

DEMANDS FOR AMENDING CONSTITUTION (SCHEDULED CASTES) ORDER, 1950

Constitutional provisions

1. The Constitution of India does not restrict the scheduled castes class to any select religions. The term "Scheduled Castes" has been defined in Article 366(24) read with Article 341(1) as: "'Scheduled Castes" means such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under Article 341 to be scheduled castes for the purposes of this Constitution."

(a) "The president may with respect to any state or union territory, and where it is a state, after consultation with the governor thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be scheduled castes in relation to that state or union territory, as the case may be."

(b) "Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification."

2. Under these provisions, a Constitution (Scheduled Castes) Order was issued in 1950. Para 3 in the order said that any non-Hindu could not be regarded as a scheduled caste. Since this order was amended in 1956 to include Sikhs, and in 1990 the Buddhists, among the scheduled castes, since the latter amendment, this para says that nobody who is not a Hindu, Sikh or Buddhist can be a scheduled caste. The text of the order is reproduced below.

The Constitution (Scheduled Castes) Order 1950

"In exercise of the powers conferred by clause (1) of Article 341 of the Constitution of India, the president, after consultation with the governors and rajpramukhs of the states concerned, is pleased to make the following order, namely:

1. This order may be called the Constitution (Scheduled Castes) Order 1950.

2. Subject to the provisions of this order, the castes, races or tribes or parts of, or groups within, castes or tribes specified in (Parts to (XXII)) of the schedule to this order shall, in relation to the states to which those parts respectively related, be deemed to be scheduled castes so far as regards member thereof resident in the localities specified in relation to them in those parts of that schedule.

3. Notwithstanding anything contained in paragraph 2, no person who professes a religion different from the Hindu, the Sikh or the Buddhist religion shall be deemed to be a member of a scheduled caste.

4. Any reference in this order to a state or to a district or other territorial division thereof shall be construed as a reference to the state, district or other territorial division as constituted on the 1st day of May 1976."

Moves for change by legislation

Efforts have been made in the past to get the Constitution (Scheduled Castes) Order 1950 amended by legislation so as to make it religion-neutral. A number of private members' bills have been moved in Parliament but to no avail. An official bill called the Constitution (Scheduled Castes) Order (Amendment) Bill was at last drafted in 1996. The opinions expressed by the state/UT governments on the bill, obtained by the central government, were divided. The government also took note of the recommendations of the 1983 Gopal Singh Panel and the central Minorities Commission which were strongly in favour of deleting para 3 of the SC Order of 1950, and of the Scheduled Castes and Scheduled Tribes Commission which was against the same. In view of all this divergence of opinion, the bill was not introduced in Parliament.

Recent court cases awaiting a decision

1. In three different pending petitions before the Supreme Court of India, the petitioners have challenged para 3 of the Constitution (Scheduled Castes) Order 1950 saying that a person not professing the Hindu, Sikh or Buddhist faith cannot be included in the lists of Scheduled Castes. They have relied upon the following grounds:

(a) Secularism is a basic feature of the Constitution of India. The denial of equal privileges to persons of scheduled caste origin converted to Christianity is in violation of both the basic features enshrined in Article 25 and the preamble to the Constitution.

(b) The Constitution has provided for equality of opportunity to all those who are similarly situated. Persons of scheduled caste origin converted to Christianity are identically situated vis-à-vis their counterparts professing the Hindu, Sikh and Buddhist religions.

(c) Even after conversion, the caste label continues and it is difficult for a person in Indian society to get out of the vice of the caste system.

(d) Caste is more a social combination than a religious group and even though the tenets of Christianity do not recognise caste, it is in fact a reality.

(e) The only available judgement on this issue, namely the constitutionality of para 3 of the Constitution (Scheduled Castes) Order 1950, is in *Soosai vs Union of India* 1985 (Supp SCC 590). In the judgement, the Supreme Court had accepted that the caste continued even after conversion. It had however sought for more material to show that the handicaps of persons of scheduled castes had remained the same even after conversion to Christianity. In the said case, the court was not satisfied with the material placed before it.

(f) The position of persons of scheduled caste origin converted to Christianity remains the same as before. They continue to be forced into the most demeaning occupations. Their position both in the church as well as amongst fellow Christians is no better than that suffered by their counterparts in other religious denominations. They continue to be both poor and socially and educationally backward. Inter-marriages between them and upper-caste Christians are rare. In the churches, they are segregated from the upper-caste Christians. Even after death they are buried in different burial grounds.

In 3 different pending petitions before the Supreme Court, the petitioners have challenged para 3 of the Constitution (SC) Order 1950 saying that a person not professing the Hindu, Sikh or Buddhist faith cannot be included in the lists of Scheduled Castes

(g) The atrocities committed on the Dalits are uniform irrespective of the religions they belong to. Yet persons of scheduled caste origin converted to Christianity are deprived of special protective provisions solely on the basis of religion.

The petitioners have sought the relief that the Supreme Court should strike down para 3 of the Constitution (Scheduled Castes) Order 1950 as unconstitutional, being violative of Articles 14, 15 and 16 of the Constitu-

tion, and direct the government to extend the protection available under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989 and the Protection of Civil Rights Act 1955 to all persons of scheduled caste origin irrespective of their religion.

2. Seven writ petitions making the same demand are pending in different high courts, based mainly on the following pleas:

(a) The presidential order of 1950 was issued by the president of India under Article 341 of the Constitution. The power conferred on the president by public notification is a delegated power which cannot run contrary to Article 13(2) of the Indian Constitution which states as follows: "The state shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void." Under Article 13(3), unless the context otherwise

requires, "law" includes any ordinance, order, by-law, rule, regulation, notification, custom or usage having in the territory of India the force of law. So the presidential order of 1950 is unconstitutional and it is a black letter written outside the Constitution, introduced through the back door by an executive order. Under Article 341, the president has no authority to proclaim the para 3 of the Scheduled Castes Order contrary to the Articles 15(2), 16(2), 29(2), and it is also against the basic structure of the Constitution as decided in *Kesavananda Bharati vs State of Kerala*; and para 3 of the presidential order can be quashed as per the judgement of the Supreme Court in *Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur vs Union of India* (AIR 1971 SC 530 (1) SCC 85). Para 3 of the presidential order is an anathema which disfigures the beauty of the written Constitution of India.

(b) Even under Article 341 the president is not given the power to proclaim to prohibit any citizen from professing any religion of his choice. But the president under Article 341 prescribes indirectly people, particularly scheduled castes, not to profess any religion different from the Hindu or Sikh religion. In other words, to get a benefit under the Scheduled Castes Order 1950, a citizen should profess only the Hindu or Sikh religion. This is against the preamble to the Indian Constitution, which secures "liberty of thought, expression, belief, faith and worship" to all its citizens. Under Article 341, the power given to the president is to specify the caste and not to specify religion or to identify the caste by the symbol of religion and hence it is a coloured legislation under the guise of a presidential order.

(c) The explanation given under Article 25 cannot be construed as exception to treat Sikhs, Jains, Buddhists and Hindus as a single class or group except for the purpose of applicability of personal laws under Article 25(2) and the presidential order has misconstrued explanation II of Article 25 for the purpose of discriminating other religions such as Christians and Muslims. Para 3 of the Scheduled Castes Order of 1950 suffers as it discriminates citizens on the ground of religion only, whereas the Scheduled Tribes Order 1951 has omitted para 3 deliberately and citizens of backward class and the forward class are not subject to discrimination on religion only in getting the equality of status and of opportunity [that] is undermined in the case of scheduled castes under the presidential order of 1950 [which] does not promote fraternity among all citizens irrespective of caste, religion and creed.

(d) In view of the judgement passed by the apex court in *Indira Sawhney vs Union of India* (Supp (3) SCC 217), the impugned Constitution (Scheduled Castes) Order 1950 is required to be struck down. The apex court in the said judgement, delivered by BP Jeevan Reddy (on behalf of Kania, CJ, Venkatachaliah, Ahmadi, and for himself), in majority view came to the conclusion that the concept of castes is not confined to the Hindu religion only but it extends irrespective of religious sanction.

(e) That the action of the government is arbitrary and

discriminatory on the ground that on one hand the Muslims have been excluded for the purposes of treating their caste as scheduled caste but on the other hand the Muslims are included in the list of backwards, meaning thereby that a person belonging to a caste which has been included in the list of Scheduled Castes shall stand excluded from being treated as scheduled caste on the simple ground that he is a Muslim. But on the contrary, if a person though Muslim, but his caste is included in the list of backwards, shall stand included for the purpose of treating him as a backward. In view of this, the action of the government suffers from hostile discrimination against scheduled caste Muslims.

These petitioners have also sought the same relief as sought in the petitions pending before the Supreme Court.

Diversity of views

There is a wide divergence in the views/opinions expressed on this subject before the commission. The following views, for and against, have been expressed before us:

A. Views in favour

(i) Even though Christianity and Islam do not recognise the caste system or untouchability, the ground reality in India is different. Persons of scheduled caste origin converted to Christianity/Islam continue to be subjected to disabilities, including untouchability associated with caste and occupation, as they continue to be part and parcel of Indian society.

(ii) It is not only society that discriminates against persons of scheduled caste origin converted to Christianity/Islam (inasmuch as such converts are not treated by other members of their own religion or by members of other religions as their equals); they are being discriminated against even by their own religious institutions like the church or mosque, the manifestation of discriminations being separate churches/mosques or separate prayer halls or prayer timings in the same church/mosque for them and earmarked areas for burial of their dead.

(iii) Denial of scheduled caste status to them despite untouchability-related practices being enforced against them or atrocities committed against them deprives them of the protection of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989.

(iv) Despite no visible change in their social or economic status as a result of conversion, the converts are deprived of the benefits of reservation, support and development schemes formulated for their counterparts in the Hindu, Sikh and Buddhist religions. This amounts to discrimination by the state on the ground of religion.

(v) Exclusion of Christianity and Islam from the purview of the Constitution (Scheduled Castes) Order 1950 is discriminatory and unconstitutional, being violative of the provisions of fundamental rights guaranteed under Articles 14, 15, 16 and 25 of the Constitution. Change of religion being a strictly personal matter, such change should not deprive persons of scheduled caste

origin [of the] protection and benefits available to similarly placed persons in other religions.

(vii) Although Sikhism and Buddhism do not recognise the caste system, like Christianity and Islam, both Sikhs and Buddhists have been given the status of scheduled castes by amending the Constitution (Scheduled Castes) Order 1950. There is no reason as to why similar dispensation cannot be extended to similarly placed persons who profess Christianity or Islam. That this is not being done is discrimination on the ground of religion that is prohibited by the Constitution.

(viii) Groups and classes of persons of scheduled caste origin professing Christianity/Islam who are included in the list of OBCs should be delisted therefrom and be given the status of scheduled castes.

B. Counterviews

(i) The very basis of identification of a certain class of people as scheduled caste is social, educational and economic backwardness arising from the age-old practice of untouchability that flowed from a rigid caste system in the Hindu religion.

(ii) Persons professing Christianity or Islam were not treated as depressed class/scheduled castes by the British in pre-independent India or by the Indian government after independence. The status of depressed class/scheduled castes was an inseparable concomitant of the Hindu religion in British and independent India.

(iii) Persons of scheduled caste origin converted to Christianity/Islam who are socially and educationally backward are included in the list of OBCs and are benefiting from reservation in services/educational institutions in favour of OBCs and from other schemes and institutional support systems formulated for OBCs.

(iv) Apart from the benefits available to the socially and educationally backward amongst Christians and Muslims as OBCs, they are also benefiting from the constitutional, legal and institutional protection/arrangements as members of minority communities.

(v) Presently, reservation is available for SCs and STs @ 15 per cent and 7.5 per cent respectively although, as per the 2001 Census, their share in the population is much more. Grant of SC status to converts to Christianity/Islam would therefore adversely affect the benefits available to scheduled castes in the matter of reservation in services/posts and educational institutions and related matters.

By all available evidence we do find the caste system to be an all-pervading social phenomenon of India shared by almost all Indian communities irrespective of religious persuasions

Conclusion

1. Inclusion of castes in the old Government of India (Scheduled Castes) Order 1936 itself was based on general impressions and not on any actual survey of the caste situation in the country. The same can be said about the Constitution (Scheduled Castes) Order 1950 which was based on the old SC Order of 1936; inclusion of additional castes from time [to time] to the lists under the present order of 1950 is also not based on a scientific survey of the actual caste situation in the country.

2. By all available evidence we do find the caste system to be an all-pervading social phenomenon of India shared by almost

all Indian communities irrespective of religious persuasions.

3. It is claimed and agreed to by almost all sections of society in India, in various contexts and especially in respect of the issue of reservations, that no special benefits can be given to any community or group on the basis of religion. At the same time however, it is generally insisted upon that the class of scheduled castes must remain religion-based. This seems to be illogical and unreasonable.

4. Our recommendations on this matter, made in accordance with these conclusions, are given in Chapter 10.

5. Member-secretary of the commission did not agree with these conclusions and has given a Note of Dissent.

DISSENT NOTE ON CONFERMENT OF SCHEDULED CASTE STATUS ON SC CONVERTS TO CHRISTIANITY AND ISLAM

Mrs Asha Das, Member-Secretary

In order to appreciate the reasons for separate delineation of SCs, it is important that the historical background and constitutional and legal position with reference to the same is examined.

Scheduled castes: Historical background and constitutional and legal position

7. In order to understand who the scheduled castes are, it is important to go into its genesis. The term "Scheduled Caste" appeared for the first time in the Government of India Act 1935. The Government of India (Scheduled Castes) Order 1936 was issued under this act. Para 3 of this order issued on April 30, 1936 provides that "No Indian Christian shall be deemed to be a member of scheduled caste". The concern for selected Hindu castes however dates back to 1880 when Sir Denzil Ibbetson, the then Census commissioner in British India, classified certain marginalised caste groups involved in diverse occupations into 17 groups. However, when apprehensions were raised regarding their Hindu background, more stringent criteria for identifying those who were 100 per cent Hindus was adopted. The criteria for identifying them were based on the relationship of the castes with the Brahmins; their authority to worship god, recognise Vedas; entry into temples for them and whether or not their touch and proximity caused pollution. It is obvious that even as early as 1880 the identification of depressed classes was from within the Hindu religious community. An elaborate attempt was made by the Census commissioner, JS Hatton, in Census report 1931 to specify criteria for identifying the untouchable groups. He proposed a series of steps which revolved around the incidence of disabilities arising out of untouchability amongst Hindus.

These included:

(i) Whether the caste or class in question is served by clean Brahmins.

(ii) Whether the caste or class in question is served by the barbers, water-carriers, tailors, etc who serve high-caste Hindus.

(iii) Whether the caste in question pollutes a high-caste Hindu by contact or by proximity.

(iv) Whether the caste or class in question is one from whose hands a high-caste Hindu can take water.

(v) Whether the caste or class in question is debarred from using public conveniences such as roads, ferries, wells or schools.

(vi) Whether the caste or class in question is debarred from the use of Hindu temples.

(vii) Whether in ordinary social intercourse a well-educated member of the caste or class in question will be treated as an equal by high-caste men of the same educational qualifications.

(viii) Whether the caste or class in question is merely depressed on account of its own ignorance, illiteracy or poverty and but for that, would be subject to no social disability.

(ix) Whether it is depressed on account of the occupation followed and whether but for that occupation, it would be subject to no social disability.

The above criteria, which in other words means discrimination based on the obnoxious practice of untouchability, may appear to hold good for purposes of specifying the scheduled castes.* Thus the test applied was the social, educational and economic backwardness arising out of the historical custom of untouchability.**

[* Report of the Commissioner for Scheduled Castes and Scheduled Tribes, Government of India, 28th Report, 1986-87, pp. 549-550.

** Handbook on Scheduled Castes and Scheduled Tribes, office of the Commissioner for Scheduled Castes and Scheduled Tribes, 1968, p. 27.]

8. The very basis for inclusion of certain castes in the schedule to the Government of India (Scheduled Castes) Or-

der 1936 and subsequently in the schedule to the Constitution (Scheduled Castes) Order 1950, which was based on the earlier order, was the traditional practice of untouchability that had plagued Hindu society for hundreds of years, resulting in social, educational and economic backwardness of such castes. Parameters or criteria applied by the British authorities for identifying depressed classes, which later came to be known as scheduled castes, largely related to the practices and prejudices arising from untouchability. "The phenomenon of untouchability in this country is fundamentally of religious and political origin. Untouchability is a part of the Hindu religious system."# Thus religion was the basis for inclusion of castes in the list of 'Scheduled Castes' in 1936 as also in 1950.

[# *Report of the Committee on Untouchability, Economic and Educational Development of the Scheduled Castes and Connected Documents, 1969, p. 1.*]

9. In the year 1956 an amendment was made in the Constitution (Scheduled Castes) Order 1950 and the Hindu and the Sikh religions were placed on the same footing with regard to specification of scheduled castes. In the year 1990 another amendment was made in the Constitution (Scheduled Castes) Order 1950 and the Buddhist religion was also brought under the realm of scheduled castes. These amendments referred to above were supported by explanation II of Article 25 of the Constitution of India, which reads as under:

"In subclause (b), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly."

It may be mentioned that the scheduled castes converted to Buddhism in large numbers after the 1950 order were already enlisted as scheduled castes. They converted voluntarily to protest against the unseemly practice of untouchability. The notification continued the recognition so that they could benefit from the special protection/facilities already available to them.

Constitutional validity of Constitution (Scheduled Castes) Order 1950

10. It has been argued that para 3 of the Constitution (Scheduled Castes) Order 1950 is discriminatory and violates Articles 14, 15(4) and 16(4) as also Articles 15(2), 16(2), 25, and Article 341.

Article 14 establishes equality before law or equal protection within the territory of India. Article 15 prohibits discrimination on grounds of religion, race, caste, sex or place of birth. Article 16 guarantees right to equality of opportunity and employment in public offices. All these articles, while guaranteeing equality before law, prohibiting discrimination on grounds of religion, caste, etc and/or guaranteeing equality of opportunity for employment, specifically make provisions for certain categories on the ground of social and educational backwardness and for scheduled castes and scheduled tribes under Articles 15(4), 16(4) and 16(4A).

11. The Constitution, in recognition of the social stratification of society and the unequal status of different groups, makes provisions for several categories of people from amongst

the backwards who needed special protection and ameliorative steps for enhancing their status and standing in society. Articles 15(4), 16(4), 46 and 341 are relevant in this regard. These included the scheduled castes, who were the only category recognised on the basis of religion and discriminatory practices existing within Hinduism by the Constitution. Castes of the Hindu religion, identified on 'untouchability'-related parameters, were already scheduled under the 1936 order. The scheduled tribes were also given a special status on the basis of geographical isolation. Articles 15(4), 16(4) and 46 made provisions for identifying socially and educationally backward classes and the weaker sections in addition to the scheduled castes and scheduled tribes and providing for their advancement. Thus the Constitution makes provision for those discriminated against within a religion, or on account of residing in inaccessible areas, or because of educational and social backwardness or belonging to weaker sections. These are all exceptions provided within articles that guarantee equality and non-discrimination, etc.

12. The validity of the order was considered by the Supreme Court in writ petition No. 9596/83 in the case of *Soosai vs Union of India & Ors* (AIR 1986 SC 733). In para 7 of the judgement, the court had observed that "Now it cannot be disputed that the caste system is a feature of the Hindu social structure. It is a social phenomenon peculiar to Hindu society." The apex court in para 8 of their aforesaid judgement further observed that, "it is quite evident that president had before him all this material indicating that the depressed classes of the Hindu and the Sikh communities suffered from economic and social disabilities and cultural and educational backwardness so gross in character and degree that the members of those castes in the two communities called for the protection of the constitutional provisions relating to the scheduled castes. It was evident that in order to provide for their amelioration and advancement, it was necessary to conceive of interventions by the state through its legislative and executive powers. It must be remembered that the declaration incorporated in paragraph 3, deeming them to be members of the scheduled castes, was declaration made for the purposes of the Constitution. It was declaration enjoined by clause (1) of Article 341 of the Constitution." The apex court in para 8 of the judgement thus observed that, "it is therefore not possible to say that president acted arbitrarily in the exercise of his judgement in enacting paragraph 3 of the Constitution (Scheduled Castes) Order 1950."

13. The Constitution (Scheduled Castes) Order enlists those communities which are eligible for getting benefits as scheduled castes. Under Article 341, the criteria followed for iden-

The term "Scheduled Caste" appeared for the first time in the Govt of India Act 1935. Para 3 of the Govt of India (SC) Order 1936, issued under this act, provides that "No Indian Christian shall be deemed to be a member of scheduled caste"

tification of communities is their extreme form of social and educational backwardness arising due to the age-old practice of untouchability. Article 15(4) of the Constitution provides, "Nothing in this article or in clause (2) of Article 29 shall prevent the state from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and the scheduled tribes". Thus the state is empowered by the Constitution to make special provision for scheduled castes and scheduled tribes in addition to the backward classes. In this context, it is relevant that Article 341 should be read harmoniously with Article 15(4) of the Constitution, which makes it clear that communities identified under Article 341 are a separate class of people belonging to the Hindu religion who are given special protection by the state on account of discriminations they have suffered for hundreds of years.

14. This is also sustained by the debate in the Constituent Assembly which recognised "That the scheduled castes were a backward section of the society who were handicapped by the practice of untouchability" and that "This evil practice of untouchability was not recognised by any other religion" i.e. other than Hindu.

The Constituent Assembly recognised that the scheduled castes were a "backward section of society who were handicapped by the practice of untouchability", an "evil practice" that was "not recognised by any other religion" i.e. other than Hindu

It is apparent that the Constitution (SC) Order 1950 relates to castes of the Hindu religion. The Constitution (Scheduled Castes) Order 1950 is not an exhaustive list of all socially backward classes in India nor is it intended to be so. It only relates to the castes discriminated within the Hindu religious system. The Constitution (SC) Order 1950 is thus not discriminatory or violative of Articles 14, 15, 16 and 25 of the Constitution nor is it ultra vires of the Constitution, as it provides for a special category i.e. the scheduled castes who have been given a special status under the Constitution.

15. Article 341 of the Constitution does not intend that all socially and economically backward classes be included in it; nor does the Constitution limit measures such as reservations to scheduled castes and scheduled tribes. The protection provided by Article 16(4) is intended to cover all backward classes and is wider in scope than Article 341. The categories included under scheduled castes are so included for certain historical reasons that are applicable to that particular class.

16. It may further be pointed out that including all socially or economically backward classes, irrespective of religion, in para 3 of the 1950 order would be tantamount to a failure to recognise the specific historical discrimination suffered by those classes included in scheduled castes. Inclusion of all backward classes in the 1950 order would constitute a discrimination against scheduled castes by treat-

ing the experience of all sections of backward classes as similar to the historical discrimination faced by scheduled castes in India.

The Constitution (SC) Order 1950 is thus neither unconstitutional nor ultra vires of the Constitution nor is it violative of any fundamental right guaranteed by the Constitution.

Conferment of scheduled caste status on scheduled caste converts to Christianity and Islam

17. The principal arguments of the section demanding scheduled caste status for persons of scheduled caste origin converted to Christianity or Islam, both as per writ petitions and arguments made available to the commission, are primarily two. First, that such converts continue to face discrimination, disabilities and handicaps, as also social, educational and economic backwardness, as their Hindu counterparts notwithstanding their conversion, whether voluntarily or otherwise, to Christianity or Islam. While they concede that the tenets of Christianity or Islam do not sanctify or even recognise the caste system or any disability, including untouchability, arising therefrom, they also contend that the ground reality is totally different, basically for the reason that despite the conversion, these people continue to be part and parcel of Indian society which is still largely caste-based. Such converts face discrimination not only by upper-caste Hindus and the better off sections within the Christian or Muslim community but also by Christian or Muslim religious institutions like the church, mosque, cemetery and their clergies. The second important argument is that given the situation that persons of scheduled caste origin converted to Christianity or Islam continue to be subjected to caste-based disabilities and discriminations, the distinction made by the Constitution (Scheduled Castes) Order 1950 between followers of the Hindu, Sikh or the Buddhist religions on the one hand and Christianity and Islam on the other hand is alleged to be discriminatory and violative of fundamental rights guaranteed by Articles 14, 15, 16 and 25 of the Constitution.

18. Viewed in this background, the eligibility of Christians and Muslims for inclusion in the Scheduled Castes list is examined below:

(i) Admitting, for argument's sake, that persons of scheduled caste origin converted to Islam/Christianity face discrimination within their own community, a pertinent question that needs to be answered is whether the discrimination or the disabilities/handicaps arising therefrom are comparable in their oppressive severity to the discrimination faced by depressed classes in the Hindu religion. Separate enclosures in prayer halls of churches or in burial grounds or the reluctance on the part of certain sections within their community to socialise with converts, though reprehensible, do not appear to match the oppression and consequential disability that has to be braided by depressed classes or untouchables in the Hindu religion. There is also no documented research and precise authenticated information available to establish that

the disabilities and handicaps suffered by scheduled caste members in the social order of its origin (Hinduism) persist with their oppressive severity in the environment of Christianity/Islam. However, studies conducted by Rev Samuel Mateer, a British missionary, in Kerala and Tamil Nadu (i.e. erstwhile princely state of Travancore-Cochin and Madras presidency) during his stay of over 25 years in India, and published in the form of two books titled *Land of Charity* and *Native Life in Travancore* in 1870 and 1883 respectively, show that the "slave caste" (the present scheduled castes) converted to Christianity in these states became socially, educationally and economically in a better position than their brethren who remained in Hinduism.

(ii) Incidentally, available social indicators in regard to Christians (separate figures for persons of scheduled caste origin converted to Christianity are not available) reveal that in terms of literacy and education levels, work participation rate, etc, Christians are way ahead of other major religious groups (other than Jains) like Hindus, Muslims, Sikhs or Buddhists... [I]n terms of important indices like literacy and work participation, Christians are somewhat better off compared to their counterparts in other religions while Muslims are by and large comparable.

(iii) Both Islam and Christianity do not accept the 'caste system' which is a basic feature of Hinduism. It may also be mentioned that discrimination on the grounds of caste/untouchability within a religious community that does not recognise, much less sanctify, the caste system calls for internal reforms within the religion and community-based interventions rather than governmental intervention for inducting them into the caste system from which they chose to move to an egalitarian religion.

(iv) Granting scheduled caste status to such converts by the government may amount to formal introduction of the caste system in Islam/Christianity and changing the basic tenets of the religion, which will be outside the jurisdiction of both the Parliament and the judiciary.

(v) In *Soosai, etc vs Union of India*, the petition was disposed of by the court on technicality rather than merit. The court did not go into the question of whether a person of scheduled caste origin converted to Christianity was entitled to the benefits/protection available under the Constitution to scheduled castes if such a person continued to be subjected to untouchability-related practices despite the conversion. The petition was dismissed for the reason that no authoritative or detailed study dealing with the condition of persons converted to Christianity was placed on record.

(vi) Even though those who profess Christianity or Islam were never treated as scheduled castes in British India or in India after independence, efforts have been made from time to time to seek conferment of scheduled caste status on persons of scheduled caste origin professing Christianity. Private members' bills have been moved more than once. The National Convention of the Parliamentary Forum of the Scheduled Caste/Scheduled Tribes in 1992 also passed a resolution for extending reservation facility to persons of scheduled caste origin [converted] to Chris-

tianity. A Constitution (Scheduled Castes) Order (Amendment) Bill was also prepared in 1996 though never introduced. The views of the various central ministries/departments and state governments were obtained in this regard. They drew attention to the debate of the Constituent Assembly and pointed out the need for determining the precise number of persons who would be covered. The absence of any suggestion on the cut-off date for determining who would benefit was also pointed out. It was also mentioned by several states and commissions that there was no justification for including scheduled caste converts to Christianity in the Scheduled Castes list. There would be enormous difficulty in identification of the original caste in the absence of authentic records. Besides, their representation in services was adequate and they were already getting the benefits of reservation, etc as OBCs.

(vii) The Protection of Civil Rights Act of 1955 is a religion-neutral act. It is applicable to all "religions and religious denominations throughout India". Hence the argument put forth by the petitioners that the benefits under the act are not available to Christians and Muslims is not based on factual information. The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989 is however specific to these two categories only.

[* *Report of the Committee on Untouchability*, p. 7.]

(viii) Both Islam and Christianity are religions which originated outside India. These came from foreign lands to India along with traders, invaders and preachers/missionaries over a period of time spanning hundreds of years and firmly established themselves as more and more indigenous people converted from their religion to Islam/Christianity. Both are religions that do not recognise caste. It may be extremely difficult to hazard a guess about the number of the progeny of such traders/invaders/preachers/settlers from foreign lands and scheduled castes who converted in the present population of Muslims/Christians in India. What can however be said with an element of certainty is that a vast majority of Muslims and Christians in India today comprise of the converts and their progeny. If this hypothesis is accepted, the identification of such Muslims/Christians who were originally of SC origin will pose many problems, as no authentic records have been maintained.

(ix) Any procedure adopted to identify the SC converts to Christianity and Islam at this stage, even if a cut-off date is fixed, is bound to produce innumerable problems that will hazard rational and equitable decision for identifying those truly eligible. The chances of abuse and of the ineligible siphoning benefits at the cost of the de-

Granting SC status to such converts by the govt may amount to formal introduction of the caste system in Islam/Christianity and changing the basic tenets of the religion, which will be outside the jurisdiction of both the Parliament and the judiciary

servicing are tremendous. Even for the castes that are listed, there is enough evidence that false certificates are being obtained. In fact, what is necessary is to ensure equitable treatment to converts from Hinduism or any other religion to another who continue to be socially and economically backward, for protection and access to services for their socio-economic upliftment. Uniform law for dealing with untouchability already exists. The Protection of Civil Rights Act is applicable to all.

(x) The 1956 and 1990 amendments to the Constitution (Scheduled Castes) Order 1950 have been justified on the ground that the Sikh and Buddhist religions were primarily home-grown sects within the Hindu religion rather than being independent religions in the nature of Christianity or Islam. Besides, they draw support from explanation II below Article 25 of the Constitution, which provides that reference to Hindu in subclause (b) of clause (2) of Article 25 shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist religion.

(xi) After 50 years of effort to eradicate untouchability, to enlarge the list of the untouchables would bring to naught all initiatives taken so far to change the age-old social structure. It would in fact be a retrograde step not in keeping with the constitutional commitment of non-discrimination.

The Protection of Civil Rights Act is a religion-neutral act applicable to all “religions and religious denominations throughout India”. The argument that its benefits are not available to Christians and Muslims is not based on factual information

(xii) The rigidities and severities of the traditional caste structure and discrimination which were part and parcel of the Hindu caste system have changed substantially. The caste distinctions have eroded and the behaviour towards scheduled castes has undergone a tremendous change. Caste distinctions have largely transformed into class distinctions, specially in urban and semi-urban areas.

There is adequate evidence to establish this through various socio-economic studies. In the case of Christians and Muslims, the discrimination reported is within the community itself. Separate enclosures in churches for “Dalits” or separate cemeteries – are issues to be addressed primarily by the religious leaders through reform within their system and through welfare and legal measures and not by introducing the caste system into religions that do not recognise it. In the last 60 years the effort has been towards eradicating the practice of ‘untouchability’ and caste distinctions and discriminations existing within the Hindu religion. There is therefore no justification for incorporating this abominable and discriminatory practice into other religions notwithstanding that the religious tenets of both Christianity and Islam do not permit it and notwithstanding the fact that the very competence of the state – executive, Parliament or even judiciary – to introduce ‘caste’ into religions that profess egalitarian regimes is questionable.

(xiii) There is enough evidence to establish that ‘untouchability’ is on the decline. The annual report of the Government of India, ministry of social justice and empowerment, laid on the table of the Lok Sabha and the Rajya Sabha on November 25, 2005 and November 28, 2005 respectively, on the Protection of Civil Rights Act 1955 for the year 2003 reveals that during 2003 only 651 cases were registered in the country in 12 states. Out of these, 495 (76.04 per cent) cases were registered in Andhra Pradesh alone, followed by 69 cases in Karnataka, 39 in Maharashtra and 17 each in Madhya Pradesh and Puducherry. The number of cases registered in Jharkhand (4), Tamil Nadu (3), Kerala (2), Orissa (2), Chandigarh (1), Gujarat (1) and Himachal Pradesh (1) varied between one to less than five. In all other states/union territories, viz Assam, Arunachal Pradesh, Bihar, Chhattisgarh, Goa, Haryana, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Punjab, Rajasthan, Sikkim, Tripura, Uttar Pradesh, Uttarakhand, West Bengal, Andaman and Nicobar Islands, Dadra and Nagar Haveli, Daman and Diu, Lakshadweep and the national capital territory of Delhi, no case was registered under the act. Compared to this, the average yearly number of cases registered under the act during the first half of the 1980s was in the region of 4,000 which declined to 2,493 in 1991-92, 1,581 in 1992-93, 1,387 in 1993-94 and 982 in 1994-95.

Admitting that like offences under numerous other statutes, including the Indian Penal Code, a large number of offences committed under the Protection of Civil Rights Act 1955 are either not reported or, if reported, are not registered, the number of registered cases in relation to the scheduled caste population of the country is an indicator of the fact that the incidents of untouchability, outlawed and punishable, have become more of an exception rather than the rule. Fifty-seven years of government’s and society’s crusade against untouchability, increase in the level of education and awareness of the people boosted by the nearly all-pervasive reach of print and electronic media, assertiveness by scheduled castes of their own status and rights, etc had a definite impact on people’s thinking and behaviour patterns in regard to untouchability. Social change has impacted on the caste structures with the result that the rigidities of the system and the severities of the practice have been diluted. It is necessary to prune the list of Scheduled Castes on the basis of comprehensive surveys so that the benefit of positive action in favour of scheduled castes percolates to the people who deserve it the most and is not cornered by the elite amongst the scheduled castes.

(xiv) In the recent past there have been occasions when the higher caste or the so-called higher castes have come forward to permit free entry to all SCs in temples where they were not allowed earlier. It may not be out of place to mention that services and facilities are provided on equal terms to those following vocations which are pollution-based e.g. manual scavengers and others engaged in unclean operations, irrespective of their religious or caste affiliations.

(xv) The views expressed by the state governments, chief ministers, other political heads, institutional heads and

NGOs have an important bearing on whether or not the status of scheduled castes should be granted to scheduled caste converts to Christianity and Islam. Out of the total of 35 states, only seven states have concurred with the proposal, five have opposed the inclusion and 10 have given no comments. Others have not yet formulated their views. Many scheduled caste organisations have opposed the grant of scheduled caste status to scheduled caste converts to Christianity and Islam on the grounds of their having embraced religions other than Hinduism only because of the discrimination faced by them on account of untouchability. Similarly, Buddhist organisations in several states represented that the Buddhists should not be included in the Scheduled Castes lists because they adopted or embraced Buddhism only because of the strong hold of the caste system in Hinduism and the discriminatory practices against them. Representatives of Muslim organisations in several states were vociferous in stating that Muslims cannot be termed "Scheduled Castes" but should be included in OBCs and given benefits.

(xvi) In view of the foregoing, the demand for grant of scheduled caste status per se is unjustified. However, the reasons for the demand merit consideration and call for action for ensuring special facilities and dispensations if atrocities or discriminations on the basis of untouchability arising out of vocation are found to be practised against them. It may be reiterated that the Protection of Civil Rights Act is not religion-based and is available to followers of all religions. Opportunities for better education, employment, etc need to be ensured where needed and the discriminatory practices redressed through administrative, legal welfare and developmental measures and not by inclusion in the Scheduled Castes list on the plea that caste continues even after conversion even though the adopted religion does not permit it.

(xvii) During the workshop held on 'Social, Economic and Educational status of Muslims: Problems and Policy options' organised by the commission in collaboration with the Indian Institute of Public Administration the Muslim scholars opined that there are three globally accepted determinants of socio-economic backwardness, namely child mortality, degree of urbanisation and the average life expectancy at birth. As far as the Muslim community is concerned, they are ahead of the majority community in this regard. In the circumstances, they were of the view that the frequent attempts to provide religion-based reservations to Muslims cannot be justified either constitutionally or ethically. They were also of the opinion that non-acceptance of the small family norm and abysmally low female work participation are responsible for the relatively lower per capita income of the Muslim community. Both of these are controlled by the powerful clergy of the community. No amount of reservations can cure this situation. The solution lies in rescuing the community from the clutches of fundamentalist scholars and mullahs. Therefore the Constitution should be amended to introduce affirmative action programmes for those minorities which are educationally backward and underrepresented in legislative bodies

and civil services. They also suggested that a common civil code should be formulated.

(xviii) The scheduled caste organisations have also been demanding that if despite their request, scheduled caste status is given to converts to Christianity and Islam, this should not be at their cost i.e. it should not affect the reservation quota and other privileges/benefits available to them.

(xx) [I]n view of the fact that untouchability, which was the sole basis for identification of a class as scheduled caste, has been abolished by the Constitution and has been outlawed by a parliamentary statute and there has been a sea change in the attitude and perceptions of society in post-independent India consistent with increased education and awareness, there should be no further inclusion in the list of Scheduled Castes. Instead, the emphasis should be on exclusion of all castes from the list and preparation of a comprehensive list of the socially and economically backward on criteria based on social and economic status. Many members of the scheduled castes have freed themselves from the pernicious yoke of untouchability and resultant disabilities in the last 60 years due to initiatives taken through positive discrimination in their favour as also the social change resulting from economic development and globalisation.

19. There are two other issues on which the commission's views have been sought with reference to the Constitution (SC) Order of 1950. They relate to 50 per cent reservation and the modalities for inclusion. With regard to the ceiling of 50 per cent in reservation, the hon'ble Supreme Court has already decided in the case of *Indira Sawhney & Ors vs Union of India* that the ceiling of 50 per cent on reservations will continue. Since scheduled caste converts to Christianity and Islam are not to be included in the list of Scheduled Castes, no change in the ceiling merits consideration at this stage. Similarly, no change in modalities is called for.

The statement made in the dissent note that the "Sikh and Buddhist religions were primarily home-grown sects within the Hindu religion rather than being independent religions" is deplorable

A NOTE ON MEMBER-SECRETARY'S DISSENT NOTE

Written by NCRLM member Dr Tahir Mahmood and fully endorsed by the chairman, Justice RN Misra, and members Dr Anil Wilson and Dr Mohinder Singh

We had a last-minute chance to see the member-secretary's dissent note. We are not sure of the propriety of this dissent note against the unanimous recommendations of the rest of the commission [as member-secretaries of commissions are generally not members in their own independent capacity but ex-officio members by virtue of their adminis-

trative position] but yet we have not raised any objection to it. However, we would like to clarify as follows:

(a) The recommendations made by us under our additional term of reference have been guided by its own wording and by the thrust of the pending court cases on this issue which it refers to. We have not been concerned about what any officer of the commission's nodal ministry may have written in this respect to the member-secretary.

(b) We have found no indication whatsoever in the Constitution – either in Article 341 or elsewhere – of an intention that scheduled castes must remain confined to any particular religion or religions. Article 341 only empowers the president (read central government) to issue the initial lists of Scheduled Castes and the Parliament to amend such lists later. It does not even remotely create any caste-religion link in respect of scheduled castes. Such a link was created – unwarrantedly in our opinion – by executive action while issuing the Constitution (Scheduled Castes) Order 1950. And we have recommended removal of this link by legislative action in terms of Article 341.

Equally deplorable is the volatile attempt made in the dissent note to place “religions which originated outside India” on a footing different from those born in India. We denounce it in the strongest possible terms

(c) We strongly refute the contention that Article 25 of the Constitution supports the view that the Sikh, Buddhist and Jain faiths are to be regarded as offshoots of the Hindu religion – in our considered opinion, this view is clearly based on a misreading of that article and conflicts with the letter and spirit of the Constitution. Accordingly, we refute the claim that it was because of this intrinsic “support” from the Constitution that the Scheduled Castes Order 1950 could be amended to include Sikhs and

Buddhists among the scheduled castes.

(d) We cannot understand that if according to any indication in the Constitution the Sikh, Buddhist and Jain faiths were akin to Hinduism, why did the Constitution (Scheduled Castes) Order 1950 initially declare that no non-Hindu could be a scheduled caste – thus excluding even the Sikhs, Buddhists and Jains? What took the Sikhs six long years and the Buddhists another 14 years (20 years in all since 1950) to get themselves included in the scheduled caste net? And

why are the Jains even now excluded from it? It seems that the scheduled caste net was initially restricted to Hindus for some supra-constitutional reasons and seeking support from the Constitution for later extending it to the Sikhs and Buddhists was an afterthought – which however is wholly repugnant to the letter and spirit of the Constitution.

(e) The statement made in the dissent note that the “Sikh and Buddhist religions were primarily home-grown sects within the Hindu religion rather than being independent religions” is deplorable, as it offends the religious sensitivities of the Sikh and Buddhist citizens of India who have always regarded their faiths as “independent religions”.

(f) Equally deplorable is the volatile attempt made in the dissent note to place “religions which originated outside India” on a footing different from those born in India. As it introduces an absolutely unconstitutional distinction between the two self-created categories of religions prevailing in India, we denounce it in the strongest possible terms.

(g) Para 3 of the Constitution (Scheduled Castes) Order 1950 does not at all speak of scheduled castes converting to Christianity or Islam. That a scheduled caste Hindu, Sikh or Buddhist on converting to any other religion must lose his scheduled caste status is only a secondary effect of the said para 3. Its main and more serious effect is that those sharing even by birth the same castes as are listed as scheduled castes are excluded from the net only because they are not Hindu, Sikh or Buddhist. In our opinion, this effect of para 3 conflicts with the constitutional guarantees of equality of status and opportunity and no religion-based discrimination and therefore we have recommended its repeal.

(h) The fundamental rights of the citizens, enshrined in the Constitution, are the supreme and overriding part of the Constitution – and this part does insist on complete equality of citizens without any discrimination whatsoever on religious grounds. The origin of the caste system in a particular religion in the distant past, the egalitarianism of some other faith traditions in their original unadulterated form and other similar things fondly talked about in the dissent note cannot be accepted as factors that can be allowed to prevail over the Constitution's unconditional emphasis on the equality of citizens and non-discrimination between the followers of various religions among the citizens of India.

For the reasons mentioned above, we reject the contentions made in the dissent note and firmly stand by every word of the recommendations we have made under this term of reference.

