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PERFORMA FOR FIRST LISTING

Section: PIL

The case pertains to (Please tick / check the correct box):

- Central Act: The National Commission for Minority Act
 - Section: Sections 2(c) and Section 9 of the NCM Act
 - Central Rule: N/A
 - Rule No: N/A
 - State Act: N/A
 - Section: N/A
 - State Rule: N/A
 - Rule No: N/A
 - Impugned Interim Order: N/A
 - Impugned Final Order / Decree: N/A
 - High Court: N/A
 - Name of Judges: N/A
 - Tribunal / Authority Name : N/A
-

1. Nature of Matter: Civil
2. (a) Petitioner / Appellant : Ashwini Kumar Upadhyay
(b) Email ID: aku.adv@gmail.com, aku.aor@gmail.com
(c) Phone No: 08800278866, 09911966667,
3. (a) Respondent: Union of India and another
(b) Email ID: N/A
(c) Phone No: N/A
4. (a) Main Category: 08 PIL Matters
(b) Sub Category: 0812, Others
5. Not to be listed before: N/A

6. Similar / Pending matter: WP(C) 489/2016

7. Criminal Matters:

(a) Whether accused / convicted has surrendered: N/A

(b) FIR / Complaint No: N/A

(c) Police Station: N/A

(d) Sentence Awarded: N/A

(e) Sentence Undergone: N/A

8. Land Acquisition Matters:

(a) Date of Section 4 Notification: N/A

(b) Date of Section 6 Notification: N/A

(c) Date of Section 17 Notification

9. Tax Matters: State the Tax Effect: N/A

10. Special Category: N/A

11. Vehicle No in case of motor accident claim matters): N/A

12. Decided Cases with Citation: N/A

Date: 30.10.2017

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(R. D. Upadhyay)

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SYNOPSIS

The National Commission for Minority Act 1992 came into force on 17.5.1993. It extends to the whole of India except J&K. As per Section 2 (c) of the NCM Act, 'minority' means a community notified as such by the Central government. In exercise of powers conferred by Section 2(c) of the NCM Act, the Central Government through a Notification dated 23.10.1993 notified five communities viz. Muslims, Christians, Sikhs, Buddhists and Parsis as 'minority' community. Jain's were also added in the list in 2014, but not the Hindus, though they are minority in eight States.

According to 2011 Census, Hindus are monitory in eight States i.e. Lakshadweep (2.5%), Mizoram (2.75%), Nagaland (8.75%), Meghalaya (11.53%), J&K (28.44%), Arunachal Pradesh (29%), Manipur (31.39%) and Punjab (38.40%). But, their minority rights are being siphoned off illegally and arbitrarily to the majority population because neither Central nor the State Governments have notified the Hindus as a 'minority' under Section 2 (c) of the NCM Act. Therefore, Hindus are being deprived of their basic rights, guaranteed under the Articles 25 to 30. Hence, Notification on Minority Community [1993-SO No.816 (E), F.No.1/11/93-MC(D)] dated 23.10.1993 is not only arbitrary and irrational but also invalid and ultra-virus the Constitution of India and its basic structure.

Muslims are majority in Lakshdweep (96.20%) and J & K (68.30%) and there is significant population in Assam (34.20%), West Bengal (27.5%), Kerala (26.60%), Uttar Pradesh (19.30%) and Bihar (18%). However, they are enjoying the 'minority' status, and the communities which are real minorities, are not getting their legitimate share because of non-identification and non-notification of minorities at State level, thereby jeopardizing their basic rights guaranteed under Part III of the Constitution. This clearly reflects arbitrariness and illegality in Notification on Minority Communities [1993-SO, No.816(E), F.No.1/11/93-MC(D)] dated 23.10.1993. Similarly, Christians are majority in Mizoram, Meghalaya and Nagaland and there is significant population in Arunachal Pradesh, Goa, Kerala, Manipur, Tamil Nadu and West Bengal but they are treated as minority. Likewise, Sikhs are majority in Punjab and there is significant population in Delhi, Chandigarh and Haryana but they are also treated as minority.

Union Government offered 20000 scholarships in field of technical education for minority students. In J&K, Muslims are 68.30% and government allotted 717 out of 753 scholarships to Muslim students but none to Hindu students citing Notification on Minority Communities [1993-SO No.816(E), F.No.1/11/93-MC(D)] dated 23.10.1993 which declares Muslim's as minority, but not the Hindus.

The Prime Minister's 15 Points Programme/scheme meant for religious and linguistic minorities is not being appropriately used, particularly in Arunachal Pradesh, Assam, Goa, Jammu & Kashmir, Kerala, Lakshadweep, Manipur, Meghalaya, Mizoram, Nagaland, Punjab, Tamil Nadu, Uttar Pradesh and West Bengal. Hindu's legitimate share is being siphoned off arbitrarily to unqualified sections of the population, because of non-identification and non-notification of minorities at State level. Although, it is duty of the Government to identify and notify religious and linguistic minorities at State level so as to safeguard the rights of minorities guaranteed under Articles 25-30.

Denial of minority rights to real minorities and arbitrary and unreasonable disbursement of minority benefits to 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)]. Therefore, this Hon'ble Court should declare the above stated Notification invalid and ultra-virus the Constitution and its basic structure.

The eleven-judge Bench of this Hon'ble Court in TMA Pai Foundation case (2002) 8 SCC 481 has held as follows:

“78. In two cases pertaining to the DAV College, this Court had to consider whether the Hindus were a religious minority in the State of Punjab. In DAV College v. State of Punjab [1971(Supp) SCR 688], the question posed was as to what constituted a religious or linguistic minority, and how it was to be determined. After examining the opinion of this Court in the Kerala Education Bill case, the Court held that the Arya Samajis, who were Hindus, were a religious minority in the State of Punjab, even though they may not have been so in relation to the entire country. In another case, DAV College Bhatinda v. State of Punjab [1971 (Supp) SCR 677], the observations in the first DAV College case were explained, and at page 681, it was stated that “what constitutes a linguistic or religious minority must be judged in relation to the State in as much as the impugned Act was a State Act and not in relation to the whole of India.” This Court rejected the contention that since Hindus were a majority in India, they could not be a religious minority in the State of Punjab, as it took the State as the unit to determine whether the Hindus were a minority community.

79. There can, therefore, be little doubt that this Court has consistently held that, with regard to a State Law, the unit to determine a religious or linguistic minority can only be the State.”

Despite the above unequivocal position of law, the Executive has failed to apply above principle evenly by excluding Hindus from purview of minority status and benefits. Hence, this Hon'ble Court may allow the petition.

LIST OF DATES

- 18.12.1992: United Nations promulgated “Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities” proclaiming that: “States shall protect existence of the National or Ethnic, Cultural, Religious and Linguistic identity of minorities within their territories and encourage conditions for their promotion”
- 17.05.1993: The National Commission for Minorities Act came into effect to constitute the National Commission for Minorities.
- 23.10.1993: The Government notified Muslim Christian, Sikh Buddhist and Parasi as “minority”.
- 08.08.2005: The Supreme Court passed judgment in Civil Appeal No- 4730 of 1999.
- 01.05.2017: Petitioner submitted representation to Law Minister to repeal notification on minority.
- 30.10.2017: The Notification on Minority Communities [1993-SO No.816 (E), F.No.1/11/93-MC(D)] is not only arbitrary and irrational but also invalid and ultra-virus the Constitution and its basic structure. However, Government has not repealed it. Hence, this petition.

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
WRIT PETITION (CIVIL) NO ... OF 2017
(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

IN THE MATTER OF:

Ashwini Kumar Upadhyay
S/o Sh. Suresh Chandra Upadhyay
Office: 15, M.C. Setalvad Chambers Block
Supreme Court of India, New Delhi-110001
Residence: G-284, Govindpuram, Ghaziabad ...Petitioner
Verses

1. Union of India

Through the Secretary,
Ministry of Law and Justice,
Shashtri Bhawan, New Delhi-110001

2. Union of India

Through the Secretary,
Ministry of Minority Affairs,
Paryavaran Bhawan, New Delhi-110003 ...Respondents

**PETITION UNDER ARTICLE 32 DECLARE THE NOTIFICATION ON
MINORITY COMMUNITY [1993 -SO NO.816(E) F.NO.1/11/93-MC(D)]
DATED 23.10.1993; INVALID & ULTRA-VIRUS THE CONSTITUTION
OF INDIA AND ITS BASIC STRUCTURE**

To,
THE HON'BLE CHIEF JUSTICE
& LORDSHIP'S COMPANION JUSTICES
OF HON'BLE SUPREME COURT OF INDIA
HUMBLE PETITION OF ABOVE-NAMED PETITIONER
THE MOST RESPECTFULLY SHOWETH AS UNDER:

- 1.** That petitioner is filing this PIL under the Article 32 to declare the notification on minority community [1993 -so no. 816(e) f.no.1/11/93-mc (d)] dated 23.10.1993; invalid and ultra-virus the constitution and its basic structure.
- 2.** That petitioner has not filed any other petition either in this Hon'ble Court or in any other High Court seeking same and similar directions as prayed in this petition.

- 3.** That petitioner's full name is Ashwini Kumar Upadhyay. Residential address is G-284, Govindpuram, Ghaziabad, Ph:8800278866, aku.adv@gmail.com, PAN: AAVPU7330G, ADHAR-659982174779. Income is 2 LPA. Petitioner is an Advocate & social-political activist, contributing his best to development of socially-economically downtrodden people.
- 4.** That the facts constituting cause of action accrued on 23.10.1993 and every subsequent days, when the Union Government, in exercise of powers conferred by Section 2(c) of the NCM Act notified five communities as minority i.e. Muslims, Christians, Sikhs, Buddhists and Parsis.
- 5.** That the injury caused to the Hindus in the States where they are minority but their lawful share is being siphoned off arbitrarily to the majority, because of non-identification and non-notification of minorities at the State level.
- 6.** That 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. There is no motive other than the public interest.
- 7.** There is no civil, criminal or revenue litigation, involving petitioner, which has or could have legal nexus, with the issue involved in this petition. It is totally bona-fide.
- 8.** There is no requirement to move concerned government authority for relief sought in this PIL. There is no other remedy available except approaching this Hon'ble Court.

- 9.** The National Commission for Minorities Act, 1992, (hereinafter NCM Act) came into force on 17.05.1993. It extends to the whole of India except Jammu & Kashmir. As per Section 2 (c) of the NCM Act 1992, 'minority' means a community notified as such by the Central government.
- 10.** That in exercise of the powers conferred by the Section 2(c) of the NCM Act,1992, the Central Government through a Notification dated 23.10.1993 notified five communities i.e. Muslims, Christians, Sikhs, Buddhists and Parsis as 'minority' community. Jain's were added in the list just before 2014 general election.
- 11.** That according to 2011 Census, Hindus are monitory in eight States i.e. Lakshadweep (2.5%), Mizoram (2.75%), Nagaland (8.75%), Meghalaya (11.53%), J&K (28.44%), Arunachal Pradesh (29%), Manipur (31.39%) and Punjab (38.40%). But, their minority rights are being siphoned off illegally and arbitrarily to the majority population because neither Central nor the State Governments have notified the Hindus as a 'minority' under Section 2 (c) of the NCM Act, 1992. Therefore, Hindus are being deprived of their fundamental rights, guaranteed under the Articles 25-30. Hence, Notification on Minority Community [1993-SO No.816 (E), F.No.1/11/93-MC(D)] dated 23.10.1993 is not only arbitrary and irrational but also invalid and ultra-virus the Constitution of India and its basic structure.

12. Muslims are majority in Lakshdweep(96.20%) Jammu & Kashmir (68.30%) and there is significant population in Assam (34.20%), West Bengal (27.5%), Kerala (26.60%), Uttar Pradesh (19.30%) and Bihar (18%). However, they are enjoying the 'minority' status, and the communities which are real minorities, are not getting their legitimate share because of non-identification and non-notification of minorities at State level, thereby jeopardizing their basic rights guaranteed under Part III of the Constitution. This clearly reflects arbitrariness and illegality in Notification on Minority Communities [1993-SO, No.816(E), F.No.1/11/93-MC(D)] dated 23.10.1993. Similarly, Christians are majority in Mizoram, Meghalaya and Nagaland and there is significant population in Arunachal Pradesh, Goa, Kerala, Manipur, Tamil Nadu and West Bengal but they are treated as minority. Likewise, Sikhs are majority in Punjab and there is significant population in Delhi, Chandigarh and Haryana but they are also treated as minority.

13. The Union Government offered 20000 scholarships in field of technical education for minority students. In J&K, Muslims are 68.30% and government allotted 717 out of 753 scholarships to Muslim students but none to Hindu students citing Notification on Minority Communities [1993-SO No.816(E), F.No.1/11/93-MC(D)] dated 23.10.1993 which declares Muslim's as minority, but not the Hindus.

14. The Prime Minister's 15 Points Programme/scheme meant for religious and linguistic minorities is not being appropriately used, particularly in Arunachal Pradesh, Assam, Goa, Jammu & Kashmir, Kerala, Lakshadweep, Manipur, Meghalaya, Mizoram, Nagaland, Punjab, Tamil Nadu, Uttar Pradesh and West Bengal. Hindu's legitimate share is being siphoned off arbitrarily to unqualified sections of the population, because of non-identification and non-notification of minorities at State level. Although, it is duty of the Government to identify and notify religious and linguistic minorities at State level so as to safeguard the rights of minorities guaranteed under Articles 25-30.

15. Denial of minority rights to real minorities, arbitrary and 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)]. Therefore, this Hon'ble Court should declare the above stated Notification invalid and ultra-virus the Constitution and its basic structure.

16. The eleven-judge Bench of this Hon'ble Court in TMA Pai Foundation case (2002) 8 SCC 481 has held as follows:

“78. In two cases pertaining to the DAV College, this Court had to consider whether the Hindus were a religious minority in the State of Punjab. In DAV College v. State of Punjab [1971(Supp) SCR 688], the question posed was as to what constituted a religious or linguistic minority, and how it was to be determined. After examining the opinion of this Court in the Kerala Education Bill case, the Court held that the Arya Samajis, who were Hindus, were a religious minority in the State of Punjab, even though they may not have been so in relation to the entire country. In another case, DAV College Bhatinda v. State of Punjab [1971 (Supp) SCR 677], the observations in the first DAV College case were explained, and at page 681, it was stated that “what constitutes a linguistic or religious minority must be judged in relation to the State in as much as the impugned Act was a State Act and not in relation to the whole of India.” This Court rejected the contention that since Hindus were a majority in India, they could not be a religious minority in the State of Punjab, as it took the State as the unit to determine whether the Hindus were a minority community.

79. There can, therefore, be little doubt that this Court has consistently held that, with regard to a State Law, the unit to determine a religious or linguistic minority can only be the State.”

17. Despite above unequivocal position of law, Executive has failed to apply above principle evenly, excluding Hindus from purview of the minority status and benefits as well. Hence, this Hon'ble Court may allow the petition.

18. That the statement of objects of the NCM Act is as follows: *“The Main Task of the Commission shall be to evaluate progress of the development of minorities, monitor the working of the safeguards provided in the Constitution for the protection of the interests of minorities and in laws enacted by the Central Government or State Governments, besides looking into the specific complaints regarding deprivation of rights and safeguards of minorities. It shall also cause studies, research and analysis to be undertaken on the issues relating to socio-economic and educational development of minorities and make recommendations for the effective implementation of the safeguards for the protection of the interests of minorities by the Central Government or State Governments. It may also suggest appropriate measures in respect of any minority to be undertaken by the Central Government or State Governments”.*

19. That Sections 9 of the NCM Act, 1992, is as follows:

“9. Functions of the Commission.—(1) The Commission shall perform all or any of the following functions, namely:—

(a) evaluate the progress of the development of minorities under the Union and States;

(b) monitor the working of the safeguards provided in the Constitution and in laws enacted by Parliament and the State Legislatures;

(c) make recommendations for effective implementation of safeguards for the protection of the interests of minorities by the Central Government or the State Governments;

(d) look into specific complaints regarding deprivation of rights and safeguards of the minorities and take up such matters with the appropriate authorities;

(e) cause studies to be undertaken into problems arising out of any discrimination against minorities and recommend measures for their removal;

(f) conduct studies research and analysis on the issues relating to socio-economic and educational development;

(g) suggest appropriate measures to be undertaken by the Central Government or the State Governments;

(h) make periodical or special reports to the Central Government on any matter pertaining to minorities and in particular difficulties confronted by them; and

(i) any other matter which may be referred to it by the Central Government.

(2) Central Government shall cause the recommendations referred to in clause (c) of sub-section (1) to be laid before each House of Parliament along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the Union and the reasons for the non-acceptance, if any, of any of such recommendations.

(3) Where any recommendation referred to in clause (c) of sub-section (1) or any part thereof with which any State Government is concerned, the Commission shall forward a copy of such recommendation or part to such State Government, who shall cause it to be laid before the Legislature of the State along with

a memorandum explaining action taken or proposed to be taken on recommendations relating to the State and the reasons for non-acceptance, if any, of any of such recommendation or part.

(4) The Commission shall, while performing any of the functions mentioned in sub-clauses (a), (b) and (d) of sub-section (1), have all the powers of a civil court trying a suit and in particular, in respect of the following matters, namely:— (a) summoning and enforcing the attendance of any person from any part of India and examining him on oath;

(b) requiring discovery and production of any document;

(c) receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any court or office;

(e) issuing commissions for the examination of witnesses and documents; and

(f) any other matter which may be prescribed.”

20. That Sections 16 of the NCM Act, 1992, is as follows:

“16. Power to remove difficulties.—(1) If any difficulty arises in giving effect to provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act, as appear it to be necessary or expedient for removing difficulty: Provided that no such order shall be made after the expiry of a period of two years from date of commencement of this Act.

(2) Every order made under this section shall as soon as may be after it is made, be laid before each House of Parliament.”

21. The Constitution of India guarantees certain rights to minorities to protect their culture, script and languages but it does not define the term “minority”. The definition of ‘minority’ was left unanswered until the 11 Judges Bench of the Supreme Court defined it in TMA Pai Foundation v. State of Karnataka, [(2002) 8 SCC 481], wherein the Court has held that the unit for the purpose of determining the minorities should be the State, not the whole of India.

22. That it is duty of the State to move beyond the minority-majority binary communal politics, which ironically passes for secularism in this country, has been the bane of our democracy. It can be traced back to the British policy of ‘divide and rule’, the result of which was partition. The Constitution was a repudiation of these ideas and the politics that perpetuated them. It rejected the suggestions for a separate electorate for the minorities and the proportional representation system, which it felt would lead to a perpetually enervated nation. However, in most policies that have been followed until now, we have seen furtherance of vote-bank politics.

23. That the term minority has not been defined in the Constitution of India but this Hon’ble Court in Re: Kerala Education Bill, AIR 1958 SC 956 has defined minority to be a group of people who are numerically a minority in ‘*a State as a whole*’ as distinguished from any particular

area or region thereof. This essentially means that determination of minority has to be done on the basis of 'a State as a unit' i.e. State-wise. Merely because Hindu community is numerically larger in number at the national level, does not disqualify it to be notified as a minority for the purpose of a State.

24. This Hon'ble Court in Bal Patil & others versus Union of India & Ors (Civil Appeal 4730 of 1999) while speaking on the question of minority, referred to the Eleven Judges Bench decision passed by this Hon'ble Court in TMA Pai Foundation & others versus State of Karnataka & others [(2002) 8 SCC 481], and inter-alia quoted the following:

"During the pendency of this appeal, the eleven judges' Bench decision in TMA Pai was delivered and the decision is reported in 2002 (8) SCC 481. Amongst several questions which were formulated for answer by the eleven judges Bench the most important question included was as under:

'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 Kirpal, CJ (as he then was) is the following:-

"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 the State and not the whole of India. Thus, religious and linguistic minorities, who have been put on a par in Article 30, have to be considered State-wise”.

25. That the Report of Basic Principles Committee, constituted by the Constituent Assembly of the State in 1954, while dealing with the item of fundamental rights, states: *“Having taken note of the fundamental rights provided in various constitutions including the Constitution of India, recommends the following rights.....”* Then under item 8, it states: *“Cultural and educational rights should also be guaranteed by the constitution. The interests of the minorities should be protected and any section of citizens having a distinct language, script or culture should have the right to conserve the same”.*

26. The Oxford Dictionary defines ‘minority’: *“a smaller number or part, a number or part representing less than half of the whole, a relatively small number of people differing from others in race, religion or language”.*

27. The Sub-Commission of the Promotion and Protection of Human Rights (before 1999, known as the Sub-Commission on Prevention of Discrimination and Protection of Minorities) has defined minority as follows: *“1) The term 'minority' includes only those non-dominant groups of the population which possess and wish to preserve*

stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population; 2) Such minorities should properly include the number of persons sufficient by themselves to preserve such traditions or characteristics; and 3) Such minorities should be loyal to the state of which they are nationals”.

28. The Parliamentary Standing Committee on Social Justice and Empowerment submitted its 14th report on the Constitution (One Hundred and Third Amendment) Bill, 2004 and the National Commission for Minorities (Repeal) Bill, 2004 on February 1, 2006 under the Chairmanship of Smt. Sumitra Mahajan wherein the Committee citing the Supreme Court Judgment in Civil Appeal 4730 of 1999, dated 08.08.2005 recommended that it is up to the State government to declare communities as minorities. The report in its paragraph 1.26 while enquiring about the criteria being adopted by the Government to classify a particular community in the list of ‘minority’ observed: *“During the course of evidence Hon’ble Chairperson enquired about the criteria being adopted by the Government to classify a particular community in the list of ‘minority’ when the Constitution does not define the term (minorities). The Secretary Ministry of Social Justice and Empowerment replied: “Madam, as regards the criteria for notifying the minorities, this has*

actually historically evolved and five communities are being treated as minorities now. The Minorities commission, in its Annual Report for the period ending 31.12.1980, had stated that the Commission has been treating Muslims, Christians, Sikhs, Buddhists and Zoroastrians as religious minorities at the national level. In March, 1984, in the context of the 15-point programme, the Ministry of Home Affairs had also clarified that these are the five minorities at the national level. As you know, this Commission was first set up in 1978 through a Resolution of the Ministry of Home Affairs. Subsequently, when the Act was passed by Parliament in 1992 and the Commission was set up in 1993, under Section 2(c), again the five communities, which had been notified as minorities, were again declared as minorities. Madam, recently there was question of including the Jains in the list of minorities and the Government had taken a stand before the Supreme Court that the Court, already in another case, stated that the State will be declared as the unit. Therefore, the States can determine as to who are the minorities in that particular State. Subsequently, the Supreme Court delivered a judgment on 8th August, that the Jains should not be declared as minorities at the national level and no more communities should be declared as minorities at the national level. So, it is up to the State Governments to declare communities as minorities”.

- 29.** The NCM Act, 1992 lays down that “minority”, means a community notified as such by the Union Government. Similarly, under State Minority Commission Acts, it is the State, which notifies a particular community as a minority for the purpose of the respective State Act. Clause 2 sub (c), Chapter 1 of the Bihar State Minorities Commission Act, 1991 defines minorities as “the persons belonging to religious and linguistic minorities residing in the State of Bihar to whom the Government (State government) has recognized as minorities.”
- 30.** The Union Government through its notification under the NCM Act, 1992 dated 23.10.1993 notified Muslims, Christians, Sikhs, Buddhists and Parsis as National Minorities of India. In 2014, Jains have also been notified as National Minorities by the Government through a notification under the NCM Act, 1992. However, many States have not legislated State Minority Commission Act providing for a State Minority Commission to safeguard the interests of religious/linguistic minorities in the State.
- 31.** That on 31.03.2010, the National Commission for Minorities convened an annual conference of the State Minorities Commissions. The agenda for said conference was published by the National Commission for Minorities wherein its Para 1.1 headed as “Recommendation No. 1” with a sub-heading ‘Action Taken Report’ observes:

“To provide a platform to look into various grievance of the minority communities and to monitor and suggest the mechanism for accelerating pace of socio-economic development of minority communities and their inclusion in the National Mainstream, and the setting up of State Minority Commissions (SMCs) in all States and Union Territories is essential.”

32. The NCM has written to the Union Government to amend the NCM Act, 1992 to make it applicable to the J&K. The Commission had also written to the State Law Minister and Chief Minister in 2012. The then Chairman Sh. Wajahat Habibullah has been reported, saying that the Commission wants that the minorities in all the States must get benefits available to minorities elsewhere and the Commission has been regularly interacting with the State Governments in this regard. He expressed happiness over the State government’s contention that it was *not averse* to benevolent recommendations of the NCM Act 1992.

33. The Article 14 is founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our Secular, Democratic, Republic. The right of equality in the present situation is that of Indian polity and not merely of a few individuals. In *Kasturi Lal Lakshmi Reddy v. State of J & K (1980) 4 SCC 1*, Bhagwati J. speaking for the Bench observed as thus:

“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.”

34. The denial of minority rights to the actual religious and linguistic minorities is a violation of fundamental right of minority community enshrined under the Article 21 also. This constitutional boon is perhaps the highest blessing that the citizens of India secured from the paramount deed in Article 14 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 the Article 21 of the Constitution. Any omission or commission on the part of the Executive or Legislature, which encourages arbitrariness, unreasonableness and illegality, infringes upon this fundamental right and a free society ceases to exist.

35. That in a catena of decisions, this Hon'ble Court has recognized several unarticulated liberties implied by the Article 21 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.

36. That denial of minority rights to the actual religious and linguistic minorities impairs Article 19(1)(a) of the Constitution. Under Article 19(1)(a) read with Article 21 of the Constitution, citizens have a right to live peacefully, to have right to leisure with all necessary ingredients of the right to life guaranteed under the Article 21.

37. The denial of minority rights to the actual religious and linguistic minorities is violation of their fundamental rights enshrined under the Articles 29 and 30. Where a religious community is in minority, the Constitution enables it to preserve its culture and religious interests by providing that the State shall not impose upon it any culture other than the community's own culture and such community shall have the right to establish and administer educational institutions of its choice and the State shall not, in granting aid to educational institutions, discriminate against such an educational institution maintained by minority community on the ground that it is under the management of a religious community.

38. The Directive Principles of State Policy which are not legally binding upon the State, are "fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws"[Article 37].

In *Sachidanand Pandey v. State of West Bengal* [AIR 1987 SC 1109] this Hon'ble Court pointed out that, "*When*

the Court is called upon to give effect to the Directive Principle and the fundamental duty, the Court is not to shrug its shoulders and say that priorities are a matter of policy and so it is matter for the policy making authority.”

39. The Article 51A, which is of special relevance for the Minorities stipulates as, *“citizens’ duty to promote harmony and the spirit of common brotherhood amongst all the people of India ‘transcending religious, linguistic and regional or sectional diversities; and citizens’ duty to value and preserve the rich heritage of our composite culture.’*

40. The social pluralism raises the need for the protection and development of all sorts of weaker sections of the Indian citizenry whether this ‘weakness’ is based on numbers or on social, economic or educational status of any particular group. The Constitution, therefore, speaks of Religious and Linguistic Minorities, Scheduled Castes, Scheduled Tribes and Backward Classes and makes or leaves room for making for them special provisions of various nature and varying import.

41. This Hon’ble Court in *TMA Pai Foundation & Ors. versus State of Karnataka & Ors. (2002) 8 SCC 481* and in a catena of decisions has held *that 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 shall be the State and not the whole of India. Thus, religious and linguistic minorities, who have been put on a par in Article 30, have to be considered State-wise.

42. That it is duty of the States, particularly, Arunachal Pradesh, Assam, Goa, Jammu & Kashmir, Kerala, Lakshadweep, Manipur, Meghalaya, Mizoram, Nagaland, Punjab, Tamilnadu, Uttar Pradesh and West Bengal to identify the actual religious and linguistic minorities in spirit of the National Commission for Minorities Act, 1992 and the Judgment of the Supreme Court and notify the 'minority' in spirit of the Article 25-30 by following the appropriate procedure, so that all the benefits available to minorities could be legally given to the actual minorities rather than un-qualified population.

43. That it is duty of the Controller and Auditor General to conduct regular audit and prepare the State-wise audit report about the effective implementation of the Prime Minister's 15-Point Programme meant for minorities.

44. That nine States has not legislated the State Minority Act to identify and notify minorities. Consequentially no community in such States have been identified and notified as State minority. But, benefits exclusively meant for the minority communities are being siphoned off to the majority communities in illegal and arbitrary manner.

45. That on 19.08.2017, web portal 'India Facts' in collaboration with 'Srijan Foundation' launched India's first ever 'Hindu Human Rights Report' documenting both systematic & episodic violations of human rights including sanctioned discrimination. It is published by Garuda Prakashan, focuses largely on incidents from 2015 and 2016 with some other selected incidents. The report was launched by RK Ohri and JP Sharma, retired IPS officers and authors of book "Majority Report". Summary is thus:

"It is State's duty to check violation of human rights without making assumption but authorities monitoring human rights fail to track violations against the Hindus because they are not notified minority. Hence, abuses against Hindus have continued to increase. As against 231 incidents of anti-Hindu attacks in 2015, there were 244 incidents in 2016. There is a legalized discrimination of Hindus and their interests by different branches of Government at Centre and States, viz. confiscation of temple assets and control over temple and administration, discriminatory government scheme targeting Hindu communities are some of the examples. In 2015, confiscation of Hindu temples was among the largest violations of religious freedom in the world, yet not a single report on religious freedom tracked this violation. Karnataka Government has repeatedly tried to take over administration of Hindu mutts and temples like Sri Kshethra Dharmasthala. Similarly, Rajasthan government has tried to confiscate and auction farms owned by Hindu temples.

There is an attempt to skew the level playing field in the private education sector against the Hindu community. In last three years, the government has forced closure of 7659 non-minority schools. Moreover, in last 3 years, budget increase for minorities is far higher compared to other groups like Tribals, Scheduled Caste and Other Backward Caste. Benchmark comparison shows that Ministry of Minority Affairs got Rs. 524.94 crores more and Ministry of Social Justice received Rs. 465.34 crores less. Hindus have been consistently persecuted by various hostile ideologies. In Tamil Nadu, there were 30 incidents of Hindu persecution involving 80 victims in 2015 and 2016. In Kerala, 12 Hindu activists were murdered in 2016 as against 06 murdered in 2015. Inaction of UP Government forced 800 Hindu Dalits to convert to Islam in 2015 and in June 2016, there was a mass exodus of Hindu families from Kairana. In last 24 years, 4224 Hindus were killed due to radical extremism. In last 35 years, 100053 Hindus died due to terrorism and 99% of these deaths have happened due to attacks by extremists with anti-Hindu affiliation. Year 2015 witnessed many religiously motivated attacks on Hindu women and 64 women became victim of murder, rape, abduction and exploitation. There were 231 incidents of violation of religious freedom of Hindus in 2015 and in 2016, this increased to 244. West Bengal, Uttar Pradesh, Kerala, Karnataka are the States of particular concern. In 2015-16, these States have witnessed a high level of physical attack on Hindus.” [www.indiafacts.org]

46. That in order to strengthen the cause of minorities, the United Nations promulgated the “Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities” on 18.12.1992 proclaiming that: *“States shall protect the existence of the National or Ethnic, Cultural, Religious and Linguistic identity of minorities within their respective territories and encourage conditions for the promotion of that identity.”*

47. That National Commission for Minorities has been observing the 18th December as a Minorities Rights Day every year. Andhra Pradesh, Assam, Bihar, Chattisgarh, Delhi, Jharkhand, Karnataka, Maharashtra, Madhya Pradesh, Rajasthan, Tamil Nadu, Uttarakhand, Uttar Pradesh and West Bengal have set up State Minorities Commissions also but they have not identified minority at State level in spirit of the judgment of this Hon’ble Court. The functions of the State Commission inter-alia is to safeguard and protect the interests of minorities provided in the Constitution and laws enacted by Parliament and the State Legislatures. Aggrieved persons belonging to the minority communities may approach the concerned State Minorities Commissions for redressal of their grievances. They may send representations to National Commission for Minorities after exhausting remedies available to them. However, none of the State recognizes Hindus as minority.

48. Though the Constitution does not define the word 'Minority' and only refers to 'Minorities' and speaks of those 'based on religion or language', the rights of the minorities have been spelt out in the Constitution in detail. The Constitution provides two sets of rights of minorities, which can be placed in 'common domain' and 'separate domain'. The rights, which fall, in the 'common domain' is those, which are applicable to all the citizens of our country. The rights, which fall, in the 'separate domain' are those, which are applicable to the minorities only, and these are reserved to protect their identity. The distinction between 'common domain' and 'separate domain' and their combination have been well kept and protected in the Constitution.

49. The Preamble to the Constitution declares the India be 'Secular' and this is special relevance for the minorities. Equally relevant for them, especially, is the declaration of the Constitution in its Preamble that all citizens of India to be secured 'liberty of thought, expression, belief, faith and worship and 'equality of status and of opportunity.'

50. That the Constitution has made provisions for the Fundamental Rights in Part III, which the State has to comply with and these are judicially enforceable. There is another set of non-justiciable rights stated in Part IV, which are connected with social and economic rights of

the people. These rights are known as 'Directive Principles of State Policy', which legally are not binding upon the State, but are "fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws".

51. That Part IV of the Constitution containing non-justiciable Directive Principles of State Policy, includes the provisions having significant implications for minorities i.e. Obligation of the State 'to endeavour to eliminate inequalities in status, facilities and opportunities' amongst individuals and groups of people residing in different areas or engaged in different vocations;[Article 38 (2)] Obligation of State 'to promote with special care' the educational and economic interests of 'the weaker sections of the people' (besides Scheduled Castes & Scheduled Tribes);[Article 46]

52. That Part IVA of the Constitution, relating to fundamental duties as provided in Article 51A applies to all citizens, including those belonging to the minorities. Article 51A(e) and Article 51A(f) is of special relevance for minorities as thus: citizens' duty to promote harmony and the spirit of common brotherhood amongst all the people of India 'transcending religious, linguistic and regional or sectional diversities; [Article 51A(e)] and citizens' duty to value and preserve the rich heritage of our composite culture.' [Article 51A(f)]

53. That in Part III of the Constitution is divided into two parts viz. (a) the rights which fall in the 'common domain' and (b) the rights which go to 'separate domain'. In the 'common domain', the fundamental rights and freedoms covered are thus: People's right to 'equality before the law' and 'equal protection of the laws';[Article 14] Prohibition of discrimination against citizens on grounds of religion, race, caste, sex or place of birth; [Article 15(1) and (2)] Authority of State to make 'any special provision for the advancement of any socially and educationally backward classes of citizens' (besides Scheduled Castes & Scheduled Tribes);[Article 15(4)] Citizens' right to equality of opportunity in matters relating to employment or appointment to any office under the State and prohibition in this regard of discrimination on grounds of religion, race, caste, sex or place of birth;[Article 16(1) & (2)] Authority of State to make 'any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State;[Article 16(4)] People's freedom of conscience and right to freely profess, practice and propagate religion-subject to public order, morality and other Fundamental Rights;[Article 25(1)] Right of 'every religious denomination or any section thereof – subject to public order, morality

and health-to establish and maintain institutions for religious and charitable purposes, 'manage its own affairs in matters of religion', and own and acquire movable immovable property and administer it in accordance with law; [Article 26] Prohibition against compelling any person to pay taxes for promotion of any particular religion; [Article 27] People's 'freedom as to attendance at religious instruction or religious worship in educational institutions wholly maintained recognized or aided by State.[Article 28]

54. The minority rights provided in Constitution are thus: Right of any section of the citizens to conserve its 'distinct language, script or culture;[Article 29(1)] Restriction on denial of admission to any citizen, to any educational institution maintained or aided by the State, on grounds only of religion, race, caste, language or any of them; [Article 29(2)] Right of religious and linguistic minorities to establish and administer educational institutions of their choice; [Article 30(1)] Freedom of minority-managed educational institutions from discrimination in the matter of receiving aid from State; [Article30(2)] Special provision relating to language spoken by a section of the population of any State; [Article 347] Provision for facilities for instruction in mother-tongue at primary stage; [Article 350A] and Provision for a Special Officer for Linguistic Minorities and his duties. [Article 350 B]

55. That definition offered by Mr. Francesco Capotorti, Special Rapporteur of UN Sub-Commission on Prevention of Discrimination & Protection of Minorities is as follows:

“A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture traditions religion or language.”

56. The High Court of Punjab & Haryana, while declaring State Government’s notification ultra-vires has held thus:

“18. The above discussion leads us to hold that secularism and equality are the basic features, particularly in professional education and additional protection for minorities, which may allow admissions to professional colleges only to students belonging to minority by ignoring the entire merit available, cannot be conferred unless there is sufficient material to substantiate claim of an identifiable group of people needing protection from likely deprivation of their religious, cultural or educational rights at the hands of other communities who may happen to be in majority and who may be likely to gain political power in a democratic form of government based on election. In Punjab, it cannot be held that Sikhs were such a group of persons who apprehended deprivation of their religious, cultural and educational rights by other communities, who were in majority and who were likely to gain political power. No such

exercise appears to have been even carried out by Government.

20. *In the present case, the State of Punjab while issuing the impugned notifications has not applied the relevant parameters for declaring a group of individuals to be minority. The country could not be taken as a unit, as has been done. There is no material to substantiate that “Sikhs” are non-dominant group in the State of Punjab apprehending deprivation of their rights at the hands of “dominant” groups, who may come to power in the State in a democratic election. Thus, the impugned notifications are clearly ultra vires the jurisdiction of the State Government, violating right of equality and public interest. As a consequence of impugned notifications, additional protection has been conferred on a group of citizens unauthorisedly to exclusion of other similarly placed citizens, which is clearly violative of Article 14 of the Constitution.*

21. *Accordingly, we allow this petition and declare notifications dated 13.4.2001, Annexure P.7 and 26.4.2001, Annexure P.11, declaring “Sikh Institutions” run by Sikh Gurdwara Parbandhak Committees to be “minority” Institutions for the purpose of Section 2(f) of the Punjab Private Health Sciences Educational Institutions (Regulation of admission, Fixation of Fee and Making of Reservation) Act 2006 or otherwise, to be void. All consequential actions taken will also stand declared void. However, this order will not affect the admissions already given prior to date of this judgment, except those which are subject matter of any pending proceedings.”*

57. The various Articles of the Constitution providing rights to the minorities, clearly and firmly point out to only one direction: that of a multi-religious, multi-cultural, multi-lingual and multi-racial Indian society, interwoven into an innate unity by the common thread of national integration and communal harmony. By the yardstick adopted by the framers of the Constitution and crystallized into its provisions, the Indian Nation is not just a conglomeration of individual inhabitants of this State; it comprises of two distinct categories of constituents. The two-tier commonwealth of Indian Nation includes, on one hand, every citizen of India individually and, on the other hand, the multitude of religious, linguistic, cultural and ethnic groups among its citizens. The Indian Nation is an enormous coparcenaries in which the individual citizens are also members of their own respective branches taking the form of religious, cultural, linguistic and ethnic groups. And all these groups, like all individuals, have the same fundamental rights to enjoy and the same fundamental duties to discharge.

58. The social pluralism, as fortified by the unique Constitutional concept of secularism, raises the need for the protection and development of all sorts of weaker sections of the Indian citizenry – whether this ‘weakness’ is based on numbers or on social, economic or educational

status of any particular group. The Constitution, therefore, speaks of Religious and Linguistic Minorities, Scheduled Castes, Scheduled Tribes and Backward Classes and makes – or leaves room for making – for them special provisions of various nature and varying import.

59. The fundamental rights guarantees under the Articles 25 to 30 are no guarantees at all in the many States due to the failure of the Central Government in identifying the actual religious and linguistic minorities and declaring them as ‘minorities. Thus the basic rights of the minorities have been practically abrogated and being siphoned off arbitrarily and illegally to unqualified communities.

60. That following observations of Justice Dickson of the Supreme Court of Canada in *Hunter versus Southam Inc* (1984) 2 SCR 145 (Canada SC) are quite appropriate:

“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 as 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. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.”

61. That in *M.Nagaraj v. Union of India* (2006)8 SCC 212, speaking for the Constitution Bench, the then Chief Justice Sh. S.H. Kapadia has observed as follows:

“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.”

62. Copy of U.N. General Assembly resolution 47/135 dated 18.12.1992 is annexed as Annexure P-1.(Page41-44)

63. Copy of Judgment of the Supreme Court [CA-4730 /1999, 8.8.2005) is annexed as Annexure P-2.(Page 45-57)

64. Petitioner’s representation, which is yet not replied by the Executive is annexed as Annexure P-3. (Page 58-83)

65. Copy of judgment of Punjab & Haryana High Court (CWP 14646/2007) is annexed as Annexure P-4.(P.84-108)

GROUND

A. Because the NCM Act 1992 came into force on 17.5.1993.

It extends to the whole of India except Jammu & Kashmir.

As per Section 2 (c) of the NCM Act, 'minority' means a community notified as such by the Central government. In exercise of powers conferred by Section 2(c) of the NCM Act, the Central Government through a Notification dated 23.10.1993 notified five communities viz. Muslims, Christians, Sikhs, Buddhists and Parsis as 'minority' community. Jain's were also added in the list in 2014, but not the Hindus, though they are minority in eight States.

B. Because according to 2011 Census, Hindus are monitory in eight States i.e. Lakshadweep (2.5%), Mizoram (2.75%), Nagaland (8.75%), Meghalaya (11.53%), J&K (28.44%), Arunachal Pradesh (29%), Manipur (31.39%) and Punjab (38.40%). But, their minority rights are being siphoned off illegally and arbitrarily to the majority population because neither Central nor the State Governments have notified the Hindus as a 'minority' under Section 2 (c) of the NCM Act. Therefore, Hindus are being deprived of their basic rights, guaranteed under the Articles 25 to 30. Hence, Notification on Minority Community [1993-SO No.816 (E), F.No.1/11/93-MC(D)] dated 23.10.1993 is not only arbitrary and irrational but also invalid and ultra-virus the Constitution of India and its basic structure.

C. Because Muslims are majority in Lakshdweep (96.20%) and J & K (68.30%) and there is significant population in Assam (34.20%), West Bengal (27.5%), Kerala (26.60%), Uttar Pradesh (19.30%) and Bihar (18%). However, they are enjoying the 'minority' status, and the communities which are real minorities, are not getting their legitimate share because of non-identification and non-notification of minorities at State level, thereby jeopardizing their basic rights guaranteed under Part III of the Constitution. This clearly reflects arbitrariness and illegality in Notification on Minority Communities [1993-SO, No.816(E), F.No.1/11/93-MC(D)] dated 23.10.1993. Similarly, Christians are majority in Mizoram, Meghalaya and Nagaland and there is significant population in Arunachal Pradesh, Goa, Kerala, Manipur, Tamil Nadu and West Bengal but they are treated as minority. Likewise, Sikhs are majority in Punjab and there is significant population in Delhi, Chandigarh and Haryana but they are also treated as minority.

D. Because Union Government offered 20000 scholarships in field of technical education for minority students. In J&K, Muslims are 68.30% and government allotted 717 out of 753 scholarships to Muslim students but none to Hindu students citing Notification on Minority Communities [1993-SO No.816(E), F.No.1/11/93-MC(D)] dated 23.10.1993 which declares Muslim's as minority, but not the Hindus.

E. Because Prime Minister's 15 Points Programme/scheme meant for religious and linguistic minorities is not being appropriately used, particularly in Arunachal Pradesh, Assam, Goa, Jammu & Kashmir, Kerala, Lakshadweep, Manipur, Meghalaya, Mizoram, Nagaland, Punjab, Tamil Nadu, Uttar Pradesh and West Bengal. Hindu's legitimate share is being siphoned off arbitrarily to unqualified sections of the population, because of non-identification and non-notification of minorities at State level. Although, it is duty of the Government to identify and notify religious and linguistic minorities at State level so as to safeguard the rights of minorities guaranteed under Articles 25-30.

F. Because denial of minority rights to real minorities and arbitrary and unreasonable disbursement of minority benefits to 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)]. Therefore, this Hon'ble Court should declare the above stated Notification invalid and ultra-virus the Constitution and its basic structure.

G. Because eleven-judge Bench of this Hon'ble Court in TMA Pai Foundation case (2002) 8 SCC 481 has held as follows:

“78. In two cases pertaining to the DAV College, this Court had to consider whether the Hindus were a religious minority in the State of Punjab. In DAV College v. State of Punjab [1971(Supp) SCR 688], the question posed was as to what constituted a religious or linguistic minority, and how it was to be determined. After examining the opinion of this Court in the Kerala Education Bill case, the Court held that the Arya Samajis, who were Hindus, were a religious minority in the State of Punjab, even though they may not have been so in relation to the entire country. In another case, DAV College Bhatinda v. State of Punjab [1971 (Supp) SCR 677], the observations in the first DAV College case were explained, and at page 681, it was stated that “what constitutes a linguistic or religious minority must be judged in relation to the State in as much as the impugned Act was a State Act and not in relation to the whole of India.” This Court rejected the contention that since Hindus were a majority in India, they could not be a religious minority in the State of Punjab, as it took the State as the unit to determine whether the Hindus were a minority community.

79. There can, therefore, be little doubt that this Court has consistently held that, with regard to a State Law, the unit to determine a religious or linguistic minority can only be the State.”

H. Because despite the above unequivocal position of law, Executive has failed to apply above principle evenly by excluding Hindus from purview of minority status and benefits. Hence, this Hon'ble Court may allow the petition.

PRAYER

Keeping in view the above stated facts and circumstances and great goals of the Preamble, it is the most 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)** declare the Notification on Minority Community [1993 –SO No.816(E) F.No.1/11/93-MC(D)] dated 23.10.1993; invalid and ultra-vires the Constitution and its basic structure;
- b)** lay down appropriate guidelines for the identification of minorities, to ensure that only those groups of persons which are numerically inferior to the other groups and are in non-dominant position, enjoy the rights and protections guaranteed to minorities; in the alternative,
- c)** direct the Central Government to exercise its power conferred by Section 2(c) of the NCM Act,1992; to notify 'minority' in consonance with the United Nations General Assembly Resolution dated 18.12.1992 and Judgment of this Hon'ble Court dated 8.8.2005 (Annexure P-1 and P-2);
- d)** direct the Government to exercise its power conferred by Section 2(c) of the NCM Act to declare Hindus as 'minority' for States, where they don't form a majority of population;
- e)** take such other steps as this Hon'ble Court may deem fit to define 'minority' and allow the cost to petitioner.

Drawn on: 25.10.2017

(R. D. Upadhyay)

Filed on: 30.10.2017

Advocate for Petitioner

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO OF 2017

IN THE MATTER OF:

Ashwini Kumar Upadhyay ...Petitioner

Verses

Union of India & another ...Respondents

AFFIDAVIT

I, Ashwini Kumar Upadhyay aged 42 years, son of Sh. Suresh Chandra Upadhyay, Office at 15, New Lawyers Chambers, Supreme Court of India, New Delhi-110001, Resident of G-284, Govindpuram, Ghaziabad, Pin-201013, at present at New Delhi, do hereby solemnly affirm and declare as under:

1. That I am the sole petitioner above named and well acquainted with facts and circumstances of the case and as such competent to swear this affidavit.
2. That I have read and understood the contents of accompanying synopsis and list of dates pages (B - F) and writ petition paras (1 - 65) pages (1 - 37) and total pages (1 - 108) which are true and correct to my knowledge and belief. The annexures filed with this writ petition are true copies of their respective originals.
3. That petitioner has not filed any other petition either in this Hon'ble Court or in any other High Court seeking same and similar directions as prayed in this petition.
4. That 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. There is no motive other than the public interest.
5. There is no civil, criminal or revenue litigation, involving petitioner, which has or could have legal nexus, with the issue involved in this petition. It is totally bona-fide.

6. There is no requirement to move concerned government authority for relief sought in this PIL. There is no other remedy available except approaching this Hon'ble Court.
7. That I have gone through Article 32 of the Constitution and Supreme Court Rules and do hereby affirm that the present writ petition is in conformity thereof.
8. That I have done whatsoever enquiry/investigation, which was in my power to do, to collect the data/material, which was available; and which was relevant for this Hon'ble Court to entertain the present writ petition.
9. That I have not concealed any data/material/information in this petition; which may have enabled this Hon'ble Court to form an opinion, whether to entertain this petition or not and/or whether to grant any relief or not.
10. That the averments made in this affidavit are true and correct to my personal knowledge and belief. No part of this Affidavit is false/fabricated, nor has anything material been concealed there from.

(Ashwini Kumar Upadhyay)

DEPONENT

VERIFICATION

I, the Deponent do hereby verify that the contents of above affidavit are true and correct to my personal knowledge and belief. No part of this affidavit is false nor has anything material been concealed there from.

I solemnly affirm today i.e. Monday, the 30th day of October 2017 at New Delhi.

(Ashwini Kumar Upadhyay)

DEPONENT

APPENDIX

THE NATIONAL COMMISSION FOR MINORITIES ACT, 1992

Section 2(c) of the National Commission for Minorities Act, 1992

(c) "minority", for the purposes of this Act, means a community notified as such by the Central Government;

THE NOTIFICATION ON MINORITY COMMUNITY

[1993 –SO No. 816(E) F.No.1/11/93-MC(D) dated 23.10.1993]

GOVERNMENT OF INDIA

MINISTRY OF WELFARE

Shastri Bhavan, New Delhi

Dated: 23rd October, 1993

NOTIFICATION

S.O. No. 816 (E). In exercise of the powers conferred by Clause (c) of Section 2 of the National Commission for Minorities Act, 1992 (19 of 1992), the Central Government hereby notifies the following communities as “the minority communities” for the purposes of the said Act, namely.

1. Muslims
2. Christians
3. Sikhs
4. Buddhists
5. Zoroastrians (Parsis)

Sd/-

(P.K. Mohanty)

Joint Secretary

F.No.1/11/93-MC (D)

The Manager,

Government of India Press

Maya Puri, NEW DELHI

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

Adopted by General Assembly resolution 47/135 dated 18.12.1992

The General Assembly,

Reaffirming that one of the basic aims of the United Nations, as proclaimed in the Charter, is to promote and encourage respect for human rights and for fundamental freedoms for all, without distinction as to race, sex, language or religion,

Reaffirming faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small,

Desiring to promote the realization of the principles contained in the Charter, the Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, and the Convention on the Rights of the Child, as well as other relevant international instruments that have been adopted at the universal or regional level and those concluded between individual States Members of the United Nations,

Inspired by the provisions of Article 27 of the International Covenant on Civil and Political Rights concerning the rights of persons belonging to ethnic, religious and linguistic minorities,

Considering that the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of States in which they live,

Emphasizing that the constant promotion and realization of the rights of persons belonging to national or ethnic, religious and linguistic minorities, as an integral part of the development of society as a whole and within a democratic framework based on the rule of law, would contribute to the strengthening of friendship and cooperation among peoples and States,

Considering that the United Nations has an important role to play regarding the protection of minorities,

Bearing in mind the work done so far within the United Nations system, in particular by the Commission on Human Rights, the Sub-Commission on Prevention of Discrimination and Protection of Minorities and the bodies established pursuant to the International Covenants on Human Rights and other relevant international human rights instruments in promoting and protecting the rights of persons belonging to national or ethnic, religious and linguistic minorities,

Taking into account the important work which is done by intergovernmental and non-governmental organizations in protecting minorities and in promoting and protecting the rights of persons belonging to national or ethnic, religious and linguistic minorities,

Recognizing the need to ensure even more effective implementation of international human rights instruments with regard to the rights of persons belonging to national or ethnic, religious and linguistic minorities,

Proclaims this Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities:

Article 1

1. States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for promotion of that identity.
2. States shall adopt appropriate legislative and other measures to achieve those ends.

Article 2

1. Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.
2. Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.
3. Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.
4. Persons belonging to minorities have the right to establish and maintain their own associations.

5. Persons belonging to minorities have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties.

Article 3

1. Persons belonging to minorities may exercise their rights, including those set forth in the present Declaration, individually as well as in community with other members of their group, without any discrimination.

2. No disadvantage shall result for any person belonging to a minority as the consequence of the exercise or non-exercise of the rights set forth in the present Declaration.

Article 4

1. States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.

2. States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.

3. States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.

4. States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole.

5. States should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country.

Article 5

1. National policies and programmes shall be planned and implemented with due regard for the legitimate interests of persons belonging to minorities.

2. Programmes of cooperation and assistance among States should be planned and implemented with due regard for the legitimate interests of persons belonging to minorities.

Article 6

States should cooperate on questions relating to persons belonging to minorities, inter alia, exchanging information and experiences, in order to promote mutual understanding and confidence.

Article 7

States should cooperate in order to promote respect for the rights set forth in the present Declaration.

Article 8

1. Nothing in the present Declaration shall prevent the fulfillment of international obligations of States in relation to persons belonging to minorities. In particular, States shall fulfill in good faith the obligations and commitments they have assumed under international treaties and agreements to which they are parties.

2. The exercise of the rights set forth in the present Declaration shall not prejudice the enjoyment by all persons of universally recognized human rights and fundamental freedoms.

3. Measures taken by States to ensure the effective enjoyment of the rights set forth in the present Declaration shall not prima facie be considered contrary to the principle of equality contained in the Universal Declaration of Human Rights.

4. Nothing in the present Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States.

Article 9

The specialized agencies and other organizations of the United Nations system shall contribute to the full realization of the rights and principles set forth in the present Declaration, within their respective fields of competence.

SUPREME COURT OF INDIA

CASE NO.: Appeal (civil) 4730 of 1999

PETITIONER: Bal Patil & Anr.

RESPONDENT: Union of India & Ors.

DATE OF JUDGMENT: 08/08/2005

BENCH: Chief Justice of India, D. M. Dharmadhikari & P. K. Balasubramanyan, J.

JUDGMENT: Dharmadhikari J.

The appellant is an organization representing a section of Jain community. It approached by writ petition the High Court of Bombay seeking issuance of a mandamus/direction to the Central Government to notify 'Jains' as a 'minority' community under section 2(c) of the National Commission for Minorities Act, 1992 (shortly referred to as the Act).

Section 2(c) of the Act defines minority thus :- "Minority, for the purposes of this Act, means a community notified as such by the Central Government;"

The High Court of Bombay by the impugned order simply disposed off the petition on the ground that the claim of various communities to the status of 'minority' for purpose of seeking constitutional protections is one of the main issues pending before a bench of eleven judges of this court in the case of TMA Pai Foundation [2002 (8) SCC 481].

This appeal stood adjourned on several dates awaiting the judgment in the TMA Pai Foundation case. In the counter affidavit filed the Central Government stated that they would abide by the judgment of the eleven judges' Bench in TMA Pai Foundation case and thereafter consider the claim of Jains to the status of minority community under the Act.

During the pendency of this appeal, the eleven judges' Bench decision in TMA Pai was delivered and the decision is reported in 2002 (8) SCC 481.

Amongst several questions which were formulated for answer by the eleven judges Bench the most important question included was as under:-

"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 Kirpal, CJ (as he then was) is the following :-

Ans: Linguistic and religious minorities are covered by the expression "minority" under Article 30 of the Constitution. Since reorganization of the States in India has been on linguistic lines, therefore, for the purpose of determining the minority, the unit will be the State and not the whole of India. Thus, religious and linguistic minorities, who have been put on a par in Article 30, have to be considered statewise.

After the decision of the eleven judges' Bench case (supra), additional affidavit by the Central Government through its Joint Secretary, Ministry of Social Justice & Empowerment has been filed. The stand now taken by the Central Government in this appeal before this court is that in accordance with the law laid down by the majority opinion in the TMA Pai case (supra), it is "for the State Government to decide as to whether the Jain community should be treated as a minority community in their respective states after taking into account their circumstances/conditions in that state". It is also informed that the State Governments of Chhatisgarh, Maharashtra, Madhya Pradesh, Uttar Pradesh and Uttaranchal have already notified Jains as 'minority' in accordance with the provisions of the respective State Minority Commissions Act.

Learned Counsel U.U. Lalit, in the light of law declared in the decision of the eleven judges' Bench (supra) and the consequent stand taken by the Central Government, strenuously urged that for the purpose of notifying a community as 'minority' at the national level, the Central Government, which is empowered to consider the claim of a particular community for being notified as such under section 2(c), cannot shirk its statutory responsibility. It is argued that the legal position explained by the majority view in the eleven judges Bench case that State Governments can determine the minority status of a community in states formed on linguistic basis under States Reorganisation Act, 1956 does not render the power of Central Government under section 2(c) of the Act redundant.

Learned counsel representing the claim of the members of the Jain community before this court further submitted that in accordance with section 2(c) of the Act,

Muslims, Christians, Sikhs, Buddhists, Zoroastrians (Parsees) have already been notified as minority communities for the purpose of the Act and the Jains having substantiated their claim of being a religious minority, the refusal to notify them as such under the Act is unjustified and abdication of statutory powers of the Central Government.

We have heard Learned Additional Solicitor General Shri B. Dutta, appearing for the Central Government who merely reiterated the stand taken in the affidavit filed on behalf of the government that in view of the judgment in TMA Pai case (*supra*), the Central Government henceforth will have no role to play. It is for the respective State Governments to take decision on the claim of Jains depending upon their social condition in the respective states.

The expression 'minority' has been used in Articles 29 and 30 of the Constitution but it has nowhere been defined. The Preamble of the Constitution proclaims to guarantee every citizen 'liberty of thought, expression, belief, faith & worship'. Group of Articles 25 to 30 guarantee protection of religious, cultural and educational rights to both majority and minority communities. It appears that keeping in view the constitutional guarantees for protection of cultural, educational and religious rights of all citizens, it was not felt necessary to define 'minority'. Minority as understood from constitutional scheme signifies an identifiable group of people or community who were seen as deserving protection from likely deprivation of their religious, cultural and educational rights by other communities who happen to be in majority and likely to gain political power in a democratic form of Government based on election.

In the background of constitutional scheme, the provisions of the Act therefore instead of giving definition of 'minority' only provide for notifying certain communities as 'minorities' who might require special treatment and protection of their religious, cultural and educational rights. The definition of 'minority' given under the Act in section 2(c) is in fact not a definition as such but only a provision enabling the Central Government to identify a community as a 'minority' which in the considered opinion of the Central Government deserves to be notified for the purpose of protecting and monitoring its progress and development through the Commission.

The Statement of Objects and Reasons for the enactment reads thus:-

"The Minorities Commission was set up on January, 1978 for providing an institutional arrangement for evaluating the safeguards provided in the Constitution for protection of the minorities and to make recommendations for ensuring implementation of the safeguards and the laws.

The Minorities Commission with statutory status would infuse confidence among the minorities about the working and the effectiveness of the Commission. It would also carry more weight with the State Governments/ Union Territory Administrations and the Ministries/ Departments and the other Organizations of the Central Government.

It has, therefore, been decided to give statutory status to the Minorities Commission by the proposed legislation.

The National Commission for Minorities will consist of a Chairperson and six members.

The main task of the Commission shall be to evaluate the progress of the development of minorities, monitor the working of the safeguards provided in the Constitution for the protection of the interests of minorities and in laws enacted by the Central Government or State Governments, besides looking into the specific complaints regarding deprivation of rights and safeguards of the minorities. It shall also cause studies, research and analysis to be undertaken on the issues relating to socio-economic and educational development of the minorities and make recommendations for the effective implementation of the safeguards for the protection and interests of minorities by the Central Government or State Governments. It may also suggest appropriate measures in respect of any minority to be undertaken by the Central Government or State Government."

The Commission set up under the Act has several functions to perform, which are provided, in section 9. The functions entrusted are for ensuring progress and development of minorities and protecting their religious, cultural and educational rights. There is no specific function conferred under section 9 on the Commission to identify any community as a 'minority' and recommend to the Central Government that it be so notified under section 2(c) of the Act.

On considering the general functions of the Commission enumerated under section 9 which are only illustrative and not exhaustive, the Commission cannot be said to have transgressed its authority in entertaining representation, demands and counter demands of members of Jain community for the status of 'minority'. Keeping in view the provisions of the Act, the recommendation made by the Commission in favour of the Jains is in the nature of advice and can have no binding effect. The power under section 2(c) of the Act vests in the Central Government, which alone, on its own assessment, has to accept or reject the claim of status of minority by a community. After the verdict in the eleven judges' Bench in TMA Pai Foundation case (supra), the legal position stands clarified that henceforth the unit for determining status of both linguistic and religious minorities would be 'state'. This position is doubly clear not only from the answer given in conclusion to question no. 1 quoted above 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-à-vis Article 30, then with "religious minority" being on the same footing, it is the State in relation to which 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."

Henceforth, before the Central Government takes decision on claims of Jains as a 'minority' under section 2(c) of the Act, the identification has to be done on a state basis. The power of Central Government has to be exercised not merely on the advice and recommendation of the Commission but on consideration of the social, cultural and religious conditions of the Jain community in each state. Statistical data produced to show that a community is numerically a minority cannot be the sole criterion. If it is found that a majority of the members of the community belong to the affluent class of industrialists, businessmen, professionals and propertied class, it may not be necessary to notify them under the Act as such and extend any special treatment or protection to them as minority. The provisions contained in the group of Articles 25 to 30 is a protective umbrella against the possible deprivations of fundamental right of religious freedoms of religious and linguistic minorities.

The recommendation in favour of Jains by the National Minority Commission was made before the Eleven Judges' Bench of this Court in TMA Pai case (supra) had clarified the concept of 'minority' for the purpose of extending constitutional protection.

It is not for this court to issue any direction or mandate on the basis of the claim of some members of the Jain community, which is opposed to by another section of the same community.

Before parting with this case, this Court cannot resist from making some observations which are considered necessary in order to remind the National and State Commissions for Minorities, the scope and nature of their functions under the provisions of the Act and the role they have to play in constitutional perspective.

The history of the struggle for independence of India bears ample testimony of the fact that the concept of 'minorities' and the demands for special care and protection of their religious and cultural rights arose after bitter experience of religious conflicts which intermittently arose in about 150 years of British Rule. The demand of partition gained momentum at the time the Britishers decided to leave by handing over self-rule to Indians. The Britishers always treated Hindus and Muslims as two different groups of citizens requiring different treatment. To those groups were added Anglo-Indians and

Christians as a result of large scale inter-marriages and conversions of several sections of communities in India to Christianity. Prior to passing of the Independence Act of India to hand over self-rule to Indians, Britishers in the course of gradually conceding some democratic rights to Indians, contemplated formation of separate constituencies on reservations of certain seats in legislature in proportion to the population of Hindus and Muslims. That attempt was strongly resisted by both prominent Hindu and Muslim national leaders who had jointly and actively participated in the struggle for independence of India.

The attempt of the Britishers to form separate electorates and make reservations of seats on the basis of population of Hindus and Muslims, however, ultimately led to revival of demand for reservations of constituencies and seats in the first elected government to be formed in free India. Resistance to such demands by Hindu and some Muslim leaders ultimately led to partition of India and formation of separate Muslim State presently known as Pakistan.

Many other revelations concerning competing claims for reservation of seats on religious basis can be gathered from the personal diary of prominent national leader late Abdul Kalam Azad. The diary was made public, in accordance with his last wish only after 25 years of independence. The publication of Azad's diary made it necessary for constitutional expert H. M. Seervai to re-write his chapter under caption 'Partition of India, Legend and Reality' in his book on 'Constitutional Law of India'. Many apprehensions and fears were expressed and disturbed the minds of the Muslims. They thought in democracy to be set up in India, the Hindus being in majority would always dominate and retain political power on the basis of their voting strength. There were also apprehensions expressed by many prominent Muslim leaders that there might be interference with and discouragement to their cultural, religious and educational rights. Abdul Kalam Azad acted as mediator in negotiations between the national leaders of the times namely late Nehru and Patel on one side and late Jinnah and Liaqat Ali on the other. Nehru and Patel insisted that in the new Constitution, there would be one united India belonging to people of various religious faiths and cultures with all having full

freedom of their social, cultural, religious and other constitutional rights. They advocated one single citizenship to every Indian regardless of his language or religion. The opposing group of Muslim leaders, in the interest of members of their community, insisted on providing to them participation in democratic processes proportionate to their ratio of population and thus counter-balance the likely domination of Hindu majority. They also insisted that separate electoral constituencies based on their population be formed and seats be reserved for them in different parts of India. Late Abdul Kalam Azad tried his utmost to find a midway and thus break the stalemate between the two opposing groups but Nehru and Patel remained resolute and rejected the proposal of Jinnah and Liaqat Ali. The tragic result was that provinces with the highest Muslim population in the erstwhile States of Sindh, Punjab and Baluchistan had to be ceded to form a separate theocratic nation - Pakistan. See the following Paragraph 1.314 at Page 153 of 'Constitutional Law of India' by H.M. Seervai, Fourth Edition, Vol.I:-

"1.314. Azad passionately believed in Hindu-Muslim unity, but he found that from the mid-twenties Gandhi had lost interest in Hindu-Muslim unity and took no steps to secure it. Further, Azad had played a leading part in providing a framework for the Constitution of a free and united India on which the Cabinet Mission Plan was largely based, a Plan which offered India her last chance to remain united. However, Gandhi, Nehru and Patel destroyed the Plan, and accepted partition instead. Azad did his utmost to prevent the partition of India, but he failed to persuade Nehru and Gandhi not to accept partition."

It is against this background of partition that at the time of giving final shape to the Constitution of India, it was felt necessary to allay the apprehensions and fears in the minds of Muslims and other religious communities by providing to them special guarantee and protection of their religious, cultural and educational rights. Such protection was found necessary to maintain unity and integrity of free India because even after partition of India, communities like Muslims and Christians in greater numbers living in different parts of India opted to continue to live in India as children of its soil.

It is with the above aim in view that the framers of the Constitution engrafted group of Articles 25 to 30 in the Constitution of India. The minorities initially recognized were based on religion and on national level e.g. Muslims, Christians, Anglo-Indian and Parsis. Muslims constituted the largest religious minority because Mughal period of rule in India was longest followed by British rule during which many Indians had adopted Muslim and Christian religions.

Parsis constituted a numerically smaller minority. They had migrated from their native State Iran and settled on the shores of Gujarat adopting the Gujarati language, customs and rituals thus assimilating themselves into the Indian population.

The so-called minority communities like Sikhs and Jains were not treated as national minorities at the time of framing the Constitution. Sikhs and Jains, in fact, have throughout been treated as part of the wider Hindu community which has different sects, sub-sects, faiths, modes of worship and religious philosophies. In various codified customary laws like Hindu Marriage Act, Hindu Succession Act, Hindu Adoption and Maintenance Act and other laws of pre and post Constitution period, definition of 'Hindu' included all sects, sub-sects of Hindu religions including Sikhs and Jains.

The word 'Hindu' conveys the image of diverse groups of communities living in India. If you search for a person by name Hindu, he is unidentifiable. He can be identified only on the basis of his caste as upper caste Brahmin, Kshatriya or Vaish or of lower caste described in ancient India as Shudras. Those who fall in the Hindu class of 'Shudras' are now included in the Constitution in the category of Scheduled Castes with special privileges and treatment for their upliftment. This was found necessary to bring them at par with upper castes in Hindu society. The aboriginals, who have no caste were considered as distinct from four castes or Varnas of Hindu society. They have been treated favourably in the Constitution as Scheduled Tribes. For them also there are provisions for special treatment and grant of special privileges to bring them on level with the other castes from the main advanced streams of Indian society.

There is a very serious debate and difference of opinion between religious philosophers and historians as to whether Jains are of Hindu stock and whether their

religion is more ancient than the vedic religion of Hindus. Spiritual philosophy of Hindus and Jains in many respect is different but the quintessence of the spiritual thought of both the religions seems to be the same. The influence of Hindu vedic religion is quite apparent in the custom, style of living, belief and faith of Jains. Jains do not worship images or idols of Gods but worship their Tirathankars meaning their ideal personalities who have attained human perfection and excellence by a process of self-improvement. The literal meaning of the word 'Jain' is one who has attained 'victory'. It signifies a person who has attained victory over himself by the process of self-purification. 'Jain' is a religious devout who is continuously striving to gain control over his desires, senses and organs to ultimately become master of his own self.

This philosophy is to some extent similar to the vedic philosophy explained by Lord Krishna in 'Bhagwat Geeta', where Lord Krishna describes qualities of a perfect human as 'Stithpragya'. Geeta has used the example of Tortoise to describe a balanced human-being as one who has gained full control over his organs like a Tortoise does which whenever needed, opens its limbs of body and when not needed, closes them.

Thus, 'Hinduism' can be called a general religion and common faith of India whereas 'Jainism' is a special religion formed on the basis of quintessence of Hindu religion. Jainism places greater emphasis on non-violence ('Ahimsa') and compassion ('Karuna'). Their only difference from Hindus is that Jains do not believe in any creator like God but worship only the perfect human-being whom they called Tirathankar. Lord Mahavir was one in the generation of Thirthankars. The Tirathankars are embodiments of perfect human-beings who have achieved human excellence at mental and physical levels. In philosophical sense, Jainism is a reformist movement amongst Hindus like Brahamsamajis, Aryasamajis and Lingayats. The three main principles of Jainism are Ahimsa, Anekantvad and Aparigrah. [See :\026 1) Encyclopedia of Religion and Ethics Vol. 7 pg. 465; 2) History of Jains by A. K. Roy pgs. 5 to 23; and Vinoba Sahitya Vol. 7 pg. 271 to 284].

It is not necessary to go into greater details of philosophical and ideological beliefs and conduct of Jains. They have been dealt with in necessary detail in the recommendations of the National Commission for Minorities.

We have traced the history of India and its struggle for independence to show how the concept of minority developed prior to and at the time of framing of Constitution and later in the course of its working. History tells us that there were certain religious communities in India who were required to be given full assurance of protection of their religious and cultural rights. India is a country of people with the largest number of religions and languages living together and forming a Nation. Such diversity of religions, culture and way of life is not to be found in any part of the world. John Stuart Mill described India as "a world placed at closed quarters". India is a world in miniature.

The group of Articles 25 to 30 of the Constitution, as the historical background of partition of India shows, was only to give a guarantee of security to the identified minorities and thus to maintain integrity of the country. It was not in contemplation of the framers of the Constitution to add to the list of religious minorities. The Constitution through all its organs is committed to protect religious, cultural and educational rights of all. Articles 25 to 30 guarantee cultural and religious freedoms to both majority and minority groups. Ideal of a democratic society, which has adopted right of equality as its fundamental creed, should be elimination of majority and minority and so called forward and backward classes. Constitution has accepted one common citizenship for every Indian regardless of his religion, language, culture or faith. The only qualification for citizenship is a person's birth in India. We have to develop such enlightened citizenship where each citizen of whatever religion or language is more concerned about his duties and responsibilities to protect rights of the other group than asserting his own rights. The constitutional goal is to develop citizenship in which everyone enjoys full fundamental freedoms of religion, faith and worship and no one is apprehensive of encroachment of his rights by others in minority or majority.

The constitutional ideal, which can be gathered from the group of articles in the Constitution under Chapters of Fundamental Rights and Fundamental Duties, is to create social conditions where there remains no necessity to shield or protect rights of minority or majority.

The above mentioned constitutional goal has to be kept in view by the Minorities Commissions set up at the Central or State levels. Commissions set up for minorities have to direct their activities to maintain integrity and unity of India by gradually eliminating the minority and majority classes. If, only on the basis of a different religious thought or less numerical strength or lack of health, wealth, education, power or social rights, a claim of a section of Indian society to the status of 'minority' is considered and conceded, there would be no end to such claims in a society as multi-religious and multi-linguistic as India is. A claim by one group of citizens would lead to a similar claim by another group of citizens and conflict and strife would ensue. As such, the Hindu society being based on caste, is itself divided into various minority groups. Each caste claims to be separate from the other. In a caste-ridden Indian society, no section or distinct group of people can claim to be in majority. All are minorities amongst Hindus. Many of them claim such status because of their small number and expect protection from the State on the ground that they are backward. If each minority group feels afraid of the other group, an atmosphere of mutual fear and distrust would be created posing serious threat to the integrity of our Nation. That would sow seeds of multi-nationalism in India. It is, therefore, necessary that Minority Commission should act in a manner so as to prevent generating feelings of multi nationalism in various sections of people of Bharat.

The Commission instead of encouraging claims from different communities for being added to a list of notified minorities under the Act, should suggest ways and means to help create social conditions where the list of notified minorities is gradually reduced and done away with altogether.

These concluding observations were required after the eleven judges Bench in TMA Pai Foundation Case (supra) held that claims of minorities on both linguistic and religious basis would be each State as a unit.

The country has already been reorganized in the year 1956 under the States Reorganization Act on the basis of language. Differential treatments to linguistic minorities based on language within the state is understandable but if the same concept for minorities on the basis of religion is encouraged, the whole country, which is already under class and social conflicts due to various divisive forces, will further face division on the basis of religious diversities. Such claims to minority status based on religion would increase in the fond hope of various sections of people getting special protections, privileges and treatment as part of constitutional guarantee. Encouragement to such fissiparous tendencies would be a serious jolt to the secular structure of constitutional democracy. We should guard against making our country akin to a theocratic state based on multi nationalism. Our concept of secularism, to put it in a nut shell, is that 'state' will have no religion. The states will treat all religions and religious groups equally and with equal respect without in any manner interfering with their individual rights of religion, faith and worship.

Let the Commission gear its activities to keep them in right direction with the above constitutional perspective, principles and ideals in its view. With these observations and concluding remarks, this appeal stands disposed of as we do not find that any case is made out for grant of any relief to the appellants in exercise of writ jurisdiction of the High Court and hence, the appellate jurisdiction of this Court.

To,

01.05.2017

The Hon'ble Minister for Law & Justice

Government of India, New Delhi-110001

Through: The Secretary-Ministry of Law & Justice

REPEAL NOTIFICATION ON MINORITY COMMUNITIES:

1993-SO NO.816(E), F.NO.1/11/93-MC(D), 23.10.1993

Respected Sir,

- 1.** The Constitution guarantees certain rights to minorities to protect their culture, script and languages but it does not define the term "minority". Definition of 'minority' was left unanswered until eleven judges Bench of the Apex Court defined it in TMA Pai Foundation case [(2002) 8 SCC 481], wherein the Court held that the unit for determining the minorities should be the State, not the whole of India.
- 2.** The National Commission for Minorities Act was passed in 1992. It extends to the whole of India except J&K. As per Section 2 (c) of Act, 'minority' means a community notified as such by the Central government. Using this power, the Government on 23.10.1993 notified five communities that is Muslims, Christians Sikhs Buddhists and Parasis as minority. Later, Jains were also added in the list.
- 3.** That according to 2011 Census, Hindus are monitory in eight States i.e. Lakshadweep (2.5%), Mizoram (2.75%), Nagaland (8.75%), Meghalaya (11.53%), J&K (28.44%), Arunachal Pradesh (29%), Manipur (31.39%) and Punjab (38.40%). But, their minority rights are being siphoned off illegally and arbitrarily to the majority population because neither Central nor the State Governments have notified them as minority under Section 2 (c) of the NCM Act 1992. Therefore, Hindus are at receiving end and their rights guaranteed under the Articles 25-30 is being violated. Hence, Notification on Minority Community [1993-SO No.816 (E), F.No.1/11/93-MC(D)] dated 23.10.1993 is arbitrary.

4. That Muslims are majority in Lakshdweep (96.20%), J&K (68.30%) and there is significant population in Assam (34.20%), West Bengal (27.5%), Kerala (26.60%), Uttar Pradesh (19.30%) and Bihar (18%). However, they are enjoying the 'minority' status and the communities, which are real minorities, are not getting their due share because of non-identification and non-notification of the minorities at State level, thereby jeopardizing their basic rights guaranteed under Part III of the Constitution. This clearly reflects illegality arbitrariness and discrepancy in the Notification on Minority Communities [1993-SO No.816(E), F.No.1/11/93-MC(D)]dated 23.10.1993. Similarly, Christians are majority in Meghalaya, Mizoram and Nagaland and there is significant population in Arunachal Pradesh, Goa, Kerala, Manipur, Tamilnadu and West Bengal but they are treated as minority. Likewise, Sikhs are majority in Punjab and there is significant population in Delhi, Chandigarh and Haryana but they are treated as minority.

5. The Central Government offered 20000 scholarships in the field of technical education for minority students. In J&K, Muslims are 68.30% but government allotted 717 out of 753 scholarships to Muslim students but none to Hindu students citing Notification on Minority Communities [1993-SO No.816(E), F.No.1/11/93-MC(D)] dated 23.10.1993, which declares Muslim's as minority, but not the Hindus.

6. The Prime Minister's 15 Points Programme and other schemes meant for religious and linguistic minorities in the Arunachal Pradesh, Assam, Goa, J & K, Kerala, Lakshadweep, Manipur, Meghalaya, Mizoram, Nagaland, Punjab, Tamilnadu, Uttar Pradesh and West Bengal is not being appropriately used and their lawful share being siphoned off arbitrarily to unqualified sections of the population, because of non-identification and non-notification of minorities at the State level. Although, it is duty of the State to identify and notify the religious and linguistic minorities at State level to safeguard the rights of minorities guaranteed under the Article 25 to 30.

7. That denial of minority rights to real minorities and arbitrary and 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)] and impairs the right to 'equality of opportunity' in matters related to public employment [Article 16(1)], 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)]. Therefore, please take appropriate steps to repeal the above stated notification which is arbitrary and irrational.

8. The eleven-judge Bench of the Supreme Court in TMA Pai Foundation case (2002) 8 SCC 481 has held as follows:

“78. In two cases pertaining to the DAV College, this Court had to consider whether the Hindus were a religious minority in the State of Punjab. In DAV College v. State of Punjab [1971 (Supp) SCR 688], the question posed was as to what constituted a religious or linguistic minority, and how it was to be determined. After examining opinion of this Court in the Kerala Education Bill case, the Court held that the Arya Samajis, who were Hindus, were a religious minority in the State of Punjab, even though they may not have been so in relation to the entire country. In another case, DAV College Bhatinda v. State of Punjab [1971 (Supp) SCR 677], the observations in the first DAV College case were explained, and at page 681, it was stated that “what constitutes a linguistic or religious minority must be judged in relation to the State in as much as the impugned Act was a State Act and not in relation to the whole of India.” This Court rejected the contention that since Hindus were a majority in India, they could not be a religious minority in the State of Punjab, as it took the State as the unit to determine whether Hindus were a minority community.

79. There can, therefore, be little doubt that this Court has consistently held that, with regard to a State Law, the unit to determine a religious or linguistic minority can only be the State.”

9. That despite the above unequivocal position of law, the previous Central Governments has failed to apply the above principle evenly, excluding the Hindus from purview of the minority status and benefits as well. Therefore, please take appropriate steps in this regard on priority.

- 10.** The Constitution of India guarantees certain rights to minorities to protect their culture, script and languages but it does not define the term “minority”. The definition of ‘minority’ was left unanswered until the 11 Judges Bench of the Supreme Court defined it in *TMA Pai Foundation v. State of Karnataka*, [(2002) 8 SCC 481], wherein the Court has held that the unit for the purpose of determining the minorities should be the State, not the whole of India.
- 11.** That it is duty of the State to move beyond the minority-majority binary communal politics, which ironically passes for secularism in this country, has been the bane of our democracy. It can be traced back to the British policy of ‘divide and rule’, the result of which was partition. The Constitution was a repudiation of these ideas and the politics that perpetuated them. It rejected the suggestions for a separate electorate for the minorities and the proportional representation system, which it felt would lead to a perpetually enervated nation. However, in most policies that have been followed until now, we have seen furtherance of vote-bank politics.
- 12.** That the term minority has not been defined in the Constitution of India but the Supreme Court in *Re: Kerala Education Bill*, AIR 1958 SC 956 has defined minority to be a group of people who are numerically a minority in ‘*a State as a whole*’ as distinguished from any particular

area or region thereof. This essentially means that determination of minority has to be done on the basis of 'a State as a unit' i.e. State-wise. Merely because Hindu community is numerically larger in number at the national level, does not disqualify it to be notified as a minority for the purpose of a State.

13. The Apex Court in *Bal Patil & others versus Union of India & Ors* (Civil Appeal 4730 of 1999) while speaking on the question of minority, referred to the Eleven Judges Bench decision passed by the Supreme Court in *TMA Pai Foundation & others versus State of Karnataka & others* [(2002) 8 SCC 481], and inter-alia quoted the following:

“During the pendency of this appeal, the eleven judges' Bench decision in TMA Pai was delivered and the decision is reported in 2002 (8) SCC 481. Amongst several questions which were formulated for answer by the eleven judges Bench the most important question included was as under:

“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 Kirpal, CJ (as he then was) is the following:-

“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 the State and not the whole of India. Thus, religious and linguistic minorities, who have been put on a par in Article 30, have to be considered State-wise”.

14. That the Report of Basic Principles Committee, constituted by the Constituent Assembly of the State in 1954, while dealing with the item of fundamental rights, states: *“Having taken note of the fundamental rights provided in various constitutions including the Constitution of India, recommends the following rights.....”* Then under item 8, it states: *“Cultural and educational rights should also be guaranteed by the constitution. The interests of the minorities should be protected and any section of citizens having a distinct language, script or culture should have the right to conserve the same”.*

15. The Oxford Dictionary defines ‘minority’: *“a smaller number or part, a number or part representing less than half of the whole, a relatively small number of people differing from others in race, religion or language”.*

16. The Sub-Commission of the Promotion and Protection of Human Rights (before 1999, known as the Sub-Commission on Prevention of Discrimination and Protection of Minorities) has defined minority as follows: *“1) The term 'minority' includes only those non-dominant groups of the population which possess and wish to preserve*

stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population; 2) Such minorities should properly include the number of persons sufficient by themselves to preserve such traditions or characteristics; and 3) Such minorities should be loyal to the state of which they are nationals”.

17. The Parliamentary Standing Committee on Social Justice and Empowerment submitted its 14th report on the Constitution (One Hundred and Third Amendment) Bill, 2004 and the National Commission for Minorities (Repeal) Bill, 2004 on February 1, 2006 under the Chairmanship of Smt. Sumitra Mahajan wherein the Committee citing the Supreme Court Judgment in Civil Appeal 4730 of 1999, dated 08.08.2005 recommended that it is up to the State government to declare communities as minorities. The report in its paragraph 1.26 while enquiring about the criteria being adopted by the Government to classify a particular community in the list of ‘minority’ observed: *“During the course of evidence Hon’ble Chairperson enquired about the criteria being adopted by the Government to classify a particular community in the list of ‘minority’ when the Constitution does not define the term (minorities). The Secretary Ministry of Social Justice and Empowerment replied: “Madam, as regards the criteria for notifying the minorities, this has*

actually historically evolved and five communities are being treated as minorities now. The Minorities commission, in its Annual Report for the period ending 31.12.1980, had stated that the Commission has been treating Muslims, Christians, Sikhs, Buddhists and Zoroastrians as religious minorities at the national level. In March, 1984, in the context of the 15-point programme, the Ministry of Home Affairs had also clarified that these are the five minorities at the national level. As you know, this Commission was first set up in 1978 through a Resolution of the Ministry of Home Affairs. Subsequently, when the Act was passed by Parliament in 1992 and the Commission was set up in 1993, under Section 2(c), again the five communities, which had been notified as minorities, were again declared as minorities. Madam, recently there was question of including the Jains in the list of minorities and the Government had taken a stand before the Supreme Court that the Court, already in another case, stated that the State will be declared as the unit. Therefore, the States can determine as to who are the minorities in that particular State. Subsequently, the Supreme Court delivered a judgment on 8th August, that the Jains should not be declared as minorities at the national level and no more communities should be declared as minorities at the national level. So, it is up to the State Governments to declare communities as minorities”.

- 18.** The NCM Act, 1992 lays down that “minority”, means a community notified as such by the Union Government. Similarly, under State Minority Commission Acts, it is the State, which notifies a particular community as a minority for the purpose of the respective State Act. Clause 2 sub (c), Chapter 1 of the Bihar State Minorities Commission Act, 1991 defines minorities as “the persons belonging to religious and linguistic minorities residing in the State of Bihar to whom the Government (State government) has recognized as minorities.”
- 19.** The Union Government through its notification under the NCM Act, 1992 dated 23.10.1993 notified Muslims, Christians, Sikhs, Buddhists and Parsis as National Minorities of India. In 2014, Jains have also been notified as National Minorities by the Government through a notification under the NCM Act, 1992. However, many States have not legislated State Minority Commission Act providing for a State Minority Commission to safeguard the interests of religious/linguistic minorities in the State.
- 20.** That on 31.03.2010, the National Commission for Minorities convened an annual conference of the State Minorities Commissions. The agenda for said conference was published by the National Commission for Minorities wherein its Para 1.1 headed as “Recommendation No. 1” with a sub-heading ‘Action Taken Report’ observes:

“To provide a platform to look into various grievance of the minority communities and to monitor and suggest the mechanism for accelerating pace of socio-economic development of minority communities and their inclusion in the National Mainstream, and the setting up of State Minority Commissions (SMCs) in all States and Union Territories is essential.”

21. The NCM has written to the Union Government to amend the NCM Act, 1992 to make it applicable to the J&K. The Commission had also written to the State Law Minister and Chief Minister in 2012. The then Chairman Sh. Wajahat Habibullah has been reported, saying that the Commission wants that the minorities in all the States must get benefits available to minorities elsewhere and the Commission has been regularly interacting with the State Governments in this regard. He expressed happiness over the State government’s contention that it was *not averse* to benevolent recommendations of the NCM Act 1992.

22. The Article 14 is founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our Secular, Democratic, Republic. The right of equality in the present situation is that of Indian polity and not merely of a few individuals. In *Kasturi Lal Lakshmi Reddy v. State of J & K (1980) 4 SCC 1*, Bhagwati J. speaking for the Bench observed as thus:

“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.”

23. The denial of minority rights to the actual religious and linguistic minorities is a violation of fundamental right of minority community enshrined under the Article 21 also. This constitutional boon is perhaps the highest blessing that the citizens of India secured from the paramount deed in Article 14 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 the Article 21 of the Constitution. Any omission or commission on the part of the Executive or Legislature, which encourages arbitrariness, unreasonableness and illegality, infringes upon this fundamental right and a free society ceases to exist.

24. That in a catena of decisions, the Supreme Court has recognized several unarticulated liberties implied by the Article 21 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.

25. That denial of minority rights to the actual religious and linguistic minorities impairs Article 19(1)(a) of the Constitution. Under Article 19(1)(a) read with Article 21 of the Constitution, citizens have a right to live peacefully, to have right to leisure with all necessary ingredients of the right to life guaranteed under the Article 21.

26. The denial of minority rights to the actual religious and linguistic minorities is violation of their fundamental rights enshrined under the Articles 29 and 30. Where a religious community is in minority, the Constitution enables it to preserve its culture and religious interests by providing that the State shall not impose upon it any culture other than the community's own culture and such community shall have the right to establish and administer educational institutions of its choice and the State shall not, in granting aid to educational institutions, discriminate against such an educational institution maintained by minority community on the ground that it is under the management of a religious community.

27. The Directive Principles of State Policy which are not legally binding upon the State, are "fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws"[Article 37].

In *Sachidanand Pandey v. State of West Bengal* [AIR 1987 SC 1109] the Apex Court pointed out that, "*When*

the Court is called upon to give effect to the Directive Principle and the fundamental duty, the Court is not to shrug its shoulders and say that priorities are a matter of policy and so it is matter for the policy making authority.”

28. The Article 51A, which is of special relevance for the Minorities stipulates as, *“citizens’ duty to promote harmony and the spirit of common brotherhood amongst all the people of India ‘transcending religious, linguistic and regional or sectional diversities; and citizens’ duty to value and preserve the rich heritage of our composite culture.’*

29. The social pluralism raises the need for the protection and development of all sorts of weaker sections of the Indian citizenry whether this ‘weakness’ is based on numbers or on social, economic or educational status of any particular group. The Constitution, therefore, speaks of Religious and Linguistic Minorities, Scheduled Castes, Scheduled Tribes and Backward Classes and makes or leaves room for making for them special provisions of various nature and varying import.

30. The Supreme Court in *TMA Pai Foundation & Ors. versus State of Karnataka & Ors. (2002) 8 SCC 481* and in a catena of decisions has held *that 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 shall be the State and not the whole of India. Thus, religious and linguistic minorities, who have been put on a par in Article 30, have to be considered State-wise.

31. That it is duty of the States, particularly, Arunachal Pradesh, Assam, Goa, Jammu & Kashmir, Kerala, Lakshadweep, Manipur, Meghalaya, Mizoram, Nagaland, Punjab, Tamilnadu, Uttar Pradesh and West Bengal to identify the actual religious and linguistic minorities in spirit of the National Commission for Minorities Act, 1992 and the Judgment of the Supreme Court and notify the 'minority' in spirit of the Article 25-30 by following the appropriate procedure, so that all the benefits available to minorities could be legally given to the actual minorities rather than un-qualified population.

32. That it is duty of the Controller and Auditor General to conduct regular audit and prepare the State-wise audit report about the effective implementation of the Prime Minister's 15-Point Programme meant for minorities.

33. That nine States has not legislated the State Minority Act to identify and notify minorities. Consequentially no community in such States have been identified and notified as State minority. But, benefits exclusively meant for the minority communities are being siphoned off to the majority communities in illegal and arbitrary manner.

34. That in order to strengthen the cause of minorities, the United Nations promulgated the “Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities” on 18.12.1992 proclaiming that: *“States shall protect the existence of the National or Ethnic, Cultural, Religious and Linguistic identity of minorities within their respective territories and encourage conditions for the promotion of that identity.”*

35. That National Commission for Minorities has been observing the 18th December as a Minorities Rights Day every year. Andhra Pradesh, Assam, Bihar, Chattisgarh, Delhi, Jharkhand, Karnataka, Maharashtra, Madhya Pradesh, Rajasthan, Tamil Nadu, Uttarakhand, Uttar Pradesh and West Bengal have set up State Minorities Commissions also but they have not identified minority at State level in spirit of the judgment of the Supreme Court. The functions of the State Commission inter-alia is to safeguard and protect the interests of minorities provided in the Constitution and laws enacted by Parliament and the State Legislatures. Aggrieved persons belonging to the minority communities may approach the concerned State Minorities Commissions for redressal of their grievances. They may send representations to National Commission for Minorities after exhausting remedies available to them. However, none of the State recognizes Hindus as minority.

36. Though the Constitution does not define the word 'Minority' and only refers to 'Minorities' and speaks of those 'based on religion or language', the rights of the minorities have been spelt out in the Constitution in detail. The Constitution provides two sets of rights of minorities, which can be placed in 'common domain' and 'separate domain'. The rights, which fall, in the 'common domain' is those, which are applicable to all the citizens of our country. The rights, which fall, in the 'separate domain' are those, which are applicable to the minorities only, and these are reserved to protect their identity. The distinction between 'common domain' and 'separate domain' and their combination have been well kept and protected in the Constitution.

37. The Preamble to the Constitution declares the India be 'Secular' and this is special relevance for the minorities. Equally relevant for them, especially, is the declaration of the Constitution in its Preamble that all citizens of India to be secured 'liberty of thought, expression, belief, faith and worship and 'equality of status and of opportunity.'

38. That the Constitution has made provisions for the Fundamental Rights in Part III, which the State has to comply with and these are judicially enforceable. There is another set of non-justiciable rights stated in Part IV, which are connected with social and economic rights of

the people. These rights are known as 'Directive Principles of State Policy', which legally are not binding upon the State, but are "fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws".

39. That Part IV of the Constitution containing non-justiciable Directive Principles of State Policy, includes the provisions having significant implications for minorities i.e. Obligation of the State 'to endeavour to eliminate inequalities in status, facilities and opportunities' amongst individuals and groups of people residing in different areas or engaged in different vocations;[Article 38 (2)] Obligation of State 'to promote with special care' the educational and economic interests of 'the weaker sections of the people' (besides Scheduled Castes & Scheduled Tribes);[Article 46]

40. That Part IVA of the Constitution, relating to fundamental duties as provided in Article 51A applies to all citizens, including those belonging to the minorities. Article 51A(e) and Article 51A(f) is of special relevance for minorities as thus: citizens' duty to promote harmony and the spirit of common brotherhood amongst all the people of India 'transcending religious, linguistic and regional or sectional diversities; [Article 51A(e)] and citizens' duty to value and preserve the rich heritage of our composite culture.' [Article 51A(f)]

41. That in Part III of the Constitution is divided into two parts viz. (a) the rights which fall in the 'common domain' and (b) the rights which go to 'separate domain'. In the 'common domain', the fundamental rights and freedoms covered are thus: People's right to 'equality before the law' and 'equal protection of the laws';[Article 14] Prohibition of discrimination against citizens on grounds of religion, race, caste, sex or place of birth; [Article 15(1) and (2)] Authority of State to make 'any special provision for the advancement of any socially and educationally backward classes of citizens' (besides Scheduled Castes & Scheduled Tribes);[Article 15(4)] Citizens' right to equality of opportunity in matters relating to employment or appointment to any office under the State and prohibition in this regard of discrimination on grounds of religion, race, caste, sex or place of birth;[Article 16(1) & (2)] Authority of State to make 'any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State;[Article 16(4)] People's freedom of conscience and right to freely profess, practice and propagate religion-subject to public order, morality and other Fundamental Rights;[Article 25(1)] Right of 'every religious denomination or any section thereof – subject to public order, morality

and health-to establish and maintain institutions for religious and charitable purposes, 'manage its own affairs in matters of religion', and own and acquire movable immovable property and administer it in accordance with law; [Article 26] Prohibition against compelling any person to pay taxes for promotion of any particular religion; [Article 27] People's 'freedom as to attendance at religious instruction or religious worship in educational institutions wholly maintained recognized or aided by State.[Article 28]

42. The minority rights provided in Constitution are thus: Right of any section of the citizens to conserve its 'distinct language, script or culture;[Article 29(1)] Restriction on denial of admission to any citizen, to any educational institution maintained or aided by the State, on grounds only of religion, race, caste, language or any of them; [Article 29(2)] Right of religious and linguistic minorities to establish and administer educational institutions of their choice; [Article 30(1)] Freedom of minority-managed educational institutions from discrimination in the matter of receiving aid from State; [Article30(2)] Special provision relating to language spoken by a section of the population of any State; [Article 347] Provision for facilities for instruction in mother-tongue at primary stage; [Article 350A] and Provision for a Special Officer for Linguistic Minorities and his duties. [Article 350 B]

43. The various Articles of the Constitution providing rights to the minorities, clearly and firmly point out to only one direction: that of a multi-religious, multi-cultural, multi-lingual and multi-racial Indian society, interwoven into an innate unity by the common thread of national integration and communal harmony. By the yardstick adopted by the framers of the Constitution and crystallized into its provisions, the Indian Nation is not just a conglomeration of individual inhabitants of this State; it comprises of two distinct categories of constituents. The two-tier commonwealth of Indian Nation includes, on one hand, every citizen of India individually and, on the other hand, the multitude of religious, linguistic, cultural and ethnic groups among its citizens. The Indian Nation is an enormous coparcenaries in which the individual citizens are also members of their own respective branches taking the form of religious, cultural, linguistic and ethnic groups. And all these groups, like all individuals, have the same fundamental rights to enjoy and the same fundamental duties to discharge.

44. The social pluralism, as fortified by the unique Constitutional concept of secularism, raises the need for the protection and development of all sorts of weaker sections of the Indian citizenry – whether this ‘weakness’ is based on numbers or on social, economic or educational

status of any particular group. The Constitution, therefore, speaks of Religious and Linguistic Minorities, Scheduled Castes, Scheduled Tribes and Backward Classes and makes – or leaves room for making – for them special provisions of various nature and varying import.

45. The fundamental rights guarantees under the Articles 25-30 are no guarantees at all in the many States due to the failure of the Central Government in identifying the actual religious and linguistic minorities and declaring them as ‘minorities. Thus the basic rights of the minorities have been practically abrogated and being siphoned off arbitrarily and illegally to unqualified communities.

46. That on aspect of interpretation of the Constitution, the following observations of Justice Dickson of the Supreme Court of Canada in *Hunter versus Southam Inc* (1984) 2 SCR 145 (Canada SC) are quite appropriate:

“The task of expounding a Constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as 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. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.”

47. That in *M. Nagaraj versus Union of India & Others* (2006) 8 SCC 212, speaking for the Constitution Bench, the then Chief Justice Sh. S.H. Kapadia, said:

“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.”

48. That adopted by consensus in 1992, the United Nations Minorities Declaration in its Article 1 refers to minorities as based on national or ethnic, cultural, religious and linguistic identity, and provides that States should protect their existence. There is no internationally

agreed definition as to which groups constitute minorities. The existence of a minority is a question of fact and that any definition must include both, the objective factors (such as the existence of a shared ethnicity, language or religion) and subjective factors (including that individuals must identify themselves as members of a minority). The difficulty in arriving at a widely acceptable definition lies in the variety of situations in which minorities live. Some live together in well-defined areas, separated from the dominant part of the population. Others are scattered throughout the country. Some minorities have a strong sense of collective identity and recorded history; others retain only a fragmented notion of their common heritage. The term minority as used in the United Nations human rights system usually refers to national or ethnic, religious and linguistic minorities, pursuant to the United Nations Minorities Declaration. All States have one or more minority groups within their territories, characterized by their own national, ethnic, linguistic or religious identity, which differs from that of the majority population.

- 49.** That according to a definition offered in 1977 by Mr. Francesco Capotorti, Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, the minority is as follows:
- “A group numerically inferior to the rest of the population of a*

State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture traditions religion or language.”

50. That while nationality criterion included in the above definition has often been challenged, the requirement to be in a non-dominant position remains important. In most instances a minority group will be a numerical minority, but in others a numerical majority may also find itself in a minority-like or non-dominant position, such as Blacks under the apartheid regime in South Africa. In some situations, a group which constitutes a majority in a State as a whole may be in a non-dominant position within a particular region of the State in question.

51. That in addition, it has been argued that the use of subjective criteria, such as the will on the part of the members of the groups in question to preserve their own characteristics and the wish of the individuals concerned to be considered part of that group, combined with certain specific objective requirements, such as those listed in the Capotorti definition, should be taken into account. It is now commonly accepted that recognition of minority status is not solely for the State to decide, but should be based on both objective and subjective criteria.

Sir,

Keeping in view the above stated facts and circumstances, and the great golden goals as set out in Preamble of the Constitution, please take appropriate steps to:

- a)** repeal the Notification on Minority Community [1993 –SO No.816(E) F.No.1/11/93-MC(D)] dated 23.10.1993; as it is arbitrary, invalid and ultra-vires the Constitution;
- b)** repeal the words '*except the State of Jammu and Kashmir*' be served from Section 1(2) of the NCM Act, as it is invalid and ultra-vires the Constitution and its basic structure.
- c)** notify 'minority' in consonance with the United Nations General Assembly Resolution dated 18.12.1992 and the Judgment of the Apex Court in Civil Appeal 4730 of 1999;
- d)** declare Hindus as 'minority' for the States where they don't form majority of population, in consonance with UN General Assembly Resolution dated 18.12.1992 and the Judgment of the Apex Court in Civil Appeal 4730 of 1999;

Thanks and Warm Regards.

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CC:

The Hon'ble Prime Minister

Government of India,

South Block, New Delhi-110001

Through: Principle Secretary – PMO