

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

**COURT NO.1**  
**SUPREME COURT OF INDIA**  
**RECORD OF PROCEEDINGS**

**Civil Appeal No. 2286/2006**

**ALIGARH MUSLIM UNIVERSITY THROUGH ITS REGISTRAR FAIZAN  
MUSTAFA**

**Petitioner(s)**

**VERSUS**

**NARESH AGARWAL & ORS**

**Respondent(s)**

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TRANSCRIPT OF HEARING

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10:40 AM IST

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2 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Not before this bench, Sir. You heard me.

3

4 **TUSHAR MEHTA:** Apropos, My Lord, last day - yesterday; apropos, My Lord, Justice Surya  
5 Kant's query about what amount was being paid from 1920 to 1950, where it emerges from the  
6 record, and I'll show that. But Your Lordships can take it from me - both AMU and BHU were  
7 getting one lakh rupees each, from the then Crown, British Government, per year, that is, My  
8 Lord, emerging.

9

10 **CHIEF JUSTICE D.Y. CHANDRACHUD:** From? What is the date from?

11

12 **TUSHAR MEHTA:** My Lord, 1920, till the Constitution. One lakh per year, both to BHU and  
13 AMU. Sometimes, at some point of time, it was increased to two lakhs and as on date, AMU  
14 gets 1500 crores per year, and they also may have some self-generation of fees, etc., some 30-  
15 40 crore. I'll conclude my argument on the question of administration for which I have  
16 compressed, I'm not going to read it, just for your ready reference: Volume 2(i). Please see  
17 this. I'm not going to read it. I'll just show what it is - that as the Act stood, as the Act stood in  
18 1921...this is only reproduction of the sections nothing more. Just for ready reference at one  
19 place, Your Lordships can get. I'll not read. I have read it yesterday.

20

21 **JUSTICE SANJIV KHANNA:** Which page are you on?

22

23 **TUSHAR MEHTA:** 2(i).

24

25 **CHIEF JUSTICE D.Y. CHANDRACHUD:** How long is this note?

26

27 **TUSHAR MEHTA:** 4 pages.

28

29 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Read it now. It will be a good recap of your  
30 submission.

31

32 **TUSHAR MEHTA:** Yes, kindly, My Lord, allow me, My Lord. I have said that it was not  
33 established by the minority. Now I am on the question of administration; whether minority  
34 had any predominant role in the administration of the university as it stood in 1920, because  
35 that is the test, Your Lordships would consider applying, not the test of today. Even today, it's

1 not, My Lord, administration by predominant minority. But, My Lord, I am on, right now, on  
2 the Act of 2020. I'm sorry, 1920.

3

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

5

6 **TUSHAR MEHTA:** a) As the Act stood in 1920, it was not administered by minority. Section  
7 13 provides for Lord Rector. Your Lordships have read. He had the supervening powers. Then  
8 14, Visiting Board. Your Lordships have read it. I'll just read. No Muslim. The Visiting Board  
9 of the University if and when the United Provinces of Agra and Oudh becomes a Governor's  
10 Province within the meaning of Government of India Act, shall consist of Governor thereof,  
11 the members of the Executive Council, the Ministers, one member nominated by the Governor  
12 and one member nominated by the Minister-in-charge of education provided that until a  
13 Governor's Province is so constituted, the Lieutenant Governor of the said Provinces shall  
14 discharge and perform the duties of Visiting Board. The Visiting Board may, by order in  
15 writing annul any proceedings not in conformity with the Act, statutes and ordinances  
16 provided that before making any such order the Board shall call upon the University to show  
17 cause why such order should not be made. So, university was subordinate and subservient to  
18 a body which was consisting of non-Muslims. Then Your Lordships may see,

19

20 c). Officers of the University are provided under Section 16, which also do not mandate to be  
21 belonging to Muslim religion. The Chancellor, the Vice-Chancellor, the Pro Vice-Chancellor,  
22 Your Lordship would recall the Court provision for Court says that all members shall be  
23 Muslim. These people need not be Muslims. Then, My Lord, there are three authorities, the  
24 Court, Executive Council and Academic Council. Though Section 23(i) proviso provides that  
25 no person other than a Muslim shall be a member, thereof, the Court was never conceived to  
26 be a body having power of administration, but was given only residuary power under Section  
27 23(ii). The Petitioners read first part, saying that it would be the main body without reading  
28 the second part, namely Sub-section 2 provided that no person other than Muslims shall be a  
29 member thereof.

30 (ii)The Court shall be the supreme governing body of the university and shall exercise all the  
31 powers of the university. They read up to this. Now, please read further. Not otherwise  
32 provided for by this Act, the statutes, the ordinances and the regulations. It shall have power  
33 to review the acts of the Executive and the Academic Councils, save where such Councils have  
34 acted in accordance with powers conferred on them under this Act, the statutes or the  
35 ordinances and directed necessary action may be taken by the Executive or the Academic  
36 Council, as the case may be, on any recommendation of Lord Rector. Again, Lord Rector  
37 supremacy is conceived. Then 13, Lord Rector, the Governor General. Now it is the Governor.

1 Governor General shall be the Lord Rector of the university. The Lord Rector shall have the  
2 right to cause an inspection to be made by such person or persons as he may direct, of the  
3 university its buildings, laboratories and equipment and of any institution maintained by the  
4 university, and also of the examinations, teaching, and other work conducted or done by  
5 university and to cause an inquiry to be made in like manner in respect of any matter  
6 connected with the university. The Lord Rector shall, in every case, give notice to the university  
7 of his intention to cause an inspection, so and so, so and so. Please see 5, Sub-section 5, where  
8 the Court does not... He has a power to direct the Court that you do this, where the Court does  
9 not, within reasonable times take action to the satisfaction of the Lord Rector, the Lord Rector  
10 may, after considering any explanation furnished, or representation made by the Court issue  
11 such directions as he may think fit and the Court shall comply with such directions. My Lord  
12 the simile which was sought to be given that Your Lordships are visitor to some university is  
13 not simile in the context, is not the correct simile in the context of the question Your Lordships  
14 are deciding. The question is who is the ultimate decision making authority in terms of  
15 administration.

16

17 **JUSTICE SANJIV KHANNA:** There are two ways to look at administration. One is, with  
18 whom the absolute or the final power is vested. The other is, day-to-day administration. Day-  
19 to-day running, functioning of the institution. The day-to-day functioning is done by the  
20 people who are at the helm of affairs, who are hands-on. Lord Rector, being the Governor  
21 General or somebody, will be having numerous functions.

22

23 **TUSHAR MEHTA:** Correct, My Lord. On site, who is... either of them, there is no dominant  
24 control.

25

26 **JUSTICE SANJIV KHANNA:** As per your argument, it's going to be these, the ultimate  
27 authority is not the ones who are.... because this argument proceeds on the basis, the one who  
28 are actually running the day-to-day administration. Like in criminal law, the persons in charge  
29 of and responsible for administration, are the ones who can be prosecuted. Day-to-day affairs  
30 of administration.

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32 **TUSHAR MEHTA:** Your Lordships are right.

33

34 **JUSTICE SANJIV KHANNA:** And not the one who's overall in charge or not the one who's  
35 a symbolic in-charge.

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37 **TUSHAR MEHTA:** Yes, even day-to-day administration....

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**RAJEEV DHAVAN:** Counter argument, which is to be answered.

**JUSTICE SANJIV KHANNA:** Please. Please.

**TUSHAR MEHTA:** This has to stop. My decency be not treated as my weakness.

**RAJEEV DHAVAN:** He's not responding to our argument. I hope we'll get the time.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** Dr. Dhavan, we'll hear you in the Rejoinder. There's no difficulty. We will hear you. Yes.

**TUSHAR MEHTA:** My Lord, here, even day-to-day administration is not in their hands. My Lord, the court was consist of some hundred and some odd people. They can't be running the administration.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** Mr. Solicitor, the argument which was made on the other side was this, that you can establish institutions of your choice, and you have a constitutional discretion to administer it. But if you give that discretion, exercise that discretion by giving the administration to others, who do not belong to a minority, that does not detract from your position under Article 30. For instance, in any educational institution, there will be... there will be non-minorities who will be an accountant, who will be performing other ancillary functions. That by itself may not be an indicator that you cease to be a minority.

**TUSHAR MEHTA:** Even that discretion is not there, that's my attempt, My Lord.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** Of course, you have said that, 'here the statute superimposes the Lord Rector and so on. We will hear the other side on that.

**TUSHAR MEHTA:** Yes, My Lord, I'm saying something else also. Something else as well. Even in terms of amending the statutes, they have no supremacy. They can amend the statute, it is always subject to Rector, the Governor General in Council, full right to set aside it, remit it back or say that, "I don't accept it, reject it." So, meaning thereby, they had a kind of advisory function, that, "This is what we think the statutes should be and according to us, this is how the administration may run." For example, the statute concerns the administration. That also, the discretion also is not conferred. Please, see further.

1 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Obviously, it was the policy of the British  
2 Government to not make this an absolutely autonomous institute. They were retaining some  
3 element of control over the institute.

4

5 **TUSHAR MEHTA:** 'Substantial and the predominant,' that's my submission, control. And,  
6 'this statute be not examined,' My Lord, my respectful submission, in the context of or under  
7 Article 30, it was not there. If any Parliament were to make this statute possibly an argument,  
8 not possibly, argument can be made. That, 'this is violating of Article 30.' But there is a history  
9 behind it, that we will have control and there would be no denominational character. Are you  
10 agreeable? They said, "yes, we are agreeable. "

11

12 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Anyway, there's no challenge to the provisions  
13 of the Act.

14

15 **TUSHAR MEHTA:** There is none.

16

17 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Therefore, we proceed on the provision that the  
18 Act is valid.

19

20 **TUSHAR MEHTA:** Even the provisions of the amendment is not under challenge. Post-  
21 constitution amendment is not challenged under... except '81 amendment.

22

23 **CHIEF JUSTICE D.Y. CHANDRACHUD:** So, we take the Act as it stands and see what is  
24 the impact on its minority status.

25

26 **TUSHAR MEHTA:** Yeah. Kindly, therefore.... Kindly, see My Lord, para 8, "the power to  
27 establish and maintain colleges and schools was subject to...."

28

29 **CHIEF JUSTICE D.Y. CHANDRACHUD:** If a similar provision were to be made today,  
30 would that detract from the minority status of the institution?

31

32 **TUSHAR MEHTA:** It may, My Lord. It may. The Government may not, My Lord... The  
33 present Government, under the Constitution, cannot compel them that either of this thing to...  
34 you agree, otherwise, we will not pass an Act. I'm not, for a second saying that, that's the  
35 prerogative. The legislature may, in this wisdom say that, "We will accept this. Or we will not  
36 accept this, but subject to judicial review." But in '20, the Crown...

37

1 **CHIEF JUSTICE D.Y. CHANDRACHUD:** The test would be this... the true test would be  
2 this. Which of these provisions are relatable to the overall regulatory power of the state, which  
3 even Article 30 allows, and which of these provisions go beyond what is really a regulatory  
4 provision which is agnostic to religion...

5

6 **TUSHAR MEHTA:** Correct, My Lord.

7

8 **CHIEF JUSTICE D.Y. CHANDRACHUD:** ... and then destroys the minority character."

9

10 **TUSHAR MEHTA:** But please, again, My Lord, at the cost of repetition, please do not read  
11 1920 Act in the context of Article 30. It is at a period of time in history where Article 30 was  
12 not there, Indian constitution was not there. There was no concept of minority. There was no  
13 concept of fundamental rights. And the British Government was in a position to put its terms  
14 - if you want this, have it, otherwise others did not agree. They started their own universities  
15 and started conferring degrees, because till '56, it was not impermissible to have universities  
16 and degrees. This degree was needed by the Aligarh Muslim University.

17

18 **CHIEF JUSTICE D.Y. CHANDRACHUD:** So, really speaking, what your contention boils  
19 down to is this, that this was not a denominational institution when the university is  
20 established in 1920. Therefore, the subsequent development, namely, the adoption of the  
21 Constitution on 26 of January 1950 cannot confer upon it a denominational character for the  
22 reason that you had bartered, you had surrendered that denomination...

23

24 **TUSHAR MEHTA:** And that is the ratio in *Basha*.

25

26 **CHIEF JUSTICE D.Y. CHANDRACHUD:** That is your submission which we will...we got  
27 the point. We'll have to hear the Rejoinder.

28

29 **TUSHAR MEHTA:** Kindly, just quickly, My Lord, Section 12.

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31 **CHIEF JUSTICE D.Y. CHANDRACHUD:** See, let's see Section 12.

32

33 **TUSHAR MEHTA:** Section 12. 3, My Lord. The most important power for any university is  
34 to affiliate other colleges, et cetera. That's the most important administrative power. Please  
35 see. The university shall, subject to statutes, have power to establish and maintain  
36 intermediate colleges and schools within such limits in the Aligarh district as may be laid down  
37 in the ordinances for the purpose of preparing students for admission to the university and

1 may provide for instruction in the Muslim religion and theology in any colleges and schools,  
2 with the approval of the Academic Council and the sanction of Governor General in Council  
3 on the recommendation of the Visiting Board and subject to such conditions as may be  
4 prescribed by the statutes and ordinances, the university may admit. So, My Lord, first  
5 supervening power of Governor General in Council - this is the major administrative act.  
6 Thereafter, the Visiting Board and subject to the statute, and Your Lordships would recall that  
7 the first statute was framed by the Imperial Parliament itself, providing that you cannot amend  
8 that statute without my permission. Even the ordinances were framed by the Governor  
9 General in Council. Please come to page 4.

10

11 **JUSTICE SANJIV KHANNA:** ...didn't want to give a complete free hand, being, they  
12 realized the importance of education and the impact they'll have because...

13

14 **TUSHAR MEHTA:** They wanted a degree. And for that, degree had a price in those days.  
15 Price, not in terms of money - that you have to accept what Government says.

16

17 **JUSTICE SANJIV KHANNA:** Was perhaps more than that. They wanted to have control  
18 over-all supervisory control, so that they could intervene and interfere.

19

20 **TUSHAR MEHTA:** In the administration. There was no absolute discretionary  
21 administrative power conferred under 1920 Act and the history, My Lord, is the proof of that,  
22 that we will have two things - no denominational character and we will have administrative  
23 control. And they were in a bargaining position. There was no Constitution. Having a minority  
24 institution or having a university was never a fundamental right. And majority of them did not  
25 do it. They accepted, My Lord. And I wanted to cite, but I am not citing. I'll request somebody  
26 else to cite. My Lord, one of the letters written by the then management to the Governor, is  
27 shocking - that we want that your British administration continues in this country forever. It's  
28 a boon for our nation, etc. I don't want to digress from that. My colleagues are citing it. Now,  
29 please come to page 4. So that was the mindset or the object which they are entitled to have.  
30 They were entitled to have, with which they surrendered everything.

31

32 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Basically, this is a pre-Constitution institution.  
33 We will have institutions which are claiming the right under Article 30, any institution which  
34 fulfils the requirements of Article 30 is entitled to claim a right post-Constitution. Irrespective  
35 of whether it has been established prior to the Constitution or after that, the law is not that  
36 you can claim the right under Article 30 only if you have been established after 1950. Now, we  
37 are dealing here with a pre-Constitution institution. Second, an institution which is governed



1 by a statute. Now, there are certain, and we are looking at the antecedent facts prior to the  
2 onset of the Constitution, prior to the adoption of the Constitution. You have to also  
3 understand that that was a period when there was absolute control which vested in the  
4 Imperial power, right? Now, to what extent was this absolute power which was yielded by the  
5 then Imperial Government so destructive of any claim in regard to minority status post  
6 constitution? So, contrary to what you are saying, we are not applying Article 50 to a situation  
7 pre-Constitution. To a certain extent, you have to do that exercise. Otherwise, we will be  
8 coming to the conclusion that no pre-Constitution institution can claim a constitutional right  
9 under Article 30. That's not the position. We can't say that a pre-Constitution institution is not  
10 entitled to claim the right under Article 30 of the Constitution. Obviously, they are, so long as  
11 they satisfy two yardsticks, namely of being established by a minority and two, being  
12 administered by a minority. Now, here there is an issue because you are placing an issue, the  
13 fact that this was really an institution which is established by the statute, according to you,  
14 that's what the Preamble says.

15

16 **TUSHAR MEHTA:** So, they had other options of establishment.

17

18 **CHIEF JUSTICE D.Y. CHANDRACHUD:** That they need not have gone the statutory way.  
19 According to you, they could have followed the Vishwa Bharati route. You could have, or any  
20 other institution...

21

22 **TUSHAR MEHTA:** I will not surrender my rights and claim the right after independence.

23

24 **CHIEF JUSTICE D.Y. CHANDRACHUD:** You don't seek recognition of your degrees. In  
25 which case, you could have just said, well, I'm going to be an institution which will be standing  
26 alone on my degrees, even if they're not recognized.

27

28 **TUSHAR MEHTA:** Stephen did it.

29

30 **CHIEF JUSTICE D.Y. CHANDRACHUD:** My students will not get government service,  
31 but so be it. Many other institutions did it. Stephen's did it. Vishwa Bharati did it. That's one  
32 aspect of the matter. But does the fact that they really chose the statutory way, is that so  
33 destructive of their claim to minority status post-Constitution?

34

35 **TUSHAR MEHTA:** My Lords, I'll... Your Lordships are...

36

1 **CHIEF JUSTICE D.Y. CHANDRACHUD:** In which case we will be saying that, once you  
2 accept the fact that you will be governed by regulatory statute for the purpose of the  
3 conferment of degrees...

4

5 **TUSHAR MEHTA:** No, it's not a regulatory statute.

6

7 **CHIEF JUSTICE D.Y. CHANDRACHUD:** It's a regulatory statute.

8

9 **TUSHAR MEHTA:** No, it's a substantive statute, providing for substantive either power or  
10 lack of power.

11

12 **CHIEF JUSTICE D.Y. CHANDRACHUD:** But regulatory statutes are also substantive.  
13 They're not procedural.

14

15 **TUSHAR MEHTA:** There are three things, My Lord, in this statute of 1920.

16

17 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Does that completely destroy its claim of  
18 minority status?

19

20 **TUSHAR MEHTA:** Correct, My Lord.

21

22 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Or are these provisions, which are designed to  
23 ensure the proper administration? Now, Governor General. Let's take the case of the Governor  
24 General. You'll find in a large number of institutions today, there is an approval required of a  
25 government officer. Minister-in-charge of education. Are these really in that sense, are they  
26 controlling influences? Or are they in the manner of an overall supervising influence to ensure  
27 that nothing drastic is done? We must also understand that the British Government had...  
28 They had sensitivities. They didn't want any one institution in India to become so powerful, so  
29 as to affect the imperial dominion power.

30

31 **TUSHAR MEHTA:** No, they say otherwise, My Lord.

32

33 **CHIEF JUSTICE D.Y. CHANDRACHUD:** They were not running these institutions.

34

35 **TUSHAR MEHTA:** I'll answer that.

36

1 **CHIEF JUSTICE D.Y. CHANDRACHUD:** They were all, this was all designed to ensure  
2 ultimately, that no institution went out of the mainstream as they wanted it.

3

4 **TUSHAR MEHTA:** No, My Lord, and some movements which were started doesn't spread  
5 across the nation. That was the reason the movement of independence. And that was 'the'  
6 reason, why most of them said, "no, we would prefer movement and not your..."

7

8 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Therefore, all the regulatory statutes were  
9 intended to provide one overarching objective, and that objective was, 'nothing should be done  
10 to destroy the hegemony of the Imperial Government and the colonial power.' To protect the  
11 colonial power...

12

13 **TUSHAR MEHTA:** Maybe as a general...

14

15 **CHIEF JUSTICE D.Y. CHANDRACHUD:** And education is a very important source of  
16 power, source of cultural power. And we have seen that pre-independence, and we've seen it  
17 post-independence.

18

19 **TUSHAR MEHTA:** May I answer Your Lordship's question? My Lord, first of all, the  
20 establishment is a fact which is pre-independence which cannot be wished away even after  
21 independence. 'How it was established?'- number one. Number two, in my most respectful but  
22 very emphatic submission, these are not regulatory provisions. These are substantive  
23 provisions, either conferring powers or not conferring powers. Number three, when we talk of  
24 administration, we never talk of administration in air. Administration is always a layered  
25 exercise. For example, 'administration of a court.' Let's say for a particular High Court. There  
26 would be five Registrar Generals, Registrars, having different powers. They would be  
27 administering. But according to what? According to something which is decided by some  
28 higher authority. That higher authority would not be doing on day-to-day basis, the  
29 administration. Thereafter, the administration would percolate. But ultimately, the  
30 controlling thing would be the statute. Controlling thing, would be, in case of a High Court,  
31 the resolutions, the Constitution, et cetera, passed by the competent authority, who has the  
32 ultimate control. So, My Lord, please, do not take these as mere regulatory provisions. These  
33 are substantive provisions. Either we confer these rights, A, B, C, D. You are not supposed to  
34 do X, Y, Z. It's very clear. These are 'power conferring substantive provisions' under the 1920  
35 Act. Not just regulating, 'who will administer?' They are not My Lord.... Therefore, please see  
36 page 4. Please see page 4. " And establishment is a factum. Whether I succeed or the other, we  
37 succeed or other side succeeds, establishment is a factum, which has taken place in 1920. That

1 cannot be wished away. What the British did, may have been completely wrong. But it has  
2 happened. And majority of the institutions have chosen to ensure that, that does not happen  
3 with them. They came after the Constitution and said that, "now, make us a university or  
4 deemed-to-be university, because, we established ourselves. We established this institution.  
5 And we have maintained its independence, we are administering it, without any outside  
6 interference." In this context, please see page 4, Section 28, J, ground J. "Both the ordinances  
7 and the statutes... These are the 'administrative governance documents.'

8

9 A will have some powers, B will have some powers, C will have some powers and peon will  
10 have some duties. Powers coupled with duty for everyone. That would be decided by  
11 ordinances and by the statutes. Correct, My Lord? That is the administrative structure,  
12 substantively provided, as a substantive provision in the Act. Statute could not have been  
13 amended without approval of the Governor General in Council. The power in this regard was  
14 so wide, that the Governor General in Council could reject the amendments proposed by the  
15 authority, of the authorities of the university. The relevant provisions are Section 28(ii)(c) and  
16 33. My Lord, please read this. No new...new statute means after the first statute which were  
17 made by the Imperial Council, no new statute or amendment or repeal of an existing statute  
18 shall have any validity until it has been submitted through the Visiting Board. My Lord,  
19 completely non-Muslim Visiting Board, which may record its opinion thereon to the Governor  
20 General in Council. And mark this word, My Lord, and has been approved by the latter, who  
21 may sanction, disallow or remit it for further consideration.

22

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

24

25 **TUSHAR MEHTA:** So, the governance document that Registrar will do this, Deputy  
26 Registrar will do this, Joint Registrar will do this, Court Master will do this...I'm just giving a  
27 hypothetical example and peon will do this...That is the document, that governance document,  
28 which is the documents of administration, there is no power in the Court- exclusive power with  
29 the Court. The Governor General in Council would say that no, this is not acceptable. Similar  
30 is the position with ordinance. No new ordinance or amendment or repeal of an existing  
31 ordinance shall have any validity until it has been submitted through the Court and the Visiting  
32 Board, which may record its opinion to the Governor General in Council and has obtained the  
33 approval of the letter, who may sanction, disallow or remit it for further consideration. My  
34 Lord, the respectful submission is, as on 1920, it was neither established nor was being  
35 administered by the minority and therefore, their claim post-Constitution, would not sustain.  
36 Now, I can say MAO, if would have remained MAO College, MAO College, could have raised  
37 the claim after the Constitution.

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**CHIEF JUSTICE D.Y. CHANDRACHUD:** When he said MAO, I said, where did this Mao come from?

**TUSHAR MEHTA:** No. No. MAO, My Lord. I'm sorry, not Mao Tse Tung. Muhammadan Anglo-Oriental College.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** I said that in a lighter sense.

**TUSHAR MEHTA:** Your Lordships are right. That college could have raised, not could have, it could definitely have raised that we established it. We were administering it. We are a minority now, post-Constitution. Because before that Constitution, there was no minority concept. There were...all of there were subjects - Hindus, Muslims, Parsis, Sikh, Jains, everyone. Now we have been doing it. That's what, My Lord, St. Stephen's did. St. Stephen's did that.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** Alright. Now, we have seen this note on administration. Now, what is the next point?

**TUSHAR MEHTA:** Now, now please see, post-Constitution, My Lord, I have given the chart.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** Which is that chart?

**TUSHAR MEHTA:** Page 5. Page 5. Post-Constitution, after taking into consideration all amendments, as it stands today, as AMU stands today, is there any administrative control? Because, Your Lordships, it is not disputed that word "and" will have to be read as "and" only. Established "and" administered not "or." It's not their argument also. Now My Lord, Chancellor need not be a Muslim under the new Act. If *de facto* Governor appoints him doesn't make the legal difference. Kindly see My Lord.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** How many Chancellors have been non-Muslims, actually, in the case of the institution?

**TUSHAR MEHTA:** We have not examined, but possibly all were Muslims. That's the convention. I am on law. 23 or 25 so far. So, *de facto* status would not change the legal position. For example, suppose there had never been a lady Attorney General. That doesn't mean that it has to be a man. It, incidentally happened to be a man.

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**JUSTICE SANJIV KHANNA:** That argument may be slightly different.

**TUSHAR MEHTA:** I'm giving a... the example may be a different.

**JUSTICE SANJIV KHANNA:** But when we are examining whether what is been the history in the past, whether administration can be only judged on the basis of what has happened and what has been actually after in last how many 1920 till we almost now going to be completing 100 years in another three years.

**TUSHAR MEHTA:** 103 years, yes. I'll just answer that question.

**JUSTICE SANJIV KHANNA:** 103 years we are completing. Any time in the past where the Chancellor, pro Vice-Chancellor, Vice Chancellor have been non-Muslims?

**TUSHAR MEHTA:** I'll check up and say, but not to my knowledge. Possibly they were Muslims.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** And why is it then that Governments, both before the advent of the Constitution...

**TUSHAR MEHTA:** Four were non-Muslims, four were non-Muslims.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** But why is it that before the advent of the Constitution and post the Constitution the predominant choice of Chancellors by successive Governments has been of Muslim. That's one, certainly one factor which has to be borne in mind.

**TUSHAR MEHTA:** Can, by Government appointing a particular community though the law does not require it to do, change the character of that university? That the Government keep on appointing Muslims irrespective of Article 30, it's not established or administered.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** Have you rightly said that we have to look at it in a holistic perspective. Could it possibly be a recognition of the fact by successive governments that this is how they have been perceived at an administrative level by the university itself?

1 **TUSHAR MEHTA:** Then they would not have required 81 Amendment. If that's what, that  
2 was the interpretation that that is how it was being given, I'll come to the periodical  
3 interpretation. Why I say My Lord, it need not be a Muslim, there is a reason. Your Lordships  
4 have seen the provision of Court where there was a provision that all members shall have to  
5 be Muslim. That's the legal provision Your Lordship would bear in mind. Here, it doesn't say  
6 the Chancellor will have to be Muslim. Incidentally he was a Muslim, he or she is different  
7 thing. That would not change Your Lordships' adjudication, whether this has a minority status.

8

9 **JUSTICE SANJIV KHANNA:** There's one more thing. Suppose, let's assume it's a minority  
10 institution.

11

12 **TUSHAR MEHTA:** Yes.

13

14 **JUSTICE SANJIV KHANNA:** In the case. the minority institution appoints a non-minority  
15 as the Vice-Chancellor or Chancellor. Will it make it non-minority?

16

17 **TUSHAR MEHTA:** It cannot. St. Stephen's, reverse, Your Lordships are right. St. Stephen's  
18 do not always appoint Principal from the Christian community.

19

20 **JUSTICE SANJIV KHANNA:** Clearly speaking therefore, when we look at the term  
21 "administration", we have to take into account how actually it is administered on the ground.

22

23 **TUSHAR MEHTA:** The legal position, not *de facto* position. The legal position. In case of  
24 St. Stephen's, it is never that only Christians were appointed as Principals. Then it's bad, that  
25 that's not the concept of a minority institution. But my point is, Your Lordships will go by the  
26 statutory provisions.

27

28 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Because our law recognizes the power of the  
29 minority to appoint the Head of the institution. No outsider can be foisted. You may choose  
30 somebody else. You may have a distinguished nuclear scientist who's not a minority. The  
31 element is the choice.

32

33 **TUSHAR MEHTA:** I'm not saying legally wrong. You should not confine the benefit going  
34 to the students, to one community, there may be many other eminent people may not be  
35 belonging to a particular community who can take the institute to a further high. But you can't  
36 deprive the students of that. That's what, My Lord, as an ideal position. Not legally, it is wrong.

37

1 **JUSTICE SANJIV KHANNA:** Article 30, herein, uses the word 'choice.' If, by choice, a  
2 minority institution agrees to abide by certain terms and conditions in order to establish itself  
3 and get certain, say, a degree, will they lose that, by choice if they do it, will they lose their  
4 minority status?

5

6 **TUSHAR MEHTA:** It is a minority?

7

8 **JUSTICE SANJIV KHANNA:** It is a minority institution.

9

10 **TUSHAR MEHTA:** Undisputed minority.

11

12 **JUSTICE SANJIV KHANNA:** Yes. By choice, they agree to certain rules and regulations  
13 and even administrative overall supervisory control. Will they lose their minority?

14

15 **TUSHAR MEHTA:** Not after the Constitution. If it is established after the constitution, no.  
16 For example, take a flip side. Take a flip side, My Lord.

17

18 **JUSTICE SANJIV KHANNA:** Why should that? Once you accept that, then why not before  
19 the Constitution? Because once you accept, then the administration is with them.

20

21 **TUSHAR MEHTA:** Take a flip side of it. My Lord, suppose, in Banaras Hindu University, as  
22 a tradition, as a tradition of a gesture of goodwill, the Government continued, had continued,  
23 I'm giving a hypothetical example, only Muslims as Vice Chancellors and Muslims in the  
24 position of power, would it come, My Lord, I'm posing a question to myself. Would it convert  
25 itself into a minority institution? If, what example we are discussing is true, the reverse also  
26 has to be true. If *de facto* can change the *de jure* position, then it should apply to everyone.  
27 And there are some benefits to a minority institution. From tomorrow onwards, some  
28 institution can start converting itself into a minority by merely appointing people, though law  
29 doesn't require. The statute incorporating it, may not require. All British... and my learned  
30 friend is right. All British authorities were Christians, in those days. So *de facto*, what is the  
31 position, is in my respectful submission, irrelevant. It may be a practice, it may be a political  
32 stand of the Government, it may be, for various reasons, as in the initial Britishers also were  
33 requested that, please, "*izzat ke liye*," that's the word which is used. Take into account our  
34 feelings and have Muslims. Maybe that's the reason. But that doesn't define the character of  
35 the institution. But therefore, I say, the way, court mandates, only consisting of Muslims with  
36 the provision now...

37



1 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Let's quickly run through this chart, so that we  
2 can go on to the next.

3

4 **TUSHAR MEHTA:** Here, when I say, "need not be Muslim" means, the law doesn't require  
5 him to be Muslim. He may be Muslim, he may be any other religion. Chancellor, need not be  
6 Muslim, Pro-Chancellor need not be Muslim throughout. I'm not reading it. Up to Proctor  
7 need not be Muslim. Then representatives of the department and colleges need not be Muslim.  
8 Some expert in a Chemical Engineering branch may be sent as a member. He may not be  
9 Muslim. He may happen to be a Muslim. But the law doesn't say that, "a representative of  
10 department of colleges belonging to Muslim community." That's not the law. Need therefore  
11 My Lord, I am carefully using the word, "need not be Muslim."

12

13 **JUSTICE SANJIV KHANNA:** Okay, this the chart Annexure A is pre-1981 or post-1981?

14

15 **TUSHAR MEHTA:** As on date. As it stands.

16

17 **JUSTICE SANJIV KHANNA:** And what is the position pre-'81?

18

19 **TUSHAR MEHTA:** I've said. Court is concerned. It was full Muslims, till '51 amendment, it  
20 was deleted. 1951 amendment which was deleted. I'll show that comparative....

21

22 **JUSTICE SANJIV KHANNA:** This is as it exists?

23

24 **TUSHAR MEHTA:** As it exists today. And as it exists today. My Lord, if Your Lordship were  
25 to go, "need not be Muslim," when I say representative...

26

27 **JUSTICE SANJIV KHANNA:** There may be slight problem in this, because, we have to deal  
28 with whether it's an institution which was minority or not as on the date with the Constitution.

29

30 **TUSHAR MEHTA:** Correct. This is irrelevant, according to my submission.

31

32 **JUSTICE SANJIV KHANNA:** So, this 1981 amendment may not be so much, or post-1981  
33 may not be so much... Because, if it was a minor.... to that extent, there is no [UNCLEAR]  
34 between the two sides. If it was a minority institution, as on the date, in 1950, then it will  
35 continue to be a minority institution.

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37 **TUSHAR MEHTA:** My Lords, the difficulty...

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**JUSTICE SANJIV KHANNA:** Of course, they have challenged, some of them have challenged the 1981 amendment also.

**TUSHAR MEHTA:** Yes. That's the issue. I'll come to that, My Lord. And there, when the Bill was introduced, it was introduced on the ground that Congress had that in the election manifest - that was the ground. And there is a beautiful opposition by an eminent Parliamentarian, who was an eminent Counsel of this Court, Somnath Chatterjee, that you can't do this, this is not the way you take away basis of the judgement. I'll come to that. But, My Lord, there are only 35 persons who can be Muslims out of 189, as on date, who can be Muslims, I'm saying. Mandate? No mandate that they have to be Muslims. For example, representatives of Alumni, past Alumni. There are all community students who are studying here. They have Engineering college, Management college, Medical college, everything. Maybe other community people may represent that constituency of Alumni. Two persons representing Urdu language, for example. He may not be a Muslim, but an expert in Urdu. There are people who are experts in Urdu. They can be the representatives. So therefore, I carefully use the word, 'need not be Muslim'. The law doesn't require them to be Muslim, but 39...35 people...37 people may be Muslim. I am against...they also don't require Muslim. Please My Lord, come to page 8.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** What's the reason to bring in representatives of Muslim culture and learning?

**TUSHAR MEHTA:** There is one of the subject... the way, My Lord, other subjects are taught.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** Why did, at all, has to bring in people who are representatives of Muslim culture? Or what is the need to bring in, say, representatives of the All India Muslim Education Conference, what is the genesis of that?

**TUSHAR MEHTA:** My Lord, if Your Lordships sees, there are several subjects being taught. My Lord, there is, a separate constituency, representatives of teachers other than Chairman and Department and Principals of colleges. So, they have representation. Chemistry will have a representation. Medicine, biology, etc., etc. But one of the subjects out of several, is Muslim theology and Muslim culture. Therefore, they have representation. But therefore, it does not say - the provision does not say they will be Muslims. Muslim Cultural Association will send five people. They may be Muslims, they may send others also. Therefore, I say what is required as per ***Kerala Education Bill*** is sprinkling of outsiders. This is not sprinkling of outsiders.

1 This is predominant outsiders, if I may use that expression. Nobody is an outsider but  
2 predominant non-minority people. Yes, I will now come to, I'll just show the chart. My Lord,  
3 the Chief Justice also desired that there has to be on one page how the amendment took place,  
4 first in '51, '65, '72, '81. So, we have prepared that chart. It won't take more than five minutes  
5 because we have depicted the amendment in different colours. So, Your Lordships would get  
6 only in five-seven minutes, My Lord. The amendments.

7

8 **JUSTICE SURYA KANT:** Section 9 was amended in '51 or '59? Section 9?

9

10 **TUSHAR MEHTA:** '51. My Lord, Your Lordships may see the Legend on the top. Black is  
11 original Act as it stood. I'm sorry. My Lord, what is in black, is as it stood when the Act was  
12 passed. Red is '51 amendment, orange is '65 amendment, gold is 1972 amendment and green  
13 is '81 amendment. The relevant would be, kindly see the green one, first. In 1981: An Act to  
14 establish and incorporate a teaching... 'establish and' is deleted. My Lord, with limited  
15 experience, I have come to know about such an amendment for the first time, where the  
16 Preamble is amended that it was not established. The historical fact is changed. By making an  
17 amendment after about 60 years and incorporation continues. So, incorporation is also  
18 establishment. They possibly forgot, they established and incorporated. Now, please see.

19

20 **CHIEF JUSTICE D.Y. CHANDRACHUD:** There may be an alternate reading also, which  
21 is that the amendment to the Preamble is to bring the Preamble in conformity with a historical  
22 fact and in that sense, it's [UNCLEAR].

23

24 **TUSHAR MEHTA:** Historical fact, My Lord, cannot be changed.

25

26 **CHIEF JUSTICE D.Y. CHANDRACHUD:** They're not changing a historical fact. They're  
27 changing the provision of an Act which was inconsistent with the historical fact, so as to bring  
28 it in conformity with the historical fact. I mean there is an, alternative reading is possible.

29

30 **JUSTICE SANJIV KHANNA:** One more thing, this is an amendment by the Parliament.

31

32 **TUSHAR MEHTA:** Correct.

33

34 **JUSTICE SANJIV KHANNA:** Is the Government accepting the amendment or...

35

36 **TUSHAR MEHTA:** Not.

37

1 **CHIEF JUSTICE D.Y. CHANDRACHUD:** How can you not accept it, accept an  
2 amendment by Parliament? Mr. Solicitor, Parliament is an eternal indestructible body under  
3 the Indian Union.

4

5 **TUSHAR MEHTA:** Correct My Lord and continuing.

6

7 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Irrespective of which Government represents  
8 the cause of the Union of India, Parliament's cause is eternal, indivisible and indestructible.  
9 And we can't hear the Government of India to say that amendment which Parliament made is  
10 something I don't stand by. You have to stand by this amendment.

11

12 **TUSHAR MEHTA:** Allow me to answer that.

13

14 **CHIEF JUSTICE D.Y. CHANDRACHUD:** You have an option. You have an option, go  
15 through the amending route and change the amending Act again.

16

17 **TUSHAR MEHTA:** Allow me to answer that question.

18

19 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Ultimately, ultimate power.

20

21 **TUSHAR MEHTA:** Allow me to answer that question. My Lord, I am not arguing a matter  
22 of A versus B. I am before a seven-judge Constitution Bench answering constitutional  
23 questions. That is number one. Number two, the amendment in question was subjected to  
24 challenge before the High Court, and there is a judgment declaring that it is unconstitutional  
25 for A, B, C, D grounds. And as a law officer, it is my right as well as my entitlement and duty  
26 to say that this view appears to be correct. And third....

27

28 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Mr. Solicitor, this will be very radical because  
29 the law officer will be then telling us that I don't abide by what Parliament has done.

30

31 **TUSHAR MEHTA:** My Lord, in that case...

32

33 **CHIEF JUSTICE D.Y. CHANDRACHUD:** You have to stand by what Parliament has  
34 done. But Parliament is supreme, Parliament is undoubtedly supreme in its lawmaking  
35 function. Parliament can always amend a statute, in which case the law officer can say, well, I  
36 have an amended statute now, which I am going to place because..

37

1 **TUSHAR MEHTA:** Your Lordships expect...

2

3 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Can we hear any organ of the Union  
4 Government to say that notwithstanding a Parliamentary amendment, I don't accept this  
5 amendment.

6

7 **TUSHAR MEHTA:** I am supporting the judgment. Would Your Lordships please allow me  
8 to answer argument.

9

10 **CHIEF JUSTICE D.Y. CHANDRACHUD:** That's why I said Parliament is an eternal,  
11 indivisible and an indestructible entity under the democracy.

12

13 **TUSHAR MEHTA:** I am not disputing that. But, My Lord, would you, I'm posing a question  
14 to myself.

15

16 **CHIEF JUSTICE D.Y. CHANDRACHUD:** How can you say I don't accept the validity of  
17 an amendment? I don't accept that there was a ground for comment.

18

19 **TUSHAR MEHTA:** Can I answer. It's more My Lord one sided type of... Can I answer that?  
20 Would a law officer be expected to say that whatever amendments were made in the  
21 Constitution of India during emergency were true only because they were made by the  
22 Parliament? Here, I have a judgment of the, allow me to complete.

23

24 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Mr. Solicitor that's why the 44th Amendment.

25

26 **TUSHAR MEHTA:** I'll not raise that point. Let others argue My Lord. If that is so I'll not  
27 raise the point.

28

29 **CHIEF JUSTICE D.Y. CHANDRACHUD:** The 44th Amendment came in only for that.  
30 The 44th Amendment came to redress the evils which was perpetrated in the name of a  
31 constitutional amendment.

32

33 **TUSHAR MEHTA:** Who will decide these are evils being perpetrated?

34

35 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Obviously. Exactly. You prove my point. The  
36 power to decide that is in the elected body of the people, which is Parliament. Parliament can

1 always say that what we did during the emergency was wrong and we are rectifying it by the  
2 44th Amendment.

3

4 **TUSHAR MEHTA:** Not after it is set aside by the division bench of a High Court and  
5 therefore it is not on the statute book. And when I am not in A versus B situation. I am in a  
6 constitution bench answering a legal proposition whether such a thing can be done or not. And  
7 if I do not do, and there is an affidavit filed by the Government. It's not my stand. It could have  
8 been my stand also. But if I cannot argue that this Amendment could not have been made, I  
9 will have to support, I means any law officer will have to support every Amendment made  
10 during emergency, irrespective of My Lord, whether it is my view or anybody else's view that  
11 this was to remove some anomalies or some bad things happening to the citizens of India. I'm  
12 sorry. Please don't make it a political thing. Please don't do this.

13

14 **KAPIL SIBAL:** [INAUDIBLE]

15

16 **TUSHAR MEHTA:** Then don't interrupt. Then don't do it. Then don't it. You said, I don't  
17 want to interrupt. And then you interrupt.

18

19 **KAPIL SIBAL:** [INAUDIBLE] fidelity in court, please.

20

21 **TUSHAR MEHTA:** My Lord, I am sorry, My Lord. Your Lordships would come in, Your  
22 Lordships would come in.

23

24 **CHIEF JUSTICE D.Y. CHANDRACHUD:** One second.

25

26 **TUSHAR MEHTA:** No, My Lord...

27

28 **CHIEF JUSTICE D.Y. CHANDRACHUD:** No, one second, let's not allow the pristine  
29 character of the dialogue to degenerate.

30

31 **TUSHAR MEHTA:** Yes, My Lord, this is unacceptable.

32

33 **CHIEF JUSTICE D.Y. CHANDRACHUD:** One second, we give you 30 seconds to make  
34 your point of law. Not on personally on the Solicitor General. Let's not keep our, let's keep out  
35 personal.... yes, just 30 seconds.

36

1 **KAPIL SIBAL:** [INAUDIBLE], My Lords, I was in the court, on the day when the emergency  
2 argument was.... I'm only going to make a historical reference, My Lord. I was sitting in court  
3 with the Attorney General of India, Niren De, was standing here and arguing that what has  
4 been done is right. I defend the emergency provision. Why? Because, he could not say  
5 otherwise. It's only that, that I'm saying. I'm not going to say anything against him. I don't  
6 know, why my learned friend...?

7

8 **TUSHAR MEHTA:** You did say something. You used an uncivilized word which is not used  
9 in the Court, and you generally do not use. Maybe infected as of now, but, My Lord, I'll say  
10 Your Lordships, the distinction is, Niren De was not in a situation, where one High Court had  
11 struck it down and the provision was not on the statute book.

12

13 **KAPIL SIBAL:** Yes, Madhya Pradesh High Court had struck it down.

14

15 **RAJEEV DHAVAN:** Nine High Courts.

16

17 **KAPIL SIBAL:** Yes. What...

18

19 **TUSHAR MEHTA:** There were other High Courts which have upheld and there is a .... all  
20 Your Lordships are aware, Mr. Niren De told the court that, "if somebody is hanged, can we  
21 not do anything?" "Yes." He said, "yes. We cannot do anything." It was not to defend it, it was  
22 to instigate the judges that, "please, interfere." This is the position. Everyone knows, there are  
23 two versions. When Mr. Niren De, the learned Attorney General then told the court, when the  
24 court asked, "do we not protect Article 21 if somebody is being hanged or his personal liberty  
25 is deprived?" He said, "Yes. You cannot do it." It was not to defend the Act. It was to instigate  
26 the court that, "you have... This is a position. Please interfere."

27

28 **JUSTICE SURYA KANT:** Mr. Solicitor General, let's come back to the point. Your argument  
29 is, that 1981 amendment, you need not to comment, for the simple reason that by virtue of the  
30 judicial verdict, this provision has been erased from the statute book.

31

32 **TUSHAR MEHTA:** Correct.

33

34 **JUSTICE SURYA KANT:** That is what you want to... So, you can argue....

35

36 **TUSHAR MEHTA:** It is... It doesn't exist as of now. I leave it at that, My Lord. I will not be  
37 uncivilized in my arguments. Now, please come to... Mr. Sibal is generally not, but... please

1 see, '51 Amendment first, '51 Amendment is at page, the Section 8, please see Section 8. It is  
2 made...This is post-Constitution. The university shall, subject to the provision of this Act and  
3 the ordinances, be open....

4

5 **JUSTICE SURYA KANT:** Section 8?

6

7 **TUSHAR MEHTA:** 8. Red is '51 Amendment. "The university shall, subject to the provision  
8 of this Act and the ordinances, be open to persons of either sex and whatever race, creed, caste  
9 or class. And it shall not be lawful for the university, to adopt or impose on any person, any  
10 test, whatsoever of religious belief or profession, in order to entitle him, to be admitted therein,  
11 as a teacher or student, or to hold any office therein, or to graduate thereat, or to enjoy or  
12 exercise any privilege thereof, except in respect of any particular benefaction accepted by the  
13 university where such test is made a condition thereof by any testamentary, or other so and so  
14 and so..." Now, please see...

15

16 **JUSTICE SANJIV KHANNA:** "While there is nothing in this section shall be deemed to  
17 prevent a religious instruction being given in a manner prescribed..."

18

19 **TUSHAR MEHTA:** Yes, My Lord. "To prevent the various instructions being given in the  
20 manner prescribed by the ordinances, to those, who have consented." My Lord, this is 21. 28.  
21 Article 28.

22

23 **JUSTICE SANJIV KHANNA:** And, just now, come to 28, Article 28.

24

25 **TUSHAR MEHTA:** 28, My Lord, yes. But I must tell Your Lordships, this is not under  
26 challenge now. But this was, I'm just saying this was to bring it in conformity with the  
27 constitution.

28

29 **JUSTICE SANJIV KHANNA:** Just let's have a look at 28.

30

31 **TUSHAR MEHTA:** 28 My Lord. No religious instruction shall be provided. No religious  
32 instruction shall be provided in any educational institution wholly maintained out of the state  
33 funds.

34

35 **JUSTICE SANJIV KHANNA:** Now, in 1951, this was a religious, this institution was  
36 maintained by only by state funds.

37



1 **TUSHAR MEHTA:** My Lord, may not be done. May not be wholly.

2

3 **JUSTICE SANJIV KHANNA:** No, wholly will have to exclude small, little fees, et cetera.  
4 But it was...

5

6 **TUSHAR MEHTA:** Otherwise, yes, yes.

7

8 **JUSTICE SANJIV KHANNA:** It was wholly. In fact, it is your argument that it was wholly...

9

10 **TUSHAR MEHTA:** They were having some minor...

11

12 **JUSTICE SANJIV KHANNA:** There is a bar on providing religious instructions in  
13 institutions wholly maintained by state fund. Now read 2.

14

15 **TUSHAR MEHTA:** Nothing in Clause 1 shall apply to an educational institution which is  
16 administered by the state but has been established under any endowment or trust which  
17 requires that religious instruction shall be imparted in such institution.

18

19 **JUSTICE SANJIV KHANNA:** So, the exception carved out is, may be administered by the  
20 state, but the establishing is by the religious, it's a trust or endowment which is established,  
21 there the religious instructions can be given. Now read 3.

22

23 **TUSHAR MEHTA:** No person attending any educational institution recognized by the State  
24 or receiving aid out of the State funds shall be required to take part in any religious instruction  
25 that may be imparted in such institution, or to attend any religious worship that may be  
26 conducted in such institution or in any premises attached thereto, unless such person, or if  
27 such person is a minor, his guardian has given his consent thereto.

28

29 **JUSTICE SANJIV KHANNA:** Okay. According to you, as on the date when Constitution  
30 was enforced, which part of Article 28 will apply? Which clause of Article 28 will apply?

31

32 **TUSHAR MEHTA:** My Lord, 3.

33

34 **JUSTICE SANJIV KHANNA:** Not 1 and 2?

35

36 **TUSHAR MEHTA:** 1 and 3, but 2 may not apply. 1 and 3.

37

1 **JUSTICE SANJIV KHANNA:** If 1, applies then is it possible for that institution to grant or  
2 permit religious instructions?

3

4 **TUSHAR MEHTA:** 1, is absolute My Lord. That's what Your Lordships said. It may not be  
5 permissible as the Constitution leads, it may not be permissible. But My Lord possibly...

6

7 **JUSTICE SANJIV KHANNA:** Then when, 1951 Amendment, which is in terms of 3 to give  
8 an option, when you say 3 applies indirectly, you are accepting it as a minority institution,  
9 because 3 only applies to minority institutions.

10

11 **TUSHAR MEHTA:** No, My Lord.

12

13 **JUSTICE SANJIV KHANNA:** Yes. No sorry, it applies to non-state funded institutions,  
14 wholly non-state funded institutions. You are right to that effect.

15

16 **TUSHAR MEHTA:** But in any case, this is not...

17

18 **JUSTICE SANJIV KHANNA:** Or, in case of state-funded institutions which are minority  
19 institutions 3, obviously will apply.

20

21 **TUSHAR MEHTA:** Now, My Lord, Section 9 was deleted. If Your Lordships, sees, Section 9,  
22 My Lord, which required please see My Lord, 9 original Act. The court shall have power to  
23 make statutes providing...

24

25 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Let's go back to Article 28 and the proviso to  
26 Section 8.

27

28 **TUSHAR MEHTA:** I'm sorry, My Lord. I was little...

29

30 **CHIEF JUSTICE D.Y. CHANDRACHUD:** We'll just go back to the proviso.

31

32 **TUSHAR MEHTA:** I was on the last point My Lord. My apologies. But I genuinely feel I can  
33 and I will.

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35 **CHIEF JUSTICE D.Y. CHANDRACHUD:** '81?

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37 **TUSHAR MEHTA:** The '81 Amendment. My apologies for that.

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**CHIEF JUSTICE D.Y. CHANDRACHUD:** '81 Amendment. Let's see Section 8 for a moment. We were looking at Section 8 at your page.

**TUSHAR MEHTA:** As it stood?

**CHIEF JUSTICE D.Y. CHANDRACHUD:** No, after the '81 Amendment. Because '81 Amendment is in red.

**TUSHAR MEHTA:** '51 is in red.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** Sorry, I meant the '51 amendment. The '51 amendment is in red.

**TUSHAR MEHTA:** Correct.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** Now, what the '51 Amendment does is introduces the proviso. Provided that nothing in this section shall be deemed to prevent religious instruction being given in the manner prescribed by the ordinances to those who have consented to receive it. So, it expressly allows for religious instruction in AMU, subject to the consent of those who are receiving a religious instruction. Now, under what provision of Article 28 does this proviso to Article, to Section 8 fall? If you look at the first clause of Article 28, the first clause of Article 28 interposes a complete bar. Right? See Article 28(1).

**TUSHAR MEHTA:** No religious instruction shall be provided in any educational institution wholly maintained out of the State funds.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** Now it is maintained out of State funds. For a moment we'll take it on the basis that it is wholly maintained out of State funds. So, any form of religious instruction would *ex facie* barred in AMU by virtue of the provisions of Article 28(1). Now, Article 28(2), Clause 2 lifts the bar to a certain extent,

**TUSHAR MEHTA:** Except for two exceptions.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** Now, where does it lift the bar? Let's. See 28(2). Nothing in Clause 1 shall apply...

1 **TUSHAR MEHTA:** I'll read... shall apply to an educational institution which is administered  
2 by the State, but has been established under any endowment or trust, which requires that  
3 religious instruction shall be imparted in such institution.

4  
5 **CHIEF JUSTICE D.Y. CHANDRACHUD:** And now what does 3 do that no person who  
6 attends such an institution or State-headed institution will be compelled to undergo religious  
7 instruction unless the parent or guardian has consented. This puts the requirement of consent.  
8 So, Clause 2, then, otherwise, there would have been an absolute bar under Article 28(1). What  
9 Clause 2 of Article 28 does is to lift the bar. In the case of an institution which may be otherwise  
10 administered by the State, but which has been established under an endowment or trust which  
11 requires that religious instruction shall be imparted in such institution.

12  
13 **TUSHAR MEHTA:** 2 doesn't apply in...

14  
15 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Perhaps the proviso to Section 8 is in  
16 recognition of, is an implementation of the provisions or is in pursuant to the provisions of  
17 Clause 2 of Article 28. But for Clause 2 of Article 28 that proviso would have run afoul of Clause  
18 1 of Article 28. So, that proviso comes in as a result of Clause 2 of Article 28. Now, when it  
19 comes under Clause 2 of 28, it's in recognition of the fact that this is established by a trust or  
20 endowment, which requires that religious instruction has to be given or imparted in such  
21 institution. That could may be the position.

22  
23 **TUSHAR MEHTA:** The Government may be kind of bound by the covenants of that trust or  
24 endowment.

25  
26 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Endowment or trust.

27  
28 **TUSHAR MEHTA:** Another thing. 1, my respectful submission is that even if there is some  
29 internal generation of money, possibly 1 may not apply. But that situation we are not facing.  
30 Here it would be 3. That is why Section 9 is deleted, number 1. Number 2, 28, is...

31  
32 **JUSTICE SANJIV KHANNA:** What it permits is, what the '51 amendment permits is, you  
33 can impart religious instructions in this institution. So, indirectly they are saying that 1 will  
34 not apply. Now 1 may not apply if the institution falls under Article 30.

35  
36 **TUSHAR MEHTA:** Not necessarily.

37

1 **JUSTICE SANJIV KHANNA:** We'll have to harmoniously interpret Article 28 and Article  
2 30.

3

4 **TUSHAR MEHTA:** May I answer that question? My Lord, may I give one more...? Your  
5 Lordships can, at this stage, examine. 28 is an agnostic provision. It applies to minority as well  
6 as non-minorities.

7

8 **JUSTICE SANJIV KHANNA:** Correct.

9

10 **TUSHAR MEHTA:** So, even if it is a minority institution or non-minority institution, one  
11 says, "if it is wholly...

12

13 **JUSTICE SANJIV KHANNA:** It introduces the character of secularism in education.

14

15 **TUSHAR MEHTA:** Yes, and 3 kind of takes a middle path, that, "All right. If you wish to,  
16 you provide, but don't compel." And even in case of a minority, academically and  
17 constitutionally, it is possible that a minority institution, say Hindu... Muslim minority  
18 institution, may say that we will provide religious education in Hindu studies and Islamic  
19 studies. What they cannot do, they cannot compel the students. So, it is...

20

21 **CHIEF JUSTICE D.Y. CHANDRACHUD:** 3 is a provision, which is against compulsion.  
22 What 3 does, is basically to create an option. That's why, 9 came to be deleted, really speaking,  
23 on that sense.

24

25 **TUSHAR MEHTA:** Exactly, I'm obliged.

26

27 **CHIEF JUSTICE D.Y. CHANDRACHUD:** 9 was deleted.

28

29 **TUSHAR MEHTA:** Simultaneously.

30

31 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Because 9 provided for compulsory religious  
32 instructions to Muslim students.

33

34 **TUSHAR MEHTA:** Yes, therefore.

35

1 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Now, after the deletion of 9, it's not that  
2 religious instruction is done away with, but all students, Muslim or otherwise, have now a  
3 choice.

4

5 **JUSTICE SANJIV KHANNA:** 3 may be therefore exception to both 1 and 2. Read it  
6 carefully.

7

8 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Another important aspect of 3 is, 3 applies,  
9 even if you are not wholly maintained out of State funds, because 3 merely says "receiving aid."  
10 "Receiving aid" maybe 5%, 10%, whatever. Once you're receiving any aid, then 3 applies. 1  
11 applies, 1 is wholly out of State funds.

12

13 **TUSHAR MEHTA:** So, meaning thereby, if you have a Madrassa or Gurukul, for both My  
14 Lord, I'm saying. Without receiving any aid, you impart religious education, religious  
15 instruction, no difficulty. But the moment you start accepting something from the  
16 Government, Constitution steps in and whether...

17

18 **JUSTICE SANJIV KHANNA:** This will be important. Just read 3 once again.

19

20 **TUSHAR MEHTA:** Yes, My Lord. No person attending any educational institution  
21 recognized by the State.

22

23 **JUSTICE SANJIV KHANNA:** So, 1, requirement is recognized by the State. Number 2 is...

24

25 **TUSHAR MEHTA:** Or receiving aid out of the State fund.

26

27 **JUSTICE SANJIV KHANNA:** Here, the words are not used "wholly funded by the State."

28

29 **TUSHAR MEHTA:** Correct My Lord, yes.

30

31 **JUSTICE SANJIV KHANNA:** Any aid received by the State.

32

33 **TUSHAR MEHTA:** Not wholly.

34

35 **JUSTICE SANJIV KHANNA:** Not wholly. So, if we read it as an exception to 1, then it may  
36 be permissible even for wholly funded State institutions to impart religious education.

37

1 **TUSHAR MEHTA:** No.

2

3 **JUSTICE SANJIV KHANNA:** No, you're not accepting that position. Your position is if it's  
4 wholly funded by the State, then, number 1 apply, Clause 1 will apply. Be careful what you're  
5 saying. It may have repercussions.

6

7 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Actually, Clause 1 imposes an absolute bar.  
8 Right? That if you are funded wholly out of State funds you cannot have a religious instruction  
9 at all. That's Clause 1. Clause 2 lifts the bar, which is evident from the use of the words "nothing  
10 in Clause 1."

11

12 **TUSHAR MEHTA:** 1. It's an exception to 1.

13

14 **CHIEF JUSTICE D.Y. CHANDRACHUD:** It's an exception to 1. Now, what 3 does is 3  
15 imposes a requirement when you are receiving any aid or of course, recognition. You're not on  
16 the recognition aspect right now. So, 3 is condition, if you're receiving any aid, even if you're  
17 receiving 5% aid or 1% aid from the State, 3 applies, and what does 3 say? 3 says, is that you  
18 can have religious instruction, but you can't make it compulsory, unless in the case of a minor,  
19 the parents or the guardian consent. Therefore 3 in that sense, 1 applies only where you are  
20 wholly funded by the State. Even if you are not wholly funded by the State you cannot  
21 compulsorily have religious instruction. Which therefore, means that if you are not funded by  
22 the State, you can make religious instruction compulsory, there is no difficulty. If you are  
23 funded by the State, whether wholly, or in part, at the least, if you are funded in part, you are  
24 receiving any aid, because it says "receiving aid." If you are receiving aid, you cannot have  
25 compulsory religious instruction, that's the purport of that.

26

27 **TUSHAR MEHTA:** That's the middle of the way. If somebody wants, give it.

28

29 **CHIEF JUSTICE D.Y. CHANDRACHUD:** But if you are wholly funded by the State you  
30 cannot have any religious instruction at all.

31

32 **TUSHAR MEHTA:** Even with consent.

33

34 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Even with consent.

35

36 **JUSTICE SURYA KANT:** If you are not receiving aid, but if you are recognized institution...

37

1 **CHIEF JUSTICE D.Y. CHANDRACHUD:** And recognised. It's either way. If you are  
2 recognized but you are not receiving aid from the State, you cannot have compulsory religious  
3 education.

4

5 **JUSTICE SANJIV KHANNA:** Therefore, if we accept your position, if it's a non-minority  
6 institution, can they impart religious education?

7

8 **TUSHAR MEHTA:** Yes, subject to 28(3).

9

10 **JUSTICE SANJIV KHANNA:** But then 28(3), as per you, the stand taken by you, will only  
11 apply to non-fully funded institutions.

12

13 **CHIEF JUSTICE D.Y. CHANDRACHUD:** So, a non-minority institution which does not  
14 receive any aid, you can have compulsory religious instruction. But even if you are, if you are  
15 a non-minority institution and you're receiving any aid from the State you can't have  
16 compulsory religious instruction.

17

18 **TUSHAR MEHTA:** Correct My Lord.

19

20 **CHIEF JUSTICE D.Y. CHANDRACHUD:** So, 28(3) applies, 28 is agnostic to whether you  
21 belong to the minority or otherwise.

22

23 **TUSHAR MEHTA:** Correct.

24

25 **CHIEF JUSTICE D.Y. CHANDRACHUD:** 28 applies across the board.

26

27 **TUSHAR MEHTA:** That's what *TMA Pai* also recognised.

28

29 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Brother Surya Kant says 28 draws no  
30 distinction between whether you're a minority or non-minority.

31

32 **TUSHAR MEHTA:** That's what I said, 28 is agnostic provision, whether you are minority or  
33 non-minority.

34

35 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Also, because, 28 occurs in a sub-title or sub-  
36 part called "Right to freedom of religion" that applies to everybody.

37



1 **TUSHAR MEHTA:** 29 and 30 only talks of minority.

2

3 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Cultural and educational rights.

4

5 **TUSHAR MEHTA:** Yes. And 29 and 30 only uses the word "minorities" necessary for the  
6 reason that '51 amendment is not under challenge.

7

8 **JUSTICE SANJIV KHANNA:** No, we are interpreting. We are just interpreting. We are not  
9 going into the merits or demerits of '51, but the impact thereof. You see, if we accept this  
10 argument, minority institution which is fully funded by the State, cannot impart religious  
11 education.

12

13 **TUSHAR MEHTA:** Correct.

14

15 **JUSTICE SANJIV KHANNA:** And in spite of Article 30, Clause 1.

16

17 **TUSHAR MEHTA:** Once, Section 9 is deleted, compulsory education to Muslim students,  
18 whatever limited minority status was there, that also went in '51. Compulsory education...

19

20 **JUSTICE SANJIV KHANNA:** Article, Clause 1 and 3 of Article 28.

21

22 **TUSHAR MEHTA:** *TMA Pai*. I will just read.

23

24 **JUSTICE SANJIV KHANNA:** Does it deal with that issue?

25

26 **TUSHAR MEHTA:** This is 5(a) para 144, page 651. 651. There the context was little different,  
27 but 28 is discussed. But my respectful submission would be, in facts of this case...

28

29 **JUSTICE SANJIV KHANNA:** Has this legal position been interpreted, the Article 28 been  
30 interpreted?

31

32 **TUSHAR MEHTA:** Yes. Please see para 144, Volume 5(a) page 651. The discussion in eleven-  
33 judge bench judgement of *TMA PAI* about 28, My Lord Justice Mishra and Justice Pardiwala.  
34 May I read para 144. It cannot be argued that no conditions can be imposed while giving aid  
35 to a minority institution. Whether it is an institution run... This is post-Constitution.

36

37 **JUSTICE SANJIV KHANNA:** What page number?

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**TUSHAR MEHTA:** 651. Please kindly bear in mind this is post- Constitutional scenario.

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

**TUSHAR MEHTA:** The earlier conditions can be imposed. Britishers were not bound by 30 or any other fundamentals. It cannot be argued that no conditions can be imposed while giving aid to a minority institution, whether it is an institution run by the majority or the minority. All conditions that have relevance to the proper utilization of the grant in aid by an educational institution can be imposed. All that Article 30, Sub-article 2 states is that on the ground that an institution is under the management of a minority, whether based on religion or language, grant of aid to that educational institution cannot be discriminated against. If other educational institutions are entitled to receive the aid. That's Article 14. The condition for grant or non-grant of aid to educational institutions have to be uniformly applied whether it is a majority-run institution or a minority-run institution. As in case of a majority-run institution the moment a minority institution obtains a grant of aid, Article 28 of the Constitution comes into play. When an educational institution is maintained out of State funds, no religious instruction can be provided therein. Article 28(1) does not state that it applies only to educational institutions, that are not established or maintained by religious or linguistic minorities. Furthermore, upon the receipt of aid, the provisions of Article 28(3) would apply, to all educational institutions, whether run by minorities or non-minorities, as they ....

**CHIEF JUSTICE D.Y. CHANDRACHUD:** So, really speaking.... Right. And therefore, the court says that, "28 applies both to minority and non-minority institutions." 28 applies to both.

**TUSHAR MEHTA:** Right. It's an agnostic provision. Because, we are right now, we are in the mental framework of religious minority.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** Once you receive aid or you are recognized within the meaning of 28(3), then the provisions... 28(1) applies, once you are wholly funded by the State.

**TUSHAR MEHTA:** My Lord, we are in....

1 **CHIEF JUSTICE D.Y. CHANDRACHUD:** And 28(3) applies, whether you are receiving  
2 part aid, full aid, or whether you are recognized. Then 28(3), the bar comes in, that you cannot  
3 compel religious instruction. That's the... and it is not as if 30 overrides 28. The prescription  
4 in 28 applies to minority institution as well.

5

6 **TUSHAR MEHTA:** As well. My Lord, kindly...

7

8 **KAPIL SIBAL:** [INAUDIBLE] That's the same page.

9

10 **SPAEKER UNKNOWN:** 558.

11

12 **JUSTICE SANJIV KHANNA:** Page number?

13

14 **KAPIL SIBAL:** Para 88, of *TMA Pai*.

15

16 **JUSTICE SANJIV KHANNA:** What is the page number?

17

18 **CHIEF JUSTICE D.Y. CHANDRACHUD:** This is 626.

19

20 **TUSHAR MEHTA:** 626. My Lord, that would... While article 28(1) and 28(2) relate to... My  
21 Lord, Your Lordships got that? "While Article 28(1) and Article 28(2) relate to institutions that  
22 are wholly maintained out of the State funds, Article 28(3) deals with an educational  
23 institution, that is recognized by the State or receives aid out of the State funds. Article 28(3)  
24 gives the person attending any educational institution the right, not to take part in any  
25 religious instruction, which may be imparted by an institution recognized by the State or  
26 receiving aid from the State. Such a person also has the right not to attend any religious  
27 worship that may be conducted in such institution or in any premises attached thereto, unless  
28 such a person is or if he or she is a minor, his or her guardian has given his or her consent. The  
29 reading of Article 28(3) clearly shows that no person attending an educational institution can  
30 be required to take part in any religious instruction or any religious worship, unless the person  
31 or his or her guardian has given his or her consent thereto. In a case, where the educational  
32 institution has been recognized by the State or receives the aid out of the State funds. We have  
33 seen that Article 26(a) gives the religious denomination the right to establish an educational  
34 institution. The religious denomination being either of the majority community or minority  
35 community. In any institution, whether established by the majority or a minority religion, if  
36 religious instruction is imparted, no student can be compelled to take part in the said religious  
37 instruction or in any religious worship.

1  
2 An individual has the absolute right not to be compelled to take part in any religious  
3 instruction or worship. Article 28(3), thereby recognizes the right of an individual, to practice  
4 or profess his own religion. In other words, in matters relating to religious instruction or  
5 worship there cannot, there can be no compulsion, where the educational institution is either  
6 recognized by the State or receives aid from it. Articles 29 and 30 are a group of articles,  
7 relating to cultural or educational rights. Article 29(1) gives the right to any citizen, of a section  
8 of citizens residing in India or any part thereof, and having distinct language, script or culture  
9 of its own to conserve the same. Article 29(1) does not refer to any religion, even though the  
10 marginal note of the article mentions the interest of minorities. Article 29(1), it can be My  
11 Lord, linguistic, 29(1) essentially refers to sections of citizens who have a distinct language,  
12 script, or culture, even though their religion may not be the same. The common thread that  
13 runs through Article 29(1) is language, script or culture and not religion. For example, if any  
14 part of the country, there is a section of the society that has a distinct language, they are  
15 entitled to conserve the same, even though the persons having that language, may profess  
16 different religions. Article 29(1) gives the right to all sections of citizens, whether they are in  
17 minority or majority religion, to conserve their language, script, or culture, etc. My Lord. May  
18 I read further? For example, Gujarati being a linguistic minority in say Delhi, may provide for  
19 an institution, and it may have people from Muslim community, Hindu community, Parsi  
20 community, all speaking Gujarati language. So, what is binding is the linguistic minority  
21 character or some kind of a culture. That's My Lord, 29 provides.

22  
23 **CHIEF JUSTICE D.Y. CHANDRACHUD:** But Parsi Gujarati is very different from  
24 Gujarati-Gujarati.

25  
26 **TUSHAR MEHTA:** That is true. That is true, My Lords.

27  
28 **CHIEF JUSTICE D.Y. CHANDRACHUD:** A little more colourful also.

29  
30 **TUSHAR MEHTA:** Sometimes extra colourful. Parsi abuse doesn't feel like an abuse. They  
31 abuse in such a way that, lovingly. Your Lordship knows, My Lord has the...

32  
33 **KAPIL SIBAL:** [INAUDIBLE]

34  
35 **TUSHAR MEHTA:** I don't bring, I'm not a man in... anyway, My Lord, I am just...

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37 **KAPIL SIBAL:** [INAUDIBLE]

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**CHIEF JUSTICE D.Y. CHANDRACHUD:** 29(2).

**TUSHAR MEHTA:** No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of the State funds, on grounds, only of religion, race, caste, language, or any of.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** So, we have now examined the '65 Amendment, '51 Amendment. Now we go to the '65 Amendment. That is orange amendment. Right? Orange is basically in Section 23, the '65 Amendment?

**TUSHAR MEHTA:** Yes. There is no other change. There are some changes My Lord in...no, there is none.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** I think 23. Just let's see what happens in...

**TUSHAR MEHTA:** 23, My Lord, the court. 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 statute.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** Then Sub-section 2 is deleted.

**TUSHAR MEHTA:** ...is deleted, the court shall be supreme authority, et cetera, et cetera. Please turn the page, My Lord, over. And it is given, advisory function. In accordance with... I'm sorry My Lords... statutes. The functions of the court shall be, to advise the Visitor in respect of any matter which may be referred to the court for advice, to advise any other authority of the university in respect of any matter which may be referred to the court for advice and to perform such other duties and exercise, such other powers as may be assigned to it by the Visitor or under this Act. My Lord this...

**CHIEF JUSTICE D.Y. CHANDRACHUD:** This was '65 Amendment?

**TUSHAR MEHTA:** This was '65.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** What happened in '72, anything substantive in '72 or?

1 **TUSHAR MEHTA:** Yes, My Lord. Please come to, Section 23 only. My Lord, there is no  
2 major change, in other aspects except, some powers of the Vice-Chancellor are improved. But  
3 23 in '72 Act, the constitution of the court and the term of office of its members shall be such  
4 as may be prescribed by the statute. Subject to the provisions of this Act, the Court shall have  
5 the following powers and functions to review from time to time the broad policies and  
6 programs of the university and to suggest measures for the improvement and development of  
7 the university, to consider and pass resolution on the annual report, annual accounts of the  
8 university and audit report thereon to advise the Visitor in respect of any matter which may  
9 be referred to it for the advice and to perform such other functions as may be prescribed in the  
10 Act.

11

12 **JUSTICE SANJIV KHANNA:** Look at the original Act 17 and 18 also? 17 and 19.

13

14 **TUSHAR MEHTA:** Yes, My Lord. Please come to 17.

15

16 **JUSTICE SANJIV KHANNA:** Chancellors shall be elected by the Court.

17

18 **TUSHAR MEHTA:** Yes, My Lord. No change in '51 and '65.

19

20 **CHIEF JUSTICE D.Y. CHANDRACHUD:** '72 they made that change in [UNCLEAR].

21

22 **TUSHAR MEHTA:** The Chancellor shall be appointed by the Visitor in such manner as may  
23 be prescribed by the statutes. The Chancellor shall, by virtue of his office, be the Head of the  
24 university. The Chancellor shall, if present, preside at convocations of the university.

25

26 **JUSTICE SANJIV KHANNA:** That's not relevant. But what is relevant part is that prior to,  
27 in the original enactment the successor to the Chancellor shall be elected by the Court. And  
28 number 2, Vice-Chancellor also, the successors to the first Vice-Chancellor shall be elected by  
29 the Court amongst its members.

30

31 **TUSHAR MEHTA:** Yes, My Lord.

32

33 **CHIEF JUSTICE D.Y. CHANDRACHUD:** After the amendment, he will be appointed by  
34 the Visitor?

35

36 **TUSHAR MEHTA:** By the Visitor.

37

1 **JUSTICE SANJIV KHANNA:** But such a point shall be subject to the approval of Governor  
2 General in Council, as far as Vice-Chancellor is concerned.

3

4 **CHIEF JUSTICE D.Y. CHANDRACHUD:** One very interesting amendment, which was  
5 made in 1972, come back to Section 5.

6

7 **TUSHAR MEHTA:** Yes.

8

9 **CHIEF JUSTICE D.Y. CHANDRACHUD:** The 5(2), university shall have the following  
10 power of 5(2) was, to promote oriental and Islamic studies and give instruction in Muslim  
11 theology and religion and to impart moral and physical training.

12

13 **TUSHAR MEHTA:** This was original.

14

15 **CHIEF JUSTICE D.Y. CHANDRACHUD:** B now comes in. It says, to promote the study  
16 of religion, civilization and culture of India.

17

18 **TUSHAR MEHTA:** Of India. Not one religion

19

20 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Becomes more secular in nature. And then  
21 comes '81. Green is '81.

22

23 **TUSHAR MEHTA:** Yes. '81. Definition clause. Please come to the definition clause. This  
24 does not stand as of now, it's set aside. 2(l). University means, originally it was Aligarh Muslim  
25 University, the educational institution of their choice, established by the Muslims of India,  
26 which originated as the Muhammadan Anglo Oriental College, Aligarh, and which was  
27 subsequently incorporated as the Aligarh Muslim University.

28

29 **CHIEF JUSTICE D.Y. CHANDRACHUD:** What the amendment of 1981 did was, to  
30 squarely sort of give it a minority status. That was the object. Because two things they did. they  
31 deleted the word "established" from the Preamble. And in the definition of university, they  
32 now take it, it's a recognition that well, this was established by the Muslims of India.

33

34 **TUSHAR MEHTA:** That can be done or cannot be done is a subject.

35

36 **CHIEF JUSTICE D.Y. CHANDRACHUD:** No, no that's a separate issue.

37

1 **TUSHAR MEHTA:** That's a separate issue. That's what they did.

2

3 **CHIEF JUSTICE D.Y. CHANDRACHUD:** What was the purport of the amendment?

4

5 **TUSHAR MEHTA:** Yes, that's what they did.

6

7 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Solicitor, it's well settled that the Legislature,  
8 whether the State Legislature or Parliament, can take away the basis of the... basis of a  
9 judgment. So, for instance, if a judgment holds a statutory provision to be violative of Article  
10 14 on the ground, and it does not comport with natural justice, the Legislature can introduce  
11 a provision for natural justice, so as to make it in conformity with the law, by recognizing... by  
12 supplanting the deficiency which was noticed by the judgment. But what you can't do, is to  
13 directly override a judgment. Right? So, for instance, the classical case was *Madan Mohan*  
14 *Pathak* where there was a binding settlement, an industrial settlement, on which, a  
15 *mandamus* was issued by the Supreme Court. That settlement was sought to be overridden by  
16 an amending provision, which the court held, 'this you can't do.' Because it has attained  
17 finality. Now, what does 2(l) do? 2(l)... or before we go to 2(l), what did *Basha* do? *Basha*  
18 said that, "AMU was not established by a Muslim minority, but was established under an Act  
19 of the Imperial Legislature, right? And it is administered, not by the minority, but is  
20 administered by this institution, by the Act. Can by merely an amendment to the definition,  
21 can you take away the basis of *Basha*? Because....

22

23 **TUSHAR MEHTA:** My Lord, my legal...

24

25 **CHIEF JUSTICE D.Y. CHANDRACHUD:** ... what 2(l) does, possibly what the argument  
26 in this, and we may have to hear the other side also in response, because, this was not argued  
27 in the opening. That 2(l) merely alters the definition of the expression 'university.' But, does  
28 the alteration of the definition of the expression 'university' take away the basis of *Basha*,  
29 that the very established... Now, what the '81 Amendment does is, it doesn't purport to  
30 establish the university at all. Now, it says that, "the word 'establish' is taken away from the  
31 Preamble."

32

33 **TUSHAR MEHTA:** But 'incorporated' remains.

34

35 **CHIEF JUSTICE D.Y. CHANDRACHUD:** 'Incorporated' remains. Then 2(l) says, "it was  
36 established by the Muslim, by the Indian Muslim... Muslims of India, originating as the MAO  
37 college, Aligarh.



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**TUSHAR MEHTA:** Correct.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** And which was subsequently incorporated.

**TUSHAR MEHTA:** Argument rejected in *Basha*, is incorporated by way of a definition.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** Now, is this amendment, by the way, in '81, is it retrospective or is it prospective?

**RAJEEV DHAVAN:** My Lord, our argument before the Allahabad High Court is, its declaratory nature and therefore retrospective, that was the argument.

**TUSHAR MEHTA:** I don't wish to give examples, but if you can change history by changing definition in a statute, Your Lordships can, with Your Lordship's wide experience and wisdom, visualize, what can be done? There are several historical facts, My Lord....

**CHIEF JUSTICE D.Y. CHANDRACHUD:** No, Parliament can do it. Parliament has a power to do it. Parliament has the power to do it. Because Parliament can.... while implementing a statute, subject to a challenge under Article 14, Parliament can....

**TUSHAR MEHTA:** Competence, yes.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** It has a competence to say this is our truth when we enact the law.

**TUSHAR MEHTA:** Whether it amounts to effacing *Basha* or not, that's the question.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** But more important substance of the point is, is this really declaratory as they are arguing or are you merely amending the definition without taking away the basis of *Basha*? The latter, you cannot do. The former, you can do.

**TUSHAR MEHTA:** You can't sit in an appeal. The Parliament cannot sit in appeal and set aside the judgment. If there is some lacuna found by the court that lacuna can be filled up. But My Lord, it is my submission.

1 **CHIEF JUSTICE D.Y. CHANDRACHUD:** See *Basha* said that AMU was not established.  
2 *Basha* says AMU is not established by the Muslim minority.

3

4 **TUSHAR MEHTA:** Intra party display.

5

6 **CHIEF JUSTICE D.Y. CHANDRACHUD:** But it was established under an Act of the  
7 Imperial Legislature. Well, this can merely an amendment to the definition of the expression  
8 university take away that basis of *Basha*.

9

10 **TUSHAR MEHTA:** And My Lord, their argument that it was established by the educational  
11 institution of their... by Muslims of India which originated...

12

13 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Because to take away the basis of *Basha* you  
14 have to take away the underlying facts on the basis of which *Basha* has been decided. Have  
15 they really altered those underlying parts by this amendment?

16

17 **TUSHAR MEHTA:** I requested Your Lordship, that I would like to read *Basha* the way I  
18 request Your Lordships to read. *Basha* doesn't say what they are apprehending. *Basha* is a  
19 *sui generis* Allahabad...Aligarh University case. And it defines and the records certain factual  
20 findings also, which My Lord, this amendment of the Parliament seeks to do away with.

21

22 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Is there an alternate reading not possible? I  
23 mean, we are discussing various options, just because, it's not an easy Act, it's a thorny issue.  
24 The original Act says the university is established and incorporated under this Act. The  
25 Preamble said "established and incorporated", right? Suppose "establish" was not there, and  
26 it had merely used the word "incorporated under the Act."

27

28 **TUSHAR MEHTA:** Only "incorporated."

29

30 **CHIEF JUSTICE D.Y. CHANDRACHUD:** In which case it would have been established  
31 by whoever it had been established by, it was given a statutory form of a juristic personality by  
32 the original Act of 1920. Now *Basha* relied heavily on the Preambular provision which was  
33 established and incorporated, that means you are setting it up for the first time by the Act of  
34 Parliament.

35

36 **TUSHAR MEHTA:** Even incorporation would be setting it up for the first time.

37

1 **CHIEF JUSTICE D.Y. CHANDRACHUD:** No, that may be a little different, because  
2 incorporation is giving it a juristic form. Establishment is an establishment in fact, but is it  
3 open to Parliament? Is it, to put it the other way, is it not open to Parliament to say that well,  
4 **Basha** relied on a statutory provision, namely the word "established" to hold it was  
5 established under an Act and not by somebody *dehors* the statute. We will amend the statute  
6 to take away the word "established" first to make it clear that our intent is that this was only  
7 given a juristic form by the act of Parliament. Can Parliament not do that? Can Parliament not  
8 do that?

9  
10 **TUSHAR MEHTA:** Can the intention of the Parliament as it existed in '20 be supplemented  
11 or amended that this was the intention?

12  
13 **CHIEF JUSTICE D.Y. CHANDRACHUD:** That we can always do. There's no, Parliament's  
14 power is untrammelled.

15  
16 **TUSHAR MEHTA:** Let that be argued. They were not comfortable in arguing this point. They  
17 said, let it go to the regular bench. I am ready to argue. This is set aside by the division bench  
18 of a High Court by a Reason Order. I'm ready to support.

19  
20 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Parliament does that all the time in the case of  
21 fiscal enactments. You will have amendments by the galore in the Income Tax Act. The  
22 moment a judgment comes, we will amend it with retrospective effect.

23  
24 **TUSHAR MEHTA:** We have, My Lord, judgements.

25  
26 **CHIEF JUSTICE D.Y. CHANDRACHUD:** This is not what we call it validating statute,  
27 or...

28  
29 **TUSHAR MEHTA:** My Lord, we have judgments, whether this can be done or cannot be  
30 done, and to support the judgment of the division bench of the High Court, and we have filed  
31 an affidavit.

32  
33 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Then one thing. Let's have conceptual clarity  
34 on what we are going to write on, I mean, what is the canvas on which we are going to write. If  
35 they are not arguing on the validity...

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37 **TUSHAR MEHTA:** They are not ready to argue. We want them to argue.

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**CHIEF JUSTICE D.Y. CHANDRACHUD:** They have not argued. That's their choice. One second.

**RAJEEV DHAVAN:** Then we shouldn't argue the '81 Act.

**TUSHAR MEHTA:** They said that let it go to the regular bench. They say.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** One second. We have got our notes. In the opening, they have said that they are not arguing on the validity of the '81 amendment, which forms the subject matter of the Allahabad judgment. So, for the purpose of this reference, then, do we proceed on the basis that the '81 amendment is a valid amendment?

**TUSHAR MEHTA:** It cannot be.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** Sorry. The other way round. That the '81 amendment is now effaced from the statute.

**TUSHAR MEHTA:** Yes, My Lord. It's not, it does not exist on the statute. It's not stayed. It's not stayed. The Court said "*status quo*" because they have granted reservation, that was the stay, therefore says *status quo*.

**KAPIL SIBAL:** *Qua* reservation it is not stayed, otherwise it is *status quo ante*.

**TUSHAR MEHTA:** No. I'll show the order.

**KAPIL SIBAL:** It is the order of the Court. It is there. It is *status quo ante* other than [UNCLEAR]

**TUSHAR MEHTA:** You can't have it both ways. Let us be very clear.

**JUSTICE SANJIV KHANNA:** If I remember correctly what had transpired was, in view of, that in case it's minority institution then the corrective will be issued in terms of the Constitution and the rights protected under Article 30. So, we are going on that basis. Solicitor, the argument which has been raised is that in *Basha*, the Court raised, found three things. One, it was legally established. Two, in fact *de facto* also, it was established not by the State, it

1 was established by the State and not by the minority institution. And third, it is not  
2 administered by the minority. These are the ...

3

4 **TUSHAR MEHTA:** Therefore, you have whatever rights you had, you have surrendered  
5 those rights.

6

7 **JUSTICE SANJIV KHANNA:** That's part of the second, that it was not established and  
8 administered, it's a part of second and third itself, because you surrendered...

9

10 **TUSHAR MEHTA:** That factual finding that you have surrendered...

11

12 **JUSTICE SANJIV KHANNA:** So, your argument is even by deleting the word "established"  
13 from the statutory enactment it will not unwind or rewrite the judgment of the *Basha* case  
14 that it was *de facto* established by the..

15

16 **CHIEF JUSTICE D.Y. CHANDRACHUD:** One more thing Mr. Solicitor. I'll have a word  
17 with My Learned Colleague over the lunch break. I'm just throwing this as an idea. It's not  
18 even my confirmed opinion, so just for the sake of a debate or dialogue in the Court. You will  
19 also concede, and the other side will also concede that the '81 Amendment does have some  
20 bearing on the minority character of AMU. What bearing it has, it is for your argument, their  
21 argument, and we'll decide it. If we accept that the '81 amendment does have a bearing on,  
22 some bearing, on the minority character of AMU because, let's face it, the object of the '81  
23 amendment was to reaffirm the minority character. That's the whole purpose of 2(I) and that  
24 Preambular chain. Now, if the '81 amendment has some bearing on the status of AMU as a  
25 minority or otherwise, then can we really decide this without going into the validity of the '81  
26 amendment? Otherwise..

27

28 **TUSHAR MEHTA:** That's precisely we requested, they were not comfortable. They said go  
29 to the regular bench.

30

31 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Because look at it this way, Mr. Sibal, please  
32 look at it this way. We are a bench of seven. Can our judgment be made contingent on what a  
33 bench of a lesser constitution will decide on the validity of this amendment? If this, take it  
34 against you for a moment, just for the sake of argument. Suppose we reverse the judgment of  
35 the Allahabad High Court and this is only for the purpose of testing the hypothesis. This is not  
36 at all, our mind is completely open on the '81, but I'm just putting it against you. Because,  
37 suppose we reverse the Allahabad High Court and affirm the validity of the '81 Amendment,

1 right? In which case the consequence of the Amendment of '81 is to clearly confer it or  
2 recognize it, as they say, the minority status, whether it is declaratory or confirmatory.

3

4 **TUSHAR MEHTA:** May be subject to certain arguments.

5

6 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Yes, yes. Arguments are, on both sides are  
7 open. In which case, how can we say that, well, we will decide this minority status of AMU  
8 *dehors* the '81 amendment? And the moment you look at the '81 amendment, we have to  
9 necessarily look at the Allahabad judgment. So perhaps, I mean, we will all sit down at lunch,  
10 may be for 5 minutes...

11

12 **TUSHAR MEHTA:** We have been saying that right through.

13

14 **CHIEF JUSTICE D.Y. CHANDRACHUD:** At lunch will all have a confabulation between  
15 us, because I've not had the benefit of my Learned Colleagues' views.

16

17 **TUSHAR MEHTA:** Kindly recall, it was our case that Your Lordship will have to go into the  
18 merit. They said no. This question may be decided by...

19

20 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Mr. Solicitor, you can continue the rest of your  
21 argument. But if we come to the conclusion that we will have to decide the validity of the  
22 Allahabad judgment here, then you can deal with the validity of that judgment in your  
23 argument.

24

25 **TUSHAR MEHTA:** First let them argue. At that stage Mr. Dhavan got up and said that I'll  
26 take two days.

27

28 **CHIEF JUSTICE D.Y. CHANDRACHUD:** You can support the judgment and we will hear  
29 them in response. That will be much faster. Otherwise, then we will have to again go back to  
30 Mr. Sibal to argue.

31

32 **TUSHAR MEHTA:** Let them have My Lord.

33

34 **RAJEEV DHAVAN:** My specific submission in the written submissions is that the '81  
35 amendment is valid, specifically there.

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37 **TUSHAR MEHTA:** Obviously, that's their take.

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**RAJEEV DHAVAN:** Once Your Lordship said, "let it be decided by the other bench", then I didn't complete the argument.

**TUSHAR MEHTA:** No, My Lord. He said that...

**CHIEF JUSTICE D.Y. CHANDRACHUD:** No, Mr. Dhavan, my recollection is that, you said, "I am not going into that. Let it go into the...."

**TUSHAR MEHTA:** Yes. "And let it be done by the regular bench." That was Mr. Dhavan's submission. On our side, we were saying that, "you'll have to decide it."

**KAPIL SIBAL:** We are not hesitant, My Lords. If I remember correctly, I had said, "if you, My Lords...."

**CHIEF JUSTICE D.Y. CHANDRACHUD:** The consequence of the interim order is that, AMU said, "we will not implement a 50% reservation." But the *status quo*, as on the date of the filing of the writ petition, was to be maintained. That is to say, when the petition was filed, Brother Dipankar Datta says 2004, the '81 amendment had already been brought into force. Therefore, the '81 amendment today, as a result of the interim order of our court, is operative.

**KAPIL SIBAL:** That's right.

**TUSHAR MEHTA:** The question is, without going into the validity of that judgment, it would not be possible for Your Lordships, in this....

**CHIEF JUSTICE D.Y. CHANDRACHUD:** *Prima facie* you may be right on that. Mr. Sibal, just reflect on it at lunch.

**KAPIL SIBAL:** We'll reflect. What I said.... one second.

**NEERAJ KISHAN KAUL:** That's not stay on judgement.

**TUSHAR MEHTA:** Judgment, My Lord.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** Neeraj, look at the other, the latter part. Latter part, that the *status quo* will be maintained, as on the date of the filing of the writ petition.

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**NEERAJ KISHAN KAUL:** That's for reservation. And also, My Lords, the next line, since Your Lordships said, should we consider the '81 issue, the next line says, "it's desirable that a larger bench considers the judgement also. Because, Your Lordships...

**CHIEF JUSTICE D.Y. CHANDRACHUD:** There is no stay of the *Allahabad judgement*.

**TUSHAR MEHTA:** There is none.

**NEERAJ KISHAN KAUL:** There is no stay on the *Allahabad Judgement*.

**TUSHAR MEHTA:** May I say something, My Lord? May I give a little background?

**KAPIL SIBAL:** Yes, it's *status quo*, My Lords, for all other matters.

**RAKESH DWIVEDI:** That is what the reservation [UNCLEAR].

**NEERAJ KISHAN KAUL:** [UNCLEAR] that should Your Lordships get into the '81 issue, '81 Amendment, the same order says that, it is desirable that this matter should be considered by a larger bench. And Your Lordships, are today, seats of the matter. The same order, which says, it is desirable.

**TUSHAR MEHTA:** What has happened, and I am going to make this submission. The matter is referred, not the question. That was our case.

**KAPIL SIBAL:** If I remember correctly, I had argued, if you set aside *Basha*...

**TUSHAR MEHTA:** No, there is no setting aside. This is not an appeal.

**KAPIL SIBAL:** If you do not agree with *Basha*, then '81 Amendment doesn't arise. That's what I had said. If you do not agree with *Basha*, then the '81 Amendment need not be gone into. What My Lord, the Chief Justice said is right. If you say that, *Basha* was right. *Basha* was right, My Lords, then the question of '81 Amendment comes in. But if *Basha* was wrong, '81 Amendment need not be discussed.

**TUSHAR MEHTA:** For deciding whether it is right or wrong, '81 will have to be examined.



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**KAPIL SIBAL:** I am not saying, "no." Please allow me. So, if Your Lordship's My Lords, on our argument says that, *Basha* is wrongly decided, you don't have to go to the '81 Amendment. So, decide that question, My Lords. What's the problem with that?

**CHIEF JUSTICE D.Y. CHANDRACHUD:** Your point, what you are saying, Parliament amended the Act in 1981, to really... should we say in a colloquial sense, to override *Basha*, right? Now, what you are arguing is that, if you come to the conclusion that *Basha* was wrong, then there's no question. But even so, if we come to the conclusion that, *Basha* was wrong, we'll have to still deal with the validity of the '81 Act.

**KAPIL SIBAL:** No, no. But then it goes without saying, whether it is trying to override the judgment or not, it is established by the minority, recognized under 30.

**TUSHAR MEHTA:** Suppose Lordships decides that *Basha* is right, then what?

**KAPIL SIBAL:** That question will not arise.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** What happens then, if we decide that *Basha* is right?

**JUSTICE SANJIV KHANNA:** Then it will rise.

**KAPIL SIBAL:** If the *Basha* is right then '81 issue will have to be gone into.

**TUSHAR MEHTA:** Then as a regular bench, that's their...

**KAPIL SIBAL:** That is the only issue that is referred to Your Lordships, My Lords.

**JUSTICE SURYA KANT:** Problem is that just now you were saying that 1981 amendment is still operative. If your argument is that, yes, it is still operative, then we have to go into the validation of that.

**KAPIL SIBAL:** If Your Lordships agree with *Basha* then of course the '81 amendment is there. If you disagree. No, don't look at it, don't look at it today. Just look at *Basha*, is it right or wrong? And if Your Lordships says the *Basha* is wrong '81 doesn't matter.

1 **TUSHAR MEHTA:** What if the Lord, says *Basha* is right?

2

3 **KAPIL SIBAL:** So, that becomes an academic issue. Why? Because it is established by the  
4 minority and under 30(1) My Lord, it is right.

5

6 **CHIEF JUSTICE D.Y. CHANDRACHUD:** If we say that *Basha* is wrong then, according  
7 to you, then the amendment in that sense recognizes what we feel also is the correct position.  
8 But what if we come to the conclusion that *Basha* is right?

9

10 **KAPIL SIBAL:** Then you have to go into the '81 My Lord.

11

12 **CHIEF JUSTICE D.Y. CHANDRACHUD:** But then if we say that *Basha* is right when  
13 who goes into the '81 Amendment?

14

15 **KAPIL SIBAL:** It is not referred to seven judges. The three judges who would hear it will go  
16 into it.

17

18 **TUSHAR MEHTA:** This is the problem.

19

20 **KAPIL SIBAL:** It's not a problem. That's the process. That's the reference is only *qua Basha*.  
21 The reference is not *qua*, the '81 Amendment. I don't think that we should refer, that we should  
22 go into that.

23

24 **CHIEF JUSTICE D.Y. CHANDRACHUD:** We'll reflect on this at lunch, in deciding your  
25 argument is that if you come to the conclusion that *Basha* is wrong, then the '81 Amendment  
26 really becomes redundant. But just reflect on this, can we decide on whether or not *Basha* is  
27 correct without looking at the statute as a composite whole, including the '81 Amendment?  
28 Okay, technically, today, true, as the Solicitor said, 81 Amendment is now not on the statute  
29 book because it has been set aside by the Allahabad court. But everything is live before our  
30 court. Now may not be live before the seven judges, but is, live before the Supreme Court.  
31 Therefore, in deciding whether *Basha* is right or wrong, *Basha* itself has interpreted the  
32 provisions of the statute while coming to a conclusion. Right? It relies on all the provisions of  
33 the statute.

34

35 **KAPIL SIBAL:** That's correct.

36

1 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Now can we, while deciding on the correctness  
2 of *Basha*, say that we will look at only some of the provisions of the statute, but we look at the  
3 statute minus the '81 Amendment Act. That will be very artificial for us to say. Just look at it  
4 that way.....

5

6 **KAPIL SIBAL:** I'll tell Your Lordships the problem that will arise, if I may. I'm sorry. Just  
7 give me a few minutes My Lord. Either we look at *Basha* on the basis of what happened in  
8 1920, that is, look at *Basha* through the lens of 20...1920 or we look at *Basha* in the context  
9 of Article 30(1), when it came into force in 1950 and what happened thereafter. His argument  
10 throughout has been, don't look at anything else, look at what happened in 1920. That's was  
11 his argument. If you don't want to look at *Basha* in the context of '20, please then look at this  
12 in the context when the Constitution came into force and apply all the principles of  
13 constitutional law in Article 30 to look at *Basha*. Then you will have to do that also. And then  
14 1981. That's not an easy exercise.

15

16 **TUSHAR MEHTA:** *Basha* also examined '51 and 55th Amendments.

17

18 **KAPIL SIBAL:** Therefore, you'll have to look at Article 30, Sub-article 1 and 2. Don't look at  
19 *Basha* on the lens of 1920. Then you'll have to go into all that. And my respectful submission  
20 is, that exercise need not be done. We are ready to argue *Basha* pre-1920 because that's how  
21 it happened. And that's throughout what has been said. Look at the Constitution. Look at the  
22 regulations. Look at what *Basha* says, look at what the Rector said, look at what the  
23 Chancellors have appointed. This is all *Basha*, 1920. We'll answer that.

24

25 **CHIEF JUSTICE D.Y. CHANDRACHUD:** *Basha* on the basis of the position as it stood  
26 in 1968?

27

28 **KAPIL SIBAL:** Yes. Look at it and see whether it was established by a minority or not. It is  
29 all you have to look at.

30

31 **RAKESH DWIVEDI:** There is one more aspect. Supposing Your Lordship considers 1981  
32 Act also, and Your Lordship holds that that Act is valid. It's unnecessary to [UNCLEAR]  
33 *Basha*.

34

35 **JUSTICE SANJIV KHANNA:** You're right, Mr. Dwivedi, but it's equally valid in case we  
36 hold *Basha* ...

37

1 **RAKESH DWIVEDI:** I am saying consider together, not....

2

3 **CHIEF JUSTICE D.Y. CHANDRACHUD:** So, the '81 Act, if it is valid, then *Basha* in any  
4 case is overridden then according to us, because I mean that's the argument.

5

6 **RAKESH DWIVEDI:** Even if *Basha* remains valid, the new Act has come which is valid...

7

8 **TUSHAR MEHTA:** What would they want to do. Let me put it bluntly, what they want to  
9 do...

10

11 **JUSTICE SURYA KANT:** *Basha* relies upon 1951 and 1965 amendment. Part of the 1965  
12 amendment has been done away with 1981. Unless you go into that whether it was done validly  
13 or not.

14

15 **TUSHAR MEHTA:** Impossible to separate this.

16

17 **KAPIL SIBAL:** Your Lordship is not looking at *Basha* in the context of '51 or '65.

18

19 **RAKESH DWIVEDI:** That's what we are saying from the beginning, My Lord.

20

21 **KAPIL SIBAL:** You're not looking at *Basha* in the context of '51 or '65.

22

23 **JUSTICE SANJIV KHANNA:** That's one basis. This issue had come up earlier and we  
24 discussed and thereafter we proceeded on this basis. We are examining the validity of the ratio  
25 in *Basha*.

26

27 **KAPIL SIBAL:** That's all.

28

29 **JUSTICE SANJIV KHANNA:** Number one, number two, the reason was, why we said so  
30 was we have to see the status of AMU as on the date when Constitution was enforced. And  
31 *Basha* when we read, we found there were two aspects dealt with specifically in *Basha*, or  
32 rather three aspects which were specifically dealt with in *Basha*, one is what is the effect of  
33 statutory enactment of creating a university. *Basha* says, this is the enactment which  
34 establishes the university. This is the only aspect dealt with in 1981 amendment. The second  
35 aspect dealt with in *Basha* now we can hold, this bench can hold yes, the statute established  
36 the university and therefore AMU came into existence, in which case we uphold that then 1981  
37 amendment has to be examined, and that can be examined by a separate bench, because then

1 the limited issue is what is the consequence of that amendment. Number one. There the  
2 argument which will arise is, could the Legislature, by merely deleting the word  
3 "establishment" override the judgment of this Court. That will be the issue, which is a separate  
4 issue. We have not addressed, nobody has addressed us. We have already gone through by  
5 about five days or four days. Nobody has addressed us on this. The second aspect, which is  
6 dealt with in *Basha*, relates to administration. And it says it is not administered by the  
7 minority right from 1920 or as of in 1950. That's the most important legal issue because both  
8 the sides concede that both the things have to be, in order to be a minority institution, it should  
9 be established as well as and administered. So that's a legal issue. The third point raised is  
10 *dehors* the amendment made in 1981, *Basha* holds it's not established, *de facto* established  
11 by the minority, and that issue is again before us. So really speaking, we need not go into 1981  
12 amendment per se to decide whether *Basha* is rightly decided or wrongly decided.

13

14 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Mr. Solicitor... Mr. Dwivedi, just one second.  
15 What we suggest is this. We are in the midst of your argument, replying to them on merits.

16

17 **TUSHAR MEHTA:** Yes.

18

19 **CHIEF JUSTICE D.Y. CHANDRACHUD:** You conclude your argument. Anyway, even if  
20 we decide to go into the validity of the *Allahabad judgment*, you said, "They should open  
21 first" We understand well why you're saying that. No difficulty. So, on this aspect, you  
22 complete your submissions. When we read *Basha* with you, when we read *Basha* with you  
23 again, we will be able to then fine tune our own understanding, on whether that issue of the  
24 *Allahabad judgment* should or should not be decided together. We'll read *Basha* with  
25 you. So, when you are reading *Basha* with us or for us, you can also focus on these issues,  
26 which Mr. Dwivedi, Mr. Kaul and you are saying requires us to also decide the issue of  
27 *Allahabad* in this reference. So, right now, we can continue with your submission, because,  
28 you are now at the latter, fag end of your, at the end of your submissions. So, we'll conclude  
29 your submissions...

30

31 **TUSHAR MEHTA:** [INAUDIBLE] is really this.

32

33 **RAKESH DWIVEDI:** It's the appropriateness.

34

35 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Appropriateness, we will hear you at the end,  
36 once you've argued on *Basha*.

37

1 **TUSHAR MEHTA:** Only give me a minute.

2

3 **CHIEF JUSTICE D.Y. CHANDRACHUD:** We will hear you for five minutes on that and  
4 then we will hear the others anyway, because this has to be dealt with. The merits, everybody  
5 will argue, then on the appropriateness of considering the issue of *Allahabad* as well, we will  
6 hear each of you and then take a call.

7

8 **TUSHAR MEHTA:** I just want to add one thing. I'll just add one thing. I bow down. What  
9 has happened is this.

10

11 **RAJEEV DHAVAN:** If the '51 Amendment is concerned, *Basha* says, "it was just in  
12 conformity with the Constitution." We have argued that the '65 Amendment was an emergency  
13 amendment. But it was reversed in '81. To that extent, My Lord, we can certainly go into it,  
14 depending on your...

15

16 **TUSHAR MEHTA:** It's not separable. My Lords, on this argument, it's not separable.

17

18 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Correct. Now, you have shown us this. You have  
19 anything else that we need to see in the chart? So that then, after lunch, you can....

20

21 **TUSHAR MEHTA:** Chart, My Lord, is remaining.

22

23 **CHIEF JUSTICE D.Y. CHANDRACHUD:** What's the remaining part that....

24

25 **TUSHAR MEHTA:** What's happening is this. What is happening is this.... And let me be a  
26 little more clearer, rather than being diplomatic. What they want is, they are taking a chance  
27 whether *Basha* is right or not? If Your Lordships are satisfied that *Basha* is right, they will  
28 have a second round, to say that, "Even if seven judges said *Basha* is right, now have a second  
29 round that now, the basis is taken away and refer this question."

30

31 **CHIEF JUSTICE D.Y. CHANDRACHUD:** If *Basha* is denied, no....

32

33 **JUSTICE SANJIV KHANNA:** But that may not happen. In case, we are uphold *Basha*, or  
34 agree with the ratio in *Basha*, on the second and third aspect, they may not have any say in  
35 it. On the second and third aspect. That is, *de facto*, it is established by....

36

1 **CHIEF JUSTICE D.Y. CHANDRACHUD:** I think, what perhaps Solicitor is arguing is  
2 that, if we come to the conclusion that *Basha* is right, then the issue of the validity of the '81  
3 Amendment will be before a lesser Constitutional... a three judge bench.

4

5 **TUSHAR MEHTA:** That's what we call the second round, My Lord.

6

7 **CHIEF JUSTICE D.Y. CHANDRACHUD:** The argument, there should be that, look the  
8 basis of *Basha* is taken away by the 1981.

9

10 **KAPIL SIBAL:** Therefore, no need to go into this. That's all, My Lord. That's all that there  
11 will be.

12

13 **TUSHAR MEHTA:** That's exactly what is the problem.

14

15 **KAPIL SIBAL:** There is no problem. You don't have to go into it.

16

17 **TUSHAR MEHTA:** You can't have this kind of second bite at the cherry.

18

19 **KAPIL SIBAL:** If seven judges say *Basha* is wrong, what else is there?

20

21 **TUSHAR MEHTA:** We can't deal with seven-judge bench like this, that you decide, what is  
22 comfortable to me and don't decide...

23

24 **KAPIL SIBAL:** You are more hurt about it than the seven judges.

25

26 **JUSTICE MANOJ MISRA:** Both should be decided together. That's the appropriate...

27

28 **TUSHAR MEHTA:** The reference is the matters are referred.

29

30 **CHIEF JUSTICE D.Y. CHANDRACHUD:** On this, we'll just defer it a little bit. You  
31 conclude your arguments. We'll also read *Basha* with you. Once we reread *Basha* with you,  
32 we would have read *Basha*, with two different perspectives.

33

34 **TUSHAR MEHTA:** I need to read some debates in '65, and that would be very crucial.

35

36 **CHIEF JUSTICE D.Y. CHANDRACHUD:** All right. So, now, after this, we will be referring  
37 to the debates and then directly take us to *Basha*? Or...

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**TUSHAR MEHTA:** Yes, My Lord.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** And then we will conclude. So, I guess, about 20 minutes for the debate and about half an hour for...

**TUSHAR MEHTA:** I'll take My Lord, 7 sessions. I'll not repeat anything.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** So, but now, what remains from your argument, is the debates, and then followed by *Basha*.

**TUSHAR MEHTA:** *Basha* and a few other points.

**RESPONDENT'S COUNSEL:** My Lord, there is also one thing, I must point out, the legal obstacle for them [UNCLEAR] suggested by them. If *Basha* is to be considered independently, not in the light of '81, virtually these proceedings will be sitting like an appellant proceeding.

**TUSHAR MEHTA:** That is going to be my submission.

**RESPONDENT'S COUNSEL:** My Lord, larger bench can go into the ratio, not the decision in that case. That's what ....

**TUSHAR MEHTA:** Not the factual finding. That is going to be my submission.

**RESPONDENT'S COUNSEL:** They want to convert the reference into an appeal.

**TUSHAR MEHTA:** It's not an appeal from five-judge bench to seven-judge bench, intra court appeal. The argument was, "look at this, what he says. Look at this, what he says."

**CHIEF JUSTICE D.Y. CHANDRACHUD:** We will presently be open. Unless and until we read... until we read *Basha* with the Solicitor General. Because ultimately, a judgment also depends on how it is, it is interpreted by both the sides. So, let's read *Basha* with you, and then we'll take a final call.

**GURU KRISHNAKUMAR:** Just one more anomaly. Assume My Lords decide that *Basha* is rightly decided. By relegating the '81 question to a smaller bench, they will get the



1 opportunity to argue that notwithstanding **Basha**, '81 Amendment is declaratory and  
2 curative. Therefore, **Basha** will not apply. Please see the anomaly, then to seven judges would  
3 have upheld **Basha** and thereafter...

4

5 **TUSHAR MEHTA**: Two litigations, in a matter which are inseparable.

6

7 **GURU KRISHNAKUMAR**: And again, anomalously, My Lord, they'll argue what is  
8 [UNCLEAR] what is decided.

9

10 **CHIEF JUSTICE D.Y. CHANDRACHUD**: We'll not conclude an opinion at this stage, let's,  
11 because Solicitor is on his legs now and we have almost substantially completed the  
12 arguments. One more session is what he requires. So today we'll finish anyway, even by his  
13 own...

14

15 **CHIEF JUSTICE D.Y. CHANDRACHUD**: Now, what next Mr. Solicitor?

16

17 **TUSHAR MEHTA**: Yes, My Lord...

18

19 **RAKESH DWIVEDI**: [INAUDIBLE] One aspect also can be kept in mind, and that is the  
20 referring order in the last paragraph refers the whole matter to Your Lordships. It says,  
21 consequently we refer the whole matter.

22

23 **CHIEF JUSTICE D.Y. CHANDRACHUD**: We will just look at that first.

24

25 **KAPIL SIBAL**: [INAUDIBLE].

26

27 **TUSHAR MEHTA**: Yes, my learned friend is right factually and thereafter, Government of  
28 India on a considered decision, filed an affidavit saying that we are not pressing this appeal  
29 and we are supporting... when you say, you say the full truth and not half a truth.

30

31 **CHIEF JUSTICE D.Y. CHANDRACHUD**: Technically, on paper, it remains, the appeal.

32

33 **TUSHAR MEHTA**: It remains. The appeal remains. I have not been permitted to withdraw  
34 the appeal. But it is the stand of Union of India, that the judgment of the division bench is true.

35

36 **CHIEF JUSTICE D.Y. CHANDRACHUD**: And there's an appeal by AMU also.

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**TUSHAR MEHTA:** Several. There are several appeals.

**JUSTICE SANJIV KHANNA:** In case we go into '81 Amendment, then this issue will arise, whether a Legislative Act or an amendment made by the Parliament, subsequently, you can withdraw. That will be an issue.

**TUSHAR MEHTA:** Correct, My Lord. Correct. And I'll have to address that, My Lord. I'm not running away from that question.

**JUSTICE SANJIV KHANNA:** Therefore, therefore... Correct, and there are two options before us. Either we accept the ratio in *Basha*. In case the ratio in *Basha* is accepted, then we come to three conclusions. Its *de jure* established by a statute and not by the minority committee. It is *de facto* established not by the minority community. Three, it is not administered by the minority committee.

**TUSHAR MEHTA:** And four, surrendering.

**JUSTICE SANJIV KHANNA:** Surrendering is part of one, two, and three.

**TUSHAR MEHTA:** First... yes.

**JUSTICE SANJIV KHANNA:** One, two and three, itself.

**TUSHAR MEHTA:** Subsumed in that.

**JUSTICE SANJIV KHANNA:** It's subsumed in that. It's an argument dealing in support of... Now, as far as 1981 Amendment is concerned, it only deals with, *de jure* first part of it, *de jure*, establish, establishment of a or establishment of the statute. It doesn't deal with the other two contentions. '81 Amendment does not touch. And if I'm not mistaken, when we read *Basha*, it deals with all the three contentions.

**TUSHAR MEHTA:** Correct.

**JUSTICE SANJIV KHANNA:** I think you are also of the opinion, it deals with all the three situations.

1 **TUSHAR MEHTA:** Yes, yes.

2

3 **JUSTICE SANJIV KHANNA:** *De jure, de facto* and administer.

4

5 **TUSHAR MEHTA:** Correct. My Lord, now...

6

7 **RAJEEV DHAVAN:** If *Azeez Basha* is declared to be right by Your Lordships, then we  
8 would have to take recourse in '81. That's a separate issue.

9

10 **TUSHAR MEHTA:** That's the whole point.

11

12 **JUSTICE SANJIV KHANNA:** That is something, what is the effect of '81 Amendment, that  
13 may have to be sent back to the High Court itself, for fresh consideration.

14

15 **TUSHAR MEHTA:** No, no. it will be before a legislative.

16

17 **JUSTICE SANJIV KHANNA:** Okay, that will be a separate... let's not open up that debate.

18

19 **RAJEEV DHAVAN:** Quite right, quite right, My Lord.

20

21 **TUSHAR MEHTA:** My Lord, the position will be this, and I leave it at that. I leave it at that,  
22 My Lord, the position will be like this. If they succeed, they get a second chance before a regular  
23 Bench. If we succeed, then there is no chance. If they lose, I'm sorry, reverse. If they lose, they  
24 get a second chance. If we lose, we lose.

25

26 **JUSTICE SANJIV KHANNA:** Mr. Mehta probably it will be a very limited chance.

27

28 **TUSHAR MEHTA:** Your Lordship knows the ingenuity My Lord, this is pending since years.

29

30 **JUSTICE SANJIV KHANNA:** Maybe, because if we uphold on the second and third  
31 principles of *Basha*... even if they succeed on the first part, that statutory establishment has  
32 been taken away.

33

34 **TUSHAR MEHTA:** On that we have sufficiently assisted Your Lordships, whether to take it  
35 up here or wait, it is entirely Your Lordships call. I will not...

36

1 **CHIEF JUSTICE D.Y. CHANDRACHUD:** We'll also like to read *Basha* with you. And  
2 then I think we can consider the case.

3

4 **TUSHAR MEHTA:** Before that, what I have done is, I desire to reach the entire debate of  
5 '65, Amendment of 1965, but with a view My Lord not to curtail, with a view to curtail my time.  
6 I will read only one, where the Hon'ble Education Minister, Justice Chagla summarizes.  
7 Justice Chagla was dealing with a Member of Parliament called Frank Anthony, who had  
8 appeared in Kerala education...

9

10 **CHIEF JUSTICE D.Y. CHANDRACHUD:** He was a member of our Bar, a very vibrant  
11 member of our Bar.

12

13 **TUSHAR MEHTA:** He was a... there are some interesting...

14

15 **CHIEF JUSTICE D.Y. CHANDRACHUD:** As a young lawyer, I have heard Mr. Anthony  
16 argue. The school is named after him.

17

18 **TUSHAR MEHTA:** Yes, yes. He was...

19

20 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Yeah, yeah, he established...

21

22 **TUSHAR MEHTA:** He was a nominated member as an Anglo Indian community. He was a  
23 nominated member as an Anglo Indian community. In fact, there is a very beautiful and  
24 interesting exchange between Justice Chagla and Frank Anthony My Lord, because both were  
25 from the same field. But the Justice Chagla had to say that you will have to concede then, I  
26 know a little law, including the Constitutional Law. That's what Justice Chagla said in the  
27 debate.

28

29 **CHIEF JUSTICE D.Y. CHANDRACHUD:** All right, let's see, what are we seeing next now?

30

31 **TUSHAR MEHTA:** Please come to my note 2(b). I am reading only one paragraph of Justice  
32 Chagla's address.

33

34 **CHIEF JUSTICE D.Y. CHANDRACHUD:** This is the parliamentary debate?

35

36 **TUSHAR MEHTA:** Parliamentary debate in '65 Amendment. When the 65th Amendment  
37 was introduced. This is *inter alia* what he said. My Lord, what he does is...

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**JUSTICE SANJIV KHANNA:** Mr. Solicitor, page?

**TUSHAR MEHTA:** I'm sorry. Page 111 at the foot. Justice Chagla narrates the history. Justice Chagla does two things. He narrates the history, which I have broadly pointed out to Your Lordships. Then second he says, that there is a reason why our Constitution makers have given them a separate status in the Constitution itself as institution of national character. Then thereafter, he says this at the foot, 2nd September 1965, Your Lordships held would recall...

**JUSTICE SANJIV KHANNA:** Can I request you? By chance I opened up the wrong page.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** 2(b).

**JUSTICE SANJIV KHANNA:** 2(b), that's a speech of Maulana Azad.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** That's right.

**JUSTICE SANJIV KHANNA:** Can you just read that also? 2(b), 111.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** And 111, is the...

**TUSHAR MEHTA:** Page, Your Lordships opened is?

**JUSTICE SANJIV KHANNA:** 111.

**TUSHAR MEHTA:** 111. Yes, My Lord. Maulana Azad. That is '51 speech.

**JUSTICE SANJIV KHANNA:** Yes.

**TUSHAR MEHTA:** I wanted to read that, but I was curtailing myself. If Your Lordships permit. 'As far as our Constitution is concerned, honourable members are aware that Article 28(3) lays down that religious instruction cannot be made compulsory in any government institution. This necessitated a reconsideration of the question as far as these two universities are concerned. In both the universities, the Hindu University and the Muslim University, the religious instruction is compulsory. This was against the Article 28 of the Constitution and necessitated the making of certain changes. So the first change that is made is that religious instruction to be made optional. Instead of being compulsory, religious instruction will be

1 given only to those students who themselves would ask for it. The honourable members are  
2 aware that a majority of students who get themselves admitted to these universities are, such  
3 as, want religious instructions being given to them. Another change has been made on the  
4 basis of recommendation of Universities Commissioned. The commission recommended that  
5 in future the President of Indian Union should be the visitor of all central universities. Having  
6 those powers with the Lord Rector and the Chancellor enjoy, it is against the spirit of our  
7 Constitution that the character of an educational institution be allowed to remain communal.  
8 All the institutions in the country should be Indian from all points of view and not Hindu,  
9 Muslim, Sikh or Christian. Naturally, the question that arose before the government was asked  
10 to what attitude they should adopt regarding the names of these two universities. The  
11 honourable members may be aware that about two years back in 1949, the government  
12 intended to introduce a bill consisting of only two Clauses, one stating that the name of these  
13 two universities be changed from Banaras Hindu University and Aligarh Muslim University to  
14 Banaras University and Aligarh University respectively, and the other making it clear that  
15 non-Hindus and non-Muslims can also become members of their Courts. Nevertheless, the  
16 government prepared the draft bill and elicited the opinions of both the universities  
17 regarding that. The Muslim University was of the opinion that, having been assured that  
18 general policy of the government was to change the communal character of the university, it  
19 would have no objection if the word, "Muslim" was deleted out from its name and it being  
20 called Aligarh University instead of Muslim University.' Then, My Lord...

21

22 **JUSTICE SANJIV KHANNA:** Do we take it that Banaras Hindu University objected?

23

24 **TUSHAR MEHTA:** I'll find out, My Lord, but possibly not objected. Possibly. But I can't  
25 make a very accurate statement on that. As a matter of fact...

26

27 **RAKESH DWIVEDI:** There was no objection. That is why...

28

29 **TUSHAR MEHTA:** Now at the foot, this is Justice Chagla. After giving history, page 111.  
30 'After giving the history of the formation or establishment of the university under the Act, and  
31 after saying that it has a separate Constitutional status given by the Constituent Assembly,  
32 Justice Chagla says this as an Education Minister, "My submission to this House is that Aligarh  
33 Muslim University has neither been established, nor is being administered by the Muslim  
34 community." But this is pre *Basha. Basha* was not there at that time. It is not a minority  
35 institution in which Sri Anthony suggests, "I will give him the reasons. You had first the  
36 Muslim College which was founded by Sir Syed Ahmed. Sir Syed Ahmed has asked the British  
37 Government of those days, to establish a university and the British Government established

1 the university. Therefore, the establishment of the institution was by Legislature and not by  
2 the community. Now I cannot understand how it can be said that administration is in the  
3 hands of minorities. The administration of the university depends upon the law. During the  
4 British times, it depended upon this Act. After Independence, it depends upon the Act, as had  
5 been amended by the Parliament." Thus, Mr. Anthony suggest that it is open to the Aligarh  
6 University or the Muslim community to change the administration of the university even to  
7 the slightest degree and go contrary to what the Parliament has laid down. If the minority had  
8 the right to administer the Aligarh University, then it can have any administration it like. It  
9 can change the administration, and it can close down the university. It can change the  
10 constitution of the Court or the Executive Council. Can it do so? Even the constitution of the  
11 Court, of the Executive Council and the Academic Council is regulated and not by the minority  
12 community, but by Parliament. There is another aspect of the matter which Mr. Anthony has  
13 completely forgotten. He has attached great importance to the fact that under the Act of 1920,  
14 the British Government, as a concession said that the Court shall consist only of Muslims. Now  
15 everybody knows that university is administrated by the Executive Council and not by the  
16 Court. The Court of course, is the supreme authority, and it is like a showpiece. It meets once  
17 a year. Lots of people come there and make speeches and pass the resolution. But the day to  
18 day administration, selection, appointments and so on are carried on by the Executive Council,  
19 and it is significant that even if in the British days it was not provided that Executive Council  
20 shall consist only of Muslims. That clearly show that British Government did not concede the  
21 argument. Although there is no Constitution then, the argument is now advanced by Mr.  
22 Anthony that the minority has a right to administer a particular institution. I say that this  
23 institution was not established by the minority, nor is it being administered by the minority  
24 community, that is the legal position as far as Article 30 is concerned.' Now My Lord may  
25 kindly see 3 (a), *Basha*, page 3, My Lord.

26

27 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Would you like to before going to that, after  
28 that speech which we read of Mr. Chagla, read the speech of Mr. Somnath Chatterjee on the  
29 '81 Amendment, which is the next page.

30

31 **TUSHAR MEHTA:** I wanted to but I didn't want to... I thought...

32

33 **CHIEF JUSTICE D.Y. CHANDRACHUD:** It is the next page.

34

35 **TUSHAR MEHTA:** 2(b) Yes, My Lord. Leading Member of Parliament on the proposed  
36 Amendment in 81 observed as under. Somnath Chatterjee. 'Kindly see what this bill says. It  
37 seeks to restore the minority character of the university and that is also in the statement of the

1 Honourable Minister. So far as bringing into effect of this university is concerned, it was done  
2 under a statute.

3

4 Everybody knows that, the statute has been construed by the Supreme Court in the  
5 background of Article 30 of the Constitution of India. It appears that the Supreme Court is  
6 thinking to have it considered by a larger bench, but the fact that, the university was brought  
7 into existence by an Act of Parliament is a historical fact, which cannot be ignored by anybody.  
8 This Bill wants to restore the minority character of the university. Undoubtedly, we appreciate  
9 the great efforts made by some of the leading Muslims, intellectuals and educationists in this  
10 country, and we greatly appreciate the efforts made by them. How can you by a legislation,  
11 change the history? We do not know, what I am apprehending is that by this, you are also  
12 opening floodgates of litigation which we do not want. If an institution has been established  
13 in a particular manner by retrospective legislation, you cannot change its manner. The  
14 Supreme Court had held, that it was set up by a statutory enactment and that it was not  
15 established by a particular community. The word establishment is now being brought in, only  
16 with a view to attract Article 30 of the Constitution, because the language used there is  
17 'established'. Shree Somnath Chatterji, maybe, but the Minister herself has said, that what is  
18 being done, is that word 'establish' has been deleted from the present act, to show that it was  
19 not established by the statute. Can what was done in 1920, be undone in 1981, by a legislation  
20 like this? The fact cannot be altered by a legislation like this, which is supposed to have  
21 retrospective effect. What is the position, by omitting, the word 'establish' from existing  
22 statute, they want to contend so. As I said, we appreciate the sentiments. But the question is,  
23 can it be achieved? It has been established by a particular community. Therefore, Article 30  
24 can be attracted. That is the argument. The Minister herself has apprehended it. And she has  
25 been advised, I take it, that is, that it seeks the restoration of minority character. So, my  
26 question is whether you can restore a character, which was not there at the beginning? The  
27 character, pre '20 character...' Somnath Chatterji, he is talking about..., 'beginning because we  
28 have to consider the statutory enactment which brought it into existence. Maybe, this is done  
29 with a view to persuading the Supreme Court to come to a decision. We cannot visualize what  
30 the Supreme Court will do, but the statutory provision is being changed, in order to pave way  
31 for the Supreme Court to come to a decision. There is also a change in the definition. The  
32 definition of the word, 'university,' is now being changed. How can a fact be altered by a change  
33 in the definition?' Please mark this. 'According to...', I'm sorry. 'According to the proposed  
34 amendment, university means an educational institution of their choice, established by the  
35 Muslims of India, which originated as Muhammadan Anglo-Oriental College Aligarh and  
36 which was subsequently incorporated as Aligarh Muslim University. Therefore, they now, by  
37 an amendment, want to make the university of a different origin, from that was done when the



1 law was enacted.' One another angle, which I'll come to later. 'Aligarh Muslim University as  
2 Aligarh Muslim University as it stood, is a part of the Constitution. Aligarh Muslim University  
3 as Aligarh Muslim University as it stood, is a part of Indian Constitution in 1963. Can you by  
4 way of amending an Act, amend the Constitution itself?' The Constitution when it used the  
5 word, 'Aligarh Muslim University' understood it to be something else. There is a separate  
6 argument on that, I'm not dwelling much on that. Now My Lord, kindly come to **Azeez**  
7 **Basha**, whose name everyone has changed to their liking, My Lord. 3(a), My Lord.

8

9 **CHIEF JUSTICE D.Y. CHANDRACHUD:** ...become Ashish.

10

11 **TUSHAR MEHTA:** Yesterday, even the Attorney General...

12

13 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Attorney General also made Azeez, Ashish. The  
14 learned AG made Azeez, Ashish during the course of his...

15

16 **TUSHAR MEHTA:** On a lighter side. Mr. Dhavan referred to him as Azeez Bhasha,  
17 then...throughout, I've noted it. Then Mr. Sibal, Azeez Pasha and the learned AG, changed the  
18 religion. It became Ashish.

19

20 **KAPIL SIBAL:** But, Azeez is common to all, mostly.

21

22 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Yes. Now we go to **Basha**, which is Volume  
23 39a) , page 3. Right?

24

25 **TUSHAR MEHTA:** Yes. Please come to My Lord, page 7. Kindly, My Lord, give me this  
26 indulgence. I'll read, what is not relevant I'll skip. Otherwise I'll read something even at the  
27 cost of repetition. 'These five petitions... writ petitions raise common questions and will be  
28 dealt with together. They attack the constitutionality of Aligarh Muslim University  
29 Amendment Act 1951 and the Aligarh Muslim University Amendment Act 1965. The principal  
30 attack is based on the provisions of Article 30(1), which lays down that all minorities, whether  
31 they are based on religion or language, shall have the right to establish and administer  
32 educational institutions of their choice. The case of all the petitioners is that Aligarh Muslim  
33 University, hereinafter referred to as Aligarh University, was established by Muslim minority  
34 and therefore, the Muslims had the right to administer it. And insofar as the Act of '51 and '65  
35 take away or abridge any part of that right, they are ultra vires.' My Lords, this was a question  
36 of fact asserted by them that, it was established by a minority. 'Besides the principal attack,  
37 the two Acts are also subsidiarily attacked for violating the fundamental rights guaranteed

1 under Article 14, 1925, et cetera.' Your Lordships can skip. Then My Lord, the government  
2 opposes the petition. 'The petitions have been opposed on behalf of the Union of India and its  
3 main contention is that Aligarh University was established in 1920 by Aligarh Muslim  
4 University Act number so and so and that this establishment was not by the Muslim minority,  
5 but the Government of India by virtue of a statute, namely the 1920 Act, and therefore, the  
6 Muslim minority could not claim any fundamental right to administer the Aligarh Muslim  
7 University under Article 13.' Thereafter, My Lord please see further. 'It was further contended  
8 that as the Aligarh Muslim University was established by the 1920 Act the Government of  
9 India, Parliament had the right to amend the statute as it thought fit in the interest of  
10 education and the amendments made by the Act of '51 and '65 were perfectly valid, as there  
11 was no question of their taking away the right of Muslim minority to administer Aligarh  
12 University for the minority not having established the university, could not claim the right to  
13 administer it. It was further contended that the fact that under the provisions of 1920 Act, the  
14 Court of Aligarh University was to be composed entirely of Muslims did not give any right to  
15 Muslim community as such to administer the university which had been administered by the  
16 authorities established by 1920 Act.' This is a factual assertion made. I am, respectfully trying  
17 to urge that, Your Lordships are virtually called upon to sit in appeal over a five judge bench  
18 judgement. There are adjudications on interpretation and facts. My Lord, kindly let me go  
19 further. 'It was further contended that the attack based on 6 Articles...' that Your Lordships  
20 can skip. 'It is necessary to refer to the history previous to the establishment of the Aligarh  
21 University in 1920.' Now, facts are being discussed. 'In order to understand the contentions  
22 raised on either side, it appears that as far back as 1870, Sir Syed Ahmed Khan thought that  
23 the backwardness of the Muslim community was due to their neglect of modern education. He  
24 therefore, conceived the idea of imparting liberal education to Muslims in literature and  
25 science, while at the same time instruction was to be given in Muslim religion and traditions  
26 also. With this object in mind, he organized a committee to devise ways and means for  
27 educational regeneration of Muslims, and in May...

28

29 **[NO AUDIO]** [1872, a society called Muhammadan Anglo-Oriental College Fund committee  
30 was started for collecting subscriptions to realize the goal that Sir Syed Ahmed Khan had  
31 conceived in consequence of the activities of the committee. A school was opened in May 1873.  
32 In 1876, the school became a high school. And in 1877, Lord Lytton then Viceroy laid the  
33 foundation stone for the establishment of a college. The] **[NO AUDIO ENDS]**

34

35 Muhammadan Anglo-Oriental College Aligarh herein after referred to as MAO College, was  
36 established thereafter and was it is said, a flourishing institution by the time Sir Syed Ahmed  
37 Khan died in 1898.' Today also this is one of the top ranking universities. Aligarh University is

1 one of the top ranking universities. 'It is said that thereafter, the idea of establishing a Muslim  
2 university gathered strength from year to year at the turn of the Century, and by 1911, some  
3 funds were collected and a Muslim University Association was established for the purpose of  
4 establishing a teaching university at Aligarh. Long negotiations took place between the  
5 Association and the Government of India..., 'which I had shown to Your Lordships, about how,  
6 under what circumstances, with what condition, in what covenants. That is what My Lord,  
7 factually is seen, '...which eventually resulted in the establishment of Aligarh University in  
8 1920 by the 1920 Act. It may be mentioned that before that a large sum of money was collected  
9 by the Association for the university as the Government of India had made it a condition that  
10 Rs. 30 lakhs must be collected for university before it could be established.' They didn't do it  
11 voluntarily. That was a condition for incorporate... or establishing and incorporating as an Act  
12 of Parliament. 'Further, it seems that existing MAO College was made the basis of university  
13 and was made over to the authorities, established by 1928, for the administration of university,  
14 along with the properties and funds attached to the college, the major part of which had been  
15 contributed by Muslims. Though, some contributions were made by other communities as  
16 well. It is necessary now to refer in some detail, to the provisions of 1920 Act to see how Aligarh  
17 University aimed to be established. The long title of the 1920 Act is, in these words, "an Act to  
18 establish and incorporate a teaching and residential Muslim university at Aligarh." The  
19 Preamble says that it is expedient to establish and incorporate a teaching and residential  
20 Muslim university at Aligarh and to dissolve the societies registered as so and so and so and  
21 so and to transfer and vest in the said universities all properties...' and mark My Lord, '...and  
22 rights of the said societies and of the Muslim University Foundation Committee. The rights  
23 are surrendered by Operation of Law.

24

25 It will be seen from this that the two earlier societies, one of which was connected with MAO  
26 College, and the other had been formed for collecting funds for establishment of the university  
27 at Aligarh, were dissolved and all their properties and rights and all the Muslim... and also of  
28 the Muslim University Foundation Committee, which presumably collected funds for the  
29 proposed university were transferred and vested in the university established by 1920 Act.  
30 Section 3 of the Act laid down that the first Chancellor, Pro Chancellor and Vice Chancellor  
31 shall be persons appointed in this behalf by a notification of the Governor General in Council,  
32 in the Gazette of India and the person specified in the Schedule shall be the first Members of  
33 the Court and they happened to be all Muslims.' Please mark this. The Court says that they  
34 were not required to be, but they happened to be Muslims. 'Further, Section 3 constituted a  
35 Body Corporate by the name of Aligarh Muslim University, and this Body Corporate was to  
36 have perpetual succession and a common seal and could sue and be sued by that name. Section  
37 4 dissolved the MAO College and the Muslim University Association and all property, movable

1 and immovable and all rights, powers and privileges of the two said societies and all property,  
2 movable and immovable, and all rights, powers and privileges of Muslim committee were  
3 transferred and vested in the Aligarh University and were to be applied to the objects and  
4 purposes for which the Aligarh University was incorporated, not the objects of the original  
5 three institutes. All that liabilities and obligations of the said societies and committee were  
6 transferred to the university which was made responsible for discharging and satisfying them.  
7 All references, in any enactment to either of the societies or to the said committee, were to be  
8 construed as reference to the university. It was further provided that any will, deed or other  
9 documents, whether made or executed, before or after the commencement of 1920 Act, which  
10 contained any bequest, gift, et cetera, et cetera.' My Lords, kindly come down a little further.  
11 'These provisions will show...'. The 5th line from the bottom of that para. 'These provisions  
12 will show that three previous bodies legally came to an end, and everything that they were  
13 possessed of, was vested in the university as established by 1920 Act. Section 5 provides for  
14 the powers of the university, including the power to hold examinations and to grant and confer  
15 degrees and other academic distinctions.' Section 6 is important. 'It laid down the degrees,  
16 diplomas and other academic distinctions granted or conferred to or on persons by university  
17 shall be recognized.' Then My Lord, Section 7. Then Section 8, provided that university shall...  
18 now Your Lordships can skip this. There may not be... I'll read it. 'Section 7 provides for reserve  
19 funds, including the sums of Rs. 30 lakhs. Section 8, provided that university shall...'  
20

21 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Actually, Mr. Solicitor, now thereafter, they are  
22 just reproducing the Act.  
23

24 **TUSHAR MEHTA:** My Lord, I therefore, wanted to...  
25

26 **CHIEF JUSTICE D.Y. CHANDRACHUD:** You can now go to page 841, Placitum C, last  
27 line.  
28

29 **TUSHAR MEHTA:** Before that My Lord 8, page 11. 841 My Lord, yes Placitum C. PDF page  
30 11. You Lordships, we are on the same page.  
31

32 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Page 11.  
33

34 **TUSHAR MEHTA:** 'These provisions clearly bring out that the final control in the matter  
35 was with the Lord Rector, who was the Governor General of India.' Then comes Section 14.  
36

1 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Now we need not read what Section 14 says,  
2 because you have read those texts. Now go to Placitum F, their conclusions we will mark,  
3 because before that, they just reproduce the section and then... Placitum F.

4  
5 **TUSHAR MEHTA:** 'This provision, though not so all pervasive as the provision in Section  
6 13 of the '20 Act shows, that the visiting board had also certain overriding powers in case the  
7 university authorities acted against the Act, statutes and ordinances. There is no condition,  
8 that Lord Rector and the members of the visiting board must belong to the Muslim  
9 community.' Then kindly come to My Lord, page 842, para page 12 of PDF. Select committee,  
10 this is important. 'It may be added here, that the select committee which went into the Bill  
11 before the 1920 Act was passed, was not very happy about this proviso and observed...'. My  
12 Lord which proviso? Proviso to Section 23, that all members of the Court should would be  
13 Muslims. They were not happy with that. And this is the finding of select committee. This is  
14 the observation of select committee. 'In reference to the constitution of the court, we have  
15 retained the provision that, no person other than Muslim shall be a member thereof. We have  
16 done this, as we understand that such a provision is in accordance with the pre preponderance  
17 of Muslim feeling, though some of us, are by no means satisfied that such a provision is  
18 necessary'. This was the genesis. My learned friend talks of genesis, this was the genesis, that  
19 what we are establishing is a secular university. But they said, that we give in to their status,  
20 their request. Then My Lord, next is 23. 2, Your Lordships can consider skipping. Section 24  
21 dealt with Executive Council.

22  
23 **JUSTICE SANJIV KHANNA:** The last sentence in the paragraph, the power of making  
24 statutes.

25  
26 **TUSHAR MEHTA:** I'll read them. I don't wish to. The way petitioners read, I didn't want to  
27 read My Lord. They read My Lord, anyway. Section 23(2). 'The Court was to be supreme  
28 governing body of the university and would exercise all the powers of the university, not  
29 otherwise provided for by the 1920 Act, the statute, the ordinances and the regulations.' So  
30 residuary power. 'It was given the power to review the acts of Executive and Academic  
31 Councils, save where such council had acted in accordance with powers, conferred on them  
32 under the Act, the statute or ordinances'. So, if they have acted in accordance, under those,  
33 Court had no power. 'The statute to direct that necessary action be taken by the Executive or  
34 the Academic Council as the case might be, on any recommendation of the Lord Rector. The  
35 power of making statutes was also conferred on the Court, along with other powers necessary  
36 for functioning of the university.' Please pause here. The real section says, the power of  
37 amendment is subject to the approval. He can even, Governor General in Council can even

1 completely reject. Section 24 dealt with the Executive Council, 25 with the Academic Council,  
2 and 26 with other authorities of the university. Section 27-28. 'There is an important provision  
3 in Section 28 with laid down that no new statute or amendment or repeal of an existing statute  
4 shall have any validity, until it has been submitted through the visiting board, which may  
5 record its opinion thereon to the Governor General in Council and has been approved by the  
6 letter, who may sanction, disallow or remedied it for further consideration. This provision  
7 clearly shows that the final power of the administration of the university rested with the  
8 Governor General in Council.' Section 29 dealt with so and so and so. Please come to slightly  
9 above H. 'No new ordinance, amendment or repeal of any existing ordinance shall have any  
10 validity, until it has been submitted through the courts so and so, who may sanction allow.'  
11 This again shows that even ordinances could not be made by the university without the  
12 approval of Governor General in Council. If any dispute arose between Executive and the  
13 Academic Council as to which had the power to make an ordinance, either Council could  
14 represent the matter to the visiting board and the visiting board had to refer the same to a  
15 Tribunal consisting of three honourable members.' My Lords I will skip. My Lords come to C.  
16 'Section 32 provided for admission of students to the university and sub-Section 4 thereof,  
17 provided that university shall not save with the previous sanction of the Governor General in  
18 Council recognize for the purpose of admission to a course of study for a degree as equivalent  
19 to its own degree, any degree conferred by any other university, or as equivalent to  
20 intermediate examination of an Indian university, any examination conducted by any other  
21 authority. This shows that in the matter of admission, the university could not admit students  
22 of other institutions unless the Governor General in Council approved the degree or any other  
23 examination of the institutions other than Indian universities established by law.' Please allow  
24 me to pause here. The university functions at two levels. One is supervisory, decision making,  
25 policy making function, which was not in the hands of minority and second on ground, the  
26 principal, vice principal they will be giving admissions, etc. They follow what is decided. That's  
27 not the administration. That is complying with the administrative guidelines or directions  
28 issue. Section 33, My Lord I'll come to F. Section 40 is important and laid down that. 'If any  
29 difficulty arises with respect to the establishment of the university or any authority of the  
30 university or in connection with the first meeting of any authority of the university, the  
31 Governor General in Council may, by order, make any appointment or do anything which  
32 appears to him necessary or experience for the proper establishment of the university or any  
33 authority thereof, or for the first meeting of any authority of the university.' Unbridled powers.  
34 'This again shows the power of the Governor General in Council in the matter of establishment  
35 of the university. This brings us to end of Sections of 1920 Act. There is nothing anywhere in  
36 any Section of the Act which vest the administration of the university in the Muslim  
37 community. The fact that in proviso to Section 23(1), it is provided that the Court of the

1 university shall consist only of Muslims does not necessarily mean that the administration of  
2 the university was vested or was intended to be vested in Muslim minority. If anything, some  
3 of the important provisions to which we have already referred show that final power in almost  
4 every matter of importance was in Lord Rector, who was the Governor General or in Governor  
5 General in Council or Academic Council'. I will add because I have shown the statutory  
6 provisions. 'Such were the provisions of 1920 Act. They continued in force in 1951 without any  
7 substantial amendment. In '51, the 1951 Act was passed. It made certain changes in '20 Act,  
8 mainly on account of coming into force of the Constitution. We shall refer only to such changes  
9 as our material for our purposes. The first change...' My Lord, I can skip that. My Lord F. Please  
10 come to Placitum F. 'It was necessary to delete Section 9, as otherwise the university might  
11 have lost the grant which was given to it by the Government of India. Further, Section 8 of the  
12 1920 Act was amended as the new section provided that the university shall be open to persons  
13 of either sex and of whatever race, creed, cast or class and it shall not be lawful for the  
14 university to adopt or impose on any person any test whatsoever et cetera, et cetera.' Kindly  
15 come to last three lines. 'Ordinances to those we have consented to receive it. Clearly, Section  
16 9 was deleted and Section 8 was amended in this manner to bring the law in conformity with  
17 the provisions of the Constitution and for the benefit of the university so that it could continue  
18 to receive aid from the government. Some amendment was also made in Section 13 in view of  
19 the change constitutional setup and in place of Lord Rector, the university was to have a  
20 visitor. Section 14 was also amended and the power of visiting board was conferred on the  
21 visitor by addition to a new sub-Section 6. The next substantial change was that the provisos  
22 to Section 23(1) which required that all members of the Court would only be Muslims.' My  
23 Lord, I can skip that.

24

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

26

27 **TUSHAR MEHTA:** Please come to Placitum E. 'It is not our function in the present petition  
28 to consider the policy underlying the amendment made by the 1965 Act, nor...'

29

30 **JUSTICE SANJIV KHANNA:** 'Nor remains the supreme government...'

31

32 **TUSHAR MEHTA:** I'll read it fully, My Lords. 'It will thus be seen by virtue of 1951 Act, non-  
33 Muslims could also be members of the Court.' Correct, My Lord.

34

35 **RAJEEV DHAVAN:** Which one?

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37 **TUSHAR MEHTA:** Yes, I am reading the full paragraph, sir.

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**RAJEEV DHAVAN:** Thank you.

**TUSHAR MEHTA:** 'But the Court still remained the supreme governing body of the university as provided by...'

**JUSTICE SANJIV KHANNA:** This is what is highlighted by them, because once you hold that the Court was a supreme governing body and the pre 1951 position was that they were all Muslims. That's the contradiction pointed out in the judgment.

**TUSHAR MEHTA:** Yes, My Lord.

**JUSTICE SANJIV KHANNA:** Because here they clearly say, 'the Court will still be the supreme governing body of the institution'. You said there's a distinction between policy and administration. I recorded it specifically. What you highlighted was policy is equivalent to administration. That will be slightly debatable but here the contradiction which is pointed out is the judgment refers to several provisions, the Court is not the supreme administrative body. And here, in paragraph over here, they themselves contradict and say Court is still maintained the supreme governing body of the institution. That's where the contradiction is.

**TUSHAR MEHTA:** Would Your Lordships, allow me to show Section 23?

**JUSTICE SANJIV KHANNA:** I'm just highlighting that...

**TUSHAR MEHTA:** No, My Lords, at this juncture, it would be relevant. The statement which is made, but let us read the Section as amended in '51. That's the answer, My Lord. As amended. 'The Court...', and in '65, it even stopped being supreme governing body. But please see, 'the Court shall...' Your Lordships can have the chart for time being, for my satisfaction. '... 'supreme body with residuary power.' Words don't confer power. It is the real powers which have to flow from the statute.

**JUSTICE SANJIV KHANNA:** Let's see. 23.

**TUSHAR MEHTA:** My Lord, 23 as amended by '51 Act. Because *Azeez Basha* is referring to '51 Act. Therefore, I'm taking '51 Act. Because '65 even did away with even that.

**JUSTICE SANJIV KHANNA:** Let's see 23.



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**TUSHAR MEHTA:** 23(2).

**JUSTICE SANJIV KHANNA:** Yes, let's read original 23.

**TUSHAR MEHTA:** Your Lordship would like to read the original?

**JUSTICE SANJIV KHANNA:** Yes.

**TUSHAR MEHTA:** Your Lordships can read this, because original is retained.

**JUSTICE SANJIV KHANNA:** Let's have 23. It's there in your chart itself.

**TUSHAR MEHTA:** Second column.

**JUSTICE SANJIV KHANNA:** Let's see the first part and the second both.

**TUSHAR MEHTA:** We'll read the both. 'The Court shall be the supreme governing body of the university and shall exercise all the powers of the university not otherwise provided for by...'

**JUSTICE SANJIV KHANNA:** There are two things now. Just read part one also, 'the Court shall consist of the Chancellor, Pro Vice Chancellor, Vice Chancellor for the time being and such other persons has to be specified in the statute, provided that no person other than the Muslim will be a member thereof.' Now will it also mean the proviso, will also mean that the Chancellor, Pro Vice Chancellor and Vice Chancellor should be Muslims?

**TUSHAR MEHTA:** It cannot mean. It cannot.

**JUSTICE SANJIV KHANNA:** Will it mean that Chancellor, Pro Vice Chancellor and Vice Chancellor will be Muslim, because if they are members of the court and the proviso say they have to be... all members of the Court will be Muslim, will it, can be impliedly said that the Chancellor, Vice Chancellor...

**TUSHAR MEHTA:** We had examined this one. The real intent is that whoever they are, happened to be Muslim, happened to be non-Muslims, they would ex-officio become members of the Court.

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**JUSTICE SANJIV KHANNA:** Okay. We have understood. Now come to page, paragraph...

**TUSHAR MEHTA:** Because thereafter, whenever there is an amendment, this has not undergone change.

**JUSTICE SANJIV KHANNA:** That's correct. But there is amendment in Law. This portion, that 'they shall be Muslim thereof' has been deleted. That has been deleted in 1951.

**TUSHAR MEHTA:** Yes, yes.

**JUSTICE SANJIV KHANNA:** So that's a big change. But now, come to this paragraph 2.

**TUSHAR MEHTA:** What was the power?

**JUSTICE SANJIV KHANNA:** 'The Court shall be the supreme governing body of the university.' That's part one.

**TUSHAR MEHTA:** Correct.

**JUSTICE SANJIV KHANNA:** 'And shall exercise powers of the universities is not exercisable...'

**TUSHAR MEHTA:** Not otherwise.

**JUSTICE SANJIV KHANNA:** So, there are two parts to it. One, is it's a supreme governing body, that's part one. The second is, it shall exercise such other Act, have the power to exercise such other powers, which are not specified by the statute, ordinances or regulations.

**TUSHAR MEHTA:** So what do we call, residuary powers.

**JUSTICE SANJIV KHANNA:** No, that's part two. Part one is, it being the supreme governing body.

**TUSHAR MEHTA:** Thereafter, please read. 'Supreme governing body and shall exercise all the powers of the university, not otherwise provided for by this Act, the statute, the ordinances and the regulations, which shall have power to review the acts of Executive and Academic

1 Council.' But which powers? Review of what? 'Save where such Councils have acted in  
2 accordance with powers conferred on them under this Act, the statute and the ordinances.' If  
3 something else happens, they can review that functioning or powers exercise by these three  
4 bodies. So here also they have residuary power. Then, 'and direct that necessary action be  
5 taken by the Executive or the Academic Council as the case may be, on any recommendations  
6 of the Lord Rector.' Again, their recommendation is not binding. It goes via Lord Rector, and  
7 if the Lord Rector finds, that 'yes' this is a power exercise by Academic Council or Executive  
8 Council, which is not their part of the power under the statute or ordinance and the Court has  
9 something to say, then their recommendation will go. So, My Lord, it's a misnomer to say that,  
10 it is a supreme governing body. Supreme governing body, yes. For anything other than what  
11 is provided for, under the statute. Suppose the statute confers, absolute power on Executive  
12 Council about admissions. Then My Lord, this body... Court will not come into the picture. If  
13 the ordinance provides, supreme power of, say, rustication of students or conferment of  
14 degrees or the quality of examination, that would be decided by those 15 or 16 people, of  
15 Executive Council or Academic Council, not by 180 people My Lord, sitting together.

16

17 **JUSTICE SURYA KANT:** The court is supreme only in respect of those power which are not  
18 expressly or by implication conferred on other authority...

19

20 **TUSHAR MEHTA:** Yes, My Lord. Therefore, residuary. That's my respectful submission.

21

22 **JUSTICE SURYA KANT:** That is what the provision says.

23

24 **TUSHAR MEHTA:** That's the interpretation. Now My Lords, in '51... Your Lordships have  
25 the second column. This proviso is deleted, 'provided that no person other than Muslim shall  
26 be a member thereof and this power is also taken away'. On the next page, 'and direct that  
27 necessary action be taken, by Executive or the Academic Council as the case may be, on any  
28 recommendation of the Lord Rector.' This is taken. Otherwise, the residuary power not vested  
29 elsewhere, under the statutes or ordinance is remain.

30

31 **RAJEEV DHAVAN:** Now, 12(d) may be read. The last line...

32

33 **TUSHAR MEHTA:** Last line of? Correct My Lord, I am on the Act. Here when Your  
34 Lordships have this, can Your Lordships also see, '65 Amendment because *Basha* considered  
35 that also.

36

1 **JUSTICE SANJIV KHANNA:** The argument on '65 Amendment is, it's because of the  
2 peculiar situation which had come about. '65, it was a very... little disturbing situation and  
3 therefore, the amendment was a temporary...

4

5 **TUSHAR MEHTA:** There were several issues, My Lord, which we may not...

6

7 **JUSTICE SANJIV KHANNA:** I tried to find out, what was the reason.

8

9 **TUSHAR MEHTA:** Ali Yavar Jung was the Vice Chancellor, if my research is correct. Very  
10 eminent diplomat, and he was so brutally attacked.

11

12 **CHIEF JUSTICE D.Y. CHANDRACHUD:** He became Governor of Maharashtra.

13

14 **TUSHAR MEHTA:** He was Governor of Maharashtra, also, and he was an ambassador in  
15 several important countries and he was a very diplomat of repute. He was requested by Justice  
16 Chagla to go there and handle the situation because there were several things happening,  
17 which I am not right now going to discuss. It's not in good taste. He was so brutally attacked,  
18 that he had about 20 wounds on the vital parts of his body and he barely survived.

19

20 **JUSTICE SANJIV KHANNA:** But, their argument on that is, these were temporary in  
21 nature, to tide over the problem at that time.

22

23 **TUSHAR MEHTA:** My Lord kindly see thereafter '72. '72 is the... '65 please see, '65 they  
24 make it, only advise it. But...

25

26 **JUSTICE SANJIV KHANNA:** Their argument on that will be, that if one holds, that it is a  
27 minority institution in terms of Article 30, then these amendments may be wrong, maybe  
28 contrary to the law.

29

30 **TUSHAR MEHTA:** Then what can be wrong?

31

32 **JUSTICE SANJIV KHANNA:** Then those amendments are contrary to Article 30 because  
33 they withdraw. That's a separate argument. We understand that. The argument that it is not a  
34 minority institution I am not [UNCLEAR]

35

36 **TUSHAR MEHTA:** That has attained finality. That amendment on facts Your Lordships,  
37 would then be requested to sit in appeal. If Your Lordships have to, there are some finding of

1 facts also recorded. If Your Lordships were to be requested to declare those amendments to be  
2 unconstitutional after almost 60 years, I'm not on delay, and that too, without putting any  
3 challenge, then it would be exercise of...

4

5 **JUSTICE SANJIV KHANNA:** In *Basha* the challenge was there. *Basha*, challenge was  
6 there.

7

8 **TUSHAR MEHTA:** Correct, My Lord. Kindly see the reference order. Reference order says,  
9 there is a question frame. Reference order unfortunately, is not shown to Your Lordships. It's  
10 not that you entirely...

11

12 **JUSTICE SANJIV KHANNA:** Reference order was shown to us.

13

14 **TUSHAR MEHTA:** That we consider *Basha*. Entirely reconsider and take a different view.  
15 That is not the reference. Reference is that there was a reference made to eleven judges bench  
16 in *TMA Pai*, what can be the indicia for deciding that this institution is a minority institution.  
17 That was not answered by *TMA Pai*, and therefore, the Court refers it. That *Basha* has  
18 something to do and impugned order in those appeals referred to *Basha*. Therefore, *Basha*  
19 is there. Not that the Court is requested to take a different view sitting in appeal over *Basha*.  
20 I'm sorry for...

21

22 **JUSTICE SANJIV KHANNA:** You have right to address.

23

24 **TUSHAR MEHTA:** Yes, My Lord, just for want of better expression, I'm saying. My Lord, let  
25 me not go further. 'It will thus be seen that by virtue...' I have read that. 'It is remarkable that  
26 though the proviso to Section 23(1) was deleted as far back as 1951, there was no challenge to  
27 '51 Act till after Ordinance 2 of '65 was passed'. '51 is now My Lord, what, 74 years back. 'The  
28 reason for this might be that there was practically no substantial change in the administrative  
29 setup of 1920 Act. And it was only when a drastic change was made by the ordinance of 1965  
30 followed by '65 Act that challenge was made not only to the '65 Act, but also to this '51 Act in  
31 so far as it did away with the proviso to Section 23(1). It is not our function in the present  
32 petition to consider the policy underlying the amendments made in the 1965 Act nor do we  
33 propose to go into the merits of the amendments made by 1965 Act. We are in the present  
34 petition concerned only with the constitutionality of the provisions of 1965 Act. If the  
35 provisions are constitutional, they were within the legislative competence. This brings us to  
36 the changes made in '65 Act which have occasioned the present challenge. The main  
37 amendment in '65 Act, was in Section 23 with respect to the composition and powers of the

1 Court of the university.' This I can skip with Your Lordship's permission. Unless other side  
2 wants me to reread because it narrates My Lord, what is '65 Amendment. Please come to  
3 846(e), Placitum E. This was the contention. 'The contention of the petitioners is that by these  
4 drastic amendments in 1965, the Muslim minority was deprived of the right to administer  
5 Aligarh Muslim University and that this deprivation was in violation of Article 30. Under  
6 Article 30(1), all minorities whether based on religion or language, shall have the right to  
7 establish...'That also Your Lordships can or My Lord I may. I'll read whatever I can...

8

9 **JUSTICE DIPANKAR DATTA:** In fact the next paragraph portions of it have been quoted  
10 in the Referral Order.

11

12 **TUSHAR MEHTA:** Yes, My Lord.

13

14 **JUSTICE DIPANKAR DATTA:** And that is what is doubted by the bench of three judges,  
15 whether, 'establish and administer' is to be read as, 'establish or administer'.

16

17 **TUSHAR MEHTA:** That's not their argument.

18

19 **JUSTICE DIPANKAR DATTA:** No, no. This is what the three judge bench...

20

21 **TUSHAR MEHTA:** Yes, Your Lordship is correct. We are going on a footing that they have  
22 also said that end is end. It is not disjunctive, but that's the only reference. But I didn't hear  
23 them argue that it should be either, 'establish or administer'.

24

25 **CHIEF JUSTICE D.Y. CHANDRACHUD:** The arguments have proceeded on the basis  
26 that 'establish and administer' means that both conditions have to be, co-exist.

27

28 **TUSHAR MEHTA:** Must co-exist. Yes.

29

30 **NEERAJ KISHAN KAUL:** Reference Order specifically referring to all previous judgments,  
31 insists on the fact that whether it's conjunctive or disjunctive. And that's why *Yashpal* and  
32 the NMC Act is also referred to because the word, 'establish or incorporate, for them. So one  
33 of our arguments is going to be 'the scope of referrals was only on the issue of being conjunctive  
34 or disjunctive.' The other issues of *Basha*, whether administered, established or the facts of  
35 the case were never referred to. These internal contradictions are now being argued. They are  
36 not the subject matter of reference ever.

37

1 **RAJEEV DHAVAN:** 16(f) may be read My Lord, just after the first para.

2

3 **TUSHAR MEHTA:** 16(f).

4

5 **RAJEEV DHAVAN:** 'We shall proceed on the assumption...'

6

7 **TUSHAR MEHTA:** 'We shall proceed on the assumption in the present petitions that  
8 Muslims are a minority based on religion'. Nobody disputes that, My Lord. Nobody disputes  
9 that. Religion. 'What then is the Scope of Article 30, sub-Section 1? And what exactly is the  
10 right conferred therein on the religious minorities? It is to our mind quite clear that 30(1)  
11 postulates that the religious community will have the right to establish and administer  
12 educational institution of their choice, meaning thereby, that where a religious minority  
13 establishes an educational institution, it will have the right to administer that'. So, kindly  
14 permit me to pause here. My respectful submission is going to be that if at all Your Lordships  
15 are called upon to re-interpret Article 30 in facts which are already decided, the choice will be  
16 choice to establish and administer, not the manner and method of establishment. That only  
17 Parliament can prescribe, that you decide, you make a university by an Act of Parliament, you  
18 register as a society under the Registration Act. But that's a separate issue. Let me complete  
19 this. I don't wish to deviate. 'And establish and administer educational institutions of their  
20 choice, meaning thereby that where a religious minority establishes an educational institution,  
21 it will have the right to administer that. An argument has been raised to the effect that even  
22 though religious minority may not have established the educational institution, it will have the  
23 right to administer it, if, by some process it had been administered by the same, before the  
24 Constitution came into force'. Now My Lord, having found a road block about establishment,  
25 they say, all right, but we were administering. 'Have a right to administer it by some so and so.  
26 We are not prepared to accept this argument. The Article, in our opinion, clearly shows that  
27 the minority will have the right to administer educational institutions of their choice, provided  
28 they have established them, but not otherwise. The Article cannot be read to mean that even  
29 if the educational institution has been established by someone else, any religious minority  
30 would have the right to administer it because for some reason or the other, it might have been  
31 administering it before the Constitution came into force. The words, "establish and  
32 administer" in Article must be read conjunctively and so read, it gives the right to the minority  
33 to administer an educational institution, provided it has been established by. In this  
34 connection, our attention was drawn in writ Kerala Education Bill, where it is argued, "this  
35 Court had held that the majority can administer an educational institution, even though it  
36 might not have established it.'" Kerala doesn't say this. I'm going to read two paragraphs from  
37 Kerala. It's a seven judge bench. In that case, an argument was raised at under Article 30 (1),

1 'protection was given only to educational institutions established after the Constitution came  
2 into force. That argument was turned down by this Court for the obvious reason that if the  
3 interpretation was given to Article 30(1), it would be robbed of much of its content. But that  
4 case, in our opinion, did not lay down that the words, 'established and administered' in Article  
5 30 sub Article (1), should be read disjunctively so that though a minority might not have  
6 established an educational institution, it had the right to administer it. It is true that at page  
7 1062, the Court spoke of Article 30, sub Article (1), giving two rights to a minority. That is one,  
8 to establish and two, to administer. But that was said only in the context of meeting the  
9 argument that educational institutions established by minorities before the Constitution came  
10 into force did not have the protection of Article 30 sub Article (1). We are of the opinion that  
11 nothing in that case justifies the contention raised on behalf of petitioners that the minorities  
12 would have the right to administer an educational institution, even though the institution may  
13 not have been established by them. The two words in Article 30 (1) must be read together and  
14 so read, Article gives the right to minority to administer the institutions established by it. If  
15 the educational institution has not been established by a minority, it cannot claim the right to  
16 administer it under Article 30(1). We have therefore, to consider whether Aligarh University  
17 is established by the Muslim minority, and if it was so established, the minority would certainly  
18 have the right to administer it.' My Lord, that was not argued that it is disjunctive. So, we are  
19 proceeding on that basis, My Lord. Court quotes **Dargah Committee Ajmer Case**. My  
20 Lord, this is where I say, when you surrender your right. I'll read H. This is also five judge  
21 bench judgment, in **Dargah Committee Ajmer**, 'If the right to administer the property is  
22 never vested in the denomination or had been validly surrendered by it or had otherwise been  
23 effectively and irretrievably lost to it, Article 26 cannot be successfully invoked.' Now, **Azeez**  
24 **Basha**, bench says, 'we shall have to examine closely, what happened in 1920, when the 1920  
25 Act was passed to decide, firstly, whether in the face of the Act, it could be said that Aligarh  
26 University was established by the Muslim minority. Secondly, whether the right to administer  
27 it, ever vested in the minority. And thirdly...,' please mark this. 'Even if the right to administer  
28 some properties that came to the university vested in the minority before the establishment,  
29 before the establishment of Aligarh University, whether it had been surrendered when the  
30 Aligarh University came to be established.' My Lord, this is a question of fact the Court poses  
31 for itself, and answer as of fact, that yes, you have surrendered. 'Before we do so, we should  
32 like to say that, words, "educational institution" are of very wide importance, would include  
33 university also. This was not disputed on behalf of Union of India and therefore it may be  
34 accepted.' Thereafter I'll come to D, Placitum D. 'There is a good deal in common between  
35 educational institution which are not universities and those which are universities. Both...' I'm  
36 sorry. Just before me D. Just before D. I'm sorry. 'The position with respect to establishment  
37 of universities, before the Constitution came into force in 1950, was this. There was no law in



1 India which prohibited any private individual or body from establishing a university, and it  
2 was therefore, open to a private individual or body to establish university.' Therefore, My Lord,  
3 I gave the history how the regime change took place. Till '56 anyone can establish university.  
4 MAO could have done it, without surrendering their rights before the Parliament. 'There is a  
5 good deal in common between educational institutions which are not universities and those  
6 which are universities. Both teach students and both have teachers for the purpose. But what  
7 distinguishes a university from any other educational institution is that, a university grants  
8 degrees of its own, while other educational institutions cannot. It is this granting of degrees  
9 by a university, which distinguishes it from the ordinary run of educational institutions.' See  
10 St. David's College, et cetera. Thus, in law in India, there was no prohibition against  
11 establishment of universities by private individuals or bodies, and if any university was so  
12 established, it must of necessity be granting degrees before it could be called a university. But  
13 though, such a university might be granting degrees, it did not follow that the government of  
14 the country was bound to recognize those degrees. Britishers would not recognize those  
15 degrees. It was not recognized for government service. Therefore, at the cost of repetition, I  
16 say many universities came without an Act of British Parliament. And they produced one of  
17 the finest alumni. I have the list, but that's not the relevant thing. I'm not going into it. 'As a  
18 matter of fact, as the law stood up to the time the Constitution came into force, the government  
19 was not bound to recognize degrees of universities established by private individual or bodies.  
20 And generally speaking, the government only recognized degrees of universities established  
21 by it by law. No private individual or body could before 1950, insist that degrees of any  
22 university established by him or it must be recognized by the government. Such recognition  
23 depended upon the will of the government generally express through the statute. The  
24 importance of the recognition of government in matters of this kind cannot be minimized. This  
25 position continued even after the Constitution came into force. It was only in 1956 that by sub-  
26 Section (1) of Section 22, the University Grants Commission Act, it was laid down that the right  
27 of conferring or granting degrees shall be exercised only by a university established or  
28 incorporated by or under a Central Act.' Please mark this word. 'Established or incorporated'.  
29 Even if it is only incorporated, it is by the statute. I'm on that amendment of '81. Deemed  
30 Central Act.

31 'A provincial Act or a state Act or an institution deemed to be university under Section 3 or an  
32 institution specially empowered by an act of Parliament to confer or grant degrees. Sub-  
33 Section 2, thereof further provided that, save as provided in sub-Section (1). No person or  
34 authority shall confer or grant or hold himself or itself as entitled to confer or grant any degree.  
35 Section 23 further prohibited the use of the word, 'university' by an educational institution  
36 unless it is established by law. It was only thereafter that no private individual or body could  
37 grant a degree in India.' The Court now refers to earlier. That earlier there was no such

1 prohibition. 'Therefore, it was possible for the Muslim minority to establish a university before  
2 the Constitution came into force, though the degrees conferred by such a university were not  
3 bound to be recognized by the government'. This is the ratio, not that once... the ratio  
4 propounded before Your Lordship is that once it is established by an Act, you cease to be a  
5 minority and now the Act requires... UGC Act requires an Act. And therefore, there can be no  
6 minority institution. No. Even after UGC Act, there are minority institutions. I have given  
7 examples, how they are created. Here it was a *sui generis* case, that you could have done what  
8 others did. 'Then there was nothing in 1920 to prevent the Muslim minority if it so chose to  
9 establish a university. But if it did so, the degrees of such university were not bound to be  
10 recognized by the government. It may be that in absence of recognition of degrees granted by  
11 a university, it may not have attracted many students and that is why we find that before the  
12 Constitution came into force, most of the universities in India were established by Legislation.  
13 The Aligarh University was also in the same way established by Legislation and it provided  
14 under Section 6, of the 1920 Act that the degrees, diplomas and other academic distinctions  
15 granted or conferred to or on persons by the university shall be recognized by the government  
16 as are the corresponding degrees, diplomas and other academic distinctions, et cetera. It is  
17 clear, therefore, that even though Muslim minority could have established at Aligarh in 1920  
18 a university, it could not insist that the degrees granted by such a university should be  
19 recognized by the government. Therefore, when the Aligarh University was established in 1920  
20 and by Section 6, it's degrees were recognized by the government. An institution was brought  
21 into existence which could not be brought into existence by any private individual or body for  
22 such individual or body could not insist upon recognition of degrees conferred by any  
23 university established by it. The enactment of Section 6, in 1920 Act, is a very important  
24 circumstance which shows that the Aligarh university, when it came to be established in 1920  
25 was not established by Muslim minority, for the minority could not insist on the recognition  
26 by government of the degrees conferred by any university established by it.' Vishwa Bharati  
27 university was a private university and was recognized after UGC Act came into force. Gujarat  
28 Vidyapeeth was a private university granting degrees, several legal and other luminaries as  
29 their alumnus. They got allotted the status of university after UGC Act. That is what **Azeez**  
30 **Basha** says. 'It is true, as it is clear from 1920 Act that the nucleus of the Aligarh University  
31 was the MAO College, which was still then a teaching institution under the Allahabad  
32 University. The conversion of that college, if may use that expression...' I'm sorry. The court is  
33 very conscious of even using the word, 'conversion' because it died, the earlier body dies and  
34 a new body comes into effect, and therefore, the Court says, if we may use this loosely, My  
35 Lord, Court uses. 'If the conversion of that college, if we may use the expression, into a  
36 university was however, not by Muslim minority. It took place by virtue of 1920 Act, which  
37 was passed by the Central Legislature. There was no Aligarh Muslim University existing till

1 1920 Act was passed. It was brought into being by the 1920 Act and must therefore, be held to  
2 have been established by the Central Legislature, which by passing the 1920 Act incorporated  
3 it. The fact that it was based on MAO College, would make no difference to the question as to  
4 whether who established the Aligarh University. The answer to our mind as to who established  
5 the Aligarh University is clear, and that is that it was the Central Legislature by enacting the  
6 Act that established the said university. As we have said already, the Muslim minority could  
7 not establish a university whose degrees were bound to be recognized by government as  
8 provided by Section Act. That one circumstance, along with the fact that without 1928, the  
9 university, in the form that it had, could not come into existence, shows clearly that the Aligarh  
10 University, when it came into existence in 1920, was established by Central Legislature. It may  
11 be that the '20 Act was passed as a result of efforts of Muslim minority, but that does not mean  
12 that Aligarh University, when it came into being under the '20 Act was established by...'

13

14 Then Your Lordships can... unless the other side wants My Lord. Kindly come to page 21, My  
15 Lord. 851. F. The Paragraph starting with F. I'm sorry, My Lord, just below D. 'We are of the  
16 opinion..., ' My Lord.

17

18 **CHIEF JUSTICE D.Y. CHANDRACHUD:** The Court has proceeded on the foundation  
19 that MAO College and Muslim University Association were institutions founded by the Muslim  
20 minority. They say that both the MAO College and Muslim University Foundation, they were  
21 societies. They were founded by the Muslim minority. Second, they said that MAO College  
22 furnished the nucleus for Aligarh Muslim University. They are both these findings which we  
23 find. The first, which I said at the bottom of page 22 and the second at the bottom of page 19.  
24 But they say that because the establishment of the university was by an Act of the Legislature,  
25 therefore, it's not an institution which is established by the Muslim minority. And to support  
26 that they say that there was no prohibition prior to 1956 on a private university, on a university  
27 being established other than through the route of lawmaking. Any person could establish a  
28 university. Therefore, they said that look, you could have established a university yourself, but  
29 you chose the route of lawmaking by the Imperial Legislature. You reached out to the British  
30 Government. And once the establishment takes place, by an Act of the Legislature, the  
31 establishment is therefore, not by the....

32

33 **TUSHAR MEHTA:** Manner. May I add, with Your Lordship's permission?

34

35 **CHIEF JUSTICE D.Y. CHANDRACHUD:** That seems to be. That's the first part of the  
36 logic. And the second part of the logic, they say is, look at the provisions of the statute and the  
37 statute makes it clear that administration is not in the hands of the Muslim minority. A

1 majority of the members in the Court have to be Muslims but even in so far as the Court is  
2 concerned, the electors to the Court are not necessarily Muslims, one. Second, there are other  
3 institutions of the university in which the majority doesn't... not majority need not have  
4 Muslims at all. That's on the administration aspect. On the establishment aspect, this is a logic  
5 really. They accept that nucleus is this. They accept that the institutions which would have the  
6 nucleus were Muslim minority institutions. But they say, once you chose legislation, you  
7 cannot say the establishment was by the minority.

8

9 **TUSHAR MEHTA:** And may I add with Your Lordship's permission?

10

11 **CHIEF JUSTICE D.Y. CHANDRACHUD:** I think that really is the...

12

13 **TUSHAR MEHTA:** One more. One more with Your Lordship's permission, I'll add. The  
14 Honourable Court, My Lord, rely upon *Dargah Committee*, rely upon *Dargah*  
15 *Committee* and examine the facts whether you surrendered your right to continue as a  
16 minority...

17

18 **CHIEF JUSTICE D.Y. CHANDRACHUD:** in the scheme of the statute, the Court has  
19 looked at in the first part of the judgment, and the latter part of the judgment on the aspect of  
20 administration. On the establishment, they follow the broad line of argument, that look, the  
21 establishment was by law.

22

23 **TUSHAR MEHTA:** Yes, My Lord.

24

25 **CHIEF JUSTICE D.Y. CHANDRACHUD:** And the establishment being by law and having  
26 approached the legislature, the government, then to pass this law, you didn't establish it  
27 yourself.

28

29 **TUSHAR MEHTA:** May I add with Your Lordships permission? And how I read the ratio,  
30 apart from what Your Lordships, have said. Based on *Dargah Committee*, the Court also  
31 examines, whether you had a right to continue as a university of your own. Answer the Court  
32 gives is, yes. Why did you not continue? Why did you surrender your rights? Because you  
33 wanted your degrees to be recognized and therefore, the Court refers to *Dargah Committee*  
34 five judge bench judgment, that before Constitution, if you have surrendered your right of  
35 administration, the matter ends. That is the second thing. And third thing, that everything  
36 which existed prior to the university coming into existence, got dissolved by operation of law

1 in the university, with a mandate that whatever is now the corpus, including the debts, will be  
2 for the university, not for the objects of MAO.

3

4 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Now, post Constitution, post Constitution, the  
5 fact that you seek recognition by the state, is not an indicia of the surrendering of your minority  
6 status or the absence of minority status, because post Constitution, now the law after, both,  
7 before and after this judgment is, that by seeking financial aid or seeking recognition, you don't  
8 surrender your minority status. Because...

9

10 **TUSHAR MEHTA:** There is an Act...

11

12 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Practically, if your degrees are not recognized,  
13 it's worthless.

14

15 **TUSHAR MEHTA:** No.

16

17 **CHIEF JUSTICE D.Y. CHANDRACHUD:** You are right, there were other institutions pre  
18 independence, pre independence. Post independence, of course, after 1956, you cannot have,  
19 you cannot set up a university at all.

20

21 **TUSHAR MEHTA:** It's a crime. It's an offense to use the word, 'university' and to hold out,  
22 that you are competent to allot degrees and diplomas, is a criminal offense.

23

24 **CHIEF JUSTICE D.Y. CHANDRACHUD:** But that goes in their favour. Not in yours.

25

26 **TUSHAR MEHTA:** No, My Lord.

27

28 **CHIEF JUSTICE D.Y. CHANDRACHUD:** I tell you why. Because post 1956, you cannot  
29 award a degree unless you have been set up as a university, and that university has been  
30 established under law. Right? Therefore, it's a mandate of statute. Pre Constitution, at least  
31 there was an option. Post Constitution, post 1956, and the UGC Act, there's no option now.  
32 Therefore, the mere fact, the mere fact, that you had to take the legal route, in the sense, of  
33 lawmaking route...

34

35 **TUSHAR MEHTA:** The lawmaking route.

36

1 **CHIEF JUSTICE D.Y. CHANDRACHUD:** ...the lawmaking route, would not by itself, be  
2 a circumstance indicating the surrender of minority state. Would it?

3

4 **TUSHAR MEHTA:** No, I'm sorry, the Court says, and in my respectful submission, rightly,  
5 that others did not surrender established universities without lawmaking route and granted  
6 degrees. But you surrendered it, I'll come further, because you wanted your degrees to be  
7 recognized by the Crown. There were universities, My Lord, I have given the list to Your  
8 Lordships, prior to the Constitution coming into force, there were universities. My Lord, how  
9 many? I'll just show the list.

10

11 **CHIEF JUSTICE D.Y. CHANDRACHUD:** The other day. But...

12

13 **TUSHAR MEHTA:** But that there were universities functioning, granting degrees.  
14 Universities of eminence. And 1920, there was no right to recognition, even if I would...  
15 suppose I am Sir so and so, I constitute a private university. Forget minority, majority and I  
16 have very good relationship with the Crown. Crown may accept my degrees, recognize my  
17 degrees. Crown may not exercise. There was no review, judicial review, 226, nothing, My Lord.  
18 There was no concept of fundamental rights for natives. So, the real ratio is, that you had an  
19 option the way others had, you chose not to exercise the option. Post Constitution, such a  
20 situation will never arise, because now you have to go before the authority under the new Act.  
21 Not only UGC Act, now there is a minority commission, Minority Educational Institution Act.  
22 So, now there is no difficulty. Now there would not be any situation which is akin to a Aligarh  
23 Muslim University. Therefore, I started by saying that *Azeez Basha* is a fact specific, Act  
24 specific, university specific, *sui generis* judgment, deciding the certain factors which help for  
25 consideration. And one of the question framed is, did you surrender your right? Because there  
26 was a right. There was no mandate that you go and get a lawmaking done. Others were  
27 exercising their right. They were granting degrees. Why did you not do that? You surrendered  
28 everything. Your property goes in the common pool. The property, by operation of law, is  
29 vested in the new body which is created. That is the ratio. Kindly read further. My Lord, kindly  
30 allow me to read further. At page 21. The un-numbered paragraph. 'From the history we have  
31 set out above, it will be clear that those who were in-charge of MAO College, the Muslim  
32 University association and Muslim University Foundation Committee were keen to bring into  
33 existence a university at Aligarh. There was nothing in law then to prevent them from doing  
34 so. If they so desired without asking government to help them in the matter. But if they had  
35 brought into existence a university on their own, the degrees of the university were not bound  
36 to be recognized by the government. It seems to us that it must have been felt by the person's  
37 concern that it would be no use bringing into existence a university if the degrees conferred by

1 the said university were not to be recognized by the government.' Gandhiji established many  
2 universities at the same time. 1920. Gujarat Vidyapeeth, Bihar Vidyapeeth, Nalanda  
3 Vidyapeeth, Jamia, Vishwa Bharati... Yes, My Lord, that appears to be the reason why they  
4 approached the government for bringing into existence a university at Aligarh whose degrees  
5 would be recognized by government and that is why we find Section 6 of the Act laying down  
6 that degree so and so. Now please see. 'It may be accepted for present purpose that MAO  
7 College and Muslim University Association and Muslim University Foundation Committee  
8 were institutions established by Muslim minority and the two of them were administered by  
9 societies registered under the Societies Registration Act. But if MAO College was to be  
10 converted into a university of the kind whose degrees were bound to be recognized by the  
11 government, it would not be possible for those who were in charge of MAO College to do so.  
12 That is why three institutions to which we have already referred approach the government to  
13 bring into existence a university whose degrees would be recognized by government. The '20  
14 Act was then passed by the Central Legislature and the university came into existence.' Please  
15 come My Lord at the foot H, Placitum H. 'It appears...', now factual adjudication is also done.  
16 'It appears from paragraph 8 of the Schedule that even though the members of the Court had  
17 to be Muslims...', please note at that time, 35 were the members of the Court. At the relevant  
18 point of time, in 1920. '...had to be Muslims. The electorate were not exclusively Muslims. For  
19 example, 60 members of the Court had to be elected by persons who had made or would make  
20 donations of Rs. 500 and upwards to or for the purpose of the university. Some of these  
21 persons were and could be non-Muslims. 40 persons were to be elected by the registered  
22 graduate of the university and some of the registered graduates were and could be non-  
23 Muslims. For the university was open to all persons of either sex and of whatever race, creed  
24 or class. Further, 15 members of the Court were to be elected by the Academic Council, the  
25 membership of which was not confined only to Muslims.' My Lord, kindly pause here for a  
26 minute. My Lord this is being decided at a time when only in recent past, for them, in '68,  
27 there were electoral colleges and constituencies reserved for Muslim where only Muslims can  
28 contest and only Muslims can vote. In 1920, 1930, etc. Possibly judges were aware that this is  
29 a constituency where you have to be a Muslim candidate. Your electorate may not entirely  
30 necessarily be Muslims. Students can be of any community. Besides, there were other bodies  
31 like Executive Council...

32

33 **CHIEF JUSTICE D.Y. CHANDRACHUD:** This comes in the administration aspect.  
34 Right? This part of the discussion is in the administration aspect.

35

36 **TUSHAR MEHTA:** Yes My Lord. 'Besides, there were other bodies like the Executive  
37 Council and the Academic Council, which were concerned with the administration of Aligarh

1 University and there was no provision in the constitution of these bodies which confined their  
2 members only to Muslims. They can be, they may not be. Law did not provide for that. It will  
3 thus be seen that besides the fact that the members of the Court had to be all Muslims, there  
4 was nothing in the Act to suggest that the administration of Aligarh University was in Muslim  
5 minority as such. Besides the above, we have already referred to Section 13, which show how  
6 Lord Rector, namely the Governor General, had overriding powers, et cetera.' Then again, My  
7 Lord, scheme is discussed, but please come to slightly above H. 'We are therefore, of the  
8 opinion...', fourth line, fifth line from the bottom. 'We are therefore of the opinion that Aligarh  
9 University was neither established nor administered by the Muslim minority. And therefore,  
10 there is no question of any amendment to 1920 Act being unconstitutional and under Article  
11 30, sub Article (1), for that Article does not apply at all to Aligarh University.' Then kindly see.  
12 Other arguments are rejected. I'll not read. Other are 26, 14, 25, et cetera. They are not gone  
13 into. So, My Lord, in respectful submission, this is a *sui generis* case, which will never arise,  
14 which cannot arise. Of course, for Aligarh University, it would be a live case, but the ratio of  
15 this judgment is not that, only because you have established that now, if you establish under  
16 the lawmaking jurisdiction, you can never be a minority. That's the pitch at which the  
17 argument was placed. That now, if this is the law, there can be no university which is a minority  
18 university because every university under UGC Act...

19

20 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Post 1956, now, as I said short while ago,  
21 Section 22 of the UGC Act, you cannot establish a university except by law. Right? Therefore,  
22 the fact that you have established a university by... under the law, by a law does not denude  
23 you of your minority status. Post 1956.

24

25 **TUSHAR MEHTA:** Post. Pre, yes.

26

27 **CHIEF JUSTICE D.Y. CHANDRACHUD:** And now you have the MEI Act after 2006.

28

29 **JUSTICE SANJIV KHANNA:** Before the 2004 Act, if we apply this ratio that, then no  
30 university could be established as a minority institution, until and unless, because every time...  
31 you require after *Yashpal*, you required a statutory amendment.

32

33 **TUSHAR MEHTA:** I'll just answer that question. UGC Act provides that no university,  
34 whether minority or otherwise, can be without an Act of Legislation.

35

36 **JUSTICE SANJIV KHANNA:** So therefore, Act of Legislation...

37



1 **TUSHAR MEHTA:** Deemed to be... Would Your Lordships have UGC Act?

2

3 **JUSTICE SANJIV KHANNA:** No. But therefore, whenever there's an Act of... as per the  
4 ratio of this judgement, if there is a by an enactment by law, whether by the Parliament or by  
5 the State Legislature, the act of establishment is by that Legislation.

6

7 **ADVOCATE N.K. KAUL:** Either an Act of Legislation or under the UGC Act, you as an  
8 institution could go for conferment of Deemed Status as a university. So, you could be a  
9 minority institution, you go to the UGC and you say, confer on me the status of a Deemed  
10 University. So, it could happen both ways. An act of Parliament has happened in this case or  
11 as a Deemed Status of a university. Under Section 22 and Section 2(f)... Section 2, sub Clause  
12 (f) read with Section 3 and Section 22, a Deemed Status would be conferred on you. And there  
13 it is, therein if someone did not do it, you could always challenge it because it had to be a  
14 rejection...

15

16 **CHIEF JUSTICE D.Y. CHANDRACHUD:** The Deemed Status, Mr. Kaul, the Deemed  
17 Status also would be conferred under the Act, right?

18

19 **ADVOCATE N.K. KAUL:** Yes.

20

21 **CHIEF JUSTICE D.Y. CHANDRACHUD:** The logic of this judgment is, therefore, that if  
22 you have been established by the Act...

23

24 **TUSHAR MEHTA:** Before the '56.

25

26 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Yeah, we come to... before the '56 stage. Yes.  
27 That's the logic of it because there you had the option. Let's clear the cobwebs. The fact that  
28 you have been established by or under the Act does not in itself indicate that you are not being  
29 established by a minority.

30

31 **TUSHAR MEHTA:** Yes.

32

33 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Right? You may be established by a minority.

34

35 **TUSHAR MEHTA:** You have to be now.

36

1 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Now post 1956. Even though you have been  
2 established by a minority...

3

4 **TUSHAR MEHTA:** You can still be a minority.

5

6 **CHIEF JUSTICE D.Y. CHANDRACHUD:** You still have to go through either the route of  
7 establishment by a law or under a law, when you get a Deemed University status. Therefore,  
8 the circumstance that the route which you followed was through lawmaking is now post 1956,  
9 irrelevant to your minority status. Because, it is mandatory. Now, does that one difference  
10 which arose prior to 1956, namely, you had a choice of either going through the legislative  
11 route or seeking to establish your own university without any recognition so that your degrees  
12 would not be...

13

14 **TUSHAR MEHTA:** Recognition by the government.

15

16 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Recognition by the government.

17

18 **JUSTICE SANJIV KHANNA:** That's an important fact.

19

20 **TUSHAR MEHTA:** In those days that was the spirit.

21

22 **CHIEF JUSTICE D.Y. CHANDRACHUD:** In other words...

23

24 **TUSHAR MEHTA:** I'm sorry, My Lord, I'm sorry. People used to prefer graduates of such  
25 universities which were not recognized by the British. That was the spirit, otherwise would  
26 anybody have... Roorkee, IIT Roorkee was a non-law made University. I have given the list.

27

28 **JUSTICE SANJIV KHANNA:** As far as employment is concerned, with hardly any private  
29 sector, it was all government employment. It was all government employment.

30

31 **TUSHAR MEHTA:** No, no, no, no...

32

33 **JUSTICE SANJIV KHANNA:** Most of it was government employment. Very few...

34

35 **TUSHAR MEHTA:** In Gujarat, I know of several shipping companies, My Lord, Mohan  
36 Singh Oberoi's father was serving, as a graduate of one of the non-recognized university, as a  
37 manager of one of the leading shipping companies in Gujarat. He was born in Gujarat.

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**CHIEF JUSTICE D.Y. CHANDRACHUD:** Post Constitution, you cannot say, that well you sought recognition and when you sought recognition, that now is at the cost of your minority character. Post constitution that proposition of law is clearly unacceptable.

**TUSHAR MEHTA:** Very clear, My Lord. I concede to that.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** Now, therefore, does a proposition which ceases to apply or ceases to uphold valid post Constitution, nonetheless become valid merely, because it is the pre Constitution context.

**TUSHAR MEHTA:** Yes, My Lord. Because there was a...

**CHIEF JUSTICE D.Y. CHANDRACHUD:** ... in the choice. But even if you had a choice, there's one very critical thing. There's one very critical thing. That means, that why do people seek recognition? People sought recognition for the reason, whether students have employability, your students have credibility. Maybe there were some institutions which had credible degrees, even though they were not recognized by the government. But is that the price which you must necessarily ask minorities to pay? That's the point...

**TUSHAR MEHTA:** We cannot. As a government now we cannot. Britishers could. They did. And if they were paid...

**JUSTICE SANJIV KHANNA:** Mr. Solicitor, one more question?

**CHIEF JUSTICE D.Y. CHANDRACHUD:** That's the point, really. I mean, I think that's the point, that's the heart of it, actually.

**TUSHAR MEHTA:** The British government could, that you take it or leave it, these are my conditions.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** There's much to be said on either side, which is why we are here, but that's really now the kernel of the controversy.

**JUSTICE SANJIV KHANNA:** When we are looking at the Constitution as framed in... as imposed in 1950. At that time, the UGC Act was not there. If we accept this proposition, one of the issues which will come in and is required to be argued is, that between 1950 to 1956, if

1 any unit of, if any minority institution had gone to set up a university and seek recognition of  
2 the degree by the government, they ceased to be a minority institution?

3

4 **TUSHAR MEHTA:** Possibly. I'll answer that after considering. That's a potent question, a  
5 very relevant question, because that would be the same regime, which was available then.

6

7 **JUSTICE SANJIV KHANNA:** Therefore... when we use the term, 'choice' over here, choice  
8 includes university. There's no doubt about it.

9

10 **TUSHAR MEHTA:** Yes, not the method of recognition.

11

12 **JUSTICE SANJIV KHANNA:** Correct. So, therefore, what was the legislative, what was the  
13 intent behind Article 30, was to provide, to provide certain safeguards and protect certain  
14 interests of the minorities. So if that be so, why should mere establishment by a statute, be a  
15 disqualification?

16

17 **TUSHAR MEHTA:** Then, we are considering then.

18

19 **CHIEF JUSTICE D.Y. CHANDRACHUD:** That's why I told you that. Post independence  
20 this argument can't hold water. Do we therefore, accept that argument merely because we are  
21 in a pre constitutional era?

22

23 **TUSHAR MEHTA:** That's the only thing, My Lord. That's the only thing that, you were  
24 before the Constitution, you had the option, you had your competitors... not competitor is not  
25 a correct word, but contemporaries who were...

26

27 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Mr. Solicitor, my only worry is this. That post  
28 Constitution, must we not really bring in all our rights realization, in a manner consistent with  
29 the constitutional...

30

31 **TUSHAR MEHTA:** Not in a pre-Constitutional era. There was no concept of minority. No  
32 concept of fundamental rights.

33

34 **CHIEF JUSTICE D.Y. CHANDRACHUD:** Is that really, tell me conceptually, is that sound  
35 Constitution Doctrine, because ultimately, anything that happened, pre Constitution, does it  
36 not have to be brought into conformity with the post constitutional rights regime? That is  
37 really...

1

2 **TUSHAR MEHTA:** My Lord, there are judgments specific... I won't do what he would  
3 otherwise would have done. There are judgments that in a pre-Constitutional era, how you  
4 surrender your rights and what are the effect on post constitutional regime. There are  
5 judgements, My Lord. We are not, My Lord, examining it in manner...

6

7 **CHIEF JUSTICE D.Y. CHANDRACHUD:** At the same time we must read any plea in  
8 regard to the surrender of rights in a very strict context. Surrender of rights is not, even in the  
9 pre constitutional era, surrender of rights to a law should not likely assume. A surrender of  
10 rights, even in a pre-Constitutional era, should be accepted only with the strictest possible  
11 construction because you are really in that sense stating that somebody who is otherwise  
12 entitled to a right has surrendered that right. Post Constitution of course, there's no waiver at  
13 all. Our Constitution [UNCLEAR] waiver at all.

14

15 **TUSHAR MEHTA:** Nobody can now argue that.

16

17 **CHIEF JUSTICE D.Y. CHANDRACHUD:** We are now dealing with the post constitutional  
18 assertion of rights of a minority which founds it's post constitutional assertion on the basis of  
19 institutions which were founded pre constitution. That is what is worrying.

20

21 **TUSHAR MEHTA:** My Lord another thing, I am also going to address and assist Your  
22 Lordship on...

23

24 **CHIEF JUSTICE D.Y. CHANDRACHUD:** If you take a very formalistic view of this  
25 matter. Found this whole constitutional argument on legally positivism, answer is very clear.  
26 Established, established by law, not established by the Muslim community, established by  
27 Legislature. If you look at in a very strictly legal, positivism there, there are clearly answers  
28 there. But then that is the question. I mean how do you involve the Constitution. Look at it in  
29 a legal... in a positivist way or you look at it in a more purported rights way. That's the point.

30

31 **TUSHAR MEHTA:** This Court as a constitutional Court saying something to those who stood  
32 by the freedom struggle and chose not to crawl before the Britishers. I'll address that. I'll  
33 address it. It's not a political argument. It's a valid argument of interpretation. I'm not in  
34 politics, therefore, outside or inside I never raise political arguments but this would be paying  
35 a negative tribute to all those institutions who chose, despite having an option not to get into  
36 the lawmaking by the British Parliament. IIT Roorkee. I'm posing a question to myself. Can  
37 we say, that they didn't have jobs? I cannot again take Your Lordships... I didn't read all the

1 list of all universities. All universities of eminence, most of... many of which are now declared  
2 over the years after Constitution to be institutes of national importance under Entry 63.

3

4 **CHIEF JUSTICE D.Y. CHANDRACHUD:** But, you know, IIT Roorkee and all these are  
5 very different institutions. These were...

6

7 **TUSHAR MEHTA:** This is an example. I will give other example.

8

9 **CHIEF JUSTICE D.Y. CHANDRACHUD:** They were highly specialized institutions.  
10 Institutions of excellence. AMU is not that. You must understand what is the purpose of AMU.  
11 It is to provide secular education to a community which was on the lowest scale of education  
12 in those times.

13

14 **TUSHAR MEHTA:** There were minority universities pre-Constitution still not going before  
15 the British.

16

17 **CHIEF JUSTICE D.Y. CHANDRACHUD:** The idea was to provide a forum for upliftment  
18 of a community which had traditionally been deprived of education. That is, you know, that  
19 is...

20

21 **TUSHAR MEHTA:** That is My Lord the... with respect, may not be a subject matter of a  
22 judicial decision.

23

24 **RAJEEV DHAVAN:** My Lords, allow 30 seconds please. Roorkee was affiliated to Calcutta  
25 and then Allahabad and in 1948 a Provincial Legislature brought her into effect. That is from  
26 his own note, My Lord.

27

28 **TUSHAR MEHTA:** My Lord, like this MAO was affiliated with Calcutta and Allahabad, and  
29 were getting degrees from Allahabad. What prevented you from giving Allahabad University  
30 degree?

31

32 **JUSTICE SANJIV KHANNA:** Probably he is speaking of... you see, what happens is when  
33 you establish as a university, then you can affiliate colleges. You have far greater freedom in  
34 choice what you want to... the subjects which you want to teach, the people who can... you can  
35 have other colleges because there are certain stipulations over here that within 25 kms you can  
36 establish more institutions. You have schools which can come up within you. So, university  
37 gives you a better status. College is obviously a secondary level. It is much low. Probably, what

1 had happened... I'm not very familiar with figures with regard to the level of education among  
2 different communities before partition. But probably what is happening was, there were  
3 communities which were inward looking. There are certain communities which were outward  
4 looking and they were absorbing the western education. They were more open to western  
5 education. What the thought process which had gone on was, because there is... sometimes  
6 you are more inward looking, you don't want to absorb new things. So let's create that  
7 opportunity for them. Let's create an opportunity for this community, and let's get out with all  
8 of us who have similar thought process and let's have modern education. Then the issue  
9 obviously had arisen, as you pointed out, subject to what the other side say. Some people felt  
10 that we should not take any aid or recognition from the government. Some people felt that it  
11 is required...

12

13 **TUSHAR MEHTA:** Hindu University. It was not minority...

14

15 **JUSTICE SANJIV KHANNA:** They said it was visualized that India will be free or  
16 independent, we will have Independent India. So, one of the ways of serving the community is  
17 getting into the government, obviously, it matters.

18

19 **TUSHAR MEHTA:** If need be, I'll show to Your Lordships, what were the factors and  
20 considerations. Even Banaras Hindu University, it is nobody's case that Hindus were not open  
21 to new ideas. Hindus were less educated. Hindus were backward in terms of education. Even  
22 they fell into My Lord, that they went for lawmaking.

23

24 **CHIEF JUSTICE D.Y. CHANDRACHUD:** On the establishment aspect, Mr. Solicitor, we  
25 have raised some doubts, which we have to answer. On the administration aspect, there are  
26 doubts that they will have to deal with because administration the *Basha* Court has  
27 specifically gone into the provision of the statute to indicate that administration was not in the  
28 hands of the Muslim...

29

30 **TUSHAR MEHTA:** That's a finding of fact, whether there can be gone into merely because  
31 the composition is of larger.

32

33 **CHIEF JUSTICE D.Y. CHANDRACHUD:** And then the larger question, that if that  
34 finding had to be overcome, namely, the finding that administration was not in the hands of  
35 the Muslim minority, if that finding had to be overcome, then the 1981 Act had to completely  
36 redo the structure of the university. You can't merely by changing a definition undo. And then  
37 what you have to do, is for instance...

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**TUSHAR MEHTA:** Composition of...

**CHIEF JUSTICE D.Y. CHANDRACHUD:** Composition of the Court...

**TUSHAR MEHTA:** Powers of the Court, everything will have to be redone. Executive Council, Academic Council, Court, Pro Vice Chancellor, Vice Chancellor, Visitor, everything, My Lord, their power, their composition, putting property dominance, Muslim minority, et cetera. We'll have to...

**CHIEF JUSTICE D.Y. CHANDRACHUD:** On the administration part, where we now have an analysis of the statute by *Basha* which says that administration in that sense was never vested with the... we will hear them on the... what they have to say.

**TUSHAR MEHTA:** I need to say something for some time. Can I do it next time?

**CHIEF JUSTICE D.Y. CHANDRACHUD:** How long now?

**TUSHAR MEHTA:** Not more than 1 hour. My Lord, I genuinely, I have not repeated anything. Your Lordships would give that to me.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** Can you cut it down to about half an hour? Now, this is the wrap up.

**TUSHAR MEHTA:** I'll not repeat anything. I don't wish to. I assure which I cannot, My Lord. I'm trying to be realistic.

**CHIEF JUSTICE D.Y. CHANDRACHUD:** We'll continue on Tuesday. Brothers?

**RAJEEV DHAVAN:** I have a small request. Justice Khanna's computer prevents us from seeing his face. You're in *pardah*, My Lord.

**JUSTICE KHANNA:** I am not in *pardah*. I am open to everybody. But you won't guess anything from my face. Neither from my questions.

**RAJEEV DHAVAN:** No, we like to see it.



1 **CHIEF JUSTICE D.Y. CHANDRACHUD:** He's saying that he has a poker face when he  
2 is...

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***END OF DAY'S PROCEEDINGS***