IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 2320 OF 2006

IN THE MATTER OF:

ALIGARH MUSLIM UNIVERSITY
THROUGH ITS REGISTRAR **... PETITIONER**

Versus

VIVEK KASANA & ORS. **... RESPONDENTS**

VOLUME II-H

WRITTEN SUBMISSIONS BY MR. RAKESH DWIVEDI, SENIOR ADVOCATE ON BEHALF OF THE RESPONDENT

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(i) In the case of ***S. Azeez Basha & Ors. v. Union of India*****,** AIR 1968 SC 662 ("**Azeez Basha**") a five judges' Bench of Hon'ble Supreme Court had given two important findings: *First*, on facts - that Aligarh Muslim University ("**AMU**") is not *established* and *administered* by a Minority Community; *Second*, on law - that for an institution to be a minority one, it should be established and administered by the Minority Community. If either of the factors is missing (from establishment or administration), an educational institutions will not get protection under Article 30(1) of the Constitution of India ("**COI**").

(ii) In 1981, in the case of ***Anjuman e Rahmania & Ors. v. District Inspector of School & Ors. [Writ Petition No. 54-57 of 1981***][1], the Hon'ble Supreme Court observed:

> "*The documents relating to the time when the institution was founded clearly shows that while the institution was established mainly by the Muslim community but there were members from the non-Muslim community also who participated in the establishment Process. The point that arises is as to whether Act. 30(1) of the Constitution envisages an institution which is established by minorities alone without the participation for the factum of establishment from any other community. On this point, there is no clear decision of this court.*

[1] Pg. 209-210, Vol. III-A.

There are some observations in ***S. Azeez Basha & Ors. v. Union of India 1968(1) SCR 333****, but these observations can be explained away. Another point that arises is whether soon after the establishment of the institution if it is registered as a Society under the Society Registration Act, its status as a minority institution changes in view of the broad principles laid down in S. Azeez Basha's case. Even as it is several jurists including Mr. Seervai have expressed about the correctness of the decision of this court in S. Azeez Sasha's case. Since the point has arisen in this case we think that this is a proper occasion when a larger bench can consider the entire aspect fully. We, therefore, direct that this case may be placed before Hon. The Chief Justice for being heard by a bench of at least 7 judges so that S. Azeez Basha's case may also be considered and the points that arise in this case directly as to the essential conditions or ingredients of the minority institution may also be decided once for all.*"

(iii) In 1981, the Parliament passed the Aligarh Muslim University (Amendment) Act, 1981, through which the Parliament tried to overrule the judgment in ***Azeez Basha*** (supra). It amended the definition clause, removed the word "established" from the preamble of the original Aligarh Muslim University Act, 1920 ("**AMU Act**") and made other changes to the AMU Act.

(iv) In 2005, when AMU decided to give 50% reservation to the Muslim students in the post-graduate medical courses by relying upon the 1981 AMU amendment, which had declared AMU as a minority institution, petitions were filed in the Hon'ble High Court of Allahabad against the decision of the AMU to give 50% reservation to Muslim students. The Hon'ble Single Judge while quashing the decision of Executive and Academic Council has held that:

(a) The amendment of 1981 has not changed the basis of ***Azeez Basha*** (supra) and hence, the judgment of ***Azeez Basha*** (supra) still holds the ground.[2]

(b) AMU being a statutory body cannot claim fundamental right under Article 30 of the Constitution.[3]

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[2] Pg. 195-197, Vol. III-A.
[3] Pg. 197, Vol. III-A.

(c) According to ***Azeez Basha*** (supra), only a private university can be a minority institution under Article 30 of the constitution.[4]

(d) Muslim Community never administered the AMU.[5]

(v) AMU went in appeal before the Hon'ble Division Bench against the Hon'ble Single Judge's order, but the Hon'ble Division Bench also refused to give any relief and held that:

(a) The Parliament cannot overrule the judgment in ***Azeez Basha*** (supra) without changing its basis and the 1981 amendment has not changed the basis of ***Azeez Basha*** (supra).[6]

(b) Parliament cannot change the definition of AMU without bringing a constitutional amendment. Parliament has no competency to bring about an AMU Amendment Act, which changes the definition of AMU given under Entry 63 of Schedule 7 of the Constitution.[7]

(c) For getting the status of a Minority Institution under Article 30, it should be established and administered by the Minority. Both the factors should be there.[8]

(d) The judgment in *TMA Pai* has mentioned five components of 'Administration' but after going through the scheme of the AMU Act, Hon'ble Court has observed that all the five factors which are essential ingredients of right to administration are absent in the Aligarh Muslim University.[9]

(e) The 1981 AMU Amendment could not even change the findings of ***Azeez Basha*** (supra) on the aspect of establishment.[10]

(f) Parliament has not been able to change the basis of ***Azeez Basha*** (supra) and hence, the 1981 Amendment is unconstitutional.[11]

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[4] Pg. 197-198, Vol. III-A.
[5] Pg. 199, Vol. III-A.
[6] Pg. 45-54, Vol. III-A.
[7] Pg. 54-57, Vol. III-A.
[8] Pg. 112-116, Vol. III-A.
[9] Pg. 118-138, Vol. III-A.
[10] Pg. 138-140, Vol. III-A.
[11] Pg. 140-141, Vol. III-A.

(vi) AMU and the Union of India went into an Appeal before the Hon'ble Supreme Court and this Hon'ble Court granted *status quo* on 24.04.2006.[12]

(vii) On 12.02.2019, in Civil Appeal No. 2286 of 2006, the Hon'ble Supreme Court has referred the following issue for the consideration of the 7 judges' Bench:[13]

> "*What are the indicia for treating an educational institution as a minority educational institution? Would an institution be regarded as a minority educational institution because it was established by a person(s) belonging to a religious or linguistic minority or its being administered by a person(s) belonging to a religious or linguistic minority?*"

A. BRIEF BACKGROUND OF ARTICLE 30 OF THE CONSTITUTION OF INDIA

1. There is no doubt that the protection and guarantee of rights for minorities is a crucial feature of the Indian Constitution. In the Resolution passed on 13.12.1946, the aim and objects for the drafting of the Constitution of India assured "*adequate safeguard shall be provided for minorities*"[14].

2. The Sub-Committees on Minorities chaired by Sh. H.C. Mukherjee in the Interim Report of the Sub-Committees on Minorities provided that: "*all minorities whether of religion, community or language shall be free in any unit to establish and administer educational institutions of their choice, and they shall be entitled to State aid in the same manner and measure as is given to similar State-aided institutions*".[15]

3. Draft Article 23 took the shape as under:-

> *"23. (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script and culture of its own shall have the right to conserve the same.*

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[12] Pg. 213-215, Vol. III-A.
[13] Pg. 216-221, Vol III-A.
[14] Pg. 2142, Vol. IV-D
[15] Recommendations of the Minorities Sub-Committee, Serial No. III(iv), Constituent Assembly Debates on Articles 29 and 30 at Pg. 7, Vol. IV-B.

(2) No minority whether based on religion, community or language shall be discriminated against in regard to the admission of any person belonging to such minority into any educational institution maintained by the State.

(3) (a) All minorities whether based on religion, community or language shall have the right to establish and administer educational institutions of their choice.

(b) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion, community or language."

4. Following extensive discussions and debates in the Constituent Assembly, the provisions of draft Article 23 were revised, leading to the creation of two separate articles: Article 29 and Article 30 as under:-

"***29. Protection of interest of minorities***. *— (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.*

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

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30. Right of minorities to establish and administer educational institutions. *— (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.*

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language."

B. ANALYSIS OF ARTICLE 30 (1)

I. "Establish and Administer" in Article 30

5. It has been settled by this Court that the word "and" in the expression "*right to establish and administer*" occurring in Article 30(1) is conjunctive. Therefore, the minority will have the right to administer the educational institution if and only if they have established the institutions but not otherwise. In this respect the Appellant has not questioned the correctness of the judgment in

Azeez Basha (supra).[16] In fact, other judgments of this Hon'ble Court namely ***Manager, St. Thomas U.P. School v. Commr. & Secy. to General Education Deptt.***, (2002) 2 SCC 497[17], ***St. Stephen's College*** (supra)[18], ***Dayanand Anglo Vedic (DAV) College Trust & Management Society v. State of Maharashtra***, (2013) 4 SCC 14[19], ***S.P Mittal v. Union of India***, (1983) 1 SCC 51[20], have also taken the same view.

6. Given the aforesaid, Article 30(1) can be invoked only when the group of persons invoking it: *first*, prove that they are either a religious or a linguistic minority; *second*, having proved that they are a minority of the said nature, they would have to prove that they at the relevant time, had a right and power to establish the educational institution in question; *third*, they would have to prove that they have actually established the educational institution in question, as differentiated from mere launching of a movement or making of a request or demand or contributing some little fund or property; and *fourth,* the establishment of the educational institution included the scheme of administration or the manner in which the institution is to be administered as per the choice of the minority.

II. Pre-COI Universities Not Entitled to rights/protections under Article 30(1)

7. The Appellants proceed on the assumption that Article 30 applies to university institutions established and administered by a Muslim minority even before the Constitution of India came into force.

8. Regarding schools and colleges, the issue has been dealt with and answered in the following judgments by the Supreme Court namely

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[16] Pg. 128-129 of Vol. V-A.
[17] *Manager, St. Thomas U.P. School v. Commr. & Secy. To General Education Deptt.*, (2002) 2 SCC 497, Pr. 5 **[Enclosed as R-7]**
[18] Pg. 412-413, Vol. V-A.
[19] Pg. 643, Vol. V-C.
[20] Pg. 431-498, Vol. V-C.

Kerala Education Bill, 1957, 1959 SCR 995,[21] ***Right Rev. Bishop S.K. Patro v. State of Bihar***, (1969) 1 SCC 863,[22] and ***St. Stephen's College v. University of Delhi***, (1992) 1 SCC 558,[23] wherein it has been held that Article 30(1) would be applicable to pre-COI Institutions (schools and colleges). In fact, ***Azeez Basha*** (supra) holds that Article 30(1) would be applicable to pre-COI Institutions provided such Institutions are established by the minority.[24]

9. It is stated that ***Azeez Basha*** (supra) more or less proceeded on an assumption that Universities established before the advent of COI would also be covered by Article 30(1). Article 30(1) is certainly not retrospective in operation. What the aforementioned judgments hold is that it would be retroactive in the sense of taking note of the facts relating to the establishment of schools and colleges by the minority, so as to extend the benefit of Article 30.

10. As regards universities, it needs to be noted that there existed a dichotomy between the schools and colleges on one hand and the universities on the other. Under the British Education Policy, the former could be established by private persons as of right and they were encouraged to do so by grant-in-aid, but universities were the sole legislative preserve of the Governor General in Council (**"GGIC"**).

11. Therefore, no private person or group, whether belonging to the majority or minority could establish a university by themselves. The establishment of a university was the sole discretion of the despotic imperial power and schemes of administration of universities were as per their design. Hence, Article 30 cannot be applied either retrospectively or retroactively to universities established during the British regime. In this context, reliance is placed on the English Education Act of 1835, Sir Charles Wood Despatch of 1854, and

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[21] Pg. 60, Vol. V-A.
[22] Pg. 145-146, Vol. V-A.
[23] Pg. 412-413, Vol. V-B.
[24] Pg. 128-129, Vol. V-A.

Hunter Commission Report of 1882, which has been elaborated hereinunder:

a. The British Policy of Education enforced by the English Education Act, 1835 as per the Minutes of Macaulay was to create a band of intellectuals who may be different "*in blood and colour, but English in taste, in opinions, in morals, and in intellect*".[25] Based on these minutes and British policy, the first university was established in Calcutta by the ACT II OF 1857, along with Universities in Bombay by ACT XXII OF 1857 and Madras by ACT XXVII OF 1857, respectively. Later, in the 1880s, it was decided by the British to open two more universities by means of an Act, the Punjab University Act with the University of Lahore in 1882 and the Allahabad University in 1887.

b. In the context of universities established pre-COI, it is stated that by the Despatch of 1845, the Bengal Council of Education had submitted a proposal for the establishment of a University on the Model of London University. The matter was considered in greater detail under Sir Charles Wood Despatch of 1854 ("**Wood's Despatch**"). Paragraphs 33-37 of Woods Despatch are quoted hereinbelow:[26]

> "***33. We desire that you take into your consideration the institution of universities at Calcutta and Bombay, upon the general principles which we have now explained to you, and report to us upon the best method of procedure, with a view to their incorporation by Acts of the Legislative Council of India. The offices of Chancellor and Vice Chancellor will naturally be filled by persons of high station, who have shown an interest in the cause of education; and it is in connection with the universities that we propose to avail ourselves of the services of the existing Council of Education at Calcutta, and Board of Education at Bombay.*** *We wish to place these*

[25] Macaulay's Minutes on Education, February 2, 1835 **[Enclosed as R-6]**.
[26] Para 33-37, The Despatch of 1854 on General Education in India by Sir Charles Wood **[Enclosed as R-1]**

gentlemen in a position which will not only mark our sense of the exertions which they have made in furtherance of education, but we will give it the benefit of their past experience of the subject. ***We propose, therefore, that the council of education at Calcutta, and the Board of Education at Bombay, with some additional members to be named by the government, shall constitute the Senate of the University at each of those Presidencies****.*

34. The additional members should be so selected as to give to all those who represent the different systems of education which will be carried on in the affiliated institutions- including natives of India, of all religious persuasions, who posses the confidence of the native communities- a fair voice in the Senates. We are led to make these remarks, as we observe that the plan of the Council of Education, in 1845, for the Constitution of the Senate of the proposed Calcutta University was not sufficiently comprehensive.

35. We shall be ready to sanction the creation of an university at Madras or in any other part of India, where a sufficient number of institutions exist from which properly qualified candidates for degrees could be supplied; It being in our opinion advisable that the great centers of European government and civilization in India should possess universities similar in character to those which will now be founded, as soon as the extension of a liberal education shows that their establishment would be of advantage to the native communities*.*

*36. Having provided for the general superintendence of education, and for the institution of universities, not so much to be in themselves places of instruction, as to test the value of education obtained elsewhere, we proceed to consider****, first, the different classes of colleges, and schools, which should be maintained in simultaneous operation, in order to place within the reach of all classes of the natives of India the means of obtaining improved knowledge suited to their several conditions of life; and, secondly, the manner in which the most effectual aid may be rendered by government to each class of educational institutions.***

37. The candidates for university degrees will, as we have already explained, be supplied by colleges affiliated to the universities. These will comprise all such institutions as are capable of supplying a sufficiently high order of instruction in the different branches of art and science, in which university degrees will be accorded. The Hindoo, Hooghly, Dacca, Krishnagur, and Berhampore Government Anglo-vernacular Colleges, the Sanskrit College, the Mohammedan Madrasas, and the Medical College, in Bengal full; the Elphinston Institution, the Poona College, and the Grant Medical College in Bombay; The Delhi, Agra, Banaras, Bareilly and Thomson Colleges in the North-Western Provinces; seminaries such as the Oriental Seminary in Calcutta, which have been stabbed by highly educated natives, a glass of places of instruction which we are glad to learn is daily increasing in numbers and efficiency; those which, like the Parental Academy are conducted by East Indians; Bishop's College, the General Assembly Institution, Dr. Duff's College, the Baptist College at Serampore, ***and other institutions under the superintendence of different religious bodies and missionary societies; will, at once supply a considerable number of educational establishments, worthy of being affiliated to the universities, and of occupying the highest place in the scale of general instruction.***" [emphasis supplied]

c. The Wood's Despatch shows that Universities at Calcutta and Bombay were being considered for being incorporated by "Acts of the Legislative Council of India" and the offices of Chancellor, Vice-Chancellor and Senate were contemplated. The Council of Education were involved to determine the procedure. It also says that the Government is ready to sanction the creation of a University at Madras, "or in any other part of India" where a sufficient number of institutions exist. It goes on to say that it would be advisable that the great centers of European Government and Civilization in India should possess universities "similar in character to those which will now be founded" as soon as their establishment would be of advantage to the native community. These universities were to be centers for

examination only. The candidates for the University degree were to be supplied by the colleges affiliated to the Universities. It mentions some places where it would be possible to establish Universities in due course. Based on Wood's Despatch, Universities were set up in Calcutta, Bombay, and Madras in 1857 under the respective Acts enacted by GGIC. This makes it clear that the process of establishment of universities was begun by the GGIC based on their own policy and schemes of administration designed by them. Initially, the universities were only examination bodies.

d. Between 1857 and 1882, no other university had been established. The Hunter Commission was appointed by resolution of the GOI dated 03.02.1882 to review the progress of English education made in India [**See Appendix A @ Pg. 623, Hunter Commission Report**]. Specific instructions were given to the Commission with respect to primary education, secondary education and colleges to examine further involvement of private efforts under the grant-in-aid system [**See Hunter Commission Report, Para 10 @ Pg. 626**]. It is noted in the report of the Commission (Para 43) that after the disappearance of British East India Company, the principles of the Despatch of 1854 had been confirmed by the Secretary of State in the Despatch of the 07.04.1859. In Para 46 of the report related to the Indian Universities, the same is quoted below:[27]

> "*46.* ***The Indian Universities, 1857 to 1882*** *- The resolution appointing the Commission* ***excludes the universities from the scope of our enquiry****; and we shall, both here and in chapter VI mention them only in their bearing upon collegiate and higher secondary education.* ***The*** Despatch ***of 1854 prescribed the establishment of Universities and in 1857 the three universities of Calcutta, Madras and Bombay were incorporated by acts of the Indian legislature. The constitution of these bodies was modelled on that of the London University, with such modifications as were locally***

[27] Para 46, Report on the Indian Education Commission dated 03.02.1882 by W.W. Hunter **[Enclosed as R-2]**

> ***needed***. *The* ***control of each university was vested in a Senate composed of a chancellor, vice chancellor and fellows, the latter being in the first instance partially selected from the previously existing councils and Board of Education. The function of these universities is that of examination, and not of instruction***. ***The latter is conducted by the affiliated colleges and other institutions authorised to send up candidates for the university examinations***. *While the three elder Indian Universities have been successfully at work during a quarter of a century, a fourth University was established for the Punjab by an Act of the Indian Legislature in 1882. As the University was not established until after March 31st, 1882, the institution now known under that name is treated in this Report and its statistical Appendix as a college. The Punjab University was the result of a movement begun in 1864, and warmly supported by successive Lieutenant Governors.* ***Among its promoters Dr. Leitner holds a very prominent place. It is mainly an examining body, but exercises a variety of functions for the promotion of literature and education. It distinguishing features are that it owns its origin to other than State efforts, and that it is designed to give special encouragement to oriental studies***." [emphasis supplied]

e. Universities were kept out of the purview of the Hunter Commission Report [**See Para 7 @ Pg. 625, Hunter Commission Report**]. The Despatch of 1854, continued to be in operation. By the time the report came, a fourth University had been established for the Punjab by an Act of the Indian Legislature in 1882. In the case of Punjab, a movement demanding the University as an examining body had been led by Dr. Leitner. Notwithstanding the feature of origination in the efforts, the establishment of a university was entirely as per the policy of Woods Despatch and under the Act of GGIC. In other words, the origination of a movement or demand for a university may be a historical fact but does not result in the establishment of a university. Later, a similar University as an examination center was established in Allahabad in 1887.

f. The GGIC enacted the Indian Universities Act, 1904 ("**Act of 1904**")[28]. Its preamble refers to the establishment and incorporation of the aforementioned five (5) universities by the Acts of GGIC. It also notes the empowerment of universities of Calcutta, Madras and Bombay to confer degrees in accordance with Act 47 of 1860, and the honorary degree of doctor in the faculty of law by Act 1 of 1884. The preamble is identical to the preamble of AMU Act which has been noted in ***Azeez Basha*** (supra). In other words, the expression "established and incorporated" is decisive of the fact of establishment of a University by the Act of Legislature. A chart comparing the Preamble of the Acts establishing the Universities of Calcutta, Madras, Bombay and Aligarh is provided herein below: -

PREAMBLE OF THE ACTS	
ACT II OF 1857[29] University of Calcutta	Whereas, for the better encouragement of Her Majesty subjects of all classes and denominations within the presidency of Fort William in Bengal and other parts of India in the pursuit of regular and liberal course of education, **it has been determined to establish an University at Calcutta** for the purpose of ascertaining by means of examination, the persons who have acquired proficiency in different branches of literature, science and art and of rewarding them by academic degrees as evidence of their respective attainments, and marks of honour proportion thereunto; and whereas, for effectuating the purposes aforesaid, **it is expedient that such university should be incorporated**: it is enacted as follows:
ACT XXII OF 1857[30] University of Bombay	Whereas, for the better encouragement of Her Majesty subjects of all classes and denominations within the presidency of Bombay and other parts of India in the pursuit of regular and liberal course of education, **it has been determined to establish an University at Bombay** for the

[28] Pg. 174-199, Vol. IV-A.
[29] ACT II OF 1857 **[Enclosed as R-3]**
[30] ACT XXII OF 1857 **[Enclosed as R-4]**

	purpose of ascertaining by means of examination, the persons who have acquired proficiency in different branches of literature, science and art and of rewarding them by academic degrees as evidence of their respective attainments, and marks of honour proportion thereunto; and whereas, for effectuating the purposes aforesaid, **it is expedient that such university should be incorporated**: it is enacted as follows:
ACT XXVII OF 1857[31] University of Madras	Whereas, for the better encouragement of Her Majesty subjects of all classes and denominations within the presidency of Fort St. George and other parts of India in the pursuit of regular and liberal course of education, **it has been determined to establish an University at Madras** for the purpose of ascertaining by means of examination, the persons who have acquired proficiency in different branches of literature, science and art and of rewarding them by academic degrees as evidence of their respective attainments, and marks of honour proportion thereunto; and whereas, for effectuating the purposes aforesaid, **it is expedient that such university should be incorporated**: it is enacted as follows:
AMU ACT[32] Aligarh Muslim University	**Whereas it is expedient to establish and incorporate a teaching and residential Muslim University at Aligarh** and to dissolve the societies registered into the Societies Registration Act 1869 which are respectively known as Mohammedan Anglo-Oriental College, Aligarh and the Muslim University Association, and to transfer to and vest in the said University all properties and rights of the said societies and of the Muslim University Foundation Committee;

g. Section 2 of the Act of 1904 declares that this Act would be deemed to be part of each of the Acts by which the said five

[31] ACT XXVII OF 1857 **[Enclosed as R-5]**
[32] Pg. 77, Vol IV-A.

universities were respectively established and incorporated. Section 4 provides the structure of the University and contemplated a system of 'fellows' who could be either elected by Senates or nominated by the Chancellor. By Section 15, the executive government of the University was vested with the Syndicate and *vide* Section 16 the Senate could confer degrees and grant diplomas etc. Sections 19-24 envisages affiliated colleges. After the enactment of the Act of 1904, all the Universities became competent to institute degrees, diplomas etc. It is in the above backdrop that a university was established in Banaras under the Banaras Hindu University Act, 1915 and in Aligarh under the AMU Act during the period of World War I. In particular, the AMU Act came to be enacted in the backdrop of the Rowlett Act of 1919 and the Jallianwala Bagh episode of 1919.

h. From the aforesaid legislative history, it is evident that all the aforesaid Universities had been established under separate legislative enactments of the GGIC. These Universities had been established under the Woods Despatch of 1894. There was no British Policy to allow private persons to establish a university. The private persons were given a right and were encouraged by grants-in-aid to establish primary schools, secondary schools, and colleges. In as much as private persons had no right to establish and administer a University, and therefore, Article 30(1) cannot be retrospectively or retroactively extended to the conditions and system of law prevalent before the advent of COI and in particular to the year 1920.

III. Were Muslims a Nation or a Minority?

12. In ***Azeez Basha*** (supra), this Court has proceeded on the assumption that Muslims are a minority based on religion. Now that the invocation of Article 30 by AMU is being considered upon a

reference, this issue needs to be decided not on the assumption but based on historical facts. The mere fact that the title of the University mentions "Muslim" would not establish that Muslims were a minority in the year 1920 when the AMU Act was passed. It will have to be considered whether the Muslims considered themselves to be a minority when the Act was passed and whether the British India Government considered them to be a minority. A community cannot claim to be a minority merely to take advantage of the COI coming into force on 26.01.1950. It is not enough that the COI considers them to be a minority. The important aspect is, whether the Muslims and the British India Government considered Muslims to be a minority in the year 1920?

a. The Petitioners have strongly emphasized that the founding father of AMU is Shri Syed Ahmad Khan, and it was he who decided to set up an educational institution initially at a primary level and then elevated it to High School and then into the M.A.O. College, whose foundation was laid by Lord Lytton. It is said that he wanted to wean away the Muslim youth from madrasas and draw them into learning Liberal Arts and Western Science. It is, therefore, important to note that based on the Islamic religion, Shri Khan considered Muslims to be a separate and distinct nation which had once ruled over India. He did not consider the Muslims to be a minority merely because they were numerically less than the Hindus. Shri Khan is considered the Father of the Two Nation Theory, which was later seconded by the poet Allama Iqbal in the 1930 Muslim League session at Allahabad, and which idea was made the basis of the 1940 Lahore Resolution by Shri M.A. Jinnah. It is this Theory of Two Nations, which emphasized a claim of parity between the Hindu India and that led to the partition of India and the creation of Pakistan. The Theory of Two Nations does not accommodate the theory of safeguards for a minority.

b. It is also an undeniable established fact in history that from 1935 onwards, AMU teachers and students actively supported the

creation of Pakistan as conceived by Shri Jinnah. In fact, the Two Nation Theory was the basis of a separate electorate with weighted reservations of seats, which was assured by Lord Minto to the Muslim Delegation led by Shri Aga Khan to Shimla, and which was implemented by the Indian Council Act, 1909 and reiterated in Government of India Act, 1919 ("**GoI Act, 1919**") and Government of India Act, 1935 ("**GoI Act, 1935**"). It is a further fact, that when Congress offered safeguards of whatever nature the Muslim league desired, Jinnah retorted that Muslims were a separate nation and not a minority and their resolution for Pakistan was not meant for safeguards but for a separate homeland for Muslims. The British rulers also supported the Theory of Two Nations propounded by Shri Khan and the same was followed by the Muslim League.

c. Reference may be made to the speech of Shri S.A. Khan in Lucknow in 1887[33] and speech in Meerut in 1888.[34]

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[33] The following extract is taken from, "Sir Syed Ahmed on the Present State of Indian Politics, Consisting of Speeches and Letters" Reprinted from the "Pioneer" (Allahabad: The Pioneer Press, 1888), Pp. 1-24. **[Enclosed as R-8]**

> *"{17}[*17*] We ought to consider carefully our own circumstances and the circumstances of Government. If Government entertains unfavourable sentiments towards our community, then I say with the utmost force that these [[17]] sentiments are entirely wrong. At the same time if we are just, we must admit that such sentiments would be by no means unnatural. I repeat it. If Government entertains these bad sentiments, it is a sign of incompetence and folly. But I say this: we ought to consider whether Government can entertain such thoughts or not. Has she any excuse for such suspicions, or not? I reply that she certainly has.* ***Think for a moment who you are. What is this nation of ours? We are those who ruled India for six or seven hundred years. (Cheers.)*** *From our hands the country was taken by Government into its own. Is it not natural then for Government to entertain such thoughts?* ***Is Government so foolish as to suppose that in seventy years we have forgotten all our grandeur and our empire?*** *Although, should Government entertain such notions, she is certainly wrong; yet we must remember she has ample excuse. We do not live on fish, nor are we afraid of using a knife and fork lest we should cut our fingers. (Cheers.)* ***Our nation is of the blood of those who made not only Arabia, but Asia and Europe, to tremble. It is our nation which conquered with its sword the whole of India, although its peoples were all of one religion. (Cheers.)*** *I say again that if Government entertains suspicions of us, it is wrong. But do her the justice and admit that there is a reasonable ground for such suspicions. Can a wise ruler forget what the state of things was so short a time ago? He can never forget it. If then the Mahomedans [[18]] also join these monstrous and unreasonable schemes, which are impossible of fulfilment, and which are disastrous for the country and for our nation, what will be the result? If Government be wise and Lord Dufferin be a capable Viceroy, then he will realise that a Mahomedan agitation is not the same as a Bengali agitation, and he will be bound to apply an adequate remedy. If I were Viceroy; and my nation took part in this affair, I would first of all drop down on them, and make them feel their mistake.*
>
> *…*
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> *{23}[*23*] In the time of Lord Ripon I happened to be a member of the Council. Lord Ripon had a very good heart and kind disposition, and every qualification for a Governor. But unfortunately his hand was weak. His ideas were Radical. At that time the Local Board and Municipality Bills were brought forward, and the intention of them was that everybody should be appointed by election. Gentlemen, I am not a Conservative, I am a great Liberal****. But to forget the prosperity of one's nation is not a sign of wisdom. The only person who was opposed to the system of election was myself.*** *If I am not bragging too much, I may, I think, say that it was on account of my speech that Lord Ripon changed his opinion and made one-third of the members appointed and two-thirds elected.* ***Now just consider the result of election. In no town are Hindus and Mahomedans equal****. Can the Mahomedans suppress [[23]] the Hindus and become the masters of our "Self-Government"? In Calcutta an old, bearded Mahomedan of noble family met me and said that a terrible calamity had befallen them. In his town there were eighteen elected members, not one of whom was a Mahomedan; all were Hindus. Now he wanted Government to appoint some Mahomedan; and he hoped Government would appoint himself.* ***This is the state of things in all cities. In Aligarh also, were there not a special rule, it would be impossible for any Mahomedan, except my friend Maulvi Mahomed Yusuf, to be elected;*** *and at last he too would have to rely on being appointed by Government.* ***Then how can we walk along a road for which neither we nor the country is prepared?"*** [emphasis supplied]

IV. About Establishment of AMU

13. The Appellant has emphasized that Shri Khan was instrumental in setting up the institution which evolved into M.A.O. College in 1877 and that the Muslims collected some funds and formed the Muslim University Association, which pleaded with the then Government of India (pre-independence) to establish universities, and not only surrendered their existing property (land and building), but also collected INR 30 lakhs as demanded by the Government for the establishment of the University. The Appellant has contended that the Muslim University Association was inspired by Shri Khan to seek a university at Aligarh for Muslims, and they requested the British rulers for that purpose and also contributed some properties and funds. Therefore, it can be said that they founded or established AMU and it was immaterial that the GGIC issued the AMU Act for that purpose. Also, the enactment of the AMU Act is only for recognition so that degrees could be recognized for employment and that ***Azeez Basha*** (supra) incorrectly denied the minority character

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[34] The following extract is taken from, "Sir Syed Ahmed on the Present State of Indian Politics, Consisting of Speeches and Letters" Reprinted from the "Pioneer" (Allahabad: The Pioneer Press, 1888), Pp. 29-53. **[Enclosed as R-9]**

> *"{7} After this long preface* ***I wish to explain what method my nation*** *— nay, rather the whole people of this country —* ***ought to pursue in political matters****. I will treat in regular sequence of the political questions of India, so that you may have full opportunity of giving your attention to them.* ***The first of all is this — In whose hands shall the administration and the Empire of India rest?*** *Now, suppose that all English, and the whole English army, were to leave India, taking with them all their cannon and their splendid weapons and everything,* ***then who would be rulers of India? Is it possible that under these circumstances two nations — the Mahomedans and the Hindus — could sit on the same throne and remain equal in power? Most certainly not. It is necessary that one of them should conquer the other and thrust it down.*** *To hope that both could remain equal is to desire the impossible and the inconceivable. At the same time you must remember that although the number of Mahomedans is less than that of the Hindus, and although they contain far fewer people who have received a high English education****, yet they must not be thought insignificant or weak.*** *Probably they would be by themselves enough to maintain their own position. But suppose they were not. [[38]]* ***Then our Mussalman brothers, the Pathans, would come out as a swarm of locusts from their mountain valleys, and make rivers of blood to flow from their frontier in the north to the extreme end of Bengal****. This thing — who, after the departure of the English, would be conquerors — would rest on the will of God.* ***But until one nation had conquered the other and made it obedient, peace could not reign in the land.*** *This conclusion is based on proofs so absolute that no one can deny it."* [emphasis supplied]

merely because the statute had intervened to give effect to their desire and efforts. Reliance was also placed on the opinion of Sh. H.M. Seervai.

14. It is stated that the establishment of the university required a far bigger campus and a larger building for running various departments of the University and several halls for the residents of Muslims, Hindus, and Females. It is for this reason that certain elite Muslims got together under the banner of the Muslim University Association to implore the Governor General to establish AMU at Aligarh. Therefore, the assumption that Muslims arranged a small campus of M.A.O. College and some funds had been arranged for persuading the Governor General, and that the objective of the Muslim University Association was to enable Muslim Youth to imbibe education in English Literature and Western Science, could not lead to the conclusion that the University was established by the Muslim University Association or Muslim Minority (assuming they were a minority). In view of the fact that the Muslim University Association had neither the right nor capacity nor power to establish AMU, it cannot be said that AMU was established by Muslim minorities in the year 1920. The right and power to do so were vested in the despotic imperialist government headed by Governor General in India and the AMU came to be established on account of the power and capacity of the British Rulers.

15. What the Appellant failed to bring forth, was the role of the GGIC. The AMU Act had been issued under the Indian Council Act, 1909. The GOI Act, 1919 though made in 1919 had come into operation only on 09.02.1921 after the first elections. The Governor General and Viceroy enjoyed an absolute imperial power. No university could be established in India without the passing of an Act by GGIC and the policy of the British Government. It may be noted that pursuant to the University Commission of 1902, the British Government under Lord Curzon had issued the Indian University Act, 1904.[35]

[35] The Indian Universities Act, 1904 (VIII of 1904) was passed by the Governor General of India in Council.

Therefore, the establishment of any university in British India was the absolute discretion of the imperial power vesting in the Governor General. Halsbury's Laws of England, on the law relating to the incorporation of universities, state that the essential feature of the University seems to be incorporation by a sovereign power. Further, the only way to establish a university is by a charter or an Act of parliament.[36]

16. It is interesting to refer to the Council Debates with respect to the AMU Bill.[37] The Bill was introduced by Mr. Shafi who was a member of the Muslim League and part of the Shimla Deputation to Lord Minto in 1906. He was a lawyer enrolled in Punjab and was in the Governor General Executive Council (1922-1925). He not only introduced the Bill but also moved the motion for reference to a select committee consisting of some British and some Muslim elites like Raja of Mahmoodabad, Shah Nawaz Bhutto (father of Zulfikar Ali Bhutto) and Hon'ble Nawab Nawab Ali Choudhary, Hon'ble Mr. Mohd. Ali and Mr. Shafi. <u>All these private persons were supporters of Muslim League and Pakistan</u>. However, in his speech, Mr. Shafi stated, that the movement for the establishment of the university '*having ascertained informally that in addition to the then existing valuable assets of the college, a large endowment fund would be required as a guarantee of its stability before Government would agree to the establishment of a University'*.[38] Aga Khan visited various centers in 1911 and negotiations with the Government on behalf of the community was organized by Raja Mohd. Ali of Mahmoodabad. On 10.06.1911, the Government of India communicated the desire of the Muslim Community and recommended sanction be given to the establishment of a teaching University at Aligarh. The Secretary of State approved it in principle

[36] Halsbury's Laws of England, 4th Edition, Volume 15 (1977), Butterworth & Co. (Publishers) Ltd., Page 183, Para 280. **[Enclosed as R-10]**
[37] Pg. 40, Vol. IV-C.
[38] Pg. 41, Vol. IV-C.

on 18.07.1911 **'*while reserving his own freedom of action*'** and sanctioned the proposed negotiations with the Association.

17. The decision is contained in the Despatch of 02.08.1911. The Despatch of Secretary of State in the month of November 1911 embodying the various provisions of the scheme which had been settled between the Govt. of India and the Muslim University Association was "issued". The Secretary of State in this Despatch of February 1911 insisted on certain alteration in the draft scheme and expressed an earnest hope that the said alterations in the draft will not lead to any insuperable difficulty in arriving at a final agreement. Meanwhile, the Hindu leaders approached the Govt. of India with a scheme for BHU and a Bill for establishment of BHU was prepared which culminated in the Act of 1915. The British Govt. therefore, decided that the University to be granted to the Muslim Community would be on the lines of BHU Act. With respect to AMU there were negotiations between AMU and Education Department of the Govt of India on the one hand and between the Govt of India and the British Government in London on the other hand.[39]

18. Ultimately the AMU Bill was founded on the BHU Act. Since the GoI Act, 1919 had intervened and recommendations of the Calcutta University Commission had been embodied in the Dhaka University Act, 1920, the British Government introduced a new and important feature in the constitution of unitary teaching and residential universities such as AMU.

19. The departmental notes[40] indicate that the scheme of administration contained in the AMU Act was designed essentially by the British Government of India and the negotiations were limited to some non-essential aspects. All major demands were rejected and broadly the scheme followed the pattern of the BHU Act. In this respect, a letter dated 24.09.1915 of Sir Harcourt Butler, the Lt. Governor, Uttar Pradesh, which states that a formal representation

[39] Pg. 41-42, Vol. IV-C.
[40] Pg. 1057-1173, Vol IV-D.

of Muslim University Foundation Committee must "*necessarily state that the MUFC has accepted the decision on questions of principles reached in connection with the Hindu University at Benares*" and details could be discussed thereafter. The letter further states that "*questions of principles such as control etc., over which there has been prolonged discussion in connection with the Hindu University is an absolute condition precedent to further action*".[41] By Resolution dated 10.04.1916 passed by Muslim University Foundation Committee (Shri M.A. Jinnah was one of the participants), the parity with BHU was accepted with a request to enable the University to recognize schools outside Aligarh.[42] Thereafter, in the meeting with the regulation committee of AMU, the government representative, Shri Sankaran Nair reiterated that the principles of Benares Act were consonant with the practice of the college. Mr. Jinnah requested that the power of veto should rest with the Governor General and not with the Lt. Governor.[43]

A telegram dated 08.05.1920 from the Government of U.P pointed out the differences in the proposed Aligarh Bill and the Benares Act, and it indicated some minor differences. For illustration, in the BHU Act, certain powers were vested with the Visitor but in the AMU Bill, it was transferred to the GGIC. It said that Aligarh and Banaras Universities are all Indian and not provincial institutions and in view of the constitutional reforms under the GOI Act, 1919 they will be central subjects and therefore, the control was vested in the GGIC. The reference was also made to those financial aids to these Universities which was to come from the imperial revenue. These changes did not affect any question of principle already settled by the Executive Council and the changes were the necessary consequence of the "Imperial Character" of these universities as well as of their being under the direct control of the GGIC. Further, since the accounts of the Universities were to include the expenditure of

[41] Pg. 1066, Vol IV-D.
[42] Pg. 1076, Vol IV-D.
[43] Pg. 1094, Vol IV-D.

the Imperial recurring grant: these must, therefore, be submitted to the British Government of India. For this reason, the Imperial Act envisages the veto of GGIC with respect to new statute.[44] From the aforesaid, it is clear that the scheme of administration under the AMU Act has been designed by the GGIC in the light of BHU Act, 1915.

20. The introduction to the BHU Act contained in the calendar of 1932 states that a sum of INR 30 lakhs was a requirement for "entertaining the application for the grant of University Charter".[45] This again shows that AMU Act was in the nature of grant by the GGIC with the sanction of His Majesty's Government (**"HMG"**). A perusal of the Act also shows that all past rights and privileges of the M.A.O. College or MUA were transferred and vested in the University along with its property, and the society was dissolved. The transfer of property was to be applied for the object and purposes of the University. Even the debts, liabilities and obligations were transferred.

21. Shri Shafi mentions that, "*recognizing the All-India character of the Benares and Aligarh Universities, the rules framed under GOI Act, 1919 proposes that the two universities should be central subject and the responsibility in connection therewith will, hence forward, rest on the shoulders of the Government of India*". Sections 6(2), 17(5), 18(5) and Statutes 8(1), 10(1) and 19(1) of the BHU Act will make it clear to Hon'ble members that the Visitor is the Lieutenant General (**"LG"**) of Uttar Pradesh is the main agency of control of the Benaras University.[46] In the present Bill in consonance with the Central nature of the subject, much of the control is transferred to the GGIC - an authority which under the Government of India Act will, hence forward, include three Indian members. All new statutes would require previous approval of the LG who may sanction, disallow, or remit for further consideration. He again repeats that generally

[44] Pg. 1120 and 1122, Vol IV-D.
[45] Pg. 216, Vol IV-D.
[46] Pg. 43, Vol. IV-C.

speaking the AMU Bill has been brought in line with Dhaka University Act[47] and in that sense improves upon the BHU Act.[48]

22. The University was a completely different venture at a higher level of education and its territorial ambit was also expanded to cover the entire country. Some key provisions of the AMU Act are as under: -

a. Section 7 specifically says that the sum of Rs. 30 lakhs was to be kept as a permanent endowment to meet the recurring charges of the University;
b. The education imparted was also to be secular and *vide* Section 8, the University was open to all persons irrespective of gender, race, creed, or class. Thus, it was not meant to be limited to the Muslims;
c. It is important to state that Section 13 recognizes the Governor General as Lord Rector of the University. He was entitled to cause inspection and give advice;
d. The Lord Rector is also given power under Section 23 to approve and sanction new statutes. The first statutes were specified in the schedule to the Act itself. Thus, GGIC had full control over the making of statute and the position was the same in regard to the making of ordinances under Section 30;
e. Section 30(5) also provides that AMU will provide instructions in accordance with the prospectus of studies of the Allahabad University;
f. Under Section 35, audited annual accounts had to be submitted to the Lord Rector through the Visiting Board. Most importantly, the Court which is the supreme governing body of the AMU while being limited to members who are Muslim, is not confined and limited to the erstwhile trustee members of M.A.O. College. In this regard, reference is also necessary to the First Statute of the AMU contained in the Schedule to the Act[49] and the Annexure.[50]

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[47] Dhaka University Act 1920 [**Enclosed as R- 29**].
[48] Pg. 44, Vol IV-C.
[49] Pg. 304-323, Vol IV-D.
[50] Pg. 329-345, Vol IV-D.

23. From the abovementioned facts, it can be concluded that the scheme of the AMU Act denotes a complete departure from the rules and regulations of M.A.O. College, and it is not the case of the Appellant that the scheme of the AMU Act was formulated by them in its essential parts. Therefore, they cannot claim that the Muslim Community established AMU.

24. From the aforesaid it is clear that ***Azeez Basha*** (supra) rightly concluded that AMU had been established by the British Rulers by means of an Act which received the sanction of HMG.

25. In so far as the provisions of the AMU Act and its comparison with BHU is concerned, the same has been dealt with in the Written Submissions of the Ld. Solicitor General. The same would be referred to if required. However, in view of the above, the fact that the word 'Muslim' occurs in the name of the AMU Act, 1920 and that the Court is to be comprised of Muslim members would be insufficient to hold that AMU has been established by the Muslim community or Muslim University Association. These bodies had no role in the establishment and incorporation of the University which included the formulation and the scheme of administration. Moreover, the GGIC and HMG had full authority of law to amend any part of the scheme at their own discretion. There was no safeguard in the form of any fundamental right during the years 1920-1947.

V. "By or Under" a Statute

26. In the above context, a distinction needs to be drawn between a university established by an Act and a university established under an Act by private persons. There was no Act or policy of the GOI entitling private persons to establish a university under a British enactment or British policy.

27. Courts have interpreted the above expression and held that '*by an Act*' would mean a provision directly enacted in the statute in question and which is gatherable from its express language or by

necessary implications. In contrast, '*under the Act*' would signify what is not directly to be found in the statute itself but it is conferred or imposed by virtue of powers enabling it to be done.

28. The Privy Council in the case of ***Hubli Electricity Company Ltd. v. Province of Bombay***, 1948 SCC Online PC 81 held as under:[51]

> "*Further the question on which the opinion of the Government is relevant is not whether a default has been wilful and unreasonably prolonged but whether there has been a wilful and unreasonably prolonged default. Upon that point the opinion is the determining matter and—if it is not for good cause displaced as a relevant opinion—it is conclusive. But there the area of opinion ceases.* ***The phrase "anything required under the Act" means "anything which is required under the Act." The question what obligations are imposed on licensees by or under the Act is a question of law.*** *Their Lordships do not read the section as making the Government the arbiter upon the construction of the Act or as to the obligations it imposes. Doubtless the Government must in expressing an opinion for the purpose of the section also entertain a view as to the question of law. But its view on law is not decisive. If in arriving at a conclusion it appeared that the Government had given effect to a wrong apprehension of the obligations imposed oil the licensee by or under the Act the result would be that the Government had not expressed such an opinion as is referred to in the section.*
>
> *The question that then emerges is whether the performance of condition VI of the Schedule incorporated in the licence by s. 3(2)(f) is required by the licensee by or under the Act. In their Lordships' view it is. The scheduled conditions unless excluded or modified necessarily form part of the licence to be granted under the Act: the licence is required to be operated in accordance with these conditions and not otherwise, and the authority to operate the licence is derived from the Act. To this it, may be added that the latter part of s. 3(2)(f) expressly provides that the scheduled conditions are to apply to the undertaking and that s. 47 provides for penalties judicially exigible on breach of the conditions.*

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[51] *Hubli Electricity Company Ltd. v. Province of Bombay*, 1948 SCC Online PC 81 **[Enclosed as R-11]**

Performance of the scheduled conditions may not on a strict reading be required of the licensee "by" the Act: it is clearly required "under" the Act." (emphasis supplied)

29. This Hon'ble Court in ***Indramani Pyarelal Gupta v. W.R. Natu***, AIR 1963 SC 274 observed as follows:[52]

> "*15. A more serious argument was advanced by learned counsel based upon the submission that a power conferred by a bye-law framed under Section 11 or 12 was not one that was conferred "by or under the Act or as may be prescribed".* ***Learned counsel is undoubtedly right in his submission that a power conferred by a bye-law is not one conferred "by the Act", for in the context the expression "conferred by the Act" would mean "conferred expressly or by necessary implication by the Act itself". It is also common ground that a bye-law framed under Section 11 or 12 could not fall within the phraseology "as may be prescribed", for the expression "prescribed" has been defined to mean "by rules under the Act" i.e. those framed under Section 28 and a bye-law is certainly not within that description. The question, therefore, is whether a power conferred by a bye-law could be held to be a power "conferred under the Act". The meaning of the word "under the Act" is well known. "By" an Act would mean by a provision directly enacted in the statute in question and which is gatherable from its express language or by necessary implication therefrom. The words "under the Act" would, in that context, signify what is not directly to be found in the statute itself but is conferred or imposed by virtue of powers enabling this to be done; in other words, bye-laws made by a subordinate law-making authority which is empowered to do so by the parent Act. The distinction is thus between what is directly done by the enactment and what is done indirectly by rule-making authorities which are vested with powers in that behalf by the Act. (Vide Hubli Electricity Company Ltd. v. Province of Bombay [76 IA 57 at p. 66] and Narayanaswamy Naidu v. Krishnamurthi [ILR 1958 Mad 513 at p. 547] .) That in such a sense bye-laws would be subordinate-legislation "under the Act" is clear from the terms of Sections 11 and 12 themselves***." [emphasis supplied]

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[52] *Indramani Pyarelal Gupta v. W.R. Natu*, AIR 1963 SC 274 **[Enclosed as R-12]**

Also see ***G. Natayanaswamy Naidu v. C. Krishnamurthi and Anr.***, AIR 1958 Mad 343.[53]

30. That in several judgments, the Hon'ble Supreme Court has interpreted the expression "*by or under*" an Act. It is submitted that this Hon'ble Court has given deep emphasis to the expressions "*established*" if appearing before the expression "*by or under*" an Act. This Hon'ble Court has distinguished corporation/ companies brought into existence by and under an Act from the other private corporation/ companies which are brought into existence by a group of people following the preconditions under an Act. In this regard reference is made to ***Dalco Engg. (P) Ltd. v. Satish Prabhakar Padhye***, (2010) 4 SCC 378, in which this Hon'ble Court observed as follows:[54]

> "***21. Where the definition of "establishment" uses the term "a corporation established by or under an Act", the emphasis should be on the word "established" in addition to the words "by or under". The word "established" refers to coming into existence by virtue of an enactment. It does not refer to a company, which, when it comes into existence, is governed in accordance with the provisions of the Companies Act. But then, what is the difference between "established by a Central Act" and "established under a Central Act"?***
>
> ***22. The difference is best explained by some illustrations. A corporation is established by an Act, where the Act itself establishes the corporation. For example, Section 3 of the State Bank of India Act, 1955 provides that a bank to be called State Bank of India shall be constituted to carry on the business of banking. Section 3 of the Life Insurance Corporation Act, 1956 provides that***
>
> ***3. Establishment and incorporation of Life Insurance Corporation of India.—(1) With effect from such date as the Central Government may, by notification in the Official Gazette, appoint, there shall be established a Corporation called the Life Insurance Corporation of India."***

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[53] *G. Natayanaswamy Naidu v. C. Krishnamurthi and Anr.,* AIR 1958 Mad 343 **[Enclosed as R-13]**

[54] *Dalco Engg. (P) Ltd. v. Satish Prabhakar Padhye*, (2010) 4 SCC 378. **[Enclosed as R-14]**

> ***State Bank of India and Life Insurance Corporation of India are two examples of corporations established by "a Central Act".***
>
> ***20. A "company" is not "established" under the Companies Act. An incorporated company does not "owe" its existence to the Companies Act. An incorporated company is formed by the act of any seven or more persons (or two or more persons for a private company) associated for any lawful purpose subscribing their names to a memorandum of association and by complying with the requirements of the Companies Act in respect of registration. Therefore, a "company" is incorporated and registered under the Companies Act and not established under the Companies Act. Per contra, the Companies Act itself establishes the National Company Law Tribunal and the National Company Law Appellate Tribunal, and these two statutory authorities owe their existence to the Companies Act.***" (emphasis supplied)

This position of law has also been affirmed by this Hon'ble Court in ***CIT v. Canara Bank***, (2018) 9 SCC 322 at Paras 25 and 26.[55]

31. AMU cannot be said to be a university which is established either under the Act or whose establishment is merely recognized by the Act of 1920. ***Azeez Basha*** (supra) rightly noted the provisions of the said Act and correctly concluded that AMU was established by the Act and not minorities.

32. AMU is a university which is established by the AMU Act. As submitted earlier, a university could be established only by an Act of GGIC. In contrast, under the University Grants Commission Act, 1956 (hereinafter "**UGC Act**") and its regulations, it is permissible to set up a university under the Act, quite apart from the establishment of university by the Act. Alternatively, without any concession, in the year 1920, nothing prevented the British Government of India and the HMG from establishing a university for catering predominantly to the interest of any particular community.

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[55] *CIT v. Canara Bank*, (2018) 9 SCC 322 **[Enclosed as R-15]**

The government had absolute and untrammeled powers. The establishment of a university by GGIC for a community is completely different from the establishment of university by the community. In short there is a distinction between 'by the community' and 'for the community'.

33. Later, by the Indian Medical Degrees Act 1916, the right to confer degree, diplomas, licenses, certificates, and other documents could be given by the authorities specified in the Schedule[56] and that included every university established by a Central Act.[57] In the above context, it has to be noted that before the COI, no community in British India had a right to establish an education institution in the nature of a university. It was the absolute discretion of the GGIC. There is, therefore, a serious problem in projecting Article 30 to that pre-constitutional phase of British India when the Governor General had absolute discretion and people did not enjoy any right to establish a university.

VI. Construction of "Right to Establish"

34. The term "establish" in Article 30 of the COI means establishment as a matter of fact and not a legal fiction. A subsequent law cannot prospectively, nor retrospectively, treat a university as established by the sovereign of the time by law as being established by a minority, when the university was established. This is particularly so when the university was established several decades before the advent of COI. The Court will have to examine if the AMU was established by a minority as a fact. Therefore, the fiction of the 1981 Act is futile, and not enough to attract the protection of Article 30 of the COI.

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[56] Section 3 read with Schedule of the Indian Medical Degrees Act, 1916. **[Enclosed as R-16]**

[57] ibid, Entry I, Schedule **[Enclosed as R-16]**

35. In the above context, it may be significant to refer to the judgments of this Hon'ble Court, which says that rights under Article 30 would be available to pre-constitutional educational institutions other than universities, with respect to educational institutions other than universities. The Education Act, 1935 and the Education Policy of the British Government permitted private education and therefore, they enjoyed the right to set up such institutions, but no right to establish a university has been conferred. It is relevant to note, that the judgments relating to pre-constitution institutions claiming rights under Article 30(1) are in relation to colleges/institutions and not Universities, which is discernable from the chart below: -

S. No.	**PARTICULARS**	**NATURE OF INSTITUTION**
1.	*Rev. Sidhajbhai Sabhai and Ors. v. State of Bombay and Anr.* [1962] 3 SCR 837	42 primary schools and a training college.
2.	*Right Rev. Bishop S.K. Patro & Ors. v. State of Bihar* (1969) 1 SCC 863	Church Missonary Society Higher Secondary School - a primary school.
3.	*Rev. Father W. Proost and Ors. v. State of Bihar* (1969) 2 SCR 73	St. Xavier's College
4.	*State of Kerala v. VRM Provincial*, 1970 (2) SCC 417	Private colleges founded by minority communities in the State aggrieved by Kerala University Act, 1969.
5.	*The Ahmedabad St. Xavier's College Society & Anr. v. State of Gujarat & Anr*, (1974) 1 SCC 717	St. Xavier's College of Arts and Commerce
6.	*Gandhi Faiz-E-Am College, Shahjahanpur v. University of Agra*, (1975) 2 SCC 283	A.V. Middle School which later became a high school and thereafter attained the status of an Intermediate college.
7.	*St. Stephen's College v. University of Delhi*, (1992) 1 SCC 558	St. Stephen's College

36. In ***Azeez Basha*** (supra), the Constitution Bench rightly emphasized at more than one place, that AMU was established by the AMU Act and not by the Muslim minorities. The long title of the Act had been noticed and reproduced in ***Azeez Basha*** (supra).[58] If a university had to be established to impart education in Liberal Arts and Western Science at a higher level, the same could have been done by an Act approved by the Governor General and passed by GGIC. It is also noteworthy, that BHU and AMU were treated as special Universities and kept as a reserved subject under the Government of India Act, 1919[59] and also *vide* Entry 13 of List I of the Seventh Schedule of Government of India Act, 1935.[60] Entry 63 of List I of the Seventh Schedule in the COI deliberately altered the character of these Universities as institutes of national importance. From Universities created by the British to divide intellectuals, amongst the Hindus and Muslims, the COI converted them into secular institutions of national importance. ***Azeez Basha*** (supra) rightly looked at the AMU Act and recorded the correct finding that the University was established by the Governor-General by means of an Act and not by the Muslim minority, who, as stated above, never considered themselves to be a minority in the first place.

37. The Appellants erroneously contended that ***Azeez Basha*** (supra) holds that the moment the statute intervenes, the minority character of the educational institution would be lost, and in that respect, it contradicts itself, as it has recognized that minorities can establish universities also. This is a complete misreading of ***Azeez Basha*** (supra). ***Azeez Basha*** (supra) does not record any finding that an educational university established by a minority would lose its character upon the intervention of a statute enabling recognition of its degrees. ***Azeez Basha*** (supra) was dealing with a specific statute which was pre-constitution, and which had been enacted

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[58] Pg. 121, Vol. V-A.
[59] Entry 5 of the Provincial List in Schedule I of the Government of India Act, 1919 referred at Page No. 46, Vol. II-A.
[60] Pg. 42, Vol. IV-F

with the approval of the Governor-General under the Indian Council Act, 1909. It dealt with the challenge set up in writ petitions under Article 32, which assailed the 1951 and 1965 amendments to the AMU Act. The claim for minority character was based on what had been done by Shri Khan and the Muslim University Association towards seeking the establishment of the University. ***Azeez Basha*** (supra) is, therefore, context-specific and statute-specific and it does not lay down any general law as argued by the Appellant.

38. In the above context, it is essential to decipher the meaning attributed to the expression "*establish*". ***Azeez Basha*** (supra) understood the expression "*establish*" under Article 30(1) to mean to bring into existence. Based on the antecedent facts, it rightly concluded that AMU as a university could not come into existence without the 1920 Act being passed and approved by the Governor General.[61] The Appellant, however, contends that subsequent judgments have discarded this definition and adopted the meaning "*to found*", and therefore, the basis of ***Azeez Basha*** (supra) stands knocked out. It was also said that the nature of the administration of the University was not decisive as the COI does not oblige the minorities to administer themselves. It is their right to administer the educational institutions established by them, but they can involve others, non-Muslims, in the institution, and in the running of the institution. This Hon'ble Court was assured that the Appellant does not seek ghettoization, and accept that the students and teachers of other communities could be involved and be a part of the institution. It was also said that the fact that some supervisory powers were vested in the Governor-General as Rector, and that the Governor was a Chancellor, would not detract from their claim as the governing body was the Court of AMU, in which only Muslims could have been the members.

[61] Pg. 132 and 133, Vol V-A

39. The expression "*establish and administer education institution*" needs to be considered as a singular expression. This is so for two reasons: *first*, the word "*and*" has been held to be conjunctive, and *second*, "*establish* and *administer*" are intricately connected to educational institutions. The word "establish" therefore, needs to be construed contextually. It cannot mean "*founding*" in the sense of being inspired, making requests, negotiating, or making some contribution in the form of property and funds. Contextually, it would mean arranging of the campus, construction of the building, devising the particular scheme of administration and providing it the cover of law and incorporation. This Hon'ble Court in ***Prof. Yashpal v. State of Chhattisgarh***, (2005) 5 SCC 420[62], has observed as follows:

> "***58. Shri Rakesh Dwivedi, learned Senior Counsel, who appeared as amicus curiae, has rightly submitted that though Entry 32 in List II is in general terms dealing with "incorporation, regulation and winding up of corporations, other than those specified in List I, and universities", but incorporation of a company is entirely different from incorporation of a university and they are conceptually different****. Sections 3, 3(1)(i), 12, 13, 26, 33 and 34 of the Companies Act relate to incorporation of a company****. It need not have a prior business and a mere statement of a lawful purpose in the memorandum of association is enough. If a company is unable to achieve its objective and is unable to carry on business, the shareholders may suffer some financial loss, but there is absolutely no impact on society at large. However, a university once incorporated gets a right to confer degrees. A university having no infrastructure or teaching facility of any kind would still be in a position to confer degrees and thereby create a complete chaos in the matter of coordination and maintenance of standards in higher studies which would be highly detrimental for the whole nation. A university may, therefore, be established by the State in exercise of its sovereign power which would obviously be through a legislative enactment. In the case of a private university it is necessary that*

[62] Pg. 823, Vol. V-A

> ***it should be a pre-established institution for higher education with all the infrastructural facilities and qualities which may justify its claim for being conferred with the status of a university and only such an institution can be conferred the legal status and a juristic personality of a university.***" [emphasis supplied]

40. In short, in order to be established, there has to be a combination of the economic aspect and statutory aspects, and the university has to be established on a firm, formal, and permanent basis. In this context, one has also to bear in mind the scheme of administration, and the actual administration in accordance with the scheme. The scheme of administration has to be provided by law, where the law establishes the educational institution. This is the significance of the word "*and*" being conjunctive in Article 30.

41. To illustrate, under the Companies Act, a company can be established by the required number of subscribers, who are also required to furnish the Memorandum of Association ("**MOA**") and Articles of Association ("**AOA**"), which is then registered by the Registrar of Companies and the company comes into being. This is a case of a company established by a private person which is then recognized by law. Similar is the case of societies and cooperative societies. In all these cases not only, does the property continue to vest in the company and cooperative society after the registration, but the scheme of administration is governed by the MOA and AOA, the rules, and bye-laws, which are framed by the company, society, and the co-operative society. A similar legal position prevails for Private Universities under the UGC regulations issued under the UGC Act. There, the universities are set up by the Sponsor who formulates the scheme of administration bearing in mind the minimal requirement provided by the Regulations. The Sponsor also arranges the properties (land and building) and thereafter, the University may either be recognized as *deemed to be a university* under Section 3 of the UGC Act or it may be established and incorporated for the Sponsor by means of a statutory enactment.

After the enactment, the Sponsor continues to hold the property and manage and administer the university.

42. Some illustrations in this regard are as hereinbelow:

Sr. No.	**Name of the University**	**The Act**	**Long Title**	**Establishing Section**
1	Amity University	The Amity University Uttar Pradesh Act, 2005[63]	An Act to establish and incorporate a Teaching University **sponsored by Ritnand Balved Education Foundation**, New Delhi at Gautam Buddha Nagar in Uttar Pradesh and to provide for matters connected therewith or incidental thereto.	There shall be established at Gautam Buddha Nagar, Uttar Pradesh a University **by the Foundation** in the name of the Amity University, Uttar Pradesh. Sec. 2(j) – Foundation means the Ritnand Balved Education Foundation registered under Societies Registration Act, 1860.
2	Galgotias University	The Galgotias University Uttar Pradesh Act, 2011[64]	An Act to establish and incorporate a teaching University **sponsored by Smt. Shakuntala Educational and Welfare Society**, New Delhi in Greater Noida, Gautam Budh Nagar and to provide for matters connected therewith or incidental thereto.	There shall be established at Greater Noida, Gautam Budh Nagar, Uttar Pradesh a University **by the Society** by the name of the Galgotias University Uttar Pradesh. Sec. 2(o) – Society means Smt. Shakuntala Educational and Welfare Society registered under Societies

[63] The Amity University Uttar Pradesh Act, 2005. **[Enclosed as R-17]**
[64] The Galgotias University Uttar Pradesh Act, 2011. **[Enclosed as R-18]**

				Registration Act, 1860.
3	Bennett University	The Bennett University, Greater Noida, Uttar Pradesh Act, 2016[65]	An Act to establish and incorporate a teaching University in district Gautam Budh Nagar of Uttar Pradesh **sponsored by Bennett Institute of Higher Education** 'a not for profit Company' registered under section 8 of the Companies Act, 2013 at Express Building, 9-10, Bahadur Shah Zafar Marg, New Delhi and to provide for matters connected therewith or incidental thereto.	There shall be established in district Gautam Budh Nagar of Uttar Pradesh **by the Company** a University in the name of the Bennett University, Greater Noida, Uttar Pradesh. Sec. 2(d) – Company means Bennett Institute of Higher Education 'a not for profit' company registered under Companies Act, 2013.
4	The Mohammad Ali Jauhar University **(Minority University)**	The Mohammad Ali Jauhar University Act, 2005[66]	An Act to establish and incorporate a Teaching University **sponsored by Maulana Mohammad Ali Jauhar Trust** at Rampur in Uttar Pradesh and to provide for matters connected therewith or incidental thereto	There shall be established at Rampur in Uttar Pradesh a University **by the Trust** in the name of the Mohammad Ali Jauhar University. Sec. 2(r) – Trust means Maulana Mohammad Ali Jauhar Trust, Lucknow, Uttar Pradesh registered under Societies Registration Act, 1860.

[65] The Bennett University, Greater Noida, Uttar Pradesh Act, 2016. **[Enclosed as R-19]**
[66] The Mohammad Ali Jauhar University Act, 2005. **[Enclosed as R-20]**

5	The Era University **(Minority University)**	The Era University, Lucknow, Uttar Pradesh Act, 2016[67]	An Act to establish and incorporate a teaching University **sponsored by Era Educational Trust duly established and administered by the members of Muslim Minority community**.	There shall be established at Lucknow in the State of Uttar Pradesh, **by the Trust** a University in the name of the Era University, Lucknow, Uttar Pradesh Sec. 2(t) – Trust means the Era Educational Trust established and administered by the members of the Muslim Minority community, a 'not for profit' Trust registered under the Indian Trust Act, 1882.
6	Maulana Azad University Jodhpur	Maulana Azad University , Jodhpur Act, 2013[68]	*An Act to provide for establishment and incorporation of the Maulana Azad University, Jodhpur in the State of Rajasthan and matters connected therewith and incidental thereto*	The first Chairperson and the first President of the University and the first members of the Board of Management and the Academic Council and all persons who may hereafter become such officers or members, so long as they continue to hold such office or membership, are hereby constituted a body corporate by the name of the Maulana Azad University, Jodhpur. Sec. 2(r) – Trust means Maulana Mohammad Ali Jauhar Trust

[67] The Era University, Lucknow, Uttar Pradesh Act, 2016. **[Enclosed as R-21]**
[68] Maulana Azad University , Jodhpur Act, 2013. **[Enclosed as R-22]**

				Lucknow, Uttar Pradesh registered under the Societies Registration Act, 1860.

43. With respect to the UGC Act the Appellant referred to Section 2(f), Section 3, Section 22 and 23 to assert that universities would always be established and incorporated by an Act and only such universities are entitled to have the word "University" associated with its name and to grant degrees, and therefore, merely because a university is established and incorporated by an Act would not be a good ground for holding that the Muslim minorities had not established AMU. This submission was on account of the misreading of ***Azeez Basha*** (supra), which does not lay down any such principal as stated above. ***Azeez Basha*** (supra) was a statute specific judgment and dealt with a pre-constitutional statute made by an imperial power. Moreover, a close reading of UGC Act itself indicates that the provisions mentioned above, contemplate universities which are established by an Act; universities which are established under the Act and universities which are recognized as deemed to be universities. The examples of the universities set up, which are mentioned above bring out this distinction. AMU Act is clearly an Act which by itself established the University and lays down the scheme of administration devised by the then Government of British India.

VII. *Azeez Basha* continues to be a good law.

44. The Appellant placed strong reliance on the judgement of this Court in ***St. Stephen's College*** (supra). In that case, two institutions were involved - St. Stephen's College and Allahabad Agricultural Institute. The character of St. Stephens College as a minority institution was in question. There was no such dispute about Allahabad Agricultural Institute (Para 18)[69]. This Hon'ble Court

[69] Pg. 407, Vol. V-A

relied upon the judgment in ***A.P. Christian Medical Educational Society***, (1986) 2 SCC 667[70], to observe that the Court has undoubted right to pierce the 'minority veil' and discover, whether there is lurking behind it, no minority at all and in that case no minority institution (Paras 7 to 10). The minority institutions must be educational institutions of the minorities in truth and in reality, and not mere masked phantoms. It is submitted that while deciding this issue it will therefore have to be seen by the court whether at the relevant time the community claiming minority rights under Article 30 considered themselves to be a minority.

45. Notably, the judgment in **St. Stephen's** (supra) had noticed the case of ***Azeez Basha*** (supra) (Para 24)[71]. It also noticed the finding of this Court that AMU *"was brought into being by the Act of Central Legislature"*, and therefore, was not considered to be a university established by a Muslim minority. In fact, **St. Stephen's** (supra) applies the ratio of ***Azeez Basha*** (supra) for determining whether St. Stephen's College was established by a Christian minority. The court referred to the case of ***S.K. Patro v. State of Bihar*** (1969) 1 SCC 863[72] which dealt with establishment of the CMS School and where it was observed that Indian Citizenship was not a pre-condition for claiming protection under Article 30, and in fact, before the COI, there was no settled concept of Indian Citizenship. The Court however held that, *"persons setting up educational institutions must be resident in India and they must form a well defined religious or linguistic minority. Those setting up the institution must be a minority of persons residing in India."* It also emphasized that the community claiming the right must prove "establishment of the institution" that was a condition precedent for claiming a right to administer (Para 28).

46. This Hon'ble Court then examined the origin and history of the college and found that the campus and building of the college belong

[70] Pg. 379 to 383, Vol. V-A
[71] Pg. 410, Vol. V-A
[72] Pg. 141, Vol. V-A

to the society since its foundation in 1881 and the immovable property continued to vest in the Indian Church Trustees. The constitution of the college consisted of the Memorandum of the Society and the Rules and the composition of the society reflected the Christian character and the management of the college was looked after by the Supreme Council and the governing body of the society. The case of St. Stephen's College was not one where the college had been established by an Act, rather the court found that the college has been constituted as a self-contained and autonomous institution (Para 29-40, 46). Thus, the judgment in ***St. Stephen's*** (supra) actually approves and applies ***Azeez Basha*** (supra). The following chart depicting the distinction in the administration of St. Stephen's and AMU would further clarify the above position:

Subject	**Provisions from the Memorandum of Society's in St. Stephen's College**	**Provisions of the Aligarh Muslim University Act, 1920 (Originally as it stood)**
Founding of the Institution	Created by the funds collected by the Cambridge Mission in Delhi in collaboration with the Society for the Propagation of the Gospel.	AMU was created by an Act passed by the then Government. In fact, there are so many documents produced to establish that the earlier societies were dissolved to get recognition from the Government.
Infrastructure	College building was housed in hired premises paid for by the Society for the Propagation of the Gospel.	AMU has been in receipt of government grants, in addition to the fact that MAO college was established on the land given by the Government.
Object and Mode of Instruction	Clause 2: the object is to prepare students of the College for University degrees and examinations and to offer instruction in doctrines of Christianity which instruction must be in accordance with the teachings of the Church of Northern India.	The preamble or the object does not mention that the sole objective of the University to emphasize on the Muslim teachings only unlike the St. Stephen's College.

Composition of Society/ University	Clause 4 categorically states the members of the society are nominated by the Christian organisation and the Chairman would be the Bishop of the Diocese of Delhi. It also provides that the Principal shall be a member of the Church of Northern India.	The Governor General in Council had an overriding power over the Court. [Section 12,13, 14, 19 and 40]
Regulation/ Admission/ Education	Society had reserved its rights to accept only such directions which are not contrary to its Constitution and to accept nothing to change its Christian character.	AMU could admit affiliate a college/ institute upon advise and subject to approval of the Governor General in Council. [Section 12] Dispute between the Executive Committee and the Academic council could not be resolved without the intervention of the Government. [Section 30] The appointment of the office bearers of the University was subject to approval of the Governor General in Council [Section 19]

47. So far as the case of ***S.K. Patro*** (supra) is concerned, the only issue was whether the school had been set up by Christians residing in India and whether the contribution of funds by CMS London would deny the protection of Article 30? This case turned on facts. The Hon'ble Supreme Court found that local residents of Bhagalpur had taken a leading role in establishing and maintaining the school and the protection of Article 30 could not be denied because of contribution of funds from abroad. What is important is the emphasis on their being no Indian Citizenship in the year 1854 independently of the Citizenship of the British empire. Thus, the political reality existing before the advent of Indian Independence has been noted and considered. Although, the expression in Para 19 is not entirely accurate as the local residents of Bhagalpur were

not 'citizens' of British empire, they were only 'subjects' of the empire.

48. It is stated that ***Azeez Basha*** (supra) continues to be a good law and has consistently been followed by this Hon'ble Court in the following judgments: -

a. **St. Stephen's College v. University of Delhi**, (1992) 1 SCC 558:[73]

> "24. *In S. Azeez Basha v. Union of India [(1968) 1 SCR 833 : AIR 1968 SC 662] the challenge was mainly directed to certain amendments made in the Aligarh Muslim University Act, 1920 by the Amendment Act of 1951 and also of 1965. The petitioners took the plea that by the amendments made in 1965, the management was deprived of the right to administer Aligarh Muslim University and that this deprivation was in violation of Article 30(1) of the Constitution. Having regard to the nature of the contention raised, it was found necessary for this Court to make a detailed study of the history of the Aligarh Muslim University in the light of the provisions of the University Act, 1920. The Court observed that although the nucleus of Aligarh Muslim University was the Mohammadan Anglo-Oriental College which was till 1920 a teaching institution, the conversion of that College into the University was not by the Muslim minority but it took place by virtue of the Act of 1920 which was passed by the then Central legislature. As there was no Aligarh Muslim University existing till the Act of 1920 and since it was brought into being by the Act of Central legislature, the Court refused to hold that it was established by the Muslim minority. It was also concluded that there is no proof to justify the claim that the Aligarh Muslim University owed its establishment to the Muslim minority and they, therefore, have no right to administer the University by virtue of the fundamental right guaranteed under Article 30(1).*
>
> ***25. A couple of years after the Azeez Basha [(1968) 1 SCR 833 : AIR 1968 SC 662] decision, this Court had another occasion to determine the nature of an ancient institution claiming to be a minority institution.*** *The decision has been reported in S.K. Patro v. State of Bihar [(1969) 1 SCC 863 : (1970) 1 SCR 172] . Since it appears to be in close parallel with the case on hand, it will be useful to have the consideration of rival contentions raised therein. There the Education Department*

[73] Pg. 384, Vol V-A.

directed the C.M.S. School to reconstitute the Managing Committee and that direction was challenged before the High Court of Patna on the ground that the school was a Christian minority institution and entitled to have its own management body without interference by the State. The High Court did not accept that claim of the institution and rounded off its conclusion:

> *"Nowhere in the petition or in the affidavit in reply it is asserted by the petitioners that the School was opened, started, founded or brought into existence, and thus established by Indian Church. Surprisingly enough even in regard to the present ownership and administration, nowhere it is stated by the petitioners that it is the Christian minority of the Indian citizens who are seeking protection of their School under Article 30 of the Constitution. It is not the case of the petitioners anywhere that the Indian Christians were members of the Church Missionary Society, London, or the Christians residing or domiciled in India had any hand in the establishment of the educational institution …. In such a situation it has got to be held that the petitioners have failed to prove that C.M.S. School was established by the minority, which is entitled to protection under Article 30 of the Constitution."*

26. The High Court further observed that the word 'minority' in Article 30 did not mean a minority with reference to the world population but had reference to the population of the Indian Citizens. If aliens residing in India claiming to constitute a minority on the basis of religion or language want to establish and administer an educational institution, they cannot claim protection under Article 30, for, the benefit of Article 30 was confined to persons of Indian origin. It was noted that the school was started in 1854 by the Church Missionary Society, London, and such a Society, could not be said to be a citizen of India and that in any event the persons who constituted the society being aliens, the C.M.S. School established by them could not get the benefit of Article 30(1).

27. On appeal, the judgment of the High Court was reversed by this Court mainly on two grounds: (i) the High Court did not pay sufficient attention to that part of the evidence supplied by the petitioners which was sufficient to justify their claim that the local citizens had participated in the establishment of the school in question, and (ii) Indian citizenship not being a condition for the application of Article 30, the protection thereunder could not be denied on that basis. Regarding the first ground, the Court examined the material on record and found it sufficient to prove that the local Christians of Bhagalpur took a leading role in

establishing and maintaining the school. Record book of the Church Missionary Association at Bhagalpur, the copies of letters written to the Church Missionary Society by the Calcutta Corresponding Committee (of the Church Missionary Society) at Bhagalpur, minutes of the meetings held and the resolutions passed by the Local Council of Bhagalpur were all relied upon in support of the conclusion. It was also found that the assistance for establishing the institution was obtained from other bodies including the Church Missionary Society, London. On this material, it was held that the school was set up by the Christian Missionaries and the local residents of Bhagalpur with the aid of funds part of which were contributed by them. On the second ground this Court observed: (SCC pp. 867-68, paras 17 and 18)

> *"It is unnecessary to enter upon an enquiry whether all the persons who took part in establishing the school in 1854 were 'Indian citizens'. Prior to the enactment of the Constitution there was no settled concept of Indian citizenship, and it cannot be said that Christian Missionaries who had settled in India and the local Christian residents of Bhagalpur did not form a minority community. It is true that the minority competent to claim the protection of Article 30(1) and on that account the privilege of establishing and maintaining educational institutions of its choice must be a minority of persons residing in India. It does not confer upon foreigners not resident in India the right to set up educational institutions of their choice. Persons setting up educational institutions must be resident in India and they must form a well defined religious or linguistic minority. It is not however predicated that protection of the right guaranteed under Article 30 may be availed only in respect of an institution established before the Constitution by persons born and resident in British India.*

Article 30 guarantees the right of minorities to establish and administer educational institutions; the article does not expressly refer to citizenship as a qualification for the members of the minorities. "

And later (SCC pp. 868-69, para 19)

> *"We are also unable to agree with the High Court that before any protection can be claimed under Article 30(1) in respect of the Church Missionary Society Higher Secondary School it was required to be proved that all persons or a majority of them who established the institution were 'Indian citizen' in the year 1854. There being no Indian citizenship in the year 1854 independently of the citizenship of the British Empire, to incorporate in the interpretation of Article 30 in*

respect of an institution established by a minority the condition that it must in addition be proved to have been established by persons who would, if the institution had been set up after the Constitution, have claimed Indian citizenship, is to whittle down the protection of Article 30 in a manner not warranted by the provisions of the Constitution."

28. There is by now, fairly abundant case law on the questions as to "minority"; the minority's right to "establish", and their right to "administer" educational institutions. These questions have arisen in regard to a variety of institutions all over the country. They have arisen in regard to Christians, Muslims and in regard to certain sects of Hindus and linguistic groups. The courts in certain cases have accepted without much scrutiny the version of the claimant that the institution in question was founded by a minority community while in some cases the courts have examined very minutely the proof of the establishment of the institution. It should be borne in mind that the words "establish" and "administer" used in Article 30(1) are to be read conjunctively. The right claimed by a minority community to administer the educational institution depends upon the proof of establishment of the institution. The proof of establishment of the institution, is thus a condition precedent for claiming the right to administer the institution. Prior to the commencement of the Constitution of India, there was no settled concept of Indian citizenship. This Court, however, did reiterate that the minority competent to claim the protection of Article 30(1) of the Constitution, and on that account the privilege of establishing and maintaining educational institutions of its choice, must be a minority of persons residing in India. They must have formed a well defined religious or linguistic minority. It does not envisage the rights of the foreign missionary or institution, however, laudable their objects might be. After the Constitution, the minority under Article 30 must necessarily mean those who form a distinct and identifiable group of citizens of India. Whether it is "old stuff" or "new product", the object of the institute should be genuine, and not devious or dubious. There should be nexus between the means employed and the ends desired. As pointed out in A.P. Christian Educational Society case [(1986) 2 SCC 667 : (1986) 2 SCR 749] there must exist some positive index to enable the educational institution to be identified with religious or linguistic minorities.

Article 30(1) is a protective measure only for the benefit of religious and linguistic minorities and it is essential, to make it absolutely clear that no ill-fit or camouflaged institution should get away with the constitutional protection." [emphasis supplied]

b. **Manager, St. Thomas U.P. School v. Commr. & Secy. to General Education Deptt.**, (2002) 2 SCC 497:[74]

"*5. The question before us is whether the High Court was correct in taking the decision it did. Under Article 30(1), all minorities whether based on religion or language, have been guaranteed the right to establish and administer educational institutions of their choice. It is not in dispute that Christians form a minority in this country.* ***The right of minorities under Article 30(1) to establish and administer educational institutions has been judicially construed as defining minority institutions. What is expressed in terms of a right under Article 30(1) in fact describes the institution in respect of which the protection of Article 30(1) can be claimed. It has, therefore, been held that unless the educational institution has been established by a minority, it cannot claim the right to administer it under Article 30(1) [S. Azeez Basha v. Union of India, AIR 1968 SC 662 : (1968) 1 SCR 833] .*** *Thus the critical issue is, was the School established by a minority? The issue has to an extent become academic as both Respondents 5 and 6 have since retired and we are given to understand that they have been paid the salary of a Headmaster for the period they would have served had the decision of the High Court been given effect to. However, the issue is still alive as far as the appellants are concerned. The second appellant is still in service and he has, because of the decision of the High Court, been asked by the School to refund the salary paid to him as Headmaster. Also if the decision is allowed to stand, the status of the School would be finally determined without scrutiny entailing far-reaching consequences in its day-to-day administration.*" [emphasis supplied]

c. **T. Varghese George v. Kora K. George**, (2012) 1 SCC 369:[75]

"*39. [Ed.: Paras 39 corrected vide Official Corrigendum No. F.3/Ed.B.J./11/2012 dated 14-2-2012.] . In the facts of the present case, we may not be required to go to the extreme*

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[74] *Manager, St. Thomas U.P. School v. Commr. & Secy. to General Education Deptt.*, (2002) 2 SCC 497 **[Enclosed as R-7]**

[75] *T. Varghese George v. Kora K. George*, (2012) 1 SCC 369 **[Enclosed as R-23]**

as canvassed by Shri Ganesh based on the quotation from the judgment in Shirur Mutt [AIR 1954 SC 282 : 1954 SCR 1005] . ***But, we cannot ignore the proposition laid down in S. Azeez Basha [AIR 1968 SC 662] , namely, that if an institution is established by somebody else, meaning thereby a person belonging to another religion or a secular person, a religious minority cannot claim the right to administer it on the basis of Article 30(1) merely because he belongs to a minority or for some reason or the other people of a minority might have been administering it.*** *In the instant case the approach of the founder is clearly seen to be a secular approach and he did not create the Trust with any restricted benefits for a religious community. Merely because he belongs to a particular faith, the persons belonging to that faith cannot claim exclusive right to administer the Trust.* ***The establishment and administration must be both by and for a minority which is not so in the present case. Similarly, it is material to note as observed in sub-paras (ii) and (iii) of para 19 in Malankara Syrian Catholic College [(2007) 1 SCC 386]*** *, the right conferred on minorities under Article 30 is only to ensure equality with the majority and not intended to place the minorities in a more advantageous position vis-à-vis the majority. The right to establish and administer educational institutions does not include the right to maladminister. This being the position in the present case, there is no occasion for us to apply the propositions in para 63(6) of All Saints High School [(1980) 2 SCC 478] judgment or the one in Mohd. Ismail [(1915-16) 43 IA 127 : AIR 1916 PC 132].*" [emphasis supplied]

d. **Dayanand Anglo Vedic (DAV) College Trust & Management Society v. State of Maharashtra**, (2013) 4 SCC 14:[76]

"*34. After giving our anxious consideration to the matter and in the light of the law settled by this Court,* ***we have no hesitation in holding that in order to claim minority/linguistic status for an institution in any State, the authorities must be satisfied firstly that the institution has been established by the persons who are minority in such State; and, secondly, the right of administration of the said minority linguistic institution is also vested in those persons who are minority in such State.*** *The right conferred by Article 30 of the Constitution cannot be interpreted as if irrespective of the persons who established the institution in the State for the benefit of persons who are minority, any person, be it*

[76] Pg. 626, Vol. V-C.

non-minority in other place, can administer and run such institution." [emphasis supplied]

e. **Sanghvi Jeevraj Ghewar Chand v. Secy., Madras Chillies, Grains and Kirana Merchants Workers Union,** 1968 SCC OnLine SC 89:[77]

> "3. … ***S. Azeez Basha v. Union of India [Writ Petitions Nos. 84, 174, 188, 241, and 244 of 1966 decided on 20-10-1967] the petitioners challenged the validity of the Aligarh Muslim University (Amendment) Act 62 of 1951 and the Aligarh Muslim University (Amendment) Act, 19 of 1965 as violating Article 30(1) of the Constitution. This Court went into the history of the establishment of the University to ascertain whether it was set up by the Muslim minority and as such entitled to rights under Article 30 and held that it was not set up by the minority but in fact established by the Government of India by passing the Aligarh Muslim University Act, 1920 (Cf. Crawford on Statutory Construction (3rd Edn.) pp. 482-83). There is thus sample authority justifying the court in looking into the history of the legislation, not for the purpose of construing the Act but for the limited purpose of ascertaining the background, the conditions and the circumstances which led to its passing, the mischief it was intended to prevent and the remedy it furnished to prevent such mischief. The statement of objects and reasons also can be legitimately used for ascertaining the object which the legislature had in mind, though not for construing the Act.***" [emphasis supplied]

VIII. Test of Dominant Control

49. As an alternate submission, assuming that there is some element of control or governance entrusted by the Act to the Court composed of members from the Muslim community, that would not be sufficient to conclude that the any right to administer AMU had been conferred on the Muslims. When in an Act one finds control of an institution vested in different bodies and authorities, it would become necessary to apply the test of "dominant control". Unless it

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[77] *Sanghvi Jeevraj Ghewar Chand v. Secy., Madras Chillies, Grains and Kirana Merchants Workers Union*, 1968 SCC OnLine SC 89 **[Enclosed as R-24]**

can be concluded that the dominant control vests in the Court composed of Muslim members, it would not be appropriate to conclude that the 1920 Act confers any right on the Muslim Community with respect to administration of AMU.

50. A perusal the history and various provisions of the 1920 Act establishes the following: -

i) The AMU has been established an incorporated by an Act of the GGIC;

ii) The Act dissolves the society of MAO;

iii) The Act transfers the property, rights and privileges, and vests the same in AMU;

iv) The transferred assets are to be used for the object of AMU;

v) AMU is an educational institution which has a right to hold examination and confer degrees as per the Act, and therefore, it is a completely new institution, at a higher level;

vi) The power to establish universities vested only in the GGIC, under British policy;

vii) Overwhelming powers have been given to the Lord Rector (Governor General) to supervise the functioning as well as the accounts of AMU;

viii) The first statutes and the ordinances are prescribed by statute and, in their framing, the Muslims had no role to play;

ix) The amendments to the statutes and ordinances are not valid unless approved by the Lord Rector;

x) The admission of students has to be made as per the ordinance made under the Act or by the Lord Rector;

xi) The Court has a minor and subservient role to carry out the provisions of the Act, statute and ordinances, and the advise and directions of the Lord Rector;

xii) The Act leaves no choice to the Court to alter the admission policy of keeping the university open to all sections and genders, as enshrined in the Act.

From the above, it is clear that the control, predominantly, vests in the Lord Rector and the Visiting Board, and not the Court. Its role being subservient and minor, it cannot be concluded that the Act vests any rights in the Muslim dominated Court to administer the University as per their choice.

51. In somewhat similar situations, where there is a mix-up of purpose, this Court has, in the context of Income Tax Act, 1922, and the doctrine of ultra vires, invoked the doctrine of dominant purpose. It is submitted that the said principle can be applied in the present situation, with equal force.[78]

IX. Constituent Assembly Debates

52. The COI departed from this objective of the British Government and itself altered the communal character of AMU and BHU and transformed them qualitatively into national educational institutions/ Universities. In this respect, reference can be made to the speeches in the Constituent Assembly when Entry 63, List I was debated. The Constituent Assembly Debates dated 30.08.1949 on Draft Article 29 and 30, in this regard are as follows:[79]

> "***The Hon'ble B.R. Ambedkar:*** *Sir, I move:*
> *"That for entry 40 of List I, the following entry be substituted*
>
> *'40. The institutions known on the date of commencement of this Constitution as the Benares Hindu University, the Aligarh Muslim University, and the Delhi University and any other institution declared by Parliament by law to be an institution of national importance.'"*
>
> *I submit the word "university" is a mistake and it ought to be "institution" and I hope you will permit me to substitute it.*

[78] P.V. Jagannath v. State of Orissa, (1968) 3 SCR 789, Pr. 14 **[Enclosed as R-30]**; ACIT v. Surat Art Silk, (1980) 2 SCC 31, Pr. 6-7 **[Enclosed as R-31]**; CIT, Madras v. Andhra Chamber of Commerce, (1965) 1 SCR 565, Pr. 25 [**Enclosed as R-32]**; CIT v. Bar Council of Maharashtra, (1981) 3 SCC 308, Pr. 7 **[Enclosed as R-33]**.
[79] Pg. 112-119, Vol. IV-B

There is no fundamental change in this except that the latter part permits also Parliament to take over any institution which it thinks is of national importance. (**Pg. 112, Vol. 4B**)

Dr. P.S. Deshmukh : (**Pg. 112, Vol. 4B**)
May I suggest that 40A may also be taken together? I, is part and parcel of the same thing.

The Hon'ble B.R. Ambedkar:

Sir, I move:

"That after entry 40 of List I, the following new entry be inserted:-

"40 A Institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament by law to be institutions of national importance."

Mr. President: *There are some amendments to entry No. 40. Item 162 stands in the name of Mr. Naziruddin Ahmad and item 1 thereof substituting " at the commencement" for "on the date of commencement" need not be moved.*

Naziruddin Ahmad

Sir, I beg to move:-

"That in amendment No. 15 of List I (Sixth week) in the proposed entry 40 of List I,

"the words 'and the Delhi University and any other institution declared by Parliament by law to be an institution of national importance' the deleted."'

I have slightly altered my amendment to suit the change introduced by Dr. Ambedkar in his own amendment. I submit that Dr. Ambedkar's amendment would unduly enlarge the jurisdiction of the Centre and many things which would be otherwise cognizable by the Provinces would now, by virtue of the words which I seek to delete, be included within the jurisdiction of the Centre. ***The Benares Hindu University and the Aligarh Muslim University have been regarded from their very inception as institutions of a national character and importance and therefore they have been rightly regarded so far as national institutions and they have been rightly placed under the jurisdiction of the Union.*** *But, Sir, the*

wording "any other institution declared by Parliament by law to be an institution of national importance", would give undue latitude to the Centre. By virtue of these words, the Union Government will be enabled at any time to acquire jurisdiction over one institution or another of a similar kind. In fact, from a University, a College or school down to a small village school, anything may be claimed as within the jurisdiction of the Centre. While one can appreciate the desire of the Centre to express a carnivorous instinct in this respect, trying to eat everything good or bad, whether belonging to somebody else or belonging to it, I should think that the Centre is getting seriously encumbered with a large number of subjects. The effect of that would be that the Provinces or the States as they are now called will feel less and less responsibility. They will have less and less money and so they will have less and less responsibility. They will develop an irresponsibility and a sense of grievance against the Centre. The result would be that for everything, the Provinces will throw the responsibility upon the Centre.

…

H.V. Kamath **(Pg. 115, Vol. 4B)**

…

As regards the two Universities mentioned in this entry, the Benares Hindu University and the Aligarh Muslim University-of course, either, ***it may be true that they are of national importance or because they have the communal tag attached to them, Government to show their impartial non-communal nature might legislate in regard to these Universities.*** *As regards Delhi too because the status of Delhi is not yet defined it is perhaps desirable that it should be within the purview of the Union. But to specify here very vaguely that any other institutions may be also taken over by the Union, legislated upon by the Union – though of course the saving proviso is there that Parliament should declare by law those institutions to be of national importance – but, Sir, in modern times Parliaments are becoming more and more very pliant tools in the hands of the Executive; and if a Government takes into its head to take over or legislate or administer any particular institution not financed by Government at all, Parliament according to the dictates of the Executive may declare that to be one of national importance, and then the Government could take it over and administer it as it likes. I have in mind certain institutions – to take only one instance -several Yogic Institutes in this country; one very well-known Yogic Institute is Kaivalyadhama in Lonavala, in Bombay. Some Government of the future may smell a rat where there is none. Of course our present Government is well disposed towards this, but there is no guarantee that the present Government will continue for many long years to come. Suppose a Government comes into power, and it is hostile*

to our ancient culture, especially Yogic and Spiritual matters, that Government may get a very obedient Parliament to declare that institution as of national importance and take it over and ultimately suppress it. The House must be well aware that Herr Hitler, soon after he became the Fuhrer and Reichskanzler of Germany, closed down certain Nature Kultur, Nature Culture institutions because …….

…

*As I said, if you have this entry**, you will give power to the Union Government to take over any institution, firstly which is financed wholly or partly or not all by Government, and secondly, which the Government may think is contrary to their interests, for the time being. I think entry 39 as already passed is quite sufficient to cover such institutions as may be financed wholly or in part by the Government of India. There are other institutions, and these may be left free to act in any manner that is not contrary to the national interest.*** (**Pg. 116, Vol. 4B**)

…

But the purity, Pavitrata, of Jnanam is being sought to be polluted by governmental interference at every step. I hope, Sir, that at least so far as the universities are concerned, apart from these three universities, we shall leave them to be regulated not overmuch by the State Governments concerned. But provision in this entry is a very sweeping provision as regards other institutions. ***It is a very pernicious provision, and I hope this House will not accept it, and that this House will pass the entry only with regard to these three universities, Benares, Aligarh and Delhi. I also hope that at no distant date the communal tag of the Benares and Aligarh universities will also disappear.*** (**Pg. 116, Vol. 4B**)

…

Mr. President : (**Pg. 119, Vol. 4B**)

The question is:

"That for entry 40 of List I, the following entry be substituted:-

'40. The institutions known on the date of commencement of this Constitution as the Benares Hindu University, the Aligarh Muslim University, and the Delhi University and any other institution

declared by Parliament by law to be an institution of national importance."

The amendment was adopted.

Entry 40, as amended, was added to the Union List."
(emphasis supplied)

X. *Stare Decisis*

53. In October 1967, a batch of five writ petitions questioned the validity of AMU (Amendment) Act, 1951 and AMU (Amendment) Act, 1965 as being violative of Article 30(1) of the COI. These five writ petitions had been filed in the year 1966. AMU did not choose to intervene in the matter. Even after the judgement had been delivered, AMU did not question the correctness of the judgement and accepted the verdict.

54. They also did not challenge the amendments which were made by the AMU (Amendment) Act, 1951 whereby the power of the Court to make statutes providing for compulsory instruction in Muslim religion (Section 9) and permitting only Muslims to be granted membership of the Court (Section 23 Proviso) were circumcised. Furthermore, AMU did not challenge the amendments made by the AMU (Amendment) Act, 1965 whereby the Court was transformed into a subordinate body vested with advisory jurisdiction to be exercised when called upon to do so by the Visitor.

55. The issue has now arisen upon a challenge to an order of reservation of seats for the minorities in the year 2005 before the Hon'ble Allahabad High Court.

56. The judgment in ***Azeez Basha*** (supra) has been operating for the last 57 years. Based on the declaration, there has been considerable development of AMU, which now stretches over an expanse of approximately 457 hectares, and its budget at present is over INR 1000 crores. AMU has received substantial funds from the Government of India for its development. The public contribution is on account of the fact that AMU is constitutionally recognized as an

institution of national importance *vide* Entry 63 List I, Seventh Schedule, COI. In fact, AMU was from its very inception recognized, along with BHU, as a central institution under the GoI Act, 1919, as well GoI Act, 1935. Under the dyarchical system of governance provided under the GoI Act, 1919, Devolution Rules were made, by which educational institutions had been transferred to the provinces, but the above two Universities were retained as reserved subjects for the GGIC. Similarly, under the GoI Act 1935, the two Universities were preserved as subjects for the Central Assembly and kept in List I [See Entry 13, List I, Seventh Schedule GoI Act, 1935].[80]

57. It is submitted that the law declared in ***Azeez Basha*** (supra), apart from being constitutionally sound, has not resulted in any public mischief. It is settled law that Constitution Bench judgments, which have operated for a very long time, ought not be reconsidered without good and strong reasons.

58. This Hon'ble Court has time and again in several cases has observed the importance of *stare decisis.* In ***Waman Rao v. Union of India***, (1981) 2 SCC 362, this Hon'ble Court held as follows:[81]

> "*37. The principle of stare decisis is also firmly rooted in American jurisprudence. It is regarded as a rule of policy which promotes predictability, certainty, uniformity and stability. The legal system, it is said, should furnish a clear guide for conduct so that people may plan their affairs with assurance against surprise. It is important to further fair and expeditious adjudication by eliminating the need to relitigate every proposition in every case. [See Harold J. Grilliot : Introduction to Law and the Legal System, 2nd Ed. (1979), p. 132] When the weight of the volume of the decisions on a point of general public importance is heavy enough, courts are inclined to abide by the rule of stare decisis, leaving it to the legislature to change longstanding precedents if it so thinks it expedient or necessary. In Burnet v. Coronado Oil and Gas Co. [285 US 393, 406] Justice Brandeis stated that "stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right".*

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[80] Pg. 42, Vol. IV-F

[81] *Waman Rao v. Union of India*, (1981) 2 SCC 362 **[Enclosed as R-25]**

> *38. While dealing with the subject of stare decisis, Shri H.M. Seervai in his book on CONSTITUTIONAL LAW OF INDIA [2nd Ed (1975), Vol. I, pp. 59-61] has pointed out how important it is for judges to conform to a certain measure of discipline so that decisions of old standing are not overruled for the reason merely that another view of the matter could also be taken. The learned Author has cited an Australian case in which it was said that though the court has the power to reconsider its own decisions that should not be done upon a mere suggestion that some or all of the members of the later court may arrive at a different conclusion if the matter were res integra. [The Tramways case (No. 1), (1914) 18 CLR 54, per Griffith CJ at p. 58] The learned Author then refers to two cases of our Supreme Court in which the importance of adherence to precedents was stressed. Jagannadhadas, J. said in the Bengal Immunity case [Bengal Immunity Co. Ltd. v. State of Bihar, (1955) 2 SCR 603 : AIR 1955 SC 661 : (1955) 6 STC 446] that the finality of the decisions of the Supreme Court, which is the Court of last resort, will be greatly weakened and much mischief done if we treat our own judgments, even though recent, as open to reconsideration. B.P. Sinha, J. said in the same case that if the Supreme Court were to review its own previous decisions simply on the ground that another view was possible, the litigant public may be encouraged to think that it is always worthwhile taking a chance with the highest Court of the land. In IT0 v.T.S.D. Nadar [AIR 1968 SC 623 : 68 ITR 252 : (1968) 2 SCR 33] Hegde, J. said in his dissenting judgment that the Supreme Court should not overrule its decisions except under compelling circumstances. It is only when the court is fully convinced that public interest of a substantial character would be jeopardised by a previous decision, that the court should overrule that decision. Reconsideration of the earlier decisions, according to the learned Judge, should be confined to questions of great public importance. Legal problems should not be treated as mere subjects for mental exercise. An earlier decision may therefore he overruled only if the court comes to the conclusion that it is manifestly wrong, not upon a mere suggestion that if the matter were res integra, the members of the later court may arrive at a different conclusion.*"

Further, in ***Shah Faesal v. Union of India***, (2020) 4 SCC 1[82] this Court held as follows:

> "*17. This Court's jurisprudence has shown that usually the courts do not overrule the established precedents unless there is a social, constitutional or economic change*

[82] ***Shah Faesal v. Union of India***, (2020) 4 SCC 1 **[Enclosed as R-26]**

mandating such a development. The numbers themselves speak of restraint and the value this Court attaches to the doctrine of precedent. This Court regards the use of precedent as indispensable bedrock upon which this Court renders justice. The use of such precedents, to some extent, creates certainty upon which individuals can rely and conduct their affairs. It also creates a basis for the development of the rule of law. As the Chief Justice of the Supreme Court of the United States, John Roberts observed during his Senate confirmation hearing, "It is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and even-handedness". [Congressional Record—Senate, Vol. 156, Pt. 7, 10018 (7-6-2010).]

18. Doctrines of precedents and stare decisis are the core values of our legal system. They form the tools which further the goal of certainty, stability and continuity in our legal system. Arguably, Judges owe a duty to the concept of certainty of law, therefore they often justify their holdings by relying upon the established tenets of law.

19. When a decision is rendered by this Court, it acquires a reliance interest and the society organises itself based on the present legal order. When substantial judicial time and resources are spent on references, the same should not be made in a casual or cavalier manner. It is only when a proposition is contradicted by a subsequent judgment of the same Bench, or it is shown that the proposition laid down has become unworkable or contrary to a well-established principle, that a reference will be made to a larger Bench. In this context, a five-Judge Bench of this Court in Chandra Prakash v. State of U.P. [Chandra Prakash v. State of U.P., (2002) 4 SCC 234 : 2002 SCC (Cri) 496 : 2002 SCC (L&S) 496] , after considering series of earlier rulings reiterated that : (SCC p. 245, para 22)

> *"22. … The doctrine of binding precedent is of utmost importance in the administration of our judicial system. It promotes certainty and consistency in judicial decisions. Judicial consistency promotes confidence in the system, therefore, there is this need for consistency in the enunciation of legal principles in the decisions of this Court."*

Also, in ***Keshav Mills Co. Ltd. v. CIT***, (1965) 2 SCR 908[83], this Hon'ble Court held as follows:

"*25. On the other hand, dealing with a similar problem in the case of Sajjan Singh v. State of Rajasthan [AIR 1965 SC 845] this Court unanimously rejected the request made on*

[83] *Keshav Mills Co. Ltd. v. CIT*, (1965) 2 SCR 908 **[Enclosed as R-27]**

behalf of the petitioners that its earlier decision in Sri Sankari Prasad Singh Deo v. Union of India and State of Bihar [1951 SCC 966 : (1952) SCR 89 : AIR 1951 SC 458] should be reviewed and revised. Hidayatullah and Mudholkar, JJ. who were somewhat impressed by some of the pleas made in support of the contention that the earlier decision should be revised, in substance agreed with the ultimate decision of the Court that no case had been made out for a review or revision of the said earlier decision. The principle of stare decisis, no doubt, cannot be pressed into service in cases where the jurisdiction of this Court to reconsider and revise its earlier decisions is invoked; but nevertheless, the normal principle that judgments pronounced by this Court would be final, cannot be ignored, and unless considerations of a substantial and compelling character make it necessary to do so, this Court should and would be reluctant to review and revise its earlier decisions. That, broadly stated, is the approach which we propose to adopt in dealing with the point made by the learned Attorney-General that the earlier decisions of this Court in New Jehangir Mills case [(1960) 1 SCR 249] , and Petlad Co. Ltd. case [(1963) Supp 1 SCR 871 : AIR 1959 SC 1177] should be reconsidered and revised."

In ***Minerva Mills Ltd. v. Union of India***, (1980) 3 SCC 625[84], this Court held as follows:

"*90. But, apart from this reasoning on principle which in our opinion clearly sustains the constitutional validity of clause (a) of Article 31-A(1), we think that even on the basis of the doctrine of stare decisis, the whole of Article 31-A must be upheld as constitutionally valid. The question as to the constitutional validity of Article 31-A first came up for consideration before this Court in Sankari Prasad v. Union of India [1951 SCC 966 : AIR 1951 SC 458 : 1951 SCJ 775 : 1952 SCR 89] . There was a direct challenge levelled against the constitutionality of Article 31-A in this case on various grounds and this challenge was rejected by a Constitution Bench of this Court. The principal ground on which the challenge was based was that if a constitutional amendment takes away or abridges any of the fundamental rights conferred by Part III of the Constitution, it would fall within the prohibition of Article 13(2) and would therefore be void. Patanjali Sastri, J., speaking on behalf of the court, did not accept this contention and taking the view that in the context of Article 13, "law" must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent power, he held that Article 13(2) does not affect constitutional amendments. This view in regard to the*

[84] *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625 **[Enclosed as R-28]**

interpretation of the word 'law' in Article 13(2) has now been affirmed by this Court sitting as a full Court of 13 Judges in Kesavananda Bharati case [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 : 1973 Supp SCR 1 : AIR 1973 SC 1461] and it is no longer possible to argue the contrary proposition. It is true that in this case, the constitutional validity of Article 31-A was not assailed on the ground of infraction of the basic feature since that was a doctrine which came to be evolved only in Kesavananda Bharati case [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 : 1973 Supp SCR 1 : AIR 1973 SC 1461] , ***but the fact remains that whatever be the arguments advanced or omitted to be advanced. Article 31-A was held to be constitutionally valid by this Court.*** *Nearly 13 years after this decision was given in Sankari Prasad case [1951 SCC 966 : AIR 1951 SC 458 : 1951 SCJ 775 : 1952 SCR 89] , a strong plea was made before this Court in Sajjan Singh v. State of Rajasthan [AIR 1965 SC 845 : (1965) 1 SCR 933 : (1965) 1 SCJ 377] that Sankari Prasad case" should be reconsidered, but alter a detailed discussion of the various arguments involved in the case, the Constitution Bench of this Court expressed concurrence with the view expressed in Sankari Prasad case [1951 SCC 966 : AIR 1951 SC 458 : 1951 SCJ 775 : 1952 SCR 89] and in the result, upheld the constitutional validity of Article 31-A, though the question which arose for consideration was a little different and did not directly involve the constitutional validity of Article 31-A. Thereafter, came the famous decision of this Court in Golak Nath case [AIR 1967 SC 1643 : (1967) 2 SCR 486 : (1967) 2 SCR 762] where a full Court of 11 Judges, while holding that the Constitution (First Amendment) Act exceeded the constituent power of Parliament, still categorically declared on the basis of the doctrine of prospective overruling that the said amendment, and a few other like amendments subsequently made, should not be disturbed and must be held to be valid. The result was that even the decision in Golak Nath case [AIR 1967 SC 1643 : (1967) 2 SCR 486 : (1967) 2 SCR 762] accepted the constitutional validity of Article 31-A. The view taken in Golak Nath case [AIR 1967 SC 1643 : (1967) 2 SCR 486 : (1967) 2 SCR 762] as regards the amending power of Parliament was reversed in Kesavananda Bharati case [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 : 1973 Supp SCR 1 : AIR 1973 SC 1461] where the entire question as to the nature and extent of the constituent power of Parliament to amend the Constitution was discussed in all its dimensions and aspects uninhibited by any previous decisions, but the only constitutional amendments which were directly challenged in that case were the Twenty-fourth, Twenty-fifth and Twenty-ninth Amendments. The constitutional validity of Article 31-A was*

not put in issue in Kesavananda Bharati case [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 : 1973 Supp SCR 1 : AIR 1973 SC 1461] and the learned Judges who decided that case were not called upon to pronounce on it and it cannot therefore be said that this Court upheld the vires of Article 31-A in that case. It is no doubt true that Khanna, J., held Article 31-A to be valid on the principle of stare decisis, but that was only for the purpose of upholding the validity of Article 31-C, because he took the view that Article 31-C was merely an extension of the principle accepted in Article 31-A and "the ground which sustained the validity of clause (1) of Article 31-A, would equally sustain the validity of the first part of Article 31-C". So far as the other learned Judges were concerned, they did not express any view specifically on the constitutional validity of Article 31-A, since that was not in issue before them. Ray, J., Palekar, J., Mathew, J., Beg, J., Dwivedi, J., and Chandrachud, J., (as he then was), held Article 31-C to be valid and if that view be correct, Article 31-A must a fortiorari be held to be valid. But it must be said that there is no decision of the court in Kesavananda Bharati case [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 : 1973 Supp SCR 1 : AIR 1973 SC 1461] holding Article 31-A as constitutionally valid, and logically, therefore, it should be open to the petitioners in the present case to contend that, tested by the basic structure doctrine, Article 31-A is unconstitutional. We have already pointed out that on merits this argument has no substance and even on an application of the basic structure doctrine. Article 31-A cannot be condemned as invalid. But in any event, I do not think that it would be proper to reopen the question of constitutional validity of Article 31-A which has already been decided and silenced by the decisions of this Court in Sankari Prasad case", Sajjan Singh case [AIR 1965 SC 845 : (1965) 1 SCR 933 : (1965) 1 SCJ 377] and Golak Nath case [AIR 1967 SC 1643 : (1967) 2 SCR 486 : (1967) 2 SCR 762] . Now for over 28 years, since the decision in Sankari Prasad case" Article 31-A has been recognised as valid and on this view, laws of several States relating to agrarian reform have been held to be valid and as pointed out by Khanna, J. in Kesavananda Bharati case [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 : 1973 Supp SCR 1 : AIR 1973 SC 1461] (SCC p. 812, para 1518) "millions of acres of land have changed hands and millions of new titles in agricultural lands … have been created'". If the question of validity of Article 31-A were reopened and the earlier decisions upholding its validity were reconsidered in the light of the basic structure doctrine, these various agrarian reform laws which have brought about a near socio-economic revolution in the agrarian sector might be exposed to jeopardy and that might put the clock back by setting at naught all changes that have been

brought about in agrarian relationships during these years and create chaos in the lives of millions of people who have benefited by these laws. It is no doubt true that this Court has power to review its earlier decisions or even depart from them and the doctrine of stare decisis cannot be permitted to perpetuate erroneous decisions of this Court to the detriment of the general welfare of the public. There is indeed a school of thought which believes with Cardozo that "the precedents have turned upon us and they are engulfing and annihilating us, engulfing and annihilating the very devotees that worshipped at their shrine" and that the court should not be troubled unduly if it has to break away from precedents in order to modify old rules and if need be to fashion new ones to meet the challenges and problems thrown upon by a dynamic society. ***But at the same time, it must be borne in mind that certainty and continuity are essential ingredients of rule of law. Certainty in applicability of law would be considerably eroded and suffer a serious set back if the highest court in the land were readily to overrule the view expressed by it in earlier decisions even though that view has held the field for a number of years. It is obvious that when constitutional problems are brought before this Court for its decision, complex and difficult questions are bound to arise and since the decision on many of such questions may depend upon choice between competing values, two views may be possible depending upon the value judgment or the choice of values made by the individual judge. Therefore, if one view has been taken by the court after mature deliberation, the fact that another Bench is inclined to take another view would not justify the court in reconsidering the earlier decision and overruling it.*** *The law laid down by this Court is binding on all courts in the country and numerous cases all over the country are decided in accordance with the view taken by this Court. Many people arrange their affairs and large number of transactions also take place on the faith of the correctness of the decision given by this Court. It would create uncertainty, instability and confusion if the law propounded by this Court on the faith of which numerous cases have been decided and many transactions have taken place is held to be not the correct law after a number of years. The doctrine of stare decisis has evolved from the maxim stare decisis et non quita movere meaning "adhere to the decision and do not unsettle things which are established", and it is a useful doctrine intended to bring about certainty and uniformity in the law. But when I say this, let me make it clear that I do not regard the doctrine of stare decisis as a rigid and inevitable doctrine which must be applied: at the cost of justice. There may be cases where it may be necessary to*

rid the doctrine of its petrifying rigidity. "Stare decisis" as pointed out by Brandeis "is always a desideratum, even in these constitutional cases, but in them, it is never a command". The court may in an appropriate case overrule a previous decision taken by it, but that should be done only for substantial and compelling reasons. The power of review must be exercised with due care and caution and only for advancing the public well-being and not merely because it may appear that the previous decision was based on an erroneous view of the law. It is only where the perpetuation of the earlier decision would be productive of mischief or inconvenience or would have the effect of deflecting the nation from the course which has been set by the Constitution-makers or to use the words of Krishna Iyer, J., in Ambika Prasad Mishra v. State of U.P. [(1980) 3 SCC 719] : (SCC para 5)

> *"where national crisis of great moment to the life, liberty and safety of this country and its millions are at stake or the basic direction of the nation itself is in peril of a shake up"*
>
> *that the court would be justified in reconsidering its earlier decision and departing from it. It is fundamental that the nation's Constitution should not be kept in constant uncertainty by judicial review every now and then, because otherwise it would paralyse by perennial suspense all legislative and administrative action on vital issues. The court should not indulge in judicial destabilisation of State action and a view which has been accepted for a long period of time in a series of decisions and on the faith of which millions of people have acted and a large number of transactions have been effected, should not be disturbed. Let us not forget the words of Justice Roberts of the United States Supreme Court — words which are equally applicable to the decision-making process in this Court:*
>
> *"The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted rail road ticket good for this day and train only.... It is regrettable that in an era marked by doubt and confusion, an era whose greatest need is steadfastness of thought and purpose, this Court which has been looked to as exhibiting consistency in adjudication, and a steadiness which would hold the balance even in the face of temporary ebbs and flows of opinion, should now itself become the breeder of fresh doubt and confusion in the public mind as to the stability of our institutions."*
>
> *Here the view that Article 31-A is constitutionally valid has been taken in at least three decisions of this Court, namely, Sankari Prasad case [1951 SCC 966 : AIR*

> *1951 SC 458 : 1951 SCJ 775 : 1952 SCR 89] , Sajjan Singh case [AIR 1965 SC 845 : (1965) 1 SCR 933 : (1965) 1 SCJ 377] and Golak Nath case [AIR 1967 SC 1643 : (1967) 2 SCR 486 : (1967) 2 SCR 762] and it has held the field for over 28 years and on the faith of its correctness, millions of acres of agricultural land have changed hands and new agrarian relations have come into being, transforming the entire rural economy. Even though the constitutional validity of Article 31-A was not tested in these decisions by reference to the basic structure doctrine, I do not think the court would be justified in allowing the earlier decisions to be reconsidered and the question of constitutional validity of Article 31-A reopened. These decisions have given a quietus to the constitutional challenge against the validity of Article 31-A and this quietus should not now be allowed to be disturbed. I may point out that this view which I am taking is supported by the decision of this Court in Ambika Prasad Mishra v. State of U.P. [(1980) 3 SCC 719] .*" [Emphasis supplied]

59. Consequently, there is no impediment for the minorities to establish private universities or deemed to be universities in the exercise of their rights under Article 30 of the COI. In these circumstances, the doctrine of *stare decisis* ought to be applied. A lot of water has flown since the 1968 judgement in ***Azeez Basha*** (supra). Subsequent developments have taken place on the footing that AMU is not a minority institution. Today, the institution stands on an expanse of 100 acres and its annual budget touches INR 1000 crores. Hence, *stare decisis* should be applied.

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IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICITON

CIVIL APPEAL NO. 2320 OF 2006

IN THE MATTER OF: -

ALIGARH MUSLIM UNIVERSITY

THROUGH ITS REGISTRAR PETITIONER

VERSUS

VIVEK KASANA & ORS. RESPONDENTS

ADDITIONAL WRITTEN SUBMISSIONS BY MR. RAKESH DWIVEDI, SENIOR ADVOCATE ON BEHALF OF THE RESPONDENT

I. TWO REFERRING ORDERS

1. The first referring Order dated 26.11.1981 was passed in W.P. No. 54-57/1981, *Anjuman-e-Rahmania & Ors. v. Distt. Inspector of School & Ors.* [**See Vol. III-A, Pp. 209**]. This case involved an institution claimed to be established by a society registered under the Societies Registration Act, 1940. It did not involve any establishment of a university under an Act of Governor General in Council ("**GGIC**"), or any Provincial Government under Government of India Act 1935 ("**GOIA 1935**"). Hence, the Judgement in S. Azeez Basha was directly involved. However, noting observations of Mr. Seervai, the Court referred the matter for being considered by a Bench of atleast Seven Judges. The Order desired a reconsideration of Azeez Basha and the points which arose in *Anjuman-e-Rahmania* so that "*essential conditions or ingredients of the minority institution may also be decided once for all*".
2. The second referring Order dated 12.02.2019 in C.A. No 2286/2006, *Aligarh Muslim University v. Naresh Agarwal & Ors.* [**See Vol. III-A, Pp. 216**] notes that the issues arising in *Azeez Basha* had bene referred to a Larger Bench in the year 1981 and the writ petitions were heard with connected cases in *T.M.A. Pai & Ors. V. State of*

Karnataka & Ors., (2002) 8 SCC 481. It further notes that Question 3(a) formulated in *T.M.A. Pai* was as follows: -

> *"What are the indicia for treating an educational institution as a minority educational institution? Would an institution be regarded as a minority educational institution because it was established by a person(s) belonging to a religious or linguistic minority or its being administered by a person(s) belonging to a religious or linguistic minority?"*

The Eleven-Judges Bench did not answer the said question. Therefore, questions arising from Azeez Basha remained undetermined. It also noted the judgement in *Prof. Yashpal & Anr. V. State of Chattisgarh & Ors., (2005) 5 SCC 420*, which in its opinion required an authoritative pronouncement. In this light, the matters were directed to be considered by a Bench of Seven-Judges.

3. One of the questions, i.e., Question 1 in *T.M.A. Pai* was about the meaning and content of the expression "minorities" in Article 30 of the Constitution of India ("**COI**") [**See Vol. V-A, Pp. 658, Pr. 161**]. the Eleven-Judges Bench only answered that the unit for determining minorities will be the State.
4. Thus, the reference today requires determination of the meaning and content of "minorities" also. Even Question 3(a) in *T.M.A. Pai*, which was not answered, would require such a determination.

II. CONTENT AND MEANING OF "MINORITY"

5. "Minority" in Article 30 is to be understood as a constitutional concept which aims at protecting religious and linguistic groups identified as minorities. Along with Article 29(1), Article 30 enables the minorities to protect their language, script, culture, and religious character. In essence, it is a safeguard against dominance by the majority community which is likely to wield the power of governance under the COI. It would follow that the group invoking Article 30 must establish that it is part of a religious or linguistic minority which is numerically smaller that the majority community. This can be called the numerical test.
6. However, the numerical test is insufficient because it is not impossible to find that the minority community is actually dominant and ruling over the majority. This is amply

shown by the past history of India and Africa. Evidently, a minority community which is also a ruling power cannot claim to be threatened by any domination by the majority. Such a ruling minority does not require any protection or safeguard. Rather, it is the majority, which is being subjected to minority rule, which would be requiring protection. Hence, the minority community should be one which is non-dominant and not a ruling power at the point of time in relation to which the issue arises for consideration.

7. When the Aligarh Muslim University Act, 1920 ("**AMU Act 1920**") was enacted by the GGIC, neither the Muslims nor the Hindus could be said to be numerically smaller than the English ruling race exercising power through the Governor General in India. Both these communities were larger in number than the British controlling the imperial power structure. This position continued until the transfer of power on 15th August 1947 under the India Independence Act, 1947. Therefore, the Muslims claiming to have established AMU were not in a minority vis-à-vis the ruling power, and they do not satisfy the numerical test.
8. The Hindu community, which was larger in number than the Muslims, even before independence, was just a subject-race as the Muslim race was, and it was in no position to dominate the Muslims under the British rule. Rather, on account of "loyalty" which had been guaranteed to the British rulers by the Muslim League formed in the year 1905, the Muslim community was fully protected vis-à-vis the Hindus. Consequently, it would not be permissible to assume that the Muslim community was a minority in 1920 because of the fact that they were numerically less that the Hindus. In the absence of the idea of dominance as between the Muslims and the Hindus, the concept of minority in relation to Hindus could not have arisen.
9. There is a basic error in the judgements of this Court which appear to be extending retroactivity to Article 30 in the context of Christian Missionary Schools and Colleges. The error lies in the fact that because it projects elements of Article 30 into the political context of a colonial British empire in which the Christian community, through the Governor General, was exercising superiority and dominance over all the other communities in India and was treating the as their subjects. There was no legal concept of equality prevalent between the Christian British power and the subjects. Rather, the British rule was founded on despotism, discrimination, and exploitation. It cannot be forgotten that pursuant to the Charters of 1813 and 1833; the minutes of Macaulay; and the English Education Act, 1835, the Christian missionaries were encouraged to

establish schools and colleges in India with the object of evangelisation, and creating brown-Englishmen. The schools and colleges established by the Christian missionaries before independence were not established as a minority but as a ruling race which had subjected the entire population of India to its domination. There is no way that such establishment of schools and colleges by Christian missionaries and evangelists could be extended the benefit of Article 30 by any principle of retrospectivity or retroactivity, or by applying underlying principles of Article 30. The Christian missionaries were merely a colonising arm in all British colonies in the world. They were the arrowhead of western cultural imperialism. It is not necessary that we agree on whether the education provided by them was good or bad. What is significant is that the establishment of educational institutions by them was not as a minority.

10. It is submitted that the tag of "religious or linguistic minority" under Article 30 would be applicable only to such religious or linguistic groups which are numerically smaller and non-dominant at the point of time when the educational institution in question had been established. This idea was also advanced in the year 1979 by Fransesco Capotorti, an Italian lawyer, and Italy's representative in the United Nations General Assembly, as follows: -

> *"a group, numerically inferior to the rest of the population of a State, in a non-dominant position, whose member – being nationals of the State – posses ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language."*
>
> [**Annexure R-1, Para 568**]

11. Capotorti drafted his report during his tenure as Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The definition was put forward after consultation with various governments. In 1985, the then Special Rapporteur of the same Sub-Commission, the Canadian judge Jules Deschênes, revised this definition as follows:

> *"A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only*

implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law."

[**Annexure R-2, Para 181**]

12. The aforestated views of Francesco Capotorti and Justice Deschenes finds resonance in the Report of the National Commission for Religious and Linguistic Minorities, reproduced as under: -

"The U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities has defined 'minority' as one including only those non-dominant groups in a population which possess and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the population".

[**Annexure R-3, Chapter 3, Para 3**]

13. Encyclopaedia Britannica defines "minority" as follows: -

"*Minority, a culturally, ethnically, or racially distinct group that coexists with but is subordinate to a more dominant group. As the term is used in the social sciences, this subordinacy is the chief defining characteristic of a minority group. As such, minority status does not necessarily correlate to population. In some cases, one or more so-called minority groups may have a population many times the size of the dominating group, as was the case in South Africa under apartheid (*c. *1950–91)***."**

[Annexure R-4]

14. Yet another feature of the concept of minority in Article 30 is that the religious or linguistic minority is given a right to establish and administer educational institution of their choice. It necessarily follows that at the time of establishment of educational institution, the minority group should have established the institution as a minority. **For this, it is essential that the group considered itself to be a minority.** If the group itself did not think that it was a minority then there would no justification to extend any underlying principle of Article 30 to the said group. In the instant case, neither the group which claims to have established MAO or AMU considered itself to be a minority, nor

the GGIC considered them to be a minority. It has previously been pointed out that Sh. S.A. Khan, whom the Appellants claim to be the founder, considered the Muslim race as a separate nation [**See Vol. II-H, Pp. 18, Para 12(c) read with F.N. 33**]. It may further be noted that Sh. S.A. Khan was a scion of the Mughal Court, and after the charter of 1833 granted to East India Company, he had taken up employment with the said company in the year 1938. After the taking over of direct governance by the HMG under the GOIA 1858, his employment was continued under the British Government, and he retired in 1878. The schools at the primary and secondary level, as well as the decision to establish MAO with the help of British grant of land and substantial aid, and aid from the Rulers of Indian States, had been taken whilst Sh. S.A. Khan was employed as sub-Judge under the British Government. Even after retirement, he was nominated as the member of Central Imperial Council for two-terms, up to 1887, and thereafter, in the Council of the Lieutenant-Governor, North-West Provinces, up to 1893. He was awarded Companion of Order of Star of India by the British Government in the year 1869, and was made the Knight Commander of Star of India 1888. He died in 1898. While building this career, he had written his book "*The Loyal Muhammadans*", and "*Asbab-e-Baghawat*" in the 1860s, while in employment of British Government. His object was to clear the taint of disloyalty and enmity with the British arising from the 1857 war of independence, and to create generations of Muhammadans who stood loyally with the British and who were imbibed with the idea of being a separate nation. The Muslim gentleman who associated with him also subscribed to the said idea.

15. Muslims as separate nation was a theme which continued to inspire the Muslim League until the partition. A statement of Viceroy Linlithgow in the year 1942 is worth noting. He said, "*India is not one national State, its two major nations being Hindus and Muslims…*" [**Annexure R-5, *Constitutional Relations Between Britain and India - Transfer of Power 1942-7*, Pp. 66-67, 233 TOP Vol. I**]. This was also the basis of the British pledge to the Muslim League under Jinnah that no transfer of power to a system of governance in independent India would be granted until the same was acceptable to the vast majority of the Muslims. This belief of the Muslim League ultimately led to the partition of India. Hence also, no constitutional principle could justifiably be retrofitted into the British conditions prevailing in the year 1920, and the Muslim group associated with MAO cannot be considered to be a religious minority. They cannot be stamped with a characteristic which they had themselves, consciously, rejected.

16. In the above context, one may also look at the political status of the persons who were involved in negotiations for non-essential changes in the AMU framework with the Government of North-West Provinces and the Officials attached to the Governor-General, as well as those who piloted the Bill and formed the Select Committee [**See Vol. II-H, Pp. 21, Para 16**].

III. ANALYSIS OF AMU ACT 1920

17. This analysis supplements that which has been placed by the Ld. Solicitor General already. The following aspects would demonstrate that the scheme of administration of the AMU, as also the University itself, has been established by the GGIC:

i) The Long Title and Preamble declare that it is the Act made by GGIC which establishes and incorporates AMU;

ii) Unlike other universities established by an Act of GGIC, AMU Act and BHU Act contemplate the institution of Lord Rector of the university, the Governor General is the Lord Rector. Rector is an office which existed in the European universities and seems to have been borrowed from there. What is important is that the Governor General himself has been made the Lord Rector;

iii) Unlike a Visitor of the universities, Lord Rector has much vaster powers. He not only has supervisory control (Section 13), but also controls the amendment to the First Statute and the Ordinances. The First Statute has been made by the Act;

iv) The statutes are to decide courses of study, conditions of award of fellowship, scholarship, medals, prizes; conditions for admission of students; the admission of students; terms of office; the fees to be charged; and the maintenance of discipline (Sections 28 – 30);

v) The Court under Section 22 consists of ex-officio members and those specified in the Statute. It is mentioned to be the supreme governing body, having power to review the acts of the Executive and Academic Councils, but its powers are not to cover those reserved for other offices and authorities under the Act, Statutes, Ordinances, and Regulations. The Court is to meet once a year (Statute 13);

vi) The Court is comprised of members who are Muslim (Statute 13). There is, however, a distinction between the Muslim group who desired, contributed and negotiated for the establishment of AMU and those who were to be the members of the Court when the University was established;

vii) A perusal of the Annexure to the First Statutes would show the names of the Founder Members of the First Court of AMU. None of the members have any connection with the MAO College. They are either Nawabs or officials of the British Government, officials of the Indian States, or graduates from other States [**See Vol. II-B, Pp. 167 – 172**].

18. The Court of the University neither enjoys overall control, nor is involved in the day-day control. It is certainly not the body which is contributing to the establishment of the University. The fact that it is described to the supreme governing body is more on account of the fact that it is largely comprised of the rulers of the Indian States, officials or ex-officials of British Government, and officials of the rulers of Indian States. The nomenclature of "supreme governing body" has to be understood in the context of the actual power it exercises.

19. It is also notable that the Act contemplates appointment of Rectors of the University who are all Heads of Local Governments; such Rulers of States in India, Princes, and other persons as the Lord Rector may appoint (Section 15 read with Section 27(a) and Statute 1).

IV. ON LEGAL POSITIVISM

20. The Appellants have attempted to present a comprehension of AMU Act 1920 by infusing the principles laid down by the Hon'ble Supreme Court in various cases. It is submitted that this approach is erroneous, and it cannot be justified by any principle of legal positivism traced to any of its protagonists – *Jeremy Bentham, John Austin, H.L.A Hart, Joseph Raz*, et al.

21. Firstly, the protagonists of legal positivism are not *ad idem* about its understanding. Secondly, none of them understand legal positivism as going beyond reading of certain moral or natural law principles to understand the legal rules established by legislative bodies. None of them go to the extent of projecting these moral or natural law principles retrospectively to a state of affairs which was politically completely different than the one in which the legislation was made.

22. This Court has had occasions to consider whether moral principles could be adopted for understanding legislations. In *Dr. T.A. Qureshi v. CIT, (2007) 2 SCC 759, Pr. 16*, this Court in fact referred to Bentham and Austin to say that the Courts need to decide on legal principles and not on one's own moral views. This Court held that law is different from morality.

23. In *Raghunathrao Ganpatrao v. Union of India, (1994) Supp 1 SCC 191, Pr. 101-105*, a Constitution Bench of this Court referred to Professor Hart's and Dias's jurisprudence which exclude morality from the concept of law. This Court also referred to Bentham and his Theory of Legislation, and said, "*Courts are seldom concerned with the morality which is the concern of the law makers*". These observations have been cited with approval by another Consitution Bench in *Krishena Kumar v. Union of India, (1990) 4 SCC 207, Pr. 31.*

24. This Court has also held in a series of cases that fundamental rights cannot be applied retrospectively [**See Vol. II-F, Pp. 28 – 25**].
    - Keshava Madhav Menon v. State of Bombay, (1951) SCR 228, 235.
    - Pannalal Binjraj v. Union of India, (1957) SCR 233.
    - Sri Jagadguru Kari Basava v. Commr. Hindu Religious and Charitable Endowments, (1964) 8 SCR 252, Pr. 11, 13.
    - Rabindranath Bose v. Union of India, (197) 1 SCC 84, Pr. 30.
    - Gurudutt Sharma v. State of Bihar, (1962) 2 SCR 292, Pr. 31.

25. The AMU Act 1920 continues despite repeal of GOIA 1919, GOIA 1935 and the earlier Council Acts vide Article 395 read with Article 372 of the COI. The continuation, however is subject to alteration and modification by competent legislature and is also subject to the provisions of the COI, which includes fundamental rights. It is not the case of the Appellants that AMU Act 1920 is violative of any fundamental right. Assuming it were violative, the only consequence would be that the said Act would *pro tanto* get eclipsed. These provisions do not have the consequence of injecting the constitutional principles to the past for understanding the legislations made by the GGIC before the advent of COI.

26. In view of the aforesaid, while principles of constitutional morality and the basic features of the Constitution like secularism could be invoked for the understanding of legislations made by Legislatures under the COI, the same cannot be utilised for the

understanding of the legislations made before the advent of COI. These principles are unique to the republican system which is envisaged by COI, and have no bearing to the colonial system of law-making which was prevalent before 1947.

STUDY ON THE RIGHTS OF PERSONS BELONGING TO ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES

by Francesco Capotorti

Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities

UNITED NATIONS

Chapter V

CONCLUSIONS AND RECOMMENDATIONS

1. *Preliminary observations*

559. An analysis of the data collected shows clearly that the application of the principles set forth in article 27 of the International Covenant on Civil and Political Rights is an extremely complex matter which does not readily admit of a uniform solution. These principles, like all other rules laid down in the Covenants were unquestionably meant to have universal application; it is therefore desirable that they should be put into effect wherever ethnic, religious or linguistic minorities exist. Nevertheless, when it comes to determining what groups constitute minorities, all kinds of difficulties arise. We have seen that, religious minorities apart, relatively few States expressly recognize the existence in their populations of groups described as "ethnic or linguistic minorities" and that, while a considerable number of States have introduced measures granting special rights to various ethnic and linguistic groups, the majority prefer not to apply the term "minorities" to them. The scope of the measures also varies from country to country, and very frequently from group to group within a country. Nevertheless, in spite of reticence, differences of opinion, and persisting wariness of any international system for the protection of minorities, some general criteria for the application of article 27 must be laid down. The extremely terse wording of the article calls for additional indications; the wide diversity of situations that arise must be taken into account, without prejudice, however, to the universal applicability of the rule. In this connexion, the observations of participants in the seminar held in Ohrid, Yugoslavia, in 1974 should be borne in mind:

> ... though the basic principles of respect for human rights were applicable to members of all minorities, the variety of the historical and socio-economic conditions under which minorities had been formed and developed in various regions of the world might require a diversified approach to the problem of the protection and promotion of their human rights. Minorities, having developed in countries very different from the point of view of their historical, economic and social evolution, each had their own characteristics. It was pointed out that, taking into account the specific economic and social features of the developing countries, European criteria and the results of European experience could not necessarily apply to the question of minorities in those countries. Some speakers felt, however, that all minorities, notwithstanding their diversity, had certain fundamental problems in common.[1]

2. *The concept of a minority*

560. The first chapter of the present study was devoted to an analysis of the concept of a minority, with particular reference to the observations of various Governments on the factors to be included in a definition of the term "minority". Reference was also made to the fact that the Sub-Commission on Prevention of Discrimination and Protection of Minorities had on several occasions submitted draft definitions to the Commission on Human Rights, which had not however reached any decision on the definitions.

561. At the present stage, it would be illusory to suppose that a definiton likely to command general approval could be achieved. In the view of the Special Rapporteur, such a definition would certainly be of great value on the doctrinal plane, but it should not be considered a pre-condition for the application of the principles set forth in article 27 of the Covenant. There are other examples of the occasional application of a rule in positive law without general agreement having been reached on the precise meaning of its terms. It should be noted in this connexion that the Commission on Human Rights did not consider it necessary to define the term "minority" before setting up the Sub-Commission on Prevention of Discrimination and Protection of Minorities. It will also be recalled that the General Assembly of the United Nations did not wait for an exhaustive and universal definition of the notion of the "right of peoples to self-determination" before proclaiming the application of the principle.

562. The problem of defining the term "minority" has never been an obstacle to the drawing-up of the numerous international instruments containing provisions on the rights of certain groups of the population to preserve their culture and use their own language. The terminology used to refer to such groups varies from one instrument to another. We have seen, for example, that the UNESCO Convention against Discrimination in Education mentions "national minorities", while the expression "national, ethnical, racial or religious group" is used in the Convention on the Prevention and Punishment of the Crime of Genocide and "racial or ethnic groups" in the International Convention on the Elimination of All Forms of Racial Discrimination. Further examples are the fact that the agreement signed in 1946 between the Italian and Austrian Governments speaks of the "German-speaking inhabitants" of Bolzano Province and some communes of Trento Province; that the agreement between Pakistan and India refers to "minorities"; that the 1954 memorandum of understanding on the status of Trieste refers to Italian and Yugoslav "ethnic groups"; and that the 1955 Austrian State Treaty speaks of the "Slovene and Croat minorities".

563. In the municipal law of States, even more varied terminology is used to refer to groups of the population the preservation of whose culture and the use of whose language are guaranteed by law or the constitution. In Belgium the term is "cultural communities"; in Romania reference is made to "co-inhabiting nationalities". In other countries, particularly in eastern Europe, the term "nationalities" is the only one in use. In yet others, the straightforward term "minority" is used. It will be noted

[1] *Seminar on the Promotion and Protection of the Human Rights of National, Ethnic and Other Minorities*, Ohrid, Yugoslavia, 25 June–8 July 1974 (ST/TAO/HR/49), para. 22.

that in the above-mentioned cases no formal definition of the terms used has been considered necessary.

564. Application of the principles set forth in article 27 of the Covenant cannot, therefore, be made contingent upon a "universal" definition of the term "minority", and it would be clouding the issue to claim the contrary. Moreover, the question has so often been complicated by a desire on the part of some Governments to restrict or refine the definition that no minority is recognized as existing in their territory, and that consequently no international obligations arise for them in relation to the protection of minorities. If, however, the problem is examined without political prejudice and from a truly universal point of view, there can be no gainsaying that the essential elements of the concept of a minority are well known, and that the only point at issue as far as the definition is concerned is whether an indisputable objective "core" can be widened or restricted by means of a few controversial considerations.

565. In discussions on the definition of the term "minorities" two sorts of criteria have in fact been proposed: criteria described as objective and a criterion described as subjective.

566. The first of the criteria described as objective to which general reference is made is the existence, within a State's population, of distinct groups possessing stable ethnic, religious or linguistic characteristics that differ sharply from those of the rest of the population. The inclusion of such a component in the definition of the term "minority" is not controversial; as the Permanent Court of International Justice pointed out, the existence of such groups is a question of fact. It is therefore essential that it should be regarded as a basic element in any definition. A second objective criterion concerns the numerical size of such groups: they must in principle be numerically inferior to the rest of the population. But two remarks are called for in this connexion. In the first place, it must be emphasized that in countries in which ethnic, religious or linguistic groups of roughly equal numerical size coexist, article 27 is applicable to them all. In the second place, it seems sensible to take account of the difficulties that would arise from the application of article 27 to groups so numerically small that it would be a disproportionate burden upon the resources of the State to grant them special status. Here, a question of fact arises that can only be solved upon consideration of each particular case in the light of the following notion: that States should not be required to adopt special measures of protection beyond a reasonable proportionality between the effort involved and the benefit to be derived from it. A third objective criterion consists in the non-dominant position of the groups in question in relation to the rest of the population: dominant minority groups do not need to be protected; on the contrary they violate, sometimes very seriously, the principle of respect for the will of the majority which is a corollary of the right of peoples to self-determination. The last objective criterion concerns the juridical status of members of the above-mentioned groups in relation to the State of residence. It is generally accepted that they must be nationals of the State.

567. As to the subjective criterion, it has generally been defined as a will on the part of the members of the groups in question to preserve their own characteristics. If the existence of such a will had to be formally established before applying article 27, there would be reason to fear that any State wishing to evade the rule might justify its refusal by claiming that the groups themselves did not intend to preserve their individuality. Apart from this point, however, it must be said that the will in question generally emerges from the fact that a given group has kept its distinctive characteristics over a period of time. Once the existence of a group or particular community having its own identity (ethnic, religious or linguistic) in relation to the population as a whole is established, this identity implies solidarity between the members of the group, and consequently a common will on their part to contribute to the preservation of their distinctive characteristics. Bearing these observations in mind, it can be said that the subjective factor is implicit in the basic objective element, or at all events in the behaviour of the members of the group. It is possible to bring these considerations together in a tentative definition of the term "minority".

568. The Special Rapporteur wishes to emphasize that the definition he proposes is limited in its objective. It is drawn up solely with the application of article 27 of the Covenant in mind. In that precise context, the term "minority" may be taken to refer to: A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.

3. *The recognition of minorities in the legal systems of States*

569. It has been noted above, in connexion with the question of the recognition of minority groups within States, that the approach adopted differs considerably according to the country concerned, and very often within a country according to the group concerned.[2] To summarize, the solutions adopted may be classified into four categories: (i) constitutional recognition of the existence of distinct groups and of the right of their members to a special régime, particularly with regard to the development of their culture and the use of their language; (ii) recognition of certain minorities and safeguards for the special rights of their members on the basis of *ad hoc* international juridical instruments; (iii) implicit recognition through laws or administrative measures concerning development of the culture of certain linguistic groups; (iv) non-recognition of minorities in the municipal legal order—which may go with either a political attitude of utter denial of the existence of such groups or an official attitude of neutrality which allows cultural or linguistic measures to be taken privately.

570. Obviously the desirable solution in all cases would be that constitutional instruments or *ad hoc* laws should contain provisions expressly recognizing the right of persons belonging to ethnic and linguistic groups to preserve and develop their culture and use their own language. In any event, it must be emphasized that the application of article 27 of the International Covenant on Civil and Political Rights should not be made contingent on the solution adopted in municipal legal systems; these must be brought into line with international obligations and not

[2] See paras. 59-81.

ANNEXURE R-2

UNITED NATIONS

ECONOMIC AND SOCIAL COUNCIL

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COMMISSION ON HUMAN RIGHTS

Sub-Commission on Prevention of Discrimination and Protection of Minorities
Thirty-eighth session
Item 16 (c) of the provisional agenda

PROMOTION, PROTECTION AND RESTORATION OF HUMAN RIGHTS AT THE NATIONAL, REGIONAL AND INTERNATIONAL LEVELS

PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES

Proposal concerning a definition of the term "minority" submitted by Mr. Jules Deschênes

GE.85-12166

175. Of the one billion persons who make up the population of China, 93 per cent are of Han origin, so that there is a large degree of homogeneity. Nevertheless, China officially recognizes 55 minorities comprising some 67 million individuals. This underscores the difference in the order of magnitude of our concerns; in China, a population two and a half times that of the whole of Canada represents only a small proportion (7 per cent) of the total population.

176. Of these 55 minorities, Wong How-Man visited about ten varying considerably in size from the Di, who number only about 10,000, the Salar and the Ge, each of which number 70,000, the Qiang 100,000 and the Tu, 160,000, to the Dong, 1.4 million, the Miao, 5 million, spread over about one hundred sub-groups, the Yi, 5 million and the Hui, 7 million.

177. Despite the power of attraction exerted by the immense population in which they are immersed, these minorities have preserved the languages of their ancestors, together with numerous special cultural peculiarities, such as diet, clothing, jewellery, music, occupations, customs and religion, which are often accentuated by a unique physical appearance. Moreover, the 70,000 Salars and the 7 million Hui are also distinguished by their membership of Islam.

178. Thus, the same conditions of particularism that we have observed elsewhere are also found in these Chinese minorities. Expressed simply, these conditions include the distinction between groups, ethnic, religious or linguistic characteristics and the collective will to survive.

179. The criteria which we have retained on the credit side of the concept of minority are thus strengthened by the Chinese comparison, and actually take on a universal character. We can now derive the desired definition with greater assurance.

180. In the light of the Ohrid seminar and the work done by Mr. Capotorti, the foregoing considerations led me initially to propose the following definition of minority:

> "A group of citizens numbering less than half the population of a State and in a non-dominant position, whose members, have a community of interest, are motivated - albeit implicitly - by a collective will to survive, and possess ethnic, religious or linguistic characteristics which differ from those of the majority of the population, and whose aim is to achieve equality with that majority in fact and in law."

181. However, after further reflection, I have come to the conclusion that this definition could be tightened and would benefit from a more logical ordering of its various elements. Consequently, I propose the following definition of minority:

> "A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law."

182. I hope that this answer to the question "what is a minority?" will be found satisfactory.

ANNEXURE R-3

Report of the

National Commission for Religious and Linguistic Minorities

सत्यमेव जयते

Ministry of Minority Affairs

Chapter 3

RELIGIOUS MINORITIES AND THEIR STATUS

Introduction

1. Religion depicts the main socio-cultural characteristics of a person. Different communities and people perceive religion differently. Some people have an established set of beliefs, rituals and traditional practices and worship one Supreme Being or deity that may be their own caste/tribe or village deity. Other people worship a number of Gods and Goddesses while some practice and perceive religion in their own way and belief others prefer to be atheist. India is a unique country where some religions like Hinduism, Buddhism, Jainism and Sikhism have originated and other religions of foreign origin flourished bringing 'unity in diversity'.

2. The word 'minority religion' has not been defined anywhere in the Constitution but it finds mention in various Articles in Part III of the Constitution.

3. The U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities has defined 'minority' as one including only those non-dominant groups in a population which possess and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the population.

4. In exercise of the powers conferred by Clause (c) of Section 2 of the National Commission for Minorities Act 1992 (19 of 1992), the Central Government in 1993 notified the following communities as "the Minority communities" for the purposes of the said Act, namely: Muslims, Christians, Sikhs, Buddhists, and Zoroastrians (Parsis). However, minorities are not limited to these five religions and States are free to declare/recognise others. Jains have been recognised as one of the religious minorities in nine States.

Socio-economic Characteristics of Religious Minorities

5. Indian social structure is characterised by unity as well as diversity. It has had numerous groups of immigrants from different parts of Asia and Europe. All the great religions of the world are represented in this country. People speak different languages. Diversity is seen in the patterns of rural-urban settlements, community life, forms of land tenure, and agricultural operations and in the mode of living. Some eke livelihood out of hills and forests, others out of land and agriculture and yet a few depend upon marine resources. The fusion of varying religions, the caste system and peoples occupational structure are the salient features of Indian society. Inter-caste relations at the village level are bound by economic ties, be it peasant, the leather worker, carpenter, blacksmith or the servicing communities.

5.1. The demography of minority communities, their rural-urban distribution, sex composition, literacy and educational status, marital status and livelihood patterns do indicate the lifestyle of the people. Pattern of landholdings, sources of income and health status narrate their quality of life. Today, socio-economic changes are taking place rapidly in the country affecting the majority as well

minority

minority, a culturally, ethnically, or racially distinct group that coexists with but is subordinate to a more dominant group. As the term is used in the social sciences, this subordinacy is the chief defining characteristic of a minority group. As such, minority status does not necessarily correlate to population. In some cases one or more so-called minority groups may have a population many times the size of the dominating group, as was the case in South Africa under apartheid (*c.* 1950–91).

The lack of significant distinguishing characteristics keeps certain groups from being classified as minorities. For instance, while Freemasons subscribe to some beliefs that are different from those of other groups, they lack external behaviours or other features that would distinguish them from the general population and thus cannot be considered a minority. Likewise, a group that is assembled for primarily economic reasons, such as a trade union, is seldom considered a minority. However, some minorities have, by custom or force, come to occupy distinctive economic niches in a society.

Because they are socially separated or segregated from the dominant forces of a society, members of a minority group usually are cut off from a full involvement in the workings of the society and from an equal share in the society’s rewards. Thus, the role of minority groups varies from society to society depending on the structure of the social system and the relative power of the minority group. For instance, the degree of social mobility of a member of a minority group depends on whether the society in which he lives is closed or open. A closed society is one in which an individual’s role and function can theoretically never be changed, as in the traditional Hindu caste system. An open society, on the other hand, allows the individual to change his role and to benefit from corresponding changes in status. Unlike a closed society, which stresses hierarchical cooperation between social groups, an open society permits different social groups to vie for the same resources, so their relations are competitive. In an open society the rank that the individual attains for himself is more important than the ranking of his social group.

Pluralism occurs when one or more minority groups are accepted within the context of a larger society. The dominant forces in such societies typically opt for amity or tolerance for one of two reasons. On the one hand, the dominant majority may see no reason to rid themselves of

the minority. On the other hand, there may be political, ideological, or moral impediments to the elimination of a minority, even if it is disliked. For instance, the commercial trade of certain European countries in the 12th and 13th centuries depended on Jewish merchants, a circumstance that (for a time) prevented the anti-Semitic aristocracy and clergy from driving the Jews into exile. Another example of begrudging toleration can be seen in Britain in the 20-year period following 1950, which saw an influx of immigrants from the Caribbean, Pakistan, and India. Many British people did not like these new minority groups, but the nation's prevailing democratic ideology overcame attempts to eject them.

A minority may disappear from a society via assimilation, a process through which a minority group replaces its traditions with those of the dominant culture. However, complete assimilation is very rare. More frequent is the process of acculturation, in which two or more groups exchange culture traits. A society in which internal groups make a practice of acculturation usually evolves through this inherent give and take, causing the minority culture to become more like the dominant group and the dominant culture to become increasingly eclectic and accepting of difference.

Efforts to forcibly eliminate a minority from a society have ranged from expulsion to mob violence, ethnic cleansing, and genocide. These forms of oppression obviously have immediate and long-term negative effects on those who are victimized. They typically devastate the economic, political, and mental health of the majority population as well. Many examples of minority expulsion exist, as with the British deportation of the French population of Acadia, a group that became known as Cajuns, in 1755. The late 19th and early 20th centuries saw widespread mob violence against minorities, including pogroms against Jews (in Russia) and lynchings of blacks, Roman Catholics, immigrants, and others (in the United States; *see* Ku Klux Klan). The mid-20th-century Holocaust, in which Nazis exterminated more than six million Jews and an equal number of other "undesirables" (notably Roma, Jehovah's Witnesses, and homosexuals), is recognized as the most egregious example of genocide in the modern era. In the late 20th and early 21st centuries, ethnic cleansing and genocide in the former Yugoslavia, Rwanda, Sudan, and elsewhere provided tragic evidence that the forcible elimination of minorities continued to appeal to some sectors of society.

The Editors of Encyclopaedia Britannica This article was most recently revised and updated by Amy McKenna.

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ANNEXURE R-5

CONSTITUTIONAL RELATIONS
BETWEEN BRITAIN AND INDIA

THE TRANSFER OF POWER

1942-7

Volume I The Cripps Mission
January–April 1942

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Smuts Professor of the History of the British Commonwealth and Fellow of St John's College, Cambridge

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LONDON
HER MAJESTY'S STATIONERY OFFICE
1970

may be trusted, I should be surprised if *Satyagraha* is revived earlier than the end of the war, as promised by Gandhi, because enthusiasm for this kind of self-sacrifice is seldom long lived and some preparation is required before a movement of this kind can be launched. Of course, a false step may again lead to active opposition; on the other hand, an enemy air raid on India will, I have little doubt, produce reactions which will not be unfavourable to Government.

Gandhi's attitude generally to the course of events from the first mooting of the amnesty proposals to the conclusion of the Wardha meeting of the A.-I.C.C. has been inconsistent and the C.I.O.'s report suggests that he has been guilty of duplicity of set purpose. It is suggested that Gandhi's sudden swing over to support for the Bardoli resolution was occasioned by the obvious unwillingness of the delegates to abandon his leadership in favour of the Bardoli resolution, although it seems clear that they were little in favour of a continuance of *Satyagraha*. The expedient which has been tried before was therefore again adopted of Congress speaking officially with one voice and Gandhi with another, on the old principle of combining threats and cajolery or, as Gandhi put it, making a small hole in the wall through which to shake hands with Britain. The main idea of the Congress now is said to be to establish an organisation parallel to the Government machinery for whatever use future developments, internal or external, may indicate.

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The Marquess of Linlithgow to Mr Amery (Extract)

MSS. EUR. F. 125/11

THE VICEROY'S HOUSE, NEW DELHI, *23–7 January 1942*

PRIVATE AND PERSONAL

12. I have had an interesting note[1] (copy of which was sent by last week's bag) from Hodson of the impressions formed by him on his recent tour, which covers a good deal of ground. I have no doubt whatever as to the educative value from his point of view of contacts of this nature; there is always the risk of one who, without previous experience of the country, merely sits in the Central Government forming views which may be off the mark. I note with interest his conclusion that the initiative in constitutional progress offered to India has patently not yet been accepted and remains in British hands.

* * *

15. Of our other travellers, Coupland has been in Bengal and the Central Provinces, and he came to lunch on Saturday, before setting off again for the

[1] Printed as an Annex to No. 30.

United Provinces. He seems to have enjoyed his tour round the country, and to be in good heart. He reminded me that when I first saw him, he had undertaken to keep off the short-range problem of our immediate political difficulties but said that inevitably he had been drawn into the vortex, and wished to give me his views. I said that I should, of course, be delighted to hear these which I was certain would be most helpful. He then proceeded to develop at length the points which he subsequently sent me in the memorandum[2] of which I send you a copy by this bag. I did not fail to point out the practical difficulties attaching to certain of his suggestions. Thus, I reminded him that Dominion Status for British India alone would leave the Governor-General entirely beholden to an Indian Ministry, with no safeguards and no limitations as to the field in which Ministerial advice would have to prevail with the Governor-General; and that the Governor-General would therefore be quite disabled from acting as Crown Representative,[3] in which position he would have to champion the rights and interests of the Princes whenever these came into collision with the interests of British India. I reminded Coupland also of the important fields in which these interests might collide, such as excise, customs, taxation, industrial and labour policy, and the like. I also tried to put to Coupland the very real difficulties which must arise in the field of defence if in that field the Governor-General was to be in the position of having to take the advice of his Ministers, and the impossibility of maintaining British troops in India if these were to be at the disposal of Indian Ministers responsible only to an Indian Legislature. But I found Coupland had got his "solution" in his mind, his ticket for home in his pocket, and his subjects, I suspect, neatly arranged in his twelve chapters, and that he was not disposed to welcome criticism which was in any degree destructive of those plans! Thus, in the matter of defence, he told me that he contemplated, as a consequence of the present war, the setting up of an international defence force, a generous allocation from which would be maintained in India, and said that the presence of this force would meet the military difficulties involved in adjusting a scheme for Dominion Status for British India, or, for that matter, for solving the defence problems of a full-blown federation for all India. I had to tell Coupland that I really could not contemplate, as a means of solving the present deadlock, the acceptance of constitutional plans which rested on any speculative hypothesis of the kind he had described. I got a letter from him later which showed that my argument had gone home, and that he was inclined to feel that Dominion Status for British India alone was rather more difficult of achievement than he had contemplated. He will be leaving India at about the end of March, and is, I think, reconciled to the prospect of travelling part of the way by sea *viâ* Lagos.

16. This business about U Saw must have given a nasty jolt to a lot of people. Comment for the first few days after the news was known tended to follow

the lines of Rajagopalachari's rather woolly statement of protest on the subject, and we have since been following Burma's lead in damping down Press speculation on the cause of detention. If more evidence could have been published or if there could have been a trial, I have no doubt that it would have been a healthy lesson for many more people out here, but, of course, I fully appreciate the reason why that has not been possible.

* * *

18. . . .I consider it necessary to examine the general question whether the Provinces can be allowed to exercise complete discretion to refuse to absorb a small State, for in any future scheme of Federation the main difficulty would be the smaller States and the probability is that three courses will be open to such States:

(*a*) A voluntary combination among themselves into some form of administrative unit;

(*b*) absorption into a larger State;

(*c*) absorption into a Province of British India.

In view of the difficulties presented by (*a*) and (*b*), it would seem probable that (*c*) would in a considerable number of cases be the most practicable course to take. In that case it will have to be decided whether the British Indian Province concerned is to be allowed complete discretion to pick and choose or whether it can be compelled to absorb any small State for which no other course but absorption is practicable. This question raises important constitutional issues, and I have asked Craik to have them examined in consultation with the Reforms Commissioner.[4] I will let you know the result.

* * *

22. Your two letters, dated 24th December and 5th January[5] have just come in, the latter by a fast mail for these times. A good many of the subjects which you touch upon have already been disposed of telegraphically or by the course of events, but I will make hurried comment on one or two of the matters about which you write.

23. In the first place let me thank you very warmly for your good wishes for 1942, which I most warmly reciprocate. I haven't the least doubt but that it will be a testing and anxious year, but I have hopes that by the end of it we may find ourselves with a good many difficulties which now seem almost insuperable well on the way to solution and with our general military position greatly improved.

[2] Not printed. [3] Government of India Act 1935, Secs. 2(1) and 3.
[4] Mr H. V. Hodson. [5] No. 5.

24. I am interested in all that you tell me about the state of opinion in the House and outside in regard to Winston and the Government. It is not easy for any one at a distance accurately to gauge the currents of opinion. But I cannot but feel that a good deal of the uneasiness can be traced to the extent to which Winston has taken the machine into his own hands, and thereby weakened the position of the other members of his Government and the prestige of the Cabinet as a whole. That is a very difficult condition to correct and, in any event, Winston, if I judge him right, is not the man to wish to make over anything which he has gathered into his own hands. But anything and everything will be forgiven if Winston can present the country with an obviously improving military position. I must admit that I do not myself see any immediate prospect of improvement in the Far East: indeed, I have little doubt that we shall have to face worse things before the tide turns. But I suppose that the situation in Russia, which is not yet by any means out of hand from the German point of view, may develop into a major German defeat, in which case (with the corollary of relief from any threat to the Middle East this year) things would come in a short while to look very much better.

25. I am interested in what you say about the prospects of Winston making a big speech on India. I confess that it had not entered my head that it might be for me to take the initiative in pressing him to do this. But I will ponder your words and if I think fit will return to the charge later.

26. The doings of the Congress Working Committee and the A.-I.C.C., and also Jinnah's organisation at their several meetings, are by now stale news; but I notice that you were correct in your prognostications about the probable outcome of these. The Congress Working Committee, with the possible exception of Nehru, who is in a very special position, appears more and more clearly as a collection of declining valetudinarians who have no grip on the country, but, who, politically, are purely parasitic on Gandhi the spell-binder. Why, therefore, should anyone expect his colleagues to dismiss the Mahatma! By their manœuvres, executed under Gandhi's skilful promptings, both he and the Working Committee have now attained the enviable position of enjoying the best of both worlds. They have put themselves right with public opinion which recognised that non-violence chimed ill with the emergent menace of Japan, while they have made it possible both for Mr. Gandhi to resume his effective leadership and for those members of the Working Committee, who do sincerely adhere to non-violence as a principle, to remain within the fold.

* * *

28. You ask whether your Manchester Speech, in which you dealt with India and the Atlantic Charter, has had any effect in clearing up the general misconception. I wish I might report that so clear and convincing a presenta-

tion had met in this country with its due reward. But the fact is that in their present mood, the politically-minded in India are not prepared to be persuaded or comforted by any speech however able or however tactfully phrased. Each successive pronouncement is hailed as a further insult to India's self-respect, as salt in the wound, and all the rest of it, and the speaker is accused of lecturing India with his tongue in his cheek. Indeed, I verily believe that the fewer speeches that you and I, or any one else even remotely responsible for Government in this country, make at this stage the better. No one could have tried harder or more effectively to help them than you yourself have done during these past months. It is with a feeling of real sadness, therefore, that I write as I have. As regards Bajpai's signing on behalf of India, I did my utmost through our publicity organisation to promote a favourable political reaction to what was quite evidently an event of real significance in the story of India's elevation to higher international status, but more than half the national Press twisted the material with which we provided them to serve their purpose of proving that Bajpai, as the hired minion of the British Government, had signed under your malevolent instructions a document which added outrageous insult to the cruel injury of Winston's interpretation of the Charter.

* * *

30. I am much obliged for your views about the continuance during the war of European recruitment for the I.C.S. and the I.P., which I raised in my private and personal telegram No. 786–S.C. of 25th October 1941. I must take a little time to consider and consult others about these, and will let you have my comments a little later on.

31. I have read with great interest what you tell me about the rather stupid leading article in the *Times* . . . .[6] I am afraid my rather rude comment to Inglis, their principal correspondent in India was that weakness of the sort displayed in the leader would very soon correct itself, for no one would for long be found willing to pay three pence for what quite obviously wasn't worth a half penny. That indeed is the position, for there is nothing of real substance in this line picked up so ill-advisedly by the *Times* from quarters moved much more by prejudice and sentiment than by any real understanding of the problem. The first consequence of this blunder will emerge on the publication of Winston's answer to Sir Tej Bahadur Sapru, for the *Times* will then be discovered to have backed a policy which is incapable of being defended in serious argument, and which is rejected by His Majesty's Government—a position quite unworthy of that great journal.

32. I am very sorry indeed to have lost Akbar Hydari,[7] for whom I had affection and real respect. He was of course far past his best, though still able

[6] Personal comments omitted.

[7] Sir Akbar Hydari died on 8 January 1942.

to make a very useful contribution. Above all, he was something which is unfortunately rare in this country—a man of broad citizenship, sincerely and selflessly devoted to the good of India.

27 January 1942

33. I liked your draft answer[8] to Sapru, which strikes me as a very adequate presentation of our case. I hope the discussion in Cabinet will go satisfactorily and that Winston will follow your advice. I see no reason why he should not because that advice is entirely in line with what I conceive to be his own inclinations and prepossessions. "Home Rule for the Viceroy" is the sort of specious slogan that goes down well with unthinking people and with all who have a prejudice against authority and what they are pleased to call red tape. I was sorry to see that Victor Sassoon lent his support to this campaign in a speech which he made the other day in Bombay. Fortunately he sent me a copy, so I was able to write a sharp note to him, telling him that, in my opinion, the plan to which he had lent his name was as mischievous as it was misconceived. I do not doubt he will put it about that I have come out strongly against Arthur Moore's leading idea, but that I think will be all to the good.

34. As I write, I have just received your telegram[9] telling me that you are forwarding a copy of the telegram[10] sent by the Foreign Office to Chungking about Chiang Kai Shek's proposed visit to India and Burma. The Foreign Office telegram has not yet been received. You may be sure that I appreciate to the full the great importance of making the visit of the Generalissimo and his Lady a great success, and I shall spare no effort to that end. Evidently his desire to talk to Gandhi and Nehru raises certain difficulties, given the fact that these two gentlemen are at the present moment not on speaking terms with me, but these difficulties we must circumvent as best we may. I knew you would at once take the point of his seeing Jinnah as well as the other two, and I shall have to coax him to receive the head of the Muslim League whether he feels inclined to or not.

[8] See enclosure to No. 15, and No. 34 below. [9] No. 40. [10] No. 41.

Annex to No. 30.[1]

Note on the the tour of the Reforms Commissioner from 8 November to 7 December 1941, to Madras, Orissa, Assam, Bengal and Bihar

L/P&J/8/509: ff 8–15

The tour was of very great value in establishing contacts and in elucidating aspects of the constitutional problem which are apt to be obscure or ignored in a Delhi-centred view. Among those with whom I had conversations were Their Excellencies the Governors of the five provinces, Ministers of the two provinces[2] where provincial autonomy was working and prospective Ministers in Orissa, representatives of the Congress, the Muslim League, the Hindu Mahasabha, the Justice Party in Madras and the Forward Bloc[3] in Bengal, of the Europeans, the Depressed Classes, the trade unions, the land-owning interests, the Assam hill tribes and other minorities in that province, the principal civil servants including Governors' Advisers and Inspectors General of Police, editors of the leading provincial newspapers, Judges and Advocates General, Chairmen of Public Service Commissions, and a large number of others, many of them detached Indian observers of the political scene. All conversations were informal and confidential, and no statements were issued to the press nor press interviews granted.

2. One impression left by the tour, bearing out earlier experience, was the persistence of old habits of thought, deriving from a reliance upon British authority and an assumption of its permanence, which have become deeply ingrained even upon the strongly nationalist mind. One of their less mischievous manifestations is the tacit assumption, so often made by those with whom one talked, that under Dominion Status there will still be some supreme non-Indian authority, available not indeed to intervene in administration but to take those critical decisions of a semi-constitutional kind where communal bias might be fatal. This assumption is traceable in many conversations with those who affected to stand for national independence as well as with others who openly asked for some such form of British authority to remain. Among the latter, of course, are the orthodox supporters of Pakistan, whose custom it is, from Mr. Jinnah downwards, to answer awkward questions put to them about such problems as all-India defence by saying that during a "transitional period" these must remain in the hands of the British. On the Hindu side, an interesting version of the view that some outside, impartial authority is needed came from a high Indian I.C.S. officer of strong nationalist sympathies, who, when I ex-

[1] This note was sent separately by bag: see No. 30, para. 12.

[2] Assam (until 25 December 1941, when the Governor took over the administration under Sec. 93 of the Government of India Act 1935) and Bengal.

[3] See No. 23, note 3.

pressed surprise that in his constitutional scheme for the future the Governor would appear to have an independent responsibility, at least as regards backward elements in the population, replied that there ought to be somebody who could ask the Prime Minister of a self-governing province "questions of conscience".

3. Almost as widespread appeared to be the belief, or at least the assumption, that the responsibility for framing a new self-governing constitution for India must fall upon the British. This is likewise based, it seems, as much upon the ingrained habit of reliance upon authority to settle disputed questions as upon any deliberate and overt arguments. There are, of course, many who profess—no doubt with sincerity—a disbelief in British good faith in offering to leave it to a representative Indian body to devise the framework of the new constitution. The arguments on such lines are very familiar. On the other hand, a number of politicians whom I interviewed expressed their frank scepticism of the ability of the different Indian communities and parties to come together and frame an agreed constitution, even on a generous interpretation of the word "agreed". People who argued thus did not intend to imply that if a constitution devised by the British Government in consultation with different elements of Indian opinion were applied, it would not meet with sufficient agreement to make it work, but only that the initiative must rest on the British side and could not be left to Indian opinion. It certainly seems that the policy of His Majesty's Government of postponing until after the war any major overhaul of the Indian constitution (a policy with which I found little quarrel outside the extremer Congress camp) has rendered any agreement between the various communities and groups in India on the lines on which the constitution should be framed unlikely until that time is reached. Conversations reflected the fact that meanwhile each faction must continue to state its case in the stiffest possible terms and to retain every bargaining counter that it can, lest by making concessions now it prejudice its position in the "real showdown". Although at the time of the tour the cloud in the Far-East was obviously about to burst, there was nothing to suggest that the approach of war to India had overborne these disruptive tendencies with an imperative sense of the need for unity. On the contrary, one could not help being impressed by the very small interest taken in the international scene as the background of present political problems or the ultimate constitutional solution. If this appreciation is just, no changing of the bait can serve to justify angling for a fish which is not yet in the stream.

4. The policy of postponing constitutional decisions, as far as the British Government is concerned, until after the war, sets the stage for the posturing of those who see in a magnification of the claims of their own particular community or group a larger opportunity of advancement (not necessarily for

themselves but for their people) than in service of a larger citizenship. One outstanding feature of almost all the conversations that I had with provincial politicians was the concentration of interest upon their own local problems. For most of those in this category the long-term constitutional problem appeared to resolve itself into the status of their own community or party in their own province. This may well account for the very small part which the problem of the Indian States seems to play in the politician's approach to the constitutional issue. They are usually left out of the picture altogether, and it is commonly assumed that, whatever solution may be found for them, their presence will not have much effect, if it has any, upon the pace and character of constitutional progress in British India.

5. One could not but be impressed, not only with the provincialism of the average politician's outlook, but also with the multiplicity of communal divisions upon which emphasis was laid in regard to such matters as separate electorates. The Brahmin–Non-Brahmin conflict in Madras, and the inter-valley conflict in Assam, came up in conversation as prominently as the Hindu–Muslim problem; and the Ahoms, the tribalists, the scheduled castes and others all raised their voices loudly in their own communal cause. I naturally heard a good deal about the formation of new provinces,—in the South by the creation of Andhra[4] and Tamilnad[5] and other provinces, in the North-East by the repartition of Bengal[6] or the re-absorption of Assam.[7] It was interesting to find in Orissa an almost unanimous agreement among official and unofficial leaders that the construction of the new province[8] had given the Oriyas a fairer deal and a larger hope than they had had in their previous subordinate position. It seems likely that for the reason suggested above the various movements for new provinces or readjustments of the boundaries of existing provinces will gather force as time goes on, in anticipation of a fresh constitutional settlement. Though they are less important and less sincere, they obviously have much in common with the Pakistan movement, which is already finding sympathisers among the separatists of the south.

6. The Pakistan theory itself was supported with strict orthodoxy by every Muslim League politician with whom I spoke (except Mr. Fazlul Huq, who

[4] The proposal to constitute a new Province of Andhra out of Telugu-speaking areas.

[5] The proposal to constitute a new Province of Tamilnad out of Tamil-speaking areas.

[6] In 1905, Bengal was partitioned. Western Bengal with the areas of Bihar and Orissa (then still parts of Bengal) formed one Province, while Eastern Bengal was joined to Assam to form the Province of Eastern Bengal and Assam. A further reorganisation took place in 1912. Bihar and Orissa were constituted a separate Province, while Eastern Bengal was separated from Assam and rejoined to Western Bengal to form a reunited, but much smaller Province of Bengal.

[7] Namely into Bengal, out of the eastern parts of which the Province of Assam had originally been created in 1874.

[8] Orissa was constituted a separate Province on 1 April 1936. Previously, the Oriya-speaking peoples had belonged to three separate provinces: Bihar and Orissa, Madras, and the Central Provinces.

was then still nominally a leading member of the League) and by no one else, though one Congress leader, Mr. Nityananda Kanungo, was prepared to say, after offering to open the whole Muslim position in a future constitution to settlement by the Muslims themselves, that if by popular vote they chose Pakistan, he would be ready to accept it. The most interesting point was that every Muslim Leaguer,[9] with but one exception, interpreted Pakistan as consistent with a confederation of India for common purposes like defence, provided the Hindu and Muslim elements therein stood on equal terms. Discussion of the position of the Muslims in Hindu-majority provinces indicated, as was to be expected, that in these provinces there was no acceptance whatever of the proposition urged upon me by Mr. Jinnah that the accomplishment of Pakistan would so relieve communal tension as to render special safeguards for minorities much less necessary than at present. Muslims, unbriefed on this by the Quaid-e-Azam,[10] usually took refuge in the principle of reciprocity over safeguards as between Hindus in Pakistan-provinces and Muslims in Hindu-provinces, but when pressed they frankly demanded not only the full rigour of existing safeguards, like separate electorates and weightage, but more besides.

7. My impression was that among the Muslim Leaguers in the provinces visited there was no genuine enthusiasm for Pakistan. At the same time, none of them will repudiate it, not only for fear of incurring the wrath of Mr. Jinnah or impairing the Muslim solidarity which they feel to be vitally necessary at the present time, but also, I thought, because the policy itself, extreme and unpalatable as it may seem to them, expresses however crudely some inarticulate but vital theme in the Muslim mind. Even Muslim critics of the League, like Sir Mahomed Usman, told me that outside Bengal it would be hopeless for anyone to try to capture a Muslim constituency on anything but the League ticket. H.E. the Governor of Madras went so far as to say that whenever there was any effective organisation among the Opposition (including the Non-Brahmins, who are not prevented by their communal proportion from actually commanding a majority) it was now always engineered by the Muslim League.

8. I was therefore led to ask myself, what is this element in Muslim thought which finds expression in Pakistan? It derives, it seemed to me, from a revolt against the allied concepts of "minority" and "safeguards". Experience under Congress governments may have been the immediate stimulus, but the real motive goes deeper. Nor does it lie only in the recognition that "safeguards" depend for their efficacy upon the presence of a third power to enforce them, a power which will disappear from the Indian scene with the coming of Dominion Status. It lies more profoundly, though perhaps less consciously, in the knowledge that "safeguards" are designed to improve, but cannot radically alter, the position of a "minority", which remains a minority, a Cinderella

with trade-union rights and a radio in the kitchen but still below-stairs. It is against this whole combination of ideas that the Muslim mind rebels. The two-nation theory, which transmutes the ideology of "minorities", is thus more fundamental to their present thought than the Pakistan theory, which transmutes the ideology of "safeguards". From this new outlook of the Muslims there will obviously be no retreat. My conversations have therefore indicated that it is misleading to approach the general Muslim problem in terms of the same phraseology as we use about the interests of minorities like the Europeans, Depressed Classes, and so on. Some new terminology is needed to keep our consideration of this problem on the right lines—a terminology which recognises that the problem is one of sharing power rather[11] qualifying the terms on which power is exercised by a majority.

9. In effect, the British Government and Parliament committed themselves to this approach when they first introduced separate communal electorates.[12] I found no sign that any substantial section of Muslim opinion would sacrifice separate electorates at any price in the currency of other constitutional concessions. This ineluctable fact is the background against which one is obliged to consider the various proposals, put to me by political leaders and constitutional students, for systems of functional representation or indirect election as a means of avoiding communalism in the electoral process. I heard a little of the former device, a good deal of the latter, in the form of the use and development of village panchayats as electoral units, or of some similar enlistment into electoral service of the alleged ability of the villager to choose a leader among his own number to speak and act for him. If, as I believe, no such arrangement, however adapted, would be acceptable for a moment to majority Muslim opinion unless it included a provision for separate communal electorates or their equivalent then neither functional representation nor indirect election can seek justification as a solution for the communal problem, but each scheme must stand on its merits by comparison with territorial elections, both alike being combined with separate electorates for Hindus and Muslims, and the new proposals under the handicap of being even more complicated and cumbersome than the present electoral system.

10. The demand for separate electorates from smaller minorities appears to be growing along with their political consciousness. The idea that was pressed on me by representatives of the Justice Party in Madras that Non-Brahmins

[9] [By Mr Hodson]. They included Sir Nazimuddin, Mr H. S. Suhrawardy, Sir Mahomed Saadullah, Mr Sobhan Khan, Mr Abdul Hameed Khan, Mr Abdul Matin Choudhry, and Khan Bahadur Saiyid Muhammad Ismail.

[10] The 'Supreme Leader', namely Mr Jinnah.

[11] The words 'than of' appear to have been omitted.

[12] In 1909, under the Indian Councils Act.

should have separate electorates to save them from domination by the Brahmins is ridiculous in theory, and the answer in practice is obviously that the Justice Party should improve its organisation and leadership. Majority Hindu opinion is, of course, strongly against separate electorates, and it is more often than not that any Hindu with whom one talks will begin his observations on the constitutional problem by blaming everything on separate electorates. Nevertheless, there is a widespread recognition, encouraged by the official policy of the Congress, that if the Muslims insist on having separate electorates they must have them.

11. In a discussion with Mr. Sarat Bose and members of his party, one of the latter said heatedly, "Either the constitution is communal from top to bottom or it is non-communal from top to bottom". He was using this as a weapon against separate electorates, but the logic of it would equally sustain an argument for special communal arrangements in legislature and executive, if the communalism of the electorate must continue to be recognized. My conversations showed that there is growing support for the idea of compulsory composite Cabinets. This notion was supported not only by all authentic Muslim League opinion but also by several representatives of Depressed Classes or Labour interests, by the provincial Presidents of the Hindu Mahasabha in Madras and Bengal, and by a number of independent Hindu and Muslim spokesmen (both prominent and obscure). I even found tentative support for it in the Congress camp. The notion goes beyond that of a coalition, implying as it does that, as in the Swiss system, the composition of the Cabinet to reflect minorities as well as the majority should override the principle of cabinet solidarity if these should clash. Many people shy from the idea because of the difficulty of envisaging what happens when there is a cabinet split, but contemporary events in Bengal furnished a useful exemplar of the fact that the British system of party majority government with collective responsibility was no proof against equal difficulties.

12. The fact that the idea received support from the representatives of Depressed Classes and of Labour is interesting. It would seem that British public opinion, approaching the constitutional problem, has not paid sufficient attention to the position of these classes. It is not suggested that the problem of establishing their place in the constitution is one-half as difficult as that of the Hindu–Muslim conflict, nor that politically they count for very much at present; but as "have-nots", in a period of economic and social development when the "haves" are finding their privileges curtailed and their possessions redistributed, these are elements whose position it may be very important to take care of if future India is to stand up well to the social problems with which it will be faced. The case put to me on behalf of organized labour in Bengal was that they preferred a wide franchise with no special representation for any economic

interest, but that if capital was to be represented in seats for landowners, commerce, etc. then labour must claim at least equal representation.

13. This obviously bears on the question of European representation in the legislatures. Incidentally, it was acknowledged by the labour spokesmen with whom I talked that British capital was a much better employer than Indian capital, and that they did not demand the abolition of European representation but would rather welcome it if they were sufficiently represented themselves. In conversation with unofficial Europeans I tried to ascertain whether, in future constitutional deliberations, they would take their stand on their business position or on their community position. In Madras opinion was divided. In Bengal the argument was that in their case these two things were practically identical, but I think that the choice will have to be made as a matter of tactics and that a good deal will turn upon it. Nevertheless, it will surely not be on theoretical grounds that the Europeans will make or lose their case for a special position in a future Indian constitution but on their record under the existing constitution. On this opinions vary. A particular problem of much indirect importance is that of the allocation of European seats to special interests like Chambers of Commerce, tea associations, etc. I heard this arrangement both criticised and defended by Europeans; my own impression is that it is a handicap to them in future constitutional dealings because it endorses the allegation, which the European community is at much pains to repudiate, that its representatives in the legislature are there merely to protect their own business interests. If, as its defenders maintain, this is not its result nor does it bring different people to the legislature from those who would come if the whole European bloc were open to election by the community in general, there remains little to be said for it.

14. The question of safeguards for the services is of a different order altogether. It divides into two parts. First there is the need for protecting the status, pay and pensions of existing members of the Secretary of State's services.[13] This is a more-or-less technical problem which does not excite political controversy at the present time. Secondly and more difficult, there is the need for defending the services generally against undue political interference which would impair their efficiency and morale. One special aspect, which was brought vigorously to my notice by several of those with whom I talked, was the relation between provincial and imperial services. It appears to be a genuine source of grievance among provincial politicians that their Ministries are served for many important purposes by officers over whose appointment, conditions of service and discipline they have practically no control. No doubt the sting would be taken from this grievance if under a constitution of the Dominion Status type such officers had no appeal to a non-Indian authority and were not duty-bound, when

[13] Government of India Act 1935, Sec. 244.

occupying the highest posts in the provinces, to report to Governors on any matters which might fall within the latter's special responsibility, a point which significantly caused peculiar irritation to Mr. Rohini Kumar Choudhury, who complained that it encouraged I.C.S. officers to adopt a patronising attitude towards Ministers. (Similarly I was told that the sting had very largely disappeared from the old Congress grievance over combination of executive and judicial functions in the lower magistracy as soon as the executive functions came under their own political control). At the same time, the absence of any court of reference beyond politics will clearly render much more difficult the problem of protecting both provincial and Imperial services against undue political pressure. Incidentally, I was told by several of the numerous representatives of the services, with whom I was at pains to discuss the problem, that the political interference to which the services had been subjected under provincial autonomy was much more of a personal and local than of a communal kind; that is to say, it was not that a Muslim Minister of a province would insist on a certain post being held by a Muslim, but that he would insist on its being given to a particular Muslim to whom he directly or indirectly *via* some political supporter owed an obligation.

15. Incidentally, I was strongly impressed by the arguments of the President of the Legislative Council[14] and the Speaker of the Legislative Assembly[15] in Bengal in favour of the establishment of their own staff of servants, who should not look elsewhere for promotion nor be liable to transfer to other departments just when experience had made them most useful, and indeed of the complete detachment of their staff and expenditure from departmental control.

16. On the assumption of Dominion Status, discussions about service conditions usually centred on the possibility of giving more powers to provincial public service commissions, though it was recognized that in the last resort there must be Ministerial responsibility for the conduct of the public services, and even for the appointment of the public service commissions and the framing of their rules; in other words, that in the last analysis the commissions' functions could only be advisory. Even so, there was seen to be a great deal of merit in making improper interference by Ministers more difficult by means of the complication and partial insulation of the machinery for appointments, promotions and discipline. Two of the Chairmen of Public Service Commissions with whom I talked made a point of the great value that would attach to the right to publish an unexpurgated annual report. Various other proposals directed to the same general end were put forward.

17. A large number of conversations on this subject, however, many of them following the lines of a comparison between civil service conditions here and

in the United Kingdom, brought out the fact that neither the defects of the machinery of public service commissions, nor even these combined with the absence of the traditions and conventions that prevent a British Minister from interfering with personal issues in the public services, altogether account for the exposure of the services in India to improper political manipulation. One reason for the better conditions in Britain is undoubtedly the solidarity of the services themselves, the existence in the lower ranks of powerful trade union organisations and in the upper ranks of an *esprit de corps* which makes the members of the civil service stand firmly together if they believe that an injustice has been done to any of their number. This solidarity takes a hierarchical as well as a horizontal form, subordinates and superiors looking to each other reciprocally for protection and loyalty; nor would anyone in authority tolerate attempts by a subordinate to use outside leverage for his own advancement. In India, apart from communal and racial divisions in the services, the traditions are largely alien to all this. Different services, I was told, are jealous of each other, and the superior services would certainly not be inclined to welcome trade union organization among the inferior branches. There is also a tradition, deeply embedded in Indian society, of the right of the humblest to appeal to the throne, which takes a perverse form in the claim of lower officers to seek the ear of Ministers on their own behalf. The protection of the services undoubtedly lies to a large extent with the services themselves. One proof of this argument appears to lie in the fact that in all the five provinces which I visited I found that there was far less complaint of successful interference by Ministers with the police than with other services on matters of personnel, a fact which is surely due in a large measure to the character of the police as a disciplined force with a strong *esprit de corps* of its own.

18. Comparison with British conditions also brought out the great importance of the party political structure in affecting the relations between politicians and services. A British Minister can rebuff a private Member who attempts to intervene on behalf, or to the detriment, of an officer of his department, because he has behind him the discipline of the government and the party over the individual Member of Parliament. This discipline rests on a number of factors such as the distribution of honours and preferment and the right to seek a dissolution of Parliament if defeated through the defection of their supporters, which an Indian provincial Ministry does not command under the present constitution, but more particularly to the power of the centralised party machine, with its funds, its propaganda and its intangible goodwill, to make or break any member who has not both the means and the popular standing to carve a way in politics for himself. The Congress alone, among the parties contesting for power in the provincial legislatures, has hitherto possessed any-

[14] Mr Satyendra Chandra Mitra. [15] Khan Bahadur Sir M. Azizul Haque.

thing comparable to this, and it may be significant that the complaints which I heard of political interference with postings, service discipline and so on, were much more numerous and vehement from the non-Congress provinces that I visited than from those which formerly had Congress governments.

19. This contrast may also be due in a large measure to the fact that the Congress governments were not only in possession of a strong party machine but were also backed by substantial and solid parliamentary majorities. It was no doubt the belief of many people at the time of the last constitutional reforms that a position of unstable equilibrium, such as was indicated by the balance of power under the Communal Award[16] in several provinces, would lead to sound and moderate government because extreme measures or communal bias or personal manipulation could be defeated by conservative elements like the Europeans, who could tip the political scales. My conversations about the working of provincial autonomy suggest that this was a profound mistake based upon a false analogy between Indian and British conditions.

20. The weakness of successive governments in Assam and its effect on service matters lent extra point to the conversations which I had there with His Excellency the Governor and a number of others about the position of the hill peoples under any future constitution. I also had an opportunity of discussing the problem of backward peoples with the Governors of Orissa and Bihar, though not at equal length. This is manifestly a problem of great difficulty, involving as it does one of the responsibilities which history has laid upon Great Britain, and I would like to advert to it separately.

21. On the whole, the impression left by the tour is not discouraging. Beneath the crust of communal and party rigidity, and of querulous shirking of responsibility for the pursuit of agreement, there seem to be trends of thought which may eventually lead to compromises and construction. These trends will need time to grow to tidal strength, and in other respects, such as the rise of fissiparous forces, time is not on the side of constitutional sanity. Meanwhile the initiative in constitutional progress, offered to India, has patently not yet been accepted, and remains in British hands.

[16] In a statement dated 4 August 1932, His Majesty's Government announced that, in the absence of any agreement between the Indian communities, it had itself decided how seats in the Provincial Legislatures were to be allocated among the communities under the proposed new Indian Constitution then under discussion by the Round Table Conference (Cmd. 4147). This allocation, known as the Communal Award, was, with some modification, to form the basis of the distribution of seats in Provincial Legislatures eventually laid down by the Government of India Act 1935.

give united support to principles embodied in Atlantic Charter and in joint declaration of 26 Nations and ally themselves with anti-aggression front. I hope latter will whole-heartedly join Allies namely China, Britain, America and Soviet Union and participate shoulder to shoulder in struggle for survival of free world until complete victory.

6. Lastly I sincerely hope and confidently believe that our ally Great Britain without waiting for any demands on part of people of India will as speedily as possible give them real political power so that they may be in position further to develop their spiritual and material strength and thus realise that their participation in war is not merely aid to anti-aggression Nations for securing victory, but also turning point in their struggle for India's freedom. From objective point of view I am of opinion that this would be wisest policy which will redound to credit of British Empire. *Ends.*

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The Marquess of Linlithgow to Mr Amery

Telegram, L/P&J/8/509: f 71

NEW DELHI, *23 February 1942, 6.50 pm*
Received: 23 February, 10.45 pm

34D/42. Following is summary of statement made by Jinnah to Associated Press on February 22nd.

Begins. Marshal Chiang Kai Shek told me he knew nothing of political and constitutional problems of India, but in parting message he has advised British Government to give real political power and freedom to India. India is not one national State, its two major nations being Hindus and Mussulmans and one third of India is under Princes. It is unfortunate that Marshal should have indulged in generalities without understanding political situation and necessary constitutional adjustments. I fear he is saturated with ideas of those who surrounded him most while in India. While Muslim India yields to none in desire to achieve freedom for all people of India it cannot accept machinations of those who speak in name of freedom for Hindu India only. We want our Hindu brethren to be free but do not want to be ruled by them; both Hindu and Muslim nations should be free equally in respective homelands and zones, any attempt militating against Pakistan demand will lead to gravest disaster in India at this critical moment. I trust British Government and public will not be carried away by generalities in which Marshal has indulged after fortnight's visit. *Ends.*