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Competence of State Legislature for the Inclusion of Classes under “Socially and Educationally Backward Classes” after the Constitution (One Hundred and Second Amendment) Act, 2018

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ABSTRACT

In the context of the controversy on the Socially and Educationally Backward Classes 2018 Act as passed by state of Maharashtra, this paper aims to examine on how The Constitution (One Hundred and Second Amendment) Act, 2018 tried to take all the power of State legislature for the inclusion of classes under the heading “socially and educationally backward classes” to the hands of the president with inclusion of Article 342A and 366(26C) in the Constitution of India. In this regard a study on how the 102nd Constitutional amendment leads to obscurity concerning the division of power between centre and state regarding the power to inclusion of classes under “Socially and educationally backward classes” along with the brief of 102nd constitutional amendment, references on the situation before the 102nd constitutional amendment, purpose of the amendment and the report presented in parliament during the pendency of the Bill in parliament. In the light of Dr. Jishri Laxmnarao Patel v. the Chief Minister of Maharashtra (Maratha reservation case) in which the Bombay High Court gave the green signal to the Act passed by State of Maharashtra and stating that state legislative competence is not in any way affected by the Constitution 102nd amendment act and appeal to this pending in Supreme Court.

I. INTRODUCTION

Every democratic nation have given a complex and challenging task of providing justice to certain section of society which are traditionally and socially discriminated along with ensuring that such an action do not hamper any opportunity given to rest of the population. Indian society is mostly targeted for discriminating humans based on descent and birth as the caste system and it is deeply encompassed in our society. The government has sought to solve this inequity by the policies of upliftment, which are the policies drawn up with a perspective to increase

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opportunities for the disadvantaged class. Government has sought to address this inequity through the affirmative action policies. Affirmative action policies refer to the policies which are formed with a view to increase the opportunities for minorities or disadvantage classes.³ The principle of affirmative action was emerged in United states of America but, in India it is referred as “compensatory discrimination”.⁴ However India’s policies on affirmative action comprises of many different schemes which are designed for the historically backward classes to progress⁵.

The Constitution of India has endeavoured itself to stop discrimination against group referred to as “other backward classes” through Articles 15, 16, 335 and 340⁶. The other backward classes comprises of Socially and educationally backward sections other than Schedule caste and schedule tribes since there is no precise definition of this term which leads to the ambiguity and the challenges lies in the development of methods to identify them. The term “other backward classes” has not been defined in the constitution,⁷ instead the term “socially and educationally backward classes” is used. The term “Backward classes” excludes the schedule caste and schedule tribes⁸. The controversy of identification of Backward classes⁹ under Indian constitution Act 1950 continues even after seventy years.

The provision enumerated in the constitution under Article 15(4) and 16(4) gives power to state to identify socially and educationally backward class of citizens but recently in The Constitution (One Hundred and Second Amendment) Act, 2018 (hereinafter referred as 102nd Amendment Act) empowers president under Article 342A to specify such classes to insert or keep out from the list from social and educationally backward classes by notification in

³ In the United States, affirmative action means giving preference to minority and women as for compensating them for all past and present denied opportunities. *Affirmative Action in India and the United States: The Untouchable and Black Experience*, 3 *Ind. Int'l & Comp. L. Rev.* 101 (1992). Policies of positive discrimination are oriented towards an 'identity group' - a group that is defined in terms of characteristics over which it has no choice, are determined at birth and rarely alterable such as race, caste, gender etc. Thomas E. Weisskopf, *Affirmative Action in the United States and India*

⁴ S. Laxman Rao, *Positive Discrimination as a Constitutional Right: Emerging Patterns and New Challenges*, *Indian J. Hum. Rts.* 110 (2001). The author explains that in India, academic writing uses various terms such as compensatory discrimination, in place of 'affirmative

⁵ The schemes under compensatory discrimination in India may be described under three divisions. First, through reservations, access to valued resources such as seats in legislative bodies, higher education and employment may be facilitated. Secondly, policies extending services such as scholarships, health care, legal aid etc are allotted to a beneficiary group on a larger scale than allotted to others. Thirdly, special protection to protect backward classes against exploitation such as legislations against bonded labour. The third category, though strictly not within the scope of 'compensatory discrimination', may be considered as such as it is a special effort to remedy the position of disadvantaged classes. Marc Galanter, *Competing Equalities - Law and the Backward Classes in India*

⁶ M. P. Jain, *Indian Constitutional Law* 141 2017

⁷ The term 'Other Backward Classes' was perhaps first used in 1928 when the Government of Bombay formed a Committee for the identification of Backward classes.

⁸ The National Commission for Backward Classes Act, 1993 defines "backward classes" to mean the classes as declared by Union government citizens other than the S.C. and S.T.

⁹ Article 15(4) and 16(4) of the Constitution of India

consultation with the Governor of concerned state.

The President acquired power for the same after the amendment in the definition clause of Constitution of India i.e., Article 366 when the 102nd Amendment inserted Article 366(26C) which defines “socially and educationally backward classes”. Under Article 366(26C), “socially and educationally backward classes” are the classes which are declared under Article 342A of the Constitution irrespective of mentioning the central or state list, and Article 342A empowers president to do so with consultation of Governor of state. So the bare reading of Article 366(26C) along with Article 15(4) and 16(4) empowers President for inclusion and exclusion of the classes from the social and educationally backward classes and the state legislature is deprived of its power to notify a particular class to be socially and educationally backward in the light of the same.

II. BEFORE THE CONSTITUTION (ONE HUNDRED AND SECOND AMENDMENT) ACT, 2018

Firstly, going through the development for constitutionalising the National commission for backward classes. The first backward class commission was appointed in 1950's chaired by Kaka Kalelkar under Article 340 of The Constitution of India¹⁰ and later in 1970's another commission for backward classes was appointed chaired by B.P. Mandal. Article 340 of the Constitution of India only provides for the creation of temporary commissions¹¹. In *Indra Sawhney case*¹², Supreme Court made the following observations: the central and state government shall in four-month to constitute a permanent body to entertain, examine and recommend the inclusion and exclusion of backward classes for protection and benefit.

Relying on the judgment, the National Commission for Backward Classes Act was enacted in 1993 and the Commission for Backward Classes was constituted, and the authority was given to them to examine the request for including the classes as a backward class in the central list. However, the parliament also constituted a committee under the chairmanship of B.K. Handique for the welfare of the other backward classes, whose first report was presented on August 2012 which recommended the constitutional status to be given to National Commission for Backward Classes. The committee in its second report recommended the inclusion of new article 338B.

¹⁰ Under Article 340(1) of the Indian Constitution, the President has a power to designate a Commission for the purpose of conducting inquiries with regard to the condition of socially and educationally backward classes

¹¹ Nevertheless, it was implemented by the Janatha Government only in 1989. Sukdev Khanna, *Reservation and its Implications* 57

¹² AIR 1993, SC 477

The Minister of social, justice and empowerment in Lok Sabha introduced The Constitution (123rd Amendment) Bill which looks for giving Constitutional status to National Commission for Backward classes in like manner to other two National commissions of schedule tribes and Schedule castes. The National Commission for backward classes (Repeal) Act was also tabled and passed to abrogate National Commission for backward classes created by the act of 1993. Over the glanced report of the Standing Committee of Rajya Sabha on the 123rd Amendment Bill 2017 was tabled. As mentioned below,

(A) Rajya Sabha Committee Report

“Seeing of the report which is characterised to show of the intention of the Government in introducing the 123rd Amendment bill 2017 and from the report and the discussion, the following Points emerge :

(a) The power and function of State Backward class commission is not affected after the alteration by the Constitutional amendment.

(b) the State Commission has still unchanged power to include or exclude classes in State backward class list.

(c) The Constitutional amendment leads to the formation of two lists i.e.. Union and state list.

(d) The new inserted Article 338B clause 9 is not going to interfere in the powers of state government in preparing their own list. The classes do not automatically comes under central list of OBC’s if they are included in state list.

(e) Similar to Schedule tribes and Scheduled Caste for inclusion or exclusion of category the State Government has to recommend it to the President under Backward classes also as provided under Article 342A of Constitution.

(f) The Amendment Bill In paragraph 48 of the Report, is clearly stated that the amendment Bill neither interferes with the powers of the State Government, nor with State Backward Class Commission to identify SEBC classes even after the passage of the said Bill.

(g) That the reservation of post under the State or under any authority of the State or seats in the educational institutions within the State was beyond the preview of the 123rd amendment.

(h) Para-67 of the report states that the backward class commission will continue to exercise its power of inclusion/exclusion of backward classes in relation to the State lists.

(i) The summary of the Report reproduced above resulted in several amendments being rejected since it was a view of the Government of India that the amendment does not seek any charge in the powers or in the status of the State of Government or the State Backward Commission.

(j) The term “list” is defined under Section 2-C of the National Commission for backward classes Act, which clearly states that the list relates to services under the Government of India or any other authority under the control by the Government of India.”¹³

But the Rajya Sabha committee report was relied upon to the limited extent of ascertaining the intention of the Parliament as they are conscious of the settled position of law that it can be only used as an external aid in interpretation.

III. THE CONSTITUTION (ONE HUNDRED AND SECOND AMENDMENT) ACT, 2018

The Constitution (One Hundred and twenty-third Amendment) Bill, 2017 got the assent of the President of India on 11 August 2018. The 102nd Amendment Act amended Article 338 and also inserted new Article 338B which gave constitutionality to National Commission for Backward Classes(NCBC) and the article also talks about the composition of NCBC and the duties and role of NCBC in monitoring and safeguarding the rights of socially and educationally backward classes, along with Article 342A which authorize the president to list socially and educationally backward classes in state and union territories with consultation of Governor of concerned state. However in sub-clause 2, to any amendment in the central list of backward classes, a law shall be enacted by parliament to do so. At last, the amendment also inserted the Article 366(26C) which is the amendment in the definition clause of the Constitution of India as under Article 366(26C) “socially and educationally backward classes” are those classes which are declared under Article 342A of the constitution.

The National Commission for Backward Classes (Repeal) Act, 2018 also got the assent of the president of India thus the debatable question brought up was, how the new NCBC is different from the Old NCBC.

Firstly, the new NCBC is not only limited to provide reservation but it is also entrusted with the responsibility for providing developmental growth among backward classes and also it is entrusted for the grievance redress function for backward classes.

Secondly, the new NCBC is having more transparency as compared to the old one as under Article 342A the inclusion or exclusion of classes in the backward list need to present before the both of the houses of parliament,

And lastly, the new NCBC have comprehensive and holistic development and advancement

¹³ Parliament of India Rajya Sabha Report of the Select Committee on the Constitution (One Hundred and Twenty-Third Amendment) Bill, 2017 (Presented to the Rajya Sabha on the 19th July, 2017) http://prsindia.org/sites/default/files/bill_files/Select%20Comm%20-%20123rd%20%28A%29%20bill%2C%202017.pdf

programs for classes to move toward equality.

Even after the improved version of itself, the National Commission for backward classes came into the major controversy in few of the Case laws.

POWERS AND FUNCTION OF NCBC

- The function of NCBC is to inquire, monitor and investigate the matters of safeguard of SEBC under law working for such safeguards.
- The commission takes an interest and instructs on the financial advancement with respect to the socially and educationally backward classes and to assess the advancement of improvement under the Central and State.
- The president laid down the reports in the parliament which is presented by NCBC annually at different occasion as commission may consider fit, report on working of those protections (on the off chance that any such report or any part thereof, identifies an issue and it concerns with a particular state then it would be sent to concerned state.)
- The commission will release such different functions in connection to the insurance, welfare and improvement and progression of the socially and educationally backward classes as the President may, subject to the arrangements of any law made by Parliament, by rule indicate.
- The power of commission is similar to a civil court while trying a suit.

HOW DOES THE NEW COMMISSION BE DIFFERENT FROM ITS EARLIER VERSION?

- The amendment contains the provision for development of Socially and educationally Backward classes and has also recognised that backward classes need development apart from reservation and it has a role in development process.
- It also has the function of grievance redressal for backward classes.
- After the amendment it leads to the more transparency in the system of inclusion or exclusion of classes in the backward list as it is mandatory to take concurrence of Parliament.
- It is also entrenched to work for the development and welfare of communities toward equality for advancement and welfare.

IV. PURPOSE OF AMENDMENT

The insertion of Article 338B is on similar lines and it constitutes a National Commission for backward classes known as “National Commission for Backward Classes”. The Commission

is cast with a duty to examine and screen all issues relating with protections to be provided for the socially and educationally backward classes under the Constitution or under any other law for the time being in force or under any order of the Government. It is also entrusted with the task of evaluating the working of such safeguards. It is also authorised to ask into explicit objections with respect of the deprivation of rights and safeguards of socially and educationally backward classes. It is also conferred with a power to present reports upon working of the safeguards to the President, annually and at such other times as the Commission may deem fit, in which it may recommend measures to be taken by the State or the Union for effective implementation of the safeguards and other measures for protection, welfare and socio economic development of the socially and educationally backward class. The Statements of Objects and Reasons of the 123rd Amendment Bill 2017 would render an insight in the Amendment Act. The Statement of Object and Reasons (SOR) reads thus :

The supreme court of India in the matter of *Indra Sawhney vs. Union of India*¹⁴ asked the government to form a permanent body with the purpose of examining and recommending request for inclusion and exclusion in the central list of other backward classes. Soon after the judgment in 1993 the central government passed the National Commission for Backward Classes Act and the commission was established under the Act. As of now the Commission was just performing the functions which were limited to inclusion of classes and over/under inclusion of classes in the list. Now, the government in the view that safeguarding the interests of the socially and educationally backward classes by putting forward the creation of National Commission for Backward Classes at par with the constitutional status similar to National Commission for Scheduled Castes and the National Commission for Scheduled Tribe.

V. CASES IN COURT

*Dr. jishri laxmnarao patel v. the chief minister of Maharashtra*¹⁵ (*Maratha reservation case*):

The state government of Maharashtra unanimously passed Socially and Educationally Backward Classes 2018 act on 29 November 2018 and was assented by governor granting 16% reservation to Maratha community as a 'backward class' and provided reservation of seats for the class in educational institutions, appointment in public services, etc. the issue related to 102nd amendment arises whether the 102nd constitutional amendment deprives the state legislature of his power to enact a legislation determining the Socially and Educationally

¹⁴ AIR 1993, SC 477

¹⁵ 2019 SCC OnLine Bom 1107

Backward Classes and conferring benefits on the said community under its enabling power and one of the other ground was that the act was not passed without complying with the requirements of the 102nd amendment act particularly with clause 9 of article 338B that the state has to consult the commission on all major policy affecting socially and educationally backward classes and also there was no notification issued by president as under Article 342A. As the Maharashtra government passed legislation for reservation of socially and educationally backward classes but the term socially and educationally backward class is defined under Article 366(26C) which imply the authority to only to the president under Article 342A and in this instant case the state government did not do so. Further elaborating the issue of deprivation of the power of state legislature is dealt with is the next topic of obscurity.

The Bombay high court held that state legislative competence is not in any way affected by the constitution 102nd amendment act, but this decision of the Bombay High court is challenged in Supreme court and the matter has been referred to larger bench on 10thsept,2020.

***Jahnvi Maheshwari v. union of India*¹⁶:**

In this case the reservation quota of NEET 2019 was challenged illegal grant of OBC reservation to MBBS/ BDS Courses in the Academic Year 2019-20 as the brochure laid down the reservation of other backward class but the petitioner argued that there cannot be any kind of reservation as after the 102nd amendment there is no notification issued by the president till now, so the reservation of other backward classes stand zero.

The matter is currently being heard in Rajasthan High Court (Jaipur Bench)

VI. OBSCURITY BETWEEN THE CONSTITUTION (ONE HUNDRED AND SECOND AMENDMENT) ACT, 2018 CONCERNING THE DIVISION OF POWER BETWEEN CENTRE AND STATE

The 102nd amendment act is being alleged that it is likely to take state legislative power of inclusion an exclusion of a group of class in ‘backward classes’ as the state legislative competence to do so under Article 15(4) and 16(4) of the constitution of India.

The 102nd amendment inserted Article 338B and Article 342A. Article 338B established the National Commission for socially and educationally backward classes which gave the constitutional status to the National Commission of backward classes. Further by Article 342A, socially and educationally backward class is introduced and a definition of socially and

¹⁶ S.B. Civil Writ Petition No.11414/2019

educationally backward class is also inserted under Article 366(26C).

Now as to who would be a “socially and educationally backward class” can only be through mechanism of Article 342A. The constitution has recognized only three classes for reservation i.e. schedule caste, schedule tribe and other backward classes of citizens who are socially and educationally backward as far as Article 15 is concerned or who are not adequately represented in service as under Article 16 is concerned. After the 102nd amendment, a socially and educationally backward classes would be entitled to claim reservation only if he goes through the path and gains entry in the same manner as laid down under Article 342A.

The insertion of Article 342A has changed the spectrum as the power to specify the social and educationally backward classes in relation to the states now vests only with the president who may by public notification after consultation with the governor of the state and union territories, which bind the state legislature to consult with the president and the president may introduce the class which is taking away the legislative competence of a state.

The other aspect in relation to the order of Bombay high court in matter of Maratha case 102nd amendment does not affect the power of the state legislature to include or exclude the socially and educationally backward classes within their jurisdiction and exercise the power conferred to them by Article 15(4) and 16(4), the power to legislate is conferred to state under Article 15,16 and other provisions and Perusal of Article 342A do not take away the power of the state and for taking away the power of state there need to be constitutional amendment which effect Article 15 and 16 so as to exclude the state government from the ambit to do so.

Howsoever, if by any chance 102nd amendment takes away the legislative power of the state then it would be the breach of the principle of federalism, which is the basic structure of the constitution. The federal structure of the constitution is an important feature of the Constitution of India as expressed by the Hon’ble apex court in its judgment *State of NCT of Delhi Vs. Union of India*¹⁷ “Our Constitution contemplates a meaningful orchestration of federalism and democracy to put in place an egalitarian social order, a classical unity in a contemporaneous diversity and a pluralistic milieu in eventual cohesiveness without losing identity. Sincere attempts should be made to give a full-fledged effect to both these concepts”

Apart from the obscurity there are many more issues which are need to be dealt by the supreme court of India

ISSUES

¹⁷ 2018 (8) SCC 501

- The new form of the National Commission for Backward Classes would probably not be able to going provide dependable and effective social justice.¹⁸
- The suggestion of new NCBC isn't authoritative on the legislature.
- since it has no obligation to define backwardness, it can't address the present test of demands of different castes to be incorporated as BCs.
- By holding the old nonexclusive name of NCBC and delinking the body from its spirit (Article 340), the government set up for the entire plan of special protection under the Constitution in danger.¹⁹
- Features of expert body, as coordinated by the Supreme Court, are not given in the composition of the new NCBC.²⁰
- Mere constitutional status and more acts won't take care of the issue at grass root level as recent information uncovered slanted portrayal of SC/ST and OBC classifications.²¹
- Article 338B (5) is quiet on the SC mandate on intermittent update of the backward class list in consultation with the NCBC.²²

VII. CONCLUSION

The 102nd amendment should be brought with some of more provisions as well as giving constitutionality to the state commission for backward classes as well, the new version is probably not going to give dependable and effective social justice architecture. And the recommendation of NCBC is not obligatory on the government which should be the obligatory on the government. And also the government must put information in public domain regarding the findings of the caste census and suggestions of the commission.

It is also found that composition, as mandated by the supreme court, should reflect the feature of the expert body, as well as the composition, should show gender sensitivity and representation of stakeholders should be there.

The prime issue of vote bank politics should be set aside and way to value based politics should be given so that only truly backward sections of society will get the benefit of reservation and

¹⁸ D Shyam Babu, *A solution in search of a problem*, The Hindu APRIL 27, 2017
<https://www.thehindu.com/opinion/op-ed/a-solution-in-search-of-a-problem/article18230098.ece>

¹⁹ Id

²⁰ National Commission for Backward Classes (NCBC), *Drishti Ias* 12 Feb 2019.
<https://www.drishtiiias.com/important-institutions/drishti-specials-important-institutions-national-institutions/national-commission-for-backward-classes-ncbc>

²¹ Id

²² Id

the classes which are not socially and educationally backward classes should not be considered under “other backward classes” only because of vote share they hold for general election.
