. Still, we must not exaggerate the drag of that anchor. Very different, even contrary, conceptions of a constitutional principle—of what treating men and women as equals really means, for example—will often fit language, precedent, and practice well enough to pass these tests, and thoughtful judges must then decide on their own which conception does most credit to the nation. So though the familiar complaint that the moral reading gives judges unlimited power is hyperbolic, it contains enough truth to alarm those who believe that such judicial power is

inconsistent with a republican form of government. The constitutional sail is a broad one, and many people do fear that it is too big for a democratic boat.

What is the Alternative?

Constitutional lawyers and scholars have therefore been anxious to find other strategies for constitutional interpretation, strategies that give judges less power. They have explored two different possibilities. The first, and most forthright, concedes that the moral reading is right—that the Bill of Rights can only be understood as a set of moral principles. But it denies that judges should have the final authority themselves to conduct the moral reading—that they should have the last word about, for example, whether women have a constitutional right to choose abortion or whether affirmative action treats all races with equal concern. It reserves that interpretive authority to the people. That is by no means a contradictory combination of views. The moral reading, as I said, is a theory about what the Constitution means, not a theory about whose view of what it means must be accepted by the rest of us.

This first alternative offers a way of understanding the arguments of a great American judge, Learned Hand. Hand thought that the courts should take final authority to interpret the Constitution only when this is absolutely necessary to the survival of government—only when the courts must be referees between the other departments of government because the alternative would be a chaos of competing claims to jurisdiction. No such necessity compels courts to test legislative acts against the Constitution's moral principles, and Hand therefore thought it wrong for judges to claim that authority. Though his view was once an open possibility, history has long excluded it; practice has now settled that courts do have a responsibility to declare and act on their best understanding of what the Constitution forbids.[9] If Hand's view had been accepted, the Supreme Court could not have decided, as it did in its famous *Brown* decision in 1954, that the equal protection clause outlaws racial segregation in public schools. In 1958 Hand said, with evident regret, that he had to regard the *Brown* decision as wrong, and he would have had to take the same view about later Supreme Court decisions that expanded racial equality, religious independence, and personal freedoms such as the freedom to buy and use contraceptives. These decisions are now almost universally thought not only sound but shining examples of our constitutional structure working at its best.

The first alternative strategy, as I said, accepts the moral reading. The second alternative, which is called the "originalist" or "original intention" strategy, does not. The moral reading insists that the Constitution means what the framers intended to say. Originalism insists that it means what they expected their language to *do*, which as I said is a very different matter. (Though some originalists, including

one of the most conservative justices now on the Supreme Court, Antonin Scalia, are unclear about the distinction.) [10] According to originalism, the great clauses of the Bill of Rights should be interpreted not as laying down the abstract moral principles they actually describe, but instead as referring, in a kind of code or disguise, to the framers' own assumptions and expectations about the correct application of those principles. So the equal protection clause is to be understood as commanding not equal status but what the framers themselves thought was equal status, in spite of the fact that, as I said, the framers clearly meant to lay down the former standard not the latter one.

The *Brown* decision I just mentioned crisply illustrates the distinction. The Court's decision was plainly required by the moral reading, because it is obvious now that official school segregation is not consistent with equal status and equal concern for all races. The originalist strategy, consistently applied, would have demanded the opposite conclusion, because, as I said, the authors of the equal protection clause did not believe that school segregation, which they practiced themselves, was a denial of equal status, and did not expect that it would one day be deemed to be so. The moral reading insists that they misunderstood the moral principle that they themselves enacted into law. The originalist strategy would translate that mistake into enduring constitutional law.

That strategy, like the first alternative, would condemn not only the *Brown* decision but many other Supreme Court decisions that are now widely regarded as paradigms of good constitutional interpretation. For that reason, almost no one now embraces the originalist strategy in anything like a pure form. Even Robert Bork, who remains one of its strongest defenders, qualified his support in the Senate hearings following his nomination to the Supreme Court—he conceded that the *Brown* decision was right, and said that even the Court's 1965 decision guaranteeing a right to use contraceptives, which we have no reason to think the authors of any pertinent constitutional clause either expected or would have approved, was right in its result. The originalist strategy is as indefensible in principle as it is unpalatable in result, moreover. It is as illegitimate to substitute a concrete, detailed provision for the abstract language of the equal protection clause as it would be to substitute some abstract principle of privacy for the concrete terms of the Third Amendment, or to treat the clause imposing a minimum age for a President as enacting some general principle of disability for persons under that age.

So though many conservative politicians and judges have endorsed originalism, and some, like Hand, have been tempted to reconsider whether judges should have the last word about what the Constitution requires, there is in fact very little practical support for either of these strategies. Yet the moral reading is almost never explicitly endorsed, and is often explicitly condemned. If neither of the two alternatives I

described is actually embraced by those who disparage the moral reading, what interpretive strategy do they have in mind? The surprising answer is: none. Constitutional scholars often say that we must avoid the mistakes of both the moral reading, which gives too much power to judges, and of originalism, which makes the contemporary Constitution too much the dead hand of the past. The right method, they say, is something in between which strikes the right balance between protecting essential individual rights and deferring to popular will. But they do not indicate what the right balance is, or even what kind of scale we should use to find it. They say that constitutional interpretation must take both history and the general structure of the Constitution into account as well as moral or political philosophy. But they do not say why history or structure, both of which, as I said, figure in the moral reading, should figure in some further or different way, or what that different way is, or what general goal or standard of constitutional interpretation should guide us in seeking a different interpretive strategy.[11]

So though the call for an intermediate constitutional strategy is often heard, it has not been answered, except in unhelpful metaphors about balance and structure. That is extraordinary, particularly given the enormous and growing literature in American constitutional theory. If it is so hard to produce an alternative to the moral reading, why struggle to do so? One distinguished constitutional lawyer who insists that there must be an interpretive strategy somewhere between originalism and the moral reading recently announced, at a conference, that although he had not discovered it, he would spend the rest of his life looking. Why?

I have already answered the question. Lawyers assume that the disabilities that a constitution imposes on majoritarian political processes are antidemocratic, at least if these disabilities are enforced by judges, and the moral reading seems to exacerbate the insult. If there is no genuine alternative to the moral reading in practice, however, and if efforts to find even a theoretical statement of an acceptable alternative have failed, we would do well to look again at that assumption.

Ronald Dworkin

Ronald Dworkin (1931–2013) was Professor of Philosophy and Frank Henry Sommer Professor of Law at NYU. His books include *Is Democracy Possible Here?*, *Justice in Robes*, *Freedom's Law*, and *Justice for Hedgehogs*. He was the 2007 winner of the Ludvig Holberg International Memorial Prize for "his pioneering scholarly work" of "worldwide impact" and he was recently awarded the Balzan Prize for his "fundamental contributions to Jurisprudence."

1. Some branches of legal theory, including the "Realist" and "Critical Legal Studies" movements of recent decades, emphasize the role of politics for a skeptical reason: to suggest that if law

depends on political morality, it cannot claim "objective" truth or validity or force. I reject that skeptical claim, and have tried to answer it in other work. See, for example, *Law's Empire* (Harvard University Press, 1986). ↩

2. *Adarand Constructors, Inc.* v. *Pena*, 115 S. Ct. 2097 (1995) ↩

3. *Texas* v. *Johnson*, 491 US 397 (1989). ↩

4. See Antonin Scalia, "Originalism: The Lesser Evil," *The University of Cincinnati Law Review*, Vol. 57 (1989), pp. 849–865. ↩

5. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980). Ely's book has been very influential, not because of his distinction between interpretive and noninterpretive approaches to the Constitution, which is happily not much used now, but because he was a pioneer in understanding that some constitutional constraints can be best understood as facilitating rather than compromising democracy. I believe he was wrong in limiting this account to constitutional rights that can be understood as enhancements of constitutional procedure rather than as more substantive rights. See my article "The Forum of Principle," in *A Matter of Principle* (Harvard University Press, 1985). ↩

6. I discuss both the role of history and the concept of integrity at length in my forthcoming book *Freedom's Law*, in which this essay appears as part of the introduction. ↩

7. See *Law's Empire*, p. 228. ↩

8. Thomas Babington, Lord Macaulay, letter to H. S. Randall, May 23, 1857. ↩

9. For a valuable discussion of the evolution of the idea of judicial review in America, see Gordon Wood, "The Origins of Judicial Review," *Suffolk University Law Review*, Vol. 22 (1988), p. 1293. ↩

10. Justice Scalia insists that statutes be enforced in accordance with what their words mean rather than with what historical evidence shows the legislators themselves expected or intended would be the concrete legal consequences of their own statute. See Scalia, "Originalism." But he also insists on limiting each of the abstract provisions of the Bill of Rights to the force it would have been thought to have at the time of its enactment, so that, for example, the prohibition against "cruel and unusual punishments" of the Eighth Amendment, properly interpreted, does not forbid public flogging, though everyone is now agreed that it does, because such flogging was practiced when the Eighth Amendment was adopted. Scalia agrees that contemporary judges should not hold flogging constitutional, because that would seem too outrageous now, but he does insist that the due process clauses and equal protection clauses should not be used to strike down laws that were

commonplace when these clauses were enacted. His position about constitutional law is consistent with his general account of statutory interpretation only if we suppose that the best contemporary translation of what the people who enacted the Eighth Amendment actually said is not that cruel and unusual punishments are forbidden, which is what the language they used certainly suggests, but that punishments that were then generally regarded as cruel and unusual were forbidden, a reading we have absolutely no reason to accept. ↩

11. Some scholars have tried to define an "intermediate" strategy in a way that, they hope, does not require answers to these questions. They say we should look not to concrete opinions or expectations of the framers, as originalism does, nor to the very abstract principles to which the moral reading attends, but to something at an intermediate level of abstraction. Judge Bork suggested, for example, in explaining why *Brown* was right after all, that the framers of the equal protection clause embraced a principle general enough to condemn racial school segregation in spite of what the framers themselves thought, but not so general that it would protect homosexuals. But, as I argue in Chapter 14 of *Freedom's Law*, there is no nonarbitrary way of selecting any particular level of abstraction at which a constitutional principle can be framed except the level at which the text states it. Why, for example, should we choose, as the intermediate principle, one that forbids any discrimination between races rather than one that permits affirmative action in favor of a formerly disadvantaged group? Or vice versa? ↩

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2316 OF 2006

IN THE MATTER OF:

Haji Muqeet Ali Qureshi **… Appellant**

Versus

Malay Shukla & Ors. **… Respondents**

WRITTEN SUBMISSIONS ON BEHALF OF SHADAN FARASAT, COUNSEL FOR THE APPELLANT

"There have before been schools and colleges founded and endowed by private individuals. There have been others built by Sovereigns and supported by the revenues of the State. But this is the first time in the history of the Muhammadans of India that a college owes its establishment not to the charity or love of learning of an individual, nor to the splendid patronage of a Monarch, but to the combined wishes and the united efforts of a whole community."

- ***Sir Syed Ahmed Khan in 1877 at a ceremony to lay the foundation stone for MAO/AMU.***

1. It is respectfully submitted that the judgment in *Azeez Basha vs Union of India*, 1968 SCR (1) 833, holding that the Aligarh Muslim University ["AMU"] is not a minority educational institution within the meaning of Article 30(1) of the Constitution, is incorrectly decided, and ought to be overruled.

2. It is submitted, *first*, that the mode of incorporation of a 'minority educational institution' – which was the basis of the judgment in *Azeez Basha* – cannot be determinative of its status under Article 30 (**I**); *secondly*, that on a contextual analysis, stripping away the minority status of the AMU will undercut its historical and modern-day significance of revitalising the education of Muslims in India, which is central to the purpose of Article 30(1) (**II**); *thirdly*, that even if two readings of Article 30 are possible, an interpretation that supports and *protects* minority status ought to be preferred over an interpretation that *denudes* it (**III**); and

finally, that contrary to the judgment in *Azeez Basha*, legislation is best understood as a means of *fulfilling* the State's positive obligations under Article 30, and as an *advancement* of the constitutional goal of minority rights protection, and not as a vehicle for *erasing* the existence of those rights (**IV**).

I. THE MODE OF INCORPORATION OF A 'MINORITY EDUCATIONAL INSTITUTION' UNDER ARTICLE 30 CANNOT BE HELD TO BE DETERMINATIVE OF ITS NATURE/STATUS

3. The crux of the reasoning in *Azeez Basha* is thus. *One,* the right of a minority community to administer an educational institution flows from having 'established' that particular institution; *two,* since the AMU was incorporated by an Act of Parliament, it was established by the State, and thus could not have been established by a minority educational institution.

4. It is the Petitioner's submission that institutions like the Aligarh Muslim University are established by the minority community through the device of a statute, i.e. an Act of Parliament. The particular legal device used — and indeed, some such legal device is required to bring into legal existence *any* juristic entity — does not determine the nature of what's sought to be established or the identity of those establishing it.

5. ***First***, the idea that the mode of incorporation of a juristic entity is determinative of its nature is incompatible with Indian constitutional jurisprudence. For example, the question of whether an entity is 'State' under the

meaning of Article 12 has long been considered by this Hon'ble Court to be one of the entity's functions and the Government's control over it, not the form of its creation. This view has held fort starting from the decision in ***R.D. Shetty v. Airport Authority of India***, (1979) 3 SCC 489 (para 27) to ***Zee Telefilms v. Union of India,*** (2005) 4 SCC 649**.** Thus, the mere fact that an entity is a creature of State action does not invest it with State-like nature; it follows naturally, then, that the mere fact that a University was incorporated by State action cannot either confer or take away from its nature, which is to be otherwise determined, through a set of independent constitutional criteria.

6. ***Second,*** the Indian model of secularism does not compel a deviation from the above generally accepted principle, in the context of the present reference. Indian secularism does not contemplate a simple and complete separation of the church and the State where public power and the promotion of religious activity are mutually exclusive, i.e. where the 'form' or 'involvement' of State action (through legislation or otherwise) itself precludes the 'religious' nature of its exercise. Rejecting this rigid wall of separation, Indian secularism contemplates instead a regime of equal inclusion and pluralism, i.e. equidistance of the State from and equal treatment of all religious identities. Thus, for example, the Indian State subsidises pilgrimages agnostic to their faith; it also codifies into statutes laws that are 'personal' and

therefore 'religious'. The fact of codification has not been held to entirely denude personal laws' religious character, only bring them into the State's regulatory ambit.

7. The nature of public power in India, thus, is not incompatible with being exercised in ways that travel into the space of 'religion'. In the words of Ali Yavar Jung, the ex-Vice Chancellor of the AMU, the existence of a 'national' 'Muslim' university is not a contradiction in terms, as far as India is concerned. Therefore, the Indian model of secularism does not support the idea that state action, by its very form, is required to be devoid of any religious import in its nature or substance. It is therefore evident that, contrary to the holding in *Azeez Basha*, the principle that the mode of incorporation of an entity does not determine its nature applies squarely to the ambit of 'minority educational institutions' under Article 30.

8. ***Third,*** as submitted above, any juristic entity is, in one way or another, a creation of State action. A registered society cannot be 'established' except through the Societies Registration Act, 1860; a corporation cannot be 'established' except through the Companies Act 1956. No juristic entity can be finally 'brought into existence' except through an action of the State.

9. Nothing in *Azeez Basha's* reasoning allows for a distinction between legislation and, say, registration by public officials, as qualitatively different forms of State

action. Thus, if 'establish' under Article 30 is to be construed narrowly to mean formally 'bring into existence' (**@ para 25, *Azeez Basha***), i.e. 'incorporating', the reasoning in *Azeez Basha* threatens the very existence of a protection under Article 30. This is because most educational institutions, be they colleges or universities or deemed-to-be-universities, to be formally brought into existence, require some form of State action. It is respectfully submitted that an interpretation that would eviscerate Article 30 of meaningful content ought to be avoided.

10. On the other hand, if it is argued that there does exist a distinction between legislation and all other forms of State action, and that *Azeez Basha* only applies to educational institutions brought into existence through an Act of Legislature, absurd consequences would follow. The necessary consequence, for example, would be that all Universities founded in those *states* that allow them to be set up without an Act of legislature, and at a time after the regulatory framework evolved to allow this, could be 'minority educational institutions' under Article 30(1). All other Universities, by accidents of time or geography, would be excluded from the ambit of Article 30(1). Such an interpretation – which ignores completely the *nature* and *functions* of the institution – would be completely detached from the text and purpose of Article 30.

11. For example, in 1920, the only route to establishing a University was through an Act of Parliament. In 2024, as per the Haryana Private Universities Act 2006, Universities can only be established by amending an Act of the Legislature. However, as per the Uttar Pradesh Private Universities Act 2019, a Gazette Notification can permit the operation of a University, but a subsequent amendment 'including' the new University is required. In addition, in 2024, private bodies can also establish 'deemed universities' — an option that was not available to the minorities in 1920 — by going through only a Gazette notification.[1] On the other hand, certain State regulatory regimes in the USA do not consider legislation as an essential pre-requisite for establishing private Universities.

12. The reasoning in *Azeez Basha*, thus, creates an absurd situation where the ambit of a constitutional provision is subject to the vagaries of the regulatory landscape. Thus, reducing the term 'establish' to the legal devices required to 'establish' a University creates constitutionally arbitrary and unreasoned distinctions between institutions capable of being 'minority educational institutions' and those that are not.

13. **In conclusion**, for all the reasons stated above, the meaning of 'establish' may not be construed narrowly

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[1] Rule 6(5), University Grants Commission (Institutions Deemed to be Universities) Regulations 2023

to mean 'incorporating' or 'bringing into legal existence'. The Statement of Objects and Reasons of the 1920 Bill bringing the AMU into existence had specifically stated that it was "designed to incorporate this University."

14. In the Petitioner's submission, a sustainable interpretation of Article 30 is required to distinguish between 'establish' and 'incorporate'. This crucial distinction is the cornerstone of Article 30 and the richness of minority educational institutions it has been able to foster in India. By undoing this, *Azeez Basha* threatens minorities' participation in the educational advancement of their communities and the nation generally.

II. STRIPPING AWAY AMU'S MINORITY CHARACTER WILL SNATCH FROM IT THE PROFOUND PLACE IT HOLDS IN HISTORY – A CRADLE FOR THE REVITALISATION AND REVIVAL OF MUSLIM EDUCATION IN INDIA.

15. From its inception as the Muhammadan Anglo-Oriental College ["MAO"] to its evolved identity as AMU, the institution in Aligarh has consistently played a vital role in shaping the educational landscape for Muslims in India, so much so that ex-President of India and Vice Chancellor of AMU, Zakir Hussain, asserted that the way Aligarh participates in various walks of national life will determine the place of Muslims in Indian national life. This sentiment rings true when one looks at the distinguished alumni of AMU, a remarkable list that

includes heads of state, Chief Justices of India, judges of high courts, university vice-chancellors, renowned academicians, accomplished medical professionals, politicians, and diplomats, among others.

16. Hence, any interpretation of Article 30 that strips away the university's intrinsic and enduring essence would snatch from it the profound place it holds in history – a cradle for the revitalisation and revival of muslim education in India.

a. *The role played by MAO in imparting modern education to Indian Muslims, especially women*

17. The Muhammadan Anglo-Oriental College was established by Sir Syed Ahmed Khan in 1877, as part of the Aligarh Movement — a social reform movement to set up a system of Western-style scientific education *for* the Muslim population.

18. In a speech he made on the day the foundation stone for the college was laid, Sir Syed said that "*from the seed which we sow today, there may spring up a mighty tree whose branches, like those of the banyan of the soil, shall in their turn strike firm roots into the earth and themselves send forth new and vigorous saplings; that this College may expand into a University whose sons shall go forth throughout the length and breadth of the land to preach the gospel of free enquiry and of large-hearted toleration and of pure morality*". He added that **"***there have before been schools and colleges founded and endowed by private individuals. There have been*

others built by Sovereigns and supported by the revenues of the State. But this is the first time in the history of the Muhammadans of India that a college owes its establishment not to the charity or love of learning of an individual, nor to the splendid patronage of a Monarch, but to the combined wishes and the united efforts of a whole community.**"**

19. MAO, the precursor of the Aligarh Muslim University, was, therefore, established by Sir Syed – a Muslim – to educate and uplift the Indian Muslim community. He professed that the chief reason that induced him to found MAO was that Muslims were "*becoming more and more degraded and poor day-by-day*" and that their "*religious prejudices*" had prevented them from taking advantage of the education proffered by the government and schools.

20. MAO imparted liberal education to Muslims in literature and science while at the same time instructing them in Muslim religion and traditions, thereby encouraging the Muslim community to pursue modern education. To date, in fact, AMU, is the only University in the country to have a dedicated department of theology for both Shias and Sunni sects. These departments serve as prominent hubs for inter-religious and interfaith studies, fostering unity among followers of various religions and Muslim sects. Beyond offering teaching and research facilities, these departments also

play a crucial role in managing the religious life on campus.

21. In particular, MAO played a pivotal role in educating Muslim women, who faced triple marginalisation, being colonial subjects, as women, and as Muslims. Recognizing this need, the Mohammadan Education Conference (MEC), established by Sir Syed Ahmad in 1886, took a significant step in 1896 by founding the Women's Education Section ["WES"].

22. In 1906, the WES started a school for girls and to train female (zenana) teachers called the ***Aligarh Zenana Madrasa (girls' school),*** which ultimately transformed into a boarding school in 1914. The school played a crucial role in ending the relative isolation of Indian Muslim women, while at the same time preserving the Muslim identity of the community.

23. The aim and objective of the WES was to establish an institute which would not only enable the intellectual development of Muslim women in the country but would also be within the realms of their Islamic beliefs. The following efforts were made to encourage Muslim families to send their daughters to the Madrasa: **a.)** practices such as strict purdah, building fortress-like walls to fend off the male gaze, and allowing only close relatives inside the college campus were implemented; **b.)** students' parents were invited to Aligarh, so that they could stay at the hostel, to convince them that the conditions there were safe; and, **c.)** actively portraying

the school as an extension of girls' families and also of their own, in order make conservative Muslim families accepting of such an institution. This familial ethos still remains, and is unique to the Aligarh Women's College.

24. In 1937, the school was upgraded to the Aligarh Muslim University (AMU) Women's College. Notably, the AMU's women's college was established at a time when the literacy rate among India's women was just 3%, and almost two decades before premier women's colleges such as Lady Shri Ram College came into existence.

25. In this manner, AMU became a catalyst for empowering Muslim women, breaking societal norms, and contributing to the broader movement for women's rights and education in India during the early 20th century. The university's commitment to gender equality and educational opportunities laid a foundation for the advancement of women in various fields, contributing to their socio-economic and intellectual upliftment. The success of AMU is, therefore, inseparable from the triumphs of Muslim women in the sub-continent, who have excelled across diverse fields. Among these trailblazers are Rana Safvi, a distinguished historian and author; Ismat Chugtai, a renowned novelist; Hashima Hassan, a notable scientist at NASA; and renowned educationist Najma Akhtar. These accomplished women have made significant contributions in areas such as law, education, politics, literature, and activism,

underscoring the broad spectrum of talent that AMU has fostered over the years.

26. In fact, even the first chancellor of AMU was a woman — Sultan Jahan Begum of Bhopal. The appointment of a woman as the inaugural chancellor marked a significant historical milestone. It was the first time a woman served as the chancellor of any Indian University.

b. *MAO, once incorporated into AMU, continued to retain its Muslim minority character and to represent a hub for social and educational reform amongst Muslims*

27. MAO College was always envisioned to be a stepping stone for the establishment of a full-fledged university, and Sir Syed often bemoaned the fact that he would not live long enough to see a university for the Muslims of India, similar to Oxford and Cambridge, becoming a reality.

28. Therefore, four days after Sir Syed passed away, on 31.03.1898, the Syed Ahmad Endowment Fund was set up with the objective of collecting a sum of ten lakh rupees so that Sir Syed's *"cherished desire of raising MAO College to the rank of a Mohamedan University*" could be fulfilled.

29. To this end, several conferences were organised and donations were made/pledged by Muslims such as Badruddin Tyabji, Aga Khan, etc.

30. By 1911, the movement for the development of a university picked up speed, and the Syed Memorial Fund Committee was replaced by a Muslim University Foundation Committee which was headed by the Aga Khan and based in Aligarh. Along with the Foundation Committee, a Constitution Committee was set up with the Raja of Mahmudabad as the President. And, on 23.09.1911, the Aga Khan and the Raja of Mahmudabad presented a draft Constitution to the then Education Minister of the Government of India, Harcourt Butler.

31. Finally, in July 1920, after a Draft Constitution was prepared, the Bill for incorporation of the MAO college received approval. The Statement of Objects and Reasons recorded that **"***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 the Muhammadan Anglo-Oriental College, Aligarh, and to transfer the property of those societies to a new body called 'the Aligarh Muslim University '. The present Bill is designed to incorporate this University.***"**

32. The Bill was moved in the Imperial Legislative Council by the Education Minister, Mohammed Shafi, in August 1920. The following is an from the discussion that preceded the passing of the Bill:

> **"***The Hon'ble Mr. Shafi: 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 by also by their children and children's children. Indeed upon the manner in which they discharge this sacred trust will depend the future welfare not only of the present generation of Indian Musalmans but also of generations to come….with all earnestness I can common, I appeal to them to concentrate their attention on nurturing of this Tree of Knowledge lest, in frittering away of their energies in ill-advised pursuits, they lose the substance for the sake of the shadow…it is through a wide expansion of education alone that they can expect to take their proper place in the India of the future."

33. Muslims started MAO college, collected funds, acquired the land, erected the buildings, employed the staff, admitted students and then, in 1920, sought incorporation by law so that it can award degrees and conduct research. Therefore, the fact that the legislature now enjoys legislative power over AMU does not take away from its intrinsic minority character. And, while Parliament holds legislative power over it, this power is *subject to the* minority's fundamental right under Article 30(1) to administer it autonomously.

34. The stark minority character of AMU was spoken of several times after its incorporation, including after this Hon'ble Court's judgment in ***Azeez Basha,*** where the

Court held that AMU was not established by the Muslims, but by a statute:

a. Dr. Zakir Husain (ex-AMU VC and the 3rd President of India) said in Rajya Sabha on September 26, 1951:

> *"It is possible in a secular republic, according to our present Constitution, to have a hundred per cent Hindu institution and a hundred per cent Muslim institution. The Constitution does not say anything against it. From various remarks that I have heard I am inclined to believe that some people think that the Constitution does not allow the existence of such purely Muslim or purely Hindu institutions.... For instance, this amending Bill for the Hindu University of Benares or the Bill relating to the Aligarh Muslim University does not seek to change the names of these universities. Further, if you look into the present Act of the Aligarh University, express mention is made there for providing for Oriental and Islamic studies and for the teaching of Muslim religion and theology. And if you look into the present amending Bill, under the 'Powers of the University' you find that the Benares Hindu University can promote Oriental studies, and in particular Vedic, Hindu, Buddhist and Jain studies and give instruction in*

Hindu religion. Now, this apparent inconsistency is the key to the understanding of the significance of what we are doing. A secular republic will have a Hindu university and a Muslim university as Central universities, because only a secular republic has the large-heartedness, the tolerance and the vision to have them both."

b. The Vice Chancellor of AMU, Ali Yawar Jung stated that "... *there need be no controversy about the basic character of the university. He saw no contradiction in its being a national Muslim university. It was principally meant for Muslims in the sense that education was provided in their religion, philosophy and traditions. But that did not mean that it was to be run for Muslims exclusively. It must continue to be a national university. He said there was no distinction of religion in the recruitment of teachers. About 40 per cent of the students were non-Muslim*".

c. The Aligarh Muslim University Inquiry Committee or the Chatterjee Committee which was formed to review the working of the University said, in its report of 1961:

"*What should be the special character, the true living tradition of the Muslim University, Aligarh? In our opinion, apart from standing for those things,*

every university must recognise as true objectives of university education, it should develop and emphasise the study of what we may describe as the contribution of the Muslim community to the complex pattern of our national culture , and in fact to the worldwide culture of humanity. That Islam has made very substantial and notable contributions to this heritage both historically as well as currently in our own age is a patent truth which no one with any pretensions to the study of the history of civilisation will dare to deny. It is this living tradition, this dynamic force, which we should like to preserve and cherish in this university...

Muslim University, Aligarh, with its open-door policy of admitting members of all communities and giving them opportunities to share fully in its residential and corporate life, is in a specially privileged position to foster that emotional integration which is essential for the preservation of India's cultural and political unity.... We recommend that the Muslim University, Aligarh, should build up strong departments for the study of languages associated with Muslim culture, such as Arabic, Persian and Urdu. It should have a strong department of History which should pay special attention to the

contributions which Islam has made not only to world history but also to the development of Indian polity, Indian thought, and Indian art" ((1961): Report of the Aligarh Muslim University Enquiry Committee, Aligarh: Aligarh Muslim University, pp. 142-143)."

d. HM Seervai critiqued this Hon'ble Court's ruling in ***Azeez Basha*****,** in the following words:

"*The Muslim community brought the university into existence in the* ***only manner*** *in which a university could be brought into existence; namely by involving the exercise by the sovereign authority of its legislative power. The Muslim community provided lands, buildings, colleges and endowments for the university, and without these the university as a body would be an unreal abstraction*."

III. ARTICLE 30(1) OUGHT TO BE GIVEN A BROAD AND LIBERAL CONSTRUCTION. WHERE TWO INTERPRETATIONS ARE POSSIBLE, AN INTERPRETATION THAT *EXPANDS* AND *PROTECTS* MINORITY STATUS OUGHT TO BE PREFERRED OVER ONE THAT *DENIES* OR *DENUDES* AN INSTITUTION OF THAT STATUS.

35. It is respectfully submitted that, in any event, where there are two possible readings of Article 30(1), this Hon'ble Court should opt for the broad and liberal reading. Thus, if the arguments advanced above constitute *a* reasonable reading of Article 30, they ought

to be preferred from the narrower reading advanced in *Azeez Basha*.

a. *This proposition follows from constitutional history and structure.*

36. Constitutions that are meant for the governance of a diverse and pluralistic democracy encode a certain set of protections for ethnic, linguistic racial, and religious minorities.

37. Historically and comparatively, these protections take two forms. The first is *structural* protection: that is, minorities (or other marginalised groups) are guaranteed a share in political power, and a stake in representative institutions. This may take place through quotas or other forms of "power-sharing" agreements. Electoral quotas for minorities exist in the national laws/constitutions of more than thirty countries. Examples include: allocated seats to members of indigenous groups in Colombia and New Zealand, seats for ethnic Hungarians, Italians, Czechs, Slovaks, and Serbs in the Croation Parliament; equal division of seats between Christians and Muslims in Lebanon; and division of seats in the Upper House between Flemish, French and German linguistic groups in Belgium (among others). The primary rationale for this is that the very nature of *majoritarian* democracy makes it difficult for *permanent* minorities (that is, minorities founded on ascriptive characteristics) to find a place in representative institutions.

38. The second form of protection is through *enforceable minority rights*, set out in the Constitution, and protected by the judiciary. This form of rights protection is based on John Hart Ely's famous insight that "discrete and insular minorities", excluded by the political process, are in specific need of *judicial* protection, through the enforcement of a bill of rights.

39. Indian constitutional history reveals that until the time of Independence, under the British, there was a form of structural protection, through the means of "separate electorates." However, the political and social division that this resulted in, which ultimately culminated in the Partition, meant that the framers of the Constitution made a conscious and active choice *not* to have structural protection for religious minorities (a limited exception was made for SCs/STs, but even here, this protection was through a joint electorate, and not a separate electorate). See **Raj Sekhar Vundru, *Ambedkar, Gandhi and Patel: The Making of India's Electoral System* (Bloomsbury 2017).**

40. Instead of having structural protection, the framers of the Constitution opted for a model of rights, which would be protected against majoritarianism through the mechanism of judicial review. At the heart of this was Article 30(1).

41. Article 30(1) was thus an assurance to the minorities that even though they were losing *political* power (through guaranteed representation in the legislature, as under the

colonial system), their rights would be protected *constitutionally*.

42. It therefore follows that – as Article 30(1) is the *only* form of protection the Constitution guarantees to minorities, with all others having been excluded *by design*, its terms should be accorded a broad and liberal interpretation. In particular, where there are two possible readings, the Court should lean in favour of a reading that protects minority status, and not one that erases it. It is evident that these two readings were open to the Court in *Aziz Basha*, when interpreting the phrase "establish and administer." The Court was incorrect to choose the narrower reading.

b. *The reasoning in Aziz Basha is contradictory*

43. Even otherwise, the underlying logic of *Aziz Basha* – that minority status is lost if an educational institution is established through a *legislation* – is contradictory.

44. As submitted in the section above, the purpose of Article 30(1) is to entrench minority protection in the bill of rights, *against* majoritarianism. The Article 30(1) protection exists specifically as an *alternative* to structural protection for minorities in the political process.

45. In this context, to hold that *legislation* – which is the core articulation of majoritarian expression in an electoral democracy such as India – *ipso facto* deprives a university of minority status, is self-contradictory. The very nature of Article 30(1) rights is that in determining

when an institution is entitled to avail of its protective ambit, majoritarian processes must be excluded. That is, legislation can neither confer – nor remove – minority status under Article 30(1).

c. *Protective State action cannot be held to denude a minoritarian space protected by the Constitution*

46. Article 30 is a *protective* provision, contemplating a constitutionally guarded space for minority-led teaching, learning, and knowledge creation. Implicit in Article 30 is the assumption that 'neutral' institutions, i.e. institutions lacking in a protected minority status, will in the natural course of things be 'majoritarian'. To say this is not to imply that such institutions are naturally oppressive; only that they tend to be driven by the assumptions, leanings, and priorities of the majoritarian groups' cultures.

47. In this context, Article 30 contemplates constitutionally protecting certain educational spaces from such a 'majoritarianism-by-default', guarding their minority character and priorities.

48. Thus, to hold that any State action (such as legislation) that *enhances* the space for minority educational initiatives shall, instead, cause an institution to lose its minority status under Art. 30(1) is to denude Art. 30 of its spirit.

49. In effect, it amounts to a holding that State action can only affiliate itself to institutions that are majoritarian-by-default, and steps taken to reverse this 'default'

balance in government-supported educational initiatives will instead only serve to reverse the minoritarian character of supported initiatives.

IV. LEGISLATION OUGHT TO BE UNDERSTOOD AS POSITIVE IMPLEMENTATION OF THE ARTICLE 30(1) RIGHT.

50. In any event, it is now well-established that rights under Part III of the Constitution have both a negative and a positive aspect (**Vishaka vs State of Rajasthan, AIR 1997 SC 3011**). The negative aspect of a fundamental right protects an individual or a group against State *interference* with that right. The positive aspect enjoins the State to *fulfil* the right, including – where required – through positive action and legislation.

51. In the case of minority institutions, State *recognition* – which can happen through legislation – which confers a range of benefits allowing the institution to function to the fullest extent – is therefore best understood not as *taking away* minority status, but by effectuating the *positive* aspect of the Article 30(1) right.

52. **The interpretation given in *Aziz Basha* is therefore absurd, because if this interpretation were to be accepted, Article 30(1) *could not have any positive component*: the moment State action through legislation takes place to "establish" a university, the protection under Article 30 would be lost for all time.** This is directly contrary to the positive rights jurisprudence of the Supreme Court.

53. Indeed, the positive aspect of a right is *specifically* important in the case of minority rights. By their very nature, the constitutional commitment to minorities – who are outside the "mainstream" and the dominant culture – is incomplete if there is mere non-interference. As minorities are structurally and institutionally disadvantaged in a majoritarian democracy, and as the Indian Constitution elected not to accord structural protection to minorities in representative institutions, it becomes particularly important for *positive State action* to make the right meaningful. The nature of the State action in *Aziz Basha* – establishment and recognition – classically falls within such category of State action.

54. A comparative example is Section 23 of the Canadian Charter of Rights and Freedoms. This article grants rights to linguistic minorities in both the anglophone provinces of Canada, and francophone Quebec. This provision has been held to be a positive right, which requires active State action for its fulfilment (see **Doucet-Boudreau v Nova Scotia (Minister of Education) [2003] 3 S.C.R. 3, 2003 SCC 62).**

55. Finally, this reading is supported in constitutional scholarship. Webber et al have argued for the concept of "legislated rights." A Constitution's bill of rights is often framed in abstract terms, and in the language of principle. It therefore creates a range of *reasonable alternatives* for the State – and the legislature – to comply with the demands of the right. For example, a

right to vote requires an infrastructure that guarantees a free and fair ballot, but leaves the precise manner of how to achieve that to the legislature (subject to certain constitutional constraints) (see **G. Webber et al, *Legislated Rights* (Cambridge University Press 2018**).

56. Article 30(1) is of similar form. It grants a set of rights to minorities, but these are in abstract terms, and there exists a wide range of ways in which these rights can be fulfilled, including through legislation. Legislation, thus – including legislation for the establishment and recognition of institutions – is best understood as *fleshing out the contours of the Article 30(1) right and giving it substance and meaning*, rather than denuding an institution of it.

V. CONCLUSION

57. It is therefore respectfully submitted that, for the reasons advanced above, the judgment in *Azeez Basha* proceeds on an erroneous understanding of Article 30 of the Constitution. Article 30(1) provides a sanctuary for minorities within a pluralist and diverse democracy that is constitutionally committed to extending equal concern and respect to all its members. *Azeez Basha's* formalistic reading of Article 30 is contrary to the purpose of the provision, and also, contrary to the understanding of constitutional secularism in India. A closer look at the history of the AMU reveals that the *nature* of the university has always been consistent with

the goals of Article 30; in this context, legislation ought to be seen as *enabling* the fulfilment of those goals, and as an instance of cooperation between the State and the institution in order to make Article 30(1) a meaningful reality. Consequently, it is respectfully submitted that this Hon'ble Court overrule the judgment in *Azeez Basha*, and affirm that the protections under Article 30 extend to the AMU.

Drawn by:

Shadan Farasat, Adv

Gautam Bhatia, Adv.

Hrishika Jain, Adv

Natasha Maheshwari, Adv

Aman Naqvi, Adv

Filed By:

Mr. Shadan Farasat

Advocate for the Appellant

IN THE SUPREME COURT OF INDIA
[CIVIL APPELLATE JURISDICTION]

CIVIL APPEAL NO. 2286 OF 2006

IN THE MATTER OF:
ALIGARH MUSLIM UNIVERSITY THR. ITS REGISTRAR
FAIZAN MUSTAFA ... APPELLANT (S)

VERSUS

NARESH AGARWAL & ORS. ... RESPONDENTS

WRITTEN SUBMISSIONS ON BEHALF OF THE APPLICANT IN I.A. NO. 563 OF 2024 [ANJUMAN E RAHAMANIA] BY M.R. SHAMSHAD, ADVOCATE

1. That the present Applicant, *Anjuman-e-Rahamania* is the original petitioner in Writ Petition (Civil) Nos. 54-57 of 1981 wherein, initially, the correctness of the law laid down in *S. Azeez Basha and Anr. Vs Union of India, 1968 (1) SCR 833* was raised in terms of orders passed on 26.11.1981 [@*Pg. 209, Vol. III-A*]. Thereafter, during the pendency of this petition, in *TMA Pai Foundation v. State of Karnataka, (2002) 8 SCC 712* various issues (*total 10 issues*) were framed/re-framed by a Bench of Hon'ble 11 Judges on 10.04.2002. Amongst the said issues, Issue no. 3 (a) has been considered to be relatable with the issues raised in terms of order dated 26.11.1981. The Applicant's writ petition was part of the whole batch of petitions in *TMA Pai* case, when the questions of law were decided by the Hon'ble 11 Judge Bench in October/November 2002. However, the issue relating to the correctness of the *Azeez Basha* judgment was not decided and left on the Regular Bench to decide. The Regular Bench of 2 Hon'ble Judges of this Court again left the said issue unanswered and the petition was disposed of in terms of order dated 11.03.2003 [@*Pg. 211, Vol. III-A*]. In this background the Applicant is present before this Hon'ble Court in the present proceedings.
2. The issue, as raised on 26.11.1981 and subsequently articulated by the 11 Judges [*in question 3(a)*] on 10.04.2002 in *TMA Pai Foundation v. State of Karnataka, (2002) 8 SCC 712* may not cover all the issues/questions of law to be considered by this Hon'ble Court in the present proceedings in view of subsequent legislative enactments and judicial pronouncements. Hence, the issues as articulated in Para 1.5 & 1.6 (@ *Pgs. 8-9 Vol. 1A*) of Dr. Rajeev Dhavan's Submissions may be considered by this Hon'ble Court for deciding the issues

relating to correctness of *the Basha principle*. While adopting the submissions in Vol.- 1A, the Applicant herein submits as under:

i. Article 30 of the Constitution of India has the following terms [@*Pg. 17-18, Vol. IV-A*]:

a) '*Minorities based on religion*'
b) '*Minorities based on language*'
c) '*Right to establish*'
d) '*Right to administer*'
e) '*Educational Institutions*'
f) *'of their choice'*

ii. All the above terms, carry their own literal and jurisprudential meanings. While articulating the provisions of Article 30, the framers of the Constitution never intended to exclude '*a University*' from the scope and ambit of the term '*educational institution*' as stated in the said Article. '*Educational institution'* is an expansive term which includes '*University*'. As regulatory mechanisms are different for different branches of educational institutions, here for instance a University, mere compliance of the said regulatory mechanism cannot and should not take away the right under Article 30 Constitution of India.

iii. The error in the *Azeez Basha* principle appears to be in holding that the conversion of the existing institution into a higher level of institution (*from College to University*) makes this entire case different because it took place with an intervention of the legislature [*Kindly See Vol. V-A @ Pgs. 131-132*]. Article 30 uses the term '*educational institutions*' and does not exclude '*educational institution'* which is or could be *a 'University*'. If we give a plain reading of *Azeez Basha* principle, the Universities established by minorities get excluded from the definition of '*educational institutions*' in view of the fact that an educational institution as a University cannot come into existence without a legislative intervention.

iv. The University Grants Commission Act (*hereinafter UGC Act*), recognised a '*University*' only if it is established or incorporated by or under a Central Act, a Provincial Act or a State Act (*Vol. IV-A Pg. 200 @ 203*). Hence, any minority educational institution within the meaning of '*a University*' will automatically use its minority character contrary to the guarantee under

Article 30 of the Constitution of India. In that event, the Right to establish minority educational institutions shall remain confined to the institutions other than Universities.

v. The impact of *the Basha ratio* is cutting down the width and ambit of rights guaranteed under Article 30 (1). The view taken in *Basha* that the government should not be bound by the degrees issued by a Private University, if established without legislative intervention. Consequentially, if legislative intervention takes place then the degree issued by the very same university is effective but the institution loses protection under Article 30. This view is primarily on the basis of the fact that in view of legislative interventions, all the universities would become a public institution/ university. This proposition does not fit in the contemporaneous legal regime where innumerable private/non-government/non-public universities are functional and all these universities have direct or indirect legislative intervention in recognizing them as a university.

vi. It is relevant to point out that NCMEI Act as amended in 2010 gives an inclusive definition of '*minority educational institutions*' to include '*Universities*' established and administered by minorities *[@Pg. 221, Vol. IV-A*].

vii. In the *Basha* case this Hon'ble Court has said that '*there was no prohibition against establishment of Universities by Private Individuals or Bodies*' and granting Degrees. However, the Government of the country will not be bound to recognize those Degrees [*Kindly See Vol. V-A @ Pg. 130*], and no private individual/body could before 1950 insist that the Degrees of any University established by him or it should be recognized. It is submitted that such a principle is erroneous considering the overall mechanism of '*Right to establish and administer*' an educational institution which does not exclude a University.

viii. Considering the above facts, this Hon'ble Court may be pleased to reconsider the view taken in the *Azeez Basha Case* holding the said principle to be incorrect.

NEW DELHI
DATED: 08.01.2024