INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 6

2021

An Accession to the Everlasting Tussle between Parliament and Judiciary: An Empirical Study on the 127th Constitutional Amendment Bill and a Critical Analysis on the Case DR. Laxmanroa Patil vs Chief Minister, Maharashtra

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ABSTRACT

India since the beginning has been a democratic state with well defined doctrine of separation of powers between the three bodies namely the legislature, the executive and the judiciary, and to keep a check on them the doctrine of rule of law also applies to the three bodies". There has been very rare instances in the history, where a tussle has taken place between the authorities, and enactment of the "127th amendment bill" is one such instance. The paper enunciates the pre-requisite knowledge regarding the previous amendments along with the case analysis in depth where the conflict of interest arose. Subsequently, the paper has listed the analysis of the "127th amendement bill" and its impact on public employment along with the shortcomings as well.

Keywords: *127th amendment bill, Constitution of india, public employment, shortcomings.*

I. INTRODUCTION

The state of India, beholding a dynamic society where the laws are open to alteration and modification in accordance to the need of the society, has been repeatedly subjected to 'tussle' between the 'Parliament' and the 'Judiciary'. One of the recent enactments of such a nature is the introduction of the "127th Constitutional Amendment Bill (2021)" which the present paper deals with. The amendment intends to provide the state with the power to 'prepare and maintain' a "state list of OBSCs", which overturns the judicial pronouncement on the case of – "Dr. Jaishri Laxmanrao Patil vs The Chief Minister & Others" along with standing in contrast to the "102nd Constitutional Amendment (2018) ", both of which provide the power to the president (with the advice of National Commission for Backward Classes) to identify the backward classes of the country as a whole and prepare a single central list for the same.

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Before moving further to critically analysing the "127th amendment", we should first understand what the Amendment is all about and discuss its salient features, along with reviewing the judgment pronounced in the case of "Dr. Jaishri Laxmanrao Patil vs The Chief Minister & Others".

II. SALIENT FEATURES OF THE "127TH CONSTITUTIONAL AMENDMENT"

The key takeaways of the "127th Constitutional Amendment" are as follows: -

- The very objective of the Bill passed by Parliament is to reinstate the power of the "States and the Union Territories" to prepare their own "OBC list", which was taken away by judicial decision in the case of "Dr. Jaishri Laxmanrao Patil vs The Chief Minister & Others".
- The bill is passed by the 'parliament' on 'August 11, 2021' with the majority approval (more than 2/3rd of the total strength and the members present and voting) of both the houses).
- The Amendment Bill intends to modify "Article 342A (1) & (2)", "Articles 366 (26c)" and "Article 338B (9)" along with establishing a new clause into the said Article i.e. 'clause 3'.
- The ambit of the president's power to identify the OBCs would no longer extend to latest 'State List'. [3]

Now, we shall proceed to review and analyse the judicial pronouncement in the case of "Dr. Jaishri Laxmanrao Patil vs The Chief Minister & Others", which the present constitutional bill purposes to overrule.

III. REVIEW ON THE CASE: - "DR JAISHRI LAXMANRAO PATIL VS THE CHIEF MINISTER & OTHERS (CIVIL APPEAL NO. 3123 OF 2020)

(A) Background of the case:

Taking into account the growing demand for reservation of '**Maratha community'** which the people showcased through a number of 'public strikes and agitation', the Maharashtra govt. was compelled to constitute a **'State Backward Class Commission'** to analyse the 'social', 'financial' and 'educational' position of the Maratha people and thereby ascertain as to where they actually stand. Thereafter, the said govt. passed the '**Maharashtra SEBC Act, 2018'** which provided for '16% reservation' for the 'Maratha community' considering them to be 'socially, economically and educationally backward'. As a result, a substantial number of

[3] Tripathi, Shailaja . "Parliament passes 127th Constitution Amendment Bill restoring state's power to make their own OBC list." Jagran Josh. 12 Aug. 2021. www.jagranjosh.com/current-affairs/127th-constitution-amendment-bill-in-parliament-what-is-it-and-why-is-it-needed-all-you-need-to-know-1628577629-1. Accessed 28 Oct. 2021.

petition was filed against the Bill before the 'Bombay High Court' on various ground, one of which is, it exceeded the '**glass ceiling of 50% quota'** which is a well-established rule under Indian reservation policies. The 'Bombay High Court', keeping in view the recommendation given by the 'Backward Class Commission', ordered the govt. to bring down the quota from '**16% to 12-13%**'. This verdict was challenged through various appeals made before Supreme court of India and thereafter the case was referred to a higher bench of 5 judges to adjudicate upon the matter.

The 'Apex court of India', in this present case, nullified the "Maratha quota reservation" provided by the 'Maharashtra Government' by the virtue of "Maharashtra Act No. LXII of 2018", which was specially meant for the people belonging to the state's **'Socially and economically backward class (SEBC)'**. One of the key issue upon which the 5 judges bench of this case dealt with is - whether the judgement of 'Indira Sawhney case'[4] be revisited/reviewed or not, to which the judges unanimously decided that **there exists no flaw in the verdict and that the principle which was laid down thereof has been well adhered to in various other judicial cases**. Another issue which was brought before the judges was whether the states have the power to determine the 'social and economic status' of the classes, to which the court decided that the state have no such power vested with them as the said power is already vested in **"NCBC (National commission for backward classes" through 102nd amendment.**

(B) Key issues of the case

- Whether the decision given in the 'Indra Sawhney case' be referred and re-looked upon by a larger bench, taking into view the dynamicity of the society?
- Whether the additional reservation given to the 'Maratha Community' by the 'Maharashtra SEBC Act, 2018', comes within the ambit of extra-ordinary or exceptional circumstances provided under the 'Indra Sawhney Judgment'?
- Whether the "102nd Constitutional Amendment" takes away the power of the state legislature to make legislations for identifying the 'SEBC's' of the concerned state and for providing them benefits thereof?
- Whether "Art. 342(A) r/w Art. 366(26c) of the Constitution of India" in any manner curtails the state's power under "Art.15(4) and Art.16(4)" to make legislations or make any reasonable classification with respect to "any backward class"?

(C) Judgement (Decision of the court along with its reasoning)

1. Issue-1

[4] AIR 1993 SC 477

"Whether the decision given in the 'Indra Sawhney case' be referred and re-looked upon by a larger bench, taking into view the dynamicity of the society?"

The '5 judges constitutional bench' held that there exists no need for re-looking upon the 'Indra Sawhney case' as the case has already received its acceptance by getting referred and applied in various other judicial precedents. The '50% ceiling' which is provided by the above case, stands in conformity with the **'principle of reasonability'** and '**principle of equality'** as envisaged under Article 14, Article 15 and Article 16 of the Indian Constitution. The ceiling establishes a balance between the assurance of 'equality to all' and the classification made for promoting 'law of equity' through 'positive or affirmative discrimination' sanctioned by "Article 15 (4) and 16 (4) of the Constitution". An attempt to change this 50% limit would result in formation of a society which would be based on 'caste rule' and not on 'equality'. In a view of taking measures for development of the weaker section of the society, increasing the number of reserved seats alone won't suffice the said objective, would rather cause a breach to the principle of reasonability and therefore other measures has to be instigated by the government for attainment of the said objective. It is an undisputed matter of fact that there always exists dynamicity in the society where the law changes as per requirements of the individual, but if something or some provision has proven to be beneficial for establishing a balance between 'equality' and 'equity' in the society, then such provisions shall not be altered or changed.

2. Issue-2

"Whether the additional reservation given to the 'Maratha Community' by the 'Maharashtra SEBC Act, 2018', comes within the ambit of extra-ordinary or exceptional circumstances provided under the 'Indra Sawhney Judgment'?

The supreme court in the present case reckoned on 'para number 108 of the Indra Sawhney Judgment' where it is provided that the scope for reservation shall not exceed the '50% threshold' until and unless there exists certain 'extraordinary situations'. In certain cases, where a group or class of people are staying in a remote area which keeps them way aloof from the 'mainstream of national life' and are surviving in such peculiar conditions that necessarily requires them to be treated preferentially from that of others, for maintaining the rule of equity, the exceeding of the '50% threshold' stands absolutely reasonable. But, taking into consideration and clearly examining the data collected by the 'Maharashtra Backward class commission' and the final report submitted by the 'Gaikwad Commission', it was crystal clear that **Marathas are 'neither socially nor educationally backward'** and hence shall not be given the benefit of reservation that exceeded the '50% threshold'.

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The SC in the present case also analysed the status of employment of the Maratha community in various categories of employment posts along with their representation as per the population of the state in totality and it was thereafter found that they were adequately represented in the govt. services. It is an established principle, through the virtue of 'Article 16(4) of the Constitution' as well as the judgment laid down in the Indra Sawhney case, that what is required in determining whether a particular group of people are to be provided with the reservation benefits or not is the **lack of Adequate representation (and not the lack of proportionate representation)** of the community in the state services. Thus, the non-fulfilment of the said 'constitutional provisions' stands as a substantial reason not giving the benefit of reservation to the 'Maratha community' which is exceeding the threshold limit.

It has also been repeatedly held from previous years that 'Maratha Community' is a 'forward community' as there were '3 National Backward Class Commissions' and '3 State Backward Class Commissions' which looked into the matter as to whether the said community shall be considered backward or not and all of them have **rejected the claim and held that it is a 'forward community'** and therefore is not entitled to such reservations as an 'other backward community'.

3. Issue-3

"Whether the '102nd Constitutional Amendment' takes away the power of the state legislature to make legislations for identifying the 'SEBC's' of the concerned state and for providing them benefits thereof?"

All the judges gave a unanimous decision in upholding the 'constitutional validity' of the '102nd amendment' but diverged their decision with regard to the ability of the state in identifying the backward community pertaining to that particular state. Some went with a clear textual understanding of the Amendment and a separate opinion was given by 'Justice S. Ravindra Bhat' (supported by 'Justice L. Nageswara Rao' and 'Justice Hemant Gupta') that the 'President of India' with the assistance of the 'National Commission for backward classes', through the virtue of the provisions laid down under **"Article 338B of the Constitution"**, have the power to identify the 'socially and economically backward classes' of each state and union teritory, upon which the parliament shall have the ability to make any sort of modification (both inclusion and exclusion) in the given list. The states are vested with the power only to propose recommendations and suggestions (which are non-binding in nature) for inclusion or exclusion in the list and to make 'policy decisions' with regard to the same.

4. Issue-4

"Whether 'Art. 342(A) r/w Art. 366(26c) of the Constitution of India' in any manner curtails

the state's power under 'Art.15(4)' and 'Art. 16(4)' to make legislations or make any reasonable classification with respect to "any backward class'?"

It was held that there shall be **only a single list which can be issued by the President, identifying the 'socially and educationally backward classes'** for the purpose of adherence to the Constitution. Through the introduction of "Articles 366 (26C) and 342A" into the 'constitution of India' by the '102nd amendment', only the president has the power of identifying the 'SEBC's' of each 'state' and 'union territory' and thereby incorporate them in a list which is to be prepared in accordance to "Article 342A (1) of the constitution". "Article 338B of the Constitution" gives an opportunity to the states to merely suggest any required modification in the already published list. The list has to be 'prepared and published' under "Article 342A (1)" i.e. under the "central list" which indirectly implies that the states have no power to make their own list of 'SEBC's'. The list, if once gets published, can be modified only through a law sanctioned by the Parliament. The very aim of enacting the said provisions is to give 'constitutional status' to the 'NCBC' in the aids and advices of which, the president shall exert.

It was further held that the said provisions in no manner violates the states' power to provide reservations benefiting a particular set of people, the 'quantum of reservations' and the power of deciding upon the 'nature and kind of affirmative actions' which the states deem fit to provide, that falls within the ambit of "Articles 15 and 16 of the Constitution". Only the power of identification of 'SEBCs' is absent.

It was contended by 'Justice Ashok Bhushan' and 'Justice S. Abdul Nazeer' in their minority opinion that the '102nd amendment of the Indian Constitution' does not in any way curtail the state's power to 'identify the SEBC's' in the states. It is a settled 'principle of Interpretation' that every word in a statute or legislation is presumed to have an 'object and purpose' to serve and therefore the word "central" in "Article 342A (2) of the constitution" has been inserted with an intention to limit the ambit of the list prepared by the President so as to make it applicable only for the 'central services' and not for the 'state services'. The definition as provided under Article 366(26C) has to be read together with "Article 342A", when its application comes into play and the said definition shall not govern or be referred in cases where the list of Backward classes is not a central list and is a state list prepared by the states.

(C) Authors' stand on the case

The authors of this paper are well satisfied with the majority opinion of the '5 judge bench'. 'Indra Sawhney Judgement' being a 'landmark case' and its principle being used in various judicial precedents, makes it an accepted judgment to be referred to in the subsequent judicial

decisions as well. The '50% ceiling' stands in conformity with the 'principle of reasonability' and 'principle of equality' which is well provided under "Article 14" of which "Article 15 and Article 16" are subsets and therefore should not be altered except in 'extra-ordinary circumstances' where exceeding the threshold becomes necessary. The case of 'Lack of proportionate representation' doesn't stand as one of these 'exceptional circumstances' as what is required to be ascertained (According to Article 16(4) of the Constitution) is whether the particular group, claiming for receiving the reservation benefits, is 'adequately represented' in the public services or not and once the same is established, no benefits of reservation can be granted. For the purpose of maintaining a uniformity in determining the 'SEBC's', for granting reservation in conformity with the 50% ceiling limit, for adhering to the "principles of reasonability" and equality provided under "Article 14 of the constitution", there shall be only a 'single list' which can be issued by the President with the aid and advice of the NCBC for identifying the 'socially and educationally backward classes of each 'state' and 'union territory' and the states shall have the power only to recommend or suggest and changes or modifications in the list already published. This in no manner obstructs the power of the state power to provide reservations benefiting a particular set of people, deciding the 'quantum of reservations' and the power of deciding upon the 'nature and kind of affirmative actions' to be provided.

Now, moving forward for critically analysing the "127th Amendment Bill" with an aim to ascertain and understand the implications it possesses upon the 'Indian legal system'.

IV. THE ANALYSIS OF THE 127TH BILL ON PUBLIC EMPLOYMENT

Penning down the key takeaways of the "127th Constitutional Amendment": - The very objective of the Bill passed by Parliament is to reinstate the power of the "States and the Union Territories" to maintain their own "OBC list", which was taken away by judicial decision in the case of "Dr. Jaishri Laxmanrao Patil vs The Chief Minister & Others"; The bill is passed by the 'parliament' on 'August 11, 2021' with the majority approval (more than 2/3rd of the total strength and the members present and voting) of both the houses); The Amendment Bill intends to modify "Article 342A (1) & (2)", "Articles 366 (26c)" and "Article 338B (9)" along with establishing a new clause into the said Article i.e. 'clause 3'; And, the ambit of the president's power to identify the OBCs would no longer extend to latest 'State List'.

It is argued on behalf of the legislature regarding the necessity and relevance of producing the said amendment bill, that if the states are not empowered to make their own "OBC list", then near about "671 OBC communities" (which is approximately "1/5th of the total OBC Communities") would lose their right to avail reservation benefits in public employment; that

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the states are in a better position to identify and understand the "socio-economic issues" and requirements which are pertaining to that particular state or portion of the state; and that the state of India, being a federal state, should adhere to and maintain the "federal structure" through its legislations. But in reality, it is just the "politics" which comes into play as the very motive of bringing such legislation into picture is to secure "vote bank" from these "backward communities" in return of the "reservation benefits" granted to them, and have no keen interest in yielding welfare to these backward classes. The state government may also favour or be biased upon a particular community while providing "reservation benefits", which is turn will cause discrimination even within the "backward communities" as well, along with hampering the rights of the "general category" individuals.

Contrasting to the argument made by the legislature, that the introduction of the "127th amendment" was necessary for maintaining the "federal structure", the authors of this paper would like to submit that the federal structure was maintained even before the introduction of 127th amendment where the "President (with the aid of NCBC)" was vested with the sole power of making the "OBC List" for the entire country through the virtue of "102nd amendment". "Federalism" means distribution of the powers of the "central government" to the "state government" where the centre deals with the most important or vital aspects of the country while the state deals with those aspects which are relatively less-vital. The "102nd Amendment" also, vested the central government with the power to "identify the backward classes" of the entire country, while keeping the power of deciding the "quantum of reservations" and the "nature and kind of affirmative actions" to be provided, with the state government, thereby abiding by the "principle of federalism".

The legislature, through the initiation of the said amendment allows the state to provide reservations to the communities who are not proportionately represented in the govt. services. But, what is required to be looked upon, while giving the reservation benefit, is whether the particular community is "adequately represented" in the govt. services or not. This has been clearly mentioned in "Article 16(4) of the Constitution of India" as well as in the judgment laid down in the "Indra Sawhney case".

The said amendment is likely to create a society which would rest upon "caste rule" and not upon "equality". This would destroy the "principle of democracy" which is a "basic structure" of the "Indian Constitution". The "objective" of the "makers of the constitution" that is to create a "caste-less society" won't be achieved if this present amendment is not nullified.

When the power is given the states for maintaining their own "OBC list", there is high chance of total reservation to exceed the "50% ceiling limit" that is set by the "landmark judgment of

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Indira Sawhney case". This ceiling limit is in conformity with the "principle of reasonability" and "principle of equality" which is clearly guaranteed under "Article 14 of the constitution", which "Article 15" and "Article 16" are subsets of. As stated by "Justice S. Ravindra Bhat" in the case of "Dr Jaishri Laxmanrao Patil vs The Chief Minister & Others", that there must exist a "balance" between the "guarantee of equality" (treating everyone equally) and "equity" (providing "affirmative discrimination" to the "underprivileged" ones) and such a balance tends to be destroyed through the introduction of the "127th amendment Bill". If an "affirmative protection" is provided to one set of people which is likely to take away the "fundamental right" of another set of people, then a "proper balance" between "equality" and "equity" won't be maintained. This can be made evident from the impact the Amendment has on the rights of the people who are belonging to the "general category". When a legislation like that of the "127th Amendment Bill" that is likely to provide reservation in "public employment" exceeding the "50% threshold", is brought into an application, will unreasonably take away the rightful opportunity of the "general category" people of availing "govt./ public posts" who were otherwise entitled to get the same. This stands violative of their "right to life", which is a "fundamental right" provided under "Article 21 of the Constitution". According to "Article 13(2)", any "legislative enactment" would prove to be "invalid or inoperative" if it, in any manner, tries to take away the "fundamental rights" of the individuals, provided under "Part III of the Constitution".

Thus making legislations that would tend to exceed the said limit would lead to clear violation of the "principle of reasonability and equality" as well as the "established principle" derived from such a "landmark judgment" as that of the "Indra Sawhney case", thereby destroying the balance that must exist between the "guarantee of equality" and the "privilege of affirmative discrimination". The reason for terming the principle laid down by the "Indra Sawhney case" as an "established principle" or established rule is that- it has been applied in various other "judicial precedents", making it declared as a "widely accepted principle" having a "binding effect" for the subsequent "judicial pronouncements" as well.

Exceeding the "50% reservation limit", would demolish the very spirit of "meritocracy" in the process of employment under the "government posts". The individuals with actual talent, experience and eligibility to do justice to a given post, will be left behind. "More than 50 % of the total government job" will be filled up with individuals who are "un-skilled", "ineligible" and "incompetent" to hold a given govt. post and also who are incapable to deliver an "efficient and righteous service" that the post would demand for. This in turn, would affect the "overall income and development" of the entire country.

 [ISSN 2581-5369]

Moreover, providing a preferential treatment to a particular set of individuals who are "socially and educationally backward" by way of giving them "reservation in government services", is not the only approach available to the govt. for aiding to their "advancement". Various other approaches that can be instituted by the govt. such as- giving "free education" to the backward classes for making them capable of availing public services by the virtue of their "merit", providing them opportunity for "additional training" and "self-development" so as to make them "self-reliant", etc.

Thus, to overcome the drawbacks and inefficiency which are likely to arise because of the introduction of such a "bill" as a "law", the "Indian legal system" should revert back and adhere to the principles laid down by the "landmark judicial pronouncements" of "Indra sawhney case" and "Dr. Jaishri Laxmanrao Patil case" so as to preserve the very essence and spirit of "Article 14" which is a "fundamental right" guaranteed to every individual belonging to India.

V. CONCLUSION

That after critically analysing the whole topic it can be figured out that the like other topics this subject matter has not only its own set of advantages and disadvantages, but also a set of political aspects to it as well. Having done with the evolution of the whole category system to the critical analysis of the case along with the shortcomings to the same, the paper has in its best capability tried to deliver about the amendment and its impact as well.

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 [ISSN 2581-5369]