IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2286 OF 2006

ALONG WITH

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

IN THE MATTER OF:

Aligarh Muslim University … APPELLANT

VERSUS

Dr. Naresh Agarwal & Others … RESPONDENTS

VOLUME I-A
WRITTEN SUBMISSIONS ON BEHALF OF APPELLANTS

2

SUBMISSIONS ON BEHALF OF
ALIGARH MUSLIM UNIVERSITY

By
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ISSUE-WISE INDEX

3

SUBJECT INDEX

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I. INTRODUCTION

1.1 The central issue in the appeals and petitions is: Whether the Aligarh Muslim University ('**AMU'**) is a minority educational institution founded by Muslim minority for the purpose of Article 30(1)?

1.2 Aligarh Muslim University is an 'institution of national importance' established before Independence. The University is ranked 9th across universities and autonomous institutions in India by the Ministry of Education's National Institutional Ranking Framework ('**NIRF**') – 2023. The National Assessment and Accreditation Council ('**NAAC**') – an autonomous body of the University Grants Commission ('**UGC'**) – has graded the University at 'A+' (3.35 out of 4). The Government of India's NIRF ranking, and NAAC scores is a testament to AMU's excellence in teaching, learning, research, outreach, inclusivity, and other parameters for educational excellence.

APPEALS & PETITIONS

1.3 The cases before this Hon'ble 7-Judge Bench are:

A. A batch of eight (8) civil appeals challenging the judgment of Hon'ble Allahabad High Court dated 05.01.2006 which declared that the Appellant-University was never a minority institution, and that the reservations for Muslim minority in postgraduate courses was declared as unconstitutional and impermissible.[1] More importantly, the Hon'ble High Court struck down three changes introduced by the Aligarh Muslim University (Amendment) Act, 1981;

[IMPUGNED JUDGMENT, Vol. III-A @ 29]

B. A civil appeal challenging the judgment of the Hon'ble Allahabad High Court dated 16.10.2015 that dismissed the prayer for *quo warranto* regarding the appointment of the then Vice Chancellor of Appellant-University;[2] and

[1] Civil Appeal Nos. 2286, 2316, 2317, 2318, 2319, 2320, 2321 and 2861 of 2006.
[2] SLP(C) No. 32490 of 2015

C. A writ petition under Article 32 seeking a writ or direction to the Appellant-University to follow the regulations laid by University Grants Commission ('UGC') in 2010 on minimum qualifications for appointment of teachers and academic staff.[3]

D. A transferred case involving a writ petition filed before the Hon'ble Allahabad High Court seeking implementation of reservations in terms of the Central Educational Institutions (Reservation in Admissions) Act, 2006.[4]

THE REFERENCE

1.4 The following is a sequence of decisions and orders that has led to the constitution of this 7-Judge Bench*:*

A. In 1967, a Constitution Bench [5-Judge Bench] in ***S. Azeez Basha vs Union of India***, (1968) 1 SCR 833 ('**Azeez Basha**'), held that the University "was neither established nor administered by the Muslim minority," and consequently, the protection for the minorities to administer educational institutions under Article 30(1) was made inapplicable for the University. **The University itself was not a party in *Azeez Basha***.

B. On 26.11.1981, a Division Bench in ***Anjuman-e-Rahmaniya vs District Inspector of Schools***, W.P.(C) No. No. 54-57 of 1981 ('**Anjuman**') questioned the correctness of ***Azeez Basha*** and referred the matter to a 7-Judge Bench. The order of reference reads as follows:

> "After hearing counsel for the Parties, we are clearly of the opinion that this case involves two substantial questions regarding the interpretation of Article 30(1) of the Constitution of India. The present institution was founded in the year 1938 and registered under the Societies Registration Act in the year 1940. 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. There are some observations in *S. Azeez Basha & ors. Vs. Union of India* 1968(1) SCR 333, but

[3] WP(C) No. 272 of 2016
[4] Transfer Case (Civil) No. 46 of 2023 [from Transfer Petition (Civil) No. 1870 of 2014].

> 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 Basha'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. A large number of jurists including Mr. Seervai, learned counsel for the petitioners Mr. Garg and learned counsel for respondents and interveners Mr. Dikshit and Kaskar have stated that this case requires reconsideration. In view of the urgency it is necessary that the matter should be decided as early as possible we give liberty to the counsel for parties to mention the matter before Chief Justice." (emphasis added) [Vol. III-A @ 209]

C. In ***TMA Pai vs State of Karnataka***, (2002) 8 SCC 481 ('**TMA Pai'**), the 11-Judge Bench framed an issue [No. 3(a)] that reflected the reference in ***Anjuman***, however, the Bench opined that "this question need not be answered by this Bench, it will be dealt by a regular Bench." [Pr. 450, Q.3(a)]. The said issue was quoted by the Three Judge Bench in the present appeal while making the present reference in 2019.

D. On 11.03.2003, a regular bench disposed-off a batch of petitions, that included ***Anjuman***, considering the 11-Judge bench decision in ***TMA Pai***, although the correctness of ***Azeez Basha*** was left to be answered. [Vol. III-A @ 211]

E. On 12.02.2019, a 3-Judge Bench has referred the present batch of appeals and petitions to a 7-Judge bench on the following basis:

(i) THAT in ***Anjuman***, a bench consisting of Justice Fazal Ali referred the matter to a 7-Judge Bench to reconsider ***Azeez Basha***;

(ii) THAT in ***TMA Pai***, the 11-Judge Bench framed the following issue on the indicia for treating an educational institution as a minority educational institution;

> "3(a) 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?"

(iii) THAT the subsequent benches of this Court did not answer the issue framed in ***TMA Pai*** and "that the correctness of the question arising from the decision of this Court in S. Azeez Basha (supra) has remained undetermined;"

(iv) THAT the decision in ***Prof. Yashpal vs State of Chhattisgarh***, (2005) 5 SCC 420 ('**Yashpal**'), concerning the establishment and incorporation of universities under the University Grants Commission Act, 1956 ('**UGC Act'**), as it relates to the correctness of ***Azeez Basha*** warranted an authoritative pronouncement; and

(v) THAT the effect of National Commission for Minority Educational Institutes Act, 2004 ('**NCMEI Act'**) and amendments thereto as it relates to the correctness of ***Azeez Basha*** warranted an authoritative pronouncement.

Therefore, it seems that the reference to the 7-Judge Bench is not clearly spelt out, requiring the issues to be framed and then decided by this Bench.

F. Another important aspect for consideration arises from the impugned decision of the Hon'ble Allahabad High Court, that is: whether the Act of 1981 amending the Aligarh Muslim University Act, 1920 has changed the basis of ***Azeez Basha*** and rendered it nugatory. The Hon'ble Allahabad High Court rejected the argument on the change of basis and went on to hold certain sections of the 1981 Amending Act to be an unconstitutional usurpation of judicial power.

ISSUES FOR CONSIDERATION

1.5 **The two reference orders of 1981 and 2019 did not specifically indicate the points of reference which needs to be delineated by this Hon'ble Court before proceeding further. Broadly, the reference may be stated as follows:**

Whether the decision in *Azeez Basha* is internally contradictory in its reasoning on facts and in law, contrary to authoritative decisions of this

Court, rendered nugatory by subsequent statutory changes, and contrary to the Constitutional dispensation of Articles 29 and 30?

1.6 The issues arising in this reference are shown below:

I. Was *Azeez Basha* correctly decided, and whether it suffers from internal contradiction and reasoning on facts and on law?

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

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

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

V. Was *Azeez Basha* correct in accepting the antecedent historical data on AMU's Muslim character, but denying its constitutional significance while deciding the issue of its minority status, which is at the variance with *St. Stephen's College vs University of Delhi*, (1992) 1 SCC 558 [5-Judge Bench], *Rev. Father W Proost vs State of Bihar*, (1969) 2 SCR 73 [5-Judge Bench], and *Right Rev. Bishop SK Patro vs State of Bihar*, (1969) 1 SCC 863 [5-Judge Bench]?

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

II. PRELIMINARY OBJECTION

PRELIMINARY ISSUE

Whether the Union of India, having accepted and defended the minority status of Aligarh Muslim University – both as a matter of fact and in law – be allowed to adopt take a new stand that is *contrary* to its pleadings and affidavits in the present litigation, in the absence of any change in circumstance or new materials?

2.1. The above is an important issue being urged in view of the affidavit filed by the Union of India, dated 30.06.2016, seeking the leave to withdraw their appeal (bearing Civil Appeal No. 2318 of 2006) challenging the decision of Hon'ble Allahabad High Court. First and foremost, the attempt to withdraw the appeal is procedurally impermissible as per ORDER XIX, Rule 26, of the Supreme Court Rules, 2013.[5]

2.2. That apart, the Union of India, through this affidavit, has taken a position that is diametrically opposite to the pleadings filed before this Hon'ble Court and Hon'ble Allahabad High Court. The reasons stated in the affidavit dated 30.06.2016, affirmed by an officer at the rank of Deputy Secretary, states:

> "24. In view of the foregoing paras in general and particularly in view of the Judgment of the Hon'ble Supreme Court in Azeez Basha case, the Union of India has decided to withdraw the earlier stand taken by the Government to support the minority institution status of Aligarh Muslim University. The SLP filed in the Hon'ble Supreme Court in 2006 in support of the minority status AMU may, accordingly, be treated as withdrawn." (emphasis added) [Vol. III-B @ 461]

UNION OF INDIA'S VOLTE FACE

2.3. 1n ***Azeez Basha***, the Union of India took a view that the Appellant-University was established by Act No. XL of 1920, and that the Muslim minority cannot claim any right under Article 30(1). The Union of India's stand, as recorded in ***Azeez Basha***, states:

> "The petitions have been opposed on behalf of the Union of India and its main contention is that the Aligarh University was established in 1920 by the Aligarh Muslim University Act, No. XL of 1920, (hereinafter referred to as the 1920-Act) and that this establishment was not by the Muslim minority but by the Government of India by virtue of a statute namely, the 1920-Act and therefore the Muslim minority could not claim any fundamental right to administer the Aligarh University under Art. 30(1). …"

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[5] "26. Where at any stage prior to the hearing of the appeal an appellant desire to withdraw his appeal, he shall present a petition to that effect to the Court. At the hearing of any such petition a respondent who has entered appearance may apply to the Court for his costs."

[Vol. III-A @ XXX]

2.4. The above stand of the Union of India was based on a misconception, *both* in fact and in law. In fact, the Union of India accepted and recognised the minority character of the University at the time of introducing the 1981 Amending Act. This is evident from the Statement of Objects and Reasons accompanying the 1981 Amending Act, which states:

> "India is a multi-religion country and its strength lies in the fact that all communities living in the country are free to establish educational and other institutions of their own choice. The Government have introduced in Parliament an Amendment Bill to remove doubts in the minds of Muslim community regarding the character of Muslim Universities. But the amendment of the Aligarh Muslim University Act would be meaningless and would be redundant if Statutes are not amended to satisfy the sentiments of the Muslim community. It is, therefore, necessary to introduce a Bill in the Parliament to achieve this objective." (emphasis added) [Vol. IV-A @ 147]

2.5. Since 1981, successive governments have recognized and maintained that the Appellant-University is a minority educational institution. In fact, the genesis of the present litigation stems from the Union of India's position in D.O No. 3-6/2005- Desk (U) dated 25.02.2005, taken at the highest levels, that:

> "… Taking note of the 'definition' of the 'University' given in Section 2(1) of the AMU (Amendment) Act, 1981 and the provision of Section 5(c) of the said Act empowering the university to promote especially the educational and cultural advancement of Muslims of India, the Government treats the Aligarh Muslim University as a religious minority institution established and administered under Article 30(1) of the Constitution of India. …" [Vol. III-E @ 39]

2.6. More importantly, the Union of India effectively contended that ***Azeez Basha*** was wrongly decided before the Hon'ble Allahabad High Court and submitted that the 1981 Amending Act was introduced as a 'corrective statute' to reaffirm AMU's minority character. [Vol. III-A @ 68] This stand was taken after a detailed consideration on law. The Union of India's clear view on AMU's minority character is further evident from the submissions of the then Additional Solicitor General on behalf of Union of India and the Attorney General for India before the Hon'ble Allahabad High Court. [Vol. III-A @ 31]

CHANGE IN STAND IS UNJUSTIFIED

2.7. Union of India's change in stand plainly unjustified. It fails to provide any new evidence or materials that negates their consistent view since 1981. Furthermore, the affidavit has failed to cite any change in policy to warrant such *volte face*.

2.8. This *volte face* is contrary to the parameters for the change in stand recognised by this Hon'ble Court, such as,

- ***State of Haryana vs State of Punjab***, (2002) 2 SCC 507 (at Pr. 16) held that:

> "16. … The decisions taken at the governmental level should not be so easily nullified by a change of Government and by some other political party assuming power, particularly when such a decision affects some other State and the interest of the nation as a whole. … But in the matter of governance of a State or in the matter of execution of a decision taken by a previous Government, on the basis of a consensus arrived at, which does not involve any political philosophy, the succeeding Government must be held duty-bound to continue and carry on the unfinished job rather than putting a stop to the same." (emphasis added)
>
> [Vol. V-A, p. 517 @ 548]

- ***AP Dairy Development Corporation Federation vs B Narasimha Reddy***, (2011) 9 SCC 286 (at Pr. 40) held that:

> "40. In the matter of the Government of a State, the succeeding Government is duty-bound to continue and carry on the unfinished job of the previous Government, for the reason that the action is that of the "State", within the meaning of Article 12 of the Constitution, which continues to subsist and therefore, it is not required that the new Government can plead contrary to the State action taken by the previous Government in respect of a particular subject. … Political agenda of an individual or a political party should not be subversive of rule of law. The Government has to rise above the nexus of vested ..." [Vol. V-A, p. 901 @ 921]

AN AFFIDAVIT CANNOT OVERRIDE PARLIAMENT'S UNAMBIGUOUS DECLARATIONS

2.9. In Pr. 12 of the affidavit, the Union of India has averred:

> "The definition of University as amended by the AMU (Amendment) Act, 1981 merely recognizes Muhammadan Anglo Oriental (MAO) college as the nucleus of the Aligarh Muslim university, which is a historical fact. But AMU and MAO are not one and the same. Even in the face of the revised definition of the University, it was MAO College that was established by the Muslims of India, not that the University was established by them. The fact remains that the University was established by enactment of the AMU Act 1920." [Vol. III-B @ 451]

2.10. The above view of Union of India is, in effect,-

(i) a defiance of Parliament's recognition in 1981 that AMU is indeed a minority institution; and

(ii) contrary to the pleadings and submissions made before the Hon'ble Allahabad High Court and this Hon'ble Court.

2.11. Besides the impropriety, the changed stance of Union of India through this affidavit under reply does not have bearing on the issues urged before this Hon'ble Bench, in light of ***Sanjeev Coke Manufacturing Company v Bharat Coking Coal Ltd***, (1983) 1 SCC 147 [5-Judge Bench], which held:

> "25. … The deponents of the affidavits filed into court may speak for the parties on whose behalf they swear to the statements. They do no speak for the Parliament. No one may speak for the Parliament and Parliament is never before the court. After Parliament has said what it intends to say, only the court may say what the Parliament meant to say. None else. … The executive Government may place before the court their understanding of what Parliament has said or intended to say or what they think was Parliament's object and all the facts and circumstances which in their view led to the legislation. When they do, they do not speak for Parliament. No Act of Parliament may be struck down because of the understanding or misunderstanding of parliamentary intention by the executive government or because their (the Government's) spokesmen do not bring out relevant circumstances but indulge in empty and self-defeating affidavits. … Validity of legislation is not to be judged merely by affidavits filed on behalf of the State, but by all the relevant circumstances which the court may ultimately find and more especially by what may be gathered from what the legislature has itself said. …" (emphasis added)
>
> [Vol. V-A, p. 340 @ 365-366]

2.12. In sum, the Union of India ought not to be permitted to plead a different case, much less a diametrically opposite one, because:

(i) It is duty bound to defend and follow the will of Parliament expressed through the 1981 Amending Act;

(ii) It has failed to provide a justifiable ground for reversing their consistent stand since 1981 at the governmental level and before this Hon'ble Court and the Hon'ble Allahabad High Court in these very proceedings;

(iii) Its failure to state any new material or legal developments to justify the change in stand is arbitrary, unreasonable and lacks *bona fide*; and

(iv) In any event, the Union of India can at best remain as a supporting respondent in appeals preferred by the Appellant University, and would be estopped from adopting a stand that is contrary to intent and purpose of Amending Acts of 1972 and 1981.

III. CORRECTNESS OF *AZEEZ BASHA*

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

3.1 This Court in ***Azeez Basha*** held that the Appellant-University was "neither established nor administered by the Muslim minority." [SCR, 853-H; Vol. III-A, p. 3 @ 23] This finding requires to be reconsidered because:

A. It held that the University was brought into existence by the Central Legislature and "not by the Muslim minority," which is inconsistent with its own finding that the MAO College (i.e., 'nucleus' of AMU) was established and administered by Muslim minority; [SCR, 849-H; Vol. III-A, p. 3 @ 19]

B. Its holding that the administration of the University was "not vested in the Muslim minority" under the 1920 Act ignores the fact that the 'supreme governing body' of the University (i.e., the Court) was restricted to Muslims members, and the authorities, officers, and other management staff were predominantly Muslims;

C. On one hand, it accepts that the minority community has the right to establish a 'university' under Article 30(1), on the other hand, it effectively holds that the Article 30(1) would not extend to a university incorporated by or under a statute;

D. It adopts a narrow meaning of the word 'establish' in Article 30(1) without considering its meaning and true import; and

E. ***Azeez Basha*** failed to recognize that the word 'establish' and 'administer' are not preconditioned to define a minority but the consequential rights that flow from such recognition. The ingredients of the rights that flow from Article 30 have been stated by ***TMA Pai*** (Pr. 50; Vol. V-A, p. 552 @ 613) and other decisions.

INHERENT CONTRADICTIONS

3.2 ***Azeez Basha*** held that the Appellant was brought into existence by the Central Legislature and "not by the Muslim minority." This conclusion contradicts its own acceptance of the following historical facts:

(i) THAT the MAO College was established *by* the Muslim community to impart liberal education *for* the Muslims in the fields of literature and science, and to give instructions in Islamic theology and traditions; [SCR, 838-E to 838-F; Vol. III-A, p. 3 @ 8]

> "It appears that as far back as 1870 Sir Syed Ahmad Khan thought that the backwardness of the Muslim community was due to their neglect of modern education. He therefore conceived the idea of imparting liberal education to Muslims in literature and science while at the same time instruction was to be given in Muslim religion and traditions also. With this object in mind, he organised a Committee to devise ways and means for educational regeneration of-Muslims and in May 1872 a society called the Muhammadan Anglo-Oriental College Fund Committee was started for collecting subscriptions to realise the goal that Sir Syed Ahmad Khan had conceived. In consequence of the activities of the committee a school was opened in May 1873. In 1876, the school became a High School and in 1877 Lord Lytton, then Viceroy of India, laid the foundation stone for the establishment of a college." (emphasis added)

(ii) THAT the desire and impetus to convert MAO College into a University came for the Muslim community, which is further evident from the long negotiations held with the Government of India; [SCR, 838-H to 839-B; Vol. III-A, p. 3 @ 8-9]

> "… Long negotiations took place between the Association and the Government of India, which eventually resulted in the establishment of the Aligarh University in 1920 by the 1920 Act. …" [SCR, 838-H; Vol. III-A, p. 3 @ 8]

(iii) THAT the funds necessary for converting MAO College into a University was largely made or contributed by the Muslim community, and that too because of "Government direction that it will only establish a university if rupees thirty lakhs were collected for the purpose;" [SCR, 857-B to 857-C; Vol. III-A, p. 3 @ 27]

(iv) THAT the properties, assets, liabilities, and rights vested in MAO College, Aligarh and Muslim University Association, and Muslim University Foundation Committee were transferred and vested in the name of AMU, *lock, stock, and barrel*.

> "… it seems that the existing M.A.O. College was made the basis of the University and was made over to the authorities established by the 1920-Act for the administration of the University along with the properties and funds attached to the college, the major part of which had been contributed Muslims though some contributions were made by other communities as well."
>
> [SCR, 839-B; Vol. III-A, p. 3 @ 9]

3.3 Most significantly, the Court in ***Azeez Basha*** holds that the MAO College was the '*nucleus'* of Aligarh Muslim University, and that the 1920 Act *converts* the MAO College into a full-fledged university. In pertinent part, the Court noted:

> "It is true, as is clear from the 1920-Act, that the nucleus of the Aligarh University was the M.A.O. College, which was till then a teaching institution under the Allahabad University. The conversion of that college (if we may use that expression) into a university was however not by the Muslim minority; it took place by virtue of the 1920-Act which was passed by the Central legislature. There was no Aligarh University existing till the 1920-Act was passed. It was brought into being by the 1920-Act and must therefore be held to have been established by the Central Legislature which by passing the 1920-Act incorporated it." [SCR, 849-D; Vol. III-A, p. 3 @ 19]

3.4 The Division Bench of the Hon'ble Allahabad High Court, too, accepts that the MAO College and its affiliates "were Mohammadan Institutions no doubt." [Chief Justice Ray's Opinion, Vol. III-A @ 34]

3.5 Having accepted that the Mohammadan institutions were converted and incorporated into the University under the 1920 Act, ***Azeez Basha*'s** finding that AMU was not established by Muslim community is fatally flawed. It must be noted that:

(i) The incorporation of Aligarh Muslim University would not be possible *but* for the active role, demand, and the contribution of the Muslims;

(ii) The 1920 Act merely converts the legal status of 'MAO College' from being an affiliate of Allahabad University to an autonomous institution by the name and style as 'Aligarh Muslim University'; and

(iii) The stated goals of MAO College and the objective behind incorporating AMU remained consistent – i.e., "imparting of Muslim religious education *to Muslims* and the inclusion of Department of Islamic Studies." (emphasis added)

MUSLIM CHARACTER IS PLAINLY EVIDENT FROM 1920 ACT

3.6 ***Azeez Basha*** arrives at the conclusion that AMU was not a minority educational institution "in the face of the [AMU] Act [1920]." [SCR, Pg. 848-A; Vol. III-A, p. 3 @ 18]

3.7 *On establishment:* ***Azeez Basha*** has failed to appreciate the following features of the 1920 AMU Act that demonstrates the minority origins of the University:

A. The Statement of Objects and Reason of the 1920 Act, in clear and certain terms, acknowledges that (*i*) the request to convert MAO College into a university came from the Muslims community; (*ii*) the Muslim community would benefit from recognition of degrees by the Government; and (*iii*) to continue the imparting of Muslim religious education to Muslims. In the pertinent part, the Statement reads as follows:

> "The Muslim University Association having requested the foundation of a University and certain funds and property being available to this end. It is proposed to dissolve that Association and Muhammadan Anglo Oriental College and to transfer the property of those societies to a new body called Aligarh Muslim University. The present Bill is designed to incorporate this University, to indicate its functions, to create its governing bodies and define its functions. ... The degrees conferred will be recognized by the Government. Special features of the University will be imparting of Muslim religious education to Muslims and inclusion of Department of Islamic studies." [Vol. IV-A @ 87]

B. The fact that the AMU is the *alter ego* of MAO College (or its 'nuclei' as described in *Azeez Basha*) is evident from the following provisions of the 1920 Act:

(a) The Preamble states the Act is to establish and incorporate "a teaching and residential Muslim University, and to dissolve … the Muhammadan Anglo-Oriental College, Aligarh and the Muslim University Association, and to transfer to and vest in the said University all properties and rights of the said Societies and of the Muslim University Foundation Committee:" (emphasis added); [Vol. IV-A @ 77]

(b) All assets (movable and immovable), rights, powers, and privileges of MAO College and its affiliate bodies *in their entirety* were transferred and vested in the name of AMU; [Sections 4(i) & 4(ii), Vol. IV-A @ 78]

(c) All references to MAO College or its affiliate bodies in any enactment or document prior to the 1920 Act are deemed to be a reference to AMU; [Section 4(iii), Vol. IV-A @ 78]

(d) All employees and other staff of MAO College are deemed to be the employees of AMU and with tenure and other terms, rights, and privileges as it existed prior; [Section 4(v), Vol. IV-A @ 78] and

(e) All donations received from the Muslim community [i.e., the sum of thirty lakh rupees (Rs. 30,00,000)] was kept as the Reserve Fund to be invested in a trust by AMU; [Section 7, Vol. IV-A @ 78-79]

(f) All students of MAO College on the date of commencement became the responsibility of AMU, including provision of instruction as per the prospectus of Allahabad University; [Section 32(5), Vol. IV-A @ 83]

(g) In the First Statutes, the Register of registered graduates was to contain the names of graduates of other Universities who had been educated for at least two years at MAO College [Statute 21, First Statutes of the University, Vol. IV-A @ 86].

C. The Central Legislature has specifically incorporated provisions in the AMU Act which are clearly intended for the benefit of Muslim community, such as:

(a) Promotion of Oriental and Islamic studies; [Section 5(2), Vol. IV-A @ 78]

(b) Instruction in Muslim theology and religion; [Section 5(2), Vol. IV-A @ 78]

(c) Furtherance of arts, science, and other branches of learning, including professional studies, technology, Islamic learning and Muslim theology; [Section 5(12), Vol. IV-A @ 78]

(d) Exempting women from attending public lectures and tutorial classes to observe *purdah*; [Section 8 proviso, Vol. IV-A @ 79]; and

(e) Compulsory instruction in Muslim religion for Muslim students; [Section 9, Vol. IV-A @ 79];

(f) Establish intermediate college and schools within the vicinity of MAO College and provide "instruction in the Muslim religion and theology." [Section 12, Vol. IV-A @ 79];

(g) The Act specifically allowed for Statutes to be framed for "instruction of Muslim students in the Muslim religion and theology" [Section 27(j), Vol. IV-A @ 81];

(h) Any Statutes dealing with instruction of Muslim students in the Muslim religion and theology did not require submission and approval that was ordinarily applicable under Section 28 [Section 28 Proviso, Vol. IV-A @ 81];

(i) There were separate Departments of Studies for Sunni Theology, Shia Theology, Islamic Studies, Arabic language and literature, Persian and Urdu [Statute 19(1), Schedule: First Statutes of the University, Vol. IV-A @ 86].

The above analysis goes to show that 1920 Act was indeed designed keeping in mind the needs of Muslim community to establish and administer a university "of their choice."

3.8 *On 'Administration'*: The conclusion in ***Azeez Basha*** that the administration of AMU was "not vested in the Muslim minority" under the 1920 Act belies the fact that Muslim community had *de jure* and *de facto* control over the management of AMU. This is evident from the following:

i. Proviso to Section 23(1) [as it stood originally in 1920] limits the membership of 'The Court' – "the supreme governing body of the University" – to members of Muslim community alone.[6] [Vol. IV-A @ 80] This ensured that the *de jure* control of AMU vested with the Muslim community. Furthermore,

a. The Court was vested with powers to appoint the Officers of the University, i.e., Chancellor, Pro Chancellor, and Vice Chancellor [Sections 17, 18 & 19, Vol. IV-A @ 80]

b. The Court was vested with powers to frame Statutes for constituting the Executive Council – "the executive body of the University" – and to regulate their powers and duties through such Statutes; [Section 24 read with Section 28, Vol. IV-A @ 80]

c. The Court was vested with powers to frame Statutes for constituting the Academic Council – the body "responsible for maintenance of standards of instruction, and for the education, examination, discipline and health of students, and for the conferment of degrees," and to regulate their powers and duties through such Statutes; [Section 25 read with Section 28, Vol. IV-A @ 80]

[6] Section 23(1) reads as follows: [Vol. IV-A @ 80]

"(1) The Court shall consist of the Chancellor, the Pro-Chancellor and the Vice Chancellor for the time being, and such other persons as may be specified in the Statutes:

Provided that no person other than a Muslim shall be a member thereof." (emphasis added)

d. The Court is the final authority to review the Annual Report of the University; [Section 34, Vol. IV-A @ 82]

e. The Court is the final authority to approve the auditor's report and financial estimates for the next financial [Section 35, Vol. IV-A @ 82]

ii. The demand for restricting the membership of the Court, in fact, came from the Muslim community. The Select Committee in their report to the Indian Legislative Council on AMU Bill stated:

> "In reference to the constitution of the Court we have retained the provision that no person other than Muslim shall be a member thereof. We have done this as we understand that such a provision is in accordance with the preponderance of Muslim feeling though some of us are by no means satisfied that such a provision is necessary." [Vol. IV-A @ 73]

iii. Besides the Court, the elected posts of Officers of the University and the members of the Executive Council and the Academic Council were Muslims by faith. This goes to show the *de facto* control over the day-to-day administration of the University. [*Refer* to Para 8.14 and 8.15 of this Written Submission on Issue No. V]

3.9 Despite the Muslim community's primacy in the Court and other governing bodies, this Court in ***Azeez Basha*** concluded that "there was nothing in the Act to suggest that the administration of, the Aligarh University was in the Muslim minority as such." It further held:

> "Besides there were other bodies like the Executive Council and the Academic Council which were concerned with the administration of the Aligarh University and there was no provision in the constitution of these bodies which confined their members only to Muslims. It will thus be seen that besides the fact that the members of the Court had to be all Muslims, there was nothing in the Act to suggest that the administration of, the Aligarh University was in the Muslim minority as such. Besides the above, we have already referred to s. 13 which showed how the Lord Rector, namely, the Governor General had overriding powers over all matters relating to the administration of the University. Then there was s. 14 which gave certain over-riding powers to the Visiting Board. The Lord Rector was then the Viceroy and the Visiting Board consisted of the Governor of the United Provinces, the members of his Executive Council, the Ministers, one member nominated by the Governor and one member nominated by 'the Minister in charge of Education. These people were not necessarily Muslims and they had over-riding powers over the administration of the University. Then reference may be made to s. 28(2)(c) which laid down that no new Statute or amendment or repeal of an existing Statute, made by the University, would have any validity until it had been approved by

> the Governor General in Council who had power to sanction, disallow or remit it for further consideration. Same powers existed in the Governor General in Council with respect to Ordinances. Lastly reference may be made lo s. 40, which gave power to the Governor General in Council to remove any difficulty which might arise in the establishment of the University. These provisions in our opinion clearly show that the administration was also not vested in the Muslim minority; on the other hand it was vested in the statutory bodies created by the 1920-Act, and only in one of them, namely, the Court, there was a bar to the appointment of any one else except a Muslim, though even there some of the electors for some of the members included non-Muslims."
>
> [SCR 853B-G; Vol. III-A, p. 3 @ 23]

3.10 This is inconsistent with the provisions of the 1920 Act which clearly display the Muslim character, as enumerated below:

(i) The Chancellor and the Vice-Chancellor being the *ex officio* members of the Court had to be Muslims [under Statute 8, *Class I* of 1920 Act]

(ii) Fifteen (15) members of the Academic Council were elected to be members of the Court [under Statute 8(7) of 1920 Act], and therefore, the members of the Council were predominantly Muslims;

(iii) The assumption that the presence of non-Muslims in the governing bodies would defeat (or militate) the minority character of the University is unsustainable in law [in light of subsequent decisions of this Court in ***Gandhi Faiz-e-Am College vs University of Agra***, (1975) 2 SCC 283, Pr. 17, 20 & 22 (Vol. V-A, p. 320 @ 328, 329-330)]; and

(iv) Likewise, the powers vested in the Lord Rector [the Governor General] and the Visiting Board (consisting of Provincial Governor and Minister) under Sections 13 and 14 of the 1920 Act, respectively, does not affect the minority character since:

(a) The University was incorporated as a body corporate and represented through the First Chancellor, Pro-Chancellor, and Vice Chancellor under Section 3 of 1920 Act. The University is **neither** represented by **nor** does the body corporate consist of the Lord Rector or the Visiting Board; and

(b) The powers vested in the Lord Rector and the Visting Board as a **supervisory** authority does not interfere with the right of administration guaranteed under

Article 30(1) [as laid down in subsequent decisions of this Court and dealt with in PART IV of this Written Submissions].

3.11 These features of 1920 Act which prove its Muslim character escaped the judicial scrutiny in ***Azeez Basha***. At this juncture, it is also relevant to recall that the Appellant University was not a party to the proceedings. Therefore, the conclusion that AMU is not a minority institution is incorrect given that:

A. the 1920 Act ensures a *transition* of MAO College from being an affiliate of Allahabad University to a standalone university.
B. the 1920 Act retains and extends the control of Muslim community over MAO College (which transitioned into AMU); and
C. the 1920 Act gives primacy to the desires of Indian Muslims to establish a university ("of their choice") which caters to the educational needs of the community.

SHEDDING MINORITY CHARACTER BY STATUTORY INTERVENTION

3.12 ***Azeez Basha*** accepts and acknowledges that the term 'educational institution' in Article 30(1) encompasses a university, besides a college, institute, or any similar centres of learning. [SCR, 848-C to 848-E; Vol. III-A, p. 3 @ 18]

> "Before we do so we should like to say that the words "educational institutions" are of very wide import and would include a university also. This was not disputed on behalf of the Union of India and therefore it may be accepted that a religious minority had the right to establish a university under Art. 30(1). The position with respect to the establishment of Universities before the Constitution came into force in 1950 was this. There was no law in India which prohibited any private individual or body from establishing a university and it was therefore open to a private individual or body to establish a university. There is a good deal in common between educational institutions which are not universities and those which are universities. Both teach students and both have teachers for the purpose. But what distinguishes a university from any other educational institution is that a university grants degrees of its own while other educational institutions cannot. It is this granting of degrees by a university which distinguishes it from the ordinary run of educational institutions." (emphasis added)

3.13 ***Azeez Basha*** further accepts and acknowledges that the degrees granted by a university – established by an individual or community – would remain unrecognised unless it is incorporated under a statute. [SCR, 849-D; Vol. III-A, p. 3 @ 19]

> "There was nothing in 1920 to prevent the Muslim minority, if it so chose, to establish a university; but if it did so the degrees of such a university were not bound to be

> recognised by Government. It may be that in the absence of recognition of the degrees granted by a university, it may not have attracted many students and that is why we find that before the Constitution came into force, most of the universities in India were established by legislation."

Even the Division Bench of the Hon'ble Allahabad High Court acknowledged that "even before the 1956 Act, and even way before we gained our Independence, the setting up of a University fair and square would need intervention of the Supreme Government." (emphasis added) [Vol. III-A @ 37]

3.14 **If a minority can establish a university under Article 30(1), and if universities are required to be incorporated under a statute for degrees to be recognised, then it must follow that the minority community is entitled to seek incorporation of its institution as a university. *Azeez Basha,*** however, held that a university incorporated by a statute would lose its status as a minority institution. The Court held:

[SCR, 849-D; Vol. III-A, p. 3 @ 19]

> "It is true, as is clear from the 1920-Act, that the nucleus of the Aligarh University was the M.A.O. College, which was till then a teaching institution under the Allahabad University. The conversion of that college (if we may use that expression) into a university was however not by the Muslim minority; it took place by virtue of the 1920-Act which was passed by the Central legislature. There was no Aligarh University existing till the 1920-Act was passed. It was brought into being by the 1920-Act and must therefore be held to have been established by the Central Legislature which by passing the 1920-Act incorporated it."

3.15 To put it simply,

(i) ***Azeez Basha*** recognizes the right of minorities to establish a university under Article 30(1);

(ii) ***Azeez Basha*** also recognizes that a university ought to be incorporated under a statute to recognize the degree to be recognized; *however*,

(iii) ***Azeez Basha*** concludes that the educational institutions of the minorities converted into, and incorporated as, a university by a statute loses or seizes to retain its minority character.

3.16 **This process of reasoning is flawed. For *one*, *Azeez Basha* ignored the import of the word "choice" as interpreted by *In Re Kerala Education Bill, 1957* (1959) SCR 995 [6-Judge Bench] ('Kerala Education Bill'), that held:**

"It is said that the dominant word is "choice" and the content of that Article is as wide as the choice of the particular minority community may make it."

[*Refer* to ISSUE IV for an elaborate discussion on *Kerala Education Bill*]

And *two*, the Parliament has recognized the rights of minorities to establish universities under the UGC Act read with the NCMEI Act and addressed extensively in ISSUE VII of this Written Submissions.

UNREASONED & NARROW CONSTRUCTION OF 'ESTABLISH'

3.17 ***Azeez Basha*** construed the meaning of 'establish' in Article 30(1) to mean 'to bring into existence', although the Court acknowledged the word has several other connotations such as 'to ratify', 'to found', 'to confirm', or 'to settle' as defined in several dictionaries or used in foreign jurisdictions. [SCR, 850-H; Vol. III-A, p. 3 @ 20]

3.18 ***Azeez Basha*'s** restricted use of the word 'establish' to mean only 'to bring into existence' is unreasoned, given that:

(i) It fails to examine Article 30(1) in its context – i.e., protection of minorities; and
(ii) It fails to justify or give reasons to exclude other connotations of the word.

3.19 In any event, the narrow meaning of 'establish' as understood in ***Azeez Basha*** is no longer good law in view of the larger bench decision in ***State of Kerala vs Very Rev. Mother Provincial***, (1970) 2 SCC 417 (6-Judge Bench) ('**Mother Provincial**') and approved by ***TMA Pai*** (11-Judge Bench) and discussed at PART VI of this Written Submissions. Suffice it say that the subsequent judgments of this Hon'ble Court have given an expansive meaning of the 'establish' and the narrow view of ***Azeez Basha*** is implicitly overruled.

3.20 ***Azeez Basha*** is not good law and requires reconsideration because:

(i) No minority community can establish a university given that the UGC Act requires a university to be incorporated by a statute; and
(ii) It nullifies the effect of words '*of their choice*' in Article 30(1).
(iii) ***Azeez Basha*** is contrary to the constitutional dispensation on rights of minorities under Article 30(1) developed by this Hon'ble Court in decisions prior and subsequent to it; and

(iv) The judgments of the Hon'ble Allahabad High Court impugned herein holds that (a) the AMU was not established by the minority but by the government through the statute; and (b) that subsequent Amending Acts of 1972 and 1981 did not change the basis of ***Azeez Basha***.

3.21 Eminent jurists and historian have criticized ***Azeez Basha***. In expressing his doubts on its correctness, Mr. Seervai noted that: ***Azeez Basha*** "is clearly wrong and productive of grave public mischief and should be overruled." [Vol. III-G, p. 185 @ 191]. Renowned academician, Professor S.P. Sathe, called for reconsideration of ***Azeez Basha*** because "if incorporation of a university is the sole test of its establishment no private university can ever be started in India." Tara Chand, a noted historian noted,

> "It will be a falsification of the history of India if it is asserted from any quarter that the Aligarh Muslim University was not established by the Muslims, and primarily for the educational advancement of the Muslims of India."

3.22 **If *Azeez Basha* is accepted as good law, then it would be impossible for any university or deemed to be university or constituent colleges which is governed by statute to be recognised as minority institution because of the statutory intervention necessary to incorporate them. A large number of universities, deemed universities and constituent colleges based on religion and language such as Manipal (Deemed to be University) or St. Stephen's College or Chistian Medical College, Vellore, or the Allahabad Agricultural Institute at Naini, that were recognized as minority educational institutions by this Hon'ble Court would lose their minority status if *Azeez Basha* is upheld.**

IV. *AZEEZ BASHA* IS NOT GOOD LAW IN THE LIGHT OF PAST & SUBSEQUENT PRECEDENTS OF THIS COURT ON ARTICLE 30

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

4.1 The ratio laid down in ***Azeez Basha*** requires to reconsidered because:

A. It fails to consider prior decisions of this Court in ***Kerala Education Bill*** and ***Rev. Sidhajbhai Sabhai vs State of Bombay***, (1963) 3 SCR 837 [6-Judge Bench] ('**Sidhajbhai**'), and

B. The effect of subsequent precedents of this Hon'ble Court, particularly in ***Mother Provincial***, ***St. Stephen's College vs University of Delhi***, (1992) 1 SCC 558 ('**St. Stephen's**') and ***TMA Pai***, have impliedly overruled its ratio on Article 30(1).

DECISIONS PRIOR TO AZEEZ BASHA

Kerala Education Bill (1959)

4.2 A 7-Judge Bench in ***In Re Kerala Education Bill, 1957***, (1959) SCR 995, while examining a reference issued under Article 143(1) on certain aspects relating to the Kerala Education Bill (1957) opined that the provisions such as minimum salaries and qualifications for appointment of teachers sought to be imposed on minority-run schools as a condition to receive aid were held to be *regulatory* in nature and that it would not offend the right of minorities to administer under Article 30(1). This first seminal case on Article 30(1) held that:

(i) *Application to pre-Constitutional institutions*

- The protection and privileges under Article 30(1) extends to institutions established prior to the commencement of the Constitution.

> … We do not think that the protection and privilege of Art. 30 (1) extend only to the educational institutions established after the date our Constitution came into operation or which may hereafter be established. …The language employed in Art. 30(1) is wide enough to cover both pre-Constitution and post-Constitution institutions. It must not be overlooked that Art. 30(1) gives the minorities two rights, namely, (a) to establish, and (b) to administer, educational institutions of their choice. [*Per* DAS CJ., SCR, 1051; Vol. V-A, p. 4 @ 16]

The above view on the protection for minorities over pre-Constitutional institutions has been affirmed subsequently in ***Right Rev. Bishop SK Patro vs State of Bihar***, (1969) 1 SCC 863 and ***St. Stephen's***.

(ii) *On 'choice'*

- The Court emphasized the importance of the word 'choice' in Article 30(1) in the following manner:

> "The key to the understanding of the true meaning and implication of the Article under consideration are the words "of their own choice". It is said that the dominant word is "choice" and the content of that Article is as wide as the choice of the particular minority community may make it. The ambit of the rights conferred by Article 30(1) has, therefore, to be determined on a consideration of the matter from the points of view of the educational institutions themselves."
>
> [*Per* DAS CJ., SCR, Pg. 1053; Vol. V-A, p. 4 @ 62]

(iii) *On establishment*

- The minority institution would not 'shed' its minority character by merely admitting non-members (or 'outsiders'). Since the Appellant University is an aided institution, the following observations are relevant:

> "… The real import of Article 29(2) and Article 30(1) seems to us to be that they clearly contemplate a minority institution with a sprinkling of outsiders admitted into it. By admitting a non-member into it the minority institution does not shed its character and cease to be a minority institution. Indeed the object of conservation of the distinct language, script and culture of a minority may be better served by propagating the same amongst non-members of the particular minority community. In our opinion, it is not possible to read this condition into Article 30(1) of the Constitution."
>
> [*Per* DAS CJ., SCR, Pg. 1052; Vol. V-A, p. 4 @ 61]

(iv) *On aid*

- The State can impose reasonable regulations as a condition for grant of aid.

> "… No educational institutions can in actual practice be carried on without aid from the State and if they will not get it unless they surrender their rights they will, by compulsion of financial necessities, be compelled to give up their rights under Art. 30(1). …" [SCR, Pg. 1063; Vol. V-A, p. 4 @ 72]
>
> "Learned Attorney-General concedes that reasonable regulations may certainly be imposed by the State as a condition for aid or even for recognition. There is

> no right in any minority, other than Anglo-Indians, to get aid, but, he contends, that if the State chooses to grant aid then it must not say— "I have money and I shall distribute aid but I shall not give you any aid unless you surrender to me your right of administration". The State must not grant aid in such manner as will take away the fundamental right of the minority community under Article 30(1)." [*Per* DAS CJ., SCR, Pg. 1062; Vol. V-A, p. 4 @ 71]

> "… We have already observed that Art. 30(1) gives two rights to the minorities, (1) to establish and (2) to administer, educational institutions of their choice. The right to administer cannot obviously include the right to maladminister. The minority cannot surely ask for aid or recognition for an educational institution run by them in unhealthy surroundings, without any competent teachers, possessing any semblance of qualification, and which does not maintain even a fair standard of teaching or which teaches matters subversive of the welfare of the scholars. It stands to reason, then, that the constitutional right to administer an educational institution of their choice does not necessarily militate against the claim of the State to insist that in order to grant aid the State may prescribe reasonable regulations to ensure the excellence of the institutions to be aided."
> [*Per* Das CJ., SCR, Pg. 1062; Vol. V-A, p. 4 @ 71]

This view has been confirmed in ***TMA Pai*** and ***PA Inamdar vs State of Maharashtra***, (2005) 6 SCC 537 [7-Judge Bench], ***TMA Pai*** holding that aided institutions do not lose minority rights by accepting state aid, and "the conditions that can normally be permitted to be imposed, on the educational institutions receiving the grant, must be related to the proper utilization of the grant and fulfilment of the objectives of the grant." [Pr. 143; Vol. V-A, p. 552 @ 651] (emphasis added).

(v) *On minority & indicia*

- While the Court in ***Kerala Education Bill*** left open the issue of "what a minority community means or how it is to be ascertained" [*Per* DAS CJ., SCR, Pg. 1050; Vol. V-A, p. 4 @ 59], this issue has now been settled in ***TMA Pai***, which held that the relevant unit for ascertaining religious and linguistic minorities is the 'state'.

(vi) *On surrender*

- The State cannot impose such 'onerous' for granting aid for minority educational institutions for receiving aid, such that the minority community is forced "to surrender their constitutional right of administering educational institutions of

their choice." [*Per* DAS CJ., SCR, Pg. 1057; Vol. V-A, p. 4 @ 66] In the same vein, such onerous obligations cannot be justified for granting or withhold recognition. In pertinent part, the Court held:

> "… Without recognition, therefore, the educational institutions established or to be established by the minority communities cannot fulfil the real objects of their choice and the rights under Art. 30(1) cannot be effectively exercised. The right to establish educational institutions of their choice must, therefore, mean the right to establish real institutions which will effectively serve the needs of their community and the scholars who resort to their educational institutions. There is, no doubt, no such thing as fundamental right to recognition by the State but to deny recognition to the educational institutions except upon terms tantamount to the surrender of their constitutional right of administration of the educational institutions of their choice is in truth and in effect to deprive them of their rights under Art. 30(1). …" [*Per* DAS CJ., SCR, Pg. 1067; Vol. V-A, p. 4 @ 76]

(vii) *On standards & excellence*

- The Court recognises the powers of the State to insist on proper safeguards (*a*) against maladministration; (*b*) to maintain fair standards of teaching; or (*c*) to ensure "excellence of the institutions."

> … The right to administer cannot obviously include the right to maladminister. The minority cannot surely ask for aid or recognition for an educational institution run by them in unhealthy surroundings, without any competent teachers, possessing any semblance of qualification, and which does not maintain even a fair standard of teaching or which teaches matters subversive of the welfare of the scholars. It stands to reason, then, that the constitutional right to administer an educational institution of their choice does not necessarily militate against the claim of the State to insist that in order to grant aid the State may prescribe reasonable regulations to ensure the excellence of the institutions to be aided. Learned Attorney-General concedes that reasonable regulations may certainly be imposed by the State as a condition for aid or even for recognition. There is no right in any minority, other than Anglo-Indians, to get aid, but, he contends, that if the State chooses to grant aid then it must not say— "I have money and I shall distribute aid but I shall not give you any aid unless you surrender to me your right of administration". The State must not grant aid in such manner as will take away the fundamental right of the minority community under Article 30(1). [*Per* DAS CJ., SCR, Pg. 1062; Vol. V-A, p. 4 @ 71]

- The aspect of excellence has been further elaborated as follows:

> … Our Constitution makers recognised the validity of their claim and to allay their fears conferred on them the fundamental rights referred to above. But the conservation of the distinct language, script or culture is not the only object of

> choice of the minority communities. They also desire that scholars of their educational institutions should go out in the world well and sufficiently equipped with the qualifications necessary for a useful career in life. …
> [*Per* DAS CJ., SCR, Pg. 1067; Vol. V-A, p. 4 @ 76]

The interest of the State to maintain excellence in all educational institutions, including minority educational institutions, has been confirmed in ***TMA Pai*** (Pr. 54, 57; Vol. V-A, p. 552 @ 615, 616) and ***Inamdar*** (Pr. 91, 103; Vol. V-A, p. 828 @ 879-880, 884-885).

4.3 ***Azeez Basha*** failed to consider the key principles laid down in ***Kerala Education Bill***, above, and erred in concluding that:

(i) the Muslim community surrendered their rights to the Central Legislature by seeking the Government to incorporate MAO College as a university, although it was their *choice* to obtain statutory approval in order for degrees to be recognised;

(ii) the regulatory features of the 1920 Act meant to ensure proper safeguards and promote 'excellence' has been misconstrued as a waiver by the Muslim community over the affairs of the University; and

(iii) the presence of 'outsiders' (i.e., non-Muslims) addresses the apprehension that minority institutions may become insular, but nonetheless, they would not 'shed' its minority character by their presence.

Sidhajbhai Sabhai (1963)

4.4 ***Azeez Basha*** did not consider the law laid down in ***Sidhajbhai*** [6-Judge Bench], wherein the stipulation to reserve 80% of seats under general category in minority educational institutions for receiving aid was struck down as being violative of Article 30(1). Here, there was no dispute that schools and colleges aggrieved by the stipulation were accepted as minority educational institution. The decision in ***Sidhajbhai*** is significant because:

(i) *On regulation*

- It held that the rights guaranteed under Article 30(1) are declared in 'absolute' terms, unlike the reasonable restrictions on freedoms guaranteed under Article 19(1). ***TMA Pai*** (*Per* KIRPAL CJ., SCC, Pr. 106 and 107; Vol. V-A, p. 552 @ 633-634) has watered down this reading of Article 30(1).

- That it rejects the contention of the State that "all regulative measures which are not destructive or annihilative of the character of the institution established by the minority, provided the regulations are in the national or public interest, are valid." [*Per* SHAH J., SCR, Pg. 856; Vol. V-A, p. 94 @ 113]; It adds that:

> "… It is intended to be a real right for the protection of the minorities in the matter of setting up educational institutions of their own choice. The right is intended to be effective and is not to be whittled down by so called regulative measures conceived in the interest not of the minority educational institution, but of the public or the nation as a whole."

NOTE: ***TMA Pai*** (*Per* KIRPAL CJ., SCC, Pr. 106 and 107; Vol. V-A, p. 552 @ 633-634) clarified that this interpretation of Article 30(1) in ***Sidhajbhai*** cannot be construed to "prevent the Government from making any regulation whatsoever."

(ii) *On Dual Test*

- The Court laid down that the regulatory measures that a State may impose must satisfy the 'dual test' as articulated below:

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

4.5 ***Azeez Basha*** failed to consider the distinction between regulatory features of 1920 Act that are intended to preserve excellence and enable AMU as an "effective vehicle of education for the minority community" on one hand, and the rights of minorities to exercise choice in day-to-day management.

IMPACT OF SUBSEQUENT DECISIONS ON BASHA

SK Patro (1969)

4.6 The first decision of this Hon'ble Court (5-Judge Bench) after ***Azeez Basha*** was a challenge to an order of the Deputy Director of Education which imposed an obligation on the school to constitute a managing committee control, administer and manage affairs. Similar to ***Azeez Basha***, this Court in ***Right Rev. Bishop SK Patro vs State of Bihar***,

(1969) 1 SCC 863 examined the issue of minority character of the school and held the following:

(i) *On pre-constitutional institutions*

- The Court followed ***Kerala Education Bill***, and held that minority institutions established prior to the Constitution will enjoy the protection under Article 30;

(ii) *On minority*

- This Court held, although there was no concept of citizenship prior to the enactment of the Constitution, the persons setting up educational institutions must be resident in India and they must form a well-defined religious or linguistic minority. [Pr. 17; Vol. V-A, p. 141 @ 145-146]

Mother Provincial (1970)

4.7 In ***State of Kerala vs Very Rev. Mother Provincial***, (1970) 2 SCC 417, this Hon'ble Court has effectively rejected the narrow view of ***Azeez Basha*** on at least two counts.

(i) *On establish*

- It holds that the establishment of an educational institution can be ascertained from the 'intention' of the minority community to "to found an institution" of their choice and "for the benefit of a minority community by a member of that community."

> "8. Article 30(1) has been construed before by this Court. Without referring to those cases it is sufficient to say that the clause contemplates two rights which are separated in point of time. The first right is the initial right to establish institutions of the minority's choice. Establishment here means the bringing into being of an institution and it must be by a minority community. It matters not if a single philanthropic individual with his own means, founds the institution or the community at large contributes the funds. The position in law is the same and the intention in either case must be to found an institution for the benefit of a minority community by a member of that community. It is equally irrelevant that in addition to the minority community others from other minority communities or even from the majority community can take advantage of these institutions. Such other communities bring in income and they do not have to be turned away to enjoy the protection." (emphasis added)
>
> [Vol. V-A, p. 163 @ 166]

(ii) *On regulation*

- It holds that the regulatory competence of the State to achieve the standards of excellence amongst educational institution would apply to those established by minorities, and such regulations are exceptions to the right of management vested upon on the minority community under Article 30(1).

> "9. The next part of the right relates to the administration of such institutions. Administration means "management of the affairs" of the institution. This management must be free of control so that the founders or their nominees can mould the institution as they think fit, and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best served. No part of this management can be taken away and vested in another body without an encroachment upon the guaranteed right."
>
> 10. There is, however, an exception to this and it is that the standards of education are not a part of management as such. These standards concern the body politic and are dictated by considerations of the advancement of the country and its people. Therefore, if universities establish the syllabi for examinations they must be followed, subject however to special subjects which the institutions may seek to teach, and to a certain extent the State may also regulate the conditions of employment of teachers and the health and hygiene of students. Such regulations do not bear directly upon management as such although they may indirectly affect it. Yet the right of the State to regulate education, educational standards and allied matters cannot be denied. The minority institutions cannot be allowed to fall below the standards of excellence expected of educational institutions, or under the guise of exclusive right of management, to decline to follow the general pattern. While the management must be left to them, they may be compelled to keep in step with others."
>
> [Vol. V-A, p. 163 @ 167]

NOTE: ***TMA Pai*** (at Pr. 109; Vol. V-A, p. 552 @ 635-636) **approved** the above quoted paragraphs (i.e., Pr. 8 and 9) in ***Mother Provincial***.

St. Xavier's (1974)

4.8 ***Ahmedabad St. Xavier's College Society vs State of Gujarat***, (1974) 1 SCC 717 (9-Judge Bench) ('**St. Xavier's**') is an authority for the proposition that the right to administer under Article 30(1) is not a right to be "free from regulation." Here too, the institutions involved herein were accepted to be minority educational institutions. The following observations in *St. Xavier's* are relevant to demonstrate the difference between regulatory features of the 1920 AMU Act and aspects dealing with University's minority character:

(i) *On choice*

- It affirms the view in ***Rev. Father W Proost vs State of Bihar***, (1969) 2 SCR 73 [5-Judge Bench] ('**Father W Proost**') and holds that religious minorities have the right to establish educational institutions to conserve language, script or culture under Article 29(1), and whereas Article 30(1) allows them to establish educational institutions "of their choice" and for any purpose unconnected with language, script or culture. [*Per* RAY C.J., SCC, at Pg. 742; Vol. V-A, p. 173 @ 198]

(ii) *On 'right to administer' and regulation*

- It holds that the right to administer comprises of: (*a*) right to choose its managing or governing body; (*b*) right to choose teachers; (*c*) right to admit students of their choice subject to reasonable regulation; and (*d*) right to use property and assets for the benefit of the institution; [Pr. 19] [*Per* RAY C.J., SCC, at Pg. 745-746; Vol. V-A, p. 173 @ 201-202]

- The right to administer under Article 30(1) is not a right "free from regulation." [Pr. 20]

> "20. The right conferred on the religious and linguistic minorities to administer educational institutions of their choice is not an absolute right. This right is not free from regulation. Just as regulatory measures are necessary for maintaining the educational character and content of minority institutions similarly regulatory measures are necessary for ensuring orderly, efficient and sound administration. Das, C.J., in the Kerala Education Bill case summed up in one sentence the true meaning of the right to administer by saying that the right to administer is not the right to mal-administer."
>
> [*Per* RAY C.J., SCC, at Pg. 746; Vol. V-A, p. 173 @ 202]

(iii) *On excellence*

- The State is competent to impose regulatory measures to ensure "the very best to the students."

> "30. … This right implies the obligation and duty of the minority institutions to render the very best to the students. In the right of administration, checks and balances in the shape of regulatory measures are required to ensure the appointment of good teachers and their conditions of service. The right to administer is to be tempered with regulatory measures to facilitate smooth

> administration. The best administration will reveal no trace or colour of minority. A minority institution should shine in exemplary eclecticism in the administration of the institution. The best compliment that can be paid to a minority institution is that it does not rest on or proclaim its minority character."
> [Vol. V-A, p. 173 @ 204]

- Regulation is desirable in the interests of achieve excellence in education imparted by minority institutions.

> "46. The ultimate goal of a minority institution too imparting general secular education is advancement of learning. This Court has consistently held that it is not only permissible but also desirable to regulate everything in educational and academic matters for achieving excellence and uniformity in standards of education." [Vol. V-A, p. 173 @ 208]

AP Christians Medical Educational Society (1986)

4.9 This Hon'ble Court in ***AP Christians Medical Educational Society vs Government of Andhra Pradesh***, (1986) 2 SCC 667 [Vol. V-A, p. 371], held that the state is not precluded from lifting the 'minority veil' of the educational institution to ascertain if it is a 'bogus' institution or truly deserves the protection under Article 30(1). Although the AMU cannot be said to a 'bogus' institution, as such ***Azeez Basha*** does not doubt its Muslim origins.

St. Stephen's (1992)

4.10 ***St. Stephen's College vs University of Delhi***, (1992**)** 1 SCC 558 (5-Judge Bench) involved the issue of minority character of pre-Constitutional institution. Although St Stephen's College was regulated by statutory framework and, though regulatory control was provided for, this did not come in the way of recognizing its minority character. Therefore, it is an authority for the proposition that the rights of minority under Article 30(1) are neither 'lost' nor 'deprived' merely because it is regulated under a statute (i.e., Delhi University Act, 1922); and most importantly, ***St. Stephen's*** is relevant for its acceptance of historical antecedents of the institution to ascertain its minority character.

(i) *On historical antecedents*

- The Court inferred the Christian character of the college from:

  (a) The history of St Stephen's College rooted in the Christian community

(b) Its "name, emblem, motto, the establishment of a chapel and its religious instruction in the Christian Gospel for religious assembly" [Pr. 34]

(c) "… the presence of a larger number of Christian members of the Church of North India on it." [Pr. 35; Vol. V-A, p. 384 @ 415]

(ii) *On minority*

- It affirms that the protection under Article 30(1) is applicable for both pre-Constitutional and post-Constitutional institutions; [Pr. 28; Vol. V-A, p. 384 @ 412-413]

(iii) *On establish*

- It would be void to 'deprive' the minority character of an institution, or 'coerce' the minority community to giving up their right of management or seek affiliation.

> "… In the first place, it may be stated that the State or any instrumentality of the State cannot deprive the character of the institution, founded by a minority community by compulsory affiliation since Article 30(1) is a special right to minorities to establish educational institutions of their choice. The minority institution has a distinct identity and the right to administer with continuance of such identity cannot be denied by coercive action. Any such coercive action would be void being contrary to the constitutional guarantee. The right to administer is the right to conduct and manage the affairs of the institution. This right is exercised by a body of persons in whom the founders have faith and confidence. Such a management body of the institution cannot be displaced or reorganised if the right is to be recognised and maintained. Reasonable regulations however, are permissible but regulations should be of regulatory nature and not of abridgment of the right guaranteed under Article 30(1)."
>
> [Pr. 41; Vol. V-A, p. 384 @ 417]

(iv) *On regulation*

- It reaffirms the ratio laid down in ***Mother Provincial***, that a regulation meant to affect standards of education does not interfere with the right of administration granted under Article 30(1), and that "standards of education are not part of the management as such." [Pr. 54; Vol. V-A, p. 384 @ 422]

- It adds that the power of state to regulate cannot have the effect of depriving the rights and privileges conferred by Article 30(1).

> "59. … The right to administer does not include the right to maladminister. The State being the controlling authority has right and duty to regulate all academic matters. … The minority institutions cannot claim immunity against such general pattern and standard or against general laws such as laws relating to law and order, health, hygiene, labour relations, social welfare legislations, contracts torts etc. which are applicable to all communities. So long as the basic right of minorities to manage educational institution is not taken away, the State is competent to make regulatory legislations. Regulations, however, shall not have the effect of depriving the right of minorities to educate their children in their own institutions. That is a privilege which is implied in the right conferred by Article 30(1)." (emphasis added) [Vol. V-A, p. 384 @ 424-425]

- It holds that reasonable restrictions on the right to select students may be imposed, although welfare of the minorities ought to be considered.

> "60. The right to select students for admission is a part of administration. It is indeed an important facet of administration. The power also could be regulated but the regulation must be reasonable just like any other regulation. It should be conducive to the welfare of the minority institution or for the betterment of those who resort to it. …" [Vol. V-A, p. 384 @ 425-426]

4.11 The view of ***St. Stephen's*** is at odds with the conclusion in ***Azeez Basha***, which inferred that any statutory intervention would denude the minority character of MAO College that later became AMU by virtue of 1920 Act.

TMA Pai (2002)

4.12 ***TMA Pai Foundation vs State of Karnataka***, (2002) 8 SCC 481 is the most authoritative decision on Articles 28, 29 and 30. In the majority opinion by Kirpal, CJI, this Hon'ble Court held that:

(i) *On minority*

- The unit for determining a "minority" for Article 30, both linguistic and religious, is the state. [Pr. 79; Vol. V-A, p. 552 @ 624]

- It approved ***Kerala Education Bill*** on the proposition that admission of non-minority students would not affect the minority character of an educational institution. [Pr. 102-104; Vol. V-A, p. 552 @ 631-632]

(ii) *On 'right to establish'*

- The right to establish educational institutions can be sourced to Article 19(1)(g), 26(a), 29(1) and 30(1). While there is some overlap between Article 26 and 30,

Article 26 provides the right to establish educational institutions to all religious communities, while Article 30 refers only to religious and linguistic minorities. [Pr. 18, 26, 84, 91; Vol. V-A, p. 552 @ 604, 606, 625, 627] To quote:

> "26. The right to establish and maintain educational institutions may also be sourced to Article 26(a), which grants, in positive terms, the right to every religious denomination or any section thereof to establish and maintain institutions for religious and charitable purposes, subject to public order, morality and health. Education is a recognized head of charity. Therefore, religious denominations or sections thereof, which do not fall within the special categories carved out in Articles 29(1) and 30(1), have the right to establish and maintain religious and educational institutions. This would allow members belonging to any religious denomination, including the majority religious community, to set up an educational institution. Given this, the phrase "private educational institution" as used in this judgment would include not only those educational institutions set up by secular persons or bodies, but also educational institutions set up by religious denominations; the word "private" is used in contradistinction to government institutions."
>
> [Vol. V-A, p. 552 @ 606]

(iii) *On the dual test*

- It quoted and approved the decision in ***St. Xavier's*** (discussed *supra*) that right to administer does not prevent making of reasonable regulations, and the right to administer does not include the right to maladminister:

> "122. The learned Judge then observed that the right of the minorities to administer educational institutions did not prevent the making of reasonable regulations in respect of these institutions. Recognizing that the right to administer educational institutions could not include the right to maladminister, it was held that regulations could be lawfully imposed, for the receiving of grants and recognition, while permitting the institution to retain its character as a minority institution. **The regulation "must satisfy a dual test - the test of reasonableness, and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it".** (SCC p. 783, para 92) It was permissible for the authorities to prescribe regulations, which must be complied with, before a minority institution could seek or retain affiliation and recognition. But it was also stated that the regulations made by the authority should not impinge upon the minority character of the institution. Therefore, a balance has to be kept between the two objectives - that of ensuring the standard of excellence of the institution, and that of preserving the right of the minorities to establish and administer their educational institutions. Regulations that embraced and reconciled the two objectives could be considered to be reasonable. **This, in our view, is the correct approach to the problem**." (emphasis added) [Vol. V-A, p. 552 @ 641]

Hence, while conditions can be imposed for seeking affiliation or recognition, such conditions must not impinge on the minority character of the institution.

[Pr. 122; Vol. V-A, p. 552 @ 641] **Examples of various such regulations have been discussed at Pr. 124.**

(iv) *On autonomy and regulation*

- The right under Article 30 is not absolute and is subject to Article 29(2). [Pr. 90, 98; Vol. V-A, p. 552 @ 627, 629]

- Affiliation and recognition must be available to every institution that fulfils the conditions for such grant. **Terms cannot be imposed as a condition of grant of affiliation or recognition such that institutional autonomy and the objective of establishing the institution are completely destroyed**. [Pr. 36; Vol. V-A, p. 552 @ 610]

- While unaided institutions have maximum autonomy, aided institutions do not lose their minority character on receiving aid, although conditions may be imposed that are "related to the proper utilization of the grant and fulfilment of the objectives of the grant." [Pr. 143; Vol. V-A, p. 552 @ 651] The State cannot compel a minority institution to give up its right under Article 30(1) as part of the restrictions for grant-in-aid. [Pr. 130; Vol. V-A, p. 552 @ 647]

- In the case of aided non-minority institutions, greater regulation is permissible for promoting good, efficient and sound administration and to prevent maladministration. For proper maintenance of high standards for education, including conditions for admissions and reservations, and protection of the interests of staff. Further, general laws of the land are applicable to minority institutions, such as taxation, sanitation, social welfare, economic regulation, public order and morality. However, they cannot be run like a government department or government institution. [Pr. 71-72, 106-107, 115, 136, 139; Vol. V-A, p. 552 @ 621-622, 633-634, 638, 649, 650].

- Institutions have a right to select students based on a rational and fair system of their own devise, subject to minimum qualifications and systems of computing equivalence between different kinds of qualifications that may be prescribed. [Pr. 40; Vol. V-A, p. 552 @ 611]

(v) *On excellence*

- This Hon'ble Court held that:

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

- The Court also observed that:

> "70. … This void in the field of medical and technical education has been filled by institutions that are established in different places with the aid of donations and the active part taken by public-minded individuals. The object of establishing an institution has thus been to provide technical or professional education to the deserving candidates, and is not necessarily a commercial venture. In order that this intention is meaningful, the institution must be recognized. ... It has been held that conditions of affiliation or recognition, which pertain to the academic and educational character of the institution and ensure uniformity, efficiency and excellence in educational courses are valid, and that they do not violate even the provisions of Article 30 of the Constitution; but conditions that are laid down for granting recognition should not be such as may lead to governmental control of the administration of the private educational institutions." (emphasis added) [Vol. V-A, p. 552 @ 620-621]

(vi) *On 'administer'*

- An illustrative list of the elements of the right to administer was provided:

> "50. The right to establish and administer broadly comprises the following rights:
> (a) to admit students;
> (b) to set up a reasonable fee structure;
> (c) to constitute a governing body;
> (d) to appoint staff (teaching and non-teaching); and
> (e) to take action if there is dereliction of duty on the party of any employees."
>
> [Vol. V-A, p. 552 @ 613]

- It further approved the decision in ***St. Stephen's*** (discussed *supra*) upholding the right of the institutions to select students as a part of the right to administer, but

not to the extent that the institution could be only for the exclusive advantage of the minority community [Pr. 127; Vol. V-A, p. 552 @ 645-646]

- It also quoted and approved Pr. 8-9 of ***Mother Provincial*** (which have been discussed *supra*). [Pr. 109; Vol. V-A, p. 552 @ 635]

(vii) *On secularism and objective of Article 30*

- The Court also emphasized the connection between secularism and the protection of the rights of minorities under Article 30:

> "157. For a healthy family, it is important that each member is strong and healthy. But then, all members do not have the same constitution, whether physical and/or mental. For harmonious and healthy growth, it is but natural for the parents, and the mother in particular, to give more attention and food to the weaker child so as to help him/her become stronger. Giving extra food and attention and ensuring private tuition to help in his/her studies will, in a sense, amount to giving the weaker child preferential treatment. Just as lending physical support to the aged and the infirm, or providing a special diet, cannot be regarded as unfair or unjust, similarly, conferring certain rights on a special class, for good reasons, cannot be considered inequitable. All the people of India are not alike, and that is why preferential treatment to a special section of the society is not frowned upon. Article 30 is a special right conferred on the religious and linguistic minorities because of their numerical handicap and to instil in them a sense of security and confidence, even though the minorities cannot be per se regarded as weaker sections or underprivileged segments of the society.
>
> …
>
> 160. … The Constitution recognizes the differences among the people of India, but it gives equal importance to each of them, their differences notwithstanding, for only then can there be a unified secular nation. Recognizing the need for the preservation and retention of different pieces that go into the making of a whole nation, the Constitution, while maintaining, inter alia, the basic principle of equality, contains adequate provisions that ensure the preservation of these different pieces.
>
> …
>
> 161. The essence of secularism in India is the recognition and preservation of the different types of people, with diverse languages and different beliefs, and placing them together so as to form a whole and united India. Articles 29 and 30 do not more than seek to preserve the differences that exist, and at the same time, unite the people to form one strong nation." (emphasis added)
>
> [Vol. V-A, p. 552 @ 657-658]

Inamdar (2005)

4.13 In ***PA Inamdar vs State of Maharashtra***, (2005) 6 SCC 537, (7-Judge Bench), this Court was tasked with the responsibility to cull out the ratio of ***TMA Pai*** and ***Islamic Academy of Education vs State of Karnataka***, (2003) 6 SCC 697 [5-Judge Bench], and resolve any inconsistencies. Some of the relevant observations are as below:

(i) Right to impart education is protected under Article 19, and Article 30 provides an additional protection to minorities, and restrictions that may be permissible under Article 19(6) may fall foul of Article 30. [Pr. 92; Vol. V-A, p. 828 @ 880]

(ii) Where there is aid by the Government, autonomy may be diluted as Article 29(2) would apply, and conditions can be laid down for recognition, such as for maintaining standard of education. However, the conditions should not directly or indirectly defeat the protection conferred by Article 30, such as by: (a) denying recognition solely due to it belonging to a minority; or (b) imposing regulations aimed at or having the effect of depriving the institution of its minority status. [Pr. 91, 103; Vol. V-A, p. 828 @ 879-880, 884-885]

(iii) Regulatory measures for ensuring educational standards and maintaining excellence are not anathema to Article 30, even for unaided minority institutions. [Pr. 105; Vol. V-A, p. 828 @ 886]

(iv) Higher levels of education may call for more State intervention and lesser say to minority. [Pr. 106-107; Vol. V-A, p. 828 @ 886-887]

(v) With regard to quotas in unaided institutions, it was held that:

> "124. So far as appropriation of quota by the State and enforcement of its reservation policy is concerned, we do not see much of a difference between non-minority and minority unaided educational institutions. We find great force in the submission made on behalf of the petitioners that the States have no power to insist on seat-sharing in unaided private professional educational institutions by fixing a quota of seats between the management and the State. …
>
> 125. … Unaided institutions, as they are not deriving any aid from State funds, can have their own admissions if fair, transparent, non-exploitative and based on merit.
> …

> 128. We make it clear that the observations in Pai Foundation in para 68 and other paragraphs mentioning fixation of percentage of quota are to be read and understood as possible consensual arrangements which can be reached between unaided private professional institutions and the State."
>
> [Vol. V-A, p. 828 @ 892-893]

4.14 In sum, the decisions laid down by this Hon'ble Court before and after the pronouncement in ***Azeez Basha*** recognise the following:

A. THAT the right of minorities to establish an educational institution flows from several provisions of Part III, and the protection under Article 30(1) is a consequence of being a religious or linguistic minority;

B. THAT the word 'choice' in Article 30(1) has been construed to mean "as wide as the choice of the particular minority community may make it," which ***Azeez Basha*** ignored;

C. THAT the regulatory or supervisory measures of the State, i.e., to maintain standards of education and promote excellence, does not impinge upon the right of management guaranteed under Article 30(1);

D. THAT the regulatory or supervisory measures permissible by the State cannot be 'onerous' such that the minority community practically surrenders or waives their protection guaranteed under Article 30(1)

E. THAT the compliance with statutory obligations or general laws (i.e., ***TMA Pai*** at Pr. 136; Vol. V-A, p. 552 @ 649) can neither constitute a waiver of protection under Article 30(1) nor can the State require the institutions to surrender their minority status to obtain recognition.

V. EFFECT OF *AZEEZ BASHA* ON THE FUTURE DECISION OF THE HON'BLE ALLAHABAD HIGH COURT IMPUGNED HEREIN

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

5.1 ***Azeez Basha* arrives at the conclusion that AMU was not a minority educational institution on the basis that, (*i*) AMU was established by the Government through the 1920 Act and not by the Muslim Community, and (*ii*) the administration of AMU was not vested in the Muslim Community. Consequently, the validity of Amending Acts of 1951 and 1965 were never tested on the anvil of Articles 26(a), 29(1), and 30(1) of the Constitution. In any case, the amendments passed after *Azeez Basha* in 1972 and 1981 have removed any shadow of doubt as to the Muslim character of AMU.**

1951 & 1965 AMENDING ACTS ARE NOT INIMICAL TO MINORITY CHARACTER

5.2 At the outset, the amendments to the AMU Act in 1951 and 1965 are irrelevant to ascertain the minority character of AMU primarily for three reasons:

A. The role of minority community in establishing an educational institution ought to be tested with reference to the date when it was founded (i.e., date when the foundation for MAO College was laid down; *if not*, when AMU Act was brought into force in 1920); and

B. The changes introduced to the AMU Act through these Acts of Parliament are prospective in application and effective from date appointed by the Central Government [*See* Section 1 of 1951 Amendment Act (Vol. IV-A @ 90) and Section 11 of 1965 Amendment Act (Vol. IV-A @ 106)].

C. Neither of the Acts of Parliament alter the character of AMU as it existed in 1920 or thereafter.

5.3 Pertinent for the present case, the 1951 Amendment Act made the following changes:

i. Section 9 of the original 1920 Act that permitted compulsory instruction in Muslim religion for Muslim students was **omitted**, although Section 8 was amended to permit religious instruction for those "[students] who have consented to receive it." [*See* Section 5 of 1951 Amendment Act (Vol. IV-A @ 91)] This change is necessitated in view of the prohibition on aided institutions under Article 28(3) of the Constitution.

ii. Proviso to Section 23(1) of the original 1920 Act that restricted membership of the Court to only Muslims was **omitted**. [*See* Section 17(a)(ii) of 1951 Amendment Act (Vol. IV-A @ 93)] However, the omission is immaterial since most members of the Court comprising of Life Members, Founding Members, and Ordinary Members (except for Nominated Members) were Muslims.

5.4 Pertinent for the present case, the 1965 Amending Act made one significant amendment: the Court was downgraded from the 'supreme governing body' of the University to an *advisory* aid to the Visitor of the University (i.e., the President of India). [*See* Section 2 of 1965 Amending Act (Vol. IV-A @ 99)] This change was, however, to serve an urgent crisis and meant a **temporary period** as evident from the Parliamentary debates.

(i) Mr. MC Chagla, the then Education Minister, while introducing the Bill in Lok Sabha stated:

> "I see from the amendments that criticism is made that the Court is nominated, it is not elected and that I have sacrificed the principles of democracy. But all these may be considered when we have the substantive legislations. Today we are dealing with a temporary measure, a provisional measure, a measure enacted to meet a particular situation. Normalcy has not been restored in Aligarh. Action that has to be taken has not been taken. Therefore, we must have a nominated Executive Council, a nominated Court and we must give special powers to the Vice-Chancellor. Powers have been given to the Vice-Chancellor to take action with regard to discipline. But when he wants to dismiss or suspend a member of staff he has got to go to the Executive Council and before he can be dismissed two third majority of Executive Council is required." (emphasis added)

(ii) Mr. AK Sen, the then Minister of Law and Social Security, supporting the Bill made the following speech in Rajya Sabha:

> "Mr. Chairman, Sir, I was giving an indication yesterday for the nature of the measure which we have proposed. It is going to be a temporary measure designed to correct the vices which had crept into the management and administration of the University and thereafter, when normalcy had returned, we would think of bringing forward a permanent measure as we did in the case of Banaras Hindu University Act."
>
> [Vol. IV-C @ 567]

(iii) Other members of the House sounded a note of caution, such as Mr. MR Masani, who stated:

> "Therefore, it is in the spirit of our multi-religious democracy that I appeal to this house to pass this Bill, but not to do anything to change the Muslim Character of Aligarh, which must remain Muslim university."

5.5 Although the Amending Acts of 1951 and 1965 permit outsiders or members of non-minority into the governing body, the presence of outsiders through regulation to "obviate maladministration" and to improve the administration are permissible. [***Gandhi Faiz-e-Am College vs University of Agra***, (1975) 2 SCC 283, Pr. 17, 20 & 22 (Vol. V-A, p. 320 @ 328, 329-330)]

1972 AND 1981 AMENDING ACTS EMPHASIZE AND CLARIFY THE MUSLIM CHARACTER OF AMU

5.6 **The relevance of the 1972 and 1981 Amendment Acts is as follows:**

(i) The 1972 Amending Act, acknowledging the temporary nature of the 1965 Amending Act, enhanced the powers of the Court from a purely advisory body to a body with powers to review decisions. It also made an amendment further entrenching the Muslim character of AMU by recognizing the importance of the University Mosque.

(ii) The 1981 Amending Act, with the explicit view to clarify the Muslim minority character of AMU, made several amendments clearly indicating that AMU was established by the Muslims of India, and restored the Court's stature as the supreme governing body of AMU.

Thus, there could be no doubt as to the Muslim character of AMU, but the Hon'ble Allahabad High Court failed to appreciate the effect of these amendments.

STEPS TAKEN IN THE 1972 AMENDING ACT

5.7 The temporary nature of the 1965 Amending Act was recognized in the Statement of Objects and Reasons of the 1972 Amending Act:

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

5.8 To this end, the amendment to Section 23 of the 1920 Act through which the stature of the Court was downgraded through the 1965 Amending Act to an advisory body was **repealed**, and the Court's powers were enhanced to review policies, pass resolutions on annual report, annual accounts, and audit report.

5.9 It is also relevant to note that, in addition to the changes in the setup, the 1972 Amending Act also substituted Section 5(9) of the 1920 Act, thereby allowing for establishment of halls and hostels, and Special Centres, Specialised Laboratories or other units for research and instruction as necessary only within 25 km of the University Mosque [Vol. 4-A @ 110]. This additional reference is a clear recognition of the centrality of AMU's Muslim character.

CLEARING DOUBTS ON AMU'S MUSLIM CHARACTER IN 1981 AMENDING ACT

5.10 Thus, in the 1981 Amending Act [Vol. IV-A, p. 147-157], to clarify that the Government merely incorporated MAO College as a university through the 1920 Act and it was the Muslim Community which established AMU, the following changes were made:

- In the Long Title to the 1920 Act, which earlier read "An Act to establish and incorporate a teaching and residential Muslim University at Aligarh", the words "establish and" were omitted.

- Similarly, in the Preamble to the 1920 Act, which earlier started as "WHEREAS it is expedient to establish and incorporate a teaching and residential Muslim University at Aligarh, …", the words "establish and" were omitted.

- Further, Section 2 was amended so that the earlier "(h) "University" means the Aligarh Muslim University" became, **"(l) "University" means the educational institution of their choice established by the Muslims of India, which originated as the Muhammadan Anglo-Oriental College, Aligarh, and which was subsequently incorporated as the Aligarh Muslim University."** Significantly, the new definition closely mirrors the language used in Article 30(1), thus clearly evidencing the intention of Parliament to remove any doubt about the applicability of Article 30 to AMU.

5.11 The significance of AMU for Indian Muslims and its commitment towards the education and advancement of Indian Muslims was further entrenched by amending Section 5(2) of the 1920 Act so that the University would also have the power: "(c) to promote especially the educational and cultural advancement of Muslims of India;". This was in addition to the power: "(a) to promote Oriental and Islamic studies and give instruction in Muslim theology and religion and to impart moral and physical training;" which existed since the inception of the 1920 Act.

5.12 The primacy of the Court in affairs of the University, which had been diluted through the 1965 Amending Act, was restored by the 1981 Amending Act:

I. Sections 17 and 18 were substituted, resulting in the Chancellor and Pro-Chancellor becoming posts elected by the Court.

II. A new Section 20-A was inserted, whereby the Honorary Treasurer was to be elected by the Court.

III. Through substitution of Section 23, the Court was once again made the Supreme Governing Body, with the power to also review the acts of the Executive and Academic Councils.

IV. The Statutes were also amended to reflect that the posts of Chancellor, Pro-Chancellor were to be elected by the Court, the Vice-Chancellor would be appointed by the Visitor from the panel of three names recommended by the Court.

V. Further, the Statutes were amended so that the Court's composition would also be predominantly Muslim, including representatives from the All India Muslim Education Conference and of Muslim Culture and Learning.

5.13 Further, being a declaratory statute brought in to declare and clarify an existing position, the 1981 Amending Act applies retrospectively. This is evident from: (*a*) the nature of the amendments made; (*b*) the Statement of Objects and Reasons; and (*c*) the statements made by the Government in the Rajya Sabha and the Lok Sabha.

5.14 The 1981 Amending Act, in effect, has undone the basis of ***Azeez Basha*** (the permissibility of such legislative overruling has been elaborated subsequently below). This is also evident from the following:

i. The Statement of Objects and Reasons is, in effect, a *mea culpa* by the Union of India for their stand in ***Azeez Basha*** that AMU was not a minority institution established by the Muslim community. The Statement notes that:

> "India is a multi-religion country and its strength lies in the fact that all communities living in the country are free to establish educational and other institutions of their own choice. The Government have introduced in Parliament an Amendment Bill to remove doubts in the minds of Muslim community regarding the character of Muslim Universities. But the amendment of the Aligarh Muslim University Act would be meaningless and would be redundant if Statutes are not amended to satisfy the sentiments of the Muslim community. It is, therefore, necessary to introduce a Bill in the Parliament to achieve this objective." (emphasis added) [Vol. IV-A @ 148]

ii. At the Rajya Sabha, the Minister of State for Education, while introducing the Bill, made the following statements:

> "… Sir, the 1920 enactment was the realisation of the long-cherished ideals of the Muslims of India and it was their dream that found expression in the establishment of this University and a substantial part of the properties and funds which went into its making was also contributed by them.
>
> Sir, these facts of history which we must recognize and acknowledge. For quite some time, the Muslims of India have been expressing concern that that the law governing the Aligarh Muslim University does not recognise or acknowledge these historical facts. There has been unanimous demand voiced by the Muslims of India that the Aligarh Muslim University Act, as it stands today, should make provision for the acknowledgement of this fact. This demand has the support of all sections of the country including all the political parties.
> …

> … The acknowledgement of the historical reality that the initial establishment of the University was not by the Government but by the Muslims of India, is reflected in the amendment proposed … We also propose to amend the definition of the expression 'University' in the Act to make it beyond any shadow of doubt that the University was the educational institution of their choice established by the Muslims of India. These two vital amendments seek to restore the original character of the University. …" (emphasis added)
> [Vol. IV-C @ 1155-1156]

iii. Further, at the Lok Sabha, the Minister of State for Education reiterated the statements made before the Rajya Sabha. [Vol. IV-C @ 1590-1592]

iv. It is also relevant to note that several parliamentarians supported the Amending Act of 1981, and it was passed with wide support. [Vol. IV-C @ 1682] The submissions of the other side by selectively quoting some members at the Parliament are therefore irrelevant.

PROVISIONS OF THE 1920 ACT AS ON DATE

5.15 Therefore, after the 1981 Amending Act [Vol. III-G, p. 30], the provisions of the Act as amended show the Muslim character as below:

i. The definition of "University" in Section 2(l) reads: "means the educational institution of their choice established by the Muslims of India, which originated as the Muhammadan Anglo-Oriental College, Aligarh and which was subsequently incorporated as the Aligarh Muslim University." [Vol. III-G, p. 30 @ 40]

ii. Under Section 4(i), the MAO College, the Muslim University Association were dissolved, and all their properties, rights, powers and privileges of the Muslim University Foundation Committee shall be transferred to and vest in AMU, to be applied to the objects and purposes of AMU. [Vol. III-G, p. 30 @ 40]

iii. Under Section 4(iv), any will, deed or other documents, whether made before or after the Act, which contain a bequest, gift or trust in favour of the MAO College, the Muslim University Association or the Muslim University Foundation Committee would be construed as if it was in favour of AMU. [Vol. III-G, p. 30 @ 40]

iv. Under Section 5(2), AMU had the power:

> "(a) to promote Oriental and Islamic studies and give instruction in Muslim theology and religion and to impart moral and physical training;
> (b) to promote the study of religions, civilization and culture of India;

(c) to promote especially the educational and cultural advancement of Muslims of India;"

[Vol. III-G, p. 30 @ 41]

v. Under Section 5(9A), AMU had the power to establish special centres, specialized Laboratories or other units of research and instruction as necessary within 25 kms of the University Mosque. [Vol. III-G, p. 30 @ 42]

vi. Under Section 6, degrees, diplomas and other academic distinctions granted by AMU shall be recognized by the Central and State Governments. [Vol. III-G, p. 30 @ 43]

vii. Under Section 7, the sum of Rs. 30 lakhs collected by the Muslim Community were to be held as Reserve Fund to be used for the recurring expenditure of AMU. [Vol. III-G, p. 30 @ 43-44]

viii. Under Section 12, AMU has the power to establish and maintain High Schools within a radius of 15 miles from the University Mosque. [Vol. III-G, p. 30 @ 44]

ix. Under Section 23, the Court is the supreme governing body of AMU and exercises wide powers, including all powers not otherwise provided for under the Act, Statutes, Ordinances or Regulations; power to review the acts of the Executive and Academic Councils; power to make Statutes, consider Ordinances, consider and pass resolutions on the annual report, annual accounts and the financial estimates; etc. [Vol. III-G, p. 30 @ 49]

x. Under Section 29, Ordinances can be framed in furtherance of Section 12, and also giving religious education. [Vol. III-G, p. 30 @ 53]

xi. Under Statute 14, the Court includes representatives of the schools maintained by AMU, of the All India Muslim Education Conference and of Muslim Culture and Learning. [Vol. III-G, p. 60 @ 74-77]

xii. Under Statute 20, AMU includes Departments of Studies for Islamic systems of medicine (including Ilmul Advia, Kulliyat, Moalijat, Jarahat, Hifzan-e-Sehat-wa-Tibbi Samaji, Tashreeh-wa-Munafeul Aza, Amraz-e-Niswan-wa-Atfal, Ilmul Amraz, Tashreehul Badan, Amraz-e-Jild-wa-Amraz-e-Zohrawiya and Iljat-Bit-Tadbir). [Vol. III-G, p. 60 @ 84-88]

xiii. Under Statute 36, AMU has established and maintained Centres at Murshidabad (West Bengal), Malappuram (Kerala) and Kishanganj (Bihar), and Institute of Pharmacy, a College of Nursing and a Para Medical College. [Vol. III-G, p. 60 @ 101-102]

xiv. Statute 43 provides for the Alumni (Old Boys') Association, which includes ex-students of MAO College or the MAO Collegiate School, Aligarh. The Explanation specifically includes graduates of MAO College. [Vol. III-G, p. 60 @ 105]

xv. Annexure to the Statutes [referable to Statute 20(2)(c)] provides for the Faculty of Theology, which includes the separate Departments of Sunni Theology and Shia Theology. [Vol. III-G, p. 60 @ 106]

xvi. Appendix A to the Statutes (referable to Statute 61) provides, under Clause 8(1)(j), the Vice-Chancellor to release funds from the General Provident Fund to eligible subscribers towards meeting expenses for Haj pilgrimages. [Vol. III-G, p. 60 @ 133]

5.16 In sum, the above analysis of subsequent amendments to the 1920 Act and their legislative history, and the Act as it exists today demonstrates the following:

A. 1972 Amending Act reflected the wishes of the Muslim community to restore the character from the temporary changes made through the 1965 Amending Act; and

B. 1981 Amending Act explicitly sought to remove any doubts on the fact that AMU was established by the Muslim Community for the benefit of the Muslim Community, and as to any doubts on its Muslim minority character protection under Article 30. It also largely restored the stature and powers of the Court and its Muslim identity.

QUESTION OF CHANGING THE BASIS BY 1981 ACT AS DECIDED BY THE HIGH COURT

5.17 The Allahabad High Court in the judgment as impugned before this Hon'ble Court held that:

A. The University was established by the 1920 Act relying on the ratio in *Azeez Basha* (the above submissions in Part IV has dealt with it); and

B. The Hon'ble High Court followed *Azeez Basha* and held that some sections of the 1981 Amending Act amount to usurpation of judicial power. The correctness of this requires consideration only if this Hon'ble Bench holds that *Azeez Basha* was correctly decided.

This is now before this Hon'ble Court, which is called upon to decide whether the decision of the Hon'ble High Court following *Azeez Basha* is correct.

CHANGING THE BASIS

5.18 While it is trite law the Parliament cannot usurp judicial power by directly overruling a judicial decision, it retains a curative and corrective power to disagree with a court decision under conditions of institutional amity.

5.19 Inter-institutional comity requires heeding to the advice in ***Indian Aluminium Co Ltd vs State of Kerala***, (1996) 7 SCC 637, at Pr. 56 [Vol. V-A, p. 489 @ 514-516], where the Court emphasized that it is unnecessary for courts to be over-zealous and conjure up incursion into judicial preserve where a valid law has been competently made. Instead, the court must determine if:

(i) the vice pointed out by the court has been cured,
(ii) whether the legislature was competent to validate the law, and
(iii) whether the validation is consistent with Part III of the Constitution.

While the legislature cannot by mere declaration overrule, revise or override a judicial opinion, it is within its domain in altering the conditions such that the decision would not be passed in the altered circumstance. The legislature is also empowered to give retrospective effect to such validation.

5.20 The oft quoted summary of these principles is in ***Prithvi Cotton Mills Ltd vs Broach Borough Municipality***, (1969) 2 SCC 283:

> "4. … The most important condition, of course, is that the Legislature must possess the power to impose the tax, for, if it does not, the action must even remain ineffective and illegal. Granted legislative competence, it is not sufficient to declare merely that the decision of the Court shall not bind for this is tantamount to reversing the decision in exercise of Judicial power which the Legislature does not possess or exercise. A court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. …" (emphasis added) [Vol. V-A, p. 148 @ 151-152]

5.21 After considering the relevant judgments, these principles have been reiterated recently in ***BK Pavitra vs Union of India***, (2019) 16 SCC 194, Pr. 77-84:

> "80. A declaration by a court that a law is constitutionally invalid does not fetter the authority of the legislature to remedy the basis on which the declaration was issued by curing the grounds for invalidity. While curing the defect, it is essential to understand the reasons underlying the declaration of invalidity. The reasons constitute the basis of the declaration. The legislature cannot simply override the declaration of invalidity without remedying the basis on which the law was held to be ultra vires. A law may have been held to be invalid on the ground that the legislature which enacted the law had no legislative competence on the subject-matter of the legislation. Obviously, in such a case, a legislature which has been held to lack legislative competence cannot arrogate to itself competence over a subject-matter over which it has been held to lack legislative competence. However, a legislature which has the legislative competence to enact a law on the subject can certainly step in and enact a legislation on a field over which it possesses legislative competence. For instance, where a law has been invalidated on the ground that the State Legislature lacks legislative competence to enact a law on a particular subject—Parliament being conferred with legislative competence over the same subject—it is open for Parliament, following a declaration of the invalidity of the State law, to enact a new law and to regulate the area. As an incident of its validating exercise, Parliament may validate the collection of a levy under the earlier law. The collection of a levy under a law which has been held to be invalid is validated by the enactment of legislation by a legislative body—Parliament in the above example—which has competence over the subject-matter. Apart from legislative competence, a law may have been declared invalid on the ground that there was a breach of the fundamental rights contained in Part III of the Constitution. In that situation, if the legislature proceeds to enact a new law on the subject, the issue in essence is whether the re-enacted law has taken care to remove the infractions of the fundamental rights on the basis of which the earlier law was held to be invalid. The true test therefore is whether the legislature has acted within the bounds of its authority to remedy the basis on which the earlier law was held to suffer from a constitutional infirmity."
>
> [Vol. V-A, p. 928 @ 993-994]

5.22 Therefore, changing the basis of a decision implies:

(i) changing the law on which a decision is based; or

(ii) changing the basis on which the facts underlying a decision may be construed; or

(iii) changing the date from which the law may be applied.

In such cases, the enactment in question does not amount to usurpation of judicial power.

5.23 One of the techniques permissible for changing the basis of a judicial decision is changing the definition, such as in:

- ***Government of Andhra Pradesh vs HMT Ltd***, (1975) 2 SCC 274 [Vol. V-A, p. 310] – Here, the Government amended the definition of "house" for the purpose of

levying 'house-tax' under the Andhra Pradesh Gram Panchayats (Amendment) Act, 1974 retrospectively, removing the basis of an earlier decision of the High Court.

- ***Bhubaneshwar Singh vs Union of India***, (1994) 6 SCC 77 [Vol. V-A, p. 471] – Here, the provision providing for the amount payable to owners of coking coal mines was retrospectively amended to deem such amount to include compensation for coal in stock as on appointed date. This was in order to get over the decision of this Hon'ble Court directing payment of such compensation.
- ***State of Orissa vs Gopal Chandra Rath***, (1995) 6 SCC 242 [Vol. V-A, p. 481]– Here, this Hon'ble Court had found that the Selection Committee was not appointed by the State Government, as required. This infirmity was retrospectively corrected through an amendment to the definition of the Selection Committee.

Thus, legal fiction and definitional changes are permissible and sufficient to change the basis.

RELIANCE ON AZEEZ BASHA BY THE ALLAHABAD HIGH COURT IS WRONG IN THE PRESENT CASE

5.24 Applying the above principles,

(i) The 1981 Amending Act is not a case of brazen overruling since it does not directly overturn ***Azeez Basha***.

(ii) ***Azeez Basha*** relies on the meaning of the word "establish" to come to the conclusion that AMU was brought into existence by the 1920 Act [Vol. III-A @ 19-21]. The change in the long title, preamble (removing the words "establish and") and definition of "university" (mirroring the language of Article 30) are fundamental and ought to be read into the whole Act along with the other changes. Such change is in line with past precedent in cases where a definitional change removes the basis for a judicial decision, and this change cannot be considered a usurpation of judicial power.

The net result of the changes made by the 1981 Amending Act is that ***Azeez Basha*** is no longer effective. However, the Hon'ble High Court erroneously relied upon ***Azeez Basha***, and went even further and struck down provisions of the 1981 Amending Act.

VI. EFFECT OF *AZEEZ BASHA* ON STATUTORY RECOGNITION OF MINORITY UNIVERSITIES

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

6.1 ***Azeez Basha*** held that, one, "educational institution" in Article 30 includes a university, and, two, that the Muslim community could have established a university without a legislation or statute, and, therefore, since the Muslims chose to approach the Government instead, AMU was established by the 1920 Act and not by the Muslim Community.

6.2 As explained in these Written Submissions above, this conclusion is based on an erroneous understanding of the law and the historical facts. It is also contrary to the prevailing and accepted practice at the relevant period. All ten (10) universities – the Universities of Calcutta, Bombay and Madras (1857), University of the Punjab (1882), University of Allahabad (1887), Benares Hindu University (1915), University of Mysore (1916), Patna University (1917), Osmania University (1918), and University of Lucknow (08.10.1920) – that existed prior to the incorporation of AMU in 1920 were established and incorporated through statutes. In other words, no other university existed in India which was neither established nor incorporated under a statute of Legislative Council at the relevant time.

EFFECT OF THE UNIVERSITY GRANTS COMMISSION, 1956 AND THE DECISION IN YASHPAL

6.3 The University Grants Commission, 1956 ('**UGC Act**') (which was in force when ***Azeez Basha*** was decided and was noticed in the decision) makes the two findings in ***Azeez Basha*** completely irreconcilable.

6.4 The statutory framework for universities is laid down in the UGC Act. The following sections are relevant:

(i) Section 2(f) defines a "University" to mean an institution that is "established or incorporated by or under a Central Act, a Provincial Act or a State Act." [Vol. IV-A, p. 200 @ 203]

(ii) More importantly, Section 22 restricts the powers to grant degrees to either a university [as defined in Section 2(f)] or deemed to be university [recognized under Section 3] or an institution specifically empowered by the Parliament. The provision reads as follows:

> "*22. Right to confer degrees*.— (1) The right of conferring or granting degrees shall be exercised only by a University established or incorporated by or under a Central Act, a Provincial Act or a State Act or an institution deemed to be a University under section 3 or an institution specially empowered by an Act of Parliament to confer or grant degrees.
>
> Save as provided in sub-section (1), no person or authority shall confer, or grant, or hold himself or itself out as entitled to confer or grant, any degree."
> [Vol. IV-A, p. 200 @ 214]

(iii) Section 23 prohibits the use of the word 'University' by an institution or entity which is not "established or incorporated by or under a Central Act, a Provincial Act or a State Act." [Vol. IV-A, p. 200 @ 215]

(iv) Section 24, in addition, prescribes fines on members of such institutions that "knowingly or wilfully authorises or permits the contravention" of Sections 22 (i.e., grants a degree) or Section 23 (i.e., wrongly uses the word 'University'). [Vol. IV-A, p. 200 @ 215]

6.5 Thus, due to Sections 2(f), 22, 23 and 24:

(i) An educational institution cannot operate, run, or call itself a 'university' unless it is incorporated under a statute made by the central or state legislature;

(ii) A degree cannot be issued by only a 'University' or a 'Deemed to be University' or other institutions expressly recognized by the Parliament.

6.6 It is pertinent to note that, in ***Prof. Yashpal***, it was held that, insofar as private universities are concerned, "established or incorporated" should be read conjunctively, i.e., "or" should be read as "and" (at Pr. 59; Vol. V-A, p. 783 @ 823-824). Further, after an appreciation of the UGC Act and the relevant Regulations, ***Yashpal*** held that, "a private university can only be established by a separate Act or by one compendious Act where the legislature specifically provides for establishment of the said university" (Pr. 57; Vol. V-A, p. 783 @ 823).

6.7 Thus, the fact that ***Azeez Basha*** regards statutory interventions as defeating the minority character is wrong because if any institution has to become a university or a deemed university, it must be through the statutory route or must be by statute.

EFFECT OF NATIONAL COMMISSION FOR MINORITY EDUCATIONAL INSTITUTIONS ACT, 2004

6.8 This fallacy was, at first, repeated by the Parliament under the National Commission for Minority Educational Institutions Act, 2004 ('**NCMEI Act**') which excluded universities from being certified as 'Minority Educational Institution'. Subsequently in 2010, the Parliament amended the NCMEI Act to rectify this error and to permit certification of universities as Minority Educational Institutions.

2004 Act	**After the 2010 Amending Act**
(g) "Minority Educational Institution" means a college or institution (other than a University) established or maintained by a person or group of persons amongst minorities;	(g) "Minority Educational Institution" means a college or an educational institution ~~(other than a University)~~ established ~~or maintained by a person or group of persons amongst~~ and administered by a minority or minorities;

6.9 In the meantime, the Central Education Institutions (Reservation in Admission) Act, 2006 ('**Central Reservation Act'**) which came into force on 03.01.2007 construed Minority Educational Institutions to include a university. Pertinently, the provision reads as follows:

> "2. (f) "Minority Educational Institution" means an institution established and administered by the minorities under clause (1) of article 30 of the Constitution and so declared by an Act of Parliament or by the Central Government or declared as a Minority Educational Institution under the National Commission for Minority Educational Institutions Act, 2004 (2 of 2005);"

6.10 The clear intent of the Parliament to permit the creation of minority universities has been carried forward by the Central Government and Minorities Commission in recognizing the minority status of several Deemed Universities and Private Universities. A list of such minority institutions is provided in the Compilation [Vol. III-G, p. 227-232].

6.11 Therefore, in light of the above, the following is clear:

a. ***Azeez Basha*** and the provisions of the NCMEI Act as amended in 2010 clearly recognize that a university can be a minority institution in terms of Article 30. This has not been doubted in any judgment of this Hon'ble Court thereafter.

b. The clear effect of the provisions of the UGC Act, as interpreted in ***Yashpal***, is that a university can only be established by a statute.

c. However, ***Azeez Basha*** has also held that a university established and incorporated by a statute cannot be held, for the purposes of Article 30, to be "established" by a Minority Community.

In light of these statutory changes, it is clear that ***Azeez Basha*** needs to be reconsidered.

VII. AZEEZ BASHA FAILED TO RECOGNIZE HISTORICAL ANTECEDENTS, WHICH LATER DECISIONS HAVE HELD TO BE FUNDAMENTAL

ISSUE (V) **Was *Azeez Basha* correct in accepting the antecedent historical data on AMU's Muslim character, but denying its constitutional significance while deciding the issue of its minority status, which is at the variance with *St. Stephen's College vs University of Delhi*, (1982) 1 SCC 558 [5-Judge Bench], *Rev. Father W Proost vs State of Bihar*, (1969) 2 SCR 73 [5-Judge Bench], and *Right Rev. Bishop SK Patro vs State of Bihar*, (1969) 1 SCC 863 [5-Judge Bench]?**

7.1 **In *Azeez Basha*, this Hon'ble Court referred to the historical background but did not find it constitutionally relevant. This is at variance with subsequent decisions of this Hon'ble Court. In particular, this Court in *St. Stephen's* placed great emphasis on historical background and also the symbolism used in the buildings and the fact that there is chapel on the campus [refer Pr. 30-34]. Therefore, the historical background of AMU becomes relevant.**

7.2 Both the judgments (***Azeez Basha*** and the impugned judgment) are in unison on the fact that:

A. The Mohammadan Anglo-Oriental College ('**MAO College'**) was the "nucleus" of Appellant-University;

B. The founders of MAO College had, from the very beginning, desired to incorporate MAO College as a university and grant degrees that are recognised by the Government;

C. The Muslim Community largely contributed the funds necessary to incorporate MAO College into a University; and

D. The founders held "long negotiations" with the Government to introduce a legislation establish and incorporate the MAO College as a University.

Nonetheless, both courts have held that the Appellant-University was not established by the Muslim community.

7.3 The historical background was demonstrated through 10 volumes filed by the Union of India before the Hon'ble High Court. While we need not go into those documents in detail at this stage, the relevant facts are briefly stated below.

7.4 The historical antecedents of AMU can be divided into 3 phases,

A. The period from 1870 to 1877, where the early idea for setting up a University *by* the Muslim community *for* the betterment and advancement of Muslims took place, and when the MAO College was established in furtherance of this idea;
B. The period from 1877 to 1910, where the Muslim community rallied to convert MAO College into a University, and due to their efforts, the Government in-principle agreed to convert College; and
C. The period from 1910 to 1920, where the founders from the Muslim University actively engaged with the Government and succeeded in their desire to convert and incorporate MAO College into Aligarh Muslim University.

THE VISION: AN INSTITUTE OF EDUCATIONAL EXCELLENCE FOR MUSLIMS

7.5 In the FIRST PHASE, Sir Syed Ahmad Khan had a vision to establish a university in India in the mould of the Oxford and Cambridge Universities to address the concerns educational backwardness amongst Indian Muslims. For this purpose:

(i) On 02.10.1870, Sir Syed established the Committee for the Better Diffusion and Advancement of Learned among Mohammadans of India ('**Committee**') at Banaras. The Committee sought views from the Muslim community as to why Muslims were not availing western education, and it was found that this was due to, *inter alia*, lack of religious education and non-consultation with Muslims [Doc. No. 1, p. 9 @ 15, 20-21, Vol. III-C]. Thus, the idea for an educational institution managed by Muslims, for the benefit of Muslims and with religious instruction received support.

(ii) In 1871, Sir Syed established the Mohammadan Anglo-Oriental College Fund Committee to collect funds for setting up the educational institution. The Rules for the Guidance and Management of the College Fund Committee clearly state that:

> "2. … The object of the Committee shall be to collect funds towards the establishment of a College, particularly one for the education of the Muhammadans as suggested by the Central Committee for the better diffusion and advancement of learning among Muhammadans of India …" (emphasis added) [Doc. No. 8, p. 71, Vol. III-C]

(iii) The Committee resolved to establish the Madrasatul Uloom ("*madrasa*" being a term for an educational institution in Arabic) at Aligarh, which was subsequently inaugurated on 24.05.1875 [Doc. No. 14, p. 800 @ p. 810, Vol. IV-C]. This was the first step towards realizing the vision of a university for the Muslim community.

(iv) The Madrasatul Uloom was then established as the Mohammedan Anglo-Oriental College ('**MAO College**') on 08.01.1877 as a registered Society [Doc. No. 13, p. 110 @ p. 117, Vol. III-C]. At the time of laying down the foundation stone of the MAO College, the College Fund Committee delivered an Address to the Viceroy and Governor-General of India, stating that:

> "… from the seed which we sow today there may spring up a mighty tree, whose branches, like those of the Banyan of the soil, shall in their turn, strike firm roots into the earth, and themselves send forth new and vigorous saplings; that this College may expand into a University, whose sons shall go forth throughout the length and breadth of the land to preach the gospel of free enquiry, or large-hearted toleration and of pure morality." (emphasis added)
> [Doc. No. 19, p. 246 @ p. 256, Vol. III-C]

(v) It is pertinent to note that the Rules and Regulations of the MAO College stated that:

> "2. The object of the College shall be primarily the education of Mahomedans and, so far as may be consistent therewith, of Hindus and other persons." (emphasis added) [Doc. No. 13, p. 110 @ p. 117, Vol. III-C]

(vi) Further, only the Muslim community was involved in the administration of MAO College since:

a. the Select Committee of the Advancement of Muslim Education had resolved on 15.04.1872 that the management of the institution should rest with Muslims [Doc. No. 1, p. 9 @ p. 15, Vol. III-C];

b. the Rules for the Guidance and Management of MAO College Fund Committee provided that all members shall be Muslim[7] [Doc. No. 8, p. 71, Vol. III-C]; and

[7] "3. Muhammadans only shall be eligible as members of this Committee. …".

c. the Rules and Regulations for the appointment of the Trustees of the MAO College provided that all Trustees shall be Muslim[8] [Doc. No. 13, p. 110 @ p. 119, Vol. III-C].

EARLY MOORINGS: A UNIVERSITY FOR MUSLIMS

7.6 In the SECOND PHASE, while the MAO College grew, Sir Syed and the Muslim community continued to seek the support of the Government to convert MAO College into a University.

(i) The primary reason for Sir Syed seeking Government support was that the Muslim community looked upon a degree as a means to success and Government jobs, as recorded by Mr. Altaf Husain Hali in his biography Sir Syed, "Hayat-i-Javed" [Doc. No. 11, p. 100 @ p. 104, Vol. III-C]. Justice S Amir Ali had also emphasized that the proposed university should be authorized to grant degrees by the Government and considered this a basic condition for conversion of MAO College into a University [Doc. No. 37, p. 357 @ p. 358, Vol. III-C].

(ii) In furtherance of this desire, a written Address dated 18.11.1884 was presented by the College Fund Committee to the Viceroy, where it was stated that:

> "… By far, the greater portion of our funds and endowments are, however, naturally derived from members of our own race and creed. … Someday when our endowments are richer and our schemes are completed, we hope to ask … to confer upon us the legal status of an Independent University." (emphasis added) [Doc. No. 27, p. 299 @ p. 305 and 308, Vol. III-C]

(iii) As recorded in Mr. SK Bhatnagar's book, the History of MAO College Aligarh, after Sir Syed passed away on 27.03.1898, a memorial fund was created on 08.04.1901 to raise funds for incorporating MAO College into a university. This proved to be a success and Rs. 1,27,000/- had been collected by 11.11.1901 [Doc. No. 12, p. 105 @ p. 107, Vol. III-C]. Further, it is recorded that one Mr. Syed Jafar Husain came up with the scheme of 'one rupee fund' to collect at least one rupee from each Muslim for the proposed university [Doc. No. 12, p. 105 @ p. 108, Vol. III-C]. These and other efforts by the Muslim Community resulted in substantial funds being collected for the establishment of the university.

[8] "9. No person other than a Mahomedan shall be appointed a Trustee."

(iv) Various representations were made by the MAO College management and members of the Muslim Community to the Government, including addresses presented to the Viceroy on 01.10.1906 and 22.04.1908, seeking assistance to help the Community found a Muslim university. In the 22.04.1908 Address, it was stated that:

> "… His ideals and those of Sir Syed with regard to the expansion of the College are ours to-day. Their view of its ultimate development was the formation of a Mahomedan University of which the idea was strongly supported by the late Mr. Justice Mahmood, son of Sir Syed, and by Mr. Theodore Morison, our last Principal. The former may indeed be said to have formulated, if not fathered, the University scheme, while the latter developed it in his numerous writings on the subject. …" (emphasis added) [Doc. No. 48, p. 398 @ p. 402, Vol. III-C]

(v) In 1910, the efforts of the Muslim community led to in-principle acceptance by the Government of India for conversion of MAO College into a Muslim University.

THE NEGOTIATIONS: ENGAGING WITH THE GOVERNMENT

7.7 The THIRD PHASE thereafter was the further collection of funds by the Muslim community and its continued negotiations with the Government to assist the community in establishing the university:

(i) Further, in 1911, the Kameti Takmili Mohammadan University (Foundation Committee) was constituted for converting MAO College into a Muslim University, with the Raja Saheb of Mahmoodabad as the President [Doc. No. 1, p. 4 @ 42, Vol. IV-C].

(ii) On the recommendation of the Government of India dated 10.06.1911, the Secretary of State on 18.07.1911 approved in-principle the establishment of a university at Aligarh, subject to provision of adequate funds and control [Doc. No. 1, p. 4 @ 42, Vol. IV-C].

(iii) In its letter dated 31.07.1911 to the Foundation Committee, the Government of India specified that the university could be established only through a bill in the Imperial Legislative Council, and that it was willing to draft the proposed bill in consultation with representatives of the community [Doc. No. 50, p. 407 @ p. 410, Vol. III-C].

(iv) In the meantime, a draft bill was prepared by the Constitution Committee held on 18.08.1911 to 20.08.1911, whose Preamble states that:

> "Whereas an Institution styled the Mahomedan Anglo-Oriental College was founded at Aligarh in the year 1875 by the Muslim Community under the leadership of the late Sir Syed Ahmad Khan Bahadur, K. C. S. I., L.L.D., with the special object of promoting the diffusion of western science and literature and of training the character of the students by a scheme adapted to meet the special requirements of the Muslim Community,
>
> And whereas from the beginning the object of the founder and the Muslim Community was to raise such College to the status of a University,
> …
> And whereas a memorial has been presented to the Government by the Trustees of the said College and other representative of the Muslim Community praying for the erection of a Muslim University at Aligarh, and inviting attention to the advantages which a University of their own would confer on their Community, to the inadequate representation which their Community has in the existing Universities, to the enthusiasm which their own University would create amongst the Musulmans for education at every stage, to the advantages of a teaching over a purely examining University, and to the need for religious teaching and the protection of oriental learning,
>
> And whereas it appears to the Government that considering the peculiar circumstances of the Muslim Community and its special educational requirements such prayer is just and reasonable,
>
> And whereas it has been determined to establish a University at Aligarh, …" (emphasis added) [Doc. No. 3, p. 39, Vol. IV-A]

(v) In November 1911, the negotiations resulted in a dispatch from the Government of India to the Secretary of State embodying the provisions of the settled scheme, where it is noted that:

> "… sanctioning a University at Aligarh … will be the source of enlightenment and prosperity to that [Muslim] Community and will crown and continue the hopes of Sir Syed Ahmad Khan." (emphasis added)
> [Doc. No. 1, p. 4 @ p. 42, Vol. IV-C]

(vi) The negotiations continued, with certain issues that resulted in delays (such as whether the university should be an affiliating one, nomenclature of the university, and whether the Viceroy should be the Chancellor). In one intervening letter dated 09.08.1912, the Education Member of the Government specifically mentioned that "… the movement was started without any reference to Government. … the hope of Sir Syed was to convert Aligarh into a teaching and residential University and his hope has been repeatedly expressed since by leading Muhammadans and others

connected with the College …"; and also noted that the draft constitution stated that "from the beginning, the object of the founder and the Muslim Community was to raise the college to the status of a university." (emphasis added) [Doc. No. 51, p. 411 @ p. 412-413, Vol. III-C]

(vii) In 1915, the Muslim University Association was founded to give practical shape to the conversion of the MAO College; it is relevant to note that all its members were Muslim [Doc. No. 61, p. 533, Vol. III-C]. In the MAO College Annual Report 1912-14, it is noted that:

> "… The present position may be summarized as follows. Subscriptions and donations to the amount of twenty-nine lakhs of rupees have been paid into the Bank. A registered body, called "The Moslem University Association", is being created from representatives of the various classes of the community, whose function it will be to examine and deal with the financial and other aspects of the scheme. Meanwhile the College continues to expand its organization, with the result that when the University comes into being the institution will be more prepared for the change than before." [Doc. No. 55, p. 425 @ 427, Vol. III-C]

(viii) The Muslim Community ultimately raised the Rs. 30 lakhs for the university, as required by the Government. This is accepted in ***Azeez Basha*** [Doc. No. 1, p. 3 @ 27, Vol. III-A].

(ix) After extended negotiations, the Muslim University Bill was prepared in 1919, which was referred to a Select Committee after discussions in the Indian Legislative Council. The Select Committee submitted its Report on 02.09.1920; the Muslim Community's predominant role in the university's establishment and administration is again clear in these debates. For instance, it is stated that:

> "2. … In reference to the constitution of the Court we have retained the provision that no person other than Muslim shall be a member thereof. We have done this as we understand that such a provision is in accordance with the preponderance of Muslim feeling though some of us are by no means satisfied that such a provision is necessary." (emphasis added) [Doc. No. 4, p. 73, Vol. IV-A]

(x) The Aligarh Muslim University Bill, 1920 was again debated in the Indian Legislative Council in light of the Select Committee Report and passed, with the President (i.e., the Viceroy and Governor-General of India) stating that:

> "Before putting the question, I would like to add my congratulations to the Muslim community on the passage of this Bill. I have come here specially this

> morning to preside in order that I might add by good wishes and congratulations to those which have already been uttered in this Council." (emphasis added)
>
> [Doc. No. 2, p. 56 @ p. 70, Vol. IV-C]

(xi) The Aligarh Muslim University Act, 1920 was thus enacted. The Statement of Objects and Reasons emphatically recognizes the role of Muslim community in the following words:

> "The Muslim University Association having requested the foundation of a university and certain funds and property being available to this end, it is proposed to dissolve that Association and the Mohammadan Anglo-Oriental College, Aligarh, and to transfer the property of these societies to a new body called "the Aligarh Muslim University." The present Bill is designed to incorporate this University, to indicate its functions, to create its governing bodies and to define their functions. … The degrees conferred will be recognized by the Government. Special features of the University will be imparting of Muslim religious education to Muslims and the inclusion of Departments of Islamic Studies." (emphasis added)
>
> [Doc. No. 5, p. 77 @ p. 87, Vol. IV-A]

OTHER RELEVANT FACTORS ARISING FROM THE HISTORICAL BACKGROUND OF AMU

7.8 It is also relevant to note that, after AMU was founded:

(a) All the Members of the first Court were Muslim [Doc. No. 64, p. 539, Vol. III-C]All the Members of the first Executive Council were Muslim [Doc. No. 64, p. 547, Vol. III-C]

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

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

(d) 34 out of 37 Vice-Chancellors have been Muslim [Doc. No. 64, p. 537, Vol. III-C]

(e) The vast majority of the Members of the Court [Doc. No. 65, p. 551, Vol. III-C], Executive Council [Doc. No. 66, p. 558, Vol. III-C] and Academic Council [Doc. No. 67, p. 565, Vol. III-C] throughout the years have been Muslim.

7.9 It is also relevant to note that, among other features which evidence AMU's Muslim character (some of which are described in reply to ISSUE I in these Written Submissions]:

(a) The history background of the institution detailed above;

(b) The architecture of the buildings of the University, such as the use of a deep green colour, domes, Qur'anic inscriptions, etc, clearly show the Islamic character of

AMU. Photos were shown to evidence this, as recorded by the Division Bench of the Hon'ble High Court [Doc. No. 2, p. 29 @ p. 35, Vol. III-A]

(c) The emblem of AMU contains a Qur'anic verse which is also its *motto*;

(d) The University has a University Mosque. After the Amending Act of 1972, AMU is allowed to establish of halls and hostels, and Special Centres, Specialised Laboratories or other units for research and instruction as necessary only within 25 km of the University Mosque [Doc. No. 8, p. 107 @ p. 110, Vol. IV-A]

(e) The University employs Muezzins.

(f) At the inception, AMU had separate Departments of Studies for Sunni Theology, Shea Theology, Islamic Studies, Arabic language and literature, Persian and Urdu [Doc. No. 5, p. 77 @ p. 86, Vol. IV-A]. There are now various Departments of Studies for Islamic systems of medicine, a Philosophy Department that is a leader in the study of Islamic Philosophy and a Centre for Quranic Studies.

(g) AMU made accommodations for female students to observe *purdah*, and photographs are available to show the system that was followed [Doc. No. 5, p. 77 @ p. 79, Vol. IV-A].

VIII. *AZEEZ BASHA* FAILED TO CONSIDER CONSTITUTIONAL DISPENSATION ON RIGHTS OF MINORITIES

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

RIGHT TO ESTABLISH UNDER THE INDIAN CONSTITUTION

8.1 It is now well settled that the right of religious minorities in India to set up educational institutions safeguarded by four (4) distinct provisions in Part III of the Constitution, i.e.,

(1) The freedom of occupation guaranteed to an individual under Article 19(1)(g);
(2) The right to establish and maintain charitable institution by a religious denomination under Article 26(a);
(3) The right to conserve distinct language, script or culture of any section of citizens by setting up an educational institution under Article 29(1); and
(4) The right of religious and linguistic minorities to establish and administer an educational institution "of their choice" under Article 30(1).

8.2 This Hon'ble Court has understood and interpreted the purpose of Article 30(1) in the sense that,-

(i) The restriction on admissions imposed on minority institutions under Article 29(2) does not impede the protection under Article 30(1) to permit favourable treatment to members of their community. [See ***St. Xavier's***, at Pr. 6; Vol. V-A, p. 173 @ 198]

(ii) *Regulation:* The State is competent to impose regulations for achieving excellence in standards of education in minority educational institutions, and such regulation can be neither 'onerous' so as to deprive of denude the minority character of the institution nor surrender the rights of minority community to administer as per "their own choice."

(iii) *Autonomy*:

> "The minorities evidently desire that education should be imparted to the children of their community in an atmosphere congenial to the growth of their

> culture. Our Constitution makers recognised the validity of their claim and to allay their fears conferred to them the fundamental rights referred to above." [See ***Kerala Education Bill,*** SCR Pg. 1067; Vol. IV-A, p. 4 @ 76]

(iv) *Unity*: Preserving and strengthening the "integrity and unity of the country;" [See ***St. Xavier's*** (Chief Justice Ray)]

(v) *Progress*: Enabling minorities to provide "best general education to make them complete men and women of the country;" [See ***St. Xavier's*** (Chief Justice Ray)]

(vi) *Equality*: Bringing about equilibrium (or equality) between majority and minorities by granting special rights to the latter through autonomy in matters of administration; [See ***St. Xavier's*** (Justice Khanna)].

CONSTITUENT ASSEMBLY DEBATES ON ARTICLES 29 & 30

8.3 The protection and guarantee of special rights for minorities is one of cornerstone features of Indian Constitution. On 13 December 1946, Pandit Jawahar Lal Nehru in his resolution *'Re: Aims and Objects'* for drafting the Constitution for India before the Constituent Assembly stated:

> "(5) WHEREIN shall be guaranteed and secured to all the people of India justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality; and
>
> (6) WHEREIN adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes; and" (emphasis added)

8.4 The right of minorities to establish and administer educational institutions enshrined in Article 30(1) has been accepted without much opposition, except for the scope of 'minorities' covered by the clause.

A. On 19 April 1947, the Minorities Sub-Committee appointed by the Advisory Committee recommended the insertion of following under "Cultural and Educational Fundamental Rights of Minorities which may be incorporated in the appropriate places:"

(i) Minorities in every unit shall be protected in respect of their language, script and culture, and no laws or regulations may be enacted that may operate oppressively or prejudicially in this respect.
(ii) No minority whether based on religion, community or language shall be discriminated against in regard to admission into state educational institutions, nor shall any religious instruction be compulsorily imposed on them.
(iii) All minorities, whether based on religion, community or language shall be free. In any unit to establish and administer educational institutions of their choice.
(iv) The State; shall not, while providing State aid to schools, discriminate against schools under the management of minorities whether based on religion, community or language. (emphasis added)
(v) …
(vi) … [Vol. IV-B @ 5]

B. On 22 April 1947, the Advisory Committee deliberated on the proposed minorities' rights. Govind Ballabh Pant suggested that the clauses "could more appropriately be incorporated as directive principles which would be kept in view by the Legislature but would not be enforceable in a court of law." This recommendation was not accepted by the Sub-Committee.

C. On 01 May 1947, Vallabhbhai Patel – the Chairman of the Advisory Committee – moved the above clauses for the acceptance of the Constituent Assembly. A proposal was made to put the clauses on hold until the partition and see "what treatment would be meted out to minorities in Pakistan or any other parts of India which might organize themselves separately." Dr. B. R. Ambedkar shot down the suggestion opining that "rights of minorities should be absolute rights and not subject to any consideration as to what another party might like to do minorities within its own jurisdiction."

D. Although the clauses recommended by the Minorities Sub-Committee were hotly debated, however, the Constituent Assembly accepted the clause relating to protection of minority educational institutions [Article 30(1)] to be incorporated in the Draft Constitution during its deliberations on 30 August 1947, and importantly, without any changes or amendments.

E. On 01 November 1947 and 03 November 1947, the clauses were deliberated by the Drafting Committee. The members here too, accepted the draft Article 30(1) although certain members such as Jaya Prakash Narayan and Damodar Swarup Seth, opposed the inclusion of religion-based minorities from its scope as "it would not

only block the way to national unity but would also promote communalism and as an anti-national outlook which had already produced disastrous results in the past."

F. The opposition to include religious minorities was rejected by the Drafting Committee and as well as the Constituent Assembly during its consideration on 07 December 1948 and 08 December 1948. Dr. Ambedkar rejected all amendments, except for omitting the term 'community' from the scope of draft Article 30(1).

8.5 Article 23(iii)(a) of the Draft Constitution was adopted and became Article 30(1) of the Constitution of India. The legislative history of Article 30(1) suggests that:

(i) The recognition of rights of minorities to establish and administer educational institutions of their choice was accepted by the Constituent Assembly without any opposition; and

(ii) The concerns expressed over the inclusion of *religious* minorities within the scope of Article 30(1) was examined but rejected by the Constituent Assembly.

8.6 ***TMA Pai*** interpreted Articles 29 and 30 on the basis of Constitutional dispensation on rights of minorities before the Constituent Assembly, which ***Azeez Basha*** failed to take any of them into account.

IX. CONCLUSION

9.1 ***Azeez Basha*** is internally contradictory in its reasoning on facts and law.

9.2 ***Azeez Basha*** failed to recognize that the word 'establish' and 'administer' are not preconditions to define a minority but the consequential rights that flow from such recognition. The ingredients of the rights that flow from Article 30 have been stated by ***TMA Pai*** (at Pr. 50; Vol. V-A, p. 552 @ 613) and other decisions.

9.3 ***Azeez Basha*** is contrary to ***Mother Provincial*** (6-Judge Bench) which elaborated that the requirement of Article 30 is to consider who founded the institution. This has been confirmed by ***TMA Pai*** (at Pr. 109; Vol. V-A, p. 552 @ 635-636).

9.4 ***Azeez Basha*** was wrong to note the historical antecedence of the Aligarh Muslim University Act, 1920 but did not attach significance to it, which is in a way contrary to decisions such as ***St. Stephen's*** [5-Judge Bench], ***Rev. Father W Proost*** [5-Judge Bench], and ***Right Rev. Bishop SK Patro*** (1969) 1 SCC 863 [5-Judge Bench].

9.5 The effect of ***Azeez Basha*** on the later impugned decisions of the Hon'ble Allahabad High Court was that the Hon'ble High Court not only followed ***Azeez Basha*** totally but went further to hold that certain sections of 1981 Amending Act were a usurpation of judicial power.

9.6 Both the 1920 Act at its inception, and the 1920 Act after the 1981 Amending Act clearly show the Muslim character of AMU.

9.7 Allowing non-minority members in governing bodies and statutory authorities of the University is entirely at sync with the decisions of the Court, such as ***Gandhi Faiz-e-Aam***.

9.8 The provisions of the University Grants Commission Act, 1956 read with the National Commission for Minority Educational Institutions Act, 2004 clearly show that establishment or incorporation of an institution under a statutory regime will not deprive minority institution recognition.

9.9 One of the effects of ***Azeez Basha*** is that no minority deemed university or constituent colleges will never be recognized as a minority institution with the constitutional protection of Article 30.

9.10 ***TMA Pai*** rightly holds that Articles 29 and 30 are part of secularism. This is evocatively stated in ***TMA Pai*** (at Pr. 94, 147 and 203 to 221; Vol. V-A, p. 552 @ 628, 653, 675-683).

9.11 There may be a feeling that Article 30 leads to insularity. This is obviated by the decision in ***Sidharjbhai*** and ***TMA Pai*** which articulated a dual test that minority institutions must become centres of excellence. Equally, it is now clear that minority institution must follow the general law of land which does not infringe Article 30 (See ***TMA Pai*** at Pr. 124 and 137; Vol. V-A, p. 552 @ 642-643, 649).

9.12 It is now clear from ***TMA Pai*** and ***Inamdar*** that unaided institutions have maximum autonomy but aided institutions which are also autonomous may be subject to seat sharing and regulations to oversee the proper utilization of the grant.

9.13 The Court may consider the Hon'ble Allahabad High Court's decision under appeal, which is based solely on ***Azeez Basha***, is incorrect.

9.14 If we look at universities globally it will make it clear that religious minorities dominate universities establishment.

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