IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO .... OF 2020

(PIL UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

IN THE MATTER OF:

Ashwini Kumar Upadhyay

Verses ...Petitioner

1. Union of India
   Through the Secretary,
   Ministry of Home Affairs,
   North Block, New Delhi-110001,
2. Union of India
   Through the Secretary,

Ministry of Law & Justice (Legislative Department) Shastri Bhawan, New Delhi-110001,

3. Union of India
   Through the Secretary,
   Ministry of Minority Affairs,
   CGO Complex, New Delhi-110003, ...Respondents

PIL UNDER ARTICLE 32 TO CHALLENGE THE VALIDITY OF SECTION 2(F) OF THE NCMEI ACT 2004 FOR BEING MANIFESTLY ARBITRARY AND CONTRARY TO ARTICLES 14, 15, 21, 29 AND 30 OF THE CONSTITUTION

To,

THE HON'BLE CHIEF JUSTICE

AND LORDSHIP'S COMPANION JUSTICES

OF THE HON'BLE SUPREME COURT OF INDIA

HUMBLE PETITION OF ABOVE-NAMED PETITIONER

THE MOST RESPECTFULLY SHOWETH AS THE UNDER:

1. Petitioner is filing this PIL under Article 32 to challenge the validity of Section 2(f) of the NCMEI Act 2004, for not only giving unbridled power to the Centre but also being manifestly

arbitrary, irrational & offending Articles 14, 15, 21, 29 and 30 of the Constitution of India.

2. Petitioner has not filed any other petition either in this Court or in any other Court seeking same or similar directions as prayed.

3. Petitioner's full name is Ashwini Kumar Upadhyay. Residence at:

4. The facts constituting cause of action accrued on 06.01.2005, when the Act came into effect and by using unbridled power under S. 2(F), Centre arbitrarily notified 5 communities viz. Muslims, Christians, Sikhs, Buddhists and Parsee as minority at national level against the spirit of TMA Pai ruling. Cause of action continues till date because followers of Judaism, Bahaism & Hinduism; who are real minorities in Laddakh, Mizoram, Lakshdweep, Kashmir, Nagaland, Meghalaya, Arunachal Pradesh, Punjab, Manipur, cannot establish & administer educational institutions of their choice because of non-identification of 'minority' at State level, thus jeopardizing their basic rights guaranteed under Article 29-30. Their right under Articles 29-30 is being siphoned off illegally to the majority community in the State because Centre has not notified them 'minority' under NCMEI Act.

Followers of Judaism, Bahaism & Hinduism are being deprived of their basic rights to establish & administer educational institutions of their choice. On the other hand, Muslims are in majority in Lakshdweep (96.58%) & Kashmir (96%) and there is significant population in Laddhakh (44%), Assam (34.20%), Bengal (27.5%), Kerala (26.60%), UP (19.30%) & Bihar (18%); can establish & administer educational institutions of their choice. Christians are majority in Nagaland (88.10%), Mizoram (87.16%) and Meghalaya (74.59%), and there is significant population in Arunachal, Goa, Kerala, Manipur, Tamil Nadu & West Bengal, can also establish & administer. Likewise, Sikhs are majority in Punjab and there is large population in Delhi, Chandigarh, Haryana, but, they can establish & administer. Similarly Buddists are majority in Laddakh but they can establish & administer educational institutions of their choice.

5. The injury caused to the followers of Judaism, Bahaism & Hinduism is large because S. 2(f) is manifestly arbitrary irrational & contrary to Articles 14, 15, 21, 29 & 30. Hindus are merely 1% in Laddakh, 2.75% in Mizoram, 2.77% in Lakshdweep, 4% in Kashmir, 8.74% in Nagaland, 11.52% in Meghalaya, 29% in Arunachal Pradesh, 38.49% in Punjab, 41.29% in Manipur but Centre has not declared

them ‘minority’, thus Hindus are not protected Articles 29-30 and cannot establish & administer educational institution of their choice. On the other hand, by using unbridled power under the Act, Centre has arbitrarily declared Muslims as minority, who are 96.58% in Lakshdweep, 95% in Kashmir, 46% in Laddakh. Similarly, Centre has declared Christians as minority, who are 88.10% in Nagaland, 87.16% in Mizoram & 74.59% in Meghalaya. Hence, they can establish and administer educational institution of their choice. Likewise, Sikhs are 57.69% in Punjab and Buddhists are 50% in Laddakh and they can establish & administer educational institution of the their choice but not the followers of Bahaism and Judaism, who are merely 0.1% and 0.2% respectively at national level. Therefore, Section 2(f) of the NCMEI Act, which gives unbridled power to the Centre, is manifestly arbitrary, irrational & contrary to Articles 14, 15, 21, 29, 30 of the Constitution.

6. Petitioner has no personal interests, individual gain, private motive or oblique reasons in filing this PIL. It is not guided for gain of any other individual person, institution or body.

7. There is no civil, criminal or revenue litigation, involving petitioner, which has/could have legal nexus, with issue involved in this PIL.

8. Petitioner has not submitted any representation to the respondents because issue involved is the interpretation of the Constitution.

9. There is no requirement to move any government authority for the relief sought in this PIL. There is no other remedy available except approaching this Hon'ble Court by way of the PIL under Article 32.

10. Amongst the questions which were formulated for answer by the eleven judges Bench in TMA Pai Case [2002 (8) SCC 481], the most important was: *"What is the meaning and content of the expression 'minority' in Article 30 of the Constitution of India?"* The answer in the opinion of majority in the Bench of eleven judges, speaking through Justice Kirpal, CJ (as he then was) is quoted hereinafter: *"Linguistic and religious minorities are covered by the expression 'minority' under Article 30 of the Constitution. Since reorganization of the States has been on linguistic lines, therefore, for the purpose of determining the minority, the unit will be State and not whole India. Thus, religious and linguistic minorities, who have been put on a par in Article 30, have to be considered state wise"*.

11. In exercise of the unbridled powers conferred by Section 2(C) of the NCM Act, the Central Government through the Notification

dated 23.10.1993 arbitrarily notified five communities viz. Muslims,

Christians, Sikhs, Buddhists and Parsis as ‘minority’ community, without defining ‘minority’ and framing guidelines for identification at State level. In 2014, Jains were added in the list as sixth minority, though the three judges bench of this Hon’ble Court in Bal Patil Case had very categorically refused to grant minority status to Jains.

12. It is pertinent to state that after the judgment in TMA Pai Case, [(2002) 8 SCC 481] the legal position is very clear that the unit for determining status of linguistic and religious minorities would be State. This position is doubly clear not only from the answer given in conclusion to Question No-1 but also the observations contained in paras 76 and 81 of the majority judgment quoted hereinafter:

*"**76.** If, therefore, the State has to be regarded as the unit for determining "linguistic minority" vis-a-vis Article 30, then with "religious minority" being on same footing, it is the State in relation to which the majority or minority status will have to be determined.*

***81.** As a result of the insertion of Entry 25 into List III, Parliament can now legislate in relation to education, which was only a State subject previously. The jurisdiction of Parliament is to make laws for the whole or a part of India. It is well recognized that geographical classification is not violative of Article 14. It would, therefore, be*

possible that, with respect to a particular State or group of States, Parliament may legislate in relation to education. However, Article 30 gives the right to a linguistic or religious minority of a State to establish and administer educational institutions of their choice. The minority for the purpose of Article 30 cannot have different meanings depending upon who is legislating. Language being the basis for the establishment of different States for the purposes of Article 30, a "linguistic minority" will have to be determined in relation to the State in which the educational institution is sought to be established. The position with regard to the religious minority is similar, since both religious and linguistic minorities have been put on a par in Article 30."

13. The Judgment in the TMA Pai Case is law of the land; hence, the identification of religious and linguistic ‘minority’ has to be done on State only and Centre has to exercise its power under NCM Act & NCMEI Act, not merely on the advice and recommendation of the National Commission for Minorities but also on consideration of social cultural and religious conditions of the community in each State. Religious and linguistic minorities for the purposes of Articles 29-30 must be determined State-wise countenancing numeric

proportions of various groups and communities in each State. However, despite the above unequivocal position of law, the Centre has completely failed to apply the above principle evenly by excluding not only Hindus but also the followers of Bahaism and Judaism from the purview of 'minority' status under Section 2(C) of the NCM Act and Section 2(F) of the NCMEI Act.

14. Petitioner respectfully submits that for purpose of notifying a community as 'minority', Centre is empowered to consider claim of a particular community for being notified as such under S. 2(C) of the NCM Act and S. 2(F) of the NCMEI Act, and cannot shirk its statutory responsibility. The legal position explained by the majority view in the TMA Pai Case that States can determine the minority status of a community, does not render the power of Centre under Section 2(C) of the NCM Act and Section 2(F) of the NCMEI Act.

15. It is respectfully submitted that denial of minority rights to the real minorities and arbitrary and unreasonable disbursement of minority benefits to the absolute majority, infringes upon the fundamental right to prohibition of discrimination on the grounds of religion race caste sex and place of birth [Article 15]; impairs the right to equality of opportunity in the matters related to public

employment [Article 16]; and offends freedom of conscience and right to freely profess practice and propagate religion [Article 25]. It also erodes the obligation of the State 'to endeavour to eliminate inequalities in status facilities opportunities' [Article 38]. Therefore, this Hon'ble Court may declare Section 2(c) of the NCM Act 1992 and Section 2(f) of the NCMEI Act 2004 void and unconstitutional.

16. Article 30 inter-alia states that minorities whether based on religion or language shall have the right to establish-administer educational institutions of their choice, but, the question is, to whom is this article applicable? There are around 300 religions in the world and around 30 exist in India as well. Can every single one of them be considered as a religious minority under Articles 29-30? If yes, then why not Centre has declared the followers of Bahaism and Judaism, as minority under the NCM and NCMEI Act?

17. The Preamble proclaims to guarantee every citizen '*liberty of thought, expression, belief, faith, worship'*. Articles 25-30 guarantee protection of religious, cultural, educational rights to both- majority and minority communities. Keeping in view the constitutional guarantees for protection of cultural, educational & religious rights of every citizen, 'minority' was not defined and instead of clearly

defining ‘minority’ in the background of the constitutional scheme, Section 2(c) of the NCM Act and Section 2(f) of the NCMEI Act gives power to the Centre to notify any community as ‘minorities’, who might require special protection of religious, cultural & educational rights. Language of Section 2(C) of the NCM Act and Section 2(f) of the NCMEI Act is same and by using unbridled power under the Act, Centre arbitrarily notified 5 communities as minority on 23.10.1993.

18. Articles 14, 15, 19, 21 are golden corners of our constitution. Therefore, Centre cannot arbitrarily grant minority status. Framers never contemplated to create a National Minority Commission and Minority Affair Ministry on religion basis. Articles 25-30 guarantee cultural religious freedoms to majority & minority both. Moreover, unity & integrity is the goal of our Constitution. Hence, concept of religious minority at national level is very dangerous for unity and national integration. For the purpose of S.2(C) of the NCM Act and S.2(f) of the NCMEI Act, minority should be identified at State level in spirit of the Judgments in TMA Pai Case and Bal Patil Case.

19. Article 29 is assumed to relate to minorities but scope is not confined. It is available to ‘*any section of the citizens residing in the territory of India or any part thereof having distinct language script*

or culture'. Hence, may include the majority also, as Ray, CJ pointed out in Ahmedabad St. Xaviers Case [(1974) 1 SCC 717]. 'Minority' is *"a group or community, which is socially economically politically non-dominant, inferior in population and deserves protection from likely deprivation of their religious, cultural and educational rights by the majority communities, who are likely to gain political power in a democratic form of government based on election"*.

20. Although the word 'minorities' occurs in the marginal note of Article 29, it does not occur in the text. The original proposal of the Advisory Committee in Constituent Assembly recommended thus: *"(1) Minorities in every unit shall be protected in respect of their language, script and culture and no laws or regulations may be enacted that may operate oppressively or prejudicially in this respect."* [B. Siva Rao, "Select Documents" (1957) Vol. 2, Page 281] But after the clause was considered by the Drafting Committee on 1st November 1947, it emerged with substitute of 'section of citizens'. [B. Siva Rao, Select Documents (1957) Vol. 3 pages 525-26, clause 23, Draft Constitution]. It was explained that the intention had always been to use 'minority' in a wide sense, so as to include (for example) Maharastrians who settled in Bengal. [7 CAD 923]

21. In Article 30(1), crucial words are: (a) minorities (b) establish and administer (c) educational institutions (d) of their own choice but the word 'minority' has not been defined in the Constitution. Motilal Nehru Report (1928) showed a prominent desire to afford protection to minorities but did not define the expression. Sapru Report (1945) also proposed, a Minority Commission but did not define minority [The Year Book on Human Right (1950), pg. 490].

22. The UN Sub-Commission on Prevention of Discrimination & Protection of Minorities has define 'minority' (by inclusive definition) thus: *(i) The term 'minority' includes only those non-document group in a population, which possess and which to preserve stable ethnic religious linguistic tradition or characteristics different from those of the rest of the population; (ii) such minorities should properly include a number of person sufficient by themselves to preserve such tradition or characteristics; and (iii) such minorities must be loyal to the State, which they are nationals.*

23. Article 27 of the International Covenant on Civil and Political Rights does not define the expression but give the rights as under: *"In those States, in which ethnic, religious or linguistic minorities exists, persons belonging to such minorities shall not be denied the*

right in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion or to use their own language".

24. After partition, Muslims & Christians, living in different parts, opted to continue to live in India. Therefore, at the time of giving final shape to the Constitution, framers felt it necessary to allay apprehensions & fears in their mind by providing special protection of religious, cultural, educational rights. At that time such protection was found necessary. The framers accepted common citizenship regardless of religion language culture faith and engrafted Articles 25-30 to give security to all and not for the appeasement to some.

25. The Constitution of India is by the Indians and for the Indians. Globally, there are 6000 plus languages. Can we consider Chinese or French speaking person a linguistic minority? If yes, then India would end up having 60+ linguistic minorities. Linguistic minorities are identified at State level & only Indian languages are considered for protection under Articles 29-30. A Hindi speaking person is linguistic minority in Kerala and Tamil speaking in Bihar. The same notion may follow for religious minorities too and only India originated religions may be considered as religious minority.

Petitioner submits that ‘minority’ means a ‘socially economically politically non-dominant’ group, which is inferior in population. It is relative term, represent very inferior numbers, sections or group.

26. **VIOLATION OF ARTICLE 14 OF CONSTITUTION:** In exercise of the unbridled powers conferred by the Act, Centre has notified Muslims, Christians, Sikhs, Buddhists Parsis & Jian as ‘Minority’ community without any study research and homework. The classification of religious minorities by the Center at pan India level has not only created a wave of inequality across different States but also encouraged those who did not belong to that minority religion, to convert themselves for the social, political and economic benefits. This Hon’ble Court through seven judges bench in State of Kerala & anr vs. N. M. Thomas & Ors [1976 SCR (1) 906] held that the classification must be a reasonable and fulfill 3 conditions: ***(i)*** *it must have a rational basis (intelligible criterion)* ***(ii)*** *it must have a close nexus with object sought to be achieved;* ***(iii)*** *it should not select person for hostile discrimination at cost of others.*

27. Rational basis of declaring certain religions as minority by Central Government as they have less population in the States is contravened when benefits of schemes for minority are acquired by

those religious minorities in States where they are in majority and those religious communities who are actually minorities are not been given equal status. The Muslims having majority in Lakshdeep and J&K, Sikhs having majority in Chandigarh and Haryana and Christians having majority in Mizoram, Meghalaya and Nagaland are still receiving minority benefits. Therefore, classifying majority Christians, Sikhs, Muslimss as “equal” to States having said religions as minority violates basic principle of reasonable classification. The classification is not intelligible differentia and fails test of rationality.

28. Object of Article 30 is explained by this Hon’ble Court in Ahmedabad St. Xaviers College Society and Anr. v. State of Gujarat and Anr [(1974) 1 SCC 717 at page 192] and reiterated in TMA Pai Foundation vs. State of Karnataka [(2002) 8 SCC 1] - "*Every section of the public, the majority as well as minority has rights in respect of religion as contemplated in Articles 25 and 26 and rights in respect of language, script, culture as contemplated in Article 29. The whole object of conferring the right on minorities under Article 30 is to ensure that there will be equality between the majority and the minority. If the minorities do not have such special protection, they will be denied equality.”*

29. **ARTICLE 14** is indeed a pillar on which rests securely foundation of our Secular, Democratic Republic. Right of equality is not merely of a few individuals. In **Kasturi Lal Lakshmi Reddy** v. State of J&K [(1980)4SCC 1], Bhagwati J. observed: *"14. Where any governmental action fails to satisfy the test of reasonableness and public interest discussed above and is found to be wanting in the quality of reasonableness or lacking in the element of public interest, it would be liable to be struck down as invalid."*

30. This Hon'ble Court has recognized unarticulated liberties implied by Article 21 of the Constitution and has ruled that Right to Life and Personal Liberty includes Right to enjoy benefits exclusively conferred upon them by the Union and State Government's schemes and other welfare programmes leading to a life of dignity. Denial of minority rights to the actual religious and linguistic minorities impairs Article 19(1)(a). Under Article 19(1)(a) read with Article 21 of the Constitution, every citizens have a right to live peacefully, to have right to leisure with all necessary ingredients of the right to life guaranteed under Article 21 of the Constitution of India. Denial of minority rights to real minorities and arbitrary/unreasonable disbursement of minority benefits to the majority, infringes upon

fundamental right to prohibition of discrimination on the grounds of religion, race, caste, sex or place of birth [Article 15(1)]; impairs the right to equality of opportunity in matters related to public employment [Article 16(1)]; and freedom of conscience and right to freely profess, practice and propagate religion [Article 25(1)]. It also erodes the obligation of the State 'to endeavour to eliminate inequalities in status, facilities and opportunities' [Article 38 (2)].

31. Denial of minority rights to actual religious and linguistic minorities is a violation of right of minority enshrined under Articles 14 and 21. This constitutional boon is perhaps the highest blessing that the citizens of India secured from the paramount deed in Articles 14 and 21 of India's *suprema lex*, its Constitution. Right to live in a society free from any fear and discrimination is covered within the scope of Article 14 and 21. Any omission/commission by Executive /Legislator, which encourages arbitrariness and unreasonableness, infringes upon Articles 14 & 21. NCM is providing schemes like Educational empowerment, economic empowerment, infrastructure empowerment and other special needs, which is beyond the scope of Articles 29-30. The successive governments through the NCM intend to manage vote bank across Indian subcontinent.

32. The central government has ignored the fundamental principle of equality, justice, liberty and secularism which plays an important role in ensuring *" Fraternity" , Dignity of Individual" and "Unity and Integrity of Nation"* as mentioned in preamble of the Constitution. Hon'ble Justice Chandrachud in AADHAAR Case [WP(C) 494/ 2012] "***10.*** *In my view, unity and integrity of the Nation cannot survive unless the dignity of every individual citizen is guaranteed. It is inconceivable to think of unity and integration without the assurance to an individual to preserve his dignity. In other words, regard and respect by individual for the dignity of the other one brings the unity and integrity of the Nation.* ***11.*** *The expressions "liberty", "equality" and "fraternity" incorporated in the Preamble are not separate entities. They have to be read in juxtaposition while dealing with the rights of the citizens. They, in fact, form a union. If these expressions are divorced from each other, it will defeat the very purpose of democracy.* ***12.*** *In other words, liberty cannot be divorced from equality so also equality cannot be divorced from liberty and nor can liberty and equality be divorced from fraternity. The meaning assigned to these expressions has to be given due weightage while interpreting Articles of Part III of Constitution."*

33. Justice Dickson in Hunter v. Southam (1984) 2 SCR 145 (Canada):

"The task of expounding Constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and easily repealed. A Constitution, by contrast, is drafted with an eye to future. Its function is to provide a continuing framework for legitimate exercise of governmental power and when joined by a Bill or Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. Judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind."

34. In **M.Nagaraj v. Union of India [(2006)8 SCC 212]**, speaking for the Constitution Bench, the then CJI Sh. S.H. Kapadia had observed: "*The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expending future and is intended to endure for ages to come and consequently to be adapted to the various crises of human affairs. Therefore, purposive rather than strict literal approach to*

interpretation should be adopted. A constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that a constitutional provisions does not get fossilized but remains flexible enough to meet newly emerging problems and challenges." The definition of "Minority" as per Article 29-30 has left leakages in the hands of State, which shall be misused and are been misused for political benefits.

THE QUESTION OF LAW

1. *Whether Centre has disregarded the ruling in TMA Pai Case*
2. *Whether Section 2(f) of National Commission for Minority Education Institution Act 2004 confers unbridled power to the Centre*
3. *Whether there is a need to define the 'Minority' under Section 2(f) of National Commission for Minority Education Institution Act 2004*
4. *Whether declaring Muslims, Christians, Sikhs, Buddhists, Parsi and Jain as minority at national level, is arbitrary irrational and contrary to Articles 14, 15, 21, 29 and 30 of the Constitution.*
5. *Whether* Centre has failed to apply TMA Pai & Bal Patil ruling evenly by excluding the followers of Bahaism, Judaism and

Hinduism from purview of ‘minority’ status under Section 2(F) of the NCMEI Act.

PRAYER

It is respectfully prayed that this Hon'ble Court may be pleased to issue a writ order or direction or a writ in nature of mandamus to:

a) direct and declare that Section 2(f) of the National Commission for Minority Education Institution Act 2004, is arbitrary, irrational and offends Articles 14, 15, 21, 29 and 30 of the Constitution hence void;

b) in alternative, direct and declare that followers of Judaism, Bahaism & Hinduism, who are minorities in Laddakh, Mizoram, Lakshdweep, Kashmir, Nagaland, Meghalaya, Arunachal Pradesh, Punjab and Manipur, can establish & administer educational institutions of their choice in spirit of the TMA Pai Ruling[(2002)8 SCC 483, para 75-76]

c) in the alternative, direct the respondents to lay down guidelines for identification of minority at State level, in order to ensure that only those religious & linguistic groups, which are socially economically politically non-dominant and numerically inferior, can establish and administer educational institutions of their choice;

d) pass such other order(s) or direction(s) as Hon'ble Court may deem fit and proper in facts of the case and allow the cost to petitioner.

10.08.2020 **(ASHWANI KUMAR DUBEY)**

NEW DELHI **ADVOCATE FOR PETITIONER**