

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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1 **ARVIND DATAR:** With Your Lordships' kind permission, sorry My Lord, this Money Bill is
2 the next seven judge matter. Will it be taken up on Tuesday now My Lord?

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** I have given the order. If I am not mistaken,
5 Chinnaiah is going to be taken up.

6

7 **ARVIND DATAR:** That is that splitting of...

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Perhaps that has been notified already. We will
10 start with Chinnaiah.

11

12 **ARVIND DATAR:** So Money Bill will come after that?

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** I think he has already notified the order, if I am
15 not mistaken. Court Master says it is today.

16

17 **ARVIND DATAR:** Originally this was supposed to come on the 30th. So then we plan that
18 next week this will not be there.

19

20 **RAKESH DWIVEDI:** Nine judges matter will not be next week?

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Sorry?

23

24 **RAKESH DWIVEDI:** Nine judges matter will not be...?

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Nine judges immediately after that.

27

28 **TUSHAR MEHTA:** After this matter, My Lord? I am sorry. We'll see the notification.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** After this we'll do Chinnaiah.

31

32 **ARVIND DATAR:** After Chinnaiah, Money Bill?

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34 **CHIEF JUSTICE DY CHANDRACHUD:** After Chinnaiah possibly Money Bill. And then
35 we'll take the nine judge matters. Those two are pending for 25 years.

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ARVIND DATAR: Mines and minerals.

CHIEF JUSTICE DY CHANDRACHUD: Mines and Minerals and the Maharashtra Property Owners Association.

TUSHAR MEHTA: Yes. Maharashtra Property Owners.

ARVIND DATAR: Before Maharashtra, is the Synthetic and Chemicals. Your Lordship has referred that.

CHIEF JUSTICE DY CHANDRACHUD: Yes, yes, yes.

ARVIND DATAR: That will be after Maharashtra?

CHIEF JUSTICE DY CHANDRACHUD: Let me see how...

TUSHAR MEHTA: Instead of asking Your Lordships, we'll see the justification.

CHIEF JUSTICE DY CHANDRACHUD: Yeah. Because it depends if you want a little break between two matters or whatever. The other pile up is... because anytime that's the one thing you are constantly juggling, the regular board and the constitution bench, because we also have...you are right, because that's Industrial Alcohol.

ARVIND DATAR: Yes.

CHIEF JUSTICE DY CHANDRACHUD: That arises from Justice Sabyasachi Mukharji's judgement.

ARVIND DATAR: No, that's Justice Altamas Kabir's judgement. I was referring that whether it should be reconsidered?

CHIEF JUSTICE DY CHANDRACHUD: The earlier one. Synthetics is Justice Sabyasachi Mukharji.

ARVIND DATAR: Yes. Jeevan Reddy also. Deeply obliged.

1 **TUSHAR MEHTA:** Grateful.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** And that, particularly, I think all over the
4 country, there are huge ramifications for the states as well...

5

6 **TUSHAR MEHTA:** There are several matters which are awaiting...

7

8 **ARVIND DATAR:** As of now, that's the only source of revenue after GST, diesel and...

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, yes Dr. Dhavan.

11

12 **RAJEEV DHAVAN:** My Lord, I want to go into the question of Administer. But before that,
13 just because there were so many random arguments, I just want to flag one small argument
14 My Lord, that they said that 1920 Act was standalone. My Lord, every single statute dealing
15 with minority is standalone. Nothing emanates from that. My Lord, on Administration, I want
16 to first address Your Lordships on four phases, that take place as far as the statutes are
17 concerned. The 1st phase is 1920 to 1951. Given the position of the court, it clearly establishes
18 the minority character, and I'll take Your Lordships to the relevant provisions. The second is
19 from 1951 to 1965 and to be read with *Azeez Basha*. Small changes were made in '51. And
20 the '65 Act, it was made from supreme to advisory. Now, My Lord, our respectful submission
21 is...

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Then the 3rd phase? 3rd phase?

24

25 **RAJEEV DHAVAN:** Sorry, My Lord?

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** That's the 2nd phase.

28

29 **RAJEEV DHAVAN:** The 3rd phase, My Lord, is from '65 to '81. But on the 2nd phase, My
30 Lord, since *Azeez Basha* confined itself to the fact that the statute dropped it from a minority
31 character. My Lord, had that not been done, that very narrow argument in *Azeez Basha*, the
32 provisions would have been struck down. But it was pre-empted My Lord, because they did
33 not examine the '51 Act. What *Azeez Basha*, in fact, said was it was brought in conformity to
34 the Constitution. That's as far as '51 is concerned. And '65, that important part of Mr. Chagla's
35 narration, it was an emergency measure, and they did not go into the details because they had
36 decided on the narrower point that because it was a statute. And then My Lord, '81. From '81
37 onwards, even if you discount the changes that were struck down, full supreme body and the

1 corrections were completely made in conformity with 1920 to '51. So, I'll take Your Lordships
2 straight away to certain provisions of the statute as it stood in 1920.

3

4 **JUSTICE SANJIV KHANNA:** Really speaking, you're talking about four phases.

5

6 **RAJEEV DHAVAN:** Yes, four phases. And therefore, what were we doing? We were always
7 petitioning the government. But these four phases, the only controversial phase is '51 to '65
8 and of course, *Azeez Basha*. That's the only controversial one. '65 to '81, sorry, that's the 3rd
9 phase. Now, if you look at it overall in the phases My Lord, what happens? The minority
10 character was robbed to some extent by '51 to '65. '51 specifically says that it is to bring the
11 statute in conformity, '51 Act, in conformity with the Constitution. And this is a finding in
12 *Azeez Basha*. And '65 was an emergency measure, and the emergency measure is recognized
13 also, not just by the speech of the Minister Mr. Chagla, but it's also recognized in the SOR,
14 that's the Statement of Objects and Reasons in the '72 Act. Otherwise, throughout this period,
15 it was, apart from this exception, throughout this period, it is the minority character that
16 existed, but for these two particular statutes, and but for the judgment in *Azeez Basha*.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Let's quickly run through the statutes, I think.

19

20 **RAJEEV DHAVAN:** I will My Lords. I think the operative word is 'quickly'. Now My Lords,
21 Your Lordships will find that there was a distinction made between officers in Section 16.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** We go to Volume 4A?

24

25 **RAJEEV DHAVAN:** Volume 2G... 3G My Lord. And in Section 22, Authorities. I'll just take
26 Your Lordships straight away to them.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Volume 3G.

29

30 **RAJEEV DHAVAN:** May I invite Your Lordship's attention to PDF 9? I had made a
31 distinction earlier when I opened between the overall supervisory functions and the actual
32 administration. So, My Lord, 13, I'll just read. "The Lord Rector later becomes a Visitor, shall
33 have the right to cause the inspection to be made and then an inquiry". These are supervisory
34 functions which go to any external authority. Then My Lord, I take Your Lordships to 16. This
35 is the officers of the university, which are the Chancellor, Pro-Chancellor, Vice Chancellor and
36 Pro-Vice Chancellor. But kindly come to PDF 10, Section 17. "After the succession period is
37 over, the Chancellor shall be elected by the court". This is the significance of the court, which

1 I will elaborate on. Section 18, "The Pro-Chancellor shall be elected by the court". Section 19,
2 "The Vice Chancellor shall be elected by the court from its own members who were all
3 Muslims". And 20 My Lord, "The Pro-Vice Chancellor shall be appointed by the court". So, as
4 far as the officers of the university are concerned, it is the court that either elects or appoints.
5 And this central part, is the court that is the nerve centre, which I'll come to in a moment. Now
6 My Lord, come to 22. The authorities are in 22, "the Court, the Executive Council, Academic
7 Council and such other authorities. We find as far as the authorities are concerned, the Lord
8 Rector, the Governor General, are not part of the authorities", that is... Now My Lords, 23 has
9 been read, but I'll quickly go through it. "The court shall consist of the Chancellor, Pro-
10 Chancellor and the Vice-Chancellor for the time being and such persons as may be specified".
11 The proviso My Lord, is important, that is in the 1st phase, "provided that no person other
12 than a Muslim shall be a member". 23(2), "The Court shall be the supreme governing body of
13 the university and shall exercise all the powers of the university, not otherwise provided by the
14 act, statutes and ordinances. It shall have the power to review... "

15

16 **JUSTICE SANJIV KHANNA:** Mr. Dhavan just one thing. The proviso when it says, "No
17 person other than the Muslim shall be a member thereof", is only restricting itself to the
18 members, not to the others.

19

20 **RAJEEV DHAVAN:** That's right My Lord. That's the point, as far as the composition is
21 concerned.

22

23 **JUSTICE SANJIV KHANNA:** Composition is concerned, because, whether members will
24 include the Chancellor, Vice Chancellor not strictly. Because members will be...

25

26 **RAJEEV DHAVAN:** No, they are all members.

27

28 **JUSTICE SANJIV KHANNA:** No, they are all members, because...

29

30 **RAJEEV DHAVAN:** Because they are members of the court, they have to be Muslims, My
31 Lord. Because members of the court, will only be Muslims. So, these persons will, by their very
32 nature have to be Muslims.

33

34 **JUSTICE SANJIV KHANNA:** So, what you are saying is, a proviso makes it mandatory,
35 that everyone, right from the Chancellor to the Vice-Chancellor and other persons will be
36 Muslims?

37

1 **RAJEEV DHAVAN:** Yes, My Lord, yes, absolutely. And that is how it works out, My Lord, in
2 the 1st phase and post 1981. Now, 3 has not been read out properly, but 2, has the power to
3 review the acts of the Executive and Academic Councils. So, there's a reviewing part in the
4 court. Then, "direct that necessary action be taken by the Executive or the Academic Council,
5 as the case may be, on recommendations by the Lord Rector". So, the Lord Rector, is somebody
6 who makes recommendations, and they will be considered by whom? The court. My Lord, 3,
7 is very important, which has not been read out to Your Lordships. "Subject to the provisions
8 of this Act, the court shall exercise the following powers and perform the following duties,
9 namely, of making the statutes or amending and repealing the same". This is a very important
10 power as far as the statutes are concerned. The next of considering ordinances. Number C, "of
11 considering and passing resolutions on the annual report and annual accounts", that's the
12 financial power to consider, "of electing such persons to serve on the authorities of the
13 university and of appointing such officers that may be prescribed by this Act and statutes, of
14 exercising such powers and performing such other duties, as may be conferred or imposed by
15 the Act and other statutes". Now, this is an extremely wide-ranging power in the court. And
16 this My Lord, 23(3) is operative throughout the period, even in phase 2. '81, My Lord, there
17 are some dilutions and then it's restored in '81. Now, the Executive Council shall be the
18 executive body of the university. Then 5 My Lord, the Academic Council shall be the academic,
19 and that is not relevant to the court part. Let me take Your Lordships, in 28, where the first
20 statutes may be amended. That's Sub-clause 2, "may be amended, repealed or added to by the
21 statutes made by the court in the following manner". So, here once again, the court has a very
22 significant function, that is, in 28, Sub-clause 2. And then the following manner is, "The
23 Executive may propose through the court, the draft of any statute to be passed by the court."
24 So, the draft comes to them and they decide whether it should be passed by the court. "Such
25 draft shall be considered by the court at its next meeting. The court may approve such draft
26 and pass the statute, or it may reject it or return to it to the Executive Council for consideration,
27 either in whole or in part, together with any amendments which the court may suggest". So
28 here is an extremely significant power in the court. The nerve centre, My Lord, in the first stage
29 and the third stage '81, is quite clearly the court and nobody else. Huge power, My Lord, as far
30 as statutes are concerned. Huge powers as far as ordinances are concerned. Then, My Lord, if
31 I may take your.... Now, the proviso here, My Lord, in Section 28, that is PDF 12. "Provided
32 that no statute dealing with instruction of Muslim students in the Muslim religion and
33 theology, shall require to be submitted or approved". That is an exception that is made out in
34 the proviso. Then, My Lord, if I may take....
35

1 **CHIEF JUSTICE DY CHANDRACHUD:** But the only point they had to emphasize was C,
2 says that, "No statute, no new statute or amendment or appeal shall have any validity unless
3 it has been submitted through the Visiting Board to the Governor General in Council".
4

5 **RAJEEV DHAVAN:** Yes, My Lord.
6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Now, significantly, this Clause C does not refer
8 to the Rector.
9

10 **RAJEEV DHAVAN:** That's right.
11

12 **CHIEF JUSTICE DY CHANDRACHUD:** It refers to the Governor General in Council. Or
13 really, Rector was to be the Governor.
14

15 **RAJEEV DHAVAN:** Not. In any case, what we are...
16

17 **CHIEF JUSTICE DY CHANDRACHUD:** So, it brings to in an outside body, namely the
18 Governor General, who has the power to approve. I mean, it's a prior approval of the Governor
19 General.
20

21 **RAJEEV DHAVAN:** Yes, My Lord. But then it comes to the court, and the court is the
22 deciding body.
23

24 **CHIEF JUSTICE DY CHANDRACHUD:** So therefore, the Governor General, in that
25 sense, was not just a supervisory power in this particular provision. The Governor General had
26 an overriding power to virtually approve any amendment... repeal as to whether there should
27 be a repeal of a statute and so on and so forth.
28

29 **RAJEEV DHAVAN:** But not to initiate. Eventually, that is there, My Lord. And as I indicated
30 earlier, My Lord, these particular are supervisory functions, and in this case, as My Lord points
31 out, a decision-making function as well. The proviso that Your Lordships had pointed out, is
32 an extension of 28(2)(c), "Provided that no statute dealing with the instruction of Muslim
33 students in the Muslim religion and theology, shall require to submit it or approve it". So, this
34 is a huge exception that is there in the proviso. So, the Lord Rector has no function as far as
35 Muslim teaching is concerned. Now, My Lord...
36

1 **RAKESH DWIVEDI:** The first statutes are by the Governor General in Council, and no
2 amendment can be made without him.

3

4 **RAJEEV DHAVAN:** No, no. It has to be.

5

6 **RAKESH DWIVEDI:** Yes, has to be. He is the complete source of statute and ordinance.

7

8 **RAJEEV DHAVAN:** Now My Lords...

9

10 **RAKESH DWIVEDI:** And actually, this Act was made under the 1909 Council, not 1919 Act.
11 Because the 1919 Act came into force on 9th February 1921 after the first elections. So the
12 Council Act was continuing. The Council was nothing but the officials and a few nominated
13 members.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** So who enacted this then?

16

17 **RAKESH DWIVEDI:** The Governor General in Council under the Act of 1909.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** 1909.

20

21 **RAKESH DWIVEDI:** Indian Council Act 1909. Though the Government of India Act is of
22 1919, it came into force after elections on 9th February 1921.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** In fact, it says that passed by the Indian
25 Legislative Council and received the ascent of the GG on 14th September 1920.

26

27 **RAKESH DWIVEDI:** The council was earlier also there. But this diarchal system came later.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** By the 1999 Act.

30

31 **RAKESH DWIVEDI:** And therefore, by rules, both these institutions, BHU and they were
32 kept with the Governor- General in Council, and rest were transferred, education was
33 transferred to the provinces, by rules.

34

35 **RAJEEV DHAVAN:** My Lord, we are not denying that in the imperial statute, this overriding
36 power with the Governor General existed as Your Lordships see. We're not denying that. But
37 it doesn't take away, as we will explain further, it doesn't take away from the power of the court

1 as a proposing body or otherwise. So the initiation, in effect, comes from the court. Now My
2 Lords, I come My Lord now to... My Lord, kindly come to the statutes on PDF 16.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Just see Section 30 ordinance. Section 30, the
5 power to make ordinances?

6

7 **RAJEEV DHAVAN:** Which section was Your Lords?

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Section 30.

10

11 **RAJEEV DHAVAN:** 30. "The Executive Council" My Lord, I had marked it, "or in academic
12 matters, the Academic Council may make ordinances". I'll tie this up, My Lord, when I read
13 the statute.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** And then 30, Clause 3.

16

17 **RAJEEV DHAVAN:** "No new ordinances or amendment or repeal of any existing ordinance
18 shall have validity until it has been submitted through the court and the Visiting Board, which
19 may record its opinion to the Governor- General and obtained the approval of the latter". So,
20 here is an important aspect, it comes through the court.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** And 30, Clause 2 says, "The first ordinances will
23 be as framed by the Governor General".

24

25 **RAJEEV DHAVAN:** Yes, My Lord.

26

27 **JUSTICE SURYA KANT:** And no new, then can be made without each other.

28

29 **RAJEEV DHAVAN:** That was an interim measurement, the first ordinances. We're now
30 looking at the change and who had the power? The power, My Lord, here is through the court
31 and the Visiting Board. Now the Visiting Board, as I'll show to Your Lordships, that provision
32 has been deleted later on. Now My Lords, 31. "The authorities of the university may make
33 regulations". And who are the authorities? The authorities that have been mentioned at PDF
34 11, in Section 22, which I've already read out to Your Lordships. And the authorities here are
35 Chancellor, Pro- Chancellor, VC, Pro-VC. The court. Yes, I've already indicated that they'll be
36 appointed and elected. I've already indicated that. I don't want to go further. Then 31(1) on
37 PDF 14. "The authorities of the university", and I've indicated who they are, "they make

1 regulations consistent with the Act, statutes and ordinances". The Governor General doesn't
2 come under the authorities of the Act. And then 31, Sub-clause (b), in (1), "providing for all
3 matters which by this Act, statutes or ordinances, shall be prescribed by the regulations".
4 Then, "every authority of the university shall make regulations providing for the giving of
5 notice to the members of such authority, dates of meetings and of the business to be conducted
6 or keeping a record of the proceedings". So, it is the authorities that become very central, and
7 when I read the statutes, it will become clearer. 33 My Lord... Sorry I've just mentioned 32.
8 "Admission of students", sorry My Lord, "shall be made by an admission committee consisting
9 of the Pro-Vice Chancellor, the Principal of an intermediate college, who shall be selected by
10 the Vice Chancellor and such other persons as may be appointed by..." Here My Lord, it is
11 without a reference to the external bodies of the Governor General or the Visitor, or Rector, as
12 the case may be. Then My Lord, Section 33, on PDF 15. So, there is some overlap, residuary
13 power in the Governor, there's no doubt about it. We're not saying that. But the mobilizing
14 factors remain the court. And then 33, that is on PDF 15, "All arrangements for the conduct of
15 examination shall be made and all examinations shall be appointed by the Academic Council,
16 in such manner as prescribed by the ordinances". So, it is, the entire administration moves in,
17 apart from that residuary power, that Your Lordships had pointed out. And then, what follows
18 from these powers, is explicated in paragraph 50, that is the right to appoint, the right to
19 governing body, et cetera, et cetera, and **T.M.A. Pai**, makes this abundantly clear. Now, My
20 Lords...

21 Now My Lord, the Vice-Chancellor, as I've shown to Your Lordships, is appointed by the court.
22 I've already done that. Now kindly come to PDF 17, that is Statute Number 3. "The Vice-
23 Chancellor shall take rank in the university next to the Chancellor and Pro-Chancellor, and
24 shall be *ex officio* Chairman of the Executive Council and Academic Council, in the absence of
25 the Chancellor, and Pro-Chancellor shall preside at convocations held for conferring degrees".
26 Then there are certain emergency powers. Then Your Lordships may kindly come to the
27 Treasurer, My Lord, in Statute 5. "The Treasurer shall be appointed by the court, on such
28 conditions and for such period, as the court may think". So, the court, My Lord, comes in, as
29 they appointing body, and as far as the terms are concerned as well. Then, My Lord, you come
30 to Statute 6 relating to the Registrar. "The Registrar shall be a whole-time paid officer of the
31 university, appointed by the court". So, all these appointments My Lords, that are crucial to
32 the administration are, in fact, appointments by the court. Now My Lords... and the Registrar's
33 functions are... Now My Lord, I come to the very important aspect of Statute Number 7. "The
34 following officers shall be appointed by the Executive Council, on the recommendation of the
35 Academic Council", that's the Proctor and the Librarian. This is an important internal part of
36 the administration in which that overall vetoing power is not there. Then, My Lord, I come to
37 Statute 8, which is absolutely fundamental. First come My Lord, as to who are the *ex officio*

1 members. Now kindly read the *ex officio* members, My Lord, along with 23 proviso, because
2 once they become members of the court, they automatically, My Lord, are Muslims. So who
3 are they, My Lord? The Chancellor, Pro-Chancellor, Vice-Chancellor, for the time being shall
4 be *ex officio* members. But by virtue of being *ex officio* members, they must necessarily be
5 Muslim, if the proviso to 23(1), My Lord, is to be taken into
6 account. Now, My Lord, kindly see Foundation Member.

7

8 **JUSTICE SANJIV KHANNA:** As a matter of fact, they've been always Muslims?

9

10 **RAJEEV DHAVAN:** Sorry? Yes.

11

12 **JUSTICE SANJIV KHANNA:** As a matter of fact, they've been always Muslim?

13

14 **RAJEEV DHAVAN:** Yes, yes. My Lord, I'm first dealing with the *de jure* argument, and we'll
15 come to the *de facto* later. *De facto*, as has already been pointed out by, Mr. Shadan Farasat
16 My Lord, that argument has been spelt out, therefore I don't need to repeat it. Now, kindly
17 come to the Foundation Members. Of the 180 My Lord, 124 were Foundation Members;
18 necessarily had to be Muslim, to read it along with 23 proviso. And this is 124 at its inception.
19 Naturally, they continued to be less and less as we moved on. So, 124. Now the next one, is Life
20 Members. This is all part of the court and that's the important part. They all have to be
21 Muslims. Then My Lord, Ordinary Members shall be elected or appointed as follows. 10
22 persons to represent states in India, and these 10 persons also, because they are members of
23 the court, they have to be Muslims. Then, My Lord, 60 members who make a donation as long
24 as they are...

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Just one second.

27

28 **RAJEEV DHAVAN:** The important point in Statute Number 8, is they all have to be
29 Muslims.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Statute 8, says that the court shall consist of the
32 following members.

33

34 **RAJEEV DHAVAN:** That's right.

35

1 **CHIEF JUSTICE DY CHANDRACHUD:** The proviso to 23(2), says every member of the
2 court has to be a Muslim. Therefore, that will apply to every person who is defined to be a
3 member under Statute 8.

4

5 **RAJEEV DHAVAN:** Because, earlier, Your Lordships indulged... indulged is not the right
6 word My Lord, in some mathematics about 34, etc. Actually, all of them, every single one of
7 them will have to be a Muslim...

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** *De jure*. I mean that's apart from Shadan's
10 argument.

11

12 **RAJEEV DHAVAN:** I'm on *de jure*, My Lord, *de facto* has been argued, and to the extent I
13 want to refer to it, I'll refer to it. Now therefore, the 10 persons to represent states, by virtue of
14 the proviso, will have to be Muslim. Then My Lord, 60 persons elected by persons who make
15 donations. By virtue of the proviso, they will have to be Muslim. Then My Lord, we come to,
16 20 persons elected by the Standing Committee of the All India Muhammadan Educational
17 Conference from amongst its own members not less than 10 of whom shall be members who
18 have engaged at least five years in teaching. They have to be My Lord. Now 7 My Lord is very
19 important, because all members... 15 members, that's Sub-section 7. "15 members to be
20 elected by the Academic Council from amongst its own members". Who will they be My Lord?
21 They will be Muslims. By virtue My Lord, of going into the proviso read with Statute 8. So
22 predominantly, My Lord, across the board, they have to be Muslim in that first phase.
23 Therefore My Lord, 15 of the persons in the Academic Council -- Academic council has only
24 28. Therefore, 15 of those 28 in the Academic Council will necessarily have to be Muslims.
25 Then Statute 9. "The members provided for in classes 1, 2, 3 and Clause 1 of Class 4 shall be
26 members of the court". Now My Lord kindly come on PDF 21. "The Executive Council shall
27 consist of not more than 30 members.

28

29 Vice Chancellor, Pro-Vice Chancellor, Principal, intermediate college, who shall be elected by
30 the Vice Chancellor and the Treasurer to be *ex officio* members. But here My Lord, Sub-clause
31 3 is important, that's Statute 15(3). "6 other members shall be elected by the Academic Council
32 and 20 shall be elected by the court, of whom not less than 7 shall be residences from outside
33 in the united provinces". May I come to Statute 60, which is important. I've already indicated
34 the composition of the Academic Council, will necessarily 15 of them. Then My Lord, if Your
35 Lordships will come to Statute 60 in PDF 21. "The Executive Council shall, subject to the
36 control of the court and to the Act, statues and ordinances, administer the revenue properties,
37 regulate the finances and so on" So the Executive Court will be subject to the control of the

1 court. Then My Lord, 15(3), "Six other the members shall be elected by the Academic Council,
2 and 20", that's important. "And 20 shall be elected by the court". So, My Lord, there are 20
3 there that shall be elected by the court. Then My Lord, 16, I've read under the control. Now My
4 Lord, kindly come to the Academic Council. I've already indicated that 15 members of the
5 Academic Council are part of the court and therefore, necessarily, those 15 in the Academic
6 Council will have to be Muslims by virtue of the proviso. Now, come to Statute 17. "The
7 Academic Council shall consist of Vice Chairman. He is a member of the court, Librarian and
8 Proctor by the EC". Then, My Lord, kindly come to PDF 22, "Two persons elected by the court".
9 Now we add to these, the 15 members which we have indicated, who would be part and parcel
10 of the court, and therefore members. Then My Lord, various... I don't think it's relevant
11 directly to the control, but the departments of studies, Your Lordship has seen, we've already
12 pointed it out, Sunni theology, Shia theology and so on.

13

14 Now My Lord, come to Statute 20, PDF 23. 20 is very, very important. "Subject to the general
15 control of the court, all appointments in the teaching staff shall be made by the Executive
16 Council from a list of persons recommended and suitable therefore by the Committee of
17 Appointments consisting of Pro-Vice Chancellor, Chairman, Department of Studies". So here
18 once again, My Lord, what we see is, subject to the general control of the court. The Foundation
19 Members has already been shown to Your Lordships on PDF 24, 25 and 26, well all the way
20 through, they're all Muslims. So, what I'm indicating to Your Lordships, although '51, which
21 was said to be, just to bring it up to date with the Constitution, '65 was an emergency measure
22 which is rectified to some extent in '72 and '81. And in '81, there is a full restoration, as it was
23 in the 1920 Act.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Can you go to briefly to the 1951 now? So that we
26 can see, what is the next. The evolution is incomplete.

27

28 **RAJEEV DHAVAN:** I cheated a little. I've been relying on this. It was easier for me.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** I see, you're not on your iPad,

31

32 **RAJEEV DHAVAN:** It can go further and further. I told you, he's my Guru. If he can do it, I
33 can do it. My Lord, the Solicitor had indicated a chart. Now let's see the statute itself. I'm
34 sorry... Take it from the chart, My Lord, which the Solicitor, or does the Your Lordship want
35 to see the statute?

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** Can we just quickly go through the statute,
2 because it's much better, you know, we see, the statute as it stands. The chart is excellent, but
3 just you know, since we are at it, it may take five minutes more.

4

5 **RAJEEV DHAVAN:** Might as well see it...

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** At '51, let's see what '51 does now. We can spend
8 a little time, because this is really the heart, about administration, the *de jure*, as you said.

9

10 **RAJEEV DHAVAN:** Yes. Certainly.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** So let's go to '51, what '51 does now. Apparently,
13 the Founding Members were to retire after five years, like the Council of States, like the Rajya
14 Sabha. So many people would retire every year after five years and they were eligible for re-
15 election.

16

17 **RAJEEV DHAVAN:** That inevitably My Lord, inevitably . So this is '51.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Now, 1951 is Volume 4A?

20

21 **RAJEEV DHAVAN:** Did Your Lordships want to see the '51 Act, as well?

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Yes. I think we...

24

25 **RAJEEV DHAVAN:** Certainly.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** Let's have a flavour of what happened there?

28

29 **RAJEEV DHAVAN:** My Lord, Volume 4A, page 19. Now, an act to further amend the Aligarh
30 Muslim University. Act is called the Amendment Act. 30 and 31 shall come into force at once
31 Section, and the remaining provisions of the Act shall come into force on such date, as these
32 were machinery, provisions. Then, My Lord...

33

34 **JUSTICE SANJIV KHANNA:** I'm sorry I missed out the page number, PDF page number.

35

36 **RAJEEV DHAVAN:** Page 90. Then, Your Lordships will see Section 2, of that Act. Nothing
37 much there. 91. So, My Lord 91, Section 5, which is really the section.

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JUSTICE JB PARDIWALA: Classes, casts and creeds.

RAJEEV DHAVAN: This is now a substitution for Section 8, that I've read out to Your Lordships. "University open to all classes, castes and creeds. The University shall be open for persons of either sex or whatever race, creed, caste or class, and it shall not be lawful for the university, to adopt or impose on any person, any test whatsoever, of religious belief or profession, in order to entitle them to be admitted therein, as a teacher or a student". Your Lordship reads Section 5. "**Azeez Basha** is right in saying that these were to bring the statute in conformity with 28 and 29(2)". So that's the change that is made in Section 5. Then I'll take Your Lordship to Section 8.

CHIEF JUSTICE DY CHANDRACHUD: If there is any provision which, you can tell us so that we'll read that as well. Here, Section 8.

RAJEEV DHAVAN: Section 6, My Lord. It deletes the compulsory education part. And this is, again, consistent of religious education. Section 10 is important. Section 10 for the words 'Lord Rector', wherever they occur, the word 'Visitor' shall be substituted. So My Lord, the Visitors power is there in every statute, whether it is a minority statute or otherwise. Now My Lords Section 14.

JUSTICE SANJIV KHANNA: Just read (b).

RAKESH DWIVEDI: In no Act My Lord, or any other Act of the university, the Visitor has power to approve amend, etc. the statutes and ordinances.

KAPIL SIBAL: It is there in Central Universities. My learned friend is wrong.

RAKESH DWIVEDI: State Universities.

KAPIL SIBAL: Talking about Central Universities.

RAKESH DWIVEDI: This is not a Central University. This is not a Central University.

RAJEEV DHAVAN: When I was President of the Cambridge Union Society, we followed the rules of Parliament, which was, somebody gets up. I accept his intervention or I don't accept his intervention. I don't accept that intervention for reasons stated by Mr. Sibal. Karan Thapar

1 goes on and on. We are the only father and son who were Presidents. Just as a side, My Lord.
2 Now My Lord...

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Section 10(b), as Mr. Sibal said, becomes...

5

6 **RAJEEV DHAVAN:** For the word 'court' wherever it occurs, the Executive Council. In 10(c),
7 "The Visitor shall, in every case, give notice to the university of his intention to cause an
8 inspection or inquiry to be made, and the university shall be entitled to appoint a
9 representative who shall have the right to be present and be heard". Now, this brings in a very
10 important element.

11

12 **KAPIL SIBAL:** Just to clarify, in Section 10, court is [UNCLEAR] Executive Council only for
13 the purpose of Section 13.

14

15 **RAJEEV DHAVAN:** That's right.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Right, in Section 13?

18

19 **KAPIL SIBAL:** Only with respect to 13, not otherwise.

20

21 **RAJEEV DHAVAN:** I accept that intervention, My Lord.

22

23 **JUSTICE DIPANKAR DATTA:** Guru's intervention has to be accepted.

24

25 **RAJEEV DHAVAN:** Now, My Lord, Section 11.

26

27 **KAPIL SIBAL:** This happens in Parliament also, because somebody gets up and the person
28 who is speaking, he says, "Please yield". And I have to decide whether I yield or whether I
29 allow. I yield or not. Or I don't allow.

30

31 **RAJEEV DHAVAN:** Perhaps, Your Lordship can be a little more lax, in the court.

32

33 **KAPIL SIBAL:** If you don't yield further, you cannot intervene. But nowadays shouting goes
34 on, so...

35

36 **RAJEEV DHAVAN:** Now, My Lord Section 14. Now, My Lord, there was a Visiting Board in
37 Section 14. I'm instructed that board never met. And therefore, My Lord, that provision for a

1 Visiting Board, which was an extra, has been deleted by Section 11. Then, My Lord, certain
2 substitutions because the Governor then becomes the Chief Rector and that is in Section 12.
3 So, these are machinery provisions to bring things in line with the Constitution.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** It says, "Successors of the first Vice Chancellor
6 to be appointed in accordance with the statutes".

7

8 **RAJEEV DHAVAN:** Important part, My Lord. 17, the proviso was deleted in Section 23. And
9 *Basha* says that in effect in this statute, there was no substantial change that was made.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** But Dr. Dhavan, would the deletion of the
12 proviso to Section 23 not be a very important change, because until then, no person could be
13 a member of the court in law unless they were Muslims.

14

15 **RAJEEV DHAVAN:** Right.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Now post 1951, the requirement of having a
18 Muslim as a member of the court is completely done away with.

19

20 **RAJEEV DHAVAN:** Except, My Lord, that I have already shown to Your Lordships, that
21 many of the members of the court had, by virtue of phase 1, necessarily had to be Muslim. This
22 is removed in phase 2.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** That's in phase 2, that is removed.

25

26 **RAJEEV DHAVAN:** That's right. Now, My Lord.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** This is because, if we proceed on the basis that
29 the court was the supreme executive authority, and post 1951 therefore, the membership of
30 the supreme executive authority is no longer defined by religion, you could be a member of
31 any religion to be a member of the court.

32

33 **RAJEEV DHAVAN:** That is a consequential amendment from the Constitution.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** No, not necessarily. You may still have even
36 today, you may have a Managing Committee of an educational institution, where the entirety
37 of the managing committee consists of Parsi Zoroastrians, Christians or Muslims or whatever.

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RAJEEV DHAVAN: Now, this is significant.

CHIEF JUSTICE DY CHANDRACHUD: It is significant. We will have to...

RAJEEV DHAVAN: It is significant and Your Lordships was right in going into the statute itself. Now, 19 is the power to make statutes which will provide for the Constitution power and duties of the authorities of the university, which I've indicated already earlier. "Election and continuance in office of members of the said authorities", that's a continuation clause, "including the continuation in office of the first members and the filling of vacancies of members and all other matters related to those authorities, for which it may be necessary or desirable to provide". The rest, My Lord, are not important, except Section 20.

CHIEF JUSTICE DY CHANDRACHUD: Where 20, Sub-section 6, now says, "Any amendment to a statute or a new statute requires a previous approval of the Visitor".

RAJEEV DHAVAN: Yes. My Lord, this happens... it is inherent in the nature, of the Visitor's powers, that's the powers of inspection and otherwise. Now, My Lord, we come to 20, Section 20, Sub-section 2, My Lord. "The court may, from time to time, make new or additional statutes or may amend the repeal of the statutes in a manner indicated, herein". So, the court comes back, "may from time to time, make new and additional statutes or may amend the statues", and the procedure is, that the Executive Council will propose and then finally, in Sub-section 4, "the court may approve any such draft as referred to in Sub-section 3 and pass the statute or reject it". So the court's power My Lord, to that extent, are there in substituting Section 28, and the court's power, My Lords, are certainly there, as far as the statutes are concerned. I don't think there's anything more. Let me take Your Lordships to the '65 Act, if I may, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: Sub-section 4, there is an appellate power given to the Central Government, on the statutes, if there's a difference between the...

RAJEEV DHAVAN: Yes. So, My Lord, all that happens, is in accordance with the Constitution, that's one part, My Lord. And the second part, the court's powers are made subject to -- the Rector's powers or the Visitor's powers made subject to the court. And then My Lord, the court eventually has to approve that, My Lord. I've already pointed that out.

1 **CHIEF JUSTICE DY CHANDRACHUD:** 21(7), "The Visitor can suspend the operation of
2 any... " 21(6) and (7), "may suspend any ordinance... "

3

4 **RAJEEV DHAVAN:** My Lord, this is a backup power in the Visitor, with many variations,
5 My Lords. The proviso to Sub-section 4, is provided that if the ordinance is not approved by
6 the court at such meeting, it shall cease to have effect.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** 25(a), "The auditors are no longer now appointed
9 by the Visiting Board, but by the Comptroller and Auditor General of India", see Section 25.

10

11 **RAJEEV DHAVAN:** Section 24, My Lord, I'm making a distinction between the internal
12 administration in whose hands it is, and the external supervisory or other powers, as the case
13 may be. So, if Your Lordships were to look at... Your Lordship was on 25, the auditors. The
14 Comptroller General comes in, which is a salutary provision.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** In this 1965 Act, I somehow missed that actually.
17 Which provision?

18

19 **RAJEEV DHAVAN:** In the '65 Act what happens is, this function becomes advisory.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Where is the expression 'Visitor' defined in the
22 '65 Act, actually? I was just checking that out.

23

24 **RAJEEV DHAVAN:** '51 Act, My Lord?

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** No, the...We are now on the... we are on the '51
27 Act, sorry. How is the expression, 'Visitor' defined? Somehow or the other, I have just seemed
28 to miss that actually. I was looking...

29

30 **KAPIL SIBAL:** Section 13, My Lords.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Section 13, is it? Section? Section 10?

33

34 **KAPIL SIBAL:** "Lord Rector, wherever Rector, the word 'Visitor' shall be substituted".

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** No, but who is the Visitor?

37

1 **KAPIL SIBAL:** The Governor General.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** Where did you get that?

4

5 **RAJIV DHAVAN:** The Governor... it says, 'substituted', My Lord.

6

7 **KAPIL SIBAL:** In '51, Section 13, the Governor General becomes the President of India.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Right. Section 10 says, "Visitor is substituted for
10 Lord Rector for the purpose of Section 13". Then, Section 12, "Governor of UP becomes the
11 Chief Rector". But where do we have in this 1951 Act, who is the Visitor? There must be some
12 provision defining who is a Visitor.

13

14 **RAJIV DHAVAN:** Who is the Visitor? Just give me a moment.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** I was checking whether there is an amendment
17 to the...

18

19 **KAPIL SIBAL:** Generally, it was the Governor General. But, as soon as we became
20 independent My Lord, the President...

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Governor General was the Lord Rector.

23

24 **RAJIV DHAVAN:** That's right.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Though the Act used the expression, both 'Lord
27 Rector' and 'Governor General in Council' separately. Right. And then comes in...

28

29 **KAPIL SIBAL:** Lord Rector was changed, but Governor General became the President. The
30 President of India took over the functions of the Governor General.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Right, under the Constitution. That must have
33 under Article 370 or something. Article 372, sorry. But what about the Visitor? And who is to
34 be the Visitor in this Act, unless there is *casus omissus* there?

35

36 **RAJIV DHAVAN:** Is there any provision?

37

1 **KAPIL SIBAL:** They have only used the word 'Lord Rector' over there in Section 13.

2

3 **JUSTICE SANJIV KHANNA:** No. No. The word 'Visitor' would have been still defined
4 somewhere. It cannot be...

5

6 **KAPIL SIBAL:** Your Lordships finds within Section 13, it would make it clear. Volume 3G.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** That we have opened actually.

9

10 **KAPIL SIBAL:** Original Section 13, have a look at that.

11

12 **RAJIV DHAVAN:** Because, My Lord, the 'Lord Rector' under Section 10, the word 'Visitor'
13 shall be substituted. Therefore, it is a matter of substitution.

14

15 **JUSTICE SANJIV KHANNA:** Okay. So, what happened was, the President became the
16 Governor General and because of this, Lord Rector got substituted by 'Visitor', that's all.

17

18 **RAJIV DHAVAN:** And this is all to bring things in conformity with the Constitution.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Oh right. Because actually... it was, right... the
21 President, because we got that now at page 45 of Volume 3G, because that's the 1920 Act, as
22 amended, and there is a footnote that Section 13 of the erstwhile Act was amended by Section
23 10 of the 1951 Act, so that the President of India became the Visitor.

24

25 **RAJIV DHAVAN:** And that would be, My Lord...

26

27 **KAPIL SIBAL:** If Your Lordship looks at page...

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Of?

30

31 **KAPIL SIBAL:** Of this 3G, it would give some clarity. "The Governor General shall be the
32 Lord Rector of the university". But then the Governor General became the President and then
33 Lord Rector became the Visitor. That's one thing. Hope that's clear with you.

34

35 **RAJIV DHAVAN:** Now, it is in 10, My Lord, that Rector became Visitor.

36

1 **KAPIL SIBAL:** Now the President is the Visitor and the Act is on as on today. That's at page
2 45 of the same volume, "Now the President shall be the Visitor of the University". That's 13.

3

4 **JUSTICE SANJIV KHANNA:** Governor General got substituted for the President. '51 Act.
5 90, with the Constitution itself, and '51 Act says, "Lord Rector will be now read as Visitor". So,
6 the circle is complete.

7

8 **KAPIL SIBAL:** Now, Visitor is the President. That's how it is.

9

10 **JUSTICE SANJIV KHANNA:** Because they substituted 'Lord Rector' with Visitor, the
11 President became the Visitor.

12

13 **RAJIV DHAVAN:** Now My Lord, the '65 Act, Your Lordship will find in the same volume at
14 99. The important section here is Section 2 My Lord, changed Section 23.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Where do we get the '65 Act now?

17

18 **RAJEEV DHAVAN:** My Lord, PDF 99.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Of volume?

21

22 **RAJEEV DHAVAN:** 4A, the same volume. I'm taking Your Lordships to Section 2 of the...
23 that 23 is substituted, and the important section is (b), for Sub-sections 2 and 3, "The functions
24 of the court shall be to advise the Visitor in respect of any matter which may be referred to the
25 court for advice, to advise any other authority in respect of any matter which may be referred
26 to the court for advice, to perform such other functions, such other duties and exercise such
27 powers as may be assigned to the Visitor". So, it becomes an advisory body. That is the big
28 change that is made. Our submission on this would be, once you have decided the question of
29 established, by a statute, then everything else, My Lord...but had that not been decided, that
30 part of the statute, these should have been struck down, because they are quite clearly invasive.
31 But of course, this is, the precursor to this was...

32

33 **JUSTICE SANJIV KHANNA:** Mr. Dhavan, you're accepting that post these amendments,
34 there was a change in administration?

35

36 **RAJEEV DHAVAN:** Yes.

37

1 **JUSTICE SANJIV KHANNA:** And minority role, as far as administration is concerned, by
2 these amendments was diluted? I am using a...

3

4 **RAJEEV DHAVAN:** I am still on *de jure*. We've come to...

5

6 **JUSTICE SANJIV KHANNA:** No, that's something separate. *De jure*, it was certainly
7 dilute, if not withdrawn.

8

9 **RAJEEV DHAVAN:** What I'm saying My Lord...

10

11 **JUSTICE SANJIV KHANNA:** When you argue and say it should be struck down, you are
12 accepting that.

13

14 **RAJEEV DHAVAN:** My Lord, what I am saying is, had the *Azeez Basha*, the ratio of *Azeez*
15 *Basha* is statutory intervention removes. Had that not been decided, and had they gone into
16 these questions, these invasive provisions would have been struck down. That's what I'm
17 saying. And of course, there is a restoration which I'll just come to.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** But Dr. Dhavan, now, we are operating today '65
20 Amendment has been made, 35 and 24, that is 59-60 years ago. Do we strike down that
21 amendment after a lapse of 60 years?

22

23 **RAJEEV DHAVAN:** No, My Lord, I am saying you could not have struck it down because of
24 the alternative ratio.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** *Basha* said it was not established by Muslim
27 minority because it was established by statute. So, once the establishment goes away for
28 *Basha*. it says it's not an MEI institution.

29

30 **RAJEEV DHAVAN:** No, that's right. I'm only saying, if Your Lordships were to hold, that a
31 statutory intervention part of *Basha* is incorrect, then some of these provisions are invasive.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Which means, we will have to strike them down
34 today to support your arguments.

35

36 **RAJEEV DHAVAN:** I am merely making the...

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Dr. Dhavan, I'll tell you why. Unless we strike
2 down those provisions now, these provisions still operate on the statute book. Of course, they
3 do.

4
5 **JUSTICE SURYA KANT:** It endangers the preamble.

6
7 **UNKNOWN SPEAKER:** It amended in '81 and the old position is restored.

8
9 **RAJEEV DHAVAN:** I accept your intervention. I am not asking Your Lordship to strike it
10 down now. I am just saying, that this is a logical consequence.

11
12 **JUSTICE SANJIV KHANNA:** We record that submission on behalf of the... And when you
13 are arguing for the first, that you're not asking for striking down of 1951 and '65.

14
15 **RAJEEV DHAVAN:** I'm saying it would have been an alternative, had the ratio being
16 confined to establish.

17
18 **CHIEF JUSTICE DY CHANDRACHUD:** No, but even if you say that... let's assume
19 anything in your favour, that we hold that *Basha* is wrongly decided...

20
21 **JUSTICE SANJIV KHANNA:** On the question of establishment.

22
23 **CHIEF JUSTICE DY CHANDRACHUD:** Even so...on the question of establishment,
24 right? Even so, the amendments which are made in '65, they don't get obliterated from the
25 statute book, merely because we say that *Basha* is wrong. But that's an independent exercise
26 of Parliament's legislative power. Either we will have to say therefore... Now look at the
27 problem in our part. We will have to then say, because *Basha* is wrongly decided on
28 establishment, there was a challenge to the constitutional validity of the 1951 and 1965
29 Amendment, before *Basha*...

30
31 **RAJEEV DHAVAN:** Which was not decided.

32
33 **CHIEF JUSTICE DY CHANDRACHUD:** Which was not decided. Now we have to decide
34 it today, in the absence of really any challenge, before us. If we don't decide it, as we cannot...
35 possibly we cannot after 65 years, that means, those amendments of 1951 and 65 continue to
36 hold the field today.

37

1 **RAJEEV DHAVAN:** The point is My Lord, I haven't... I'm sorry.

2

3 **JUSTICE SANJIV KHANNA:** Even if we accept that in 1981...

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** So, '81, they...

6

7 **JUSTICE SANJIV KHANNA:** [UNCLEAR] in partial or full,

8

9 **RAJEEV DHAVAN:** Not some My Lord, a radical...

10

11 **JUSTICE SANJIV KHANNA:** Partial or full, I said, that is something separate. But from
12 1965 or from 1965 to '81, it was not a minority institution.

13

14 **RAJEEV DHAVAN:** My Lords, I have said that. There are problems in that particular phase,
15 I've indicated that.

16

17 **JUSTICE SANJIV KHANNA:** Can that be then restored?

18

19 **RAJEEV DHAVAN:** For that period, of course Your Lordship will look at the *de facto*
20 argument. But at this point in time, the reason why I put it in phases My Lord, was precisely
21 because apart from this glitch, that existed in '65, I'd mentioned that, the restoration that
22 comes in '81, which I'll just show to Your Lords.

23

24 **JUSTICE SANJIV KHANNA:** So, your argument is, because of the restoration, it came
25 back?

26

27 **RAJEEV DHAVAN:** That's right.

28

29 **JUSTICE SANJIV KHANNA:** *De jure*, argument?

30

31 **RAJEEV DHAVAN:** And Your Lordship, will bear one thing in mind...

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** And significantly, the '81 Amendment, in
34 Parliament this question is specifically raised, that you have merely done a facial amendment
35 by saying 'established' and deleting established and changing the definition of university. But
36 you have not taken any... done anything to change the basis in the sense, that you have not

1 changed the administrative provisions. That's what Justice Banatwala said, rather Dipankar
2 said.

3

4 **RAJEEV DHAVAN:** Three provisions are facial in nature. That's the Preamble, 2(l) and
5 5(2)(c). Assume My Lord that they not there. The rest of the '81 Act, also makes restorative
6 provisions, which I'll show to Your Lordships.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** So, '65 law, the Act of 65, continues to hold the
9 field between 1965 and 1981?

10

11 **KAPIL SIBAL:** '71 My Lord.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Now let's see the '72 Amendment. We have seen
14 now the '65 Act.

15

16 **RAJEEV DHAVAN:** We've shown the '65 Act.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** '65, anything apart from this that we have to see?

19

20 **RAJIV DHAVAN:** '72, I have already indicated to Your Lordships. My Lords just kindly come
21 to PDF 107.

22

23 **KAPIL SIBAL:** Page 102.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Rather 1965 Act, look at also the amendment to
26 Statute 8 at page 102 of Volume 4A.

27

28 **KAPIL SIBAL:** Kindly look at that. That's not in the chart of the Solicitor General.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** That's right. Let's see that. Statute 8...

31

32 **KAPIL SIBAL:** "The Court shall consist of the following members: The Chancellor, the Pro-
33 Chancellor, Members of the Executive Council, Chief Person... "

34

35 **JUSTICE SANJIV KHANNA:** Which page are you?

36

37 **CHIEF JUSTICE DY CHANDRACHUD:** Page 102. This is very important.

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KAPIL SIBAL: [UNCLEAR] It is very important. Your Lordships have that?

CHIEF JUSTICE DY CHANDRACHUD: Yes.

KAPIL SIBAL: It says, "The Court will consists of the following member: *ex officio* Pro-chancellor, *ex officio* members of the Executive Council, *ex officio* Chief Person being Heads of Department of Study of Principles of College of the University nominated by the Visitor". Now, as Your Lordship knows, the Visitor is the President. "Two persons being Professors from Departments of Studies or Colleges or University nominated by the Visitor. Two persons from among teachers of the university, other than the Professors nominated by the Visitor. Three representatives of Parliament, two of them nominated by the Speaker of the House of the People from among the members thereof, and one of...one to be nominated by the Chairman of the Council of States from among the members thereof, and 30 persons nominated by the Visitor". So the whole basis was taken... was changed. Now kindly come... There's another element Your Lordships must look at. My Lords, it's taken over. Now kindly look at, they change the Executive Council. Kindly look at page 103

CHIEF JUSTICE DY CHANDRACHUD: That's for Statute 15...

KAPIL SIBAL: Yes. Lordships, 103. Statute 15. "The Executive Council shall consider the following: The Vice-Chancellor, 7 persons nominated by the Visitor and one person nominated by the Chief Rector at his discretion. And all the members of the Executive Council, other than *ex officio* members, shall hold official term of 3 years". So the whole institution was taken over. Now, **Basha** doesn't decide that. Because **Basha** says, [UNCLEAR] established, so that's the end of the matter. That's what happened. I'll address Your Lordships differently on this. This also is not provided by the Solicitor in his...

CHIEF JUSTICE DY CHANDRACHUD: Then says, "Every person who is a member of the court shall, on the 20 May 1965, cease to hold office". That is at page 105. So, we have completed the 1965 Act.

KAPIL SIBAL: The position is partly restored in '72 and fully in '81. That's what happened. Sorry.

CHIEF JUSTICE DY CHANDRACHUD: Let's see the '72 Act now.

1 **RAJEEV DHAVAN:** My Lord, 107.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** Volume 4C, right? 4A, page 107.

4

5 **RAJEEV DHAVAN:** I want to refer to one part of the SOR, because Mr. Chagla had
6 mentioned that '65 was a temporary measure, because there was a lot of agitation, etc. This is
7 reinforced in the SOR in the prefatory note in '72. I'm on page 107. May I read that prefatory
8 note? Because that is a declaration of Parliament on what, '65 in fact did and in what context
9 it did... it passed the '65 Act. May I just read it?

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

12

13 **RAJEEV DHAVAN:** Now, prefatory note, My Lord. Statement of Objects and Reasons. "As
14 a result of differences.... disturbances that took place in Aligarh Muslim University, the
15 President promulgated Aligarh Muslim University Ordinance '65, and on 20 May '65, the
16 amendment came into play. The ordinance was later replaced by the Act of '65. Both the
17 ordinances and the Amendment Act were temporary provisions to tide over the difficult
18 situation which were prevalent in the university at that time, and the intention was to bring
19 before Parliament, in due course, a comprehensive long-term legislation". And then it said why
20 it could not be introduced. So this is a statement by Parliament itself..

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** This statement Dr. Dhavan, this is very
23 important that the Justice Gajendragadkar Committee was appointed by the UGC.

24

25 **RAJEEV DHAVAN:** That's right.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** Everything was deferred until the report of the
28 Gajendragadkar Committee was appointed. Now see para 2 and para 5, they say that the
29 recommendations of the Gajendragadkar Committee are received, and the Gajendragadkar
30 Committee has proposed that all central universities should be brought at par. And pursuant
31 to which, this is amended. So then this idea is to make this at par with central universities
32 appears. See para 5, "The report of Gajendragadkar Committee on governance of university
33 was received by government in July '71. Recommendation to the Committee were accepted
34 both by UGC and government in principle. It has also decided to amend the acts of central
35 universities in the light of the recommendation made by the Committee. Based on the
36 recommendation of the Committee and taking into account all other serving factors, the

1 government decided to introduce this comprehensive legislation for Aligarh Muslim
2 University".

3

4 **RAJEEV DHAVAN:** Yes, that's right.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** In para 2, as well. The government... "that the
7 report of the Committee should be awaited before introducing long-term legislation for
8 Banaras Hindu University as well as Aligarh Muslim University". And the second sentence,
9 "The intent all along, was the legislation for BHU and AMU should be broadly on similar lines".

10

11 **RAJEEV DHAVAN:** But what happened My Lord, is that *Basha* had come by that time.

12

13 **JUSTICE SANJIV KHANNA:** Really speaking, they say in paragraph 3, that they were
14 anxious to have a democratic setup because there was a golden jubilee celebration in
15 December. 1970. And therefore, the Amendment Act of 1970 was introduced. The bill got
16 defeated there.

17

18 **RAJEEV DHAVAN:** '65 has an intention to bring on par, I'm not saying it didn't. But at the
19 same time... '72. At the same time, the more comprehensive changes were made in the '81 Act,
20 because the report hadn't come, all those things were not done. And then I'll take Your
21 Lordship... Now My Lord, let me just read from the SOR, the main features of the bill.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

24

25 **RAJEEV DHAVAN:** The main features of the Bill are -- This is in 108. The university is being
26 given additional powers. Important amongst them are, the provision of instruction through
27 corresponding courses, establishment of special centres, specialized laboratories and such
28 other units for research and education, as are necessary. And further the objects of the
29 university, within a radius of 25 km of the university and appointment of persons working in
30 other universities, institutions, or organizations, that's teachers. In view of the persistent
31 demand for preserving the residential character of the university, the provision in the Act of
32 the university for affiliation is being deleted. So earlier, their affiliation to Allahabad and now
33 is being deleted. Then it goes on to say, sub point(iv), the constitution and functions of the
34 court, Executive Council, and other authorities of the university, are being revised in the light
35 of the recommendations made by the Gajendragadkar Committee, the court will thereafter be
36 a deliberated body, and will not be saddled with the authority to overrule the decisions of the

1 Executive Council and other bodies. And then My Lords, further down the court will consist of
2 104 members at this point in time.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

5

6 **RAJEEV DHAVAN:** Just kindly come to 110, My Lord, Section 4(vii), for Clause 9, the
7 following clauses shall be substituted, namely to institute and maintain within a radius of 25
8 km of university, mosque, hills, halls and residences and to recognize places of residences for
9 the students of the university, within the said limits and to withdraw such recognition
10 according to any such place of residence. And then, My Lord, Clause 9, 9(a) to establish within
11 a radius of 25km university mosque, such special centres, specialized laboratories for research
12 and instruction, in the opinion of the university, necessary for furthering its objects. So, those
13 provisions of 25 km, which are part of the functions of the university and show continuity they
14 will remain. Of the Mosque, yeah. So, this is an interim measure, which was substantially
15 changed in '81. May I take Your Lordships through the 81 Act?

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Before that, now what, another very important
18 thing he does is, that it says, that the Chancellor will be now appointed by the Visitor according
19 to the statutes, the Pro-Chancellor and the Vice-Chancellor, will be appointed by the Visitor
20 by statute and the statutes, are now provided in the First Schedule under Section 28.

21

22 **RAJEEV DHAVAN:** Yes,

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** See, because Section 28 says, Section 28 is
25 amended, Section 24 of this Act, page 115, 'on and from the commencement of the Amendment
26 Act of 1972, the statutes as set out in the Schedule shall be the statutes of the university'. Now
27 let's go to the Schedule and see what the Schedule does.

28

29 **RAJEEV DHAVAN:** 119, My Lord.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** 119. Now see what this does. Look at the
32 amended statutes, page 119.

33

34 **RAJEEV DHAVAN:** Yes.

35

1 **CHIEF JUSTICE DY CHANDRACHUD:** Now, the modalities for the appointment of the
2 Chancellor is that the Chancellor shall be appointed by the Visitor from a panel of not less than
3 three persons recommended by the Executive Council.

4

5 **RAJEEV DHAVAN:** The Executive Council. Yes, My Lord.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** So really, the appointment of the Head is now
8 vested on the Visitor completely.

9

10 **RAJEEV DHAVAN:** It is, My Lord. That part has not been changed. We will only see the
11 changes now, in the '81 Act. Because at that stage, My Lord, *Basha* treated it as a non-
12 minority institution and these were consequential changes, following *Basha*.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Now, Statute 14 is substituted at page 125. So the
15 Court. Now see who is in the Court. Court now becomes Vice-chancellor, Ex-Vice chancellors,
16 Pro-vice Chancellor, Deans of the Faculties, Student's Council, Students Welfare, Librarian,
17 Representative, Principals of each of the following colleges, namely, Women's College, Tibbia
18 College and Polytechnic by rotation, Heads of Department, five Professors, Representatives of
19 Students, Representative of ex-Students, Representatives of Parliament, Members of the
20 Learned Professions, Nominated Members, remaining members. So, would it be correct to say
21 that by the 1972 Act and the statutes which are substituted, the Muslim character of the
22 institution as it existed in 1951 and following the 1965 Act, because '72 has never been in
23 challenge?

24

25 **RAJEEV DHAVAN:** Never been. That's true.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** And this now becomes completely a secular
28 management, isn't it? It's what happens to the Executive Council, for instance.

29

30 **RAJEEV DHAVAN:** My Lord, we have to come to '81 to see those changes because they are
31 the definitive ones.

32

33 **JUSTICE SURYA KANT:** More democratic.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Because, we will now have to see finally, what
36 did '81 do. What was restored under '81 and what was not restored under '81.

37

1 **RAJEEV DHAVAN:** Let me come to that, My Lord. 148. May I just read, My Lord, My Lord,
2 the Prefatory Note in 148 says - the SoR: India is a multi-religious country, and its strength
3 lies in the fact that all communities living in the country are free to establish educational and
4 other institutions of their choice. The government have introduced in parliament an
5 amendment bill to remove the doubts in the mind of the Muslim community, regards the
6 character of the Muslim university. But the amendment of the Muslim University Act would
7 be meaningless and would become redundant if the statutes are not amended to satisfy the
8 sentiments of the Muslim Community. Therefore, it is therefore necessary to introduce a bill
9 in the Parliament to achieve these objects. That is the purpose, My Lord, in the SoR. Now sub-
10 section 2, My Lord, says - In the Aligarh Muslim University Act 1920, herein referred to as the
11 Principle Act in the long title and in the preamble, the words 'establish and' shall be omitted.
12 This was struck down by the Allahabad High Court.

13

14 Then, if Your Lordships will come to Section 3, that is L, University means the educational
15 institution of their choice, established by the Muslims of India, which originated as the
16 Muhammadan Anglo-Oriental College, Aligarh, and which was subsequently incorporated as
17 the Aligarh Muslim University. And this was struck down as well. Then, My Lord, kindly see
18 Section 4, which amends 5. 5(1), to promote specially the educational and cultural
19 advancement of the Muslims of India. Your Lordships have seen that. That was also struck
20 down.

21

22 Now, My Lord, I want to take Your Lordships to the other provisions that are important.
23 Section 12 was not challenged. The court shall consist of the Chancellor, Pro-Chancellor, Vice
24 Chancellor, and Pro-Vice Chancellor, if any, for the time being and such persons as maybe
25 specified in the statutes. This is also a restoration My Lord of the earlier provisions. Then I
26 need to, subsection 2. The court shall be the supreme governing body of the university and
27 shall exercise all the powers of the university, not otherwise provided by the act, statutes,
28 ordinances and regulations and it shall have the power to review the acts of the Executive and
29 Academic Councils, save where such councils have acted in accordance with the provisions.
30 Then the powers are given in subsection 3. Subject to the provisions of this Act, the court shall
31 exercise the following powers. These are the provisions that empower the court once again to
32 make statutes and to amend or repeal the same to consider ordinances, to consider and pass
33 resolution through the annual report, annual accounts and the financial estimates. To elect
34 such persons, to serve on the authorities of the university and to appoint such officers as may
35 be prescribed by the Act. And then My Lord (E). To exercise such powers and perform such
36 duties as may be confirmed or imposed by it by the act or the statutes. So many of the
37 provisions that were there in the original Act have come back and I'm not dealing

1 with the... and none of these, I had argued the case before the Allahabad High Court. None of
2 them were challenged. I want my learned friend... it's important. Section 7. In Section 17 of the
3 Principal Act, the following subsection will be substituted. The Chancellor of the university
4 shall be elected by the court in such manner and for such terms as may be prescribed. So, here
5 the Chancellor is now elected by the court. As Your Lordships will see, the Pro-Chancellor will
6 also be elected. The Pro-Chancellor shall be elected by the court in such manner. Same thing.
7 Then My Lord, in the Principal Act, the treasurer, Your Lordships will see what is introduced
8 here in 20(A). The Honorary Treasurer shall be elected by the court in such manner. Then if
9 Your Lordships will come to 12. 12, substitution of a new section for Section 23. This is Section
10 12. None of this was challenged. The only challenges were made with the three provisions that
11 were struck down. The court shall consist of the Chancellor, Pro-Chancellor, Vice Chancellor,
12 or the Pro Vice Chancellor, if any. for the time being and such other persons as may be specified
13 in the statute. Then My Lord, subsection 2. The court shall be the supreme governing body of
14 the university and shall exercise the powers of the university not otherwise provided by the
15 Act, etc.

16

17 Then, the duties are mentioned in Sub-section 3. Subject to the provisions of this Act, the court
18 shall exercise the following powers and perform the following duties. This is the court again to
19 make statutes to amend or repeal the same, to consider ordinances, to consider and pass
20 resolutions on the annual report. To elect such persons to serve on the authorities, as may be
21 prescribed.

22

23 '16 My Lords. There's another substitution. On the commencement of the Aligarh Muslim
24 University Amendment Act, the statutes enforce immediately before such commencement, as
25 amended by the Act, shall be statutes of the university. And then after the commencement of
26 the AMU Act, 1981. The court may, notwithstanding anything contained in Sub-section 1,
27 make new or additional statutes or may amend or repeal the statutes referred to in Sub-section
28 1, in the manner provided. Now My Lord, come to Section 3, Sub-section 3. The Executive
29 Council may propose to the court, the draft of any statute for its consideration and such draft
30 shall be considered by the court at its next meeting, provided the Executive Council shall not
31 propose the draft, of any statute or the amendment affecting the status powers or constitution
32 or any authority, unless until such authority has been given an opportunity to express a natural
33 justice provisions. Now, page 152, Section 35, My Lord. 20. 20 is not important. 21, throughout
34 the statutes, head of department, wherever they occur, will be the Chairman of the department,
35 shall be substituted in such consequential amendments made in the rules of grammar that
36 may require to be made. Then the Chancellor shall be elected by the court by a simple majority.

1 The Chancellor, that's three years, we are not concerned with that, My Lord. Pro-Chancellor is
2 also, My Lord elected by a simple majority.

3

4 **GURU KRISHNAKUMAR:** The proviso, removing the Muslims character, that is not
5 restored. That's not restored.

6

7 **RAJEEV DHAVAN:** May I complete? I'm racing against time. You didn't have that
8 disadvantage. Then My Lords, in statute number 2, in PDF 153, the Vice-Chancellor shall be
9 appointed by the Visitor from a panel of three persons, recommended by the court from a
10 panel of five persons, recommended by the Executive Council, provided that if the Visitor does
11 not approve, he may call for fresh recommendations. So, that is a process that is important.
12 Earlier, it was Visitor, now it's from the court to the Visitor. Now My Lord kindly, come to the
13 composition of the court, in Section 14, which had been deleted earlier. Chancellor, Pro-
14 Chancellor, Vice-Chancellor, Pro Vice-Chancellor, Honorary Treasurer, Treasurer, all ex Vice-
15 Chancellors, all Deans of Faculties, Deans of Student Welfare, Librarian, Registrar, then 20
16 Chairman of departments, these are democratic changes that take place, to represent students.
17 And then Your Lordships, will see on page 154, the representatives of the All India Muslim
18 Education Conference, 5 representatives, representatives of Parliament, representatives of
19 Muslim culture and learning.

20

21 **KAPIL SIBAL:** 25 representatives, ex-students to be elected by the Old Boys' Association,
22 that's 20.

23

24 **RAJEEV DHAVAN:** Then kindly come to '25. 15 persons representing Muslim culture and
25 learning to be elected by the court, of whom 10 shall be persons residing outside the state of
26 Uttar Pradesh. Next My Lord, that is (xxvi), six persons representing Muslim colleges of
27 Oriental learning in India to be elected by the court. Then My Lord, Chairman of Waqf Board
28 to be elected by the court once again. Two persons representing Urdu language and literature
29 to be elected by the court. Then My Lord, (xxix), five persons of Muslim culture and societies
30 situated outside the state of Uttar Pradesh to be elected by the court. Can we argue that the
31 Muslim character is not mentioned here? And the argument on the other side was that the
32 Muslims have been thrown out. No challenge. Therefore, the three struck that were struck
33 down are separate. Now we are looking at the administration.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Look at the *ex officio* members. There is no
36 requirement under the statute that they have to be professing the Muslim religion. So from
37 Clause 1 to Clause 14 is agnostic to religion. Then likewise, I think from Clause 1 to Clause

1 20.... 21, you get ten representatives of donors who have donated at least a sum of Rs. 10,000.
2 Then again 10 persons representing learned professions to be elected by the court. 28 is
3 certainly representatives of the All India Muslim Conference.

4

5 **RAJEEV DHAVAN:** Before that, Urdu My Lord.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Five, 10 members of Parliament. Again, there's
8 no requirement of religion. So if you look at 23, 25, 26, 27, 28 and 29 these are the real Muslim
9 representatives in the court.

10

11 **RAJEEV DHAVAN:** Yes, that's right. There had to be a democratization. I know of no
12 university, and I've taught in many My Lords, you have to put the students in. You have to
13 bring the eminent professors in. There is no other way to do it.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** But can we say that now, as a matter of these
16 amendments, *de jure*, that control is vested in the Muslim community by the court? Or is it
17 that they also have a representation of the court. Would it not be more appropriate to say that
18 now they have got a representation in the court but they are not controlling the court, or there
19 is no legal requirement of the proviso to Section 23, that only a Muslim can be a member of
20 the court. Because that which was deleted, with 23(2) proviso, that has never come back
21 thereafter.

22

23 **RAJEEV DHAVAN:** That is true My Lord. I'm not doubting that. But My Lord, the operative
24 part in the judgment, says in whom the minority have confidence.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** What is the total strength of the court? In
27 number it will vary. All ex-Vice Chancellors. It depends on how many ex-Vice Chancellors are
28 still....

29

30 **RAJEEV DHAVAN:** All Muslims.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** No, I'm not on that. What is the total number in
33 the court?

34

35 **KAPIL SIBAL:** About 180 My Lords. Ex-Vice Chancellors.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** No, no. Not ex-Vice Chancellors. Just the total
2 number in the court.

3

4 **RAJEEV DHAVAN:** 180.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** 180.

7

8 **RAJEEV DHAVAN:** And when you say ex-Vice Chancellors, have to go into the de facto.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** How many are drawn from clauses 23, 25, 26,
11 27, 28 and 29? We'll actually get into...

12

13 **RAJEEV DHAVAN:** About 40.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** It will be 5.

16

17 **RAJEEV DHAVAN:** But My Lord, when we say ex-Vice Chancellor, we need to add to that
18 number.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** 32, 37

21

22 **KAPIL SIBAL:** That makes it 65. There are 25, Old Boys.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** So between who has to be necessarily a Muslim.

25

26 **KAPIL SIBAL:** They have to be. We are going into numerical which has nothing to do in the
27 context of what is a minority institution. I will come to that My Lord. Let my Learned Friend
28 finish.

29

30 **RAJEEV DHAVAN:** So My Lord, we are more or less done with this.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Done with this statute.

33

34 **RAJEEV DHAVAN:** Now My Lords, can I take Your Lordships to my written submission?
35 Just a small... page 25 of my written submission. Volume 1(f).

36

1 **RAKESH DWIVEDI:** There is a report of [INAUDIBLE] Your Lordships would like to see
2 now or later on? Relevant portion of that Gajendragadkar Committee. We can show it later on.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** You might as well tender to it now, because then
5 they can also look at it at lunch because if there's something of relevance in that because you
6 will not give any opportunity now after they have discussed.

7

8 **RAKESH DWIVEDI:** It is only the relevant pages, which we have taken out. Not the whole
9 report.

10

11 **KAPIL SIBAL:** There are so many reports which are in our favour. Then Chatterjee
12 Committee's report in 1961, which is entirely in our favour. The Minority Commission Report
13 is in our favour.

14

15 **RAKESH DWIVEDI:** Since you all were referring...

16

17 **KAPIL SIBAL:** Ultimately, this is a constitutional issue. It's not a numerical issue.

18

19 **RAKESH DWIVEDI:** No, the idea was to make it, to treat it as a separate university.

20

21 **KAPIL SIBAL:** My Lord let me just in a minute tell Your Lordships what the constitution
22 says if Your Lordships will permit me. Did I establish this university? If I have established, I
23 have the right to administer. I have the right to establish and the right to administer. The test
24 is not whether I'm administering or not. Going into something which is relevant for the
25 constitution at all. And this has been held by 11 [INAUDIBLE].

26

27 **RAJEEV DHAVAN:** My Lord, I don't want to get into the question of the committees
28 because by and large, they are in our favour. Just to take out a paragraph or two will not make
29 a difference. If my learned friend wants to do the surrejoinder now, the answer would be very
30 different. I don't think so that we go into the committees.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Now, what is the next limb Dr. Dhavan?

33

34 **RAJEEV DHAVAN:** I'm just going to one or two provision. Page 26.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** Of Volume?

37

1 **RAJEEV DHAVAN:** 1-F. Here My Lord, I go to 7.3 the *de facto* argument. Because the *de*
2 *facto* argument becomes important if the numbers that had been appointed, were *de facto*
3 Muslims. When we don't My Lord at that stage in any way, we are not, in any way... I'm sorry
4 My Lords.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

7

8 **RAJEEV DHAVAN:** I'll leave it there. I just want to read. I'm sorry.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Aspects which is worrying us, we may, may tell
11 you now, so you have a little time over lunch, is that, the 1981 Amendment, does not restore
12 the position as it stood prior to 1951. In other words, the '81 Amendment, it does a half-hearted
13 job. I can understand if the '81 Amendment had said, okay we are going back to the original
14 1920 statute, confer complete minority character on this. It says, okay, established while
15 changing, universities, we are changing the definition. So, it was really an... It was a,, they
16 were placating that sentiment. But when they actually came to the brass tracks. They didn't go
17 back to the position prior to 1950.

18

19 **RAJEEV DHAVAN:** In part.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** And what they did was it brought a Muslim voice
22 into AMU's administration as you see it, in the court, for instance. They brought a Muslim
23 voice into the institution.

24

25 **RAJEEV DHAVAN:** That's correct.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** But it still stopped short even parliament, which
28 it had power to do, it still stopped short of back to the 1920 Act or the pre 1951 Act.

29

30 **RAJEEV DHAVAN:** Take for example the foundation members.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Somehow or the other, you know they just
33 [UNCLEAR] order and they said, okay we will do a little bit of... we will make a few confessions,
34 but they never took us back to the pre 1951 Act. That's something which...

35

36 **RAJEEV DHAVAN:** To some extent, it couldn't have gone back. There were two elements.
37 Firstly, the democratic elements of students, etc., were brought in. That is consistent with the

1 fact that some democratic elements had to be brought in. We get a voice. Now suppose, these
2 were non-Muslims all across the board, they might be subject to challenge on the *de facto*..

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Okay. We will come back after lunch.

5

6 **RAJEEV DHAVAN:** I'll only take five minutes more My Lords. And then I will hand over to
7 Mr. Sibal.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Certainly, thank you, Dr. Dhavan.

10

11 **RAJEEV DHAVAN:** I will just take a few minutes.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, Dr. Dhavan. Yes.

14

15 **RAJEEV DHAVAN:** My Lord, in response to Your Lordship's question earlier My Lord, Your
16 Lordship indicated that the '81 Act may be half hearted. I have My Lord, two responses to that.
17 The first is My Lord, the numerical argument in the Court. But My Lord we don't just have to
18 look at the Court, we have to look at the purposes of the University and these are writ large.
19 I'll read them out from the amended Act, My Lord. The purposes, Your Lordships will find, in
20 the original Act. It said - 'To promote Oriental and Islamic studies and give instruction in
21 Muslim theology and religion and to impart moral and physical training.' Now, what was
22 added, My Lord, in '72 was - 'To promote the study of religion, civilization and culture of India.'
23 And see which is important My Lord, which comes in '81 - 'To promote specially the
24 educational and cultural advancement of Muslims in India.' So I'm making a distinction, My
25 Lord, with the powers and composition of the Court on the one hand and the purposes of the
26 Statute read as a whole. And it is the purposes of the Statute that will govern. It's the purposes
27 of the Statute, which will also run alongside. And that's why we can't read the Act minus the
28 purposes of the Statute. And then My Lord, in Statute 20, there are various faculties and
29 departments which are clearly to promote the Muslim culture. So, this is the fundamental
30 distinction that we wish to make, that you go by purpose, you go by empowerment. And to that
31 extent the Statute is crystal clear. The second point that I wanted to make, draws on Justice as
32 he then was Mukharji's argument in the Bhopal case. In that it says, I'll give Your Lordships,
33 the citation **1990, 1 SCC 613** and para 13. He says - 'We don't just examine the provisions of
34 a statute, but also how it works itself out.' Now, the *de facto*, *de jure* My Lord, are not
35 opposites, they are composites. Therefore, when we mention the *de facto* argument, it is how
36 the Act has worked itself out and that is a consideration that Your Lordships will consider
37 when Your Lordship, examines how it works itself out. The rest, Mr. Sibal will answer. Can I

1 just take Your Lordships, My Lord, back to my submission? There are just two or three
 2 paragraphs, My Lord, that I have to read. That is 26 in Volume 1(f). 7.3. 'Muslims have a *de*
 3 *facto* administrative control over AMU since its founding in a 104 years. All members of the
 4 first Council, first Court were Muslims. Then all the members of the first Executive Council
 5 were Muslims. 8 over 12 members of the Academic Council were Muslims. Every Chancellor
 6 to date has been a Muslim. 34 out of 37 Vice Chancellors and then the vast majorities of the
 7 members of the Court. Three non-Muslims were Acting Vice Chancellors. The vast majority of
 8 the members of the Court, Executive Council, Academic Council throughout the years have
 9 been Muslim in nature.' Now, because I'm saying we have to examine how the Act works itself
 10 out, *de jure* and *de facto* have to be considered together. Then My Lord, I come to the 7.4 -
 11 'Notwithstanding the *de facto* and *de jure* control, if any provision of the AMU Act is found to
 12 be invasive of the minority character they will be susceptible to challenge.' Then My Lord, 7.5
 13 is an important point and we've just put in the quotation from **P.A. Inamdar**. It says that-
 14 'If 19(6) restrictions are there which are invasive then it is 30 that will trump 19(6).' And over
 15 the page, there is a distinction which I'd made earlier which I'm reinforcing, 'Between external
 16 supervisory control and internal day to day control, these are requirements after 1950 to
 17 conform to a more egalitarian Constitutional setup. It does not denude the institution of its
 18 minority character.' And then apart from '67 to '81, AMU has always been a minority
 19 institution and therefore, one of the questions was, why now? The answer to that question is
 20 it has already been there throughout this particular period except for this interim phase, which
 21 I've described in the phases. I don't want to say more than that, I must yield to Mr. Sibal. I call
 22 him my Guru from time to time. Justice Thakur said who is the *Guru* and who is the *shishya*?
 23 We don't know. Let me end on that by way of levity.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you, Dr. Dhavan. Yes, Mr. Sibal.

26

27 **KAPIL SIBAL:** This matter has been argued at various levels. One that this University was
 28 not established by the minority community, which is the finding in **Basha**. Then, in any case
 29 it was not administered by the Muslims. That's the other level. That's also the finding in
 30 **Basha**. Then, in any case, it is not a minority. That's the third level at which it is argued. And
 31 fourth, that it is an institution of national importance. So it's lost its minority character even
 32 if it had any. These are the four broad submissions that have been made. And I think, with
 33 respect, greatest respect, that we are going a bit astray, constitutionally. What does Article 30
 34 say? 'All minorities whether based on religion or language shall have the right to establish and
 35 administer educational institutions of their choice.' Let's pause here. If I have not established
 36 as a minority, I cannot administer. So, I have a right to establish. That's what 30 said. If I have
 37 established, then I have a right to administer. So, Article 30 gives me a right to administer. It

1 doesn't say that the administration must be in my hands or in Muslim hands or Christian
2 hands. That's not the meaning of Article 30. Administer of my choice, right to administer of
3 my choice. I have a choice, not you, not the government. But I must establish it. Unless I
4 establish it, that right doesn't accrue to me. And the right that accrues to me is the right to
5 administer the institution as I please, of my choice. My Lords take, for example, any minority
6 institution in this country. I don't think any minority institution in this country is administered
7 by minorities. You apply the wrong test, you'll get the wrong answer. Take St. Stephen's. How
8 many teachers are minority? Not even 5%. Administration, how many are filled with
9 Christians? Not more than 5%. Students, how many are Christians? I don't know now, used to
10 be 9%, 14%. What's the relevance of that? This whole numerical argument is wholly irrelevant
11 to Article 30. So, kindly take the statute. Take St. Stephen's College in the context of Delhi
12 University Statute. The syndicate is not... I am not part of that syndicate. I'm not part of the
13 Executive Council. I'm not part of the Academic Council. That means I'm not a minority
14 institution. What tests are we applying? Never before in the history of this Court have these
15 tests ever been applied. That's why there are no judgments cited, My Lords. So, My Lords, the
16 mistake in **Basha** was, that when **Basha** said that you have not established this University
17 as a minority, then the Council argued - 'But I am administering it.' And **Basha** said - 'You
18 are not.' That's not the test. So, Governor General does this, the Rector does this... My Lords,
19 I want to ask myself a question, if I am enacted by an Act of the Central Legislative Council,
20 will there not be a structure by which somebody has to see that I'm not maladministering. Take
21 our Constitution today, I set up a minority institution. When I'm setting up that institution,
22 will the Chancellor of the institution, which has nothing to do with the minority, not have the
23 right to inspect? He will have the right to inspect. He'll have emergency provisions. He may
24 even have the right to take over. Administration doesn't mean maladministration. So, let's
25 start with the proposition that I have a right to administer. Your Lordship asked a very
26 fundamental question, 'But the '81 Act is not a *status quo ante*?' Your Lordship is right, but I
27 accept it. I accept it. I'm not a minority institution. I still am. That's my choice. And the other
28 mistake that we are making, which is an error of law. I don't have to be administered either by
29 the Muslims or the Christians when it comes to minority institutions. You won't have
30 Christians or you won't have Muslims who are educated at that level to be in every... So, My
31 Lords **T.M.A. Pai** had four tests. Para 50 of **T.M.A. Pai** set up four tests. What do you mean
32 by administer? My Lords, just kindly come... I've done a Rejoinder. It's also part of the... Kindly
33 come to Note 1(g). Yes, page 3 of Note 1(g). That's why My Lords, my learned friend when I
34 argued this in the beginning, never answered that question. Because 19(6) regulates minority
35 institutions as much as it does majority institutions. The regulation does not mean destruction
36 of the right. So, if the Chancellor is appointed by the President, it doesn't mean that I've lost
37 my right as a minority institution. So, My Lords kindly see the **T.M.A. Pai** para 50.

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CHIEF JUSTICE DY CHANDRACHUD: Where do you get it?

KAPIL SIBAL: My Lords, that's my Volume 1(g) My Lords.

CHIEF JUSTICE DY CHANDRACHUD: At page?

KAPIL SIBAL: Page 3.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

KAPIL SIBAL: 'Mandate of right to administer was set out as including the right to admit student, subject to an objective and rational procedure of selection.' No problem. That's the institution that has a right, the minority... Once I establish the institution as a minority institution, I have a right to admit students in accordance with procedure which is fair and transparent. Perfectly good. I'm doing that in Jamia, in AMU. '(2) Set up a reasonable fee structure.' The institution is doing it. '(3) To constitute a governing body.' We have a governing body. It doesn't say governing body must have all Muslims or governing body must have all Christians. Where is it said? Where is that test? '(4) To appoint staff.' Appoint staff. Now My Lords, the University says - 'If you want to teach in AICTE, the teacher must have these qualifications.' You abide by that. But the right to choose the teacher is mine. In Delhi University, My Lords, the University provides that if you want to teach Economics, the person must be a doctorate or whatever. The choice of which doctorate will teach is mine, but the University will set the standard. That's what it is. To appoint staff, teaching and non-teaching. Standards set by the structure of the University. And '(4) To take action if there is dereliction of duty.' These are the five indicia of administration. That's eleven judges. Now, test this in the context of what **Basha** said. Now kindly come to **Basha** for a minute. 3(a), page 16. I'm sorry. Page 16 of **Basha** at Volume 3(a), page 16. And My Lords, Placitum G and H. Wrong argument, therefore the wrong answer.

It's not a twin test. Am I administering? That's not the test. And we have all, throughout these days, we've been arguing about - 'Show me if you are administering.' It's not required by 30. You'll never get that. That means there will be no minority institutions left in this country. Apply this even to the institutions after 2005. All the provisions that are here in the '81 Act are all there in 2005. Inspection, emergency, final approval, all that. I've got a chart I'll show it to you. So what are we trying to do? Apply a test which will destroy the entire minority structure of education in this country. That's why if Your Lordships remember in the opening I said, and

1 Your Lordships put it also that your argument is that if I cede that right, that's my choice to
2 the extent that I cede it. If I feel somebody is interfering, I can challenge it. I can challenge it.
3 I have a right to administer, not a duty that I must administer everything. And no judgment of
4 any Court since 1950 has held this. That's why I got up and said that numerical strength is not
5 an issue, can never be. I am satisfied with this and I will go numerically also. Out of the external
6 members My Lords, I am 77 out of 104. But I don't want to fall into that trap. That's why I
7 choose not to challenge. I'm happy. So this is the fundamental Constitutional issue that Your
8 Lordships will have to decide and consistent with judgments of this Court. It's not a twin test.
9 I have the right to establish, I have the right to administer and of my choice. So, if I am within
10 Delhi University, I am an affiliated college, I accept the discipline of the University. So, what
11 is the only choice I have in St. Stephen's, some element of reservation. That's all, nothing more.
12 And I appoint my own teachers, I dismiss my own staff, I take disciplinary action against them.
13 I have an admissions policy which now... I don't want to talk about, that's pending in this
14 Court. I had an admissions policy where I could admit students but with standards. Your
15 Lordship knows in private institutions also, those standards had to be applied, then admit.
16 The Christian Medical College, Your Lordships know they used to hold their own tests at one
17 time. And they had their own standards. The Court said - 'No. When you come to medical
18 seats, you should go by NEET.' Fine. That doesn't mean it's not a minority institution.

19

20 **JUSTICE SURYA KANT:** Mr. Sibal, one clarification. Just please see one head note above
21 paragraph 48 in *T.M.A Pai* and just clarify if para 50 applies to minority, Government aided
22 institution also.

23

24 **KAPIL SIBAL:** Yes. I'm on Government aided.

25

26 **JUSTICE SURYA KANT:** Just clarify that part.

27

28 **KAPIL SIBAL:** Yes. I'm Government aided, My Lords.

29

30 **JUSTICE SURYA KANT:** You are Government aided. But see the head note above
31 paragraph 48.

32

33 **JUSTICE DIPANKAR DUTTA:** It says, 'Private, unaided, non-minority educational
34 institution.' That is, the head note.

35

36 **KAPIL SIBAL:** That applies also to the Government aided, My Lord. That also applies to
37 Government. It makes no difference. It's all right. Non-minority, same principle applies, same

1 principle. We are talking about administration. My Lords, please appreciate. We're talking
2 about administration. Nothing to do with minority, non-minority. I said that test of
3 administration.

4

5 **JUSTICE DIPANKAR DUTTA:** 50, whether the same test would apply for a minority...

6

7 **KAPIL SIBAL:** It will have to. Under 30, it will have to My Lords. Your Lordships have never
8 said otherwise.

9

10 **JUSTICE DIPANKAR DUTTA:** Somewhere provided as to what would be the test for
11 minority. Because this is specifically dealing with private, unaided, non-minority.

12

13 **KAPIL SIBAL:** Because the argument was that we should not be subject to anything. I am
14 My lords, I am on... please appreciate. Let's test it on first principles. The meaning of
15 administration can't change. Let's test it on first principles. Let's test it on first principles.
16 What does administration mean? Whether it's minority or non-minority makes no difference.
17 Administration can't vary if an institution is aided or unaided, a minority or non-minority. The
18 meaning of administration can't change. Unless you find it in Section 30 that not only do I
19 have the right, but I must administer the institution all by myself.

20

21 **JUSTICE SANJIV KHANNA:** Mr. Sibal, your argument...

22

23 **KAPIL SIBAL:** Para 5 only explains what the right comprises of. 50 only explains...

24

25 **JUSTICE DIPANKAR DATTA:** It says, 'to admit students.' Therefore, a private institution
26 may say that I will admit only a particular category of students. Students belonging to a
27 particular category. It's a private institution.

28

29 **KAPIL SIBAL:** Can't say. If it wants a degree, it cannot. My Lords, I'm sorry.

30

31 **JUSTICE DIPANKAR DATTA:** No, no. This is only institution. *T.M.A. Pai* was not
32 concerned with University.

33

34 **KAPIL SIBAL:** No, no. It was considered, we're dealing with everything schools, universities,
35 institutions, everything. Let's pause here. I am a non-minority, unaided institution but I want
36 a degree. I'll have to abide by the admissions policy, but I can, within that, admit students of
37 my choice, on merit. Let's talk of first principles here. The right to administer cannot change.

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JUSTICE DIPANKAR DATTA: Let's say that in a particular course.

KAPIL SIBAL: Yes.

JUSTICE DIPANKAR DATTA: 100% would be from a particular category.

KAPIL SIBAL: Cannot be.

JUSTICE DIPANKAR DATTA: You say, you can't do that.

KAPIL SIBAL: You can't.

JUSTICE DIPANKAR DATTA: Can you say that 50% would be for a particular category?

KAPIL SIBAL: In minorities yes, that's the law. Yes, that's the law. Within minority institutions, yes. And merit, we can't do away with merit. But that doesn't mean that I have lost my character or I have surrendered. Therefore, let's be clear on first principles here.

JUSTICE DIPANKAR DATTA: Because in 2004, for the first time, you sought to reserve 50% for the PG course. Prior to that, you did not.

KAPIL SIBAL: I'll tell Your Lordships why. Because... I'll come to that later. The area of manoeuvrability, as I was concerned, had been reduced from 50% to 25%. So therefore, I wanted. And it was struck down, according to me, maybe rightly, but we're not on that. At the moment, we are discussing the fundamentals of Article 30. Where do you get this proposition, that a minority institution for the Muslim community must be administered only by the Muslim community? Not in Article 30, not in any judgment of this Court, not even in **T.M.A. Pai** . And this is the proposition that **Basha** proceeds on. Look at the Rector, look at the Governor General, he is not a Muslim. That's the argument. Does the Governor... does the President of India have to be a Muslim to get St. Stephen's minority status. What kind of argument is that? If this were the test, there'll be no institution which can ever claim to be a minority institution in this country.

JUSTICE SANJIV KHANNA: Argument is, as if a minority establishes an institution that's good enough for compliance, for getting protection.

1 **KAPIL SIBAL:** Yes. Under 30.

2

3 **JUSTICE SANJIV KHANNA:** Under 30.

4

5 **KAPIL SIBAL:** Correct.

6

7 **JUSTICE SANJIV KHANNA:** It's my right. Thereupon it's my right to administer. And my
8 right to administer includes these four points

9

10 **KAPIL SIBAL:** Correct. You may expand it My Lords, I have no problems with that. But the
11 right to administer is my choice, I can give up certain rights. I can't waive a fundamental right
12 as Your Lordship knows, but I can give it up for the time being. If I find there's still
13 interference, I can challenge it. I can choose not to challenge. So **St. Stephen's** says... I'll just
14 My Lords read that, it says 'The right...' Exactly what My Lord has said. 'The rights claimed by
15 a minority community to administer the educational institution depends upon the proof of
16 establishment of the institution. The proof of establishment of the institution is thus a
17 condition precedent for claiming the right to administer the institution.' That's exactly what
18 My Lord said. And **Basha** also says that. But **Basha** says -'But you are not governed by
19 Muslims.' In fact, **Basha** should never have gone into this question. If **Basha** came to the
20 conclusion that this is not established by a Muslim minority, there was nothing to... it should
21 have stopped there. Why it didn't stop? Because we made the argument. Even if we are not
22 established, we are administering the institution. It's a mistake on our part. For the first time,
23 my learned friend is agreeing with me on this. And university was not a party.

24

25 **TUSHAR MEHTA:** My learned friend is in a rejoinder. There are several statements which
26 are either inaccurate or misleading. But we won't give up the chance to...

27

28 **KAPIL SIBAL:** My learned friend is very kind always to say that everything that I say is
29 misleading the Court.

30

31 **TUSHAR MEHTA:** Not everything.

32

33 **KAPIL SIBAL:** It's my... the politeness of my learned friends is which you say it is admired
34 by me.

35

36 **TUSHAR MEHTA:** Not everything. I didn't....

37

1 **KAPIL SIBAL:** What is it that is misleading? State one... make one statement that is
2 misleading. One statement. Don't just get up only for the sake of getting up.

3

4 **JUSTICE SANJIV KHANNA:** Mr. Sibal, what is the meaning of para 54 of *St. Stephen's*?

5

6 **KAPIL SIBAL:** 54. Volume 5. Yes. 5(a). Yes, paragraph 54. Which page is that? Page 422.

7

8 **JUSTICE SANJIV KHANNA:** *St. Stephen's* is page 4?

9

10 **KAPIL SIBAL:** 22, My Lord. 422. That's exactly the point.

11

12 **JUSTICE SURYAKANT:** Particularly the line, 'This management must be free from the
13 control...'

14

15 **KAPIL SIBAL:** Correct. 'Of the founder or their nominees can mould the institution as they
16 seem fit and in accordance with their ideas of how the interests of the community in general
17 and the institution in particular must best be served.' Entirely in agreement with what I'm
18 saying. Entirely My Lord. That's my choice. Supposing My Lords, the Vice Chancellor of Delhi
19 University said -'I will appoint your teacher, I will decide who will teach in the university.' It'd
20 be violative of 30. And see, read the rest of the paragraphs. All in my favour My Lords. 'But the
21 standard of education...'

22

23 **JUSTICE DIPANKAR DATTA:** Funds as you like.

24

25 **KAPIL SIBAL:** I'm sorry.

26

27 **JUSTICE DIPANKAR DATTA:** Whatever public funds you receive, can you use it as you
28 like?

29

30 **KAPIL SIBAL:** No, My Lords. I have a grant in aid. 90% grant in aid is given to me. And
31 *T.M.A. Pai* says -'The fact that you are aided has nothing to do with your minority character
32 of the institution. You still retain the minority character. Aid is fundamental.

33

34 **JUSTICE DIPANKAR DATTA:** No. The fact that your accounts are audited by the AG, does
35 it not make any difference?

36

1 **KAPIL SIBAL:** It's audited. No, because it must be audited. I am not absolved of the general
2 principles of law applicable, My Lords. It has nothing to do with administration. My Lords, to
3 prevent mismanagement, to prevent maladministration. That's why My Lords, it is to be
4 audited.

5

6 **TUSHAR MEHTA:** Page 417...

7

8 **KAPIL SIBAL:** One second. Hold on, sir, if you don't mind. Allow me. I don't interfere like
9 this. Please allow me. Allow me.

10

11 **TUSHAR MEHTA:** [UNCLEAR] wrong, was not right. But I'll leave...

12

13 **KAPIL SIBAL:** I'm sure. Please leave it at that.

14

15 **TUSHAR MEHTA:** There are 36. They do have the number test.

16

17 **KAPIL SIBAL:** Again. Do have the number test means what? This only to *que* establishment
18 of the institution, nothing to do with the administration. Again, you are misleading. 1 second.
19 This is... How the institution is established. Bishop of the diocese, who shall be the chairman?
20 The person is appointed by the Bishop of the diocese. He's not managing the institution. This
21 is the genesis of the institution. Let's not have a... I'm before the Court, not before you. The
22 day you become a judge, I'll argue before you. Let's not deviate from the issue, My Lords.

23

24 **TUSHAR MEHTA:** That means 36 does help the... justifies the 36. Does talk of management,
25 does talk of administration.

26

27 **KAPIL SIBAL:** I don't understand what my learned friend is unnecessarily.... I don't know
28 why keep on...

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Alright. [UNCLEAR] Just we are now on the
31 very verge of the end of the argument.

32

33 **KAPIL SIBAL:** It's not the end. It happens to be just the beginning of my argument.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** You have got 1 hour and 15 minutes.

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37 **KAPIL SIBAL:** I can't possibly finish.

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CHIEF JUSTICE DY CHANDRACHUD: You have to close today. We have another matter listed next week. We don't mind [UNCLEAR] beyond 4 O' clock, but Mr. Sibal you have to...

KAPIL SIBAL: I have not raised any new points. I'm just trying to answer....

CHIEF JUSTICE DY CHANDRACHUD: But this point which you have made that it's your right to establish, it's your right to administer and merely because you choose any third party to administer, doesn't take away your right to administer in a manner which you think is appropriate. That's the point.

KAPIL SIBAL: That's the point. That's the point.

JUSTICE SANJIV KHANNA: It's not a right, not a condition.

KAPIL SIBAL: That's correct. That's all. It's not a right, not a condition. Absolutely right. Not a directive, not a condition, not a directive. **St. Stephen's** said so. So, My Lords, having said that, now see what mistake **Basha** made. Volume 3(a), page 16. Okay, page 16, Placitum G and H - 'An argument has been raised by...' Placitum G My Lords, at page 16, Volume 3(a). **T.M.A Pai** answers the question of aid. **T.M.A Pai** answers the question of affiliation. None of these conditions can take away from the character of the minority institution. So, that is already covered by judgment of eleven judges. But My Lords, kindly see, if Your Lordships don't mind... it's Placitum G, paragraph 3(a) at page 16 of Volume 3(a). **Basha**, Volume 3(a), page 16 between Placitum G and H.

JUSTICE DIPANKAR DATTA: **Basha** is right.

KAPIL SIBAL: That he is consistent with **St. Stephen's**. That's what I'm saying. I'm saying exactly that. But then what does **Basha** say? Kindly see the other paragraph, page 17, between E and F. You see - 'The two words in Article 30 must be read together and so that the Article gives a right to a minority administered institutions established by it. If the education institution has not been established by a minority, it cannot claim the right to administer under 30.' Perfectly good, Then, what does the.... 'We are therefore to consider, to examine closely what happened in 1920 when the Act was passed to decide whether in the face of the Act, it could be said that Aligarh was established by the minority, whether the right to administer it ever vested in the minority.' That's the wrong thing. This is ultimately the conclusion. I'm sorry. At page 22 in paragraph F - 'Nor do we think that the provisions of the

1 Act can bear out the contention that it was a Muslim minority which was administering the
2 Aligarh University.' This is wholly irrelevant. That's not the test. The issue is not whether the
3 Muslim minority were administering the university. Already **Basha** said - 'If you've
4 established it, you have a right to administer.'

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** But then why did you challenge the 1951 and
7 1965 Amendments?

8

9 **KAPIL SIBAL:** I'm sorry.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Why did you... You in the sense... why was in
12 1951 and 1965 amendments challenged in the first place?

13

14 **KAPIL SIBAL:** Because it took away my right to administer.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Right. That's exactly the point. So the 1951 and
17 1965 amendments were challenged.

18

19 **KAPIL SIBAL:** I did not challenge it My Lord. Somebody challenged.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Somebody challenged, AMU didn't challenge. It
22 was challenged on the ground that both these amendments took away the right to administer.
23 How did it take away the right to administer, by creating institutions for the governance of the
24 university in which people who are not of the faith or of the confidence of the founders would
25 be brought in. That was the essence of the challenge. Otherwise, if your argument today is
26 right that once you have established you are entitled to decide how to administer, then there
27 was no reason to challenge the '51 and '65 amendment.

28

29 **KAPIL SIBAL:** There is a reason,. The reason was they took over the entire control of the
30 university. I was not in. I was under **Basha**. I'm not a minority institution. I was not a
31 minority institution under **Basha**.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** How did they take away the control of the
34 university? They took away the control as for instance. Regulating. First, it said that the
35 proviso to 23 was deleted. Secondly, the Constitution of the court was altered. Then they
36 brought in the concept of a Visitor, they brought in a whole lot of other changes. Now that was
37 challenged on the ground that it takes away the right to administer.

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KAPIL SIBAL: Correct.

CHIEF JUSTICE DY CHANDRACHUD: Now, if that be so... If '81... '81 is not under challenge.

KAPIL SIBAL: No.

CHIEF JUSTICE DY CHANDRACHUD: Now if '81 does not restore the position as it stood entirely prior to 1951, then the amendment, which is not in challenge has not perpetuated to do that. It has not in fact restored the position prior to 1951.

KAPIL SIBAL: I agree. I'm happy with '81. I have no problem.

CHIEF JUSTICE DY CHANDRACHUD: That's exactly, You can't be happy with '81. '81 doesn't go far enough.

KAPIL SIBAL: It's far enough for me. Please appreciate what I'm saying. It is far enough for me. I am 74 out of 104 in the external members. The court is restored. My voice is heard. The Old Boys Association are represented. I'm happy with that.

CHIEF JUSTICE DY CHANDRACHUD: That is not because of the '81 amendment. It is about how the working has actually panned out in fact.

KAPIL SIBAL: No, it's in the '81 amendment. I'm sorry.

CHIEF JUSTICE DY CHANDRACHUD: If you look at the '81 amendment the constitution of the court, it doesn't give you 74 out of 104.

KAPIL SIBAL: It does. It does. I'll show it to you. It does My Lords. I don't... point is I don't....This is a mistake I am making My Lords. I'm sorry. This is not the issue at all. As I said to you, that grounds St. Stephen's is not a minority institution.

CHIEF JUSTICE DY CHANDRACHUD: But if you are right that once you establish then irrespective of whether we administer or not, it's your choice. You can leave administration to a third party.

1 **KAPIL SIBAL:** I didn't say that. Irrespective... Once I establish it, if the Government
2 interferes in my right to administer, I can challenge it. That's all. Nothing more than that. If
3 there are regulations which seek to destroy that right I can challenge it. My Lord, that's the
4 limited argument I'm making. I can even write. I can even challenge some of the '81. But I'm
5 happy with it because it continues. My character is maintained. I have no problems with it.
6 What My Lord is putting to me is, that I have, must have, I must demonstrate that I am
7 administering as a Muslim university. No. I was at that point in time, in 1920. I don't have to
8 go back to that position. Where does regulation and infringement begin My Lords, that's the
9 question. That's my right. I have to decide that. That My Lords, with respect, even the Court
10 may not decide. Where does regulation end and where does refrigerator begin, is something I
11 have to decide My Lords.

12

13 **JUSTICE SANJIV KHANNA:** Mr. Sibal, the difficulty is, when we started the arguments,
14 you said -'We are not going to the question of 'or'. We accepting 'or' should be read as 'and'.
15 Now your argument today is slightly different. What you are saying is - 'Once the minority
16 decides to 'establish' an institution, then two rights flow. One is they have the right to establish
17 which is the first right, which is connected with the rights of the minority to establish, and
18 there's a second right, right to administer. Right to administer cannot be read as a condition
19 precedent for declaration as a minority.'

20

21 **KAPIL SIBAL:** That's right. I've already....

22

23 **JUSTICE SANJIV KHANNA:** It's a consequence, not the condition.

24

25 **KAPIL SIBAL:** Yes, I've always maintained that, My Lord.

26

27 **JUSTICE SANJIV KHANNA:** Now you've raised your argument in a very different way.

28

29 **KAPIL SIBAL:** No, My Lords. But I have always been saying this. The other day I said to My
30 Lord. The Chief Justice said -'That means if you give up your right you're happy with it.' I said
31 that, My Lord. I remember that.

32

33 **JUSTICE SANJIV KHANNA:** Because now you are arguing 'and' should not be read as 'or'.

34

35 **KAPIL SIBAL:** It cannot be read as 'or', My Lord. It's a right, My Lord. There's no question
36 of 'or'. My Lord it is 'and'.

37

1 **JUSTICE SANJIV KHANNA:** You have both the rights together.

2

3 **KAPIL SIBAL:** Yes, I have both rights. I have always said that. I've never said 'or' My Lords.
4 I've never contended 'or'. It's a right. It's a right to establish and a right to administer. Now my
5 right... when somebody infringes my right, whether it's the university or the Government, I
6 can challenge it. But to the extent I'm administering it, I feel that if this element of free play
7 in the joints is good enough for me, I'm happy with it. So I'm not in any way saying My Lords.
8 See '65, was challenged by somebody My Lord's but the *de facto* continued. So in a sense, right
9 from 1950 onwards this has been an institution My Lords which has been actually serving the
10 interests of the minority community *de jure* and *de facto*. Kerala Education bill says - 'It must
11 not be overlooked that 31 gives the minorities two rights. To establish and to administer
12 educational institutions of their choice. The second right clearly covers pre-constitutional
13 schools.' This is exactly what... this has been the law throughout. I have never said anything
14 different. I happen to have argued most of these matters. Otherwise, if you'll be laying down a
15 test, My Lords as I said, no minority institution can ever claim to be a minority on this basis.
16 Article 30 only contains one My Lords, It doesn't contain two tests. I'll have to show that I
17 established the institution and the Church of North India established My Lords St. Stephen's
18 college. That's the fundamental issue. **Basha** answered it wrongly because **Basha** said - 'No,
19 the Muslims were not administering.' Where is it in Article 30 that only the Muslims must
20 administer or the Christians must as administer or any other community must administer?

21

22 And what is the administration running? That's the other thing. What is the administration?
23 Running the day to day affairs of the institution. That's administration, I hope. Nothing more
24 than that. If some statute has to be approved by somebody that's not administration. I have to
25 run the university in accordance with the Law. Law is 19(6). And nobody's answered 19(6) on
26 the other side. I've been saying again and again - 'Apply that 19(6) to pre 1950.' These were all
27 regulations. Of course, somebody had to approve. There was a British Empire under which we
28 were being governed. There was a Governor General, there was a Proctor. Somebody had to
29 be there but that's not administering. Administering is running the day to day affairs of the
30 university, which means appointing your teachers, holding examinations, admissions of
31 students. That's what administration is. Administration is not some approval that is to be
32 taken to a statute. How many times do you think will St. Stephens have any role to play and
33 an approval taken by a statute of the Executive Council or the Academic Council or the
34 Ordinances of Delhi University. Nobody takes. We are governed by it. We are governed by...
35 that's 19(6). So these are all regulations of 19(6).

36

1 **JUSTICE SURYA KANT:** Mr Sibal, with your argument, the standard of administration of
2 one minority institution will be different than the other minority institution.

3

4 **KAPIL SIBAL:** Always is.

5

6 **JUSTICE SURYA KANT:** Because *St. Stephen's*... See the level of what was the
7 interference by the university and how this Court turned down that interference. So, now you
8 are accepting that there can be an appointment of a Vice Chancellor, appointment of a Visitor.

9

10 **KAPIL SIBAL:** Always has been. For all minority institutions. Never an exception.

11

12 **JUSTICE SURYA KANT:** But in that case, the standard of administration in your case will
13 be different than those.

14

15 **KAPIL SIBAL:** Always, than other minority institution. Yes, or any other institution, of
16 course, because these teachers are appointed by me. That's admitted, My Lord. That's accepted
17 position. That's the administration. Every day running of the university. How do I run the
18 university? How do I run the hostel, appointment of teachers, disciplinary action against
19 employees? The university doesn't take disciplinary action against my employees. It will take
20 *que* others. We can go to court and say, look, this is wrong. That's fine. So, all that is governed
21 because that's regulatory. That's 19(6). Just read 19(6). Just read 19(6) with me. 'Nothing in
22 Clause G of the said Clause shall affect the operation.' Sorry, this is 5 because it's. No, it's. It's
23 an occupation. Yeah. 'Nothing in G of the said Clause shall affect the operation of any existing
24 law insofar as it imposes or prevents the state from making any law imposing in the interest
25 of the general public reasonable restrictions on the exercise of the right.' That's all. Now, if I
26 find any particular restriction to be unreasonable, I will challenge it. So, all these are
27 reasonable restrictions. If approval of the proctor is to be taken, is a reasonable restriction. If
28 inspection is to be done, if there are any misgivings about the way it is functioning, that's a
29 restriction. It's reasonable. And that's exactly... Therefore, Your Lordships have said time and
30 again, right to administration is not the right to maladminister. The moment there is
31 maladministration, you lose your right under Article 30. And it's nobody's case that AMU is
32 maladministered. I've been hearing from the other side, it's a great university. It's a university
33 of great excellence. So, obviously I must be administering it okay. And it is. So, with the
34 greatest respect, please do not apply a test which may be constitutionally suspect. Please do
35 not do that. And therefore, we are going wrong because *Basha* went on a wrong footing to say
36 that -'Look, it's not administered by Muslims, therefore... ' *Basha* need not have answered

1 that at all, because **Basha** ultimately says -'Because you're not established, you have no right
2 to administer anyway.' But then, 1968 judgment took off on that basis.

3

4 So I've done with this. I've made my submissions. Then the second submission is that.... I am
5 sorry, My Lords. One second. I want to show Your Lordship factually. Kindly come to my
6 submissions Volume 1(G) page 15. Yes, one second. So My Lords we have... that's why I have
7 been saying throughout. All you have to decide is to whether **Basha** has rightly decided or
8 wrongly decided on establishment. The rest will follow.

9

10 Then I have the right to administer whatever the act is. If I feel that some provision is violative
11 of my right and it's infringing my right, I'll challenge it. If not, I'll be happy. That's all that Your
12 Lordships have to decide. Then My Lords the other thing I want to say, My Lords, my learned
13 friends kept on saying there's a decision of a fact. How can a judge... how can a Legislation
14 overturn that fact? What's the fact in **Basha**? The only fact in **Basha** that is decided is that
15 because you incorporated you're not established by the minority or is there any other fact that
16 was established? That's the only fact. That's all. That's the fact. The rest of it is interpretation
17 of legal provision. How is anybody overturning that fact? In fact, in 1981 Act in fact, takes away
18 the basis and I tell Your Lordships why. Now kindly come to 1(g). But there is not a fact decided
19 by **Basha**. He says -'Because the statute says you were incorporated and established,
20 therefore, you are not a minority institution.' That is the only fact, ignores everything else.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** How did it takeaway Volume(g)?

23

24 **KAPIL SIBAL:** Yes, kindly now see My Lords. It's very interesting. I'll just give Your
25 Lordships briefly, orally, the background. The background is that when from the beginning,
26 sorry, when from the beginning attempts where we make to set up, My Lords we set up the
27 college, MAO college and then ultimately, actually, originally, we wanted to set up a university,
28 but when the college was set up and talks were taking place as how this is to be done, we
29 ourselves said that -'We want to establish a university and we'll allow supervision by the
30 Government, but we want to be independent. No interference by the Government. Otherwise
31 we'll not go forward.' And My Lords kindly have a look at page 15 of my note, letter dated 14th
32 June, 1872 from Sir Syed to Elliot. I have given My Lords the volume. So therefore there's no
33 need... 'Bringing to his attention....

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Page 15, right?

36

37 **KAPIL SIBAL:** Page 15, paragraph 18(a). Lordships have it or not?

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CHIEF JUSTICE DY CHANDRACHUD: Paragraph?

KAPIL SIBAL: Paragraph 18(a). Page 15 My Lords. PDF 15. Any problem?

JUSTICE DIPANKAR DATTA: 18 and then 19. There is no 18(a).

CHIEF JUSTICE DY CHANDRACHUD: There's 18 and then 19, actually,

JUSTICE DIPANKAR DATTA: There's no 18(a).

CHIEF JUSTICE DY CHANDRACHUD: 18 is 'AMU is able to demonstrate...'

KAPIL SIBAL: Yes. Small a, My Lords, small a.

JUSTICE DIPANKAR DATTA: No, no.

CHIEF JUSTICE DY CHANDRACHUD: There's none.

JUSTICE DIPANKAR DATTA: 18 starts with -'Hence AMU is able to demonstrate...'

KAPIL SIBAL: No, no, I'm talking about my rejoinder submissions, which is Volume 1(g).

CHIEF JUSTICE DY CHANDRACHUD: 1(g). Yeah. We're on 1(g).

KAPIL SIBAL: Oh, God!! You have not uploaded the right version. Then upload it. Unbelievable. How can we waste time like this?

CHIEF JUSTICE DY CHANDRACHUD: Separately they can just... even hard copy, They can just put it on the visualizer and upload it for us.

JUSTICE SANJIV KHANNA: In the other version is it... this contention is given?

KAPIL SIBAL: I don't know My Lord, they've uploaded the wrong version. What can I...? This is very bad. I'm sorry.

CHIEF JUSTICE DY CHANDRACHUD: Hard copy *le lo unse*, visualiser pe.

1

2 **KAPIL SIBAL:** Now My Lords, we also don't work on hard copies. I'll read it, My Lords. Let
3 them email it. I'll just read it. There's a letter of 14th June '72 by Syed to Elliot, 'Bringing to his
4 attention that the committee was to be appointed to raise funds for establishment.' Kindly see.
5 'For establishment of a college for the Mohammedans.'

6

7 **JUSTICE SANJIV KHANNA:** Okay. Does this begin - 'Muslim minority wanted to establish
8 a university for grant of degrees on its own, which would be recognized by Government.' That's
9 page number 18, paragraph number 32.

10

11 **KAPIL SIBAL:** But we'll give you the final version. So therefore what we understand by
12 establishment is not the statutory form of establishment. That's page 64. Relevant page 65,
13 Volume 3(c). I've given the Citation. Now, have you sent the right one? Now My Lords, B.
14 Another letter of 10 July '72, from Evelyn Baring Captain to Sir Syed acknowledging letters of
15 14th and stating that - 'If the institution when established showed a reasonable prospect of
16 divisibility...' So, they also understand what established means. Therefore, I have been saying
17 again and again, the concept of establishment under Article 30 is different from the concept
18 of establishment through a statute. That's a Constitutional Right to establish. Even Sir Syed
19 and the Association and the minority never thought of establishment in the statutory sense.
20 And I'm talking about 1872. 'If the institution, when established, show the reasonable prospect
21 of divisibility and general success, and if the course of instruction is such to convince his
22 excellency that a *bona fide* effort is we make to afford sound secular instruction, he is prepared
23 to devout Rs. 10,000 to the perpetual establishment of a scholarship in the same branch in a
24 European language.' I haven't quoted him. He wants some European chair. That's okay. Then
25 there's a letter of 20th July, Syed to Mohammedan Chief saying, intimating them that, 'The
26 lowest sum required for the establishment of the proposed college...' Again for the
27 establishment of the proposed college... 'is estimated at 10,000 and that subscriptions to what
28 this have been invited and contributions having been come from the people of all classes.' Then
29 on 18th November 1884. This is most important. 'College Fund Committee to the Viceroy
30 Government expresses that - 'We wish someday when our endowments are richer and our
31 schemes are completed, we hope to be in a position to ask the great representative of India by
32 Majesty to confer upon us the legal status of an independent university'. To confer upon us.
33 So, that this, this is a conferment of the legal status. It is not establishment of the university.
34 These are two separate concepts, and it is reflected in the contemporaneous communications.
35 It's done now. And we wanted an independent and I will show to Your Lordships and I'll just
36 presently show it. Now yes, so I was referring to 18(a), (b) and (c), and (d), which I have read

1 to Your Lordships. Now kindly come to 19. If all My Lords have it, I'll read that? My Lord,
2 Justice Surya Kant has it?

3

4 **JUSTICE SURYA KANT:** Yes.

5

6 **KAPIL SIBAL:** Justice Pardiwala? I'm sorry. It's now on the screen also. It is also on the
7 screen. Paragraph 19. So, 19 - 'Third- It is clear from the correspondence and other historical
8 materials that such a college was envisioned as free of Governmental interference. As such,
9 there is no surrender at any point of the right to establish the institutions that they had been
10 indigenous. Even at the time, the founders do a distinction between Government interference
11 on the one hand, and supervision and support on the other. In this context, the proposed
12 scheme for MAO College presented by Syed, is relevant.' The scheme reads - 'I have to mention,
13 first of all, that management of this institution should be perfectly free from any control of the
14 Government beyond mere supervision.' So you can supervise me, but you can't control me.
15 That's Article 30. The following passage is crucial. 'The best educational institution in Europe
16 are either entirely or next to entirely free from any control of Government of the country and
17 this in countries where rulers belong to the nation whose education is conducted. With how
18 much greater force does this argument hold good in the case of India, where the Government
19 is almost wholly composed of persons belonging to a nation totally different from us in
20 language and religion and mode of thought. By saying so, I simply mean to support my
21 argument that it is next to impossible for the British Government to understand fully our
22 wants with respect to education or to superintend it in any perfect manner. The utmost we can
23 expect from an enlightened Government is to receive what in fact, we in fact do receive from
24 our Government encouragement and patronage. If our university is intended to give sound
25 education. The English Government, as a matter of course, will patronize such institutions.
26 And if any direct pecuniary aid is given to us, we should not be unwilling to put our university
27 under Government supervision provided no interference is made in the management of the
28 institution.'

29

30 **TUSHAR MEHTA:** Which is the year here?

31

32 **KAPIL SIBAL:** This I'm reading is Volume 3.

33

34 **TUSHAR MEHTA:** 1902. The list also is not updated.

35

36 **KAPIL SIBAL:** I'll give the date.

37

1 **TUSHAR MEHTA:** 1903.

2

3 **KAPIL SIBAL:** No, it's not 1903. Anyway. I'll give the date. 1870's. Anyway, so the point I'm
4 making is this is how it was envisaged that you will give it a status. Right, but we will be
5 independent. Don't interfere with us. And that's why those provisions. That the Governor can
6 inspect. These are all supervisions. Otherwise there's no interference in the administration, on
7 appointments, on admissions, on appointing teachers, on everything is controlled by the
8 Court. I'm not on Muslim and non-Muslim now. I'm talking pure administration. I'm not
9 concerned with Muslim non-Muslims. The point was that the provisions that my learned
10 friend has read are provisions under 19(6), equivalent to 19(6). Provisions of supervision that
11 you don't fall foul of the standards. That's what it is. It has nothing to do with establishment.
12 And giving it legal status is the establishment under the statute. So then, then this very MAO
13 all got taken over. Sorry. This MAO was taken over by AMU and the same thing happened in
14 AMU. Exactly the same. No change. Whatever Government control was there in MAO, the
15 same was there in AMU. No change. That is, we have a chart to that effect. That is chart A in
16 1(h). Just you note that we have said so. We've demonstrated. So our concept of establishment
17 was clear. That they can supervise was clear. Because they're going to give us aid. The same
18 here. That's 19(6). They regulated us that finally I can't, apart from the first ordinance, if I
19 wanted to amend it, the Court could amend it, but ultimately it'll have the final approval. Every
20 ordinance in Delhi University will have the final approval of the visitor. That's not
21 administration. There's a whole complete confusion on the concept of administration. So this
22 happened. This is the background on the basis of which the university was set up. Now, let's
23 move from 19... because there are four, so to say milestones 1920, 1950, 1965 and 1981. '68
24 and 1981. Now these rights got frozen in 1950. Rights got frozen. If you now come to the
25 conclusion what **Basha** was wrong by taking that test of fact, namely because you were
26 incorporated, therefore you were established, therefore you didn't establish the university. If
27 that's wrong, then in 1950 I was a minority university, and that was frozen. And the same test
28 would apply. And what is Your Lordships considering? What was the position in 1950? If I was
29 a minority institution in 1950, established by the minority, which is clear on facts, it is clear
30 that all been set out by Your Lordships. Fund was mine, donations were given by Muslims,
31 non-Muslims, even others. 30 lakhs was never given by the Nizam as one Counsel said and
32 that was the condition precedent for establishing that you have to bring in 30 lakhs. We
33 brought in. Its value is over 320 or 40, 50 crores today. In what way did I not establish, other
34 than the fact that I incorporate. I incorporated why? And that's also history My Lords, I can't
35 go through it because there's no time. The history is this My Lords that there were two schools
36 of thought and if the Muslims are conservative today, you can imagine how conservative they
37 were in the 19th century. And there were two schools of thought. Well, there were two kinds

1 of schools, what are called the Halkabandi schools and the Tehsili schools. Halkabandi is in
2 the halkas. And then in the tehsil the schools were there. And the Muslim parents never used
3 to want to send to these schools. Some of them English speaking, they didn't want. The
4 conservative elements didn't want that. But the Sir Syed element wanted a liberal education
5 to copy the British. And that's how My Lords, this whole concept came about, but without
6 interference by the Imperial Government. And the Imperial Government agreed with it. They
7 didn't interfere. Have Your Lordships seen any document in this entire proceeding right from
8 1968 onwards that the Imperial Government ever interfered, ever interfered? No statute was
9 ever refused as suggested by the court. Never. They were never interfering. And the argument
10 is - no, no, no because they had the final right of approval therefore, this is not established.
11 That's a non-starter according to me. So My Lords, the committee was set up. In terms of
12 committee, there were two schools of thought. One school of thought says - 'Let's move forward
13 with best in education. Let's have our children be taught in the English language.' That was
14 one school of thought. The other school of thought was - 'No, we suspect these people. We don't
15 want to go to these schools. We are against Sir Syed to set up this university.' And the British
16 said - 'If you are able to get 30 lakhs, if you are bona fide in your efforts, I will help you.' And
17 the statute itself in the 1920 Central Legislative Act didn't have any element of interference
18 with the day to day functioning of the AMU. Never. And then in 1950, it got frozen. Then what
19 happened in 1965, was this act and which was challenged by somebody. There, Chagla said -
20 'It's a temporary provision, it's an emergency provision, but I will continue to maintain the
21 character of the university.' What did he mean by that? Character of the university means it's
22 for the minority, it was not for the majority. He had to support the Act. Naturally, he had to
23 then agree with **Basha**. How can a minister stand in parliament and moving an act to amend
24 and say - 'no, no, no.' This is before **Basha**. That's right. Yes, that's right this is before **Basha**.

25

26 **JUSTICE SANJIV KHANNA:** No, but he did say. He did say, but that may not be binding
27 on us. But he did say that he did not believe.

28

29 **KAPIL SIBAL:** I accept that. I accept that. My Lords, he did say My Lords. But I'll tell Your
30 Lordships again. Quite frankly....

31

32 **JUSTICE SANJIV KHANNA:** He probably wanted that it should not be declared as a
33 minority institution because let's not forget St. Stephen's came much down.

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35 **KAPIL SIBAL:** That's correct. Your Lordship is right.

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37 **JUSTICE SANJIV KHANNA:** But at that time, there was no question or reservations.

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KAPIL SIBAL: That's right. That's a separate issue altogether.

JUSTICE SANJIV KHANNA: That was not the Issue at all.

KAPIL SIBAL: Yes, that was not the issue at all. But anyway My Lords, so that's what happened My Lords and therefore, *de facto* it continued. That character of the minority institution continued. There was no interference. So from 1950 till 2005 there was no interference as a minority institution. So My Lords what is the occasion today to interfere, if **Basha** is wrong? If **Basha** is right, My Lords then it's another matter altogether. And therefore My Lords, Your Lordships will have to see the position in 1950 what happened and what the word 'established' means in 1950, which I said in my opening argument that the concept of establishment under the constitution is different from establishment under a statute because that is to seek recognition. And in the speeches My Lords, that you will find the people are saying, look, how will our children get jobs and because My Lords AMU, we set up the university with the approval of the British Government, the second argument made was that we were loyalists to the British. So were the soldiers of India loyal to the British when they fought in the world war? So was My Lords the Allahabad University loyal to the British? Everybody is seeking a job in the Government... then Government was loyal to the British. Is that a test My Lords? Is that an argument?

All ICS officers were loyal to the British. Is that an argument? That's a communal argument. So, let's not deviate from the essential constitutional question. Loyalty to the British or being part of. There were several people who were not part of the national movement, but that didn't mean they were not loyal to India. Their concepts were different. Some people wanted social change. Netaji said - 'I'll revolt. I won't be part of it. I'll be part of the allies sorry, axis.' The others said - 'No, we'll part of the allies.' So different concepts. So we can't put a status to an institution based on these kind of considerations. It'll be wholly irrelevant and also, I think, very divisive. Then the concept of minority. What is a minority? How do you discern between a linguistic minority in a State? They'll be stable in linguistic minorities in the State. How will you determine that? So this whole concept of you're not a minority at all. If in a State, somebody is in power in Maharashtra then who are the minorities in Maharashtra? What kind of argument is that? We are not ruled by the Pope. It was a British Empire. The fact that they were Christians, it didn't mean that we were ruled by the Pope. So, that's the other level of argument. Then My Lords, the third level was that look this is an institution of national importance. Correct? It is an institution of national importance. Now My Lord, look at it Constitutionally. As a matter of Law, can you say that a minority institution established under

1 Article 30, which is our fundamental right, as a community cannot be an institution of national
2 importance? Can it ever be said? In other words, a field of legislation where Parliament has
3 the authority to make law will destroy my Constitutional fundamental right. Can it ever be
4 said? Minority institution is the furtherance of a Constitutional objective. Why? And I said so
5 in the beginning, no reservations in any institution. Coming back to the reservation issue. If
6 today there were reservation in this institution, minorities won't have a place because 60% of
7 the seats will go. And there are many institutions of national importance where reservation is
8 not allowed even under our Constitution, even today. So that's again, not an issue before Your
9 Lordships. 1981, not an issue before Your Lordships. The only issue before Your Lordships is
10 whether we establish this university or not. That's the only issue. Everything else will follow.
11 Whether '81 Act is good, '81 Act is bad, all will follow. If we have established, then it will be
12 tested on that basis. If we are not established we are out. We're not a minority institution.
13 That's the limited issue that Your Lordships will have to decide. And decide it on the context
14 of 26th January 1950, what do you mean by the word establishment here? And can, on the
15 basis of what is placed before Your Lordships, Your Lordships can come to the conclusion -
16 yes, it was established by the minority? If Your Lordship says **Basha** is right because it was
17 incorporated, you got legal status, therefore you're not a minority, that's another issue. That's
18 what **Basha** decided, but that's what Your Lordships have to decide. As simple as that. This
19 numerical test has no, with respect, has no application. And I'll give your Lordships since Your
20 Lordships wanted. Just giving to My Lord, the numerical test. Just My Lords, Your Lordships
21 may note the provisions of the Constitution which refer to Institutions - while you do this -
22 institution of national importance. My Lords, kindly just note it, Article 62, Entry 62, list 1.
23 Entry 63, list 1. Entry 64, list 1. 67, list 1. Then Entry 12, list 2, subject to Parliament. Entry 40,
24 Concurrent List like museums of national importance, archaeological sites of natural
25 importance. Then Schedule 6, Section 3(A)(n), and Section 3(A)(b). These are various entries
26 in which the reference to institutions of national importance has been made, but these are only
27 fields of legislation. These are not Constitutional Rights, which are given. Mainly because you
28 have the right to pass a law *qua* minority institution doesn't mean it's not a minority
29 institution.

30

31 **TUSHAR MEHTA:** This is *de facto* provisions.

32

33 **KAPIL SIBAL:** Yes. The other thing. Just to say we were established by an act of the Imperial
34 Parliament, we could not been in list 2. Education was in list 2. We could not have been there.
35 That's why it was included here. If it had been, universities it would have been regulated by
36 the State. The Union didn't want that, and it was passed by the Imperial Parliament. There
37 was no question of it being included in list 2. Then the third issue is If you were to include it

1 in list 2, then each State will have its own control each university in that State. Nobody wanted
2 that to happen. There were only three universities of any character in this Country at that point
3 in time. Delhi University, Banaras Hindu University and AMU and there was no fourth. That's
4 why it says and any other. Than the IITs came the IIMs came, Bhabha Atomic Energy. All that
5 came later. 165 universities happened later. That doesn't mean that they don't have the
6 character. And each of them will be peculiar to it. So the other argument was, look at this
7 university established in, Annamalai. Annamalai was established because there was a private
8 person, it's not a minority institution. Annamalai was a private person who was the founder of
9 that university. He handed over everything to the Government and said -'But I want, as a
10 founder, I want control over the staff. I want control over nominations and stuff like that.' They
11 said -'Fine, you take it.' But how do you apply that test to an university under 30 or a minority
12 institution? I mean, each institution... and the founding moment is entirely different, for each
13 university will be different. You can't make an argument of uniformity, that every university
14 must be in the same manner, established in the same manner, it can never be. Universities
15 anywhere in the world will be established in different manners, depending on the time, the
16 level at which society is placed, all that will be factors. So that takes care of that argument. The
17 other thing is that...

18 Let me now see if there's anything left. My Lords, I want to... And there can be no surrender
19 of a fundamental right. How can there be a surrender? I can't waive it, I can't surrender it. If
20 in 1950, I was an institution established by the minority, there's no question of surrendering
21 anything. But if I have not established and if **Basha** is right that because I was incorporated,
22 then of course, it's another issue. So the administrative argument that has been made is
23 without reference to the scheme of the Constitution. It has no relevance. The only relevance
24 is, was it established. Now, My Lords, on surrender in **St. Xaviers** it says - 'It is doubtful
25 whether the fundamental right under Article 30 can be bartered away or surrendered by any
26 voluntary act or that it can be waived.' That whole argument. 'The reason is that the
27 fundamental right is vested in a plurality of persons as a unit, or, if we may say so in the
28 community of persons, necessarily fluctuating. Can the present members of a minority
29 community barter away or surrender the right under the article so as to bind its future
30 members of the unit. The fundamental right is for the living generation by a voluntary act of
31 affiliation of an educational institution established and administered by a religious minority.
32 The past members of the community cannot surrender the right of future members of the
33 community. The future members of the community do not derive the right under 30 by
34 succession or inheritance.' Very powerful words. Justice Matthew and Justice Chandrachud,
35 as he then was. Also **Kerala** My Lords - 'nor do we think that there is any substance in the
36 argument advanced by learned Counsel for **Kerala** that this bill has not introduced anything
37 new and the Anglo-Indian schools are not being subjected to anything beyond what they have

1 been submitting to under the Education Acts and codes of Travancore. In 1945 or '47, when
2 those acts and codes came to operation, there was no fundamental rights and there can be no
3 loss of fundamental rights merely on the ground of non-exercise of it. There is no case of
4 estoppel here assuming that there has been an estoppel against the constitution.' There can be
5 no estoppel against the constitution. So surrender, estoppel, waiver... I just have... completely
6 alien to our Constitution as far as fundamental rights are concerned, and 30 is part of
7 fundamental rights. My Lords, my learned friend talked about national character. That's
8 nothing to do with the entry. Entry only says national importance. Now My Lords, just so
9 that... because I have no time now. Oh!! I have 20 minutes. Lot of time. Actually, I'm happy
10 Your Lordships asked me to encapsulate it. I could... I will be able to finish it. Now My Lords,
11 just I want to show you the present, I have a chart of the of the present universities established
12 after 1950. My learned friend also made an argument - 'See, in the universities today that are
13 established by the minority, there is a statement there that they are established under 30.' But
14 that statement could not have been there in 1920 My Lord. It is the effect of **Basha** that that
15 statement comes, because of **Basha**. That can't be used, that because there was no such
16 statement there, My Lords. You'll have to see from the facts of the case as to whether we were
17 the ones who actually established a university with funds that we collected, with the vision that
18 we had, with the intention of setting up a university, with the idea of helping our community.
19 A loyalty to the British, for the My Lords, according to me, the gentleman was loyal to his
20 community, not loyal to the British, by thinking of trying to help his community. The loyalty
21 that he was demonstrating was that to the community where the poor amongst the Muslims
22 had no access to education. And may I just tell Your Lordships, Your Lordships asked a very
23 valuable question. All these institutions of national importance, what is the national character
24 of these institutions? We did some research My Lords and we found a very interesting feature,
25 that in IITs My Lords... page 33 of 1(g) of our note My Lords, very interesting. Sachar
26 Committee. Page 33. 1(g) Page 33. It's on the screen. See My Lords, page 33.

27

28 **TUSHAR MEHTA:** 2006 period. I think.

29

30 **KAPIL SIBAL:** Yes, yes, I'm only talking about the 2006. Whatever figures I have, I'm giving
31 it. I'm just showing. That's the time when the reservation was made and it was challenged.
32 IIMs. Your Lordship has that paragraph 62 at page 33? 'About 1 out of 3 Muslim applicants is
33 selected in IIMs, which impairs favourably with in fact, a somewhat better than the success
34 rate of other candidates. Despite a better success rate, Muslims constitute 1.3% students
35 studying in all courses in IIM.' 1.3%. This is the state today after independence and whatever
36 little the community has, you want to take that away also. And in absolute numbers, there were
37 only 63 out of 4743. 'IITs, in the case of the IITs, out of 27,161 students enrolled in the different

1 programs there were only 894 Muslims. The share of Muslims in post-graduate courses is just
2 about 4%. But it is even lower in undergraduate courses of 1.7%.' 1.7%. This is the factual, this
3 is the national character of IIT that my learned friend was talking about.

4
5 'Only 1 out of 25 students enrolled in undergraduate courses and only 1 out of 50 students in
6 postgraduate courses is a Muslim. The status of Muslims in PG courses, equally disappointing,
7 only about 1 out of 20 students is a Muslim. This is significantly below the share of OBC's 24%,
8 SC's/ST's 13%.' So this is the state of affairs. So, what do we have? We have one university,
9 which is a university of excellence. And you want to say today that -'No, take it away.'
10 Argument is, it is too good to be a minority. And even the private survey shows one point only,
11 says 1.6% are Muslims, in 2019, I'm talking about. Well that's it's a private survey, My Lords,
12 but this is Government for IIT's and IIM's. I am talking about IITs and IIMs. 2019. Private
13 surveys say that and done for the IITs. So, now My Lords, kindly go to my chart in the
14 beginning of this note. Yes. The index, table of content.

15

16 **TUSHAR MEHTA:** Based on the entrance test...

17

18 **KAPIL SIBAL:** I didn't say anything turns on it. You said that these institutions must
19 represent national character. So what's the character they're representing?

20

21 **TUSHAR MEHTA:** Non-denomination.

22

23 **KAPIL SIBAL:** It is not denominational. It's a right. Fundamental right given to the minority.
24 Diversity, we are admitting. But as I said this university has graduated thousands and
25 thousands of non-Muslims. St. Stephen's, thousands of non-Muslims, some of them sitting
26 here, some of them are sitting there. Nadar [UNCLEAR] was a product of AMU. He did his
27 LL.M and Ph.D. there. So what are we talking about? Secular nature of education can never be
28 discarded. Should never be discarded. If it is, then it is violative of people's fundamental rights.
29 But we are imparting secular education. But we have certain elements that have something to
30 do with our community. And as I said, if my learned friend is right, and he's right. There was
31 no reservation. But the fact of the matter is there was Institutional reservation. So, from MAO
32 college people came into the university. So there was enough Muslim students because of that.
33 From the schools they came to the university college. That's how the representation was
34 maintained. We didn't need reservations. But if you throttle that My Lords, then where will we
35 go? It is to make up for the lack of representation in other institutions that you have an
36 institution which is an institution of excellence. Why do you want to take it over? I don't

1 understand this. I've not understood the rationale for it that why do you want to take it over?
2 Is there something that this university has done which is anathema to our constitutional values

3

4 **TUSHAR MEHTA:** Think so. Nobody speaks about taking over...

5

6 **KAPIL SIBAL:** No. You are making an argument that because it was incorporated, it is not
7 established. That's your whole argument which you are taking over, but you are saying it's not
8 established. Therefore you will take over. What will be left? My Lords, you can appoint
9 anybody you like then. There'll be 60% reservation also. 50 plus ten now. Then, what will be
10 left? So, these are very dangerous arguments. I mean one little citadel of learning, one little
11 small citadel of learning in a country of 120 billion people, what do you want? 1.4 billion
12 people. What are you trying to do? Small institution. So, just the contents. One factual
13 argument on administration My Lords, I've already done that. I've shown that. I've given the
14 pages because they're all structured here with the pages and the cross references. 'Broader
15 analysis of Article 30.' Just come to page 11 at the bottom. 'Broader analysis of 30'.
16 'Respondents have argued that in order to determine whether a particular institution or
17 minority institution, a twin test must be satisfied. First, the minority must show that they
18 established it and second, they must demonstrate that they are administering it.' It's the wrong
19 test.

20

21 It's an absolutely wrong test. 'This argument of the Respondents is mounted on the strength
22 of the word 'and' in 'established and administered'.' That's my, the learned Solicitor, my
23 dearest friend he has been arguing this. So, I've set out the law of the subject, and I say, and
24 ***St. Xaviers, Kerala Education Bill***, all those opinions, I have given the passages. 'The
25 community in question is a religious or linguist minority, and the minority community
26 established the educational institutions and it must not be overlooked that 30(1) gives the
27 minorities two rights to establish and to administer.' I've done that. So we'll go back to the
28 contents now. So, this is on 2. Then no surrender. I've shown that to Your Lordships. Then
29 declaration AMU is an institution of national importance. I've dealt with it, and legislative
30 debates do not render AMU a non-minority institution. Your Lordships have to look at only
31 the aspect of establishment. Yes. I want to show that chart, which is at page 1(h). My Lords, I
32 hope you have it. 1(h). Yes. Now, this is My Lords, there are two charts. This is, the first chart
33 is the comparison between Aligarh Muslim University and MAO College. Your Lordships will
34 find that at page 1. MAO also had external supervision just like AMU. No difference. I'm sorry.
35 I apologize to Your Lordships.

36

37 **CHIEF JUSTICE DY CHANDRACHUD:** 1(h), right?

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KAPIL SIBAL: Anyway, what I want to say is that whatever restrictions were there in MAO College in terms of supervision. The same came in the AMU. No difference. Consistent with that statement we don't want any interference. We are acceptable on supervision. And MAO was accepted by **Basha's** minority. The only change being it was incorporated. Therefore, you lost your minority status. Overriding powers were there even in MAO. It's just simple. It has to be. Somebody has to ultimately be responsible. In any educational institution, you just can't leave it to the institution and the principals of the college. So the same. Then the second one, second chart. It's there on the screen. Now you will see the second chart is.. page 8 it starts. My Lords, it's on the screen. Now, what we've done is we've looked at University of Calcutta, Aligarh University, Aliah University and Haryana private universities. You will find similar provisions in all universities. So they are not minority institutions because there's a right of inspection. Page 15(c). I agree that I'm saying it has the same provisions, that right to inspect, which you talked about as far as the AMU was concerned. You said you have a right of inspection. See, it's a right of inspection here. How does it change the minority nature of the institution? Statute amendment is the same. You can amend the statutes the same, they can amend the statute. So, how will that make a difference to the minority character. And Aliah is 100% aided. Page 15 just see My Lords - 'Governor of Haryana shall be the Visitor.

The Visitor shall have the following powers. When present, he shall first, he shall preside over the convocation to call for any paper of information relating to affairs of the university. On the basis of information received, he's satisfied that any order, proceeding or decision taken by any authority is not in conformity with the provisions of the statutes, he may issue such directions he may think fit notwithstanding anything concerned, contains the university shall be bound to comply with all the rules, regulations this thing, empowers the Government to inspect universities and academic and administrative, everything, and audit' - as My Lord Justice Datta put it. Same provision. Does it mean that these universities, which are incorporated as minority institutions, are not minority because of these conditions? Aliah also the same. Government control is not the test for inspection and for malice. This is to ensure that there is no maladministration. And Haryana Act is for all institutions; Whether minority or non-minority, all institutions. So the tests are wrong. The application of the test is wrong. The Constitutional conception is wrong. The approach to Article 30 is wrong. It would be an unfortunate day My Lords, in a secular country, wedded to plurality, wedded to, wedded to the cause of an India which is inclusive, we are arguing here that take away this. It was never a minority institution. All I can say is it'll be a sad day if that ever happens. Thank you very much.

1 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you, Mr Sibal.

2

3 **KAPIL SIBAL:** I may be excused, My Lord.

4

5 **SALMAN KHURSHID:** I have a very short, very short submission that I'll take about 15
6 minutes.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** We'll not be able to assemble now after today,
9 because we have another set of matters. So today we have to have a cut off on this matter.
10 Whatever you want to say you can say it in a short note. Maybe a couple of pages.

11

12 **SALMAN KHURSHID:** That's what I'll do My Lords. I'll only point out to Your Lordships
13 that much of what has been said is very beautifully reflected in David Lelyveld's book called
14 the 'First generation of Aligarh'. My Lords, the entire conspectus of how the Aligarh College,
15 the MAO College was conceived, what was the kind of support it had from what they called the
16 *quam*, the community, the sort of community support it had and how that moved forward to
17 becoming finally the AMU. My Lords, there are three chapters, I will mark them out. There
18 are three chapters there, which would be, which I believe will be edifying and important in
19 actually fortifying whatever has been argued before Your Lordships. Just two or three points
20 that I will put down. My Lords, I will just indicate, one is on nature of rights. My learned friend
21 Mr. Dwivedi has talked a little bit about positivism and a difference between morality and law.
22 Your Lordships are all familiar with it. My Lords, I have argued and I would reiterate that, that
23 the issue of morality and law is not what is involved here, but the issue of Constitutional
24 morality, which Your Lordships have conceived as a manner of looking at the Constitution in
25 a wholesome manner started with ***Kesavananda Bharti***. Where did that take us in the
26 present circumstances? My Lords, I have a little bit on that. On non-denominational issue My
27 Lords, I'm going to highlight the fact that, of course, there was the Wood's despatch and so on
28 and so forth, saying that we now prefer nondenominational institutions. But the fact remains
29 the non-denominational institution didn't prevent them from saying that we are setting up
30 Banaras Hindu University. We are setting up an Aligarh Muslim University. And when the
31 Aligarh Muslim University is set up My Lords, the logo, the logo and the motto looked very
32 clearly, it's very, very clearly and specifically Islamic. And, in fact it's a verse from the Quran
33 is quoted in the motto which has taught man what he knew not. Quran: Verse 96. My Lords,
34 I'll put these in my supplementary submission. Your Lordships may please consider this. I'm
35 grateful, My Lords. Thank you.

36

37 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you. Yes, Mr. Farasat.

1
2 **SHADAN FARASAT:** I'll just conclude within five minutes if Your Lordships will permit.
3 My Lords, quickly, the first submission, I just have two short points of rejoinder. The first
4 submission is insofar as establishment is concerned of 1920 and the argument was that by
5 establishing, you have taken away the denominational status because you gave away right.
6 That is what Solicitor argued. Now in response to that My Lords, I have compared all the
7 universities, the two denominational universities, namely the BHU and AMU and the non-
8 denominational, i.e., Allahabad, Bombay, et cetera, which were also through an Act of Imperial
9 Legislature. I have compared that to show that, in fact, in these enactments, that is
10 denominational statutes, the Legislature went way far ahead in terms of giving the autonomy
11 and that comparison, Your Lordships will have in 1(h) which is my written submission in
12 rejoinder, from page 15 onwards. For instance, broadly, I'm not going to take in detail. The
13 broad point is this, even in the opening of those statutes, the statutes mention that this is for
14 all subjects of Her Majesty or His Majesty's Government. So, the very opening of those
15 statutes, Allahabad University, Calcutta University, etc., they say -'It's for all subjects.' No such
16 provision is there in AMU Act. Similarly, the Chancellor and the Vice Chancellor are
17 Government officials. They are My Lords, either the Governor General by name, by
18 designation, they are Government officials. Here, the power is left with the Governor General.
19 Here, the power is left with the Governor General and the persons who have been appointed
20 pursuant to that power when we look at *de facto* and *de jure* together are Muslim persons. The
21 power was left so that it could be exercised to appoint a Muslim. Otherwise, you would have
22 by designation, named the Governor General or some Government official as in the
23 Nondenominational Act. Similarly, there is a power of something called Fellows in these
24 enactments. There is a whole bunch of Fellows which are there and they also are all
25 Government officials. No such provision exists. Power to grant decrees. Who grants a degree?
26 The Government official grants a degree. Here the university grants it. So the point, broad
27 point is the space of Court, Executive Council and AC which has been created, it is, of course,
28 subject in some aspect to the supervision of the higher authority. It's like most two hands need
29 to clap. The day to day administration the decision, the initiation keeps on coming from the
30 university body which is minority body. And on some aspects, there's a confirmation by a
31 higher body. Of course, the Colonial Government will keep some level of control with it. It is
32 not going to establish a Muslim university and say-'Out you go, you do whatever you want.'
33 That's quite clearly understood. So, in that respect, the initiation stays with us. And that is the
34 fundamental distinction. The chart has many examples. due to paucity of time. I can't go into
35 it. But if Your Lordships will just examine that chart, on every aspect, it will show the
36 denominational nature is evident from the level of autonomy granted *vis-a-vis*, the non-
37 denominational universities of the relevant time. That's submission 1. My Lords, submission

1 2. Your Lordships have the entire canvas before Your Lordships today. Everything has been
2 argued on facts, on law, on decisions from 1820 onwards till 2024. The question there are
3 various approaches available to Your Lordships in this reference. What I would commend to
4 Your Lordships is that Your Lordships will restrict as Mr. Sibal argued to 50 and not test any
5 specific amendment in this reference. The reason is this. In particular the declaratory
6 amendments of 1981, because the non-declaratory portions are not in challenge at all. They
7 have never been challenged. What was challenged about them, what has been set aside by the
8 Allahabad High Court is the declaratory portions. The reason is this My Lords. It is the
9 constitutional obligation of the Executive to defend a Parliamentary enactment. If today the
10 Executive has chosen not to defend it, the Parliament is without a voice before this
11 Constitutional Court. The Parliament has spoken through an amendment, but it doesn't have
12 a defence before this Court on that amendment, that is something very fundamental and core
13 for that reason alone. Everything is before Your Lordships and Your Lordships will consider
14 it. But don't test the *vires*, because there is no constitutionally valid defence before the Court
15 today. And my written submissions Your Lordships will have page 13. I'll just formulate it
16 quickly. I won't take it. My Lords the Executive has a say in Legislation. The say is at the stage
17 when you, My Lords, when the ascent is granted by the President under Article 111. The
18 President can, as Your Lordships know, send it back. That is Aid and Advice function. It can
19 still come back and then the President has to approve. So, what does the limited say on the
20 legality or constitutionality or desirability the executive has. Once it's a one-time exercise, once
21 the ascent is given, and once a Law is notified, the Executive loses the power to either go
22 contrary to the Act in terms of enforcement or not to defend it. Because constitutionally,
23 otherwise, it will append everything for a reason. Just test this. Let us say, the Executives today
24 wants to overrun an earlier Constitutional amendment. I'm just hypothetical, not on this case.
25 It wants to overrun an earlier Constitutional amendment. It doesn't have the numbers in both
26 the Houses. What does it do? It has a Frontal Litigation. It chooses not to defend as a
27 Defendant. By the same logic, it can even challenge earlier amendment. If it is entitled not to
28 defend, surely the Executive claim will challenge earlier amendment.

29

30 And it is not the responsibility of Aligarh Muslim University or any of the private Petitioners
31 on this side to defend the Parliament. The Parliament has spoken in our favour. Therefore, we
32 are defending it on that particular amendment. But it's not the responsibility. The
33 Constitutional obligations solely and exclusively lies on the executive, and they don't have a
34 choice because the prerogative of testing the constitutionality is the exclusive domain of this
35 Honourable Court, of the Constitutional Courts. It is not with the executive. In fact, that
36 changes the separation of power. If the executive were to decide what is Constitutional and not
37 and then defend accordingly. That will completely append the structure. So my respectful

1 submission is even a law which the executive of the day believes to be unconstitutional, it is
2 Constitutionally expected and obligated to defend it before a Court. That's why, just as an
3 example, the ***Brown versus Board of Education***, the Attorney General of Kansas had...
4 was the executive express....

5

6 **TUSHAR MEHTA:** If he wants to raise, I did [UNCLEAR]. These are new arguments.

7

8 **SHADAN FARASAT:** It's a response to what was argued. The submission was this, that
9 although the executive's view declared was that segregation as a policy is not proper, it's not
10 desirable, it is possibly unconstitutional. But before the nine judges of the US Supreme Court,
11 the executive, through the attorney, defended it for the reason that the executive has no other
12 option. So because the Parliament doesn't have a voice today, my respectful submission would
13 be that aspect of just a declaration, Your Lordships will leave it at a subsequent state. Your
14 Lordships may consider deciding in this matter if the executive has that option of disagreeing
15 or not. That's my respectful submission. I'm extremely grateful.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Shamshad...

18

19 **MR. SHAMSHAD:** I had argued 3-4 points, in fact. One was recognition, second was group
20 rights, and third was the concept of educational institution is very broad. And for that I had
21 taken through Your Lordship with the ***Basha*** principle itself. The only thing that I could not
22 complete that day and I had given the pagination and Your Lordship had noted
23 ***Kesavananda Bharti*** para 535(a), Volume 1(e). I have given in Volume 1(e), page 78. 535
24 and I'll not read.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Yes,

27

28 **MR. SHAMSHAD:** In the background of entire minority rights from pre-independence till
29 formation of, till Constitution has been set out. And then in that background, it has been stated
30 that it is in the nature of essential feature of the Constitution. So that is one aspect. Then
31 coming to, Your Lordship's judgment in ***Puttaswamy***. In ***Puttaswamy*** My Lord, para 298.
32 Your Lordship may have this paragraph at page 500 in Volume 5(b). Your Lordship has stated
33 that '-Constitution has recognized in-alienable rights.' My submission is My Lord,
34 fundamental right chapter has recognized many in-alienable rights which existed pre-
35 Constitution. Article 30, what it does, it recognizes the right. Once you recognize those rights
36 either in the present regime of Constitution of India or prior to the Constitution, the question
37 of surrender of your rights does not arise. So the surrender argument that has been advanced

1 in relation to one of the components which has been held by this Honourable Court in
2 **Kesavananda Bharti** Case that it is in the nature of basic feature of Constitution, so to say
3 today, that surrender of autonomy or rights falling in Part 3 of our present Constitution is
4 neither contemplated in today's constitutional scheme. It's my submission, nor this Court will
5 recognize that it was possible to surrender those in-alienable right in favour of erstwhile
6 sovereign powers. That's what they have argued. Dr. Dhavan has already highlighted in his
7 written submission saying that how minority rights were recognized even prior to
8 Constitution. So there is a list already, so in that context Article 20, 9th Interpretation of Your
9 Ladyship Justice Ruma Pal in **T.M.A. Pai**. Though she has dissented. But that dissent is not
10 to say that minorities right was lesser than what Majority has said. The dissent is to say that -
11 'See, majority is that Article 29(2) 50% reservation of St. Stephen's has to come through a
12 state intervention.' In many circumstances even that is not justified. So Your Ladyship has
13 spoken to say that -'See if you are fixing there may be a circumstance in which beyond 50%
14 would be required for those who have established their institution.' So in that background
15 there is dissent of Justice Pal and to support this argument para number 381 of Your Ladyship
16 Justice Ruma Pal in **T.M.A. Pai** at 5(a) page number 736. Your Lordship may kindly consider.
17 So in this background My Lord, last line. When Your Lordship is considering interpretation of
18 Article 30 and taking a decision whether **Basha** should be reconsidered or not Your
19 Lordship's this judgment is going to decide the future prospect of Article 30, I can say this. It
20 will have implication on many aspect of minorities right in the country. The only submission
21 I am making to Your Lordship that while deciding this, Your Lordship will take a view, that
22 view advances Article 30's protection and the way they have argued as if it is only a decorative
23 provision. That decorative provision it will not turn into decorative provision of minorities in
24 the country, My Lord. That's my respectful submission. Your Lordship will give a broader
25 interpretation. Thank you.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you Dr. Dhavan. Thank you everyone.

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END OF DAY'S PROCEEDINGS