Anjum Kadari vs Union Of India on 5 November, 2024

Author: Dhananjaya Y Chandrachud

Bench: Dhananjaya Y Chandrachud

Reportabl

2024 INSC 831

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE/ ORIGINAL JURISDICTION

Special Leave Petition (C) No.8541 of 2024

Anjum Kadari & Anr. …Appellants

Versus

Union of India & Ors. …Respondents

With Special Leave Petition (C) No.7857 of 2024 With Special Leave Petition (C) No.7821 of 2024 With Special Leave Petition (C) No.7878 of 2024 With Special Leave Petition (C) No.7890 of 2024 With Special Leave Petition (C) No.13038 of 2024 With And with Transfer Petition (C) No.2697 of 2024 JUDGMENT Dr Dhananjaya Y Chandrachud, CJI Table of Contents A. Introduction .....4 B. Background .....4 a. History of Madarsas .....4 b. Teaching in Madarsas .....6 c. Madarsa Act .....9 d. Steps taken by the State Government and the Board pursuant to the Madarsa Act .....18 e. Proceedings before the High Court and Impugned Judgment ..... 20 f. Steps taken by the State Government and the proceedings before this Court .....23 C. Submissions .....24 D. Secularism and regulation of minority educational institutions ..... 29 a. Secularism in the constitutional context ..... 29 b. Testing the validity of a statute for violation of the basic structure of the Constitution .....34 c. Regulation of minority educational institutions ..... 41 d. The Madarsa Act is a regulatory legislation ..... 45 e. Interplay of Article 21-A and Article 30 ..... 51 E. Legislative Competence

1. The High Court of Judicature at Allahabad 1 has held the Uttar Pradesh Board of Madarsa Education Act, 2004 2 to be unconstitutional on the ground that it violates the principle of secularism and Articles 14 and 21A of the Constitution. The Madarsa Act established the Uttar Pradesh Board of Madarsa Education,3 to regulate, among other things, the standards of education, qualifications for teachers, and conduct of examinations in Madarsas in the State of Uttar Pradesh. The entirety of the Act has been struck down by the High Court.

B. Background

a. History of Madarsas

2. The term 'madarsa' refers to any school or college where any sort of education is imparted.4 The history of the establishment of Madarsas in the Indian subcontinent may be traced to the rule of the Tughlaqs. 5 The pre-colonial Madarsas were of two types: (i) the Maktabs which were attached to mosques and imparted elementary education; and (ii) the Madarsas which were centres of higher learning and contributed to the administrative, religious, and cultural needs of the prevalent society. 6 During colonial rule, the relative importance of Madarsas diminished with the introduction of English as the language of the colonial administration. 7 "High Court" "Madarsa Act" "Board" Yoginder Sikand, Bastions of the Believers: Madrasas and Islamic Education in India (Penguin Books, 2005) ibid Arshad Alam, 'Understanding Madrasas' (2003) 38(22) Economic and Political Weekly 2123 Padmaja Nair, The State and madrasas in India (Working Paper 15, University of Birmingham 2009) 11 PART B

3. The colonial government formulated the Education Code of 1908 to recognize Madarsas in Uttar Pradesh for conducting Arabi-Pharsi examinations. The Arabic institutions preparing candidates for Maulvi, Alim, and Fazil examinations and the Persian institutions preparing candidates for Munshi and Kamil examinations were required to make an application to the Registrar of Arabic and Persian Examinations.

4. After Independence, the Department of Education of the UP government issued the Madrasa Education Rules 1969 to bring Madarsas under the domain of the Education Department. Subsequently, the State government framed the UP Non-Government Arabic and Persian Madrasa Recognition Rules 1987 8 to govern the procedure for recognition and the terms and conditions of service of teachers in the Madarsas. According to the 1987 Rules, recognition to Madarsas was

granted by the Recognition Committee and confirmed by the Registrar of Arabic and Persian Exams. The 1987 Rules also prescribed requirements for the quality of buildings and eligibility qualifications for teaching staff as a precondition to the grant of recognition. In 1996, the management of Madarsas was transferred to the Minority Welfare and Waqf Department of the UP government.

5. The Central government has also framed schemes to modernize education imparted in Madarsas. In 1993-1994, the Central Government implemented the Area Intensive and Madrasa Modernization Programme9 to encourage "1987 Rules" "Madrasa Modernization Programme" (Under the Madrasa Modernization Programme, the government covered the salary of two madrasa teachers who taught modern subjects. It also provided one-time grants for purchase of science and math kits and book-banks for the madrasa libraries. See PIB, Ministry of Human PART B Madarsas and Maktabs to teach modern subjects such as Science, Mathematics, English, Hindi, and Social Studies alongside the traditional curriculum. The Madrasa Modernization Programme subsequently became a part of the Sarva Shiksha Abhiyan. During the 11th Five Year Plan (2007 to 2011), the Ministry of Human Resource Development implemented the Scheme for Providing Quality Education in Madrasas to encourage and incentivize Madarsas and Maktabs to impart education in modern subjects by providing them financial assistance. 10 Only Madarsas which have been in existence for at least three years and registered under central or state legislation, Madarsa boards, or waqf boards are eligible to apply for assistance under this scheme.11 b. Teaching in Madarsas

6. According to the data placed on record in the affidavit filed by the State of Uttar Pradesh, there are presently around thirteen thousand Madarsas catering to more than twelve lakh students in the state. The following table is instructive:

> Type of Madarsas Number of Madarsas Number of students State funded 560 1,92,317 Permanently recognized 3,834 4,37,237 (non-state funded) Temporarily recognized 8,970 6,04,834 (non-state funded) Total 13,364 12,34,388 Resource Development, Centre Releases Rs. 5.9 crore for madrasa modernization (12 December 2003) https://archive.pib.gov.in/archive/releases98/lyr2003/rdec2003/12122003/r1212200330.html) Department of School Education and Literacy, https://dsel.education.gov.in/spemm Central Sponsored Scheme for Providing Quality Education in Madrasa, https://www.education.gov.in/sites/upload_files/mhrd/files/upload_document/SPQEM-scheme.pdf PART B

7. The state government has an annual budget of Rupees one thousand and ninety-six crores for the salaries of teaching and non-teaching staff working in the state-aided Madarsas. The state government also provides books and midday meals to students of state-funded Madarsas. Moreover, it also operates Industrial Training Institutes in recognised Madarsas to teach trades such as welding, mechanics, and stenography.

8. Academic education in Madarsas is broadly divided into four levels: (i) Tathania (equivalent of elementary classes I to V); (ii) Fauquania (equivalent to upper elementary classes VI to VIII); (iii)

Maulvi or munshi (equivalent to a certificate of secondary school or Xth standard); and (iv) Alim (certificate of senior secondary level examination or XIIth standard).

9. The syllabus until the Alim classes is in accordance with the syllabus of the Uttar Pradesh State Council of Educational Research and Training.12 For the Munshi/Maulvi and Alim levels, the Madarsas teach subjects such as theology (Sunni and Shia), Arabic literature, Persian literature, Urdu literature, General English, General Hindi, and optional subjects such as Mathematics, Home Sciences, Logic and Philosophy, Social Sciences, Science, Tibb (medical science), and Typing. The Munshi/Maulvi and Alim certificates are treated equivalent to High School and Intermediate levels respectively by the Uttar Pradesh government and the Government of India. The Sachar Committee "SCERT" PART B Report suggests that most students study in Madarsas only till primary and middle classes. 13

10. A few Madarsas also award certificates of Kamil (undergraduate degree) and Fazil (post-graduate degree). The State of Uttar Pradesh has stated in its affidavit that Kamil and Fazil degrees awarded by Madarsas are not recognised as alternatives to graduate and post-graduate degrees respectively. The government further states:

> "At the undergraduate and post graduate level, the U.P Madrasa Board grants the Qamil and Fazil degrees respectively, specialized courses for the education of Arabic-Persian and Deenyat subjects, which are the minimum educational qualifications required for imparting education of Arabic-Persian and Deenyat subjects in Madrasas. These courses have not been given equivalence by the Government of Uttar Pradesh/Government of India/any university established by law, nor has the education of these courses been recognized as an alternative to the graduation/post-graduation degree of a university established by law for employment at the level of Uttar Pradesh Government or Government of India."

11. Consequently, students educated in Madarsas are only eligible for occupations that have High School or Intermediate as qualification requirements. While Kamil and Fazil are not considered to be alternatives to the regular undergraduate and post-graduate degrees, a notification issued by the University Grants Commission 14 in March 2014 which lists the degrees governed by the University Grants Commission Act 1956 15 includes both Fazil Social, Economic and Educational Status of the Muslim Community of India: A Report (Prime Minister's High Level Committee, Cabinet Secretariat, Government of India) Appendix Table 4.4 (293) "UGC" "UGC Act" PART B and Kamil under the title of 'Specification of Degrees with Urdu/Persian/Arabic nomenclature'. The effect of the notification shall be considered in the course of the judgment.

c. Madarsa Act

12. The State legislature of Uttar Pradesh enacted the Madarsa Act which was deemed to come into force on 3 September 2004. The long title of the Madarsa Act states that it is "an Act to provide for the establishment of a Board of Madarsa Education in the State and for the matters connected therewith and incidental thereto". The Statement of Objects and Reasons indicates the reason for

the enactment:

> "In para 55 of the Education Code the Registrar, Arabi-Pharasi Examinations, Uttar Pradesh, Allahabad had been authorised to recognise the Arabi-Pharasi Madarsas in the State and for conducting the examinations of such Madarsas. These Madarsas were managed by the Education Department. But with the creation of the Minority Welfare and Wakfs Department in 1995 all the works relating to such Madarsas were transferred from Education Department to the Minority Welfare Departments by virtue of which all the works relating to Madarsas are being performed under the control of the Director, Minority Welfare, Uttar Pradesh and the Registrar/Inspector Arabi-Pharasi Madarsas, Uttar Pradesh. The Arabi-Pharasi Madarsas were being administered under the Arabi-Pharasi Madarsas Rules, 1987 but since the said rules have not been made under an Act, many complication [sic] arose in running the Madarsas under the said rules. Therefore, with a view to removing the difficulties arisen in running the Madarsas, improving the merit therein and making available the best facility of study to the students studying in Madarsas it was decided to make a law to provide for the establishment of a Board of Madarsa Education in the state and for the PART B matters connected therewith or incidental thereto.
>
> ..." (emphasis supplied)

13. Section 2 provides definitions. The expressions "institution", "Madarsa Education" and "recognition" have been defined as follows:

> "2. Definitions. — In this Act unless the context otherwise requires: — ...
>
> (j) "institution" means the Government Oriental College, Rampur and includes a Madarsa or an Oriental College established and administered by Muslim Minorites and recognized by the Board for imparting Madarsa-Education;
>
> (h) "Madarsa-Education" means education in Arabic, Urdu, Parsian, Islamic studies, Tibb Logic, Philosophy and includes such other branches of learning as may be specified by the Board from time to time; ...
>
> (j) "recognition" means, recognition for the purpose of preparing candidates for admission to the Board's Examination;
>
> ..." (emphasis supplied)

14. Section 3 provides the constitution of the Board. Sub-section (1) of Section 3 provides that the Board shall be established at Lucknow on the date declared by the State government by a notification. Sub-section (2) states that the Board shall be a body corporate, while Sub-section (3) details the composition of the Board. The majority of the members of the Board are either part of the State PART B Government (or the legislature) or nominated by the State Government. The Board

consists of the following members:

> a. a renowned Muslim educationist in the field of Madarsa Education, nominated by the State Government, who is the Chairperson; b. the Director, Minority Welfare, Uttar Pradesh, who is the Vice Chairperson;
>
> c. principal, Government Oriental College, Rampur; d. one Sunni-Muslim Legislator to be elected by both houses of the State Legislature;
>
> e. one Shia-Muslim Legislator to be elected by both houses of the State Legislature;
>
> f. one representative of the National Council for Educational Research and Training (NCERT);
>
> g. two heads of institutions established and administered by Sunni Muslims, nominated by the State Government;
>
> h. one head of institution established and administered by Shia Muslims, nominated by the State Government;
>
> i. two teachers of institutions established and administered by Sunni Muslims nominated by the State Government; j. one teacher of an institution established and administered by Shia Muslims, nominated by the State Government; k. one Science or Tibb teacher of an institution nominated by the State Government;
>
> PART B l. the Account and Finance Officer in the Directorate of Minority Welfare, Uttar Pradesh;
>
> m. the Inspector 16; and n. an officer not below the rank of Deputy Director nominated by the State Government, who is the Registrar.

15. Sub-section (4) of Section 3 deals with the issuance of a notification by the State Government that the Board has been duly constituted, after the election and nomination of the members. Sub-section (5) pertains to the procedure to nominate or elect members who are Sunni-Muslim or Shia-Muslim legislators in certain special circumstances. Sub-section (6) stipulates that from the date of the establishment of the Board, the erstwhile Arbi and Farsi Education Board shall stand dissolved.

16. Section 4 pertains to the power of the State Government to remove members, other than ex-officio members, from the Board. This removal may be ordered, if in the opinion of the State Government, the member has “so flagrantly abused his position … as to render his continuance on the Board detrimental to the public interest”. Section 5 specifies the term of office of the members and Section 6 mandates that the State Government take steps to reconstitute the Board before the expiry of the terms of office of the members. Section 7 governs the procedural specificities of the

meetings of the Board, while Section 8 "Inspector" has been defined in S.2(e) of the Act as: "(e) "Inspector" means the inspector, Arabic Madarsas, Uttar Pradesh and includes an officer authorised by the State Government to perform all or any of the functions of the inspector under this Act" PART B clarifies that no acts of the Board or its committees may be invalidated on the ground of a vacancy or defect in its constitution.

17. Section 9 which enunciates the functions of the Board, is relevant to the constitutional challenge before us. The functions of the Board are wide-ranging and relate to inter alia prescribing the course material, granting degrees or diplomas, conducting examinations, recognizing institutions to conduct exams, conducting research and training, and other incidental functions. These functions are exercised at various levels of education detailed above – Tahtania, Fauquania, Munshi, Maulvi, Alim, Kamil, Fazil, and other courses. The provision reads thus:

> "9. Functions of the Board. — Subject to the other provisions of this Act the Board shall have the following functions, namely: —
>
> (a) to prescribe course of instructions, textbooks, other books and instructional material, if any, for Tahtania, Fauquania, Munshi, Maulavi, Alim, Kamil, Fazil and other courses;
>
> (b) prescribe the course books, other books and instruction material of courses of Arbi, Urdu and Pharsi for classes up to High School and Intermediate standard in accordance with the course determined there for by the Board of High School and Intermediate Education;
>
> (c) to prepare manuscript of the course books, other books and instruction material referred to in clause (b) by excluding the matters therein wholly or partially or otherwise and to publish them;
>
> (d) prescribe standard for the appointment of Urdu translators in the various offices of the State and ensure through the appointing authority necessary action with respect to filling up of the vacant posts;
>
> (e) to grant Degrees, Diplomas, Certificates or other academic distinctions to persons, who—
>
> (i) have pursued a course of study in an institution admitted to the privileges or recognition by the Board;

PART B

(ii) have studied privately under conditions laid down in the regulations and have passed an examination of the Board under like conditions;

(f) to conduct examinations of the Munshi, Maulavi, Alim and of Kamil and Fazil courses;

(g) to recognize institutions for the purposes of its examination;

(h) to admit candidates to its examination;

(i) to demand and receive such fee as may be prescribed in the regulations;

(j) to publish or withhold publication of the result of its examinations wholly or in part;

(k) to co-operate with other authorities in such a manner and for such purposes as the Board may determine;

(l) to call for reports from the Director on the condition of recognised institutions or of institutions applying for recognition;

(m) to submit to the State Government its views on any matter with which it is concerned;

(n) to see the schedules of new demands proposed to be included in the budget relating to institutions recognised by it and to submit if it thinks fit its views thereon for the consideration of the State Government;

(o) to do all such other acts and things as may be requisite in order to further the objects of the Board as a body constituted for regulating and supervising Madarsa-Education up to Fazil;

(p) to provide for research or training in any branch of Madarsa-Education viz, Darul Uloom Nav Uloom, Lucknow, Madarsa Babul lim, Mubarakpur, Azamgarh, Darul Uloom Devband, Saharanpur, Oriental College Rampur and any other institution which the State Government may notify time to time.

(q) to constitute a committee at district level consisting of not less than three members for education up to Tahtania or Faukania standard, to delegate such committee the power of giving recognition to the educational institutions under its control.

(r) to take all such steps as may be necessary or convenient for or as may be incidental to the exercise of any power, or the performance or discharge of any function or duty, conferred or imposed on it by this Act." PART B

18. Section 10 pertains to the 'Powers of the Board'. Sub-section (1) defines these powers in general terms and stipulates that the Board shall have all such powers as may be necessary for the performance of its functions and the discharge of its duties under the Madarsa Act or the allied rules and regulations. Sub-section (2) details specific powers of the Board, without prejudice to the generality of the powers of the Board detailed in sub-section (1). These powers inter alia include the power to cancel or withhold the result of an examination, prescribe fees for the examinations

conducted, refuse recognition of an institution, call for reports from and inspect institutions to ensure compliance with the prescribed rules and regulations and fix the maximum number of students to be admitted to a course. Sub-section (3) clarifies that the decision of the Board with regard to the matters dealt with in this provision shall be final. Section 11 allows the Board, to recognize an institution "in any new subject or group of subjects for a higher class", with the prior approval of the State government. Section 12 deals with the proper utilization of donations by the institutions.

19. Section 13 details the 'Power of the State Government' to inter alia issue directions and orders which are binding on the Board. Sub-section (1) states that the State Government shall have the right to address and to communicate its views to the Board on any matter with which it is concerned. Sub-section (2) requires the Board to report to the State Government if any action has been taken pursuant to the communications or proposals made by the State Government. Sub-section (3) stipulates that in circumstances where the Board does not act within a reasonable time to the satisfaction of the State PART B Government, after considering the explanation or representation by the Board, the State Government may issue necessary directions with which the Board shall comply. Sub-section (4) states that in cases, where the State Government is of the opinion that it is necessary or expedient to take immediate action, it may, without making any reference to the Board, pass an order or take other action consistent with the Act, including modifying, rescinding or making any regulation. Sub-section (5) stipulates that such actions by the State Government shall not be called into question in any court.

20. Section 14 deals with officers and other employees of the Board and provides that they are appointed by the Board, with the prior approval of the State Government. Sections 15 and 16 pertain to the powers and duties of the Chairperson and Registrar of the Board, respectively, while Section 17 deals with the appointment and constitution of committees and sub-committees.

21. Section 20 stipulates the power of the Board to make regulations.17 Sub-section (1) provides this power in general terms and empowers the Board to make regulations "for carrying out the purposes of the Act". Sub-section (2) details Section 20 reads: "20. (1) The Board may make regulations for carrying out the purposes of this Act. (2) In particular and without prejudice to the generality of the foregoing powers, the Board may make regulations providing for all or any of the following matters, namely:–

(a) constitution, power and duties of committees and sub-committees;

(b) the conferment of Degrees, Diplomas and Certificates;

(c) the conditions of recognition of institutions;

(d) the courses of study to be laid down for all Degrees, Diplomas and Certificates;

(e) the conditions under which candidates shall be admitted to the examinations and research programme of the Board and shall be eligible for Degrees, Diplomas and Certificates;

(f) the fees for admission to the examination of the Board;

(g) the conduct of examination;

(h) the appointment of examiners, moderators, collators, scrutinisers, tabulators, Centre inspectors, Superintendents of Centres and invigilators and their duties and powers in relation to the Board's examinations and the rates of their remuneration;

(i) the admission of institutions to the privilege of recognition and the withdrawal of recognition;

(j) all matters which are to be, or may, provided for by regulations." PART B particular matters for which the Board may make regulations, without prejudice to the generality of its powers. This includes subjects such as inter alia the conferment of degrees, diplomas and certificates, conditions for recognition of institutions, the course of study, and the conduct of examinations. Section 21 mandates that these regulations shall be made with the prior approval of the State Government and published in the Gazette. The State Government may approve the regulations with or without modifications. Pursuant to these provisions, the Board has framed the Uttar Pradesh Non-Governmental Arabic and Persian Madarsa Recognition, Administration and Services Regulations, 2016, with the approval of the State Government. 18

22. Sections 22 to 26 deal with subjects such as the requirement of a 'scheme of administration' for every institution; the procedure for appointment and conditions of service of heads of institutions, teachers, and other employees; casual vacancies; and the power of the Board and Committees to make by- laws, respectively. Section 27 states that no suit, prosecution or legal proceedings shall lie against the State Government, the Board or any of its committees/sub-committees in respect of anything which is done in good faith or under the Madarsa Act and its allied rules, regulations, by-laws, orders or directions. Section 28 bars the jurisdiction of Courts and states that no order or decision of the Board or its committees/sub-committees shall be called into question in any court.

"2016 Regulations" PART B

23. Section 32 confers on the State Government the power to make rules for carrying out the purposes of the Madarsa Act. 19 d. Steps taken by the State Government and the Board pursuant to the Madarsa Act

24. The provisions of the Madarsa Act grant the Board and the State Government wide-ranging powers to frame regulations, directions and rules and to regulate education in the Madarsas. After the enactment of the Madarsa Act, both the Board and the State Government have in fact taken various steps. Some of the steps detailed below indicate that there is a marked shift by the State Government and the Board towards including modern subjects in the curriculum and adopting the established curriculum (such as the NCERT curriculum). These steps are:

> a. On 15 May 2018, the Board issued a circular with the stated aim of "bringing educational upgradation in standardization and uniformity" in the Madarsas. The

circular states that it has been decided that for education in the Madarsas in Mathematics, Science, English, Hindi, Computer Science and Social Science, the curriculum will be based on the available textbooks of NCERT. Subsequently, by a letter dated 30 May 2018, the State Government sent a copy of the Circular and directed all the District Minority Welfare Officers to include the books prescribed by the NCERT in the syllabus of Madarsa Education from the Academic Section 32 reads: "32. The State Government may, by notification, make rules for carrying out the purposes of this Act." PART B Session of 2018-19. The District Minority Welfare Officers were directed to take steps to ensure that there are sufficient NCERT Books and to apprise the Board if training is required for the teachers in the Madarsas in the district;

b. Pursuant to Section 20, the Board has framed the 2016 Regulations with the approval of the State Government. Two amendments were made to the 2016 Regulations in 2017 and 2018, respectively. The latter amended the provision which dealt with the medium of instruction in the Madarsas. Originally, the Regulations provided that while all subjects could be taught, the medium of education should be Urdu, Arabic and Persian. However, the provision was amended to stipulate that while the medium of instruction in "Deenayat and other Arabic, Persian subjects" shall remain in Urdu, Arabic and Persian, the medium of instruction for "Maths, Science, Social Science, Computer etc." may be Urdu, Hindi or English, as the case may be; 20 and c. The functions of the Board under the Madarsa Act include prescribing the course of instruction, textbooks and instructional material for courses at various educational levels and classes. For this purpose, the Board has held several meetings from time to time. The Minutes of one such meeting dated 12 October 2021 have been placed on record before this Court, which contains a discussion on the curriculum to be implemented in Madarsas. It is noted in the Minutes of the Meeting that the Board has Uttar Pradesh Non-governmental Arabic and Persian Madarsa Recognition, Administration and Services (Second Amendment) Regulations, 2018 PART B approved the inclusion of Elementary Math and Elementary Science, History and Civics as compulsory subjects from Class 1 to secondary level in accordance with the NCERT curriculum. e. Proceedings before the High Court and Impugned Judgment

25. In 2019, a Writ Petition was instituted before the High Court by an individual appointed as a part-time assistant teacher in one of the Madarsas. 21 He sought regularization of his services and salary at par with regular teachers, relying on several provisions of the Madarsa Act and the allied Regulations. By an Order dated 23 October 2019, a Single Judge of the High Court issued notice on the Writ Petition and observed that certain questions related to the vires of the Madarsa Act arose for consideration, which warranted consideration by a larger bench. The Single Judge observed as follows:

"...

7. From perusal of the same, following questions arise for consideration: -

(i) Since the Madarsa Board is constituted for education in 'Arabic, Urdu, Parsian, Islamic-studies, Tibb Logic, Philosophy and includes such other branches of learning as may be specified by the Board from time to time', how come persons of a particular religion are provided to be member of the same? It does not talks about exponence (sic) in the aforesaid fields, for the purposes of which the Board is constituted, but persons of specific religion. It was put to learned Additional Chief Standing Counsel as to whether the purpose of the Board is to impart religious education only, to which he submits that a perusal of the Madarsa Education Act, 2004 does not indicate so.

Writ A No. 29324 of 2019.

PART B

(ii) With a secular constitution in India can persons of a particular religion be appointed/nominated in a Board for education purposes or it should be persons belonging to any religion, who are exponent in the fields for the purposes of which the Board is constituted or such persons should be appointed, without any regard to religion, who are exponent in the field for the purposes of which the Board is constituted?

(iii) The Act further provides the Board to function under the Minority Welfare Ministry of State of U.P., hence, a question arises as to whether it is arbitrary for providing the Madarsa education to be run under the Minority Welfare Department while all the other education institutions including those belonging to other minorities communities like Jains, Sikhs, Christians etc being run under the Education Ministry and whether it arbitrarily denies the benefit of experts of education and their policies to the children studying in Madarsa?

8. All these questions impacts the vires of the Madarsa Act, 2004 and are important questions to be decided before looking into the application of the Madarsa Act, 2004 and the regulations framed thereunder. Thus, I find it appropriate that the matter may be placed before the Larger Bench for decision on the aforesaid issue.

..." (emphasis supplied)

26. Other similar Writ Petitions were also referred to a larger bench and the Chief Justice of the High Court constituted a bench to hear the reference. During the pendency of the reference, another Writ Petition was filed challenging the vires of the Madarsa Act on the ground that it violates the principle of secularism and Articles 14, 15 and 21-A of the Constitution. 22 A challenge was also mounted on the constitutionality of Section 1(5) of the Right of Children to Free and Compulsory Education Act, 2009 23, which inter alia states that the Act does not Writ (C) No. 6049 of 2023 - Anshuman Singh Rathore versus Union of India and others. "RTE Act" PART B apply to Madarsas. 24 This petition was filed by an advocate practicing before the High Court.

27. All these petitions were tagged together and placed before the Division Bench of the High Court. By an Order dated 14 July 2023, the High Court appointed three amici curiae to assist the Court. Several organizations, some of whom are before this Court in the present proceedings, moved intervention applications before the High Court. In the Impugned Judgement, the Division Bench recorded the position of the State of Uttar Pradesh and the Madarsa Board, to the effect that the Madarsas impart not only religious education but also "religious instruction and teachings." Accordingly, the reference was re-framed by the High Court in the following terms:

> "Whether the provisions of the Madarsa Act stand the test of Secularism, which forms a part of the basic structure of the Constitution of India." 25

28. By a judgment dated 22 March 2024, the High Court rejected the preliminary objections raised by some of the parties with respect to the locus standi of the petitioner and the purported absence of adequate pleadings on the subject. On the merits, the High Court held that the Madarsa Act violates the principle of secularism and Articles 14, 21 and 21-A of the Constitution of India and is ultra vires Section 22 of the UGC Act. According to the High Court, the object and Section 1(5) reads: "(5) Nothing contained in this Act shall apply to Madrasas, Vedic Pathsalas and educational institutions primarily imparting religious instruction." Para 9, Impugned Judgment.

PART B purpose of the Madarsa Act itself violated the principle of secularism, and thus, it is not possible to segregate or save any portion of the legislation.

29. The High Court held that the Madarsa Act in its entirety was unconstitutional and directed that the State Government take steps to accommodate all students studying in the Madarsas in regular schools recognized under the Primary Education Board and the High School and Intermediate Education Board of the State of Uttar Pradesh. The State Government was directed to establish a sufficient number of additional seats and new schools, if required for this purpose and to ensure that no child between the ages of six and fourteen is left without admission in a duly recognized institution.

f. Steps taken by the State Government and the proceedings before this Court

30. In view of the Impugned Judgement, the Government of Uttar Pradesh took steps to implement the directions. On 4 April 2024, a Government Order was issued by the Chief Secretary, Government of Uttar Pradesh, with the following directions:

> a. Madarsas eligible to get recognition from the education boards, at the state or central level, based on various parameters, can run primary or secondary schools after getting recognized by the concerned education boards; and b. Madarsas which cannot get formal recognition because of "sub- standard" facilities will be closed. Committees are to be set up at the PART C district level to ensure that the students studying in such Madarsas are admitted to the schools run by the education department.26

31. Special leave petitions were instituted by the appellant(s) before this Court assailing the correctness of the Impugned Judgement. On 5 April 2024, this Court heard the counsel for the various parties and issued notice on the lead petition. While staying the implementation of the Impugned Judgement, this Court recorded the brief reasons for issuing the interim direction. Accordingly, on 12 April 2024, in view of the stay on the Impugned Judgement, the above Government Order issuing directions for implementation were withdrawn by the State Government.

C. Submissions

32. Dr Abhishek Manu Singhvi, Mr Salman Khurshid, and Dr Menaka Guruswamy, senior counsel assailed the Impugned Judgment and advanced the following submissions:

> a. The State legislature is empowered under Article 246 read with Entry 25 of List III of the Seventh Schedule to enact legislation to regulate Madarsa education. The Madarsa Act principally deals with the regulation of Madarsas concerning curriculum, instruction, standard of education, conduct of examination, and qualifications for teaching. The enactment of laws for regulating secular activities of minority institutions or prescribing standards of education is consistent with Articles 25 to 30; G.O. No. 43/52-3-3034-2099/4/2024.
>
> PART C b. In S R Bommai v. Union of India,27 it was held that secularism is a positive concept of equal treatment of all religions. Articles 25 to 30 secure the rights of religious and linguistic minorities, including their right to establish and administer educational institutions. By recognizing and regulating the Madarsa education, the State legislature is taking positive action to safeguard the educational rights of the minorities; c. Article 28 prohibits religious instructions in educational institutions wholly maintained out of state funds. Madarsas impart education based on modern curriculum such as Mathematics, Social Sciences, and Science. Additionally, Madarsas impart education about religion and not “religious instructions.” Article 28 does not bar the State from funding schools providing religious education;
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> d. Article 21-A recognizes the fundamental right of children between the ages of six to fourteen to free and compulsory education. Section 1(5) of the RTE Act excludes Madarsas from the purview of the legislation. The law enacted by the State in pursuance of Article 21-A cannot violate the fundamental rights of minorities to establish and administer educational institutions; and e. Striking down the Madarsa Act will create a legislative vacuum and result in the deregulation of Madarsas. This will affect the future of more than twelve lakh students studying across the Madarsas in UP. Further, the direction of the High Court to relocate students studying in Madarsas to regular schools will effectively shut down all Madarsas in the state and result in violation of Article 30.
>
> (1994) 2 SCR 644 PART C

33. Mr KM Natraj, Learned Additional Solicitor General, appeared for the State of Uttar Pradesh. In its Counter Affidavit, the State of Uttar Pradesh states that it had accepted the decision in the Impugned Judgement and taken steps to implement it. However, it would comply with the final decision of this Court and has accordingly, withdrawn the government order which sought to implement the Impugned Judgement. Mr Nataraj contended that while some provisions of the Madarsa Act may be unconstitutional, the High Court erred in striking down the entire Madarsa Act without severing the invalid provisions from the rest of the Madarsa Act.

34. Mr Guru Krishna Kumar, learned Senior Counsel made the following submissions:

> a. The Act does not make any provisions to impart secular subjects as part of the curriculum and is a measure undertaken by the state to recognize and regulate "religious instruction" traceable to a particular community; b. Article 28 inter alia prohibits institutions which receive funds from the state from imparting 'religious instruction'. Thus, as a corollary, the state cannot seek to regulate and thereby, recognize religious instruction; c. The preamble which specifies that India is a "secular" republic, Article 21- A, Article 25, Article 28, Article 30 and Article 41 all point to the "pervasive principle" of secularism underlying the Constitution. This principle militates against the state regulating religious instruction; d. The striking down of the Act would only discontinue the functioning of the Board and the consequent state recognition of religious instruction. The PART C education provided in the Madarsas and their existence would continue to be protected by Article 30;
>
> e. The word "education" in Entry 25, List III of the Seventh Schedule must be construed to mean "secular education" and cannot include "religious instruction". Thus, the state legislature only has the competence to enact a law that regulates educational institutions, but no power to recognize and regulate religious instruction; and f. Entry 25, List III is subject to Entry 66 List I, which pertains to higher education and standards. The Parliament has enacted the UGC Act under Entry 66, List I. Section 22 of the UGC Act provides that no degrees can be conferred by any institution other than the institutions defined under the UGC Act. Thus, the provisions of the Madarsa Act which regulate higher education, at the undergraduate, graduate and grant the Board power to grant equivalent degrees are beyond the legislative competence of the state legislature.

35. Ms Madhavi Divan, learned Senior Counsel, advanced the following submissions:

> a. The Madarsa Act deprives students enrolled in such institutions of the benefits of mainstream, holistic, secular education, thereby violating Articles 21 and 21A;

b. The Madarsa Act divests students of equal opportunity in relation to future employment opportunities (Articles 14, 15, 16) and the right to practice any profession, occupation, trade or business of their choice (Article 19(1)(g). It PART C creates two classes of children — the first, who receive secular, mainstream education, and the second, who receive religious instruction, which

prohibits them from even attempting to adopt professions which are easily available for the former class. This deprivation of choice also violates the constitutional value of dignity and deprives students of the liberty of thought and expression protected under Article 19;

c. The Madarsa Act violates the constitutional value of 'fraternity' as the dissemination of Madarsa education creates intellectual and outlook barriers, which prevent students from integrating into a pluralistic society; d. The definition of "Madarsa Education" in Section 2(h) indicates that the focus on "other branches of learning" is only tertiary. The focus of the statute and the competence of the Board is restricted to religious instruction; e. The Board is disproportionately populated by persons whose competence is in the field of religious instruction. As decisions of the Board are taken by a majority of members, present and voting, the views of the "non-secular" members would prevail and the curriculum is likely to be skewed in favour of religious education. The functions of the Board delineated in Section 9 also indicate disproportionate weightage to religious instruction; and f. The qualifications for teachers in the Madarsas laid down in the regulations are not adequate to ensure quality education. The qualifications are rooted in the "same Madarsa echo chamber", and the minimum requirements for teaching in regular educational institutions are not prescribed. PART D

36. The National Commission for the Protection of Child Rights (NCPCR) supported the arguments of the respondents and assailed the constitutional validity of the Madarsa Act.

D. Secularism and regulation of minority educational institutions

37. The preamble to the Constitution enshrines the declaration to constitute India into a sovereign, socialist, secular, democratic, republic. The 42nd Amendment to the Constitution incorporated the expression 'secular' in the preamble. However, the constitutional amendment merely made explicit what is implicit according to the scheme of the Constitution. 28 a. Secularism in the constitutional context

38. Articles 14, 15, and 16 mandate the State to treat all people equally irrespective of their religion, faith, or belief. 29 Article 14 provides that the State shall not deny to any person equality before the law or equal protection of laws within the territory of India. Article 15 provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Article 16 mandates that there shall be equality of opportunity for all citizens in matters relating to public employment or appointment to any office under the State. Article 16(2) further provides that no citizen shall be discriminated against in respect of any employment or office under the State on S R Bommai, [304] Justice BP Jeevan Reddy (for himself and Justice Agrawal) S R Bommai (supra) [304] (Justice BP Jeevan Reddy) PART D the grounds of religion, race, caste, sex, descent, place of birth, residence, or any of them.

39. Secularism is one of the facets of the right to equality. 30 The equality code outlined in Articles 14, 15, and 16 is based on the principle that all persons, irrespective of their religion, should have equal access to participate in society. The State cannot give preference to persons belonging to a particular religion in matters of public employment. As a corollary, the equality code prohibits the State from mixing religion with any secular activity of the State. 31 However, the Constitution

recognizes that equal treatment of persons is illusionary unless the State takes active steps in that regard. Therefore, the equality code imposes certain positive obligations on the State to provide equal treatment to all persons irrespective of their religion, faith, or beliefs. 32 Dr M Ismail Faruqui v. Union of India, (1994) 6 SCC 360 [37] S R Bommai (supra) [148] Justice Sawant ["148. One thing which prominently emerges from the above discussion on secularism under our Constitution is that whatever the attitude of the State towards the religions, religious sects and denominations, religion cannot be mixed with any secular activity of the State. In fact, the encroachment of religion into secular activities is strictly prohibited."] S R Bommai (supra) [304] (Justice B P Jeevan Reddy) ["148. [...] Articles 14, 15 and 16 enjoin upon the State to treat all its people equally irrespective of their religion, caste, faith or belief. While the citizens of this country are free to profess, practice and propagate such religion, faith or belief as they choose, so far as the State is concerned, i.e., from the point of view of the State, the religion, faith or belief of a person is immaterial. To it, all are equal and all are entitled to be treated equally. How is this equal treatment possible, if the State were to prefer or promote a particular religion, race or caste, which necessarily means a less favourable treatment of all other religions, races and castes. How are the constitutional promises of social justice, liberty of belief, faith or worship and equality of status and of opportunity to be attained unless the State eschews the religion, faith or belief of a person from its consideration altogether while dealing with him, his rights, his duties and his entitlements? Secularism is thus more than a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions. This attitude is described by some as one of neutrality towards religion or as one of benevolent neutrality. This may be a concept evolved by western liberal thought or it may be, as some say, an abiding faith with the Indian people at all points of time."] PART D

40. Articles 25 to 30 contain the other facet of secularism, that is, the practice of religious tolerance by the State. 33 Article 25 provides that all persons are equally entitled to freedom of conscience and the right to freely profess, practise, and propagate religion subject to public order, morality, health, and other provisions of Part III. The provision allows the State to make any law to regulate or restrict any economic, financial, political or other secular activity associated with religious practice. The Constitution distinguishes between religious and secular activities, permitting the State to regulate the latter. 34

41. Article 26 guarantees every religious denomination the right to establish and maintain institutions for religious and charitable purposes. It further guarantees religious and charitable institutions the right to manage their own affairs in matters of religion; own and acquire movable and immovable property; and administer the property in accordance with law. The right of management given to a religious body is a fundamental right that cannot be abridged by any legislation. On the other hand, the State can regulate the administration of property owned or acquired by a religious denomination through validly enacted laws. 35 S R Bommai (supra) [183] Justice K Ramaswamy ["183. [...] Constitution made demarcation between religious part personal to the individual and secular part thereof. The State does not extend patronage to any particular religion, State is neither pro particular religion nor anti particular religion. It stands aloof, in other words maintains neutrality in matters of religion and provides equal protection to all religions subject to regulation and actively acts on secular part."] Seshammal v. State of Tamil Nadu, (1972) 2 SCC 11 [19]; Bijoe Emmanuel v. State of Kerala, (1986) 3 SCC 615 [19] Ratilal Panachand Gandhi v.

State of Bombay, (1954) 1 SCC 487 [16] ["16. [...] The language of the two clauses (b) and (d) of Article 26 would at once bring out the difference between the two. In regard to affairs in matters of religion, the right of management given to a religious body is a guaranteed fundamental right which no legislation can take away. On the other hand, as regards administration of property which a religious denomination is entitled to own and acquire, it has undoubtedly the right to administer such property but only in accordance with law. This means that the State can regulate the administration of trust properties by means of laws validly enacted; but here again it should be remembered that under Article 26(d), it is the religious denomination itself which has been given the right to administer its property in accordance with any law which PART D

42. Article 27 provides that no person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. The rationale underlying Article 27 is that public funds should not be utilized for the promotion or maintenance of any particular religion or religious denomination. 36

43. Article 28 prohibits the imparting of "religious instruction" in any educational institutions wholly maintained out of State funds. The provision further provides that no person attending any educational institution recognised by the State or receiving aid from the State funds should be compelled to take part in any religious instruction without their consent. Religious instruction is the inculcation of tenets, rituals, observances, ceremonies, and modes of worship of a particular sect or denomination. 37 Article 28 does not prohibit educational institutions maintained out of State funds from imparting religious education. Religious education is imparted to children "to make them aware of thoughts and philosophies in religions without indoctrinating them and without curbing their free-thinking, right to make choices for conducting their own life and deciding upon their course of action according to their individual inclinations." 38 Article 28 does not prohibit educational institutions from teaching about the philosophy and culture of a particular religion or a saint associated with that the State may validly impose. A law, which takes away the right of administration altogether from the religious denomination and vests it in any other or secular authority, would amount to violation of the right which is guaranteed by Article 26(d) of the Constitution."] S R Bommai [304] (Justice BP Jeevan Reddy) D A V College v. State of Punjab, (1971) 2 SCC 269 [26] Aruna Roy v. Union of India, (2002) 7 SCC 368 [78] (Justice D M Dharmadhikari) PART D religion. 39 Article 28 does not prohibit the State from granting recognition to educational institutions imparting religious instruction in addition to secular education. 40

44. Articles 29 and 30 deal with the cultural and educational rights of minorities. Article 29(1) provides that Indian citizens have a right to conserve their distinct language, script, or culture. Article 29(2) guarantees that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them. A citizen who has requisite academic qualifications cannot be denied admission into any educational institution funded by the State on grounds of religion. 41

45. Article 30 pertains to the right of minorities to establish and administer educational institutions. It provides that all minorities, whether based on religion or language, have the right to establish and administer educational institutions of their choice. Article 30(2) enjoins the State not to discriminate against any educational institution in granting aid on the ground that it is under the management of a minority, whether based on religion or language. Article 30 confers a special right on religious and linguistic minorities to instill in them a D A V College (supra) [26] [26. [...] To provide for academic study of life and teaching or the philosophy and culture of any great saint of India in relation to or the impact on the Indian and world civilizations cannot be considered as making provision for religious instructions."] Ahmedabad St Xavier's College Society v. State of Gujarat, (1974) 1 SCC 717 [139] (Justice K K Mathew and Justice Y V Chandrachud) ["139. We fail to see how affiliation of an educational institution imparting religious instruction in addition to secular education to pupils as visualized in Article 28(3) would derogate from the secular character of the state. Our Constitution has not erected a rigid wall of separation between church and state. We have grave doubts whether the expression "secular state" as it denotes a definite pattern of church and state relationship can with propriety be applied to India. It is only in a qualified sense that India can be said to be a secular state. There are provisions in the Constitution which make one hesitate to characterize our state as secular."] See In re Kerala Education Bill 1957, 1958 SCC OnLine SC 8 [22] PART D sense of security and confidence. 42 It secures equal treatment of majority and minority institutions and preserves secularism 43 by allaying all apprehensions of interference by the executive and legislature in matters of religion.44 The constitutional scheme under Articles 25 to 30 distinguishes between the right of an individual to practice religion and the secular part of religion, which is amenable to State regulation. 45 b. Testing the validity of a statute for violation of the basic structure of the Constitution

46. The provisions discussed in the above segment indicate that secularism is embodied in the constitutional scheme, particularly Part III. In Kesavananda Bharati v. State of Kerala, this Court held that Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution. 46 It was held that the power of Parliament to amend the Constitution cannot have the effect of destroying or abrogating the basic structure or framework of the Constitution. 47 Further, the judges constituting the majority enumerated certain T M A Pai Foundation v. State of Karnataka, (2002) 8 SCC 481 [157] Ahmedabad St Xavier's College Society (supra) [9]; T M A Pai Foundation (supra) [138] ["138. As we look at it, Article 30(1) is a sort of guarantee or assurance to the linguistic and religious minority institutions of their right to establish and administer educational institutions of their choice. Secularism and equality being two of the basic features of the Constitution, Article 30(1) ensures protection to the linguistic and religious minorities, thereby preserving the secularism of the country. Furthermore, the principles of equality must necessarily apply to the enjoyment of such rights. No law can be framed that will discriminate against such minorities with regard to the establishment and administration of educational institutions vis-à-vis other educational institutions. Any law or rule or regulation that would put the educational institutions run by the minorities at a disadvantage when compared to the institutions run by the others will have to be struck down."] Ahmedabad St Xavier's College Society (supra) [75] (Justice H R Khanna) S R Bommai (supra) [183] (1973) 4 SCC 225 Kesavananda Bharati (supra) [1426] (Justice H R Khanna) ["1426. [...] The word "amendment" postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been

subjected to alterations. As a result of the amendment, the old Constitution cannot be destroyed and done away with; it is regained though in the amended form. What then is meant by the retention of the old Constitution? It means the retention of the basic structure or framework of the old Constitution. A mere retention of some provisions of the old Constitution even though the basic structure or framework of the Constitution has been destroyed would not amount to the retention of the old Constitution. Although it is PART D basic features of our Constitution, including the secular character of the Constitution. 48 In S R Bommai v. Union of India,49 a nine-Judge Bench held that secularism is a basic feature of the Constitution. The issue that arises for our consideration is whether the basic structure doctrine can be applied to invalidate ordinary legislation.

47. The Constitution imposes certain limitations on the legislative powers of Parliament and the State legislatures. Article 13(2) provides that the State shall not make any law that takes away or abridges the rights conferred by Part III. Statutes enacted by the State legislatures must be consistent with the fundamental rights enumerated under Part III of the Constitution. Further, Article 246 defines the scope and limitations of the legislative competence of Parliament and State legislatures. A statute can be declared ultra vires on two grounds alone: (i) it is beyond the ambit of the legislative competence of the legislature; or (ii) it violates Part III or any other provision of the Constitution.50

48. In Indira Nehru Gandhi v. Raj Narain, 51 the Allahabad High Court disqualified the then Prime Minister for indulging in corrupt practices according to the Representation of the People Act, 1951. To nullify the decision of the High permissible under the power of amendment to effect changes, howsoever important, and to adapt the system to the requirements of changing conditions, it is not permissible to touch the foundation or to alter the basic institutional pattern. The words "amendment of the Constitution" with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the Constitution."] Kesavananda Bharati (supra) [292] (Chief Justice Sikri); [487] (Justice Shelat and Grover); [1426] (Justice H R Khanna).

(1994) 3 SCC 1; [29] (Justice AM Ahmadi); [151] (Justice P B Sawant (for himself and Justice Kuldip Singh)); [182] (Justice K Ramaswamy); [304] (Justice B P Jeevan Reddy (for himself and Justice S C Agrawal)) State of A P v. McDowell & Co., (1996) 3 SCC 709 [43] ["43. [...] The power of Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision."]; State of Kerala v. Peoples Union for Civil Liberties, (2009) 8 SCC 46 [45] 1975 Supp SCC 1 PART D Court, Parliament enacted the Representation of the People (Amendment) Act 1974 and Election Laws (Amendment) Act 1975 and placed them under the Ninth Schedule of the Constitution. The issue before this Court was whether the amendments violated the basic structure of the Constitution.

49. Chief Justice A N Ray held that the constitutional validity of a statute depends entirely on the existence of the legislative power and the express provision in Article 13. Since the legislation is not subject to any other constitutional limitation, applying the basic structure doctrine to test the

validity of a statute will amount to "rewriting the Constitution." 52 The learned Judge further observed that application of the undefinable theory of basic structure to test the validity of a statute would denude legislatures of the power of legislation and deprive them of laying down legislative policies. 53 Justice K K Mathew similarly observed that the concept of a basic structure is "too vague and indefinite to provide a yardstick to determine the validity of an ordinary law."54 Justice Y V Chandrachud (as the learned Chief Justice then was) observed that constitutional amendment and ordinary laws operate in different fields and are subject to different limitations. 55 Indira Nehru Gandhi (supra) [134] and [137] Indira Nehru Gandhi (supra) [136] ["136. The theory of basic structures or basic features is an exercise in imponderables. Basic structures or basic features are indefinable. The legislative entries are the fields of legislation. The pith and substance doctrine has been applied in order to find out legislative competency, and eliminate encroachment on legislative entries. If the theory of basic structures or basic features will be applied to legislative measures it will denude Parliament and State Legislatures of the power of legislation and deprive them of laying down legislative policies. This will be encroachment on the separation of powers."] Indira Nehru Gandhi (supra) [357] Indira Nehru Gandhi (supra) [691] and [692]. ["691 [...] The constitutional amendments may, on the ratio of the Fundamental Rights case, be tested on the anvil of basic structure. But apart from the principle that a case is only an authority for what it decides, it does not logically follow from the majority judgment in the Fundamental Rights case that ordinary legislation must also answer the same test as a constitutional amendment. Ordinary laws have to answer two tests for their validity: (1) The law must be within the legislative competence of the legislature as defined and specified in Chapter I, Part XI of the Constitution, and (2) it must not offend against the provisions of Article 13(1) and (2) of the Constitution. "Basic structure", PART D

50. The majority in Indira Nehru Gandhi (supra) held that the constitutional validity of a statute cannot be challenged for the violation of the basic structure doctrine. However, Justice M H Beg (as the learned Chief Justice then was) dissented with the majority view by observing that the basic structure test can be used to test the validity of statutes because statutes cannot go beyond the range of constituent power. 56

51. In State of Karnataka v. Union of India,57 Justice N L Untwalia (writing for himself, Justice P N Shingal, and Justice Jaswant Singh) reiterated that the validity of a statute cannot be tested for violation of the basic structure of the Constitution. Justice Y V Chandrachud (as the learned Chief Justice then was) also observed that a statute cannot be invalidated on supposed grounds so long as it is within the legislative competence of the legislature and consistent with Part III of the Constitution. 58 However, Chief Justice M H Beg observed that testing a statute for violation of basic structure does not "add to the contents of the Constitution." 59 He held that any inference about a limitation based on the basic structure doctrine upon legislative power must co-relate to the express provisions of the Constitution. 60 by the majority judgment, is not a part of the fundamental rights nor indeed a provision of the Constitution. The theory of basic structure is woven out of the conspectus of the Constitution and the amending power is subjected to it because it is a constituent power. "The power to amend the fundamental instrument cannot carry with it the power to destroy its essential features — this, in brief, is the arch of the theory of basic structure. It is wholly out of place in matters relating to the validity of ordinary laws made under the Constitution.] Indira Nehru Gandhi (supra) [622] (1977) 4 SCC 608 [238] State of Karnataka (supra) [197] State of Karnataka

(supra) [128] State of Karnataka (supra) [123] PART D

52. In Kuldip Nayar v. Union of India,61 a Constitution Bench held that ordinary legislation cannot be challenged for the violation of the basic structure of the Constitution. Statutes, including State legislation, can only be challenged for violating the provisions of the Constitution. 62 However, in Madras Bar Association v. Union of India,63 a Constitution Bench applied the basic structure doctrine to test the validity of Parliamentary legislation seeking to transfer judicial power from High Courts to tribunals. Justice J S Khehar (as the learned Chief Justice then was), writing for the Constitution Bench, held that the basic structure of the Constitution will stand violated if Parliament does not ensure that the newly created tribunals do not "conform with the salient characteristics and standards of the court sought to be substituted." 64

53. In Supreme Court Advocates-on-Record Association v. Union of India,65 this Court had to decide the constitutional validity of the Constitution (Ninety- ninth Amendment) Act 2014 and the National Judicial Appointments Commission Act 2014. Justice J S Khehar (as the learned Chief Justice then was) built upon his reasoning in Madras Bar Association (supra) by observing (2006) 7 SCC 1 ["107. The basic structure theory imposes limitation on the power of Parliament to amend the Constitution. An amendment to the Constitution under Article 368 could be challenged on the ground of violation of the basic structure of the Constitution. An ordinary legislation cannot be so challenged. The challenge to a law made, within its legislative competence, by Parliament on the ground of violation of the basic structure of the Constitution is thus not available to the petitioners."] Ashok Kumar Thakur v. Union of India, (2008) 6 SCC 1 [116] Madras Bar Association v. Union of India, (2014) 10 SCC 1 [109] ["This Court has repeatedly held that an amendment to the provisions of the Constitution would not be sustainable if it violated the "basic structure" of the Constitution, even though the amendment had been carried out by following the procedure contemplated under "Part XI" of the Constitution. This leads to the determination that the "basic structure" is inviolable. In our view, the same would apply to all other legislations (other than amendments to the Constitution) as well, even though the legislation had been enacted by following the prescribed procedure, and was within the domain of the enacting legislature, any infringement to the "basic structure" would be unacceptable."] Madras Bar Association (supra) [136]. ["136. (iii) The "basic structure" of the Constitution will stand violated if while enacting legislation pertaining to transfer of judicial power, Parliament does not ensure that the newly created court/tribunal conforms with the salient characteristics and standards of the court sought to be substituted."] (2016) 5 SCC 1 PART D that a challenge to ordinary legislation for violation of the basic structure would only be a "technical flaw" and "cannot be treated to suffer from a legal infirmity." 66 He observed that the determination of the basic structure of the Constitution is made exclusively from the provisions of the Constitution. The observations of the learned Judge are instructive and extracted below:

> "381. [...] when a challenge is raised to a legislative enactment based on the cumulative effect of a number of articles of the Constitution, it is not always necessary to refer to each of the articles concerned when a cumulative effect of the said articles has already been determined as constituting one of the "basic features" of the Constitution. Reference to the "basic structure" while dealing with an ordinary

> legislation would obviate the necessity of recording the same conclusion which has already been scripted while interpreting the article(s) under reference harmoniously. We would therefore reiterate that the "basic structure" of the Constitution is inviolable and as such the Constitution cannot be amended so as to negate any "basic features" thereof, and so also, if a challenge is raised to an ordinary legislation based on one of the "basic features" of the Constitution, it would be valid to do so. If such a challenge is accepted on the ground of violation of the "basic structure", it would mean that the bunch of articles of the Constitution (including the Preamble thereof, wherever relevant), which constitute the particular "basic feature", had been violated. We must however credit the contention of the learned Attorney General by accepting that it would be technically sound to refer to the articles which are violated, when an ordinary legislation is sought to be struck down as being ultra vires the provisions of the Constitution." Supreme Court Advocates-on-Record Association (supra) [381] PART D

54. However, Justice Lokur differed with Justice Khehar on the issue of testing the validity of a statute for violation of the basic structure doctrine. Justice Lokur followed the view of the majority in the State of Karnataka (supra) 67 that a statute cannot be challenged for violating the basic structure doctrine.

55. From the above discussion, it can be concluded that a statute can be struck down only for the violation of Part III or any other provision of the Constitution or for being without legislative competence. The constitutional validity of a statute cannot be challenged for the violation of the basic structure of the Constitution. The reason is that concepts such as democracy, federalism, and secularism are undefined concepts. Allowing courts to strike down legislation for violation of such concepts will introduce an element of uncertainty in our constitutional adjudication. Recently, this Court has accepted that a challenge to the constitutional validity of a statute for violation of the basic structure is a technical aspect because the infraction has to be traced to the express provisions of the Constitution. Hence, in a challenge to the validity of a statute for violation of the principle of secularism, it must be shown that the statute violates provisions of the Constitution pertaining to secularism. Supreme Court Advocates-on-Record Association (supra) [795] ["795. For the purposes of the present discussion, I would prefer to follow the view expressed by a Bench of seven learned Judges in State of Karnataka v. Union of India [State of Karnataka v. Union of India, (1977) 4 SCC 608 (Seven-Judge Bench)] that it is only an amendment of the Constitution that can be challenged on the ground that it violates the basic structure of the Constitution—a statute cannot be challenged on the ground that it violates the basic structure of the Constitution. [The only exception to this perhaps could be a statute placed in the Ninth Schedule of the Constitution.] The principles for challenging the constitutionality of a statute are quite different."] PART D c. Regulation of minority educational institutions

56. The right of minorities to administer educational institutions includes the right to manage the affairs of the institution in accordance with the ideas and interests of the community in general and the institution in particular.68 The right to administer minority educational institutions encompasses: (i) the right to constitute the managing or governing body; (ii) the right to appoint

teachers; (iii) the right to admit students subject to reasonable regulations; and (iv) the right to use property and assets for the benefit of the institution. 69 However, the right to administer minority educational institutions is not absolute. The right to administer educational institutions implies an obligation and duty of minority institutions to provide a standard of education to the students.70 The right to administer is, it is trite law, not the right to maladminister.

57. In re Kerala Education Bill 1957, 71 this Court classified minority educational institutions into three categories: (i) those which do not seek either aid or recognition from the State; (ii) those which want aid; and (iii) those which want only recognition but not aid. The first category of institutions is protected by State of Kerala v. Very Rev. Mother Provincial, (1970) 2 SCC 417 [9]. Ahmedabad St Xavier's College Society (supra) [19] (Chief Justice A N Ray) ["19. [...] The right to administer is said to consist of four principal matters. First is the right to choose its managing or governing body. It is said that the founders of the minority institution have faith and confidence in their own committee or body consisting of persons elected by them. Second is the right to choose its teachers. It is said that minority institutions want teachers to have compatibility with the ideals, aims and aspirations of the institution. Third is the right not to be compelled to refuse admission to students. In other words, the minority institutions want to have the right to admit students of their choice subject to reasonable regulations about academic qualifications. Fourth is the right to use its properties and assets for the benefit of its own institution."] Ahmedabad St Xavier's College Society (supra) [30] ["30. [...] The minority institutions have the right to administer institutions. This right implies the obligation and duty of the minority institutions to render the very best to the students. In the right of administration, checks and balances in the shape of regulatory measures are required to ensure the appointment of good teachers and their conditions of service. The right to administer is to be tempered with regulatory measures to facilitate smooth administration."] 1958 SCC OnLine SC 8 [23] PART D Article 30(1). 72 As regards the second and third categories, Chief Justice S R Das observed that the "minority cannot surely ask for aid or recognition for an educational institution run by them in unhealthy surroundings, without any competent teachers, possessing any semblance of qualification, and which does not maintain even a fair standard of teaching or which teaches matters subversive of the welfare of the scholars."73

58. The State has an interest in ensuring that minority educational institutions provide standards of education similar to other educational institutions.74 The State can enact regulatory measures to promote efficiency and excellence of educational standards. 75 Regulations about standards of education do not directly bear upon the management of minority institutions.76 The State can regulate aspects of the standards of education such as the course of study, the qualification and appointment of teachers, the health and hygiene of students, and facilities for libraries. 77

59. The State may impose regulation as a condition for grant of aid or recognition.

Such regulation must satisfy the following three tests: (i) it must be reasonable and rational; (ii) it must be conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it; and (iii) it must be directed towards maintaining the excellence of education In re Kerala Education Bill (supra) [24] In re Kerala Education Bill (supra) [31] Very Rev Mother Provincial (supra) [10] All Saints High School v. Government of AP, (1980) 2

SCC 478 [63]; Dayanand Anglo Vedic (DAV) College Trust and Management Society v. State of Maharashtra, (2013) 4 SCC 14 [32] Ahmedabad St Xavier's College Society (supra) [90] Very Rev Mother Provincial (supra) [10]; St Xavier's College (supra) [18] PART D and efficiency of administration to prevent it from falling standards.78 To determine the issue of the reasonableness of a regulation, the court has to determine whether the regulation is calculated to subserve or will in effect subserve the purpose of recognition or affiliation. 79

60. In P A Inamdar v. State of Maharashtra, this Court held that the considerations for granting recognition to a minority educational institution are subject to two overriding conditions: (i) the recognition is not denied solely on the ground of the educational institution being one belonging to minority; and (ii) the regulation is neither aimed at nor has the effect of depriving the institution of its minority status. 80

61. In Ahmedabad St Xavier's College Society v. State of Gujarat, 81 the issue before a Bench of nine Judges was whether religious and linguistic minorities who have the right to establish and administer educational institutions of their choice have a fundamental right to affiliation or recognition. Chief Justice A N Ray held that minority educational institutions have no fundamental right to recognition. The learned Chief Justice observed that the primary purpose of recognition is to ensure that students reading in minority educational institutions have "qualifications in the shape of degrees necessary for a useful career in life." 82 He further observed that a minority educational institution seeking affiliation must follow the statutory educational standards and efficiency, the Sidhrajbhai Sabbai v. State of Gujarat, 1962 SCC OnLine SC 150 [15]; P A Inamdar v. State of Maharashtra, (2005) 6 SCC 537 [94], [122] Ahmedabad St. Xavier's College Society (supra) [176] (Justice KK Mathew and Justice Y V Chandrachud) P A Inamdar (supra) [103] (1974) 1 SCC 717 Ahmedabad St. Xavier's College Society (supra) [14] PART D prescribed courses of study, courses of instruction, qualification of teachers, and educational qualifications for entry of students. 83 However, the learned Chief Justice held that a law providing for recognition should not result in abridgement of the right of linguistic and religious minorities to administer and establish educational institutions of their choice under Article 30(1).84

62. Justice K K Mathew (writing for himself and Justice Y V Chandrachud), in his concurring opinion stated that the principle of juridical equality ensures the "co- existence of several types of schools and colleges including affiliated colleges" with proportionate equal encouragement and support from the State.85 The learned judge further held that the State's interest in the education of religious minorities would be served if minority educational institutions impart secular education accompanied by religious education. He also observed:

> "145. The State's interest in secular education may be defined broadly as an interest in ensuring that children within its boundaries acquire a minimum level of competency in skills, as well as a minimum amount of information and knowledge in certain subjects. Without such skill and knowledge, an individual will be at a severe disadvantage both in participating in democratic self-Government and in earning a living. No one can question the constitutional right of parents to satisfy their State-imposed obligation to educate their children by sending them to schools or colleges

established and administered by their own religious minority so long as these schools and colleges meet the standards established for secular education." Ahmedabad St. Xavier's College Society (supra) [16] Ahmedabad St. Xavier's College Society (supra) [14] Ahmedabad St. Xavier's College Society (supra) [144] PART D The State has an interest in maintaining the standards of education in minority educational institutions. Affiliation or recognition of minority educational institutions by the Government secures the academic interests of students studying in such institutions to pursue higher education. 86 d. The Madarsa Act is a regulatory legislation

63. The Statement of Objects and Reasons of the Madarsa Act indicates that it is enacted to remove difficulties in running Madarsas and improve the merit of students studying in Madarsas by making available to them facilities of study of the requisite standard. Section 3 provides for the constitution of the Board. The Board comprises persons who are related to or know about education in Madarsas. The Board has been statutorily empowered to: (i) prescribe courses of instruction and text-books for courses; (ii) grant degrees, diplomas, certificates and other academic distinctions; (iii) conduct examinations; (iv) recognise institutions for examination; (v) admit candidates for examinations; In re Kerala Education Bill 1957 (supra) [32] ["32. [...] The minorities evidently desire that education should be imparted to the children of their community in an atmosphere congenial to the growth of their culture. Our Constitution makers recognised the validity of their claim and to allay their fears conferred on them the fundamental rights referred to above. But the conservation of the distinct language, script or culture is not the only object of choice of the minority communities. They also desire that scholars of their educational institutions should go out in the world well and sufficiently equipped with the qualifications necessary for a useful career in life. But according to the Education Code now in operation to which it is permissible to refer for ascertaining the effect of the impugned provisions on existing state of affairs, the scholars of unrecognised schools are not permitted to avail themselves of the opportunities for higher education in the university and are not eligible for entering the public services. Without recognition, therefore, the educational institutions established or to be established by the minority communities cannot fulfil the real objects of their choice and the rights under Article 30(1) cannot be effectively exercised. The right to establish educational institutions of their choice must, therefore, mean the right to establish real institutions which will effectively serve the needs of their community and the scholars who resort to their educational institutions. There is, no doubt, no such thing as fundamental right to recognition by the State but to deny recognition to the educational institutions except upon terms tantamount to the surrender of their constitutional right of administration of the educational institutions of their choice is in truth and in effect to deprive them of their rights under Article 30(1)."]; Milli Talimi Mission v. State of Bihar, (1984) 4 SCC 500 [4] PART D

(vi) publish the results of the examination; and (vii) to provide for research and training in any branch of Madarsa education.

64. Section 10 empowers the Board to: (i) cancel an examination or withhold the result of an examination; (ii) prescribe fees for conducting examinations; (iii) refuse recognition to institutions that do not fulfil the standards of staff, instructions, equipment, or buildings laid down by the Board; (iv) withdraw recognition to an institution not able to adhere to the standards of staff,

instructions, equipment, or buildings laid down by the Board; and (v) inspect an institution to ensure due observance of the prescribed courses of study and facilities for instruction.

65. The legislative scheme of the Madarsa Act suggests that it has been enacted to regulate the standard of education in Madarsas recognized by the Board for imparting Madarsa education. The Madarsa Act grants recognition to Madarsas to enable students to sit for an examination and obtain a degree, diploma, or certificate conferred by the Board. The statute envisages granting recognition to Madarsas which fulfil the prescribed standards for staff, instructions, equipment and buildings. The grant of recognition imposes a responsibility on the Madarsas to attain certain standards of education laid down by the Board. Access to quality teachers, course materials, and equipment will allow Madarsa students to achieve stipulated educational and professional standards. 87 Frank Anthony Public School Employees' Association v. Union of India, (1986) 4 SCC 707 [16] ["16. The excellence of the instruction provided by an institution would depend directly on the excellence of the teaching staff, and in turn, that would depend on the quality and the contentment of the teachers. Conditions of service pertaining to minimum qualifications of teachers, their salaries, allowances and other conditions of service which ensure security, contentment and decent living standards to teachers and which will consequently enable them to render better service to the institution and the pupils cannot surely be said to be violative of the fundamental right guaranteed by Article 30(1) of the Constitution."] PART D Failure of the Madarsas to maintain the standards of education will result in the withdrawal of their recognition.

66. In Bihar State Madarasa Education Board v. Madarasa Hanfia Arabic College,88 the State legislature enacted the Bihar State Madarasa Education Board Act 1982 to constitute an autonomous State Madarasa Education Board to grant recognition, aid, and to supervise and control the academic efficiency in the Madarsas aided and recognized by it. Section 7(2)(n) of the legislation empowered the Board to dissolve the managing committee of a Madarsa for non-compliance with its directions. The issue before this Court was whether the provision was violative of Article 30(1) of the Constitution. This Court observed that the State has the power to regulate the administration of minority educational institutions in the interests of educational needs and discipline of the institution. However, it was observed that the State has no power to frame rules to completely take over the management of such institutions by superseding or dissolving their management. Hence, Section 7(2)(n) was declared invalid for violating Article 30(1).

67. The other issue before this Court was whether a statutory Board established for recognition of minority educational institutions must only comprise of persons belonging to the minority community. It was held that there is no constitutional obligation that such a Board must exclusively consist of members belonging to the minority community. It was observed:

> "7. [...] Article 30(1) does not contemplate that an autonomous Educational Board entrusted with the (1990) 1 SCC 428 PART D duty of regulating the aided and recognised minorities institution, should be constituted only by persons belonging to minority community. Article 30(1) protects the minorities' right to manage and administer institutions established by them according to their choice, but while seeking aid and recognition for their institutions there is no constitutional obligation

> that the Board granting aid or recognition or regulating efficiency in minority institution should consist of members exclusively belonging to minority communities. In the instant case the constitution of the Board under Section 3 of the Act ensures that its members are only those who are interested in teaching and research of Persian, Arabic and Islamic studies. This provision fully safeguards the interest of Madarasa of the Muslim community."

68. The Madarsa Act allows the Board to prescribe curriculum and textbooks, conduct examinations, qualifications of teachers, and standards of equipment and buildings geared to ensure the maintenance of standards of education in Madarsas. The provisions of the Madarsa Act are reasonable because they subserve the object of recognition, that is, improving the academic excellence of students in the recognised Madarsas and making them capable to sit for examinations conducted by the Board. The statute also enables the students studying in the recognised Madarsas to pursue fields of higher education and seek employment.

69. Regulations pertaining to standards of education or qualification of teachers do not directly interfere with the administration of the recognized Madarsas. Such regulations are "designed to prevent maladministration of an educational institution". 89 The Madarsa Act does not directly interfere with the day-to-day Ahmedabad St Xavier's College Society (supra) [92] PART D administration of the recognized Madarsas. 90 Further, the provisions of the Madarsa Act are "conducive to making the institution an effective vehicle of education for minority community" without depriving the educational institutions of their minority character.

70. Fundamental rights consist of both negative and positive postulates. They require the State to restrain its exercise of power and create conducive conditions for the exercise of rights. 91 The essence of Article 30(1) is the recognition and preservation of different types of people, with diverse languages and different beliefs, while maintaining the basic principle of equality and secularism.92 In the spirit of positive secularism, Article 30 confers special rights on religious and linguistic minorities "because of their numerical handicap and to instil in them a sense of security and confidence". 93 The positive concept of secularism requires the State to take active steps to treat minority institutions on par with secular institutions while allowing them to retain their minority character. Positive secularism allows the State to treat some persons differently to treat all persons equally. 94 The concept of positive secularism finds consonance in the principle of substantive equality.

P A Inamdar (supra) [121] ["121. [...] the urge or need for affiliation or recognition brings in the concept of regulation by way of laying down conditions consistent with the requirement of ensuring merit, excellence of education and preventing maladministration. For example, provisions can be made indicating the quality of the teachers by prescribing the minimum qualifications that they must possess and the courses of studies and curricula. The existence of infrastructure sufficient for its growth can be stipulated as a prerequisite to the grant of recognition or affiliation. However, there cannot be interference in the day-to-day administration. The essential ingredients of the management, including admission of students, recruiting of staff and the quantum of fee to be charged, cannot be regulated."] Supriyo v. Union of India, 2023 SCC OnLine SC 1348 [158] T M A

Pai Foundation (supra) [160-161] T M A Pai Foundation (supra) [157] St Stephens College v. University of Delhi, (1992) 1 SCC 558 [97] ["97. The Constitution establishes secular democracy. The animating principle of any democracy is the equality of the people. But the idea that all people are equal is profoundly speculative. It is well said that in order to treat some persons equally, we must treat them differently. We have to recognise a fair degree of discrimination in favour of minorities. But it PART D

71. In Joseph Shine v. Union of India,95 one of us (Justice D Y Chandrachud) held that the notion of formal equality is contrary to the constitutional vision of a just social order. On the contrary, substantive equality is aimed at producing equality of outcomes through different modes of affirmative actions or state support. 96 Substantive equality is directed at eliminating individual, institutional and systemic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political, and cultural participation in society. 97 Enactment of special provisions or giving preferential treatment by the State allows the disadvantaged individual or community to overcome social and economic barriers and participate in society on equal terms. 98

72. The Madarsa Act secures the interests of the minority community in Uttar Pradesh because: (i) it regulates the standard of education imparted by the recognised Madarsas; and (ii) it conducts examinations and confers certificates to students, allowing them the opportunity to pursue higher education. The Madarsa Act is consistent with the positive obligation of the State to ensure that students studying in the recognised Madarsas attain a minimum level of competency which will allow them to effectively participate in society and earn is impossible to have an affirmative action for religious minorities in religious neutral way. In order to get beyond religion, we cannot ignore religion. We must first take account of religion. It is exactly in the spirit of these considerations that this Court in its advisory opinion in Kerala Education Bill case [1959 SCR 995 : AIR 1958 SC 956] recognised a fair degree of discrimination in favour of religious minorities. In this respect the Court seems to have acted on the same principle which is applied to socially and educationally backward classes, that is the principle of protective discrimination."] (2019) 3 SCC 39 Ravinder Kumar Dhariwal v. Union of India, (2023) 2 SCC 209 [37] Joseph Shine (supra) [171] Neil Aurelio Nunes v. Union of India, (2022) 4 SCC 1 [33] PART D a living. 99 Therefore, the Madarsa Act furthers substantive equality for the minority community.

73. The High Court erred in holding that a statute is bound to be struck down if it is violative of the basic structure. Invalidation of a statute on the grounds of violation of secularism has to be traced to express provisions of the Constitution. Further, the fact that the State legislature has established a Board to recognise and regulate Madarsa education is not violative of Article 14. The Madarsa Act furthers substantive equality.

e. Interplay of Article 21-A and Article 30

74. Article 21-A provides that the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine. It imposes a constitutional obligation on the State to impart elementary and basic education. Parliament enacted

the RTE Act to provide full-time elementary education of satisfactory and equitable quality to every child in pursuance of Article 21-A. The RTE Act seeks to provide a "quality education without any discrimination on economic, social, and cultural grounds." 100 Section 3 makes the right of children to free and compulsory education justiciable. 101 Ahmedabad St Xavier's College Society (supra) [145] (Justice K K Mathew and Justice Y V Chandrachud) State of Tamil Nadu v. K Shyam Sunder, (2011) 8 SCC 737 [21]; Bharatiya Seva Samaj Trust v. Yogeshbhai Ambalal Patel, (2012) 9 SCC 310 [26] Section 3, RTE Act PART D

75. In Society for Unaided Private Schools of Rajasthan v. Union of India, 102 a three-Judge Bench of this Court upheld the constitutional validity of the RTE Act. It further held that the statute applies to an aided school including a minority school receiving aid or grant to meet whole or part of its expenses from the appropriate Government or local authority. Subsequently, Parliament amended the RTE Act to exempt its application to Madarsas, vedic pathsalas and educational institutions primarily imparting religious instruction. 103

76. In Pramati Educational and Cultural Trust v. Union of India,104 a Constitution Bench had to determine the constitutional validity of Article 21-A. One of the issues before this Court was whether Article 21-A conflicts with Article 30. This Court held that the law enacted by Parliament under Article 21-A cannot abrogate the right of minorities to establish and administer schools of their choice. It held that application of the RTE Act to minority educational institutions, whether aided or unaided, "may destroy the minority character of the school."105 (2012) 6 SCC 1 [64] Section 1(4) and (5), RTE Act. [It reads:

> "[(4) Subject to the provisions of Articles 29 and 30 of the Constitution, the provisions of this Act shall apply to conferment of rights on children to free and compulsory education. (5) Nothing contained in this Act shall apply to Madrasas, Vedic Pathsalas and educational institutions primarily imparting religious instruction."] (2014) 8 SCC 1 Pramati Educational and Cultural Trust (supra) [55] ["55. When we look at the 2009 Act, we find that Section 12(1)(b) read with Section 2(n)(ii) provides that an aided school receiving aid and grants, whole or part, of its expenses from the appropriate Government or the local authority has to provide free and compulsory education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum of twenty-five per cent. Thus, a minority aided school is put under a legal obligation to provide free and compulsory elementary education to children who need not be children of members of the minority community which has established the school.

We also find that under Section 12(1)(c) read with Section 2(n)(iv), an unaided school has to admit into twenty-five per cent of the strength of Class I children belonging to weaker sections and disadvantaged groups in the neighbourhood. Hence, unaided minority schools will have a legal obligation to admit children belonging to weaker sections and disadvantaged groups in the neighbourhood who need not be children of the members of the minority community which has established the school. While discussing the validity of clause (5) of Article 15 of the Constitution, we

have held that members of communities other than the minority community which has established the school cannot be forced upon a minority institution because that may destroy the minority character of the school. In our view, if the 2009 Act is made applicable to minority schools, aided or unaided, the right of the minorities under Article 30(1) of the Constitution will be abrogated. Therefore, the 2009 Act insofar it is made applicable to minority schools referred in clause (1) of Article 30 of PART D Therefore, it held that the RTE Act is ultra vires the Constitution to the extent it applied to minority educational institutions.

77. The purpose of education is to provide for the intellectual, moral, and physical development of a child. A good education system is correlated to the social, economic, and political needs of our country. 106

78. Article 30(1) guarantees the right to establish and administer educational institutions of their choice to religious and linguistic minorities. However, the State has an interest in ensuring that the minority educational institutions impart secular education along with religious education or instruction. 107 The constitutional scheme allows the State to strike a balance between two objectives: (i) ensuring the standard of excellence of minority educational institutions; and (ii) preserving the right of the minority to establish and administer its educational institution. 108 The State generally strikes a balance by enacting regulations accompanying the recognition of minority educational institutions.

79. The High Court erred in holding that education provided under the 2004 Act is violative of Article 21A because (i) The RTE Act which facilitates the fulfilment of the fundamental right under Article 21 – A contains a specific provision by which it does not apply to minority educational institutions; (ii) The right of a the Constitution is ultra vires the Constitution. We are thus of the view that the majority judgment of this Court in Society for Unaided Private Schools of Rajasthan v. Union of India [(2012) 6 SCC 1] insofar as it holds that the 2009 Act is applicable to aided minority schools is not correct."] Maharashtra State Board of Secondary and Higher Secondary Education v. K S Gandhi, (1991) 2 SCC 716 [13] Ahmedabad St Xavier's College Society (supra) [138] (Justice K K Mathew and Justice Y V Chandrachud) P A Inamdar (supra) [122] PART E religious minority to establish and administer Madarsas to impart both religious and secular education is protected by Article 30; and (iii) the Board and the state government have sufficient regulatory powers to prescribe and regulate standards of education for the Madarsas.

E. Legislative Competence a. The Madarsa Act is within the legislative competence of the State under Entry 25, List III

80. The distribution of legislative powers is contained in Part XI of the Constitution.

Article 246(2) confers exclusive power on Parliament to make laws "with respect to" any of the matters enumerated in List I (the Union List) of the Seventh Schedule. Clause (1) is prefaced with a non-obstante provision which gives it precedence over Clauses (2) and (3). Article 246(2) enunciates the legislative principles with regard to List III (the Concurrent List) and states that both Parliament and State legislatures have concurrent powers of legislation "with respect to" the matters

enumerated in this list. This clause also begins with a non-obstante provision giving it precedence over clause (3). Finally, Article 264(3) states that the State Legislature has exclusive power to make laws on the matters enumerated in List II (the State List).

81. When the Constitution was enacted, the subject of "education" was part of List II (the State List) of the Seventh Schedule. This followed the scheme of distribution of powers in the Government of India Act 1935, whereby, the entry titled "Education" was placed in the Provincial List. At the time of the enactment of the Constitution, Entry 11 of List II read as follows:

> PART E "11. Education including universities, subject to the provisions of entries 63, 64, 65 and 66 of List I and entry 25 of List III."

82. At this time, Entry 25 of List III read as follows:

> "25. Vocational and technical training of labour."

83. With effect from 3 January 1977, by the Constitution (Forty-Second Amendment Act) 109, Entry 11 of List II was omitted, and Entry 25 of List III was amended to account for it. In other words, the legislative entry pertaining to "education" was moved from the State List to the Concurrent List. Entry 25, List III now reads as follows:

> "25. Education, including technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour."

84. To address the contention raised by the respondents regarding the legislative competence of the state legislature, the following settled principles governing the interpretation of the entries in the Seventh Schedule are relevant110:

> a. The entries are legislative heads and not sources of legislative powers. The legislative entries use general words to define and delineate the legislative powers of Parliament and State legislatures, and the words should receive their ordinary, natural, and grammatical meaning; Constitution (Forty-second Amendment) Act, 1976, s. 57 (w.e.f. 3-1-1977). Mineral Area Development Authority & Anr. vs Steel Authority of India & Anr, 2024 INSC 554 [40-42] PART E b. The legislative entries should not be read in a narrow or pedantic sense but must be given their "broadest meaning and the widest amplitude". The ambit of the entries extends to all ancillary and subsidiary matters which can fairly and reasonably be said to be comprehended in them; c. There is a possibility of an overlap and conflict between two or more entries. In such cases, the doctrine of pith and substance comes into play to determine whether the legislature in question has the competence to enact a law;
>
> d. There may arise situations where a legislature may frame a law that in substance and reality transgresses its legislative competence. Such a piece of legislation is called

> "colourable legislation". The substance of the legislation is material. If the subject matter is in substance beyond the legislative powers of the legislature, the form in which the law is clothed would not save it from being declared unconstitutional; and
> e. In certain entries, such as Entry 25 in List III, the Constitution uses specific expressions such as "subject to" in order to resolve potential overlaps between entries in the three lists. This is used in cases where the Constitution stipulates that the exercise of power traceable to certain legislative entries overrides the exercise of power traceable to another entry in a different list.

85. The provisions of the Madarsa Act seek to "regulate" Madarsas. These are educational institutions run by a religious minority. There is a distinction between "religious instruction" and "religious education". While the Madarsas PART E do impart religious instruction, their primary aim is education. Legislative entries must be given their widest meaning, and their ambit also extends to ancillary subjects which may be comprehended within the entry. The mere fact that the education which is sought to be regulated includes some religious teachings or instruction, does not automatically push the legislation outside the legislative competence of the state.

86. Article 28 is titled "Freedom as to attendance at religious instruction or religious worship in certain educational institutions". Article 28(1) states that no religious instruction shall be provided in any educational institution wholly maintained out of State funds. Article 28(3) provides that no person who is attending any educational institution recognised by the state or receiving aid out of state funds shall be compelled to take part in religious instruction or attend religious worship without their consent. The corollary to this provision is that religious instruction may be imparted in an educational institution which is recognized by the state, or which receives state aid but no student can be compelled to participate in religious instruction in such an institution. However, the dissemination of religious instruction does not change its fundamental character as an institution that imparts education. To read Entry 25, List III in the manner proposed by the respondent, would render it inapplicable to all legislation which deal with any institution "established and administered" by minorities, which may provide some religious instruction. This runs contrary to the constitutional scheme in Article 30, which recognizes the right of minorities to establish and administer educational institutions. Merely because an educational institution is run by a minority or even a majority community and professes some of its teachings, PART E does not mean that the teachings in such institutions fall outside the ambit of the term "education".

87. In fact, reference was made to an eleven-judge bench of this Court in T.M.A. Pai Foundation v. State of Karnataka, 111 on the "scope of the right of minorities to establish and administer educational institutions of their choice under Article 30(1) read with Article 29(2)" in view of the inclusion of Entry 25 in List III of the seventh schedule. 112 One of the questions before this Court was whether the "minority status" of an institution under Article 30(1) would be determined with the unit being the state or the entire country, since both the state and the union can legislate on the subject of "education". Therefore, it is beyond the pale of doubt that the regulation of minority institutions was assumed to fall within the ambit of Entry 25, List III by an eleven-judge bench of this Court.

88. Further, Entry 25, List III itself provides specific carve-outs. The entry is subject to entries 63, 64, 65 and 66 of List I. None of these entries in the Union List seek to regulate 'religious education'. Further, Mr Guru Krishna Kumar, Senior Counsel has not indicated any other entry in List I with which there is a conflict so as to indicate that the legislation is a "colourable legislation" within the competence of the Parliament and not within the competence of the state legislature.

(2002) 8 SCC 481.

Ibid [3-4].

PART E

89. With respect to the concurrent exercise of power by the State Legislature and the Parliament with respect to matters in List III (the Concurrent List), the Constitution also provides for the doctrine of repugnancy to resolve inconsistencies between laws made by the Parliament and the state legislatures. 113 In such cases, the law made by the State legislature gives way to the law made by the Parliament, subject to certain exceptions. 114 In the present instance, the question of repugnancy does not even arise as there is no central law which purports to regulate the functioning of Madarsas. As noted above, the RTE Act, which is the legislation framed by Parliament pursuant to Entry 25, specifically states that it is inapplicable to Madarsas, and thus, there is no issue of a conflict or repugnancy between the two Acts.

90. In view of the above, there is no jurisprudential basis to read Entry 25, List III to be limited to only education that is devoid of any religious teaching or instruction and to contend that the Madarsa Act (in its entirety) which seeks to regulate the functioning of Madarsas in Uttar Pradesh is outside the competence of the state legislature. The challenge on the ground of legislative competence fails. b. Certain provisions of the Madarsa Act conflict with the UGC Act enacted under Entry 66, List I Article 254, Constitution of India.

Forum for People's Collective Efforts v. State of W.B., (2021) 8 SCC 599 [116] PART E

91. As noted above, Entry 25 of List III has been made subject to certain entries in List I. One of these entries is Entry 66 of List I, which reads as follows:

> "66. Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions."

92. In Mineral Area Development Authority & Anr. vs. Steel Authority of India & Anr. 115, a Constitution Bench of this Court had occasion to observe the purport of the legislative entries in List II using the phrase "subject to" in the following terms:

> "44. Where the entries have used the phrase "subject to", the legislative power of the State is made subordinate to Parliament with respect to either the Union List or the Concurrent List. The expression "subject to" conveys the idea of a provision yielding

> place to another provision or other provisions to which it is made subject. Therefore, where the Constitution intends to displace or override the legislative powers of the States, it has used specific terminology – "subject to". However, the Constitution has also indicated the extent to which a particular legislative entry under List II is subordinated. For instance, the subjection is either with respect to provisions of List I or List III, or it can also be to the extent of "any limitations" imposed by Parliament by law. Thus, it is imperative that the entries in List II must be read and interpreted in their proper context to understand the extent of their subordination to Union powers." (emphasis supplied) 2024 INSC 554.
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> PART E

93. The UGC Act has been enacted by Parliament pursuant to Entry 66 and seeks to make provisions for the "co-ordination and determination of standards in Universities and for that purpose, to establish a University Grants Commission." 116 The Madarsa Act has been enacted pursuant to Entry 25 of List III. This Court has held in a consistent line of precedent that the UGC Act occupies the field with regard to the coordination and determination of standards in higher education. Therefore, state legislation which seeks to regulate higher education, in conflict with the UGC Act, would be beyond the legislative competence of the State legislature. 117

94. In Prof. Yashpal & Anr vs. State of Chhattisgarh,118 a three-Judge Bench of this Court adjudicated on the constitutionality of the provisions of a state legislation in Chhattisgarh, which inter alia, granted the state government the power to recognise and establish universities, which offered degrees that were not recognised by the UGC. The state relied on Entry 32 of List II which pertains to the incorporation of universities and Entry 25 of List III, to justify the legislative competence of the state legislature. This Court declared that the provisions of the state legislation which conflict with the provisions of the UGC Act are unconstitutional as the UGC Act was validly enacted by Parliament under Entry 66 of List I. After considering the consistent line of precedent on this question, this Court observed thus:

> Long Title, UGC Act.
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> Osmania University Teachers' Association vs. State of Andhra Pradesh, (1987) 4 SCC 671; Dr Preeti Srivastava and another vs. State of M.P., (1999) 7 SCC 120; Prof. Yashpal & Anr vs. State of Chhattisgarh, (2005) 5 SCC 420; Annamalai University, Represented by Registrar vs. Secretary to Government, Information and Tourism Department, (2009) 4 SCC 590; Kalyani Mathivanan versus K.V. Jeyaraj, (2015) 6 SCC 363.
>
> (2005) 5 SCC 420 PART E "45. The State Legislature can make an enactment providing for incorporation of universities under Entry 32 of List II and also generally for universities under Entry 25 of List III. The subject "university" as a legislative head must be interpreted in the same manner as it is generally or commonly understood, namely, with proper facilities for teaching of higher level and

> continuing research activity. An enactment which simply clothes a proposal submitted by a sponsoring body or the sponsoring body itself with the juristic personality of a university so as to take advantage of Section 22 of the UGC Act and thereby acquires the right of conferring or granting academic degrees but without having any infrastructure or teaching facility for higher studies or facility for research is not contemplated by either of these entries. Sections 5 and 6 of the impugned enactment are, therefore, wholly ultra vires, being a fraud on the Constitution.

46. [...] The impugned Act which enables a proposal on paper only to be notified as a university and thereby conferring the power upon such university under Section 22 of the UGC Act to confer degrees has the effect of completely stultifying the functioning of the University Grants Commission insofar as these universities are concerned. Such incorporation of a university makes it impossible for UGC to perform its duties and responsibilities of ensuring coordination and determination of standards. In the absence of any campus and other infrastructural facilities, UGC cannot take any measures whatsoever to ensure a proper syllabus, level of teaching, standard of examination and evaluation of academic achievement of the students or even to ensure that the students have undergone the course of study for the prescribed period before the degree is awarded to them."

95. Section 22 of the UGC Act pertains to the right to confer degrees and reads as follows:

> "22. Right to confer degrees – (1) The right of conferring or granting degrees shall be exercised only by a University established or incorporated by or under a Central Act, a Provincial Act or a State Act or an institution deemed to be a University under section 3 or PART E an institution specially empowered by an Act of Parliament to confer or grant degrees.
>
> (2) Save as provided in sub-section (1), no person or authority shall confer, or grant, or hold himself or itself out as entitled to confer or grant, any degree. (3) For the purposes of this section, "degree' means any such degree as may, with the previous approval of the Central Government, be specified in this behalf by the Commission by notification in the official Gazette."

96. Sub-section (1) expressly restricts the right to confer or grant degrees to (i) universities established or incorporated by a Central or State statute; or (ii) an institution deemed to be a university under Section 3; 119 or (iii) an institution specially empowered by an Act of Parliament to confer degrees. Sub-section (2) provides the same in the negative and stipulates that no person or authority, except those stipulated in sub-section (1) is entitled to confer or grant a degree or present himself as entitled to confer or grant a degree. Sub-section (3) provides that, for the application of Section 22, "degree" includes those degrees which are specified in this regard by the UGC by a notification issued in the Official Gazette, after previous approval of the Central Government.

97. During the course of the hearing, in response to queries posed by this Court, the Standing Counsel for the UGC clarified on instructions that the notification referred to in sub-section (3) of Section 22 has been issued. The latest notification in this regard, which currently holds the field, was

issued by the UGC Section 3 reads: "Application of Act to institutions for higher studies other than Universities – The Central Government may, on the advice of the Commission, declare by notification in the Official Gazette, that any institution for higher education, other than a University, shall be deemed to be a University for the purposes of this Act, and on such a declaration being made, all the provisions of this Act shall apply to such institution as if it were a University within the meaning of clause (f) of section 2" PART E in March 2014. 120 The notification lists the nomenclature of all the degrees which fall within the ambit of Section 22 of the UGC Act. Under the title of 'Specification of Degrees with Urdu/Persian/Arabic nomenclature', the following degrees are specified:

98. Section 9 of the Madarsa Act specifies the functions of the Board under the Madarsa Act. Several of these functions pertain to the regulation of the Fazil and Kamil degrees, which correspond to a bachelor's level and a post-graduate degree, respectively. In particular, the following provisions deal with regulating these higher education degrees:

> a. Sub-clause (a) empowers the Board to prescribe courses of instructions, textbooks and other material for inter alia the Kamil and Fazil courses; b. Sub-clause (e) empowers the Board to grant degrees, diplomas, certificates and academic distinctions to those who have either studied in institutions NO. F. 5-1/2013 (CPP-II).
>
> PART E recognized by the board or studied privately under the conditions mandated by regulations and passed an examination conducted by the Board; c. Sub-clause (f) empowers the Board to conduct the examinations of inter alia the Kamil and Fazil courses. Sub-clauses (g), (h) and (j) further empower the Board to recognize institutions for the purpose of examinations, admit candidates for the examinations, and publish or withhold the publication of the examination results; and d. Sub-clause (o) empowers the Board to carry out all acts which are required to further the object of the Board, which is a body constituted to regulate and supervise "Madrasa-Education up to Fazil". Pursuant to the above provisions, several provisions in the Regulations framed by the Board also seek to regulate the Kamil and Fazil courses and degrees.

99. The Madarsa Act to the extent to which it seeks to regulate higher education, including the 'degrees' of Fazil and Kamil, is beyond the legislative competence of the State Legislature since it conflicts with Section 22 of the UGC Act. Entry 25 of List III, pursuant to which the Madarsa Act has been enacted, has been expressly made subject to Entry 66 of List I. The UGC Act governs the standards for higher education and a state legislation cannot seek to regulate higher education, in contravention of the provisions of the UGC Act. c. The entire Madarsa Act need not be struck down on the above ground

100. In the foregoing sections of this Judgment, we have upheld the constitutionality of the Madarsa Act on various grounds, that were urged before the High Court and subsequently, before this Court. However, certain provisions PART E of the Madarsa Act which pertain to the regulation of higher

education and the conferment of such degrees have been held to be unconstitutional on the ground of lack of legislative competence. Thus, the question that arises is whether the entire legislation must be struck down on this ground. In our view, it is in failing to adequately address this question of severability that the High Court falls into error and ends up throwing the baby out with the bathwater.

101. The entire statute does not need to be struck down each time that certain provisions of the statute are held to not meet constitutional muster. The statute is only void to the extent that it contravenes the Constitution. This position may be derived from the text of Article 13(2) itself, which states:

> "(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

102. Although Article 13(2) upholds this proposition in the context of laws which abridge the fundamental rights in Part III, the same doctrine is equally applicable to provisions of a statute which are set aside on the ground of lack of legislative competence. This position has also been affirmed by a steady line of precedent of this Court. We may helpfully refer to the observations in the locus classicus on the subject. In R.M.D. Chamarbaugwalla v. Union of India121, a Constitution bench of this Court adjudicated on the constitutionality of certain provisions of the Prize Competitions Act, 1956 and its allied rules. This Court, speaking through Justice TL Venkatarama Ayyar, had occasion to 1957 SCC OnLine SC 11.

PART E lay down the contours of the doctrine of severability and held that when a statute is in part void, it will be enforced as regards the rest, if that part is severable from what is invalid. It was clarified that it is immaterial whether the invalidity of the statute arises by reason of its subject matter being outside the competence of the legislature or by reason of its provisions contravening other constitutional provisions. To determine whether the specific provisions or the portion of the statute which is invalid is severable from the rest of the statute, this Court adopted certain rules of construction, which are as follows:

> "22. […]
>
> 1. In determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor. The test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid. […]
>
> 2. If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety.

On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable. [...]

3. Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole. [...]

4. Likewise, when the valid and invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety.

5. The separability of the valid and invalid provisions of a statute does not depend on whether the law is PART E enacted in the same section or different sections;

[...] it is not the form, but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provision therein.

6. If after the invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void, as otherwise it will amount to judicial legislation. [...]

7. In determining the legislative intent on the question of separability, it will be legitimate to take into account the history of the legislation, its object, the title and the preamble to it. [...] (emphasis supplied)

103. Having already disagreed with the High Court on the question of whether the entire Madarsa Act suffers from an infirmity on the principle of secularism and other contentions, the only infirmity lies in those provisions which pertain to higher education, namely Fazil and Kamil. These provisions can be severed from the rest of the Madarsa Act. As noted earlier, the purpose behind the Madarsa Act was to remove the difficulties in running the Madarsas, improve their merit and provide adequate facilities to students studying in these institutions. The purpose was not limited to only regulating Fazil and Kamil, and the legislature would have still enacted the statute if it were aware that the portions pertaining to higher education were invalid. Further, if the provisions relating to higher education are separated from the rest of the statute, the Act can continue to be enforced in a real and substantial manner. On an examination of the Madarsa Act, it is clear that prescribing the instructional material, conducting exams and conferring degrees for Fazil and Kamil were only a part of the functions of the Board. The severance of these functions from PART F the Board does not impact its entire character. Thus, only the provisions which pertain to Fazil and Kamil are unconstitutional, and the Madarsa Act otherwise remains valid.

F. Conclusion

104. In view of the above discussion, we conclude that:

a. The Madarsa Act regulates the standard of education in Madarsas recognized by the Board for imparting Madarsa education; b. The Madarsa Act is consistent with the positive obligation of the State to ensure that students studying in recognised Madarsas attain a level of competency which will allow them to effectively participate in society and earn a living;

c. Article 21-A and the RTE Act have to be read consistently with the right of religious and linguistic minorities to establish and administer educational institutions of their choice. The Board with the approval of the State government can enact regulations to ensure that religious minority institutions impart secular education of a requisite standard without destroying their minority character;

d. The Madarsa Act is within the legislative competence of the State legislature and traceable to Entry 25 of List III. However, the provisions of the Madarsa Act which seek to regulate higher-education degrees, such as Fazil and Kamil are unconstitutional as they are in conflict with the UGC Act, which has been enacted under Entry 66 of List I. PART F

105. The judgment of the High Court of Judicature at Allahabad dated 22 March 2024 is accordingly set aside and the petitions shall stand disposed of in the above terms.

106. Pending applications, if any, stand disposed of.

... ... CJI [Dr Dhananjaya Y Chandrachud] .....J [J B Pardiwala] .....J [Manoj Misra]
New Delhi;

November 05, 2024.